COURT OF APPEALS OF VIRGINIA

Record No. 0862-25-1

BRIAN DAMON FARABEE
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Beales, White and Duffan
Argued at Norfolk, Virginia

Opinion Issued September 22, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY
Holly B. Smith, Judge

Charles E. Haden for appellant.

Helen M. Yorke, Assistant Attorney General (Jason S. Miyares,[1] Attorney General; Robert B. Bell, Deputy Attorney General; Allyson K. Tysinger, Senior Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY
JUDGE KIMBERLEY SLAYTON WHITE

Brian Damon Farabee challenges the trial court's judgment requiring his continued inpatient hospitalization as an acquittee ruled not guilty by reason of insanity (NGRI). Though Farabee sought release, the trial court found he was unwilling or unable to participate in a conditional release plan. It further determined that he required continued confinement. In his only assignment of error, Farabee claims the trial court erred in its determination because he does not fit the criteria for continued confinement set forth in Virginia statute. We disagree.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

[1] Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND

"On appeal, 'we review the evidence in the "light most favorable" to the Commonwealth,' the prevailing party below." *Diaz v. Commonwealth*, 80 Va. App. 286, 295 (2024) (quoting *Clanton v. Commonwealth*, 53 Va. App. 561, 564 (2009) (en banc)). "That principle requires us to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom.'" *Id.* (quoting *Kelly v. Commonwealth*, 41 Va. App. 250, 254 (2003) (en banc)).

I. Arson Charge

On November 3, 1998, while Farabee was a patient at Eastern State Hospital (ESH), he lit two sheets and a blanket on fire and made no effort to leave the room while it filled with smoke. He had heard "mumbled voices" coming from his locker and thought the best way to get rid of them was to burn down the locker. He wanted to kill himself partly because he thought he would get cancer if he did not. He was pulled out of the room by a staff member before any serious injury occurred.

Dr. Kevin McWilliams conducted an evaluation and concluded that, though there had been no reports of Farabee hearing voices prior to this incident, he was "naïve and believable" and he had been "genuinely suicidal and actively hallucinating." In May 1999, he was found not guilty of arson by reason of insanity (NGRI). It was determined that he would require continued confinement pursuant to Code § 19.2-182.3 and then continued inpatient treatment thereafter pursuant to Code § 19.2-182.5.

II. Inpatient Treatment and Incarceration History

The NGRI finding initiated a long period of alternating inpatient treatment and incarceration. The 2023 annual report of the Department of Behavioral Health and Developmental Services (DBHDS) included a listing, "accurate at the time of [the report]," of his

charges and outcomes from the date of his arson acquittal to the date of the report. Initially, Farabee was placed at Central State Hospital (CSH), but was convicted of malicious wounding twice in 2000 and another time in 2002. He was moved to the custody of the Department of Corrections (DOC) where he remained from 2000 to 2012, with "brief hospitalizations" at CSH in 2003 and 2004. He went back to CSH from 2012 to 2015, but was transferred to Western State Hospital (WSH) after that. He was at WSH only a month before he was back in DOC custody for a probation violation. He remained in DOC custody until November 2020. He was placed back at CSH until March 2021, when he was transferred to ESH. He remained there just over a year and was transferred back to "maximum detention" at CSH "due to being found in possession of multiple items of contraband that could be considered weapons." Finally, he was transferred back to ESH in August 2022.

During that period of time, he was charged with many additional law violations that were each resolved by a motion to nolle prosequi by the Commonwealth. Among the charges were numerous assault and batteries, including some on corrections officers and an unlawful wounding. The record is unclear where he was held during the pendency of those charges.

III. Evaluations

Jeremy Schreiber, Ph.D., conducted an annual continuation of confinement report on July 18, 2022. Dr. Schreiber summarized Farabee's history of hospitalization and diagnoses of personality disorders along with symptoms of trauma and diagnosed Farabee with post-traumatic stress disorder (PTSD), borderline personality disorder, and antisocial personality disorder. He highlighted Farabee's progress within a "graduated privileging system" at ESH, noting that he successfully utilized unescorted community privileges for about eight months without incident. In his view, Farabee's "issues were related primarily to his relationship with the system that he has been embroiled [in] for over two decades and remains hopelessly intertwined." In

Dr. Schreiber's estimation, Farabee was ready for release, beginning with a conditional or unconditional release plan.

Melissa Bennett, Ph.D., attempted to interview Farabee on March 29, 2023, but he refused to meet with her, threatened her, and stated that his "evaluation ha[d] already been completed." More specifically, she approached him after an incident with another patient to "check on his safety," but when she announced her intentions to him, he stood and approached her, telling her to "get the fuck away from [him]." She stopped approaching him, put up her hands, told him she was not going to move, and asked him not to throw a cup he was holding with its contents at her. After Farabee returned to his seat, Dr. Bennett left the room "to avoid further provocation."

