COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2110 **Cir. Ct. No. 2003CI1**

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

IN RE THE COMMITMENT OF MICHAEL L. MCGEE:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL L. MCGEE,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael L. McGee appeals an order dismissing his petition for discharge from a WIS. STAT. ch. 980 (2011-12)[1] commitment and an

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

order denying his motion for postcommitment relief. He contends that the circuit court erred in dismissing his petition without a trial. He further contends that the court's decision deprived him of due process of law. We reject his claims and affirm the orders.

¶2 In May 2004, McGee was committed under WIS. STAT. ch. 980 as a sexually violent person. For purpose 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 April 2010, McGee filed a petition for discharge from his commitment. The circuit court subsequently determined that a discharge trial was necessary.

¶4 At the 2010 discharge trial, the State relied on the testimony of Dr. Cynthia Marsh, while McGee relied on the testimony of Dr. Carolyn Hensel Fixmer. Ultimately, the circuit court found Marsh's testimony more persuasive and agreed with her conclusion that McGee remained a sexually violent person. Accordingly, it denied the petition for discharge. McGee appealed.

¶5 Prior to McGee's appeal, the Department of Health Services (DHS) filed its 2010 annual reexamination report of him. While his appeal was pending, DHS filed its 2011 annual reexamination report as well. Fixmer was the psychologist charged with making both reports. In them, she reiterated her conclusion that McGee did not satisfy the standard for commitment as a sexually violent person and should be discharged.

¶6 In November 2011, McGee filed another petition for discharge. The circuit court held a hearing and determined that, based on Fixmer's reports, McGee was entitled to a new discharge trial. Meanwhile, this court affirmed the circuit court's previous decision denying McGee's 2010 petition for discharge. ***State v. McGee***, No. 2011AP789, unpublished slip op. (WI App July 25, 2012).

¶7 In November 2012, DHS filed yet another annual reexamination report of McGee. This time, Dr. Richard Elwood was the psychologist charged with making the report. Like Fixmer, Elwood concluded that McGee did not satisfy the standard for commitment as a sexually violent person and should be discharged.

¶8 The State subsequently moved the circuit court to reconsider its decision to hold a new discharge trial, citing this court's then-recent decision in ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311. The court granted the motion, finding that ***Schulpius*** required it to dismiss McGee's petition because he had failed to set forth new evidence since his 2010 discharge trial. Accordingly, it issued an order dismissing the petition for discharge. McGee moved to vacate that order via a motion for postcommitment relief. The court then issued another order denying that motion. This appeal follows.

¶9 To determine whether the circuit court properly dismissed McGee's petition for discharge without trial, 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.

¶10 Determining whether to hold a discharge trial 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]

¶11 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).

¶12 As we explained in ***Schulpius***, 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 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

[2] WISCONSIN STAT. § 980.09 was amended after the circuit court dismissed McGee'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.

> 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 trial, 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).

¶13 On appeal, McGee first contends that the circuit court erred in dismissing his petition for discharge without a trial. He submits that his petition was sufficient to warrant a discharge trial because (1) Elwood was a credible expert witness;[3] (2) he had more experience in the field than Fixmer; (3) the circuit court had not rejected the foundation for Fixmer's testimony; and (4) Elwood and Fixmer had relied on "new professional information that was seemingly not available at the time of McGee's 2010 discharge trial."

¶14 Of the reasons McGee cites, the first three (i.e., Elwood's credibility and experience as a witness and the circuit court's non-rejection of the foundation for Fixmer's testimony) can be quickly rejected, as they are not submissions of "new fact, new professional knowledge, or new research." ***Schulpius***, 345 Wis. 2d 351, ¶35. The only reason that arguably meets this standard is McGee's contention that Elwood and Fixmer had relied on "new professional information" in their reports. Accordingly, we examine that contention closer.

[3] In particular, McGee notes that Elwood is employed and trained by DHS and was "randomly appointed" to his case.

¶15 It is true that Fixmer cites a presentation in one of her reports that post-dates McGee's 2010 discharge trial. However, that does not mean that McGee has presented new evidence within the meaning of ***Schulpius***. As noted by the State, the presentation Fixmer cites actually undercuts McGee's argument that he is no longer a risk to reoffend. That is because it assigns offenders with a score of 5 on the Static-99R actuarial instrument, the score Fixmer attributed to McGee, with a Real Recidivism Rate[4] of 60%. Thus, even if it is new, the presentation is not evidence from which a reasonable trier of fact could conclude that McGee no longer meets the criteria for commitment as a sexually violent person.

¶16 The same can be said about the studies in Elwood's report. Elwood cites several studies that post-date McGee's 2010 discharge trial. One addresses McGee's risk of being charged with another sex offense within ten years of release from custody and places it at 36%. This is actually higher than the risk percentage Fixmer had given at the 2010 discharge trial for the same time period.[5] As such, it undermines McGee's argument that he is now at a lesser risk to reoffend. The other studies, meanwhile, support the commonsense proposition that alcohol abuse, cocaine abuse, social rejection, and loneliness (all of which remain areas of concern for McGee) increase the risk of sexual recidivism. McGee fails to show how this information could lead a reasonable trier of fact to conclude that he no longer meets the criteria for commitment as a sexually violent person.

[4] According to Fixmer's report, a Real Recidivism Rate is defined as including both detected and undetected recidivism rates.

[5] Fixmer had placed McGee at a 30% risk to be reconvicted for a sex offense at ten years.

¶17 McGee next contends that the court's decision to dismiss his petition without a trial deprived him of due process of law. Again, we disagree.

¶18 Here, McGee was afforded the due process protections of both re-examination and a probable cause hearing. *See* ***Combs***, 295 Wis. 2d 457, ¶28 (the periodic re-examination and probable cause hearing are among the protections that supreme court has considered significant in concluding that that WIS. STAT. ch. 980 proceedings do not violate the right to due process). Ultimately, he was denied a new discharge trial because he failed to present any new evidence within the meaning of ***Schulpius*** from which a reasonable trier of fact could conclude that he no longer met the criteria for commitment as a sexually violent person. We are not persuaded that requiring such evidence offends due process.

¶19 For these reasons, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).