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Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1007

In the Matter of the Civil Commitment of:
Mitchell Lee Kenney

Filed December 21, 2020
Reversed
Kalitowski, Judge[*]

Commitment Appeal Panel
File No. AP19-9092

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Considered and decided by Hooten, Presiding Judge; Frisch, Judge; and Kalitowski, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

The Minnesota Commissioner of Human Services (commissioner) challenges the commitment appeal panel's (CAP's) grant of respondent Mitchell Lee Kenney's petition for a provisional discharge from his commitment to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP), arguing that (1) CAP's decision is not supported by the record; and (2) CAP's grant of the petition was functionally a result of its disagreement with petitioner's treatment, and therefore, the grant exceeded CAP's authority. We reverse.

FACTS

Kenney is diagnosed with a pedophilic disorder, with an attraction to 11- to 16-year-old females and, at times, attraction to prepubescent children. From 1992 to 2004, Kenny was adjudicated delinquent or convicted of five separate criminal sexual offenses. And he also admitted to numerous additional sexual offenses against seven victims, for which he was not charged. In 2010, the district court indeterminately committed Kenney to MSOP as an SDP. He is currently in phase II of the three-phase treatment program at MSOP, where he resides at Community Preparation Services (CPS). As a phase II client, Kenney does not receive opportunities for community outings because clients must be in phase III before they receive such privileges.

In 2018, Kenney petitioned the special review board (SRB) for a reduction in custody from his civil commitment. Following a hearing, the SRB recommended that Kenny's request for provisional discharge be granted, but his request for full discharge be

denied. Both the commissioner and Kenney sought rehearing and consideration by CAP, which subsequently held a contested hearing on Kenney's petition. Kenney withdrew his request for full discharge and sought only provisional discharge. At the hearing, five defense witnesses testified: MSOP reintegration director Scott Halvorson, MSOP clinician Kelly Meyer, MSOP therapist Michelle Ensz, independent court-appointed examiner Dr. Andrea Lovett, and Kenney. Two witnesses testified for the state: Department of Human Services forensic evaluator Dr. Jessica Scharf and MSOP clinical courts services director Christopher Schiffer.

In July 2020, CAP provisionally discharged Kenney to the community, finding that (1) his course of treatment and present mental status indicate there is no longer a need for treatment and supervision at CPS, and (2) the conditions of the provisional discharge plan will provide a reasonable degree of protection to the public and will enable Kenney to adjust successfully to the community. The commissioner appeals.

DECISION

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) (2018). In determining whether to grant a provisional discharge, the 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) (2018).

The party seeking "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) (2018). If the petitioning party meets this burden, then the party opposing provisional discharge bears the burden of proving by clear and convincing evidence that the provisional discharge should be denied. *Id.*; *In re Civil Commitment of Kropp*, 895 N.W.2d 647, 650-51 (Minn. App. 2017), *review denied* (Minn. June 20, 2017).

I. Standard of Review

When CAP decides the merits of a patient's petition for a reduction in custody, appellate courts review that decision for clear error, examining the record to determine whether the evidence as a whole sustains CAP's findings. *In re Civil Commitment of Edwards*, 933 N.W.2d 796, 803 (Minn. App. 2019), *review denied* (Minn. Oct. 15, 2019). Under the clear-error standard of review, we do not reweigh the evidence as if trying the matter de novo. *Id.* But the question of "whether the evidence as a whole sustains the CAP's findings" still appears to lend itself to some inherent reweighing of the evidence. *See id*. at 805.

II. Need for Treatment at CPS

CAP found that Kenney's course of treatment and present mental status indicate that there is no longer a need for him to be treated and supervised at CPS. CAP reviewed all

evidence and found that Kenney has made "a great deal of progress on his sexual deviance." Although CAP found that Kenny has remaining work to do, it found that Kenny can do that work in an outpatient setting. CAP also found that Kenney is motivated to be successful at treatment, and that there was "no credible evidence that he would be unable to make continued clinical progress in an outpatient setting."

We conclude that notwithstanding CAP's determination, the record as a whole demonstrates that the therapeutic community at CPS is crucial to Kenney's continued treatment. It was the unanimous opinions of Schiffer and both experts, Dr. Lovett and Dr. Scharff, that Kenney's petition for provisional discharge was premature and that he continues to have treatment needs that can only be met in his current treatment setting. No witness testified to the contrary.

CAP relied heavily on positive testimony regarding Kenney's treatment progress from both experts who testified. Specifically, Kenney's substantial treatment progress, his role as a positive support person at CPS, and Kenney's positive quarterly and annual treatment reports were all cited by CAP in support of its decision.

