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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0252**

In the Matter of the Civil Commitment of: Willard John Hince

**Filed August 6, 2018
Affirmed
Johnson, Judge**

Supreme Court Appeal Panel
File No. AP16-9196

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Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Willard John Hince is civilly committed as a sexually dangerous person. He requested a discharge from his commitment. The special review board denied his request for a full discharge but granted his request for a provisional discharge. After the commissioner requested rehearing and reconsideration, the judicial appeal panel granted his request for a provisional discharge. We affirm.

FACTS

Hince is a 62-year-old man who was determined to be a sexually dangerous person (SDP). Hince's status as an SDP is based on sexual misconduct that occurred approximately 30 or more years ago, including conduct that was the subject of three criminal charges, which resulted in two convictions. Hince also engaged in sexual misconduct toward 15 other women in additional incidents that did not result in criminal prosecution.

In December 1994, Pennington County petitioned the district court to indeterminately commit Hince as an SDP. In November 1996, the district court granted the petition. This court affirmed. *See In re Hince*, No. C1-97-95, 1997 WL 311662 (Minn. App. June 10, 1997).

Since his commitment, Hince has been in the Minnesota Sex Offender Program (MSOP). While in treatment, Hince has been diagnosed with alcohol- and drug-abuse disorders, though he has been sober since July 1988. He completed a chemical-dependency-treatment program in December 2014. He also has been diagnosed with anti-social personality disorder and a paraphilic disorder against non-consenting adult females. Since March 2014, Hince has been in Phase III of treatment, which is the "transitional phase of treatment that focuses on deinstitutionalization and community reintegration." In December 2015, he was transferred to Community Preparation Services (CPS). He is employed part-time at CPS, mowing the lawn and cleaning the lobbies.

In March 2016, Hince petitioned the special review board for a full discharge or a provisional discharge. In December 2016, the special review board recommended denying

his request for a full discharge and granting his request for a provisional discharge. The commissioner petitioned the judicial appeal panel for rehearing and reconsideration with respect to the issue of provisional discharge.

The judicial appeal panel held an evidentiary hearing in October 2017. Hince withdrew his request for a full discharge. He called six witnesses. Frank Weber, a licensed psychologist and the clinical director of an out-patient treatment program, testified in support of Hince's request for a provisional discharge based on his psychosexual assessment. Dr. Cindy Spielman, a forensic evaluator, testified that Hince demonstrates accountability for his sexually abusive behavior, that he completed a full-disclosure polygraph without deception, and that certain dynamic risk factors are no longer a concern. Dr. Thomas Alberg, a court-appointed examiner, testified that Hince would be able to receive the sex-offender treatment he needs in an out-patient setting and that a reintegration specialist should be assigned to Hince to create a more specific provisional-discharge plan. Hince's MSOP security counselor, who has worked with Hince for two years, testified that she has never had any issues with him. Hince's former MSOP vocational supervisor testified that Hince was a "really good worker" and that he never saw Hince argue or fight with another person while at CPS. Hince also testified on his own behalf.

The commissioner called two witnesses. Dr. David Thornton, an independent forensic psychologist, testified that Hince should not be granted a provisional discharge. Christopher Schiffer, the clinical director of MSOP at St. Peter, testified that a provisional discharge would be premature because Hince continues to need supervision in his current treatment setting. Schiffer also testified that, whenever the clinical leadership at MSOP

determines that Hince is ready for a provisional discharge, a reintegration specialist will be assigned to help him create a provisional-discharge plan.

In December 2017, the judicial appeal panel issued a 21-page order and memorandum in which it granted Hince's petition for a provisional discharge. The commissioner of human services appeals.

D E C I S I O N

The commissioner argues that the judicial appeal panel erred by concluding that she failed to prove by clear and convincing evidence that Hince's petition for a provisional discharge should be denied.

