COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1871 **Cir. Ct. No. 2004CV654**

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

IN RE THE COMMITMENT OF MICHAEL ALGER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL ALGER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Michael Alger appeals an order denying his 2014 petition for discharge from his WIS. STAT. ch. 980 commitment.[1] The circuit court concluded Alger's petition was insufficient to set the matter for trial because Alger had refused to participate in treatment following his previous discharge trial in 2012, wherein a jury found Alger remained dangerous within the meaning of WIS. STAT. § 980.01(7).

¶2 However, the basis for Alger's petition was not that his condition had improved as a result of treatment. Rather, Alger's petition was supported with an expert report applying new research regarding the proper use of one of the actuarial instruments utilized by the experts at Alger's prior discharge trial. Applying this new research, the report concluded Alger no longer met the criteria for commitment under WIS. STAT. ch. 980. This expert's report was not prepared at Alger's behest, but rather was submitted pursuant to WIS. STAT. § 980.07(2), as a component of the Department of Health Service's (DHS) statutorily mandated, annual reexamination of Alger.

¶3 Based upon this shift in the relevant professional understanding regarding the evaluation of a person's dangerousness, a fact finder "would likely conclude [Alger's] condition has changed since the most recent order denying a petition for discharge" such that Alger "no longer meets the criteria for commitment as a sexually violent person." *See* WIS. STAT. § 980.09(1). Accordingly, we reverse and remand with directions for the circuit court to conduct a discharge trial.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

BACKGROUND

¶4 Alger was committed under WIS. STAT. ch. 980 as a sexually violent person in May 2005, when he was forty-five years old.[2] Alger filed two discharge petitions in 2011. These petitions were denied following an August 20, 2012 trial, at the conclusion of which the jury found Alger remained a sexually violent person.

¶5 Alger filed another discharge petition in 2014. His 2014 petition relied on reports by two doctors who were not involved in his 2011 petitions: (1) a November 8, 2013 report authored by Dr. Lakshmi Subramanian, an examiner appointed by the DHS; and (2) a September 6, 2013 evaluation report authored by Dr. Craig Rypma, a clinical psychologist appointed at Alger's request. Both examiners reported that Alger does not meet the definition of a "sexually violent person" because he does not have a mental disorder predisposing him to commit acts of sexual violence.[3] Both examiners also opined that, even *if* Alger did have a qualifying mental disorder, the condition would not cause him to be more likely than not to commit acts of sexual violence.

¶6 The circuit court conducted a hearing under WIS. STAT. § 980.09(2) to evaluate the sufficiency of Alger's 2014 discharge petition. The court began the

[2] A "sexually violent person" is someone who has been convicted or adjudicated delinquent for a sexually violent offense, or has been found not guilty of, or not responsible for, a sexually violent offense by reason of insanity or mental disease, defect, or illness, 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] *See* WIS. STAT. § 980.01(2) ("Mental disorder" means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.").

hearing by indicating it believed Alger had previously refused treatment, and asked Alger's counsel whether that made it "difficult for you to show that he's likely to improve and the condition has changed" since the previous discharge trial.[4] Alger's counsel conceded Alger was not in treatment. However, counsel asserted the petition was nonetheless sufficient because it showed that new professional knowledge and research developed since the August 20, 2012 discharge trial, as applied to Alger, established that his risk to reoffend fell below the legal threshold for commitment.

¶7 The circuit court orally denied Alger's discharge petition. It concluded "the best way to determine whether a condition is changed is by participating in the treatment and then having new tests taken based upon the treatment options that are available at Sand Ridge [Secure Treatment Center]." The court further stated that if a person is "not participating in the treatment, they're not going to get better because they're not being cooperative." It determined that any change in Alger's condition based on his advancing age was "total speculation[,] … especially since he's not participating in treatment." A written order was later entered adopting these conclusions. Alger now appeals the denial of his 2014 discharge petition without a trial.

[4] Both the August 20, 2012 discharge hearing transcript and a treatment progress report dated October 10, 2013 indicate Alger has thus far declined to participate in the sexually violent person treatment program.

DISCUSSION

¶8 A person committed under WIS. STAT. ch. 980 may petition for discharge at any time. WIS. STAT. § 980.09(1). The circuit court must deny the petition without a hearing

> unless the petition alleges facts from which the court or jury would likely conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of the discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

Id.

