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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0378

In the Matter of the Civil Commitment of: Jerry Gene Kerkhoff.

Filed July 22, 2019
Affirmed
Larkin, Judge

Commitment Appeal Panel
File No. AP17-9002

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

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Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold, Judge.

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

LARKIN, Judge

In this post-remand appeal, appellant challenges an order of a commitment appeal panel (CAP)[1] granting respondent's petition for provisional discharge, arguing that the

[1] We refer to the entity formerly known as the supreme court appeal panel or judicial appeal panel as the commitment appeal panel. *See* Minn. Stat. § 253D.28, subd. 1 (2018) (providing for review by "the judicial appeal panel established under section 253B.19, subdivision 1"); Minn. Stat. § 253B.19, subd. 1 (2018) (providing that the supreme court shall establish an appeal panel).

CAP erred by rejecting expert opinions and by relying on evidence outside of the record. Because the evidence as a whole supports the CAP's findings in support of provisional discharge, we affirm.

FACTS

Respondent Jerry Gene Kerkhoff is 46 years old. He has been placed at the Minnesota Sex Offender Program (MSOP) for nearly 20 years, pursuant to his commitment as a sexually dangerous person (SDP). During his adolescence and early adulthood, he sexually abused 41 minors, ranging in age from 3 months to 15 years old. He committed his first sexual offense when he was 12 years old. In 1986, when he was 13 years old, Kerkhoff sexually abused a six-year-old boy and a three-year-old girl while babysitting them. He was adjudicated delinquent for second-degree criminal sexual conduct, placed on probation for one year, and required to participate in outpatient sex-offender treatment. The following year, Kerkhoff sexually abused a six-year-old girl. He was adjudicated delinquent for second-degree criminal sexual conduct and placed at a juvenile correctional facility. In 1994, when he was 21 years old, Kerkhoff was convicted of first-degree criminal sexual conduct for sexually abusing a seven-year-old girl periodically over the course of a year. That same year, he was also convicted of second-degree criminal sexual conduct for sexually abusing his seven-year-old stepson multiple times over the course of two years. Kerkhoff was sentenced to 82 months in prison for his offenses against the two children.

In 1999, Kerkhoff was indeterminately committed as an SDP and placed at MSOP. In 2015, Kerkhoff was transferred to Community Preparation Services (CPS). He currently is in Phase III of the MSOP program and stage two of the CPS program.

In 2016, Kerkhoff petitioned the Special Review Board (SRB) for provisional or full discharge. Appellant Minnesota Commissioner of Human Services (the commissioner) opposed Kerkhoff's petition.[2] The SRB recommended that Kerkhoff's petition be denied in its entirety. Kerkhoff petitioned the CAP for rehearing and reconsideration.

In 2017, the CAP held a Phase I hearing. Kerkhoff testified on his own behalf and presented testimony from Dr. Adam Gierok, a senior clinical forensic psychologist and court-appointed examiner. The CAP received several exhibits, including Dr. Gierok's report, a provisional-discharge plan, and a sexual-violence risk assessment (SVRA). Dr. Gierok reported that Kerkhoff did not meet the criteria for provisional or full discharge and testified that he believed that continued treatment at CPS was appropriate. The commissioner moved to dismiss under Minn. R. Civ. P. 41.02(b). The CAP granted the motion with respect to full discharge, but denied the motion with respect to provisional discharge, reasoning that Kerkhoff had presented prima facie evidence demonstrating that he is entitled to provisional discharge.

In 2018, the CAP held a Phase II hearing on the issue of provisional discharge. The CAP received 18 exhibits from the commissioner, including Kerkhoff's individual-

[2] Representatives of Douglas County did not participate in the hearing, and Douglas County did not join in this appeal.

treatment plan, a treatment report update, an SVRA update, and an annual treatment progress report. The commissioner presented the testimony of four witnesses: Kerkhoff; Chris Schiffer, a clinical director at MSOP; Dr. Mallory Obermire, a forensic evaluator with the Minnesota Department of Human Services; and Dr. Gierok. Schiffer testified that MSOP clinical leadership believes that provisional discharge would be premature. Dr. Obermire testified that Kerkhoff does not meet the statutory criteria for provisional discharge. Dr. Gierok once again opined that provisional discharge would be inappropriate.

