Appeal Nos. 2004AP3081
2005AP859

Cir. Ct. Nos. 2002CI1
2000CV120

WISCONSIN COURT OF APPEALS
DISTRICT IV

IN RE THE COMMITMENT OF ROBERT L. KRUSE:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT L. KRUSE,

RESPONDENT-APPELLANT.

FILED

December 15, 2005

Cornelia G. Clark
Clerk of Supreme Court

IN RE THE COMMITMENT OF CHRISTOPHER L. COMBS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHRISTOPHER L. COMBS,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Higginbotham, JJ.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

These appeals raise the issue of what showing is required to obtain an evidentiary hearing on a petition for discharge from a WIS. STAT. ch. 980 commitment. In each case, the trial court found there was no probable cause "to believe that the committed person is no longer a sexually violent person" under WIS. STAT. § 980.09(2)(b) (2003-04),[1] despite having the report of a court-appointed expert concluding that the person did not meet the statutory definition of a sexually violent person. The trial courts' actions thus raise important and recurring questions regarding the standard a trial court should apply in deciding whether an expert's conclusion in a re-evaluation report entitles the petitioner to an evidentiary hearing.

We think it obvious that the legislature did not intend to provide a full evidentiary discharge hearing that solely rehash issues that were or could have been litigated during initial commitment proceedings. For example, if purported probable cause for a new hearing hinges on a re-evaluation of information available at the first hearing, using the same diagnostic tools or actuarial instruments available then, then it would seem that a new hearing is not required because it would, in effect, simply relitigate the issue decided at the initial hearing. But avoiding new hearings that merely rehash what has already been litigated is problematic in several respects.

It would seem that an opinion based on old information, but viewed in the light of a new diagnostic tool or actuarial instrument, should be cause for a new hearing. Similarly, if a new expert report appears to show that an expert at

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the initial hearing made an objective error—such as plugging demonstrably wrong factual information into the calculation on an actuarial instrument—then a new hearing may be warranted. Often, however, a new expert opinion is based in part on new information encompassing a committed person's behavior since the initial hearing, while at the same time the dispositive factor in the opinion appears to be the expert's disagreement with the expert opinion adopted by the fact-finder in the initial proceeding.

Under current case law interpreting the applicable statutes, it is unclear how a trial court may avoid relitigation without denying new hearings when there is something new to litigate. Perhaps holding new hearings that simply rehash issues already decided is unavoidable because it is not possible to construe the statutes in a manner that isolates and denies such hearings. The cases we certify present expert opinions that rely partly on new information but substantially on a reassessment of information available at the original hearing using the same actuarial instruments. Thus, the cases provide vehicles for this court to provide guidance on when a hearing is required where a substantial part of the new opinion involves a reassessment of old information. Because the resolution of this issue will have a statewide effect on the ability of committed persons to obtain a discharge hearing and, therefore, release, we certify the appeals in these cases to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61.

BACKGROUND

These two appeals come to us in similar procedural postures. Robert Kruse was committed under WIS. STAT. ch. 980 to the Department of Health and Family Services on September 25, 2003. On April 7, 2004, Dr. Janet Hill filed a

periodic re-examination report on behalf of the Department with the Jefferson County Circuit Court, recommending that Kruse not be considered for either supervised release or discharge. Dr. Sheila Fields was then appointed by the court to provide an independent evaluation pursuant to WIS. STAT. § 980.07(1). Dr. Fields interviewed Kruse on June 15, 2004, reviewed his treatment file, prison records and prior evaluations, and employed actuarial and psychometric assessment tools to assess whether he continued to meet the criteria for civil commitment. She concluded to a reasonable degree of professional certainty that Kruse manifested a mental disorder—namely, pedophilia—that affected his volitional capacity and predisposed him to commit sexually violent acts but that he was not much[2] more likely than not to commit additional sexually violent acts if discharged.

After reviewing the reports and hearing argument from counsel, the court concluded Kruse had failed to establish probable cause to believe he was no longer sexually violent. In making that assessment, the court explicitly noted it gave little weight to Dr. Fields' report because Dr. Fields had stated in the report that there was little compelling evidence that Kruse's risk of reoffending had been reduced. It did not make sense to the court that Dr. Fields could conclude that Kruse was no longer a proper subject for commitment if his risk of reoffending had not been reduced. Taken in conjunction with the evidence produced at the

[2] The legislature altered the standard under WIS. STAT. § 980.01(7) for a sexually violent person from "substantially probable"—meaning much more likely than not—to "likely"—meaning more likely than not by 2003 Wis Act 187, §§ 1 and 2, eff. April 22, 2004. However, the parties stipulated that the "much more likely than not" standard could be used for the purposes of the probable cause hearing.

original commitment proceeding, the court found Dr. Hill's report to be "much more weighty."

