COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2240 **Cir. Ct. No. 2003CI1**

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

IN RE THE COMMITMENT OF KEVIN M. GAETZ:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEVIN M. GAETZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Sherman and Blanchard, JJ., and Charles P. Dykman, Reserve Judge.

¶1 PER CURIAM. Kevin Gaetz appeals an order denying Gaetz's petition for discharge from commitment under WIS. STAT. ch. 980 (2009-10).[1] Gaetz contends that the circuit court erred by denying his petition without holding a full discharge hearing under WIS. STAT. §§ 980.09(2) and (3). We conclude that the circuit court properly denied the discharge petition. Accordingly, we affirm.

Background

¶2 In August 2005, Gaetz was committed as a sexually violent person under WIS. STAT. ch. 980. In April 2009, Gaetz filed a petition for discharge. *See* WIS. STAT. § 980.09. The court held a full discharge hearing on the petition in 2010. Dr. William Schmitt and Dr. Hollida Wakefield provided expert testimony on Gaetz's behalf, explaining that they determined that Gaetz did not meet the criteria for commitment as a sexually violent person because he was not more likely than not to reoffend. Schmitt and Wakefield both explained the assessment tools they utilized in reaching their conclusions, including Gaetz's score on a standard psychopathy checklist. Both stated that Gaetz's moderate psychopathy score did not increase or decrease his risk for re-offense.

¶3 Dr. Christopher Tyre testified for the State, explaining that he concluded that Gaetz met the criteria for commitment, including that Gaetz was more likely than not to reoffend. Tyre explained that he considered Gaetz's psychopathy score to increase his risk for re-offense. The court determined that the State had met its burden to establish that Gaetz met the criteria for commitment, and denied the petition for discharge.

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

¶4 In March 2011, Gaetz again petitioned for discharge from commitment. *See* WIS. STAT. § 980.09. Gaetz argued that his most recent annual re-examination, conducted by Dr. Richard Elwood, supported a determination that Gaetz no longer met the criteria for commitment as a sexually violent person. In his report, Elwood stated that he determined that Gaetz was not more likely than not to reoffend, and recommended Gaetz be considered for discharge. Elwood scored Gaetz lower on the psychopathy range than previous evaluators, in part based on Gaetz's behavior during the previous five to six years. The court held a hearing under § 980.09(2), and determined that the factual information underlying Elwood's report was already utilized at the 2010 discharge hearing. Thus, the court denied the petition without a full discharge hearing. Gaetz appeals.

Standard of Review

¶5 This case involves the interpretation and application of WIS. STAT. § 980.09 to the facts of this case. Interpreting and applying statutes to a set of facts presents a question of law, which we review de novo. *See* ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

Discussion

¶6 A person committed under WIS. STAT. ch. 980 may petition for discharge at any time. WIS. STAT. § 980.09(1).[2] A petition for discharge requires the circuit court to undertake a two-part analysis to determine whether the

[2] Likely through scrivener's error, the first subsection of WIS. STAT. § 980.09 is not numbered. Therefore, we follow the logical convention used in ***State v. Arends***, 2010 WI 46, ¶23, 325 Wis. 2d 1, 784 N.W.2d 513, and elsewhere, to assume that there is a missing "(1)," and we refer to the first subsection of the statute as "§ 980.09(1)."

petitioner is entitled to a full discharge hearing. ***Arends***, 325 Wis. 2d 1, ¶51. First, the court conducts an initial paper review of the petition and supporting documents to determine if they "allege[] facts from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person." ***Id.***, ¶¶23-30. If the petition does not allege sufficient facts to support that determination, the court must deny the petition. ***Id.***, ¶30. If it does allege sufficient facts, the court conducts the second step of the process to determine whether the petitioner is entitled to a full discharge hearing. ***Id.*** The second step requires the court to examine current and past re-examination reports and treatment progress reports, relevant facts in the petition and the State's response, counsel's arguments, and any supporting documentation provided by the parties. ***Id.***, ¶¶31-32. Additionally, the court may hold a hearing as part of its review to determine whether the petitioner is entitled to a full discharge hearing. ***Id.*** If a review of the entire record reveals facts that would support a reasonable fact finder in determining that the petitioner is not a sexually violent person, the court must hold a full discharge hearing; if those facts are not present, the court must deny the petition. ***Id.***, ¶43.

