STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2143

In the Matter of the Civil Commitment of: Anthony Bruce Eberhardt

Filed May 20, 2019
Affirmed
Connolly, Judge

Commitment Appeal Panel
File No. AP17-9167

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Keith Ellison, Attorney General, James Clark, Assistant Attorney General, St. Paul, Minnesota (for appellant Commissioner of Human Services)

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Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges the order of the commitment appeal panel (Panel) granting respondent's petition for provisional discharge, arguing that the Panel clearly erred by failing

to consider one of appellant's witnesses and improperly discrediting one of appellant's expert witnesses based on respondent's refusal to be interviewed. Because the evidence supports the Panel's decision, we affirm.

FACTS

Respondent Anthony Bruce Eberhardt, 56, has engaged in harmful acts of sexual conduct against eight female victims—seven adults and one 11-year-old girl—all of whom were strangers. He has two criminal-sexual-conduct convictions for offenses at age 18 and three criminal-sexual-conduct convictions for offenses at age 22. He also acknowledges three additional uncharged sexual assaults or attempts at age 22. Eberhardt was repeatedly incarcerated as a result of these and other offenses, but he has not committed a sexual offense since 1984. After being released from incarceration in 2000, Eberhardt lived in the community for about five years without committing a sexual offense.

In 2005, following an executive order for review of all level 3 sex offenders in the community, Isanti County (County) petitioned for Eberhardt's commitment as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP).[1] In 2006, the district court granted the petition and Eberhardt was indeterminately civilly committed to the Minnesota Sex Offender Program (MSOP) as an SDP and an SPP. Eberhardt is currently in the final phase of the three-phase treatment program at MSOP.

In 2016, the Panel granted Eberhardt's request for transfer to community preparation services (CPS) at MSOP, where he is currently in Stage 2 of the four-stage

[1] This was not pursuant to the commission of a new sexual offense, but due to his failure to register as a predatory offender.

CPS reintegration program. He has not advanced further due to four rule violations in 2017: (1) he provided prescription medication to a peer; (2) he engaged in "code talking" with his mother on the phone; (3) he participated in a prohibited three-way phone call; and (4) he brought his self-administered medication to work with him.

In 2017, Eberhardt petitioned the special review board (SRB) for provisional discharge or full discharge and presented a provisional discharge plan. Appellant Commissioner of Minnesota Department of Human Services (Commissioner) and the County opposed Eberhardt's petition.[2] The SRB recommended granting Eberhardt's petition for provisional discharge, but denying the petition for full discharge. The Commissioner petitioned the Panel for rehearing and reconsideration of the SRB's recommendation for provisional discharge.

The Panel conducted a two-phase hearing. During the first-phase hearing, the Panel received seven exhibits from Eberhardt and 21 exhibits from the Commissioner. It heard testimony from Eberhardt; Nicole Elsen, Ph.D., LP; Rachel Mack, Psy.D, LP, DHS Forensic Evaluator; Paul Reitman, Ph.D., LP; and David Robinson, Eberhardt's primary therapist. During the second-phase hearing, the Panel received four additional exhibits from the Commissioner and one additional exhibit from Eberhardt. It heard testimony from Scott Halvorson, Reintegration Director; David Thornton, Ph.D., LP; Christopher Schiffer, MA, LP, Clinical Director; and George Komaridis, Ph.D., LP. Following the hearings, the Panel granted Eberhardt's request for provisional discharge. The Commissioner appeals.

[2] Although the County opposed Eberhardt's petition, it is not a party on this appeal.

D E C I S I O N

We review the Panel's decision for clear error, examining the record to determine whether the evidence as a whole sustains the Panel's findings. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014). We do not reweigh the evidence. *Id.* If the evidence as a whole sustains the Panel's findings, "it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Piotter v. Steffen*, 490 N.W.2d 915, 919 (Minn. App. 1992), (quoting *Johnson v. Noot*, 323 N.W.2d 724, 728 (Minn. 1982)), *review denied* (Minn. Nov. 17, 1992).