¶9 WISCONSIN STAT. § 980.09 creates a two-step procedure for review of discharge petitions. Under WIS. STAT. § 980.09(1), the circuit court first "engages in a paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact [would likely] conclude that the petitioner does not meet the criteria for commitment as a sexually violent person."[5] ***State v. Arends***, 2010 WI 46, ¶4, 325 Wis. 2d 1, 784 N.W.2d 513. In reviewing the petition, the court may proceed to a second-level review and hold a hearing to determine if the petitioner's "condition has sufficiently changed such that a court or jury would likely conclude the person no

[5] A previous version of WIS. STAT. § 980.09(1) required a discharge trial if the petition presented sufficient evidence from which the fact finder "may conclude" the petitioner does not meet the criteria for commitment as a sexually violent person. The legislature has since increased the petitioner's burden, requiring the petitioner to show that his or her condition has sufficiently changed "such that a court or jury *would likely* conclude the person no longer meets the criteria for commitment as a sexually violent person." *See* 2013 Wis. Act 84, § 23 (emphasis added). In both instances, the determination regarding whether the burden has been met is made before consideration of any additional evidence that the State may submit at a discharge trial.

longer meets the criteria for commitment as a sexually violent person." WIS. STAT. § 980.09(2); *see also* ***Arends***, 325 Wis. 2d 1, ¶32. Whether the petition is sufficient to entitle the petitioner to a discharge trial is a question of law that we review de novo. *See* ***State v. Fowler***, 2005 WI App 41, ¶8, 279 Wis. 2d 459, 694 N.W.2d 446.

¶10 Alger's 2014 discharge petition emphasized the methodology and conclusions contained in Dr. Subramanian's November 8, 2013 report. Subramanian, who was acting on behalf of the DHS, diagnosed Alger with alcohol use disorder and opined that this diagnosis did not meet the WIS. STAT. § 980.01(2) definition of a "mental disorder." While the absence of a qualifying mental disorder would itself require Alger to be discharged, Dr. Subramanian nonetheless conducted a comprehensive risk assessment that included consideration of static and dynamic factors pertinent to sexual recidivism.[6]

¶11 Dr. Subramanian primarily relied on the Static-99R, an actuarial instrument used to assess the likelihood of recidivism over a specified period.[7] An individual is evaluated and assigned a score; "[t]he recidivism associated with a particular score depends on the Static-99R subsample that the individual best resembles." Static-99R samples are broadly classified as "Routine" or

[6] According to Subramanian, static factors are "frequently historical factors that remain unchanged." Dynamic factors "may change or moderate as a result of certain variables such as treatment and age."

[7] Actuarial instruments are "statistical research-based instruments that are created using data obtained by studying various factors associated with recidivism in groups of people who were convicted for sexual offenses, released, and followed over time." ***State v. Combs***, 2006 WI App 137, ¶4, 295 Wis. 2d 457, 720 N.W.2d 684.

"Nonroutine." The "Routine" sample consists of an undifferentiated sample of all sex offenders. The "Nonroutine" sample is composed of various subsamples of offenders, including those identified as having a "Treatment Need" and those in a "High Risk/High Need" grouping.

¶12 Dr. Subramanian opined that recent research indicated that static and dynamic factors, considered in combination, "offer unique variance in assessing sexual recidivism risk." Specifically, Subramanian cited a 2011 research presentation that "assessed sexual recidivism using the Static-99R as a static instrument and Violence Risk Scale – Sex Offender Version (VRS-SO), Structured Risk Assessment – Forensic Version (SRA-FV), and Stable – 2007 as instruments to assess dynamic risk factors and presented results graphically." Subramanian also cited 2012 research presented at the Association of Treatment of Sexual Abusers that showed "[s]exual recidivism probabilities differed for nineteen samples based on dynamic factors external to Static-99R assessed by any one of the three instruments described above. Like the study in 2011, this research also concluded that dynamic factors accounted for the sample base rates."

¶13 Based on Alger's dynamic risk factors, which included substance abuse and intimacy deficits as the two main relevant factors, Dr. Subramanian concluded the recidivism probability estimates of the "Nonroutine" group best applied to Alger.[8] Subramanian scored Alger a "5" on the Static-99R. Individuals in the "Nonroutine" sample with a score of "5" had sexual recidivism rates of 20%

[8] Other dynamic factors Subramanian considered included the absence of a "persistent history of significant nonsexual violence"; Alger's score in the moderate range on the PCL-R, a measure of a person's psychopathy; the absence of a history of antisocial behavior; and the absence of a diagnosis of paraphilia.

in five years and 28% in ten years. Subramanian therefore concluded Alger's "lifetime probability [of] sexual offending does not exceed the legal threshold of fifty-one percent."