¶7 Gaetz contends first that WIS. STAT. § 980.09(2) requires only that a petitioner establish a change since the original commitment, not that a change has occurred since his last full discharge hearing.[3] Gaetz argues that § 980.09(1)

[3] The State contends that Gaetz forfeited this argument by failing to raise it in the circuit court. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). It points out that Gaetz argued in the circuit court that his current petition was based on facts "not previously presented and adjudicated at an evidentiary hearing," rather than asserting that a change need only be established since the original commitment. Because we reject Gaetz's argument on the merits, we need not deem it forfeited.

specifically requires a court to consider whether the petitioner's condition has changed "since the date of his or her initial commitment," and that nothing in subsections (1) or (2) requires a petitioner to establish a change since the last discharge hearing. Thus, according to Gaetz, the circuit court erred by denying his petition based on the fact that he had not presented evidence of a change from the time of his 2010 full discharge hearing, rather than determining whether the petition presented evidence of change since the original commitment. We disagree.

¶8 Under WIS. STAT. § 980.09(1), which sets forth the first step in the determination of whether a petitioner is entitled to a full discharge hearing, the circuit court must consider whether the petitioner's condition has changed since the date of the initial commitment. However, under § 980.09(2), which sets forth the second step in the determination of whether the petitioner is entitled to a full discharge hearing, the circuit court must consider whether the entire record would support a determination that the petitioner no longer meets the criteria for commitment. Contrary to Gaetz's assertion, then, § 980.09 does not explicitly limit the entire determination of whether to hold a full discharge hearing to whether the petitioner has established a change since the initial commitment, without regard to facts established at a prior discharge hearing.

¶9 Additionally, case law indicates that the issue during the second step under WIS. STAT. § 980.09(2) is whether the entire record would support a finding that the petitioner no longer meets the criteria for commitment, based on information not previously litigated at the commitment trial *or at a prior*

discharge hearing.[4] *See* ***State v. Kruse***, 2006 WI App 179, ¶35, 296 Wis. 2d 130, 722 N.W.2d 742 (explaining that we have rejected the argument that the sufficiency of a discharge petition and supporting material must be evaluated "without regard to whether that opinion is based on matters that were already considered by experts testifying at the commitment trial *or a prior evidentiary hearing*" (citation omitted and emphasis added)); ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684 (holding that a petition for discharge based on an expert's opinion "must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in *a prior proceeding* that determined the person to be sexually violent" (emphasis added)); *see also* ***Arends***, 325 Wis. 2d 1, ¶¶23-32, 43.

¶10 We also agree with the State that Gaetz's interpretation of WIS. STAT. § 980.09 is untenable. As the State points out, Gaetz's reading of § 980.09 would entitle a petitioner to a full discharge hearing on each new petition following a first full discharge hearing, so long as the petitioner continues to assert changes since the time of the original commitment. This is contrary to the gatekeeping function of the circuit court in evaluating discharge petitions, as set forth in ***Arends***, 325 Wis. 2d 1, ¶¶28, 38.

¶11 We turn, then, to Gaetz's next argument: that his petition set forth facts from which a fact finder may determine that he is no longer a sexually

[4] Gaetz argues that the case law indicating that the second step of analysis under WIS. STAT. § 980.08(2) looks to determinations made at a prior discharge hearing is not controlling because those cases were decided under a prior version of WIS. STAT. § 980.09. However, Gaetz does not explain how intervening legislative changes to § 980.09 have rendered the prior cases inapplicable. Additionally, the supreme court has indicated that those cases are still helpful in analyzing the requirements under § 980.09(2), despite the legislative amendments to § 980.09. *See* ***Arends***, 325 Wis. 2d 1, ¶39 n.21.

violent person. Gaetz contends that Elwood did not simply reach new scores on previously utilized assessment tools, an approach rejected as insufficient to warrant a full discharge hearing in ***Combs***, 295 Wis. 2d 457, ¶34. Rather, Gaetz asserts, Elwood's report was based on facts and analysis not available at the 2010 discharge hearing, which a fact finder may find more persuasive than the State's evidence. Gaetz points out that Elwood relied on Gaetz's changes in behavior and lower psychopathy score. Again, we disagree with Gaetz's argument.

¶12 At the 2010 discharge hearing, the experts agreed that Gaetz had participated in treatment and made progress, but still had issues to work on. Elwood provided a similar opinion in his report of February 23, 2011. Elwood stated in his report that he scored Gaetz lower on the psychopathy checklist based in part on changes in the previous five to six years. In taking that position, however, Elwood did not specify any changes since the 2010 discharge hearing. Additionally, as set forth above, Gaetz's psychopathy score was not a critical factor at the prior discharge hearing. In any event, to the extent that score was factored into the experts' analyses, nothing in Gaetz's current petition indicates Elwood's lower score is based on facts not available to the experts who testified at the 2010 discharge hearing. Accordingly, under ***Arends***, ***Kruse***, and ***Combs***, the circuit court properly denied Gaetz's petition without a discharge hearing. We affirm.

By the Court.—Order affirmed.

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