STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1227

In the Matter of the Civil Commitment of: Isaiah Swedeen.

Filed December 9, 2019
Affirmed
Connolly, Judge

Commitment Appeal Panel
File No. AP18-9128

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

Cheri Templeman, Jill Avery, Templeman Law PLLC, Minneapolis, Minnesota (for respondent Isaiah Swedeen)

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent Pine County)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Cochran, Judge.

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

CONNOLLY, Judge

Appellant commissioner challenges the decision of the commitment appeal panel (CAP) to grant respondent's petition for a discharge from his commitment as a sexually dangerous person (SDP), arguing that the record does not support the CAP's findings of fact regarding the discharge factors set out in Minn. Stat. § 253D.31 (2018) and *Call v.*

Gomez, 535 N.W.2d 312 (Minn. 1995). Because the evidence as a whole supports the CAP's findings, we affirm.

D E C I S I O N

Respondent Isaiah Swedeen, born in 1986, has two younger sisters, born in 1987 and 1989. In 2001 or 2002, respondent admitted to a therapist that, when he was between the ages of six and fifteen, he had repeatedly sexually abused his sisters. Based on this admission, respondent was indeterminately committed as an SDP in 2007, and that commitment was affirmed by this court. *In Re Civil Commitment of Swedeen*, No. A07-0805, 2007 WL 2770440 (Minn. App. Sept. 25, 2007).

In 2018, respondent filed a petition for reduction in custody. Following a hearing, a special review board recommended denial of his petition under Minn. Stat. § 253D.27, subd. 4 (2018). Respondent then filed a petition for rehearing and reconsideration by the CAP, as provided by Minn. Stat. § 253D.28 (2018).[1]

A CAP proceeding has two phases. At the phase I hearing, respondent presented his case for provisional discharge and discharge from civil commitment. "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." Minn. Stat. § 253D.28, subd. 2(d). Respondent met this burden.

[1] The entity now known as CAP was formerly known as a Judicial Appeal Panel and is referred to in the statute by that term.

At the phase II hearing, appellant Commissioner of Human Services presented its case opposing the discharge. "[T]he party opposing discharge or provisional discharge bears the burden by clear and convincing evidence that the discharge or provisional discharge should be denied." Minn. Stat. § 253D.28, subd. 2(d). The CAP concluded that appellant did not meet this burden.

The CAP issued an order granting respondent's petition for discharge from civil commitment after concluding that:

> 2. Respondent is capable of making an acceptable adjustment to open society. Minn. Stat. § 253D.31.
> 3. Respondent is no longer dangerous to the public and is no longer in need of inpatient treatment and supervision. *Id.*
> 4. Respondent's continued confinement no longer bears a reasonable relationship to the original reason for his commitment. *See Call v. Gomez*, 535 N.W.2d 312, 319 (Minn. 1995).

Appellant argues that the CAP clearly erred in concluding that respondent no longer needs treatment and supervision for his sexual disorder and no longer poses a danger to the public because the evidence does not support the CAP's findings underlying these conclusions.[2] "We review a [CAP's] decision for clear error and examine the record to determine whether the evidence as a whole sustains the [CAP's] findings. We do not reweigh the evidence." *In re Civil Commitment of Duvall*, 916 N.W.2d 887, 892 (Minn. App. 2018), *review denied* (Minn. Sept. 18, 2018) (quotation and citation omitted). "[I]t

[2] Appellant does not challenge the CAP's conclusions that "[r]espondent is capable of making an acceptable adjustment to open society" and that "[r]espondent's continued confinement no longer bears a reasonable relationship to the original reason for his commitment."

is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* at 894 (quotation omitted).

1. Whether Respondent Needs Treatment and Supervision for a Sexual Disorder

The CAP concluded that respondent no longer needs treatment and supervision for his sexual disorder. This conclusion is based chiefly on the testimony and reports of two doctors, A.P. and J.T.

