COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2013

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. 2012AP1468 **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 orders 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 the orders by which the circuit court denied his petition for discharge from a WIS. STAT. ch. 980 (2011-12)[1] commitment and his motion for reconsideration. Haen argues that he should have been granted a discharge hearing. We disagree and affirm.

¶2 Diagnosed with pedophilia, paraphilia not otherwise specified, and borderline personality disorder, Haen was committed under WIS. STAT. ch. 980 as a sexually violent person in 2006. He petitioned for discharge in 2009. The circuit court found sufficient facts to warrant a discharge hearing. Forensic psychologists Janet Page Hill and Diane Lytton testified at the April 2010 hearing. Hill concluded that a score of "6" made Haen more likely than not to reoffend sexually during his lifetime and opposed his discharge. Lytton could not conclude that he was more likely than not to reoffend. Noting that Haen had not participated in the recommended sex-offender treatment, the court concluded that nothing had changed since his commitment and denied the request for discharge.

¶3 Mandatory re-examinations, *see* WIS. STAT. § 980.07(1), were done in July 2010 and June 2011. Haen again petitioned for discharge and requested that Lytton be appointed to evaluate him. The circuit court held a hearing on the psychologists' reports to determine whether sufficient facts existed to support a finding that Haen no longer met the commitment criteria so as to warrant a discharge hearing. Lytton concluded that Haen should be considered for discharge because a risk assessment "based on new research does not support that Mr. Haen's risk is 'more likely than not'" to reoffend. The "new research" was an actuarial tool called the MATS-1, which used a larger data sample. Haen's

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

recidivism score on the MATS-1 was similar to those who reoffended at a rate of seventeen percent over an eight-year period, as compared to a rate of ten percent over five years, using another tool. The court determined that virtually nothing had changed and denied Haen's petitions. Haen moved for reconsideration. He argued that the court had overlooked the portion of Lytton's report referencing the MATS-1. The court denied his motion. Haen appeals.

¶4 WISCONSIN STAT. § 980.09 governs petitions for discharge from WIS. STAT. ch. 980 commitments. Whether to grant a discharge hearing under § 980.09(1) entails a two-step process. *See* ***State v. Arends***, 2010 WI 46, ¶¶3, 23 n.16, 325 Wis. 2d 1, 784 N.W.2d 513. First, there is a "paper review." ***Id.***, ¶4. A discharge hearing must be denied 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.***, in other words, that "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," § 980.09(1).

¶5 If such facts are alleged, the circuit court proceeds to WIS. STAT. § 980.09(2), which requires it to review the items listed in the subsection, including all current and past reports filed under WIS. STAT. § 980.07. ***Arends***, 325 Wis. 2d 1, ¶5. The court's task is to determine whether the petition and supporting materials contain 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.***, ¶53. We review a denial of a hearing de novo. *See* ***State v. Arends***, 2008 WI App 184, ¶7, 315 Wis. 2d 162, 762 N.W.2d 422.

¶6 Haen argues that his petition alleged sufficient facts to warrant a discharge hearing because Lytton's September 2011 report contained new professional research, the MATS-1, not considered at his initial commitment or 2010 discharge hearing. We disagree.

¶7 As the State points out, Lytton's 2011 and 2010 reports make the same arguments, based largely on the same research. In both reports, Lytton recognizes that Haen scored a "6" on the commonly used Static-99R and opines that his likelihood of reoffending is significantly less than the fifty-percent threshold necessary for commitment. Both reports criticize the Static-99R. Both cite and discuss the same studies by Abbott, Donaldson and Abbott, Waggoner, and Wollert and Waggoner. Both note that the 2009 Wollert and Waggoner study "found that those who scored in the medium-high category," as Haen did, "had an estimated reoffense rate of only about 10 percent at five years." Both note adjustments for age of the offender.

¶8 The only information in Lytton's 2011 report bearing on Haen's likelihood to reoffend sexually not presented at the prior discharge hearing is a brief discussion of the MATS-1 and Haen's score on it:

> Finally, Wollert et al. (2010) published a new actuarial tool, the MATS-1. It … comprise[s] … the large Static-99 data sample (Hanson, 2006) and an exhaustive New Zealand sample. On the MATS-1, Mr. Haen[] scores similar to offenders (in his risk category and age group) who reoffended over 8 years at a rate of about 17 percent.

¶9 The same researcher, Wollert, researched the 2009 actuarial study and the 2010 MATS-1 tool. Haen's recidivism-rate scores were similar on each: ten percent after five years on the 2009 tool versus seventeen percent after eight years using the MATS-1. Two studies a year apart by the same researcher

yielding similar results does not strike us as research reflecting a change in professional knowledge. *See* ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540. Also, Lytton acknowledges that the Static-99 is the most commonly used risk assessment tool. Neither her 2011 report nor Haen explain why a reasonable fact finder could rely on the MATS-1 over the Static-99 to conclude that Haen does not meet the commitment criteria.[2]

By the Court.—Orders affirmed.

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

[2] To show the lack of wide acceptance of the MATS-1, the State points out the dearth of references to it in the case law. One court observed that, while the MATS-1 may "end up becoming the gold standard for actuarial risk assessment instruments," it was "skeptical" that it currently could be relied on because it is the subject of ongoing research, is not commonly used and accepted, and was derived from the Static 99—"the most commonly used actuarial risk assessment instrument in use in the world today." ***State v. Suggs***, No. 30051-09, 2011 WL 2586413, at *22 (N.Y. Sup. Ct. June 30, 2011).