COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP266 **Cir. Ct. No. 2004CI2**

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

IN RE THE COMMITMENT OF KENNETH ROBERTS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KENNETH ROBERTS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ

¶1 BLANCHARD, J. Kenneth Roberts appeals an order denying his petition for discharge from commitment under WIS. STAT. ch. 980 (2009-10).[1] Roberts contends that the circuit court erred in denying his petition without holding a full discharge hearing under WIS. STAT. § 980.09(2) and (3). We conclude that the court did not err in denying the petition without holding the full hearing. Accordingly we affirm.

BACKGROUND

¶2 In June 2005, Roberts was committed as a sexually violent person under WIS. STAT. ch. 980.[2] In January 2010, Roberts filed a petition for discharge. *See* WIS. STAT. § 980.09. The petition contained two substantive paragraphs and had no attachments.

¶3 Roberts alleged in his petition that new research indicates that levels of recidivism, at least as measured by diagnostic instruments, are much lower than previously thought, including in particular new scoring methods for the "Static-99" diagnostic instrument. He further alleged that, if he were evaluated under new scoring methods for diagnostic instruments, he would no longer be eligible for commitment. More specifically, Roberts alleged that, "Based on the new scoring[,] … Mr. Roberts would[] statistically speaking have a less than [] 22%

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

[2] "'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). "'Likely'" means "'more likely than not,'" which means that the offender is more than fifty percent likely to commit another sexually violent offense. ***State v. Smalley***, 2007 WI App 219, ¶¶3, 10, 305 Wis. 2d 709, 741 N.W.2d 286 (citation omitted).

chance of recidivism." Roberts also alleged that a "new actuarial [instrument] has started to be implemented … which takes into account the age of the offender," and that his age of fifty-three "puts him into the category where his likelihood to re-offend drops. Using this method, Mr. Roberts would likely be placed in the low to moderate reoffend category."

¶4 Also in the record at the time of Roberts' petition was an annual evaluation report regarding Roberts prepared by Dr. William Merrick. Dr. Merrick's report had been transmitted to the court in December 2009 pursuant to WIS. STAT. § 980.07(6). The allegations in Roberts' petition appeared to be drawn, at least in part if not entirely, from Dr. Merrick's report.

¶5 Dr. Merrick's report showed that Dr. Merrick had re-scored Roberts using updated statistical tables for the Static-99 to yield a predicted rate of future recidivism of twenty-two percent within five years and thirty-two percent within ten years. However, based on Roberts' combined scores on the Static-99 and another instrument, Dr. Merrick concluded in the report that Roberts' risk of sexual recidivism was in the "[h]igh [r]isk" range.

¶6 In addition, Dr. Merrick determined in his report that Roberts had failed to show improvement in several "dynamic" risk factors, including but not limited to a failure to submit to therapy that might be used to determine whether Roberts' clinical diagnoses had changed, a failure to make progress in correcting distorted attitudes, and a failure to complete treatment. Dr. Merrick concluded that "Mr. Roberts has not made significant changes in any of th[e]se dynamic risk factors that could potentially lower his risk …." Dr. Merrick acknowledged that relatively "advanced age" can be a dynamic risk factor associated with reduced risk but specifically noted that, because Roberts' sexually violent offense occurred

when he was already forty-seven years old and incarcerated, "in [Roberts'] case, his risk of future violent sexual offending is not lowered to any substantive degree by this factor."

¶7 Based on all of his findings, Dr. Merrick's ultimate conclusion in his report was that Roberts remained more likely than not to commit another sexually violent offense if discharged and, therefore, was not a proper subject for discharge.

¶8 In August 2010, the circuit court conducted a hearing as part of its review to determine whether Roberts was entitled to the full discharge hearing he sought. The State opposed holding a full discharge hearing. Counsel for Roberts acknowledged at the hearing that she did not have an independent examiner's report or any other evidence to offer in support of the petition, apart from Dr. Merrick's report.

¶9 The circuit court addressed Roberts' petition for discharge under ***State v. Arends***, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513, which describes the two-step process for obtaining a full discharge hearing under WIS. STAT. § 980.09.[3] The court concluded that the allegations in Roberts' petition were insufficient to meet the threshold first step of the ***Arends*** two-step process, because those allegations showed only that the assessment methodology had changed, not that Roberts' condition or particular risk to reoffend had changed. In addition, the court concluded that, even if the petition allegations had been sufficient, Roberts' failure to offer any expert opinion in his favor meant that

[3] Likely through scrivener's error, the first subsection of WIS. STAT. § 980.09 is not numbered. Therefore, we follow the logical convention used in ***State v. Arends***, 2010 WI 46, ¶23, 325 Wis. 2d 1, 784 N.W.2d 513, and elsewhere, to assume that there is a missing "(1)," and we refer to the first subsection of the statute as "§ 980.09(1)."