A person who is committed as an SDP or an SPP may petition the SRB for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2018). The term "reduction in custody" includes a provisional discharge, a full discharge, or a transfer out of a secure treatment facility. *Id.*, subd. 1(b) (2018). A person who is committed as an SDP or an SPP "shall not be provisionally discharged unless the committed person is capable of making an acceptable adjustment to open society." Minn. Stat. § 253D.30, subd. 1(a) (2018). In determining whether to grant a provisional discharge, the Panel must consider two statutory criteria:

> (1) whether the committed person's course of treatment and present mental status indicate there is no longer a need for treatment and supervision in the committed person's current treatment setting; and
>
> (2) whether the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable the committed person to adjust successfully to the community.

Id., subd. 1(b) (2018).

In a proceeding before the Panel on a petition for a provisional discharge, the petitioner "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d) (2018). This burden is merely a burden of production. *Coker v. Jesson*, 831 N.W.2d 483, 486 (Minn. 2013). In considering such a motion, the Panel "may not weigh the evidence or make credibility determinations," but instead must view the evidence in a light most favorable to the committed person. *Id.* at 490-91. "The proceeding in which a committed person produces evidence is commonly referred to as a 'first-phase hearing.'" *Id.* at 486.

If a committed person satisfies his burden of production at the "first-phase hearing," the proceeding moves to a "second-phase hearing." *Id*. At this phase, the party opposing the petition "bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied." Minn. Stat. § 253D.28, subd. 2(d). The clear-and-convincing evidence standard requires "more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 654 (Minn. App. 2017) (quotation omitted), *review denied* (Minn. June 20, 2017).

There is considerable evidence in the record to support the Panel's determinations that (1) there is no longer a need for treatment and supervision in Eberhardt's current treatment setting and (2) the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public. *See* Minn. Stat. § 253D.30, subd. 1(b).

Of the nine witnesses who testified, five were in favor of provisional discharge, two opposed provisional discharge, and two were neutral. A review of their testimony shows that Dr. Mack, Dr. Reitman, and Dr. Komaridis explicitly concluded Eberhardt meets the statutory criteria for provisional discharge; Dr. Thornton concluded that he does not; and Dr. Elsen made no comment about whether he does. Additionally, Eberhardt's and Robinson's testimony support provisional discharge, Schiffer's testimony does not support provisional discharge, and Halvorson's testimony was neutral.

A. Evidence Supporting the Panel's Decision

Dr. Mack conducted a sexual-violence-risk assessment of Eberhardt in 2017 and updated it in 2018. She conducted a clinical interview of Eberhardt, reviewed records, and corresponded with collateral sources, including Eberhardt's psychologist, primary therapist, and reintegration director. She used actuarial tools and other risk measurements to aid in her assessment. Dr. Mack noticed numerous improvements in Eberhardt since the 2017 assessment: Eberhardt participated in reintegration activities and community outings, developed a reoffense prevention plan, completed chemical-dependency treatment, and was participating consistently in arousal-management aftercare. Dr. Mack concluded that Eberhardt meets the statutory criteria for provisional discharge. She found Eberhardt's current treatment needs are best suited to an outpatient program and that the provisional discharge plan is sufficient to protect the public safety.

Dr. Reitman, whom Eberhardt retained as an expert, concluded that Eberhardt meets the statutory criteria for provisional discharge. Dr. Reitman emphasized that Eberhardt has been at MSOP for 13 years and has not committed a sexual offense in approximately 34

years, five of which were spent living in the community. Dr. Reitman found that Eberhardt is not at risk for committing a sexual offense and has made significant progress in treatment. Dr. Reitman concluded that Eberhardt's current treatment needs can be met in an outpatient setting and that intensive supervised release is sufficient to protect public safety.

Although Dr. Komaridis concluded in his June 2018 report that Eberhardt did not meet the statutory criteria for provisional discharge, he concluded in his October 2018 report that Eberhardt does meet the criteria. Komaridis reviewed records, interviewed Eberhardt, and communicated with Eberhardt's treatment providers. He noted that Eberhardt's treatment team initially opposed the request for provisional discharge, but that half the team now supported it, while the other half was more conservative but did not oppose it. Dr. Komaridis's current concern is Eberhardt's potential risk to violate rules, not to act out sexually. Dr. Komaridis concluded that Eberhardt meets the statutory criteria for provisional discharge and all the data shows Eberhardt is working hard to change and is a low risk to reoffend sexually.

