COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP598 **Cir. Ct. No. 2005CI1**

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

IN RE THE COMMITMENT OF KEVIN J. HAEN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEVIN J. HAEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Kevin J. Haen appeals from an order denying his petition for discharge from a WIS. STAT. ch. 980 (2011-12)[1] commitment. Haen

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

contends that the circuit court erred in denying his petition without a hearing. We disagree and affirm.

¶2 In July 2006, Haen was committed under WIS. STAT. ch. 980 as a sexually violent person. For purposes of ch. 980, the term "sexually violent person" means "a person who has been convicted of a sexually violent offense … and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." WIS. STAT. § 980.01(7).

¶3 In August 2009, Haen filed a petition for discharge from his commitment. The circuit court subsequently determined that a hearing was necessary.

¶4 At the discharge hearing, the State relied on the testimony of Dr. Janet Page Hill. Hill testified that Haen suffered from pedophilia and borderline personality disorder, disorders which predisposed him to sexually reoffend. Hill further testified that Haen was likely to commit another sexually violent offense. She based this conclusion, in part, on the Static-99R actuarial instrument. Hill gave Haen a score of "6" on the instrument and explained that, when taking into account extrapolation, a score of "5" or "6" would be sufficient to meet the legal threshold of "more likely than not." She also based her conclusion on Haen's refusal to participate in sex offender treatment. Finally, while Hill acknowledged that Haen's behavior had improved since his commitment, she attributed that fact to his change of setting. She explained, "Sand Ridge is a hospital, it's not a prison, and [patients like Haen] are treated very, very well there and their every need is taken care of. It's a very sheltered, therapeutic environment."

¶5 The circuit court found Hill's testimony credible and agreed with her conclusion that Haen remained a sexually violent person. Accordingly, it denied the petition for discharge. Haen appealed, and this court affirmed the circuit court's ruling. ***State v. Haen***, No. 2010AP3134, unpublished slip op. (WI App December 14, 2011).

¶6 In August 2013, Haen filed another petition for discharge. Attached to the petition was the report of Dr. Christopher Snyder. Snyder opined that Haen no longer met the criteria for commitment, as his risk to commit another sexually violent offense was below the legal threshold of "more likely than not." Snyder based this opinion on two primary factors. First, Haen had aged to the point (age thirty-five) where his score on the Static-99R could be reduced by one point from a "6" to a "5." Second, Haen's positive behavior at Sand Ridge demonstrated that he "may have made some progress" with certain dynamic risk factors (i.e., self-regulation and impaired socio-affective functioning), notwithstanding the fact that he continued to refuse to participate in sex offender treatment.

¶7 Ultimately, the circuit court denied Haen's petition for discharge without a hearing. In so doing, the court concluded that nothing had changed since the previous discharge hearing. It then entered a written order formally denying the petition. This appeal follows.

¶8 To determine whether the circuit court properly dismissed Haen's petition for discharge without a hearing, we must examine the statute governing such petitions, WIS. STAT. § 980.09, and apply it to the facts of this case. Interpretation and application of a statute are questions of law that we review de novo. ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

¶9 Determining whether to hold a discharge hearing under WIS. STAT. § 980.09 involves a two-step process. ***Arends***, 325 Wis. 2d 1, ¶¶3, 22. First, the circuit court conducts a "paper review" of the petition and its attachments pursuant to § 980.09(1). ***Arends***, 325 Wis. 2d 1, ¶¶4, 25. The court must deny the petition without a hearing unless the petition alleges facts "from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person." ***Id.***, ¶4; *see also* § 980.09(1).[2]

¶10 If such facts are alleged, the circuit court performs a more comprehensive review under WIS. STAT. § 980.09(2). ***Arends***, 325 Wis. 2d 1, ¶¶30, 32. In this second step, the court must examine the entire record, including all reports, the petition and any written response, the arguments of counsel, and any supporting documentation filed by either party. ***Id.***, ¶38. As under § 980.09(1), the court must determine whether there are facts from which a reasonable trier of fact could conclude the petitioner does not meet the criteria for commitment. *See* § 980.09(2).

¶11 As we explained in ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311, in order to meet this standard, a petition for discharge must

> set forth new evidence, not considered by a prior trier of fact, from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. An expert's opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient

[2] WISCONSIN STAT. § 980.09 was amended after the circuit court denied Haen's petition for discharge. The statute now requires the court to deny a discharge petition without a hearing if the petition does not contain facts from which a court or jury "would likely conclude" the person no longer meets the criteria for commitment. *See* 2013 Wis. Act 84, §§ 21, 23.

> for a new discharge hearing under [WIS. STAT.] § 980.09(2). This result is the only reasonable one. Permitting a new discharge hearing on evidence already determined insufficient by a prior trier of fact violates essential principles of judicial administration and efficiency.

Schulpius, 345 Wis. 2d 351, ¶35 (citation omitted). Accordingly, a new expert opinion may be sufficient to entitle the petitioner to a discharge hearing, but only if it is based on "something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding." ***Id.***, ¶39 (quoting ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684).

¶12 Here, it appears that the circuit court proceeded directly to the second step of the screening process to determine whether the facts warranted a discharge hearing. It also appears that the court applied the principles of ***Schulpius*** when it denied a new hearing based on its conclusion that nothing had changed since the previous discharge hearing. Haen takes issues with the circuit court's conclusion and argues that the facts on which Snyder relied were new evidence from which a reasonable trier of fact could conclude that Haen did not meet the criteria for commitment as a sexually violent person. We disagree.

¶13 As noted, Snyder's opinion regarding Haen's risk to reoffend was based on two primary factors. First, Haen had aged to the point where his score on the Static-99R could be reduced by one point from a "6" to a "5." Second, Haen's positive behavior at Sand Ridge demonstrated that he "may have made some progress" with certain dynamic risk factors

¶14 We are not persuaded that Haen's reduction in score on the Static-99R constituted new evidence from which a reasonable trier of fact could conclude

that he did not meet the criteria for commitment as a sexually violent person. Indeed, the reduction in score was rendered moot by Hill's prior testimony that, with extrapolation, a score of "5" or "6" would be sufficient to meet the legal threshold of "more likely than not."

¶15 Likewise, we are not persuaded that Haen's positive behavior at Sand Ridge constituted new evidence from which a reasonable trier of fact could conclude that he did not meet the criteria for commitment as a sexually violent person. The circuit court was aware of Haen's positive behavior from Hill, who attributed the improvement to a change of setting as opposed to a reduction in risk to reoffend. The fact that Snyder arrived at a different conclusion was not sufficient to warrant a new hearing.

¶16 For these reasons, we are satisfied that the circuit court properly denied Haen's petition without a discharge hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.