COURT OF APPEALS DECISION DATED AND FILED

April 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1815 **Cir. Ct. No. 2007CI2**

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

IN RE THE COMMITMENT OF SCOTT MAHER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SCOTT MAHER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Reversed and cause remanded with directions*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. Scott Maher appeals an order denying his petition for discharge from civil commitment as a sexually violent person under

WIS. STAT. ch. 980 (2011-12) without holding a discharge hearing.[1] Maher argues that the circuit court's denial of his petition without holding a discharge hearing was based on an impermissible weighing of the relative persuasiveness of conflicting examination reports of experts. We agree, and accordingly reverse.

BACKGROUND

¶2 The facts necessary to decide the issues presented on review are limited.

¶3 Following a jury trial, Maher was adjudged to be a sexually violent person and committed to a secure mental health facility until such time as he is no longer a sexually violent person.[2] Since his commitment, Maher has not had a discharge hearing.

¶4 Just over three years after his commitment trial, Maher requested, and the court granted, an order appointing Hollida Wakefield, a licensed psychologist, to conduct an independent reexamination of Maher's mental condition, pursuant to WIS. STAT. §§ 980.031(3) and 980.07(1). Relying heavily on Wakefield's evaluation report, Maher then filed the petition for discharge, pursuant to WIS. STAT. § 980.09. The petition is the focus of this appeal.

¶5 Summarizing here only key points, Wakefield's conclusions included the following: Maher suffers from Antisocial Personality Disorder,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. The parties do not call our attention to any changes to any provision of Chapter 980 throughout the time period referenced in this appeal.

[2] The original commitment order was made by the Honorable James O. Miller.

which "predisposes him to act impulsively and irresponsibly, fail to follow social norms, and get in trouble with the law" but not "to commit[,] specifically[,] sexually violent acts"; Maher does not "have a mental disorder predisposing him to commit sexually violent offenses"; he is "not more likely than not to commit a future sexually violent offense"; he "demonstrated appropriate adjustment while incarcerated"; and "[a]lthough he was in some sex offender treatment while incarcerated, his continued denial of guilt [in connection with child sexual assault charges for which he was convicted in 1997] meant he didn't progress past two rounds of" a particular focus group, thus he "hasn't been in treatment and therefore treatment will not have lowered his risk." Wakefield also observed that, "given his age[3] and blood pressure problems," Maher is "likely to be less preoccupied with sex" than when he had been previously interviewed.

¶6 In assessing Maher's risk to reoffend, Wakefield used three "assessment techniques," including the Static-99R and the MATS-1 actuarial instruments. Using these assessment tools, Wakefield concluded that Maher "scored similarly to groups of sex offenders in which approximately 15% to 35% sexually recidivated in 10 years." Wakefield explained that research published since Maher's WIS. STAT. ch. 980 commitment trial demonstrates that the risk levels that were previously predicted using the Static-99 tool (the precursor to the Static-99R released in October 2009) "significantly" overstated risk. Wakefield also stated that the MATS-1 tool, which was developed after Maher's ch. 980

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[3] Maher was born on May 15, 1970, and therefore turned forty-three approximately one month after the court entered the order challenged in this appeal.

commitment trial, has the advantage of using "age-stratified actuarial tables," which is supported by research published in 2010.

¶7 In deciding whether to hold a discharge hearing, the circuit court also had before it, in addition to other evaluation reports, an evaluation report of licensed psychologist William Schmitt. Schmitt explained and provided support for his view that, contrary to Wakefield's view, Maher suffers from "Paraphilia, NOS and Antisocial Personality Disorder, each of which is a mental disorder, ... that affects his emotional or volitional capacity, and predisposes him to commit sexually violent acts as defined by Chapter 980."

¶8 The circuit court denied the petition without holding a discharge hearing. As explained in more detail below, the court grounded its decision on the idea that "wild[]" differences between the conclusions reached by Wakefield and the conclusions of other mental health professionals, "call[] into question how much [a] finder of fact might be able to rely on" Wakefield's testimony at a discharge hearing.