Kerkhoff presented the testimony of two witnesses: Kelly Meyer and Scott Halvorson. Meyer is an assessment-department clinician at MSOP who facilitates the arousal-management and hypersexuality programming. She testified regarding Kerkhoff's completion of the arousal-management module, his participation in aftercare programming, and his transparency. Halvorson is the MSOP reintegration director. He generally testified regarding the reintegration process, provisional-discharge planning, and the residential and outpatient care programs.

The CAP granted Kerkhoff's request for a provisional discharge. The commissioner appealed. This court remanded to the CAP for additional findings "that explain the rationale of its decision." *In re Civil Commitment of Kerkhoff*, No. A18-1191, 2019 WL 178875, at *2 (Minn. App. Jan. 14, 2019). On remand, the CAP issued an order with additional findings and once again granted Kerkhoff's request for a provisional discharge. The commissioner appeals.

D E C I S I O N

Kerkhoff petitioned for provisional discharge under section 253D.27 of the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA: SDP/SPP), Minn. Stat. §§ 253D.01-.36 (2018). A person who is committed as an SDP "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). In determining whether to grant a provisional discharge, a CAP 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).

At the Phase I hearing, Kerkhoff bore the burden of going forward with sufficient evidence to support his request for provisional discharge. *See* Minn. Stat. § 253D.28, subd. 2(d) ("The petitioning party seeking discharge or provisional discharge 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."). The CAP determined that Kerkhoff satisfied his burden of production.

At the Phase II hearing, the commissioner bore the burden of proof by clear and convincing evidence that the provisional discharge should be denied. *See* Minn. Stat.

§ 253D.28, subd. 2(d) ("If the petitioning party has met this burden, the party opposing discharge or provisional discharge bears the burden of proof by clear and convincing evidence that the discharge or provisional discharge should be denied."). 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) (quotations omitted), *review denied* (Minn. June 20, 2017).

Following the hearing, the CAP found that,

> [Kerkhoff] is capable of making an acceptable adjustment to open society because: (1) his treatment and mental status indicate that he no longer needs treatment and supervision in his current treatment setting; and (2) the conditions of his provisional discharge plan will provide a reasonable degree of protection to the public and will enable him to adjust successfully to the community.

The commissioner contends that the CAP's order should be reversed because "the [CAP] improperly disregarded nearly all of the evidence in [the commissioner's] favor, took witness testimony out of context, and relied on evidence outside of the record." The commissioner argues that "[a]pplying *de novo* the application of the statutory criteria to the uncontested facts of this case, it is clear [the commissioner] met its burden to show by clear and convincing evidence that [Kerkhoff's] petition for provisional discharge should be denied."

Since remanding this case to the CAP for additional findings, this court has clarified the standard of review that applies on review of a CAP's decision on the merits of a petition for a reduction in custody, holding that this court does not apply de novo review "unless the panel has ordered dismissal under Minn. R. Civ. P. 41.02(b)." *In re Civil Commitment*

of Edwards, ___ N.W.2d ___, ___, Nos. A19-0194, A19-0239, slip op. at 1 (Minn. App. July 22, 2019). "Instead, we review such a decision for clear error, examining the record to determine whether the evidence as a whole sustains the panel's findings." *Id.* We explained this court's standard of review as follows:

> [W]e review such a decision for clear error, examining the record to determine whether the evidence as a whole sustains the CAP's findings. We do not reweigh the evidence as if trying the matter de novo. If the evidence as a whole sustains the CAP's findings in support of its decision, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary. In sum, we will not reverse a CAP's decision on a petition for a reduction in custody so long as the underlying findings are supported by the evidence as a whole.

Id. at 13.

Pursuant to our standard of review, we have examined the record to determine whether the CAP's findings in support of Kerkhoff's provisional discharge are supported by the evidence as a whole.

The record indicates that Drs. Gierok and Obermire agree that Kerkhoff has made substantial progress at MSOP and CPS. Dr. Gierok testified that Kerkhoff is generally active and engaged in treatment programming. Kerkhoff has successfully completed the arousal-management module. He has been participating in the aftercare program for over two years and is doing fairly well. And he has participated in many community outings, which have gone well with no significant safety issues.