A person who is committed as an SDP may petition the special review board for a reduction in custody. Minn. Stat. § 253D.27, subd. 2 (2016). The term "reduction in custody" includes provisional discharge. *Id.*, subd. 1(b). 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) (2016). A judicial appeal 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).

A person who seeks a provisional discharge from civil commitment bears an initial burden of production, which requires “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) (2016); *see also Coker v. Jesson*, 831 N.W.2d 483, 485-86 (Minn. 2013); *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650-51 (Minn. App. 2017), *review denied* (Minn. June 20, 2017). If the committed person satisfies that burden of production, “the party opposing provisional discharge bears the burden of proof by clear and convincing evidence that the . . . provisional discharge should be denied.” Minn. Stat. § 253D.28, subd. 2(d); *see also Coker*, 831 N.W.2d at 486; *Kropp*, 895 N.W.2d at 651.

This court applies a clear-error standard of review to a judicial appeal panel’s findings of fact by “examining the record to determine whether the evidence as a whole sustains the panel’s findings.” *Kropp*, 895 N.W.2d at 650. In doing so, “we do not reweigh the evidence,” and “it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Id.* We apply a *de novo* standard of review to issues of statutory interpretation and to a judicial appeal panel’s application of the law to the facts of a particular case. *Id.*

In this case, the commissioner contends that the judicial appeal panel made findings of fact that are not supported by the record because the panel “mischaracterized or ignored that Dr. Alberg, Dr. Thornton, and Mr. Schiffer all testified they ultimately did *not* support Hince’s petition for provisional discharge.” The commissioner further contends that, because the judicial appeal panel based its decision on an inaccurate or incomplete set of facts, its ultimate decision is erroneous as a matter of law.

A.

The commissioner contends that “Dr. Alberg credibly and persuasively testified that a provisional discharge is not presently appropriate considering the statutory provisional-discharge criteria.” The commissioner further contends that the panel “did not make any findings indicating that Dr. Alberg testified against provisional discharge and, instead, erroneously framed Dr. Alberg’s opinion as supportive of provisional discharge.”

Our review of the evidentiary record reveals that Dr. Alberg’s opinions are nuanced. His written report states, “Mr. Hince’s current treatment needs would be best served in the community where he would have a better chance to practice his skills and integrate them into life in a community setting.” The report also states that Hince’s “provisional discharge plan is sufficient” to provide a reasonable degree of protection to the public and enable him to successfully adjust to society. Dr. Alberg noted that Hince needs “to develop a more detailed plan for where he could live, work, and receive treatment” but that “he has not been able to do so due to not being able to work with a reintegration specialist at this time.” In his written report, Dr. Alberg recommended that the district court order Hince to begin to define a more detailed plan with a reintegration specialist “so [Hince] could be able to receive a provisional discharge to the community after [it] is sufficiently developed.”

At the evidentiary hearing, Dr. Alberg reiterated in his oral testimony that Hince could receive the sex-offender treatment he needs in the community, outside of CPS. When asked by Hince’s attorney whether he supported a provisional discharge, Dr. Alberg stated that Hince “should be placed in a position where he’s receiving services to formulate a provisional-discharge plan” with a reintegration specialist. He explained:

I think by the time, realistically, a full provisional discharge plan is put together with all the specifics, it's going to take probably six months to a year. So I don't see anything happening in the near future. I think it's beginning, the process now makes sense, and let all the rest of that develop as it can.

On cross-examination by the commissioner's attorney, Dr. Alberg testified, "Based on what the plan is that [Hince has] been able to develop, no, I can't support a provisional discharge. I'd like him to be able to develop a plan."

The judicial appeal panel noted and credited Dr. Alberg's opinion that "it would be appropriate for Mr. Hince to continue his treatment in the community." The panel also noted and credited Dr. Alberg's oral testimony that Hince "has considered treatment needs, need for supervision, and need to comply with supervisory expectations in developing his provisional-discharge plan." The panel agreed with Dr. Alberg's view that a reintegration specialist should be appointed but refrained from ordering such relief because of the panel's perceived limits on its own authority.