¶14 To a lesser extent, Alger's 2014 discharge petition also relied on Dr. Rypma's September 6, 2013 report. Rypma diagnosed Alger with antisocial personality disorder, alcohol dependence, and polysubstance abuse, but Rypma found that none of these diagnoses predisposed Alger to commit acts of sexual violence. Nonetheless, Rypma also completed a risk assessment. He, like Dr. Subramanian, scored Alger a "5" on the Static-99R. Rypma, citing 2010 research indicating there was substantial overlap among the reference groups due to the "arbitrary and speculative nature with which each of the comparison groups were derived," endorsed the use of an "Aggregate" sample consisting of both the "Routine" and "Nonroutine" groups. Rypma criticized the procedures testified to by the State's expert, Dr. James Harasymiw, at Alger's previous discharge trial. In particular, Rypma questioned the use of the "High Risk/High Needs" subsample, the use of "dynamic variables to adjust actuarial estimates of risk derived from instruments such as the Static[-]99R,"[9] and the use of a process known as "extrapolation" to "predict recidivism beyond what is demonstrated by the actuarial schemes." Rypma, applying a modified version of Alger's Static-99R score to the Multi-Sample Age-Stratified Table of Sexual Recidivism Rates

[9] Doctor Rypma does not appear to have been criticizing Dr. Subramanian's use of dynamic risk factors to select the appropriate Static-99R subgroup for comparison. Rather, at Alger's 2012 discharge trial, Dr. Harasymiw testified that Alger's score of "5" on the Static-99R was associated with recidivism rate of 36% among individuals with a similar score within the instrument's "High Risk/High Needs" subsample. However, Dr. Harasymiw concluded the Static-99R significantly understated the risk based on several dynamic factors, including Alger's deviant sexual interests, distorted attitudes that justified reoffending, impaired relationship functioning, impaired self-management, and previous failure on supervision.

(MATS-1), determined Alger's estimated risk of reoffending to be at 21.2% over the next eight years. Rypma therefore concluded Alger was not more likely than not to commit acts of sexual violence in the future and recommended that he be discharged.

¶15 The circuit court concluded Alger's petition was insufficient because Alger had refused to participate in treatment and therefore could not demonstrate that his condition had changed since the 2012 discharge hearing. The State, on appeal, does not defend this rationale. Instead, the State argues that the circuit court correctly denied Alger's petition without further proceedings because Alger failed to present new evidence not considered at the 2012 discharge trial. The State also argues that, even if there was new evidence, a discharge trial was not required because Alger failed to establish that a jury "would likely" conclude he is no longer dangerous. We reject each of these arguments.

I. Failure to participate in treatment

¶16 A petitioner must show that his or her condition has, in some way, changed since the original commitment order or, as in this case, since the most recent order denying a petition for discharge on the merits. *See* WIS. STAT. § 980.09(1). However, the circuit court's conclusion that Alger's petition was insufficient solely because he declined to participate in treatment is clear error. In ***State v. Pocan***, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860, we held that treatment progress "is not the only way" of showing that a person is not still a sexually violent person. ***Id.***, ¶12.

¶17 Rather, the required change in the petitioner's condition encompasses not just "a change in the person himself or herself, but also a change in the professional knowledge or research used to evaluate a person's mental

disorder or dangerousness, if the change is such that a fact finder [would likely] conclude the person does not meet the criteria for commitment." ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540; *accord* ***State v. Richard***, 2014 WI App 28, ¶20, 353 Wis. 2d 219, 844 N.W.2d 370; ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. Thus, for Alger to obtain a discharge trial, he must produce some new evidence—here, an expert opinion based on new professional knowledge or research—that demonstrates he does not meet the criteria for commitment under WIS. STAT. ch. 980. *See* ***State v. Schulpius***, 2012 WI App 134, ¶¶4, 35, 345 Wis. 2d 351, 825 N.W.2d 311.

II. New evidence

¶18 The State contends that much of the evidence Alger presented in support of his 2014 discharge petition was also considered by the jury during the August 2012 proceedings on Alger's prior petitions. The State notes that at the prior discharge trial, the jury heard: (1) expert testimony from Drs. Diane Lytton and Hollida Wakefield that Alger did not have a qualifying mental disorder; (2) that Drs. Harasymiw, Lytton and Wakefield scored Alger a "5" on the Static-99R; (3) expert testimony about the MATS-1 from Dr. Lytton, who opined that Alger's risk to reoffend was 6% over the next eight years using that instrument; and (4) expert testimony from Drs. Lytton and Wakefield criticizing the way Dr. Harasymiw determined Alger's reoffense risk.

¶19 The State concedes, however, that Dr. Subramanian's report does rely on new research endorsing the use of the VRS-SO, SRA-FV, and Stable – 2007 instruments to determine Alger's reoffense risk under the Static-99R. The State agrees "no expert discussed these research tools at Alger's 2012 discharge

trial" and that they represent "new" research. Applying these tools—as informed by the new professional research—permitted Subramanian to use dynamic risk factors to objectively determine which Static-99R subsample Alger was most comparable to, and ultimately to determine Alger's risk of reoffense. In the end, Subramanian concluded that Alger should be compared to the "Nonroutine" sample, a group which does not appear to have been used by any other expert at Alger's 2012 discharge trial.