Information in Dr. Gierok's report indicates that in July 2017, Kerkhoff had an overall treatment attendance rate of 82%, attended all core group sessions, was consistently

engaged in treatment, regularly provided challenging feedback to peers, and was consistent in "addressing his deviant thoughts/urges appropriately in the moment." From August until December of 2017, Kerkhoff had an overall treatment attendance rate of 91%,[3] was "engaged a majority of the time," and "continued to offer challenging feedback to peers and did so in a more tactful manner." Kerkhoff "completed the shame module at MSOP and has volunteered for 'Shame Part 2.'" Kerkhoff's "use of relaxation and sexual journals also remained consistent; he regularly discussed progress in managing his deviant arousals with his core group and therapist." "Kerkhoff was noted to 'consistently implement' his arousal management aftercare plan." "Kerkhoff consistently participated in debriefing sessions and provided his core group with updates about his community outings," and he "continued to be a mentor to other peers in MSOP."

The record indicates that Kerkhoff has diminished and managed his deviant sexual arousal. Dr. Gierok testified that Kerkhoff is transparent about his deviant arousal. Meyer testified that when Kerkhoff is "struggling with deviant arousal or when he needs help, he's extremely transparent and asks for it." Schiffer testified that Kerkhoff is "fairly aware of his sexuality" and "has a good understanding of what some of those risks are." He further testified that Kerkhoff has "done some good work in terms of learning about a variety of different ways to manage his pedophilic interest."

[3] Kerkhoff attended 33 of 35 core group sessions and 10 of 12 psychoeducational module sessions; he missed sessions when he was meeting with his attorney or in court.

Kerkhoff has completed several penile plethysmographs (PPGs),[4] and the recent PPGs suggested fewer areas of deviant arousal than in the past. Kerkhoff also completed a full-disclosure polygraph, which indicated no deception. Kerkhoff has used ammonia and other interventions as directed to address his thoughts appropriately in the moment. Dr. Gierok testified that when arousals occurred during community outings, Kerkhoff handled them appropriately and made changes in treatment to address them.

Dr. Obermire's SVRA update reports that Kerkhoff "has followed treatment recommendations (i.e. attending Communications module), maintained vocational placement, and not demonstrated any attempt to circumvent the rules." The SVRA update indicates that Kerkhoff has been productive during his vocational placements, presented a positive attitude, and managed his emotions well. Dr. Obermire testified that Kerkhoff has "been consistently reporting to his vocational placement as well as demonstrating good performance." In October 2017, Kerkhoff received a positive Vocational Treatment Notice for his contributions in the vocational department and "was commended for going above and beyond with helping out in moving the vocational department." The SVRA update also indicates that Kerkhoff has participated in recreation and leisure outings, special events, and a 5K run. Schiffer testified that Kerkhoff "has the full range of liberties that are available to him" and he has done well with that level of privilege.

The SVRA update contains several positive comments from Kerkhoff's treatment providers. For example, Kerkhoff is "very transparent. He is able to come to Core Groups,

[4] A PPG is an objective measure that evaluates sexual arousal patterns by assessing sexual responsiveness in penile circumference to a variety of visual and auditory stimuli.

discuss deviant and intrusive thoughts, and is able to put that information out there without hesitating." Kerkhoff "will tell you anything about his deviance. It does not feel like he is glamourizing or getting off on it, but is just aware of his inner world as far as deviance goes." Kerkhoff "does a great job mentoring, providing guidance for people in other stages, using his own personal experiences and knowledge and helping to guide them in their treatment journey." "Kerkhoff has awareness that his sexual interests are 'disturbing,' and he 'understands the impact of his disorders, and respects it.'"

Despite the positive reports and significant progress Kerkhoff has made in treatment, Drs. Gierok and Obermire opined that Kerkhoff does not meet the statutory criteria for provisional discharge, and Schiffer testified that the MSOP treatment team believes that provisional discharge would be premature. Some of their concerns relate to Kerkhoff's provisional-discharge placement. Kerkhoff initially proposed his mother's house as a placement option, which is located approximately 50 miles from the nearest treatment location. Drs. Gierok and Obermire expressed concerns regarding that proposal. But Kerkhoff explained that while preparing for the hearing, he was not allowed to contact any outside entities to investigate housing options other than his mother's home. He testified that he requested and is willing to go to a placement that contracts with MSOP.