Kenney's commitment to his treatment program and to his peers at CPS is commendable. But despite Kenney's significant progress, Schiffer and both experts opined that the therapeutic community at CPS is crucial to Kenney's continued success in treatment, highlighting the differences between the reintegration opportunities available through provisional discharge and phase III. Schiffer testified that CPS is a more ideal setting for Kenny than provisional discharge. He explained that provisional discharge locations do not offer the structure, expectations, or therapeutic community provided by

CPS, including access to treatment providers and security counselors who are immersed and trained in the therapeutic model on a daily basis. Schiffer opined that provisionally discharging Kenney without reintegration work at CPS would be akin to dropping him in the "deep end of the pool" without teaching him to swim.

In addition, Dr. Lovett testified that provisionally discharging Kenney before he is ready would be "sabotaging his possibility for success." She stated that Kenney needs time and support to slowly reintegrate into the community, and that it is "important for him to be in CPS where he is comfortable" and "has 24/7 access to professionals." Based on the risk-needs-responsivity model, Dr. Lovett opined that Kenney is at an average level of risk of sexual re-offense and concluded that Kenney "is close," but "not yet ready," for provisional discharge.

And Dr. Scharf testified that Kenney "continues to need the intensity of the inpatient therapeutic community milieu of his present setting," and that "there's the potential that [Kenney's] dynamic risk would increase" in an alternate setting. She also stated that it is important for Kenney to have continued access to security counselors as he practices reintegration and that the CPS therapeutic community "allows constant perpetual opportunities to engage in treatment oriented conversations" with people who are aware of the treatment he is working on. Dr. Scharf utilized the Stable-2007, in part, to assess Kenney's treatment needs. She initially scored Kenney at an 8, which falls into the moderate need category. Given the time that passed between that scoring and the trial, she rescored Kenney. When Dr. Scharf rescored Kenney, he was a 6, which demonstrates progress but still falls into the moderate need category. She concluded that Kenney still

needs the intensity of inpatient treatment and that "[i]t would be a disservice to Mr. Kenney's treatment efforts and gains to not provide him the opportunity to test these gains under the support and supervision offered in his present therapeutic treatment community."

In sum, the fact that Kenney has demonstrated success in phase II treatment at MSOP does not alone reasonably support CAP's finding that Kenney no longer needs treatment and supervision in his current treatment setting at CPS. Nor does it indicate that provisional discharge is the appropriate next step. And although the panel may reject expert testimony, it may not disregard the evidence as a whole. Because the record includes substantial uncontradicted evidence that Kenney still needs the treatment and supervision available to him at CPS, we conclude that the evidence as a whole does not reasonably support CAP's finding to the contrary.

III. Protection to the Public and Successful Adjustment to the Community

CAP found that the conditions of Kenney's provisional discharge plan will provide a reasonable degree of protection to the public and will enable him to adjust successfully to the community. The panel noted that Kenney's proposed provisional discharge plan provides a number of protections for the public, including Global Positioning Service (GPS) monitoring, face-to-face contacts, collateral contacts, drug/alcohol testing, and continued treatment in an appropriate community-based sex offender treatment program.

But our review of the record indicates that the only two witnesses who were qualified to opine on risk and who actually reviewed Kenney's provisional discharge plan—Dr. Lovett and Dr. Scharf—testified that the conditions in the provisional discharge plan would not adequately protect the public or enable Kenney to adjust successfully.

Dr. Lovett reviewed Kenney's provisional discharge plan and concluded that, given his lack of reintegration activities, it was not adequate to protect the public at this time. She observed that Kenney's risk of sexual recidivism "increases when he experiences significant or persistent emotional dysregulation and/or feelings of inadequacy, failure, or worthlessness." She expressed concern that Kenney "would struggle to the point that he may end up needing to return" or have his provisional discharge revoked if he is provisionally discharged before he has the chance to engage in reintegration through CPS. She also stated that because of his limited exposure to pubescent and prepubescent females in public locations, Kenney "requires a slow, gradual, and supervised progression of exposure to the community while residing within his current setting."

Dr. Scharf opined similarly. She noted that "[g]iven Mr. Kenney's offending history, current dynamic risk factors, as well as [his] assessed static risk level, first experiencing [challenges in the community] on a provisional discharge is not recommended at this time, and will not set him up to be successful in the future." In light of his remaining treatment needs, Dr. Scharf indicated that Kenney "would not be able to adjust successfully to the community," and "[g]iven his assessed dynamic and static risk, public safety is still of concern."

Again, although CAP may reject expert testimony, it may not disregard the evidence as a whole. Because the record includes substantial uncontradicted evidence that the conditions of Kenney's provisional discharge plan are not enough either to provide a reasonable degree of protection to the public or to enable him to adjust successfully to the community, the evidence as a whole does not reasonably support CAP's finding.

Based on our review of the record, we conclude that CAP substituted its judgment for that of the experts who testified. Because the overwhelming weight of the evidence shows that provisional discharge is premature and would be counterproductive to Kenney's overall development, we reverse CAP's grant of provisional discharge.

Because we reverse on other grounds, we need not address the commissioner's additional argument that CAP exceeded its authority by granting Kenney's petition for provisional discharge.

Reversed.