COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2689 **Cir. Ct. No. 2001CI1**

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

IN RE THE COMMITMENT OF ALFRED T. RILEY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALFRED T. RILEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Alfred Riley appeals an order that denied his petition for discharge from a Chapter 980 commitment. The sole issue on appeal

is whether Riley was entitled to a hearing on his discharge petition. For the reasons discussed below, we conclude that he was not. Accordingly, we affirm the circuit court's order.

¶2 A person committed under Chapter 980 is entitled to periodic reexamination under WIS. STAT. § 980.07 (2011-12),[1] and may petition the circuit court for discharge at any time. However, the court shall deny a discharge petition without a hearing unless the petition alleges facts from which the court or a jury could conclude that the petitioner's condition has changed since the initial commitment, such that he or she no longer meets the criteria for a sexually violent person—that is, that the subject: (1) committed a sexually violent offense; (2) currently has a mental disorder affecting emotional or volitional capacity and predisposing the subject to engage in acts of sexual violence; and (3) is dangerous because the mental disorder makes it more likely than not that the subject will engage in future acts of sexual violence. WIS. STAT. § 980.09(3); WIS JI—CRIMINAL 2506.

¶3 In making its determination as to whether an evidentiary hearing is warranted, the circuit court may consider the facts alleged in the petition and the State's response, any past or current evaluations in the record or other documents provided by the parties, and arguments by counsel. WIS. STAT. § 980.09(2). This limited paper review to test the sufficiency of the petition is aimed at weeding out meritless or unsupported claims. ***State v. Arends***, 2010 WI 46, ¶¶26-30, 325 Wis. 2d 1, 784 N.W.2d 513.

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

¶4 An expert opinion that the petitioner is no longer sexually violent may provide sufficient grounds to warrant a hearing if based 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," such as information about the committed person that did not exist until after the prior adjudication or new professional knowledge about how to predict dangerousness. ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. Put another way, a circuit court can deny a discharge petition that is based upon a new expert opinion without a hearing if the expert simply disagrees with the diagnoses or conclusions that led to the original commitment, but must grant a hearing if the petition alleges any change in either the person himself, or in the professional knowledge or research used to evaluate a person's mental disorder or dangerousness, from which a fact-finder could determine that the person does not meet the current criteria for commitment. ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540.

¶5 Here, Riley's discharge petition was based upon a report by Dr. Craig Rypma dated January 5, 2012. Rypma diagnosed Riley with Adult Antisocial Behavior, but not with Antisocial Personality Disorder or with Paraphilia, NOS, as other evaluators had done. Consequently, Rypma concluded that "Riley's mental disorder only predisposes him to violate rules generally and does not cause him to lack control of his sexual urges or behaviors" or to commit acts of sexual violence.

¶6 With regard to an actuarial evaluation of risk assessment, Rypma stated that the Static 99R statistical instrument would predict recidivism rates for someone with Riley's static and dynamic factors ranging from 11.4% to 35.5% in five to ten years, depending upon the comparison group used. However, Rypma

explained in detail why he questioned the statistical accuracy of the Static 99R instrument, including the methodology for choosing comparison groups. Rypma also opined that the risk levels identified under the Static 99R were not magnified because Riley did not meet the criteria for psychopathy. Rypma concluded that the available actuarial data was not a sufficient basis to conclude that Riley was more likely than not to commit further sexual offenses.

¶7 The circuit court compared Rypma's 2012 report with a 2009 report Rypma had prepared and testimony he had given on Riley's behalf at a 2010 discharge hearing in order to determine what new facts were being alleged. The court noted that the conclusions in Rypma's 2012 report regarding Riley's diagnosis were verbatim repetitions of conclusions he had drawn in his 2009 report, and that Rypma's discussion of the flaws in the actuarial instruments paralleled his testimony at the 2010 discharge petition. The court concluded that the 2012 petition did not allege any significant changes in either Riley's behavior or the status of professional knowledge since the issues of Riley's proper diagnosis and the accuracy of the actuarial instruments had been litigated at the 2010 discharge hearing.

¶8 Riley points out that Rypma did not explicitly address the makeup of the comparison groups used for the Static-99R in his prior report or testimony, or challenge the other experts' use of the high risk/high need comparison group. However, the four comparison groups were mentioned in the reports of other experts that were submitted at the 2010 hearing, and Riley does not allege that the flaws Rypma now identifies are primarily based on studies that were done after 2010.

¶9 In sum, we agree with the circuit court that the primary basis for Riley's 2012 discharge petition was disagreement with the expert opinions that had resulted in his original commitment. Since those disagreements were already litigated at the 2010 discharge hearing, the allegations in the petition were insufficient to warrant a new hearing.

By the Court.—Order affirmed.

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