Robinson, Eberhardt's primary therapist, has had contact with him at least every other day since September 2016. Robinson testified that Eberhardt completed the arousal-management and chemical-dependency treatment and attends Narcotics Anonymous meetings. He noted that Eberhardt is "a leader in core group," "always a very active participant," "very supportive of his peers," and "attentive to his treatment goals." Robinson testified that Eberhardt is involved in the MSOP mentoring program and is on the community council that oversees conflict resolution. Robinson also noted that

Eberhardt is the only one of his clients who has been requested by a clinician to help mentor others. Robinson testified that Eberhardt has "clear insight" of his triggers and has been "transparent regarding his sexuality." Robinson testified that Eberhardt worked to expand his support network and has the support of his family and peers. Robinson noted that his current concerns are not about Eberhardt's sexually deviant thinking, but about his rule breaking. However, he also testified that Eberhardt has gained insight into his rule-breaking behaviors through his active involvement in the intimacy program.

Eberhardt's testimony supports the finding that he no longer needs to receive treatment and supervision in his current setting. He testified about his past actions, including his sexual offenses and criminal activities. While at MSOP, he has completed arousal-management and chemical-dependency programs and different modules to work through his triggers. He explained some of what he has learned in treatment such as insight into his shortcomings in the area of intimacy. He took responsibility for his rule-breaking behaviors and explained that he has learned the importance of obeying even small rules. He testified that he has both a provisional discharge plan and a relapse-prevention plan.

Halvorson testified generally about the structure of the MSOP reintegration process, which includes five tiers through which individuals on provisional discharge progress. Halvorson testified that he helps clients develop a provisional discharge plan including assistance finding housing. He also testified that there is a very high level of supervision of individuals on provisional discharge and they must submit to drug testing, comply with the conditions of their release, and remain active global positioning system (GPS).

Halvorson's testimony supports the conclusion that Eberhardt would have a high level of supervision if provisionally discharged.

Dr. Elsen testified that Eberhardt completed the arousal-management program and created an aftercare plan. Dr. Elsen authored the report following Eberhardt's penile plethysmograph (PPG) assessment and testified that the PPG indicated "no clinical significant response;" she made no findings of Eberhardt using suppression in that assessment. She also testified that it is not part of her job to opine regarding whether a client should be provisionally discharged and made no statement about whether Eberhardt meets the statutory criteria.

B. Schiffer's Testimony

Schiffer was the clinical director at MSOP, but became the clinical court services director the day before testifying. He testified that the program's position is that provisional discharge is premature at this time. Schiffer testified about concerns with rule violations, including Eberhardt's internal and external motivations and whether he is committed to following rules long-term. But Schiffer also testified that Eberhardt has "been largely successful in terms of living a more responsible life, earning his way, [and] being recognized as a helpful and productive person in the workplace." Schiffer testified that Eberhardt's current treatment program would best address his needs regarding rule violations and deceptive behaviors.

The Commissioner first contends that the Panel clearly erred by ignoring Schiffer's opinions and making no factual findings on his recommendations or testimony. Schiffer is listed as a witness, but is not otherwise mentioned in the Panel's order. The

Commissioner relies on *Edina Cmty. Lutheran Church v. State*, 673 N.W.2d 517, 523 (Minn. App. 2004), to argue that the Panel must make factual findings "sufficient to permit meaningful appellate review" and on *State v. White* to argue that by ignoring Schiffer's opinions, the Panel abdicated its duty to weigh and resolve conflicting evidence regarding whether Eberhardt should be provisionally discharged. *See State v. White*, 357 N.W.2d 388, 390 (Minn. App. 1984) ("We are also guided by the principle that the factfinder must choose between conflicting factual accounts and determine the credibility, reliability, and weight given to witnesses' testimony."). Neither *Edina Cmty. Lutheran Church* nor *White* suggests that failure to make certain factual findings or credibility determinations regarding a witness constitutes clear error, and the Commissioner cites no authority for that proposition.

Furthermore, the record does not establish that the Panel failed to consider Schiffer's testimony. "It is well to bear in mind that on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal." *White v. Minnesota Dep't of Nat. Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (quoting *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944)). Although the Panel did not explicitly address Schiffer's testimony in its order, it addressed his concerns about Eberhardt's rule violations and belief that those would be best addressed in CPS. It is clear that the Panel considered the rule violations when it granted provisional discharge because they are mentioned throughout the factual findings and the analysis:

> The Panel does not find the rule violations from 2017 predictive although [Eberhardt] will need to remain vigilant that he abides by all the conditions of his provisional discharge

> and the reintegration agents' rules. The MSOP reintegration system is designed with a high degree of structure and supervision with a gradual step down, [so] that it will enable [Eberhardt] to adjust successfully to the community.