¶20 We established in ***Combs*** that an expert's use of an actuarial instrument considered during a previous discharge trial can be considered "new" evidence *if* the expert's interpretation is based on "research or professional writings on how to interpret or score" the instrument that were not available at the time of the previous hearing. ***Combs***, 295 Wis. 2d 457, ¶27; *accord* ***Richard***, 353 Wis. 2d 219, ¶16 ("[T]he rule is that an expert opinion based solely on facts or professional knowledge or research considered by experts who testified at the commitment trial is insufficient to warrant a discharge hearing."). Doctor Subramanian's report, applying recent research not considered by testifying experts at the 2012 discharge hearing, undoubtedly qualifies as "new" evidence under this standard.

III. Likelihood of success

¶21 The State's principal argument appears to be that Alger has not established that a fact finder would likely conclude he is no longer dangerous. As noted previously, the legislature changed the requirements of WIS. STAT. § 980.09(1) such that a petition for discharge is no longer sufficient if a jury "may conclude" the petitioner is no longer dangerous; the petition must establish that a jury "would likely" reach such a conclusion. *See supra*, ¶7 n.5; *see also* 2013

Wis. Act 84, § 23. The State contends that while a "new actuarial scale" could be enough to satisfy the "may conclude" standard, it does not supply the basis for a new discharge trial under the "would likely conclude" standard.

¶22 We disagree, at least under the facts of this case. The applicable standard for commitment requires that a person be more likely than not to commit future acts of sexual violence. *See* WIS. STAT. § 980.01(1m), (7). Alger's 2014 petition presents an expert opinion from an independent, DHS-appointed doctor that Alger is a suitable candidate for discharge. That opinion was formed by applying new research to determine Alger's Static-99R reoffense risk in a manner different than that performed by any doctor who testified at Alger's previous discharge trial. According to Dr. Subramanian, individuals representing the same degree of risk as Alger reoffended at a rate of 20% after five years and 28% after ten years, well below the legal threshold for commitment (i.e., greater than 50%). Assuming Subramanian's testimony at a discharge trial is consistent with her report, and without considering at this time any rebuttal evidence introduced by the State, a jury would likely conclude Alger's condition has changed since the 2012 discharge hearing.

¶23 The State contends the VRS-SO, SRA-FV, and Stable – 2007 "attempt to quantify the same underlying information considered in 2012. It is a repackaging of old facts in a slightly new way." This is an insufficient reason to deny Alger a discharge hearing. Even when the underlying, or historical, facts of a case have not changed, a hearing is required when "a psychologist reports that significant amendments to one of the actuarial instruments used at [the previous] trial reduce the petitioner's risk to reoffend below the legal threshold." ***Richard***, 353 Wis. 2d 219, ¶25.

¶24 In emphasizing the difference between the "may conclude" and the "would likely conclude" standard, the State appears subtly to suggest that only in rare instances would new research justify a discharge hearing, as opposed to a change in the facts—e.g., treatment. For example, the State argues the "new standard allows for some weighing of evidence and consideration of the scientific value of the research relied upon." Citing a 2009 article from a psychology journal, the State argues that "[f]urther research is required to establish the reliability of the VRS-SO results and understand what changes during treatment." However, the weight to give the evidence is best left for the trier of fact. *See* ***State v. Curiel***, 227 Wis. 2d 389, 421, 597 N.W.2d 697 (1999) ("The credibility of an expert witness and the weight the trier of fact is going to give to his testimony, as contrasted to other witnesses, is always an issue that is properly before the trier of fact."). Further, we disagree with the State that the change in the applicable standard in WIS. STAT. § 980.09 effectively overturned the prior case law interpreting the *nature* of the evidence required to meet that standard.

¶25 Finally, the State argues there was nothing "new" because "the prior evaluators considered both static risk factors and dynamic risk factors in drawing their conclusions." However, Dr. Subramanian, when applying dynamic risk factors by using actuarial instruments to determine the proper Static-99R subsample for comparison, appears to have selected factors other than those considered by Dr. Harasymiw, who applied dynamic risk factors *after* determining Alger's Static-99R reoffense risk to conclude that Alger posed a risk much greater than the Static-99R indicated.

¶26 Under the circumstances, we conclude Alger's petition is sufficient under WIS. STAT. § 980.09(1) and (2). Based on Dr. Subramanian's report, which reflects the opinions of an independent, agency-appointed expert, as well as the

similar opinions of Dr. Rypma, a jury would likely conclude Alger no longer meets the criteria for commitment as a sexually violent person. Accordingly, we reverse and remand with directions for the circuit court to hold a discharge trial pursuant to WIS. STAT. § 980.09(3).

By the Court.—Order reversed and cause remanded with directions.

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