This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0620

In the Matter of the Civil Commitment of: Christopher Raymond Coker.

Filed September 16, 2019
Affirmed; motion denied
Reyes, Judge

Commitment Appeal Panel
File No. AP18-9007

Marilyn B. Knudsen, St. Paul, Minnesota (for appellant Christopher Coker)

Keith Ellison, Attorney General, Anthony R. Noss, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of the Department of Human Services)

Michael O. Freeman, Hennepin County Attorney, Jennifer M. Inz, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Florey, Judge.

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

REYES, Judge

On appeal from the denial of his petition for full discharge from his commitment as a sexually dangerous person (SDP) after a second-phase hearing, appellant argues that (1) the Commitment Appeal Panel (CAP) erroneously determined that respondent proved by clear and convincing evidence that his petition for discharge should be denied and

(2) the Minnesota Commitment and Treatment Act (MCTA) violates due-process standards and the separation-of-powers doctrine. We affirm.

FACTS

In 2000, appellant Christopher Raymond Coker was civilly committed as an SDP to the Minnesota Sex Offender Program (MSOP). He obtained provisional discharge from the MSOP in 2015. In 2017, appellant petitioned the Special Review Board (SRB) for a full discharge. The SRB denied appellant's petition. Appellant petitioned for a rehearing and reconsideration of the SRB's recommendation. Appellant made a prima facie case on his petition for discharge at the first-phase hearing.

At the second-phase hearing, respondent Commissioner of the Minnesota Department of Human Services (the commissioner) called three witnesses. The CAP issued an order concluding that the commissioner established by clear and convincing evidence that appellant's discharge should be denied. This appeal follows.

D E C I S I O N

I. The CAP did not clearly err in determining that the commissioner proved by clear and convincing evidence that appellant's petition for discharge should be denied.

Appellant challenges the CAP's denial of his petition for discharge, arguing that the commissioner failed to prove by clear and convincing evidence that his petition should be denied. We disagree.

This court reviews a CAP's decision for clear error, examining the record to determine whether the evidence as a whole sustains the CAP's findings. *Matter of Civil Commitment of Kropp*, 895 N.W.2d 647, 650 (Minn. App. 2017), *review denied* (June 20,

2017). In this review, we do not reweigh the evidence. *Larson v. Jesson*, 847 N.W.2d 531, 534 (Minn. App. 2014). If the evidence as a whole sustains the CAP's findings, we need not consider evidence that 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), *review denied* (Minn. Nov. 17, 1992).

Minnesota Statutes chapter 253D provides that a committed person shall not be discharged unless the CAP determines that the committed person is (1) "capable of making an acceptable adjustment to open society;" (2) "no longer dangerous to the public;" and (3) "no longer in need of treatment and supervision." Minn. Stat. § 253D.31 (2018). In determining whether to recommend discharge, the CAP "shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the committed person in adjusting to the community." *Id.* Absent these conditions, a petition for discharge shall be denied. *Id.*

In a first-phase hearing, the committed person bears the burden of coming forward with sufficient evidence that, if proven, would entitle the person to relief. *Coker v. Jesson*, 831 N.W.2d 483, 486 (Minn. 2013). In a second-phase hearing, the party opposing the petition bears the burden of proving by clear and convincing evidence that discharge should be denied. Minn. Stat. § 253D.28, subd. 2(d) (2018); *Kropp*, 895 N.W.2d at 651.

A. The commissioner proved by clear and convincing evidence that appellant is not currently capable of making an acceptable adjustment to open society.

Katie Thelemann, appellant's MSOP reintegration agent for the past two years, testified at the phase-two hearing that her team "isn't sure how [appellant will] handle a move to a residence that's not as supervised," and, as a result, appellant remains fixed in his current tier of MSOP supervision. Theleman testified that appellant is a "very capable, able-bodied individual to live on his own." She testified that she encouraged him to seek different housing than the "24-7 oversight" outpatient residence where he currently resides because "[MSOP] would expect that he not be [living there] any longer than he needs to." Thelemann testified that appellant is "not interested in moving" to more independent housing because he does not want to move to St. Paul, as it is too far away from his job and family, he does not want to live in a house with other sex offenders because his fiancée might visit him, and it would cost $200 more per month than what he is currently paying.

