COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2348 **Cir. Ct. No. 2004CI1**

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

IN RE THE COMMITMENT OF JAMERREL V. EVERETT:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMERREL V. EVERETT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jamerrel Everett appeals an order denying his petition for discharge from his commitment as a sexually violent person. The

issue is whether the State met its burden of proof at the discharge hearing. We conclude that it did. We affirm.

¶2 Everett was committed as a sexually violent person under WIS. STAT. ch. 980 (2009-10)[1] in 2004. In 2009, Everett filed a pro se petition for discharge pursuant to WIS. STAT. § 980.09. Other than previously filed reports of Everett's periodic examinations and treatment progress, the State presented no witnesses or new evidence at the court trial. The sole witness was Hollida Wakefield, appointed by the court at defense counsel's request to conduct an independent exam of Everett in connection with his petition. Wakefield testified that Everett had antisocial personality disorder but did not meet the criteria for commitment under ch. 980 because he was not more likely than not to commit a crime of sexual violence in the future. *See* WIS. STAT. § 980.01(1m), (7). The court denied the petition.

¶3 Everett's appointed appellate counsel filed a no-merit report. This court ordered Everett's counsel to investigate and consult with him as to whether the circuit court's review of previous reports and other documents filed under WIS. STAT. § 980.07 suffice in terms of the State meeting its burden of proof at the discharge hearing. Everett moved to establish a WIS. STAT. RULE 809.19 briefing schedule and we rejected the no-merit report. This appeal followed.

¶4 Everett contends that the evidence was insufficient as a matter law to prove that he still is a sexually violent person. His challenge is more procedural than substantive. He argues that (1) the circuit court should not be able to treat

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

previously filed reports and documents as substantive evidence simply upon Wakefield's testimony that she reviewed them and "agreed" with the diagnoses expressed in them, and (2) without that evidence, the State failed to present any expert testimony, foreclosing the circuit court from properly making a finding that he remains a sexually violent person, particularly on the issue of future dangerousness. While the record could—and should—have been clearer, we are satisfied that the circuit court had before it evidence sufficient to support its conclusion, such that the State met its burden of proving by clear and convincing evidence that Everett still is a sexually violent person. *See* WIS. STAT. § 980.09(3).

¶5 The transcript indicates that six exhibits were marked for identification at the outset of the hearing. Those exhibits were: Exhibit 1, the June 4, 2004 report of psychologist Caton F. Roberts; Exhibit 2, a timeline of Everett's treatment requests; Exhibit 3, Wakefield's curriculum vitae; Exhibit 4, Wakefield's July 25, 2009 report; Exhibit 5, a treatment progress report prepared by psychologist Bridget Kanz[2]; and Exhibit 6, a report of psychologist Christopher Snyder. The exhibit list does not specify the dates of the Kanz and Snyder reports. A seventh exhibit, an "Awareness Report" listing Everett's behavior incidents and disciplinary actions, was marked just before Everett testified.

¶6 The hearing transcript is not a model of clarity in regard to rulings on the admission of the exhibits. Only Exhibit 1, Dr. Roberts' 2004 report, was unequivocally admitted. Related docket entries reflect: "Court marks the originals

[2] The psychologist's surname is spelled "Kay" on the exhibit list, but we adopt the spelling shown in the treatment progress report.

[of Exhs. 1-6] as exhibits and takes judicial notice of Ex. 3 & 4," and, later, "Ex. 2, 6 & 7 received." The Exhibit List in the record indicates that Exhibits 1-4 and 7 were received. The only one left unaddressed in any fashion is Exh. 5, Dr. Kanz's treatment progress report.

¶7 The docket entries and the Exhibit List are efforts to memorialize the less-than-clear oral pronouncements. We see it as being analogous to instances when a circuit court's oral and written decisions conflict. As in those cases, it is the court's intent that should control. *See, e.g.*, ***State v. Lipke***, 186 Wis. 2d 358, 364-65, 521 N.W.2d 444 (Ct. App. 1994). Despite the poor hearing record and the conflicting entries we are persuaded that the court intended to admit Exhibit 6, the report of the State's expert, Dr. Snyder.

¶8 We first note that, as a practical matter, Dr. Snyder's report was one in a series of annual reexaminations submitted to the court, via the Department of Health Services, to determine whether Everett made sufficient progress for the court to consider whether he should be placed on supervised release or discharged. *See* WIS. STAT. § 980.07(2), (6). In addition, the transcript reflects that the parties stipulated that they would ask the court to take judicial notice of their experts' reports. The attorneys and the court conducted the remainder of the hearing in a manner consistent with the court accepting the stipulation and receiving the reports as evidence. Both parties questioned Dr. Wakefield about Dr. Snyder's conclusions and the court referred to them in its oral decision.

¶9 We also are able to conclude that the report referred to at trial was the one Dr. Snyder prepared in April 2009. The parties' questioning about the report included references to "the new Static-99," to specific reconviction rates at specific intervals, and to a fourth-degree sexual assault mentioned on "page 6 of

16" of the report. Those references do not appear in his 2008 report. Further, his 2009 report is part of a document in the record that also includes Dr. Kanz's treatment progress report, marked as Exhibit 5. Her report is dated April 1, 2009. We conclude Dr. Snyder's report could only be the one from April 2009.

¶10 The question then becomes whether the evidence was sufficient to grant Everett's petition for discharge. We review the sufficiency of the evidence according to the same standard applicable to criminal convictions. *See* ***State v. Curiel***, 227 Wis. 2d 389, 418, 597 N.W.2d 697 (1999). Adapting the test to a WIS. STAT. ch. 980 context, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the commitment, is so lacking in probative value and force that no reasonably acting trier of fact could have found beyond a reasonable doubt that the respondent was a sexually violent person. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Further, if any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find that the respondent was a sexually violent person, this court may not overturn the verdict even if it believes that the trier of fact should not have so found based on the evidence before it. *See* ***id***.

¶11 Dr. Snyder submitted a sixteen-page report. He found that Everett, diagnosed with Antisocial Personality Disorder, was predisposed to commit sexually violent acts and had serious difficulty controlling his behavior. He also found that there were not facts from which the court could conclude that Everett did not meet the criteria for commitment as a sexually violent person, and that Everett's degree of risk fell into a category above the legal threshold that he "more likely than not" would commit another sexually violent offense were he to be discharged.

¶12 Offset against Dr. Snyder's report was Wakefield's testimony and report. Although Wakefield opined that Everett was "not more likely than not to reoffend," her opinion was not unqualified. She went only as far as to say that Everett "may" meet the criteria for discharge and frankly cautioned that he would be "better off in supervised release," which Everett was not seeking, and that "[b]oth [Everett] and society would benefit if he weren't discharged at this time." As the trier of fact, the circuit court was free to weigh the experts' conflicting testimony and decide which was more reliable; to accept or reject any expert's testimony, in whole or in part, and to consider any nonexpert testimony—here, Everett's own—in deciding whether there was a substantial probability that Everett would commit future acts of violence. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 441, 597 N.W.2d 712 (1999). The court decided that Dr. Snyder's opinion was the more reliable. We are bound by that determination.

¶13 Because we conclude that the State satisfied its burden of proving by clear and convincing evidence that Everett still is a sexually violent person, we affirm the circuit court's decision to deny his petition for discharge from his WIS. STAT. ch. 980 commitment.

By the Court.—Order affirmed.

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