Appeal Nos. 2015AP330
2015AP1311

Cir. Ct. Nos. 2007CI1
2007CI3

WISCONSIN COURT OF APPEALS
DISTRICT III

NO. 2015AP330

IN RE THE COMMITMENT OF DAVID HAGER, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID HAGER, JR.,

RESPONDENT-APPELLANT.

FILED

FEB 02, 2016
Diane M. Fremgen
Clerk of Supreme Court

NO. 2015AP1311

IN RE THE COMMITMENT OF HOWARD CARTER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HOWARD CARTER,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Seidl, JJ.

We certify these appeals to the Wisconsin Supreme Court to determine issues related to the effect of 2013 Wis. Act 84, which modified WIS. STAT. § 980.09(2) (2011-12), regarding petitions for discharge from commitment as a sexually violent person. Under the previous version of § 980.09, after a circuit court reviewed the sufficiency of the petition for discharge, it was required to consider current or past reports, the committed person's petition and the State's written response, arguments of counsel, and any supporting documents to determine whether those documents contained "facts from which the court or jury *may conclude* that the person does not meet the criteria for commitment …." WIS. STAT. § 980.09(2) (2011-12) (emphasis added). "If the court determine[d] that facts exist[ed] from which a court or jury could conclude the person does not meet the criteria for commitment the court shall set the matter for hearing." ***Id.*** Effective December 14, 2013, § 980.09(2) was amended by 2013 Wis. Act 84 to require the court to set the matter for trial only if "the court determines that the record contains facts from which a court or jury *would likely conclude* the person no longer meets the criteria for commitment." (Emphasis added.)

We certify four issues arising from the change to the statute: (1) Does the change in the statute authorize the circuit court to weigh the evidence at this stage, overruling ***State v. Arends***, 2010 WI 46, ¶¶40-43, 325 Wis. 2d 1, 784 N.W.2d 513; (2) If the court is allowed to weigh the evidence, how is such a weighing accomplished, and, specifically, what factors should the court consider when predicting whether the factfinder would likely conclude the person no longer meets the criteria for commitment; (3) If the statute allows the court to weigh the evidence and consider the credibility of the competing psychological reports at this stage where the petitioner bears the burden of establishing a change in his or her condition, is the statute unconstitutional because it misallocates the burden of

proof; and (4) Does the change in the statute apply retroactively to a petition for discharge filed before the revised statute's effective date.

BACKGROUND

DAVID HAGER

Hager was initially committed as a sexually violent person in 2008. At that time, actuarial instruments predicted a thirty-three percent likelihood of reoffending within five years, and a thirty-eight to forty-nine percent likelihood within ten years. Hager's 2014 amended petition for discharge was supported by a report from licensed psychologist Hollida Wakefield. Using other actuarial instruments, Wakefield calculated Hager's likelihood of reoffending at approximately twenty-five percent in five years and thirty-four percent in ten years. Wakefield criticized the use of the high risk subgroups as recommended by the authors of the STATIC 99-R, which indicated a thirty-one percent rate of reoffense in five years and forty-two percent in ten years. Wakefield also noted Hager's progress in suppressing deviant arousal, as measured by the penile plethysmograph; his denial of sexual fantasies about children (purportedly confirmed by polygraph tests); and his repudiation of past distorted attitudes about sexual entitlement and the notion that children enjoy sex with adults.

The State countered with a report by psychologist Bradley Allen who placed Hager in the high risk group for scoring on the STATIC 99-R, with corresponding reoffense rates. This likelihood of reoffense was nearly unchanged from that testified to during Hager's 2008 commitment. Based on the underreporting of sex offenses and the need to predict the lifetime likelihood of reoffense as opposed to the ten-year reoffense period measured by the actuarial

instruments, Allen concluded it was more likely than not that Hager would reoffend.

The circuit court determined that, but for Hager's aging, there was no change in his condition. It determined Hager was still psychologically the same person and needed more counseling. The court denied Hager's petition for discharge based on its pretrial determination that the factfinder was unlikely to conclude Hager no longer meets the criteria for commitment.