According to Thelemann, the MSOP reintegration staff encouraged appellant to find different employment with better pay after he noted that his current employment does not pay enough for him "to create the life that he wants in the community for himself." Appellant expressed "reluctan[ce] to pursue [other job opportunities] because he is nervous about [Thelemann's] supervision requirements getting in the way of the [new] employer." Thelemen informed appellant that, as his reintegration agent, she would be as flexible as possible with a new employer should he find one. In essence, appellant has not demonstrated to MSOP his ability to live independently in the community because he has self-limited his advancement within the MSOP-supervision tiers by failing to implement

the reintegration agent's feedback relating to more independent housing and obtaining higher-paying employment.

Dr. Mallory Obermire, a forensic evaluator with the Department of Human Services, prepared a report in advance of the second-phase hearing, in which she opined about appellant's results in several sexual-violence-risk assessments. Dr. Obermire testified about the Structured Assessment of Protective Factors (SAPROF), "an assessment tool designed to measure protective factors for adult offenders."[1] The relevant protective factors for appellant are coping, self control, work, attitude toward authority, social network, intimate relationship, professional care, living circumstances, and external control. Dr. Obermire noted that "some of these [protective] factors would not be in place if he were granted a full discharge, including living circumstances and external control." Her report also noted that "[t]his is particularly important" as these factors encompass aspects of reintegration into the community. Dr. Obermire concluded that appellant's "resistance to seeking alternative housing, to seeking independent living skills, [and] to utilizing independent living skills . . . raises concern about his ability to adjust [to open society] successfully," and he "remains stagnant" in provisional discharge.

Dr. Linda Marshall, a court-appointed examiner who conducted a risk assessment of appellant, testified that he currently is not capable of making an acceptable adjustment to open society, "[b]ecause he's [still] in the process right now of doing some gradual

[1] "Protective factors" are "factors considered to protect an offender from engaging in future acts of sexual or non-sexual violence, as opposed to risk factors, which are considered to increase an offender's likelihood of engaging in future acts of sexual or non-sexual violence."

transition to open society." She opined that appellant is "sabotaging his treatment" by "not working fully with the reintegration specialist … in terms of recommendations that are made to him." For example, by not following through with recommendations to seek housing with a lower level of supervision, appellant fails to "gradual[ly] reunify[y] with society and learn[] to be able to live independently and develop [the] skills to be successful." Dr. Marshall agreed that the MSOP agent's recommendations are consistent with "successful and acceptable adjustment to the community" and would promote "increase[d] interactions with all members of society." She noted that "[i]t's offered to him. . . but he's not taking advantage of the opportunit[ies]." She agreed with appellant's antisocial-personality diagnosis and that further assessments showed that he had a high degree of antisocial behavior. She noted that appellant has not yet demonstrated the ability to handle the stressors of daily living. Based on the witnesses' testimony, the commissioner provided clear and convincing evidence that appellant is not currently capable of making an acceptable adjustment to open society.

B. The commissioner proved by clear and convincing evidence that appellant remains a danger to the public.

Dr. Obermire's testimony and report indicate that, at present, appellant poses a danger to the public, and that the danger relates to his sexual disorder. On the Static-99R, which "is designed for use with adult male sexual offenders to predict sexual recidivism," appellant "received a total score of 6, reflective of Level IVb (i.e. Well Above Average)." "Offenders in this risk level generally present with higher risk for sexual re-offense than typical offenders." Based on appellant's Static-99R score, his "dynamic need areas, and

his current status," he closely reflects a sample group that has "a recidivism rate of 20.5 percent within a five year follow-up period."

On the Static-2002R, which "measure[s] [the] risk of sexual and violent recidivism" in adult male sexual offenders,[2] appellant received a score of 8, "which places him in the Level IVb, Well Above Average Risk Category." Offenders with this score "sexually reoffend at a rate of 34.3 percent within a five-year follow-up period."