Roberts could not satisfy the second step of the two-step process required for a full discharge hearing. Roberts now appeals the resulting order.[4]

DISCUSSION

¶10 The parties agree that this appeal turns on whether the facts of this case satisfy the legal standards under WIS. STAT. § 980.09 and ***Arends***. Interpreting and applying statutes or other legal standards to facts presents a question of law, which we review de novo. *See* ***Arends***, 325 Wis. 2d 1, ¶13.

¶11 We first summarize the process that courts undertake to determine whether a petitioner is entitled to a full discharge hearing under WIS. STAT. § 980.09, as explained in ***Arends***. As indicated above, the process involves two potential steps.

¶12 First, the court conducts an initial paper review of the petition and supporting documents to determine if, assuming all alleged facts to be true, the court or a jury "may conclude" that the petitioner does not meet the criteria for commitment as a sexually violent person. ***Id.***, ¶¶23-30. If the petition does not allege sufficient facts to support that determination, the court must deny the petition. ***Id.***, ¶30. The court in ***Arends*** analogizes this step of the process to court review of a motion to dismiss for failure to state a claim upon which relief can be granted under WIS. STAT. § 802.06(2)(a). ***Id.***, ¶29.

[4] For reasons not relevant to this appeal, the written order that Roberts now appeals was not entered until approximately one year after the hearing at which the circuit court denied Roberts' petition.

¶13 If the petition alleges sufficient facts, the court conducts the second step of the process to determine whether the petitioner is entitled to a full discharge hearing. ***Id.*** This requires the court to examine current and past re-examination reports and treatment progress reports, relevant facts in the petition and the State's response, counsel's arguments, and any supporting documentation provided by the parties. ***Id.***, ¶¶31-32. The court may hold a separate hearing, as occurred in this case, as part of its review to determine whether the petitioner is entitled to a full discharge hearing. *See* ***id.*** If a review of the entire record reveals "any facts" that would allow a reasonable fact finder to determine that the petitioner is not a sexually violent person, the court must hold a full discharge hearing; otherwise, the court must deny the petition. ***Id.***, ¶43.

¶14 Having summarized the two-step process under WIS. STAT. § 980.09, we now explain why we conclude that Roberts has failed to demonstrate on appeal that the circuit court erred in denying him a full discharge hearing.

¶15 Initially, we note some confusion as to whether Dr. Merrick's report should be considered part of Roberts' petition for purposes of the first step of the process. As suggested above, Roberts' petition appeared to draw directly from, but did not expressly reference or attach, Dr. Merrick's report. The apparent direct borrowings from this report created potential ambiguity from the start as to whether Roberts meant to incorporate by reference at least portions of the report into the petition. Now on appeal, Roberts' arguments seem to assume that we should consider the substance of at least portions of the report for purposes of step one. However, the State's arguments seem to assume, without explaining why, that we should not. We need not resolve which party is correct on this point, because we will assume, without deciding, that Roberts' petition was sufficient to survive step one of the two-step process. This obviates the need to address

whether portions of Dr. Merrick's report should be considered in the first step of the process and the need to address other arguments of the parties that involve only the first step of the process. Operating from our assumption, we agree with the circuit court that Roberts' petition fails under step two for the reasons explained below.[5]

¶16 The only material that Roberts relies on in arguing that he met step two of the two-step process consists of the two substantive paragraphs in his petition and Dr. Merrick's report, as already described above. Roberts' argument is, in essence, this: Roberts' updated Static-99 score, showing a predicted rate of

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[5] When Roberts' trial counsel acknowledged in the circuit court that she did not have the report of any expert other than Dr. Merrick to offer in support of Roberts' petition, she seemed to concede, in the following exchange with the circuit court, that Roberts could not meet step two of the two-step process without such an additional report:

> [COUNSEL]: … I don't have an expert to back [the petition] up at this point.
>
> THE COURT: I did authorize a hearing of an expert.
>
> [COUNSEL]: [That expert] didn't do a report. I discussed it orally and I basically called and your judicial assistant said [the expert] can do a report but the county is going to get the bill. [The expert]'s willing to write up a report if the Court wants to do that but I know how these funding issues go.
>
> I was trying to minimize that since I wouldn't present it[.] Then [the State's attorney] would have the opportunity to use it and then—I can have [the expert] do that, I just didn't want it so—
>
> THE COURT: Well so if we did go forward to a probable cause hearing today you couldn't reach that burden?
>
> [COUNSEL]: No, I could not your Honor.

