STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0615

In the Matter of the Civil Commitment of: Kevin McGrane.

Filed August 29, 2022
Affirmed
Connolly, Judge

Commitment Appeal Panel
File No. AP20-9162

Jennifer L. Thon, Warren J. Maas, Jones Law Office, Mankato, Minnesota (for appellant McGrane)

Keith Ellison, Attorney General, Leonard J. Schweich, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Human Services)

Charles G. Rasmussen, Todd County Attorney, Long Prairie, Minnesota (for respondent county)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from the commitment appeal panel's (CAP's) denial of his petition for discharge from his commitment as a person who has a mental illness and is dangerous to

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

the public, appellant argues that the record does not support the CAP's decision. We affirm.

FACTS

Appellant Kevin McGrane was indeterminately committed as what was then known as mentally ill and dangerous in November 2001, following an incident in which he assaulted a state trooper. In 2018, McGrane was granted an amended provisional discharge that allowed him to live independently. McGrane then moved into an apartment, obtained employment, and managed his affairs without incident.

In the spring of 2020, McGrane quit his job and moved in with his sister. At about the same time, McGrane filed a petition with the special review board (SRB) requesting two amendments to his existing provisional discharge conditions and seeking discharge from civil commitment. Following a hearing, the SRB issued its findings and recommendation that the amended provisional discharge allow McGrane to continue living with his sister be granted, but the request for amended provisional discharge to live independently and the request for discharge from civil commitment be denied. Respondent Commissioner of Human Services (commissioner) subsequently issued an order adopting the SRB's recommendation.

McGrane petitioned for rehearing by the CAP. At the first phase of the hearing, McGrane testified in support of his petition. Conversely, Dr. Linda Marshall, the court-appointed examiner, opined that a full discharge was premature because there was still a risk to the public under his present circumstances.

Following the first phase of the hearing, the CAP determined that McGrane satisfied his burden of production. Dr. Kimberly Turner, a forensic examiner with the Department of Human Services, testified at the second phase of the hearing. Dr. Turner emphasized her inability to speak with McGrane, who declined to be interviewed. She testified that she did "not believe that [McGrane] meets the criteria for full discharge at this time" because McGrane "continues to need oversight provided by the provisions in his discharge, including continuing to take psychiatric medication, continued supervision in terms of medical appointments, doctors appointments."

Following the second phase of the hearing, the CAP granted McGrane's petition for amended provisional discharge to independent living. The CAP also noted that it was "disappointed by the experts and the Commissioner's presentation on the issue of continued dangerousness." But the CAP determined that McGrane's "elevated baseline risk and overall lack of insight into his mental illness satisfy the requisite constitutional requirements for continued civil commitment." Thus, the CAP concluded that there "was clear and convincing evidence, under the totality of the evidence presented, to deny the petition for full discharge at this time." McGrane appeals.

DECISION

McGrane challenges the CAP's denial of his request for a full discharge from civil commitment. We review such a challenge for "clear error." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 223 (Minn. 2021). In discussing the clear-error standard, the supreme court recently stated that

> clear-error review does not permit an appellate court to weigh the evidence as if trying the matter *de novo*. Neither does it permit an appellate court to engage in fact-finding anew, even if the court would find the facts to be different if it determined them in the first instance. Nor should an appellate court reconcile conflicting evidence. Consequently, an appellate court need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the [district] court. Rather, because the factfinder has the primary responsibility of determining the fact issues and the advantage of observing the witnesses in view of all the circumstances surrounding the entire proceeding, an appellate court's duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision.

Id. at 221-22 (quotations and citations omitted).

A person who has been civilly committed as mentally ill and dangerous may petition for a reduction in custody. Minn. Stat. § 253B.18, subd. 5(a) (2020). An SRB must then hold a hearing on the petition and "provide the commissioner of human services with written findings of fact and recommendations." *In re Civ. Commitment of Opiacha*, 943 N.W.2d 220, 224 (Minn. App. 2020) (quotation omitted). The commissioner must then issue a decision on the petition. *Id.*

The criteria governing the SRB's recommendation and the commissioner's decision on a petition for a reduction in custody are specified by Minn. Stat. § 253B.18, subd. 15 (2020). *See id.* at 224-25. The statute provides:

> (a) A patient who is a person who has a mental illness and is dangerous to the public shall not be discharged unless it appears to the satisfaction of the commissioner, after a hearing and a favorable recommendation by a majority of the [SRB], that the patient is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, and is no longer in need of treatment and supervision.

> (b) In determining whether a discharge shall be recommended, the [SRB] and commissioner shall consider whether specific conditions exist to provide a reasonable degree of protection to the public and to assist the patient in adjusting to the community. If the desired conditions do not exist, the discharge shall not be granted.

Minn. Stat. § 253B.18, subd. 15.