DISCUSSION

¶9 The procedures and standards governing petitions for discharge are well established, and involve a two-step process "aimed at weeding out meritless and unsupported petitions, while still protecting a petitioner's access to a discharge hearing." *See* ***State v. Arends***, 2010 WI 46, ¶22, 325 Wis. 2d 1, 784 N.W.2d 513. We recently summarized the two steps as follows:

> [T]he [circuit] court first engages in an initial, or "paper," review of the discharge petition and its attachments ([under] WIS. STAT. § 980.09(1)). The court must determine whether "a reasonable trier of fact could conclude from the facts alleged in the petition and its attachments that the petitioner does not meet the criteria for

> commitment as a sexually violent person." [*S*]*ee* ... WIS. STAT. § 980.09(1). Typically, the petition will allege that the committed person does not have a mental disorder that predisposes him or her to acts of sexual violence, and/or the committed person is not more likely than not to commit a sexual offense.
>
> If the petition is facially sufficient, the court proceeds to a review under WIS. STAT. § 980.09(2), which is a second level of review before the petitioner is entitled to a discharge hearing. In this step, the court must examine the record *in toto*, including any current or past examination reports or treatment progress reports, the petition and any written response, the arguments of counsel, and any other documentation filed by either party. The standard is the same as the facial review under § 980.09(1); that is, the court must determine whether there are facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment. *See* WIS. STAT. § 980.09(2). The court may hold a hearing at this stage, or order the production of any enumerated items not in the record. "Essentially, review under § 980.09(2) ensures that the claims in the petition are supported with actual facts."

State v. Richard, 2014 WI App 28, ¶¶12-13, ___ Wis. 2d ___, ___ N.W.2d ___ (case citations omitted). The interpretation and application of this statute is a question of law that we review independently of the circuit court, but benefitting from its prior analysis. ***Arends***, 325 Wis. 2d 1, ¶13.

¶10 It is apparent here that the circuit court concluded that Maher's petition was facially sufficient under WIS. STAT. § 980.09(1), and made its decision based on the second stage of the process, under § 980.09(2). The State concedes on appeal that "Maher's petition met the requirements of WIS. STAT. § 980.09(1)." This meant that the court was left to determine whether the petition

contains facts "from which a court or jury could conclude [Maher] does not meet criteria for commitment" as a sexually violent person.[4] Section 980.09(2).

¶11 In denying the petition without a discharge hearing, the court provided the following reasoning:

> I don't think [this court] can find that the fact that Mr. Maher is simply a few years older [than at the time of the commitment trial], and we have one doctor[5] who concludes something different from essentially the same information that was available at trial, is sufficient under the circumstances to require the court to order a new hearing in this case.
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> This is a closer call, frankly, than I anticipated it might be when I first started reviewing this information, but especially in light of the fact that I'm required to review all the information and [that] ... there is some ability [of the court] apparently to assess the accuracy of the expert's report or their qualifications[,] given that it appears in many ways the statistical analysis done by all the doctors on some of the tests come out effectively the same.
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> And then [the experts] reach wildly different conclusions from those things certainly I think calls into question how much [a] finder of fact might be able to rely on Dr. Wakefield.
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> As a result, under the circumstances as they exist in total, while I would acknowledge that this is as I said before a closer case than maybe I had once thought in my initial review, I don't believe the court has enough information to require a ... hearing on the potential discharge.

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[4] WISCONSIN STAT. § 980.09(2) has since been amended and now requires the court to deny the petition unless "the record contains facts from which a court or jury would likely conclude the person no longer meets the criteria for commitment." 2013 Wis. Act 84, § 23. Here, we apply the pre-Act 84 standard.

[5] Wakefield's credentials include an M.A., a Minnesota license to practice as a psychologist, and publications and seminars in various professional settings, but she does not assert that she is a doctor of medicine or a Ph.D.