As to the Stable-2007, an assessment "designed to assess and track changes in risk status over time by assessing changeable dynamic risk factors,"[3] appellant received a score of 6, placing him in the Moderate Need category. The Stable-2007 assessment of appellant revealed two dynamic risk factors: negative emotionality and relationship stability. "[N]egative emotionality" remains a "dynamic risk factor" for appellant, which he exhibits through emotional reactivity, hostility, oppositional behavior and a perception of malevolent intentions by the MSOP staff, and verbalized resentment directed toward the MSOP. Dr. Obermire testified that sometimes a sense of helplessness or hopelessness underlies negative emotionality, individuals might counteract that feeling through attempts to gain power and control. "Power and control dynamics were quite relevant in

---

[2] Dr. Obermire reported that, "[i]n contrast to the Static-99, which consists of ten items, the Static-2002 considers 14 factors. These factors include an assessment of some of the theoretical characteristics presumed to cause recidivism and may provide incremental validity when used in conjunction with the Static-99R."
[3] Dr. Obermire reported that "'[s]table' dynamic risk factors are personal skill deficits, predilections, and learned behaviors that correlate with sexual recidivism but that can be changed through a process of 'effortful intervention.'"

[appellant's] sexual offense history." Dr. Obermire expressed concern because this "parallels [his] offense behavior."

She opined that poor problem-solving skills remain a dynamic risk factor for appellant, but to a lesser extent. While an offender's problem-solving ability is not a salient factor in determining recidivism, in appellant's case, it relates directly to his motivations for past offenses. Dr. Obermire opined:

> [O]ne of the reasons that [appellant] identified as pertaining to his offending history was to maintain a certain lifestyle, maintain a certain image, and so that's why he engaged in the sexual offense behavior, that's why he attempted to coerce females into prostitution, in order to have a certain lifestyle. And so we would hope that he would be able to establish some more prosocial problem solving skills in order to -- in order to meet those needs.

Dr. Obermire testified about appellant's historical scores on the Psychopathy Checklist Revised (PCL-R), an "actuarial tool" that "assesses psychopathic traits in an individual." Appellant's past scores on the PCL-R are "a relevant factor to take into consideration for future recidivism."[4] Research indicates that "there is a strong correlation between sexual deviancy and high psychopathy as it pertains to sexual recidivism." Dr. Obermire concluded, and her report confirmed, that appellant is at a high risk of recidivism.

---

[4] In 1999, appellant received a PCL-R score of 31.6. In 2007, appellant received a PCL-R score of 30.5 "which falls in the high range." The reason Dr. Obermire used appellant's past PCL-R score, is because "[i]t's standard practice that, if there's already scores on record, that we would not necessarily rescore unless a significant period of time had gone by or if there was any reason to rescore, such as discrepancy in scores."

Dr. Marshall testified that appellant poses a danger to the public relating to a sexual disorder due to "[t]he likelihood of his having another sexual reoffense based on his not completing treatment." Appellant also poses a danger through his "general attitude about things" and how "similar individuals like him tend to use sexual behavior . . . as unhealthy coping" when things do not go their way or they become stressed. She relied on Dr. Obermire's actuarial assessment scores for her opinion that appellant poses a danger to the public. The commissioner proved by clear and convincing evidence that appellant remains a danger to the public.

C. The commissioner proved by clear and convincing evidence that appellant continues to need treatment and supervision.

Dr. Obermire testified about appellant's score of one on the Acute-2007 assessment, "which places him in the moderate priority." She testified that this priority indicates "that [appellant] currently . . . requires some oversight in order to manage his acute risk factors." Dr. Marshall testified that, in her opinion, appellant "continue[s] to need treatment for his sexual disorder and supervision." Dr. Marshall reasoned that appellant "still needs to work on some of those dynamic needs factors" including negative emotionality and the way he talks to people. This testimony constitutes clear and convincing evidence that appellant requires continued treatment and supervision.

D. The commissioner proved by clear and convincing evidence that specific conditions do not exist to provide a reasonable degree of protection to the public and to assist appellant in adjusting to the community at this time.

Dr. Obermire testified that appellant "does have some positive support in the community, which is . . . important for an individual who is going to be transitioning."

