COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP272 **Cir. Ct. No. 1994CF942751**

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

IN RE THE COMMITMENT OF JAY WARREN DOWNS

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAY WARREN DOWNS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jay Warren Downs appeals from an order that dismissed his petition for discharge from his commitment as a sexually violent person. He contends that the circuit court erred by dismissing the petition without

granting him an evidentiary hearing. Because we conclude that Downs did not support his petition with evidence of his progress since the date of his last discharge hearing, we affirm.

BACKGROUND

¶2 In 1982, Downs pled guilty to two counts of first-degree sexual assault of a child and three counts of sexual exploitation of a child. He was subsequently civilly committed as a sexually violent person, and he has lived at Sand Ridge Secure Treatment Center, a locked residential treatment facility, since 1998. He petitioned for discharge in August 2008 and October 2009, and the circuit court conducted a single jury trial on the petitions in July 2010. On July 22, 2010, the jury returned a verdict that Downs remained a sexually violent person. The circuit court entered an order denying discharge.

¶3 On September 8, 2010, Downs filed a new petition for discharge, and on April 5, 2011, he filed an amended petition. The circuit court denied the amended petition without a hearing on the ground that Downs did not allege any new information that was not previously presented to a factfinder assessing whether Downs continues to satisfy the criteria for commitment. Downs appeals.

DISCUSSION

¶4 Downs petitioned for discharge from his commitment pursuant to WIS. STAT. § 980.09 (2011-12).[1] The statute provides in pertinent part:

> A committed person may petition the committing court for discharge at any time. The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person.
>
> (2) The court shall review the petition within 30 days and may hold a hearing to determine if it contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. In determining under this subsection whether facts exist that might warrant such a conclusion, the court shall consider any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. If the court determines that the petition does not contain facts from which a court or jury may conclude that the person does not meet the criteria for commitment, the court shall deny the petition. If the court determines that facts exist from which a court or jury could conclude the person does not meet criteria for commitment the court shall set the matter for hearing.

Id.

¶5 Downs's primary claim on appeal is that he is entitled to an evidentiary hearing on his most recent petition for discharge because it contains allegations of fact demonstrating that "[his] condition has changed since his initial commitment." He maintains that such evidence warrants a hearing regardless of

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

whether he previously submitted that evidence in support of an earlier petition for discharge. We rejected this position in ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311. There, we held that a person is not entitled to an evidentiary hearing upon a petition for discharge from commitment as a sexually violent person unless the person "has 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." *See* ***id.***, ¶35. A petitioner, we explained, must offer some "new fact, new professional knowledge, or new research not considered by a prior trier of fact" to earn a discharge hearing. *See* ***id.***, ¶36 (some punctuation omitted). Accordingly, we reject Downs's claim that he is entitled to a discharge hearing based on evidence that he presented to a prior factfinder in support of a previous petition for discharge. *See* ***id.***

¶6 Downs's remaining claim is that he is entitled to a hearing because his petition and supplemental petition for discharge presented facts "that suggested a change had occurred since the trial in July of 2010." Downs asserts that this court is in as good a position as the circuit court to determine whether he presented new information and that we therefore should review the question *de novo*. *See* ***Weinberger v. Bowen***, 2000 WI App 264, ¶7, 240 Wis. 2d 55, 622 N.W.2d 471. The State does not disagree, so we view that proposition as conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we turn to an examination of Downs's contention that new facts support his request for a hearing.

¶7 Downs first cites his "increasing age." In support, he points to an expert's report stating that he "is 74 years old, and very few offenders over 70 reoffend." Downs, however, was seventy-three years old when the jury

determined in 2010 that he remained a sexually violent person. At that time, he presented evidence that "once an individual gets over a certain age, 65, 70, there has to be a proactive case made for why that individual is still high risk." Thus, a factfinder has already considered whether Downs is a sexually violent person in light of evidence that he is more than seventy years old and getting older.

¶8 Downs next asserts that he offered an "additional demonstration of ability to comply with rules." In support, he points to an expert's report that he "complies with the rules and institutional policies [of Sand Ridge]." This evidence is not new. At his trial in July 2010, the jury heard testimony from Lloyd Sinclair, the associate treatment director at Sand Ridge, who said that Downs's behavior "remained pretty much trouble free" and that Downs "complies with rules and expectations of our patients."

¶9 Downs also contends that he presented evidence of "progress in socio-affective functioning, including managing his emotions well, having adequate interpersonal abilities, and getting along with others." We have examined the section of the expert's report that Downs cites in support of this contention. The expert explains:

> when [Downs] originally entered [a confined treatment facility] in 1996 he was demanding and sarcastic with staff. He has no contact with his six children. He has made some progress in this area; recent progress notes describe him as having adequate interpersonal abilities and getting along with those around him. He is polite and respectful to both peers and staff.

¶10 This information does not reflect new facts that have developed since Downs's trial ended in July 2010. Rather, the report notes Downs's progress since 1996. Indeed, the information is little more than an echo of a progress report prepared in July 2009 by the Sand Ridge treatment coordinator. The 2009

progress report, received as an exhibit at the 2010 trial, stated: "Downs' interpersonal abilities are adequate. He is able to articulate his views and is polite and respectful to both peers and staff."

¶11 Last, Downs points to his "increasingly deteriorating health." As the State demonstrates, however, the record reflects that Downs continues to be plagued in varying degrees by the ailments that afflicted him at the time of his trial in 2010. Although Downs identifies a new diagnosis in September 2010 of "major depressive disorder and generalized anxiety disorder," his expert's January 2011 report explains that Downs "was given medication and the episode appears to be in remission." We do not agree that the September 2010 diagnosis of conditions that were already in remission three months later demonstrates "increasingly deteriorating health." Moreover, the State points out that the jury heard testimony in 2010 that Downs was "diagnosed as depressed" and received medication for the condition.

¶12 In his reply brief, Downs directs our attention to a report discussing his 2011 cardiac treatment. The report reflects that Downs "had a cardiac bypass operation in 2010 and is making good strides with his cardiac rehabilitation. He had a stent put in his heart in 2011." The record is undisputed, however, that Downs had bypass surgery five months before his July 2010 trial and that he presented evidence of that surgery to the jury. Thus, the 2011 report does not demonstrate deterioration in his health since his trial ended; rather, the report reflects ongoing management of a chronic medical condition that the factfinder considered in 2010.

¶13 In sum, the record supports the circuit court's decision to deny Downs's petition for discharge without a hearing. Downs fails to show that he

presented new facts about his age, his health, his rule compliance, or his socio-affective functioning that were not considered by a prior trier of fact and that could support a finding that he no longer qualifies for commitment as a sexually violent person. *See* ***Schulpius***, 345 Wis. 2d 351, ¶36. Accordingly, we affirm.

By the Court.—Order affirmed.

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