Halvorson testified that MSOP has a process to locate and provide appropriate housing and treatment providers when a CAP grants a provisional discharge. Dr. Gierok agreed that if Kerkhoff were placed at a facility such as Zumbro House,[5] it would help him

[5] Zumbro House is a residential treatment facility that contracts with MSOP. Zumbro House provides sex-offender treatment in a secure facility that is staffed 24 hours a day.

acclimate to society while protecting the public. Dr. Obermire testified that she was not comfortable with Kerkhoff being provisionally discharged to an independent living facility or apartment and that she was only comfortable with CPS, but she acknowledged that a 24-hour supervised facility, which includes the majority of residential facilities that contract with the department of human services, would be more secure than CPS. Dr. Obermire also testified that Kerkhoff would benefit from "[b]eing with individuals in MSOP who are familiar with his individual needs [and] have that sort of training," and she acknowledged that the Zumbro House staff work with sex offenders.

Halvorson testified that provisionally discharged clients are subject to five tiers of supervision, which provide gradual reintegration into the community. Halvorson also testified that clients on provisional discharge are subject to a combination of both random searches and scheduled searches. Halvorson explained that if a client fails to comply with conditions of his provisional-discharge plan, his discharge can be revoked.

The record indicates that if Kerkhoff were provisionally discharged, he would be on active GPS monitoring, which would monitor his real-time movements and alert supervising authorities if he is at an unauthorized location. Kerkhoff would not be allowed "to leave the residence without a MSOP staff member accompanying him for the first 30 days at minimum" or to attend events that are attractions for minors. Kerkhoff would be required to abstain from the use and possession of alcohol and controlled substances and to participate in any testing requested including urinalysis, DNA collection, polygraphs,

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In re Civil Commitment of Duvall, 916 N.W.2d 887, 897 (Minn. App. 2018), *review denied* (Minn. Sept. 18, 2018).

physiological assessments, breathalyzers, and blood samples. Kerkhoff's provisional-discharge plan would also include conditions regarding financial responsibility, developing a schedule, attending outpatient treatment, participating in community support groups, and seeking employment.

As to Kerkhoff's risk of reoffending, the record indicates that Drs. Obermire and Gierok used actuarial tools to assess Kerkhoff's risk level and determined that he presents a "well above average" risk to reoffend compared to the average sex offender. But in *In re Civil Commitment of Duvall*, this court affirmed a CAP's order granting provisional discharge even though the petitioner "was considered a high-risk patient." 916 N.W.2d at 889, 894, 899. The appellants in *Duvall* argued that the petitioner's provisional-discharge plan would "not provide a reasonable degree of protection to the public because [the petitioner posed] an exceptionally high risk of re-offending." *Id.* at 897 (quotation marks omitted). This court rejected that argument, reasoning that the CAP "was persuaded because the provisional discharge plan provided for GPS monitoring, 24-hour supervision from staff at his residence, and restrictions preventing [the petitioner] from leaving his residence unless accompanied by MSOP staff and with approval from MSOP's reintegration director." *Id.* This court concluded that the record supported the CAP's finding that the provisional-discharge plan would provide a reasonable degree of protection to the public. *Id.* In this case, the CAP was similarly persuaded that Kerkhoff's provisional-discharge plan will provide a reasonable degree of protection because it contains "public safety conditions, such as: GPS monitoring, a residence with supervision

and locked doors and windows, and not leaving the residence without MSOP staff escorting him."

On remand, the CAP panel explained why it was not persuaded by the experts' opinions that Kerkhoff does not meet the statutory criteria for provisional discharge. The CAP explained that Dr. Gierok's opinion was not supported by the facts that he related and "too equivocal to meet a clear and convincing standard," that Dr. Obermire's "testimony was incongruent with her acknowledgement that [Kerkhoff's] provisional discharge plan could provide sufficient structure for his daily living and safety to the public," and that Dr. Obermire's conclusions "conflict with the facts of [Kerkhoff]'s treatment progress."