The judicial appeal panel did not misstate Dr. Alberg's written report or oral testimony. The panel did not summarize all aspects of Dr. Alberg's report or testimony, but there is no requirement that it do so. The judicial appeal panel "is free to accept part and reject part of a witness's testimony." *Coker*, 831 N.W.2d at 492. The panel apparently determined that the most significant aspect of Dr. Alberg's report and testimony was his opinion that Hince's treatment needs would be best served in the community. Dr. Alberg's primary concern was the lack of a well-developed provisional-discharge plan, but that factor is not determinative. *See Kropp*, 895 N.W.2d at 652-53 (affirming provisional

discharge even though plan lacked specificity as to location of residence). The panel's order is not erroneous in its discussion of the evidence offered by Dr. Alberg.

B.

The commissioner contends that Schiffer “credibly and persuasively testified repeatedly that Hince still needs treatment and supervision in his current treatment setting at this time” and that he also testified that “Hince’s petition is premature and not supported by MSOP clinical leadership, of which Mr. Schiffer is a member.” The commissioner further contends that the panel “ignored Mr. Schiffer’s testimony against Hince’s petition for provisional discharge and instead erroneously framed his testimony as ultimately ambivalent about Hince’s request for provisional discharge.”

Schiffer presented his views in two written reports and in oral testimony. His written report states that, during treatment, Hince is “an active participant who demonstrates insight into the ‘roots’ of his offending and has made a significant shift regarding his antisocial behavior.” The report states that Hince is “participating in core group with increasing frequency, a leader in his core group, and an active mentor.” The report further states that Hince chooses to participate in sobriety-support meetings, maintains vocational placements, attends community outings without incident, and continues to make progress in CPS. But the report states that a provisional discharge would be “premature” and that Hince “would benefit from continuing in Phase III in the current setting.” At the hearing, Schiffer testified that “Hince has made some significant progress” but still needs in-patient treatment supervision to help improve his empathy, lessen his desire toward power and control, and improve his general intimacy with others. Schiffer

also testified that Hince needs to complete stage four of Phase III, which includes provisional-discharge planning.

The judicial appeal panel referred to Schiffer's opinions in only two portions of its order. The panel stated that Schiffer testified that Hince "has made significant progress establishing healthy behaviors, recognizing the triggers of his offense cycle and coping with those triggers" and that Hince "is respectful to MSOP staff, treats peers with respect, and follows the policies and procedures of MSOP." The panel also stated that Schiffer testified that "if the [panel] ordered provisional discharge, then MSOP would assign a reintegration specialist to create a provisional discharge plan."

The judicial appeal panel did not misstate Schiffer's written reports or oral testimony. The panel did not rely on Schiffer's testimony that a provisional discharge would be premature. But again, there is no requirement that it do so because the panel "is free to accept part and reject part of a witness's testimony." *See Coker*, 831 N.W.2d at 492. The panel's order is not erroneous in its discussion of the evidence offered by Schiffer.

C.

The commissioner contends that Dr. Thornton "credibly and persuasively testified unequivocally that . . . he opposes the Panel granting Hince's petition for provisional discharge" but that "the Panel completely ignored Dr. Thornton's opinion against provisional discharge."

Dr. Thornton testified that Hince continues to need supervision in his current in-patient treatment setting. He testified that, although Hince has shown progress, his

psychopathic traits require providers to view his progress cautiously. He testified that Hince's anti-social and sexual-deviance tendencies will get worse in an out-patient setting, which offers less control and less treatment than his present treatment setting. On cross-examination by Hince's attorney, Dr. Thornton could not identify any incidents in the past five years in which Hince exhibited signs of anti-social urges and sexual deviance. Dr. Thornton also testified that provisional discharge was "inappropriate at this time" because Hince's provisional-discharge plan was too speculative to determine whether it would be effective.

