FILED
January 18, 2023
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN COURT OF APPEALS

A22-0735

ORDER OPINION

In the Matter of the Civil Commitment of:
Joseph Anthony Favors.

Commitment Appeal Panel
File No. AP19-9023

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and Wheelock, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. Appellant Joseph Anthony Favors was indeterminately committed to the Minnesota Sex Offender Program (MSOP). In March 2018, Favors petitioned the Special Review Board (SRB) for full or provisional discharge, which SRB denied.

2. Favors petitioned for rehearing and reconsideration by the Commitment Appeal Panel (CAP). A CAP petition for full or provisional discharge typically proceeds in two phases. The committed person must first present a prima facie case showing entitlement to the requested relief. Minn. Stat. § 253D.28, subd. 2(d) (2022). If the committed person makes that showing, the opposing party has the burden in the second phase of showing by clear and convincing evidence that relief should be denied. *Id.*

3. Before his Phase I hearing in August 2019, Favors withdrew his request for full discharge and proceeded only on his request for provisional discharge. Favors offered

several exhibits at the Phase I hearing, including a report from the court-appointed examiner, Favors's relapse-prevention plan, and Favors's discharge plan. Favors also testified in support of his petition. CAP found that Favors established a prima facie case for provisional discharge and scheduled a Phase II hearing for April 2020. But the Phase II hearing did not occur until January 2022 after CAP granted Favors's request for a continuance due to the COVID-19 pandemic.

4. At the Phase II hearing, Favors objected to the admission of a complaint he wrote to respondent Minnesota Commissioner of Human Services, five civil complaints that Favors filed in state and federal courts, and an exhibit containing various MSOP individualized program plans for Favors. Favors claimed that the commissioner sought to use the exhibits against him to retaliate for his complaints about MSOP in violation of his First Amendment rights. CAP admitted the evidence. The commissioner presented additional testimony and exhibits to which Favors did not object. Favors again testified and offered an exhibit on his own behalf.

5. CAP denied provisional discharge, ruling that the commissioner established by clear and convincing evidence that Favors could not acceptably adjust to open society. CAP relied primarily on the opinions of two witnesses—a forensic evaluator who conducted Favors's risk assessments and an MSOP clinical leadership member who authored the most recent SRB treatment report on Favors. CAP noted both witnesses' "concern over [Favors]'s decompensation [in] the past two years . . . including remaining fixated on and stalking two MSOP clients to the extent [that] he has not been able to focus on treatment." Among other things, the forensic evaluator described "how [Favors]'s

stalking behavior resembled [his] offense behavior, particularly the obsessiveness and lack of concern for" the boundaries of others. The witnesses explained that Favors angrily disrupted the therapeutic environment and refused to be redirected when confronted about his behavior. They believed that provisional discharge was inappropriate.

6. CAP emphasized "the measures [MSOP] took because of [Favors]'s noncompliance . . . such as [individualized program plans], a unit change[1], placing [Favors] on orientation for an extended period of time, and removing [him] from" group therapy. CAP noted that the sexual-violence risk assessments concluded that Favors poses "the highest level of risk."

7. Favors challenges CAP's denial of provisional discharge, seemingly arguing that CAP erroneously admitted evidence tainted by MSOP staff's retaliation against him in violation of his First Amendment rights. Favors asks this court to reverse and remand for CAP to filter out any tainted evidence.

8. We review the merits of CAP's decision on a custody-reduction petition "for clear error, examining the record to determine whether the evidence as a whole sustains the CAP's findings." *In re Civ. Commitment of Edwards*, 933 N.W.2d 796, 803 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019). Clearly erroneous means "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted).

[1] The forensic evaluator testified that MSOP moved Favors to a new living unit twice and that the second move was because the two peers Favors had been stalking were moved to Favors's unit.

9. Favors was indeterminately committed as a sexually dangerous person and sexual psychopathic personality. Such a person "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) (2022). CAP must consider two factors to determine whether the committed person is capable of acceptably adjusting. First, CAP must consider "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." *Id.*, subd. 1(b)(1) (2022). Second, CAP must consider "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)(2) (2022).

10. Here, witnesses familiar with Favors's treatment progress at the time of the hearing opposed a reduction in custody. Numerous unobjected-to treatment documents authored by the witnesses and other MSOP staff corroborated the witnesses' testimony. CAP considered the statutory factors, and the evidence reasonably supports CAP's finding that Favors could not acceptably adjust to open society. CAP did not clearly err by denying provisional discharge.

11. Favors's argument is unclear. And in his appellate brief, he presents facts without citing any record evidence. At most, he objected to the admission of the complaint to the commissioner, the civil complaints, and the individualized program plans. But he forfeited review of the admissibility of any other evidence on First Amendment grounds by failing to object below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that

appellate courts generally consider only matters presented to and considered by the district court); *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) ("[A]n objection to the admissibility of evidence must be made at the first opportunity, and . . . failure to do so forfeits the right to raise the question on appeal.").

12. Harmless error must be ignored. Minn. R. Civ. P. 61; *In re Civ. Commitment of Turner*, 950 N.W.2d 303, 309 (Minn. App. 2020) (applying rule 61). Here, CAP relied on the objected-to evidence little or not at all in its order. Therefore, any error in admitting the objected-to evidence was harmless and does not merit reversal.

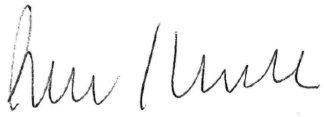
IT IS HEREBY ORDERED:

1. CAP's order is affirmed.

2. Pursuant to Minn. R. Civ. App. P. 136.01, subd. 1(c), this order opinion is nonprecedential, except as law of the case, res judicata, or collateral estoppel.

Dated: January 18, 2023

BY THE COURT



Judge Renee L. Worke