If the commissioner denies the petition for discharge, the committed person may petition for rehearing and reconsideration of the commissioner's decision. Minn. Stat. § 253B.19, subd. 2 (2020). Such a petition is referred to a CAP, that must then hold a hearing on the petition. *Opiacha*, 943 N.W.2d at 225. The committed person "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. § 253B.19, subd. 2(c). If the committed person satisfies his or her burden of production, "the party opposing discharge . . . bears the burden of proof by clear and convincing evidence that the discharge . . . should be denied." *Id.* The decision of the majority of the panel "supersede[s]" the decision of the commissioner. *Id.*, subd. 3 (2020). "A party aggrieved by an order of the [CAP] may appeal from the decision of the [CAP] to the court of appeals." *Id.*, subd. 5 (2020).

McGrane argues that the CAP clearly erred in determining that he was not entitled to a full discharge because the record does not support the decision that he is still (A) dangerous to the public and (B) incapable of making an acceptable adjustment to open society and in need of treatment and supervision.

A. Dangerous to the public

A civil commitment cannot continue if the constitutional requirement of both a mental illness and continued dangerousness do not exist. *Opiacha*, 943 N.W.2d at 228. The dangerousness must bear some reasonable relation to the reason for the initial commitment. *Call v. Gomez*, 535 N.W.2d 312, 318 (Minn. 1995).

McGrane argues that the CAP's decision that he remains dangerous to the public is "undermined by the findings made by the [CAP] and the record as a whole." To support his position, McGrane refers to the testimony of Dr. Marshall and Dr. Turner who both provided scant evidence supporting a determination that McGrane presents a danger to the public. He argues that, without more evidence on the issue of dangerousness, the CAP's "conclusion is clearly erroneous because the evidence as a whole does not reasonably support th[e] decision."

We disagree. The commissioner presented evidence that the Minnesota Department of Human Services's Forensic Review Panel (FRP) issued a report dated January 25, 2022, stating that a full discharge was not recommended because there was no change in McGrane's needed level of care. Moreover, McGrane's case manager reported that, in January 2022, McGrane had been acting differently, was more guarded, was on edge, and had recently been fired from his job. The case manager was also in contact with McGrane's sister, who expressed concern about McGrane because he recently had some angry outbursts. Most telling, McGrane's case manager noted that McGrane has never acknowledged having a mental illness or experiencing psychiatric symptoms.

Dr. Marshall also opined that a full discharge was premature because there was still a risk to the public under his present circumstances. In her report, Dr. Marshall noted that McGrane has "continually stated he does not believe he has a mental illness," but has "expressed a willingness to continue to participate in treatment even if not mandated to do so." Dr. Marshall also noted that McGrane's historical risk factors "that were previously identified remain relevant" because there "was clear evidence that [McGrane's] baseline risk for future violence was elevated" by his history of violence, antisocial behavior, substance use, and mental health disorders. Although Dr. Marshall acknowledged that McGrane's risk of danger to the public is "kind of unknown . . . at this point," she testified that the "concern is that with his mental health with his stressors, he might destabilize."

Dr. Turner testified that she has spoken with McGrane "several times and he's never particularly had insight into his mental illness." Dr. Turner also referenced "collateral data," which indicated that McGrane has "been experiencing an increase in psychiatric symptoms." Dr. Turner opined that she did not believe that full discharge is in the interest of public safety at this time because McGrane "continues to need oversight provided by the provisions in his discharge, including continuing to take psychiatric medication, continued supervision in terms of medical appointments, doctors appointments." Although the record may also support findings to the contrary, we conclude that the evidence in the record reasonably supports the determination that McGrane remains a danger to the community at this time.

B. Ability to make an acceptable adjustment to open society and need for continued treatment and supervision

McGrane also contends that the record does not support the decision that he is still incapable of making an acceptable adjustment to open society and in need of treatment and supervision. But the statute provides that to be granted a full discharge, the patient must demonstrate that he or she "is capable of making an acceptable adjustment to open society, is no longer dangerous to the public, *and* is no longer in need of treatment and supervision." Minn. Stat. § 253B.18, subd. 15 (emphasis added). The statute's use of the word "and" means that all three criteria must be satisfied. *See Bergen v. Sonnie of St. Paul, Inc.*, 799 N.W.2d 234, 237 (Minn. App. 2011) (stating that the word "and" generally has a conjunctive meaning); *see also* Minn. Stat. § 645.08(1) (2020) (stating that words are "construed according to rules of grammar and according to their common and approved usage"). Because the record supports the CAP's decision that McGrane is still a danger to the community, he has failed to satisfy all three elements of section 253B.18, subdivision 15. Accordingly, even if McGrane satisfies the other two criteria, he cannot demonstrate that the CAP clearly erred by denying his petition for a full discharge.

Affirmed.