After interviewing respondent in December 2018, Dr. A.P. diagnosed him as having "Posttraumatic Stress Disorder [PTSD], with dissociative symptoms of derealization." She noted that:

> [respondent] does not meet criteria for any sexual disorder. He does not experience any symptoms of sexual deviance. His sexual behavior with his sisters as a very young child was a result of a trauma-specific reenactment of having been sexually abused and being forced to be sexual with them. The behavior simply continued throughout the years. . . . As [he] matured and experienced sexual contact with peers in adolescence, he began to have some sense that what he was doing [to his sisters] was wrong. Thus, he disclosed the behavior to a therapist at age 15. It took him about a year (age 16) to fully realize the wrongfulness of his behavior and the effects on his sisters.

Dr. J.T. interviewed respondent in July 2018. She diagnosed him with PTSD and other specified personality disorder with borderline features. She also reported:

> [Respondent's] case is atypical. [Respondent] offended against his two younger sisters, after years of chronic sexual abuse by his biological parents and multiple other adults. [He] was forced to engage in sexual activity with his sisters from a young age (i.e., toddler years), and continued to engage in sexually abusive behaviors against them for approximately ten years. He is absent a history of sexually abusive conduct toward other children or adults. While in treatment as an adolescent, he was provided an objective measure of sexual

> interest, which did not indicate deviant sexual interest. Additionally, at that time, he participated in a full disclosure polygraph which did not indicate the presence of deception. Given this, as well as his relationship to the victims and developmental course of the abuse, it does not appear [respondent] requires sex offender specific therapy. . . . He does not meet criteria for pedophilia, a paraphilia, or other sexual disorder which would require treatment in an intensive sex offender program. His present treatment needs pertain primarily to his mental health and reintegration needs, of which there are many.

The CAP heard the two doctors testify concerning their reports and "found [them] persuasive and credible as to [respondent's] current functioning and current treatment needs." The CAP also "found [A.P.] most credible in her diagnostic formulation and ultimate opinion for full discharge from the civil commitment." Based on this, the CAP found that "[respondent] does not have a sexual disorder or a personality disorder related to his sexual offending. He is not a sex offender and he does not need sex offender specific treatment and supervision." These findings of the CAP are supported by the two doctors' reports, on which they testified.

A third doctor, D.T., was retained by appellant; respondent declined to be interviewed by him. D.T. diagnosed respondent with antisocial personality disorder and other personality disorder with borderline traits, and also noted, "It does seem likely that [respondent] did have PTSD as a child." However, D.T. did not diagnose respondent as having conditions that would result in his being committed as SDP or a sexual psychopathic personality (SPP). D.T. concluded:

> [T]he problematic personality traits that are here diagnosed as Antisocial Personality Disorder and Borderline Traits, combined with his other characteristics, . . . dispose[d]

> him to continue offending against his sisters. They would similarly predispose him to sexual reoffending. As a consequence, [respondent] continues to need the level of supervision required by his current setting [i.e., civil commitment in MSOP].

The CAP did not ignore D.T.'s evidence: it rather addressed that evidence, saying it "did not find [D.T.'s] opinion credible as to [respondent's] diagnoses [and] current functioning . . . ."

Thus, the evidence as a whole supports the view that respondent does not need treatment and supervision for a sexual disorder. *See Duvall*, 916 N.W.2d at 892-93.

2. Whether Respondent Is a Danger to the Public

The same three doctors reported on and testified as to the degree to which respondent should be perceived as a danger to the public. A.P. and J.T. noted in their reports that respondent is a juvenile-only sex offender, i.e., that all his sexual offenses were committed between 1992 and 2002, when he was six to fifteen; that the degree of recidivism for juvenile-only offenders is probably low; and that therefore respondent has a low risk of any further criminal sexual conduct. A.P. said in her report:

> Available studies investigating juvenile sexual recidivism consistently show juvenile [offenders] sexually reoffend at a rate of 4-5 %. Thus, according to the majority of studies, 95% - 96% of juvenile sexual offenders do not sexually reoffend.
>
> . . . [A]dult sex offender treatment was never warranted to treat any adult paraphilic behavior [in respondent] . . . . Treatment targeting prosocial outcomes and maturity has created internal change in [respondent], and, likely mitigated his low level of risk in the lower direction.