On April 19, 2023, Dr. Bennett completed an annual continuation of confinement report using all available records and consulting Farabee's treatment providers. She noted that his "presentation" had drastically changed since Dr. Schreiber's 2022 report. She explained that his progress in the NGRI privileging system had stopped when he allegedly smuggled a butterfly knife into ESH and threatened two other patients with it. He had additional charges for assault and battery in 2022 and 2023 at CSH and ESH. She concluded, "[T]here would be a significant risk of bodily harm to other persons in the foreseeable future [if Farabee were not hospitalized]. I do not believe outpatient treatment or monitoring would prevent his condition from deteriorating to a degree that he would need inpatient hospitalization." She considered his mental status, lack of insight, psychiatric history, risk of aggressive behavior, and "other relevant information" in forming her conclusion.

Dr. Bennett completed an update report on Farabee's mental status on September 14, 2023 after he again refused to meet with her the day before. In this report, she concluded that his

"overall pattern of behaviors" had not changed and that "[h]e is either unable or unwilling to engage with offered therapeutic interventions."

IV. Biennial Review Hearing

Farabee's biennial review hearing in accordance with Code § 19.2-182.5 was initially set for May 17, 2023. The hearing was continued multiple times as Farabee requested the removal of six of his appointed attorneys, electing in the end to represent himself. It was also continued as Farabee sought to include the testimony of Dr. McWilliams, who had evaluated his mental state after the initial arson charge in 1998 for which Farabee was judged NGRI.

Farabee received an independent evaluation by Dr. McWilliams. In the evaluation, Dr. McWilliams agreed that Farabee was "recurrently, and plainly quite accurately, diagnosed with borderline personality disorder," but he disagreed that Farabee had antisocial personality disorder. He further stated that Farabee was not receiving treatment in the state hospital setting and that his condition would worsen if he remained in that setting. Farabee was "capable of functioning safely and effectively on an outpatient basis and free of the control/custody of DBHDS."

On March 7, 2025, based in part on the new report by Dr. McWilliams, the trial court ordered a conditional release plan to be prepared by the Virginia Beach Community Services Board. The Virginia Beach Community Services Board prepared the conditional release plan, noting it strongly objected to Farabee's release as it had not been able to properly assess the level of risk that Farabee presented to himself and the community or the level of support he would need upon release. Farabee refused to participate in the formation of the conditional release or to sign it. On April 11, 2025, the Forensic Review Panel, the entity tasked by the DBHDS Commissioner with reviewing NGRI release planning, reported that it had reviewed the drafted conditional release plan and determined that Farabee was not an appropriate candidate for

conditional release. The panel concluded that "continued inpatient hospitalization would provide Mr. Farabee with the opportunity to engage in the NGRI graduated release process to demonstrate a durable period of safety and stability at increasing levels of community access."

The biennial review hearing before the trial court finally took place on April 23, 2025, addressing new misdemeanor charges, a potential conditional release plan, and the NGRI biennial review.[2] The Commonwealth submitted an exhibit containing the annual continuation of confinement reports for Farabee described above. At the hearing, the trial court noted that it had reviewed and considered the reports by Dr. Schreiber, Dr. Bennett, Dr. McWilliams, and the Forensic Review Panel. Farabee, *pro se*, objected to the proposed conditional release plan and requested to be released unconditionally without oversight by the Commonwealth.

Dr. McWilliams testified that Farabee would, and previously did, fare better outside of the state hospital setting. In his view, due to Farabee's distrust towards the state hospital system, Farabee was unlikely to comply with the conditions proposed in the conditional release plan. The Commonwealth, emphasizing the need for public safety, raised concerns about Farabee's unwillingness to engage with individuals both inside and outside of the state hospital system and his pattern of violence in response to stress.

After listening to arguments, the trial court ordered continued hospitalization. In its decision, it considered the risk Farabee likely posed to himself or others, his failure to abide by court orders, his ability to manage things outside of a hospital setting, the lack of evidence for his ability to manage things due to Farabee's lack of cooperation with others, and "such other factors as the Court deems relevant." The trial court recorded its ruling in an order dated May 6, 2025.

[2] At a previous hearing conducted on March 3, 2025, the circuit court refrained from addressing multiple motions by Farabee, as it determined they "should be [addressed] right immediately before trial" as it would "make[] more sense . . . procedurally."