However, the State does not argue that this exchange constituted a concession on step two, and rather than determine whether Roberts forfeited his argument regarding step two, we simply address that argument on its merits.

future recidivism of only twenty-two percent within five years and thirty-two percent within ten years, constitutes the "any facts" from which a fact finder could reasonably conclude that he is no longer a sexually violent person, despite all of Dr. Merrick's other findings and Dr. Merrick's ultimate opinions that Roberts was more likely than not to re-offend and therefore remained a sexually violent person. We are not persuaded.

¶17 Dr. Merrick's report expresses the view, at least implicitly, that Roberts' Static-99 scores standing alone are not reliable predictors of Roberts' likelihood to reoffend over his lifetime. Rather, it is clear from Dr. Merrick's report that he concluded that, in order to opine reliably regarding Roberts' risk to reoffend over Roberts' lifetime, one needed to consider not only the Static-99 but the other diagnostic instrument as well as "dynamic" factors, none of which favored Roberts.

¶18 Thus, given Dr. Merrick's report, Roberts would have needed, at a minimum, to point to some other expert evidence or legal authority suggesting that his Static-99 scores, limited as they were to five-year and ten-year projections, could, by themselves, be credible evidence of his risk to reoffend over his lifetime. Roberts did not direct the circuit court to any such evidence or authority, and does not direct this court to any such evidence or authority now.

¶19 Although the allegations in Roberts' petition might be read, when viewed in isolation and without reference to Dr. Merrick's report, to suggest that Roberts has only a twenty-two percent risk to reoffend over his lifetime, it is clear, when the petition is considered with Dr. Merrick's report, as is appropriate under step two, that a reasonable fact finder could not reach such a conclusion on this record. More specifically, it is clear that Roberts' petition cites the twenty-two

percent figure from the report selectively and imprecisely. As indicated above, the report shows that the twenty-two percent figure in the petition is only in reference to Roberts' risk to reoffend within five years as measured only by the Static-99, isolated from other factors. Similarly, the report makes clear that the thirty-two percent figure is only in reference to Roberts' risk to reoffend within ten years as measured only by the Static-99, isolated from other factors. We recognize that Roberts had reached the relatively advanced age (for purposes here) of fifty-three at the time of the petition. However, this does not change our view of what a fact finder could or could not reasonably conclude from all available information under the step-two analysis, particularly given Dr. Merrick's finding that Roberts' age was not a factor that might lead to reduced risk in Roberts' particular case.

¶20 Stated another way, the only reasonable reading of Dr. Merrick's report is that he concluded that Roberts' lifetime recidivism risk exceeds fifty percent, and that the re-scored Static-99 is not, by itself, reliable evidence to the contrary. There is simply no basis on this record, as Roberts now argues, to conclude that Dr. Merrick's report "contains facts from which a reasonable trier of fact could conclude [that] Roberts does not pose the requisite risk to reoffend."

¶21 It is true, as Roberts argues, that a fact finder is not necessarily bound by the opinion of any expert. *See* ***State v. Wenk***, 2001 WI App 268, ¶9, 248 Wis. 2d 714, 637 N.W.2d 417. However, this general rule does not assist Roberts, because he presents no alternative opinion that a fact finder could reasonably rely on. And, for reasons we have already explained, Roberts provides no support for the proposition that a fact finder could reasonably choose to rely solely on his re-scored Static-99, to the exclusion of the rest of Dr. Merrick's report, to conclude that his risk to reoffend over his lifetime is less than fifty

percent. Such a proposition, if theoretically supportable, is not one that could be considered to be within the common knowledge of the fact finder.

¶22 It is also true, as Roberts stresses on appeal, that a petition may be based on a change in the understandings of professionals and the research results used to evaluate the person's mental disorder or dangerousness, "not only [on] a change in the person himself or herself." *See* ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540. Yet, this general proposition does not undercut Dr. Merrick's more specific conclusions as to Roberts' particular situation, especially given that Roberts acknowledges that Dr. Merrick took into account changes in research results and evaluation tools.

¶23 Thus, we conclude on this record that the circuit court was presented with no facts from which a court or jury could conclude that Roberts no longer meets the criteria for commitment as a sexually violent person.

CONCLUSION

¶24 For these reasons, we conclude that the circuit court did not err in denying Roberts' petition without holding a full discharge hearing under WIS. STAT. § 980.09.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.