J.T. similarly reported:

> [R]esearch suggests that juvenile offenders are at a low risk to reoffend, with recent research showing the recidivism rate to be 2.75%. . . . Specifically, the research has found the effects of long term treatment on recidivism are greatest for high risk offenders, and can be less helpful or even detrimental for low risk offenders. [Respondent's] risk for sexual dangerousness, based on these findings, is statistically low, and would not warrant the amount of treatment and security prescribed at MSOP.

D.T. did not address respondent's risk of recidivism in his report, but he was questioned on it during the hearing. He agreed with A.P. and J.T. that studies of recidivism for juvenile-only sexual offenders "have generally been interpreted as indicating a fairly low base rate of sexual recidivism for this group. . . . [M]y starting assumption is that I'm unlikely to think that they meet the level of risk required for commitment." When asked, "And what do you mean by 'low'?" he replied, "[S]omething like a three percent sexual recidivism rate for live samples of juvenile history of sex offending . . . ." When asked if he considered it appropriate to accept the three percent rate for respondent or to consider other factors, D.T. replied that, in a period "relatively close to when [juvenile-only offenders] committed the original offense, they may be more likely to re-offend; but . . . [in] a period . . . many years later—so after they had been out in the community for many years . . . then that risk is rather low."

D.T. explained further that, when doing adult follow-up of juvenile-only sex offenders, "the individuals have matured by the time that they are being followed up, and that it's . . . less sexually preoccupied, less aggressive, and so on by that time, and that a

lower rate of re-offending would reflect that." Thus, D.T. agreed generally with A.P. and J.T. that juvenile-only sex offenders have a low rate of recidivism as adults.

But D.T. did not say a low rate of recidivism would necessarily apply to respondent.

> [O]ver the last few years, he's still sexually preoccupied, he's still impulsive and depressive, shows poor regulation of his emotions. . . . Behaviorally he's very, very similar to a juvenile with behavioral and emotional problems. . . . He doesn't seem to have shown the kind of maturation which would have been typical in those samples. . . . .
>
> On the other hand, he is in fact somewhat older and his offenses were in fact some years [now 17 or 18 years] ago, so my conclusion is, *frankly, we don't know*. . . . .
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> . . . [T]he applicable base rate [of recidivism] might be around twelve percent or something, and so somebody who was high-risk relative to that would have a substantial risk of re-offending. . . . [But] the applicable base rate might be as low as three percent, in which case somebody . . . would have a much lower risk. And I don't think we are . . . in a position to tell which of those things apply [to respondent.]

(Emphasis added.) The opinions of two doctors that respondent, a juvenile-only sex offender, was likely to have a very low rate of recidivism, about three percent, and the statement of a third doctor that he did not really know, but that it might be as high as 12%, do not amount to clear and convincing evidence that respondent poses a danger of reoffending, given the low risk of recidivism. *See* Minn. Stat. § 253D.28, subd. 2(d) ("[T]he 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 CAP said it "did not find [D.T.'s] opinion credible as to [respondent's diagnoses, current functioning, and potential risk of re-offense." The CAP also noted that

D.T.'s statement that he did not really know whether the low recidivism rate for juvenile-only offenders would apply to respondent

> does not even support a finding of significant risk by a preponderance of the evidence. The Commissioner has the burden to provide clear and convincing evidence that the discharge should be denied, and [D.T.'s] analysis was not clear and convincing, especially concerning whether . . . the low base rates associated with recidivism risk for juvenile-only offenders properly applies to [respondent.] The [CAP] was persuaded by [A.P.'s] and [J.T.'s] risk analysis and explanations of [respondent's] current treatment needs as well as the applicability of the juvenile-only base rates to [respondent's] situation.

Thus, the evidence as a whole supports the CAP's findings that respondent "is no longer dangerous to the public and is no longer in need of inpatient treatment and supervision," and we agree with the CAP's conclusion that appellant "failed to show by clear and convincing evidence that [respondent's] petition for a full discharge should be denied."

Affirmed.