The judicial appeal panel indicated that it was familiar with Dr. Thornton's opinions but did not make findings based on them. The panel noted that Dr. Thornton "did not interview Mr. Hince" and that "his report was based solely on a review of the records." The panel stated that it was "not persuaded by Dr. Thornton's testimony, compared to other testimony and records." The panel noted Dr. Thornton's opinion that Hince "has manipulated MSOP staff to believe he will be successful in provisional discharge" but found that "careful review of the record does not reveal recent incidents involving manipulative behavior." The panel also discussed Dr. Thornton's opinions about comments Hince made in treatment by stating that Hince "understands that rape thoughts are unhealthy," that he "is able to intervene on sexual thoughts," and that he "is accountable for his past sexual behavior."

The judicial appeal panel did not misstate Dr. Thornton's written report or oral testimony. The panel did not expressly note Dr. Thornton's conclusion that Hince should not receive a provisional discharge, but the panel's order does not indicate otherwise. Once

again, there is no requirement that the panel recite all aspects of Dr. Thornton's opinions because the panel "is free to accept part and reject part of a witness's testimony." *See Coker*, 831 N.W.2d at 492. The panel's order is not erroneous in its discussion of the evidence offered by Dr. Thornton.

D.

The commissioner's final argument is that the judicial appeal panel erred in its ultimate decision because that decision is based on inaccurate or incomplete findings of fact. The commissioner asserts that the testimony of witnesses who opposed a provisional discharge showed by clear and convincing evidence that Hince should not be provisionally discharged.

As stated above, the judicial appeal panel did not clearly err in its findings concerning the written reports and oral testimony of Dr. Alberg, Schiffer, and Dr. Thornton. The panel's ultimate finding—that the commissioner did not prove by clear and convincing evidence that Hince continues to need treatment and supervision in his current treatment setting and that the conditions of his provisional discharge will not provide a reasonable degree of protection to the public and will not enable him to successfully adjust to the community—must be upheld if "the evidence as a whole sustains the panel's findings." *See Kropp*, 895 N.W.2d at 650.

The evidentiary record contains sufficient evidence to support the judicial appeal panel's ultimate determination that Hince should be provisionally discharged. Dr. Alberg testified that Hince would be able to receive sex-offender treatment in the community, outside of CPS, and that his current treatment needs would be best served in the community

so that he could integrate his skills. In his report, he stated that Hince showed a willingness to continue treatment voluntarily and that he “has sufficiently progressed to a point where the community would be protected even if he is in the community.” Spielman testified that Hince has been accountable for his sexually abusive behavior and for his offenses. In her report, Spielman stated that, based on her sexual-violence risk assessments, several dynamic risk factors that were a concern in the past “do not appear to be a present concern for Mr. Hince.” Hince’s MSOP security counselor testified that Hince demonstrates appropriate boundaries, and his former MSOP vocational counselor testified that Hince has “never had an issue with any vocational placements.”

Based on this evidence and other evidence, the judicial appeal panel found that Hince “has made significant progress establishing healthy behaviors,” that he is an active participant in therapy, that he “has made efforts to demonstrate transparency regarding his sexual fantasies and appears to have the ability to intervene on sexual thoughts that . . . are unhealthy,” that he relies on his support network, and that he “us[es] his skills to avoid deviant thoughts about women.” The judicial appeal panel noted that Hince’s “progress in treatment demonstrates insight into the cause of his offending” and that “he has made significant progress . . . recognizing the triggers of his offense cycle and coping with those triggers.” Appellate courts “do not reweigh the evidence,” and “it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.” *Kropp*, 895 N.W.2d at 650.

In sum, the judicial appeal panel’s findings of fact are not clearly erroneous because the panel’s decision is supported by evidence in the record. Therefore, the judicial appeal

panel did not err by finding that the commissioner failed to prove by clear and convincing evidence that Hince is not entitled to a provisional discharge.

Affirmed.