¶12 The reasoning of the court here is a close match to the conclusions of the circuit court as we characterized and rejected them in ***Richard***, a case that also, as it happens, involved opinions of Wakefield. In ***Richard***, the circuit court had "reasoned that the historical facts upon which Richard was committed had not changed, and one psychologist's conclusion to the contrary, drawn from those same facts, was insufficient to justify a discharge hearing." ***Richard***, 2014 WI App 28, ¶15. After reviewing court precedent in this area, this court in ***Richard*** concluded that:

> a petition alleging a change in a sexually violent person's status based upon a change in the research or writings on how professionals are to interpret and score actuarial instruments is sufficient for a petitioner to receive a discharge hearing, if it is properly supported by a psychological evaluation applying the new research.

Id., ¶20. Therefore the standard under WIS. STAT. § 980.09(2) "is satisfied when a psychologist reports that significant amendments to one of the actuarial instruments used at trial reduce the petitioner's risk to reoffend below the legal threshold." ***Id.***, ¶25.

¶13 We assume that, when the circuit court here observed that it had "some ability apparently to assess the accuracy of the expert's report or their qualifications," the court was referring to the following passage in ***Arends***: "This is not to say that the court must take every document a party submits at face value. The court's determination that a court or jury could conclude in the petitioner's favor must be based on facts upon which a trier of fact could reasonably rely." ***Arends***, 325 Wis. 2d 1, ¶39.

¶14 However, in ***Arends***, the supreme court went on to explain the meaning of the phrases "face value" and "reasonably rely" in this context. The

court explained that a court might conclude that a trier of fact could not reasonably rely on a report "if the evidence shows the expert is *not qualified* to make a psychological determination, or that the expert's report was based on *a misunderstanding or misapplication* of the proper definition of a sexually violent person …." ***Id.*** (emphasis added). The court further explained that the standard under WIS. STAT. § 980.09(2) "is similar to that used in a civil action to decide a motion to dismiss at the close of evidence under Wis. Stat. § 805.14(4)." ***Id.***, ¶42. "If any facts support a finding in favor of the petitioner, the court must order a discharge hearing on the petition; if no such facts exist, the court must deny the petition." ***Id.***, ¶43.

¶15 Even though the circuit court here alluded to accuracy and qualifications in making its decision, the court did not point to any inaccuracy in Wakefield's report nor to any deficiency in her qualifications. Instead, the court based its decision on the idea that Wakefield's conclusions appeared "wildly" different from those of other experts.

¶16 Our review of the record shows that Wakefield provided support for her conclusions upon which a trier of fact could reasonably rely. Relying on the Static-99R and MATS-1 instruments, the fact that Maher was now into his forties, her observations that his record of behavior and attitudes have improved at least to a degree, and his presentation in an interview, Wakefield concluded that it is not more likely than not that Maher would commit a sexually violent offense. As Maher now points out, "Wakefield's report specifically links Maher's current age to the methodology she employed using the [newly revised] Static-99R." It is of course an open question whether Wakefield's conclusions would be persuasive to a finder of fact at a discharge hearing after a full airing of her opinions and those of other experts, with the opportunity for cross-examinations. However, the

circuit court cannot base its decision under WIS. STAT. § 980.09(2) on a prediction that she would likely not be persuasive. *See* ***Arends***, 325 Wis. 2d 1, ¶40 ("We reject the State's argument that the circuit court may weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner.").

¶17 For the most part the State on appeal, following the circuit court's approach, effectively asks this court to reject Wakefield's report as weak or unpersuasive. However, as in ***Richard***, the State fails here to provide us with a basis to conclude that an expert's opinion is not entitled to any weight. *See* ***Richard***, ¶23 ("The State does not tackle Richard's broader contention that, at the time of his commitment trial, the Static–99 scoring tables had not yet been adjusted to reflect new research about the effect of aging on recidivism.").

CONCLUSION

¶18 For these reasons, we remand to the circuit court so it may hold a discharge hearing.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.