While it would have been preferable for the Panel to make findings and credibility determinations on all the testimony presented, particularly the testimony that conflicts with its decision, the Panel's decision not to do so here was not clear error.

C. Dr. Thornton's Opinion

The Commissioner next argues that the Panel clearly erred by discounting Dr. Thornton's opinions because he did not have the opportunity to interview Eberhardt. Dr. Thornton was retained as an expert by the Commissioner. Eberhardt declined to be interviewed by him, but Dr. Thornton testified that he had sufficient information to form an opinion because he spoke with Eberhardt's primary therapist and clinical supervisor, reviewed his MSOP records, and used actuarial tools.

Dr. Thornton emphasized his concern with Eberhardt's antisocial personality disorder, rule breaking, and deceptive behavior. He testified that Eberhardt was deceiving his treatment team to the point where it "thinks overly highly of him." Dr. Thornton also warned against drawing inferences from Eberhardt's most recent PPG results showing "no significant response to any of the stimuli." Dr. Thornton did not find the proposed provisional discharge plan sufficient and concluded that Eberhardt was unsuitable for provisional discharge based on his lack of transparency and rule violations.

The Panel credited Dr. Komaridis's testimony and opinion over Dr. Thornton's, explaining that,

> Dr. Thornton and Dr. Komaridis were both helpful in assisting the Panel in understanding the risk, but Dr. Thornton did not have an opportunity to interview [Eberhardt] and discounted the treatment team too readily. Dr. Thornton also did not take into consideration the high degree of structure and control that will be exerted by the reintegration agents.

We generally defer to the Panel's evaluation of expert testimony. *Matter of Civil Commitment of Duvall*, 916 N.W.2d 887, 895 (Minn. App. 2018), *review denied* (Minn. Sept. 18, 2018). Dr. Mack, Dr. Reitman, and Dr. Komaridis concluded that Eberhardt meets the statutory criteria for provisional discharge. Dr. Thornton concluded that he does not. We defer to the Panel's evaluation and conclude that the Panel did not clearly err in weighing the expert testimony in favor of provisional discharge. *See id*.

Relying on *Rice*, the Commissioner contends, "The Panel should not give an expert opinion less weight due to a committed persons' refusal to meet with the expert." *See Matter of Rice*, 410 N.W.2d 907, 910 (Minn. App. 1987) ("It would be incongruous for us to permit a proposed patient to defeat all commitment proceedings merely by refusing to be examined."), *review denied* (Minn. Oct. 28, 1987). But this misinterprets *Rice*, which is also factually distinguishable. *Rice* involved a petition for commitment as a chemically dependent person, not a discharge petition for an SDP or an SPP. *Id.* at 909. "In *Rice*, the district court determined that the patient could not avoid a civil *commitment* proceeding simply by refusing an interview." *Duvall*, 916 N.W.2d at 895. Similarly, the Commissioner was not prohibited from moving forward in responding to Eberhardt's *discharge* petition because Eberhardt refused an interview. The Commissioner was allowed to call Dr. Thornton although he had not interviewed Eberhardt.

Nevertheless, we share the Commissioner's concern that a committed individual may refuse to be interviewed by the Commissioner's expert witness in an attempt to receive some benefit. We remind the Panel that an individual's refusal to be interviewed by such a witness should in no way be held against the state or the Commissioner or weigh in favor of that individual. However, it appears the Panel here discredited Dr. Thornton's opinion because he "discounted the treatment team too readily" and did not consider the high degree of structure provided during provisional discharge, not because he did not meet with Eberhardt.[3]

Because the evidence as a whole sustains the Panel's conclusion that Eberhardt meets the statutory criteria for provisional discharge, we discern no error. *See Larson*, 847 N.W.2d at 534. Therefore, we affirm.

Affirmed.

[3] The Commissioner also argues that the above-listed errors caused the Panel to erroneously conclude that the Commissioner failed to show by clear and convincing evidence that Eberhardt's petition for provisional discharge should be denied. But as we conclude that the Panel did not err, we do not address this argument.