Howard Carter

Carter was initially committed as a sexually violent person in 2009. His petition for discharge was supported by a report by Dr. Diane Lytton, who concluded Carter did not have a mental disorder that would make him more likely than not to reoffend. She noted Carter had advanced to Phase 2 of treatment at Sand Ridge Secure Treatment Center. Carter's STATIC-99 score was either eight or nine, with a five-year recidivism rate of twenty-nine to thirty-nine percent. On the MATS-1, an actuarial instrument not used in previous evaluations, Carter's risk to reoffend was thirty-six percent over eight years. Lytton did not use the "High Risk/Needs" base rate sample, concluding it had a large amount of out-of-date sex offenders in the sample.

The circuit court retroactively applied the revised version of WIS. STAT. § 980.09(2) without objection.[1] The court criticized Lytton's report for not

[1] Because Carter's trial counsel failed to object to the retroactive application of the revised statute, the arguments on appeal are presented under the rubric of ineffective assistance of counsel.

containing enough background information on Carter, and questioned whether the MATS-1 was commonly used by evaluators of sexually violent persons. Although the court did not exclude any evidence under ***Daubert***,[2] it speculated that Lytton's testimony might not be admissible under ***Daubert***, in effect applying the ***Daubert*** methodology at this pretrial stage. The court denied Carter a trial on his discharge petition and subsequently denied a postdisposition motion based on ineffective assistance of counsel.

DISCUSSION

Statutory construction

The State argues, and the circuit court in Hager's case held, that the change to the applicable standard in the statute allows a circuit court to weigh the evidence submitted both in support of and against the petition to determine whether the factfinder "would likely conclude" the committed person no longer meets the criteria for commitment. Under the previous version of the statute, a committed person was not required to convince the court that evidence supporting his position was stronger than the evidence against it. ***State v. Ermers***, 2011 WI App 113, ¶24 & n.11, 336 Wis. 2d 451, 802 N.W.2d 540. The State contends the new version of the statute was intended to make the burden more difficult for the committed person, requiring a showing that a favorable verdict is more likely than not, rather than a mere possibility. It cites the legislative history of Act 84, as well as the plain language of the statute, to support that proposition.

[2] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 589, 597 (1993).

Hager contends the revision neither was intended to nor did overrule ***Arends***, which prohibited weighing the evidence. He focuses on the statute's reference to whether the "record contains facts" from which a court or jury would likely conclude that the person does not meet the criteria for commitment. He contends weighing the evidence is inconsistent with the question of whether the record "contains facts." Hager maintains the "would likely conclude" language simply requires that the proffered evidence, considered on its own merits, clearly favors the person petitioning for discharge as opposed to the old version of the statute, which permitted a trial on ambiguous or barely probative evidence. Hager contends the change in the statute was not meant to create a scenario in which the person petitioning for discharge would have the burden of proof prior to the actual trial. Based on our close review of language in WIS. STAT. § 980.09, especially as it compares with the prior version of § 980.09, we see potential merit in both parties' interpretation of the statute.

Factors the circuit court should consider

If the statute is construed to allow the circuit court to weigh the evidence when deciding whether to conduct a trial on the issue of continued commitment, questions arise regarding how to implement the statute, many of which are evidenced in the Carter proceedings. At the hearing in which the paper record is considered, can the court take testimony? Regardless, does the court decide the credibility of the experts? Is the person petitioning for discharge allowed to attack the foundation for and validity of an unfavorable expert's report? Can this attack be accomplished without cross-examination? What factors or standard should the court use to predict the findings a factfinder would make? Is the court to consider the competing experts' prior performance in evaluating

likelihood of a sexually violent person's reoffense? How do the evaluations of the experts differ from the determinations made at a ***Daubert*** hearing? If the petition requests a trial to the court, how does a pretrial hearing differ from a trial? Importantly, is the circuit court's determination deemed a finding of fact to which this court would give deference, or a conclusion of law to be reviewed de novo? As applied in the Hager case, how should this court review the circuit court's determination that Allen's report outweighs Wakefield's report?

Constitutionality of the statute

Hager and Carter contend the statute, as construed by the State and the circuit courts, violates their due process rights. The availability of discharge petitions plays a significant role in assuring the constitutionality of WIS. STAT. ch. 980. ***Ermers***, 336 Wis. 2d 451, ¶32. A commitment regime '"passes constitutional muster' [if] confinement is 'linked to the dangerousness of the committed person' and there are procedures for ending confinement when the person is no longer dangerous." ***Id.*** (citation omitted). Due process requires the State to carry the burden of proof in a civil commitment proceeding. ***Addington v. Texas***, 441 U.S. 418, 431-32 (1979).

