COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2857 **Cir. Ct. No. 2005CI1**

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

IN RE THE COMMITMENT OF ROBERT THUNDER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT THUNDER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Robert Thunder appeals an order denying his petition for discharge from a WIS. STAT. ch. 980 (2009-10)[1] commitment. After conducting a paper review of the petition required by WIS. STAT. § 980.09(1) and a review of the entire record as required by § 980.09(2), the court found there was not a sufficient basis for a finder of fact to reasonably determine that Thunder was no longer a sexually violent person. We affirm the order on alternative grounds.[2]

BACKGROUND

¶2 Thunder was committed as a sexually violent person in 2006. In 2009, he filed a petition for discharge that was supported by a report and addendum prepared by psychologist Hollida Wakefield. The report diagnosed Thunder with pedophilia, polysubstance abuse and anti-social personality disorder. These conditions predispose him to commit sexually violent acts. The report noted that Thunder was in treatment for only a few months before he dropped out and had not made significant progress in treatment. The report also detailed Thunder's criminal record including a sexual assault while he was in prison. The report noted that the recidivism rate for high-risk individuals after ten years was thirty-two percent. Despite his lack of progress in therapy, Wakefield opined that it was not substantially probable that Thunder would engage in acts of sexual violence on supervised release, although she did not believe Thunder should be considered for supervised release because the only change since his original commitment was new recidivism norms for the Static-99. The court denied the

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

[2] This court may affirm on grounds different from those relied upon by the circuit court. ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

petition for discharge and denied supervised release, finding that Thunder had not made significant progress in treatment and was still a sexually violent person.

¶3 In 2010, Thunder filed another petition for discharge that gives rise to this appeal. Wakefield was again appointed to submit an evaluation. The report substantially mirrors the 2009 report except that it notes a change in the scoring system for the Static-99R test, taking account of the committed person's age. Although she disagreed with placing offenders in subgroups like the high-risk group, she stated that the high-risk group rate of recidivism for individuals with Thunder's score was thirty percent after ten years. Wakefield concluded that Thunder was an appropriate candidate for discharge because reoffending was not more probable than not. The court denied the petition, noting that Wakefield did not strictly apply the Static-99R factors and ignored the psychopathy checklist.

DISCUSSION

¶4 Under WIS. STAT. § 980.09, the court conducts an initial paper review of the petition and its attachments to determine whether the petition alleges sufficient facts to show that the petitioner no longer meets one or more of the statutory requirements for being a sexually violent person. ***State v. Arends***, 2010 WI 46, ¶¶25-27, 325 Wis. 2d 1, 784 N.W.2d 513. If the petition is sufficient, the court then reviews current and past re-examination reports or treatment progress reports, the petition and the State's response, the arguments of counsel and any supporting documentation to determine whether there are facts from which the court or jury may conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. ***Id.***, ¶¶32, 37. However, the court need not take every document submitted by a party at face value. ***Id.***, ¶39. For example, a report favorable to the petitioner is not sufficient if it is based solely on

evidence that had already formed the basis for the denial of a previous discharge petition. ***Id.***, ¶39 n.21; ***State v. Kruse***, 2006 WI App 179, ¶35, 296 Wis. 2d 130, 722 N.W.2d 742.

¶5 Thunder contends the court implicitly and inappropriately weighed Wakefield's opinions against other facts when it denied the petition. We need not review that issue because we conclude that Wakefield's 2011 report is substantially the same as her 2009 report. Because an expert's opinion supporting discharge must depend on something more than facts, professional knowledge, or research that was considered in a prior proceeding, ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684, merely repeating the same facts and conclusions that were previously adjudicated does not constitute grounds for re-litigating the issue. The only substantive difference between the 2009 and the 2011 reports is the scoring adjustment in the Static-99R that takes account of Thunder's age. That adjustment reduces the likelihood of re-offense after ten years by only two percent for the high-risk group. Because the court in 2009 found that Thunder was more likely than not to re-offend despite the actuarial score showing a thirty-two percent likelihood of re-offense, reducing the likelihood to thirty percent is *de minimis*.

By the Court.—Order affirmed.

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