Although none of the experts opined that Kerkhoff meets the standard for provisional discharge, the ultimate determination whether the applicable statutory standard for a reduction in custody is met is entrusted to the CAP, and not the experts. *See Larson v. Jesson*, 847 N.W.2d 531, 534-35 (Minn. App. 2014) (stating that "the committed person may be provisionally discharged only if *the [commitment] appeal panel* determines that the committed person is capable of making an acceptable adjustment to open society" under Minn. Stat. § 253D.30, subd. 1(a) (emphasis added) (quotation omitted)). And similar to the circumstances in *Duvall*, the CAP here had to weigh the expert opinions recommending no reduction in custody "against the plethora of records reflecting [the petitioner's] behavioral compliance and reported treatment gains, both within the confines of MSOP and in the community." *See Duvall*, 916 N.W.2d at 895 (quotation marks omitted). The CAP was entitled to give the evidentiary value of such records and testimony significant

weight in its decision with respect to the statutory elements. *See id*. (concluding that CAP properly rejected expert testimony).

Citing *Addington v. Texas*, the commissioner argues that, in commitment trials, the judiciary must rely on experts to interpret the facts. *See* 441 U.S. 418, 429, 99 S. Ct. 1804, 1811 (1979) ("Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists."). Expert testimony regarding the merits of a petition for a reduction in custody may be necessary, but a CAP is not bound by such testimony. *See Duvall*, 916 N.W.2d at 895. So long as the evidence as a whole supports a CAP's findings, we will defer to the CAP's evaluation of expert testimony. *See In re Civil Commitment of Fugelseth*, 907 N.W.2d 248, 256 (Minn. App. 2018) (stating that this court generally defers to a CAP's evaluation of expert testimony), *review denied* (Minn. Apr. 17, 2018); *see also Edwards*, slip op. at 20 (declining to defer to CAP's reliance on an expert's testimony as support for a reduction in custody because the evidence as a whole did not support the CAP's findings).

The commissioner's main argument against provisional discharge is that Kerkhoff needs the constant support and accountability provided by staff and peers in CPS to adjust successfully into the community while protecting the public. Although that is one inference that may be drawn from the record, the evidence as a whole supports the CAP's findings that continued placement in CPS is not necessary. We will not substitute our assessment of the evidence for that of the CAP under these circumstances. *See Edwards*, slip op. at 13 ("If the evidence as a whole sustains the CAP's findings in support of its

decision, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.").

The commissioner also argues that the CAP relied on evidence outside of the record because it stated that Kerkhoff "is further along in his treatment than other clients this [CAP] has seen in similar circumstances." The commissioner contends it was error for the CAP "to consider evidence outside of the record based on its own experiences." For the reasons that follow, we are not persuaded.

The CAP exists for the purpose of hearing appeals from decisions of the SRB regarding requests for a reduction in custody. *See* Minn. Stat. § 253B.18, subd. 4c (2018) (establishing special review board); Minn. Stat. § 253D.27 (setting forth procedure by which persons civilly committed as sex offenders may petition the SRB for a reduction in custody); Minn. Stat. § 253D.28, subd. 1 (authorizing petition to "the judicial appeal panel established under section 253B.19, subdivision 1, for a rehearing and reconsideration of a recommendation of the [SRB] under section 253D.27"); *see also* Minn. Stat. § 253B.19, subd. 1 (providing that the supreme court shall establish an appeal panel). As a result of its charge, a CAP may have specialized experience and expertise that provides context when considering the statutory standards and criteria that govern a decision on a request for custody reduction. A CAP does not err by relying on such experience and expertise. *See Duvall*, 916 N.W.2d at 895-96 (rejecting argument that "[CAP] improperly relied on its own experience by stating, 'MSOP does not have a history of recommending provisional discharge for those who are committed to its treatment program,'" reasoning that the

panel's comment regarding MSOP's recommendation history "was proper and well within the panel's authority").

In sum, we do not discern reversible error in the CAP's decision to grant Kerkhoff's petition for provisional discharge. And because the evidence as a whole supports the CAP's findings in support of provisional discharge, we affirm.

Affirmed.