Under the State's construction of the revised statute, a petitioner is not entitled to a discharge trial unless he or she first successfully shows that the evidence in support of the petition is qualitatively better than the evidence offered in opposition. ***Arends***, and previous versions of the statute, place the burden on the person petitioning for discharge to produce some evidence in his or her favor to receive a trial regarding continued commitment. Hager contends allowing circuit courts to weigh the evidence would change the burden of production to a

burden of proof. To be entitled to a trial, Hager argues a petitioner would have to prove he or she does not meet the criteria for commitment.

The State notes the presumption of a statute's constitutionality and contends its interpretation of the revised statute passes constitutional muster because the State continues to have the burden of proof at the trial, if one is held. The State observes Hager fails to cite any cases that require the State to assume the burden of proof at a pretrial stage.

Carter also challenges the constitutionality of the revised statute. He contends strict scrutiny is appropriate because of the liberty interest involved. *See* ***State v. Williams***, 2001 WI App 263, ¶6, 249 Wis. 2d 1, 637 N.W.2d 791. He asserts the revised statute does not provide an adequate mechanism for periodic review and was not narrowly tailored to achieve a purpose that is constitutionally required. He notes the revised statute is significantly different from the statutory scheme that existed when WIS. STAT. ch. 980's constitutionality was upheld in ***State v. Carpenter***, 197 Wis. 2d 252, 274, 541 N.W.2d 105 (1995).

Citing ***State v. Alger***, 2015 WI 3, ¶¶42-44, 360 Wis. 2d 193, 858 N.W.2d 346, the State contends the rational basis test applies because the amendment to the pretrial procedures does not implicate a fundamental right. Under that test, the legislation must be upheld unless it is patently arbitrary or has no rational relationship to a legitimate government interest. ***Id.***, ¶39. The State asserts the amendment merely gives the court additional tools to weed out non-meritorious petitions and avoid wasting judicial time and resources. The State contends the amended statute presents no procedural due process problem because it involves a change in the *standard* of proof necessary to get a hearing. In Carter's appeal, the State does not acknowledge an issue regarding the *burden* of

proof being placed on the petitioner at a hearing in which the court weighs the evidence.

Carter also argues the revised statute should not apply to a petition for discharge filed before the effective date of the statute. The Wisconsin Supreme Court's decision on retroactivity of a procedural statute to a case already "in the pipeline," ***Trinity Petroleum, Inc. v. Scott Oil Company***, 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1, noted retroactive application of a procedural rule is not an absolute rule. ***Id.***, ¶53. A procedural statute will not have retroactive application if it disturbs vested rights or imposes an unreasonable burden on a party attempting to comply with the procedural requirements of the rule. ***Id.*** Carter contends the continued deprivation of his liberty and his right to access to an impartial factfinder implicate his vested rights. He contends the new statute places an unreasonable burden on the person petitioning for discharge to establish the superiority of his or her expert's conclusion over those of the State's experts.

The State concedes that retroactive application of the statute remains unsettled, noting the issue is also presented in case No. 2014AP2724, ***State v. Sugden***. The State contends the *standard* of proof to be applied at the pretrial hearing is a matter of procedure because it merely prescribes the manner or mode of conducting legal proceedings. *See* ***Trinity***, 302 Wis. 2d 299, ¶41. It contends a person petitioning for discharge has no vested right in any particular procedure and the statute does not impair the person's right to petition for discharge. The State contends the revised statute does not place an unreasonable burden on the petitioner because the parties were given adequate notice of the new rule.

Reasons the supreme court should accept certification

We submit these appeals are appropriate for review by the Wisconsin Supreme Court to fully clarify the effect of the statutory change. No published opinion has addressed the new statutory language and, given the large number of petitions for discharge, early consideration of these issues by the Wisconsin Supreme Court will promote judicial efficiency, eliminate current uncertainty regarding application of the new statute, and further clarify the law for both the circuit courts and persons petitioning for discharge, whose liberty interests are at stake. A decision on the constitutionality of the revised statute will determine whether the act is enforceable at all and, if it is unconstitutional, whether the circuit courts should refrain from weighing the evidence or should place the burden of proof on the State at the pretrial stage. If constitutional, a decision will assist circuit court's implementing use of the statute and the decision will determine how appellate courts review circuit court rulings. Finally, because these cases frequently take a substantial amount of time to litigate, we seek guidance on the question of retroactive application of the revised statute to petitions filed before the effective date.