ANALYSIS

"When a defendant is acquitted by reason of insanity at the time of the offense, the court must place the acquittee in the temporary custody of the Commissioner . . . for an evaluation to determine whether that acquittee can be released or requires commitment." *Commonwealth v. Chatman*, 260 Va. 562, 571-72 (2000) (citing Code § 19.2-182.2). "If an acquittee is mentally ill and in need of inpatient hospitalization, the court must commit the acquittee." *Id.* at 572 (citing Code § 19.2-182.3). The trial court's decision to commit shall be based upon the following factors:

1. To what extent the acquittee has mental illness or intellectual disability, as those terms are defined in [Code] § 37.2-100;

2. The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;

3. The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and

4. Such other factors as the court deems relevant.

Code § 19.2-182.3.

"When an acquittee is committed for inpatient hospitalization, the committing court must conduct periodic assessments of the confined acquittee's continuing need for such treatment. *Chatman*, 260 Va. at 572 (citing Code § 19.2-182.5). "[T]he provisions of the Code dealing with the disposition of persons acquitted by reason of insanity do not, however, limit the length of time that an acquittee can be confined for inpatient treatment." *Id.* "Thus, it is conceivable that an acquittee could be confined for inpatient treatment for many years or for the remainder of his or her life, if the acquittee continues to be mentally ill and in need of inpatient treatment." *Id.*

However, "[a]t any time the court considers the acquittee's need for inpatient hospitalization," it shall "place the acquittee on conditional release" upon finding that

> (i) based on consideration of the factors which the court must consider in its commitment decision, he does not need inpatient hospitalization but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need inpatient hospitalization; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the acquittee, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety.

Code § 19.2-182.7.

"The language of the applicable statutes, the existing case law interpreting them, and analogous legal principles provide the governing standard of review for appeals involving the treatment of a defendant acquitted based on a plea of not guilty by reason of insanity." *Walker v. Commonwealth*, 78 Va. App. 52, 63 (2023). "The text of the statutory scheme [addressing the disposition of persons acquitted by reason of insanity] expressly grants discretion to the circuit courts applying it." *Id.* "Consequently, an abuse-of-discretion standard governs the circuit court's ultimate determination regarding the appropriate conditions for release and their further review under the statutory scheme, subject to additional principles regarding review of a court's discretionary rulings." *Id.* at 64.

Farabee challenges the decision to continue his inpatient hospitalization because "Farabee no longer met the criteria for continued confinement pursuant to Va. Code § 19.2-182.5 and Va. Code § 19.2-182.3."[3] The only Virginia authority cited on brief by Farabee is *Williams v.*

[3] Farabee quickly turns to a claim that his constitutional due process rights were violated by the trial court's decision and eventually challenges the constitutionality of the Virginia statutes themselves. But "[o]nly assignments of error listed in the brief will be noticed by this Court." *Davis v. Christy*, 87 Va. App. 29, 42 (2026) (alteration in original) (quoting Rule 5A:20(c)(1)). Further, "[w]e do not consider issues touched upon by the appellant[s'] argument but not encompassed by [their] assignment of error." *Id.* (second and third alterations in

Commonwealth, 18 Va. App. 384 (1994), but that case is disanalogous to his. First, unlike Farabee, the acquittee in that case was diagnosed with organic personality disorder, not borderline personality disorder or antisocial personality disorder. *Id.* at 387. Farabee misstates the facts of that case, saying Williams "was diagnosed with borderline personality disorder. The Virginia Court of Appeals ruled that that was not an organic impairment." Second, *Williams* presented a challenge to a previous version of the statutory scheme governing commitment of NGRI acquittees. But this Court explained that "[b]ecause the statutory scheme has been revised since the hearing in this case, we need not address the remaining issues raised by Williams." *Id.* at 390 (citations omitted). Thus, we cannot address the questions at the heart of *Williams*, but must instead focus on Farabee's claim in his single assignment of error—whether the trial court incorrectly determined that he met the statutory criteria for continued hospitalization. *See* Rule 5A:20 (prohibiting this Court from addressing arguments not raised in the assignments of error on brief). We now address the assignment of error according to the merits.

The trial court's finding that Farabee has a mental illness was not plainly wrong or without evidence to support it.[4] While the decision about the need for continued inpatient hospitalization is reviewed according to an abuse of discretion standard, "the determination with regard to whether [the acquittee] suffers from a mental illness, and therefore should continue to

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original) (quoting *Banks v. Commonwealth*, 67 Va. App. 273, 290 (2017)). Thus, we do not address the constitutionality of the Virginia statutes here.