However, if appellant relies solely on that social support instead of "utiliz[ing] independent living skills," it will result in a "parallel [of] past offense behavior." At present, there is no evidence of the balance between social support and appellant's independence skills. "[G]iven his level of static risk, given the dynamic need areas that were identified, [appellant] has made progress, but he remains stagnant at this point on provisional discharge, and in order to provide a reasonable degree of safety to the public, having those external controls gradually reduced is important." Dr. Marshall testified that appellant failed to demonstrate the ability to handle the stressors of daily living. She testified that the statutory discharge criteria is not met because of appellant's "resistance to have that experience . . . to . . . move to a different apartment and have more freedom and more time so that he can prove that he can do this." She testified that considering all four statutory discharge criteria, discharge is "premature" and is "not an appropriate option."

The record supports the CAP's determination that the commissioner proved by clear and convincing evidence each element of the statutory discharge criteria.

II. The MCTA does not violate due-process standards or the separation-of-powers doctrine.

Appellant argues that the MCTA (1) violates due-process standards because it does not provide for periodic judicial review, as required by *Kansas v. Hendricks*, 521 U.S. 346, 364, 117 S. Ct. 2072, 2083 (1997); (2) process for addressing discharge requests impermissibly places the initial burden of going forward with the evidence on the committed person; (3) process for determining whether continued confinement is required is unconstitutional; and (4) violates the separation-of-powers doctrine by limiting the

power of the judicial branch to rule on the constitutionality of confinement. Appellant's arguments fail.

We review a question of a statute's constitutionality de novo. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). We presume Minnesota statutes to be constitutional and will not declare them unconstitutional unless absolutely necessary. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). The party challenging the statute's constitutionality must demonstrate that it is unconstitutional beyond a reasonable doubt. *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000).

This court squarely rejected appellant's first constitutional argument in *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). We held that "the United States Supreme Court did not mandate adoption of [the *Kansas v. Hendricks*] procedures to maintain the constitutionality of a sexual predator commitment law." *Id.*

As to appellant's second constitutional argument, this court rejected it in *Caprice v. Gomez*, by holding that the requirement for a committed person to bear the initial burden of going forward with evidence in a discharge proceeding is not unconstitutional because the state has the ultimate burden of persuasion to show that commitment should continue. 552 N.W.2d 753, 758 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

The supreme court in *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994), rejected appellant's third argument. The *Blodgett* court held that the sex-offender civil-commitment statutes provide for sufficient treatment, review, and reevaluation of the need for continued confinement in a manner that protects the substantive-due-process rights of

civilly committed sex offenders. *Id.* Instead of addressing *Blodgett*, appellant relies on Supreme Court cases that are either inapplicable or irrelevant to his case. He also relies on a 2011 Office of the Legislative Auditor (OLA) report to support his argument that the MSOP is flawed.[5]

Appellant's fourth constitutional argument lacks merit because appellant has an adequate remedy outside of these proceedings, including seeking a writ of habeas corpus. *See* Minn. Stat. § 589.01, subd. 5 (2018). *See* Minn. Stat. § 253B.23, subd. 5 (2018)[6] ("Nothing in . . . chapter [253B] shall be construed to abridge the right of any person to the writ of habeas corpus."); *see also Beaulieu v. Minn. Dep't of Human Servs.*, 798 N.W.2d 542, 546 (Minn. App. 2011), *aff'd*, 825 N.W.2d 716 (Minn. 2013)). We conclude that the MCTA does not violate due-process standards or the separation-of-powers doctrine.

Affirmed; motion denied.

---

[5] On June 20, 2019, the commissioner filed a motion with this court to strike certain portions of appellant's brief, including citations to the 2011 OLA report, asserting that they are based on matters outside the record on appeal. This court received no response to the motion to strike. The record on appeal is defined by Minn. R. Civ. App. P. 110.01. Generally, appellate courts do not consider matters outside the record on appeal, *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988), and strike references to such matters, *Merle's Constr. Co., Inc. v. Berg*, 442 N.W.2d 300, 303 (Minn. 1989). This applies to appeals in commitment matters. *See Nash v. Wollan*, 656 N.W.2d 585, 591 (Minn. App. 2003) (striking matters beyond the record in CAP appeal). Here, our affirmance is based on the entirety of appellant's brief and addendum. Therefore, we deny the commissioner's motion as unnecessary.

[6] "The provisions of section 253B.23 apply to commitments under this chapter except where inconsistent with this chapter." Minn. Stat. § 253D.03 (2018).