[4] The Commonwealth makes a 5A:18 waiver argument on brief. According to the Commonwealth, "During the review hearing, Farabee did not claim a lack of mental illness." We disagree. He repeatedly compares his case to *Foucha v. Louisiana*, 504 U.S. 71 (1992), which he interprets to be establishing that "an insanity acquittal commitment has to be for treatment. So you have to be mentally ill." As he argues further in the hearing, "the Supreme Court in effect said, regarding the due process issue under the Fourteenth Amendment, that continuing his confinement just because he is potentially dangerous is a due process violation . . . . His confinement wouldn't be for treatment because he is no longer suffering that mental illness. I contend that exact same scenario is here before us today. I mean, they are identical."

be committed to the custody of the Commissioner, is a question of fact to be resolved by the trial court based upon consideration of the relevant Code provisions, and the report and testimony of mental health experts." *Mercer v. Commonwealth*, 259 Va. 235, 242 (2000). "Conflicting expert opinions constitute a question of fact . . . ." *Id.* (alteration in original) (quoting *McCaskey v. Patrick Henry Hosp.*, 225 Va. 413, 415 (1983)). It is within the province of the fact finder alone "to assess the credibility of the witnesses and the probative value to be given their testimony." *Richardson v. Richardson*, 242 Va. 242, 246 (1991). "The factual determinations of the trial court, like those of a jury, are binding on this Court, and we will reverse such findings 'only if they are plainly wrong or without evidence to support them.'" *Mercer*, 259 Va. at 243 (quoting *Richardson*, 242 Va. at 246).

Here, testimony about the nature of Farabee's illness was contradicted by multiple experts in their mental health assessments. Dr. Schreiber diagnosed him with PTSD, antisocial personality disorder, and borderline personality disorder. Dr. Bennett confirmed these diagnoses. Dr. McWilliams diagnosed him with borderline personality disorder, but denied that he had antisocial personality disorder or PTSD. As the trial court stated, "The law is very specific about what [it is] permitted to do and what [it is] not permitted to do. In this respect, there is evidence still of mental illness." Additionally, "[t]he Court has before it many reports. The Court has carefully considered and, frankly, gave weight -- the appropriate weight to the 2022 report and Dr. McWilliams' report."

Despite contradictions between experts, both Dr. Schreiber and Dr. McWilliams agreed that Farabee has borderline personality disorder. None of the United States or Virginia caselaw cited by Farabee on this issue indicates that borderline personality disorder is not a mental illness. *See Foucha v. Louisiana*, 504 U.S. 71 (1992); *Mercer*, 259 Va. 235; *Williams*, 18 Va. App. 384. Thus, it is sufficient that experts agree Farabee has a personality disorder, even if

they disagree on antisocial personality disorder and PTSD. The trial court has not made a plainly wrong finding as long as it has evidence to support a finding that Farabee has "a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others." Code § 37.2-100.

The reports of multiple experts constitute evidence that Farabee meets the criteria for "mental illness." Neither the text of the statute nor applicable caselaw suggest borderline personality disorder is excluded as a mental illness. Even if it were, at least one expert diagnosed Farabee with PTSD and antisocial personality disorder as well. Thus, the determination that Farabee has a mental illness is not plainly wrong or without evidence to support it and we find no reason on these grounds to suppose the judgment that he requires inpatient hospitalization is an abuse of discretion.

Whether Farabee poses a risk of harm to others is also a finding of fact that we review under the highly deferential standard applied to other findings of fact. *See Walker*, 78 Va App. at 72 (describing deference to findings of fact that include the trial court's "evaluation of risk posed by unconditional release"); *Bates v. Commonwealth*, 287 Va. 58, 63 (2014). The trial court also had evidence of potential risk of harm to others based on the report from Dr. Bennett. It stated its explicit reliance on the potential risk of harm to others in determining that Farabee needed continuing inpatient hospitalization.

Dr. Bennett, in her report, wrote that "there are other times where he will position himself and wait for opportunities to intentionally cause harm to specific others without an identified antecedent." She further wrote, "I believe that if Mr. Brian Farabee were not hospitalized, there would be a significant risk of bodily harm to other persons in the foreseeable future." Though

this testimony contradicts Dr. Schreiber's and Dr. McWilliams's opinions, the trial court, as finder of fact, is entitled to accord weight to each expert's testimony. Dr. Schreiber's report occurred before new developments mentioned in Dr. Bennett's report, and Dr. McWilliams's report did not include first-hand exposure to some of the behaviors Dr. Bennett witnessed or documented. The trial court is entitled to accord weight to expert testimony about risk of harm just as it does about the presence of mental illness. Thus, the trial court's finding that Farabee was a risk of harm to others was not "plainly wrong or without evidence to support it" and we find no reason on these grounds to suppose the judgment that he requires inpatient hospitalization is an abuse of discretion.

Thus, there was no error in the trial court's judgment that Farabee required continuing inpatient hospitalization.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.