Christopher Combs was committed to the Department under WIS. STAT. ch. 980 on May 25, 2001. On May 17, 2004, Dr. James Harasymiw filed a periodic re-examination report on behalf of the Department with the Columbia County Circuit Court recommending Combs not be considered for either supervised release or discharge. Coincidentally, the court also appointed Dr. Fields to provide an independent evaluation. Dr. Fields interviewed Combs on August 5, 2004, reviewed his treatment file, prison records and prior evaluations, and employed actuarial and psychometric assessment tools to assess whether he continued to meet the criteria for civil commitment. She concluded to a reasonable degree of professional certainty that Combs manifested a mental disorder—namely, antisocial personality disorder—that affected his volitional capacity and predisposed him to commit sexually violent acts but that he was not more likely than not to commit additional sexually violent acts if discharged.

After reviewing the reports and hearing argument from counsel, the court concluded Combs had failed to establish probable cause to believe he was no longer sexually violent. The court reasoned:

> I have considered the arguments presented in the briefs and am persuaded by the arguments set forth by the State that Dr. Fields really does not present anything that wasn't already considered at the time of trial, and therefore, doesn't rise to the level of creating probable cause. The evaluation then by Dr. Fields, essentially, doesn't make any new diagnosis. The evaluation applied a different interpretation to the RRASOR and the Static 99 diagnostic tools that were utilized by all of the other evaluators at the time of trial.
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> Dr. Fields applied a different interpretation on how to score that RRASOR and Static 99, and based on the

> different scoring comes to a different conclusion. However, that is not something that hasn't already been considered and argued. I'm cognizant and have reviewed State v. Pocan a case cited by both of you in your briefs, 267 Wis. 2d 953.
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> In that, the Court of Appeals had indicated that a new diagnosis would be another way of proving one is still not a sexually violent person. In this case, we don't have a new diagnostic tool. That was the basis for the Court's decision in Pocan.
>
> We have the same diagnostic tools in RRASOR and Static 99. What we have presented here is one professional's interpretation of the same diagnostic test, and these issues have been disputed at the trial and resolved by the jury's verdict at the trial. Therefore, at this point, the Court is going to decline to find probable cause based on Dr. Field's report, and accordingly, will not order this case set on for trial.

Kruse and Combs each appeal, contending Dr. Fields' reports established probable cause sufficient to entitle them to evidentiary hearings on their discharge petitions. Because their positions and the State's responses are similar and overlap considerably, we will not further distinguish their arguments for the purposes of this certification.

DISCUSSION

A person committed under WIS. STAT. ch. 980 is entitled to periodic re-examination under WIS. STAT. § 980.07 and, unless the person waives the right to petition for discharge following such an examination, "the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person." WIS. STAT. § 980.09(2)(a). The probable cause hearing set forth in § 980.09(2)(a) "is a paper review of the re-examination report(s) with argument that provides an opportunity for the committing court to weed out frivolous petitions by committed persons alleging that they are no longer dangerous and are fit for release." ***State v. Paulick***, 213

Wis. 2d 432, 438-39, 570 N.W.2d 626 (Ct. App. 1997). A § 980.09(2)(a) hearing is not an evidentiary hearing but rather a hurdle a petitioner must overcome in order to obtain a § 980.09(2)(b) evidentiary hearing on a discharge petition. ***Id.*** at 437. Although § 980.02(2)(a) does not assign a burden of persuasion to either the petitioner or the State at the probable cause hearing, the petitioner must in effect "present some evidence that there is a real question as to whether he or she is still dangerous." ***State v. Thayer***, 2001 WI App 51, ¶¶17 and 28, 241 Wis. 2d 417, 626 N.W.2d 811. The court must then determine "whether sufficient facts exist to warrant a full evidentiary hearing on whether the committed person is still a sexually violent person." ***Id.***, ¶17.

In making its determination as to whether an evidentiary hearing is warranted, a trial court is to apply the same probable cause standard employed at preliminary hearings in criminal cases. ***State v. Fowler***, 2005 WI App 41, ¶11, 279 Wis. 2d 459, 694 N.W.2d 446, *review denied*, 2005 WI 150, ___ Wis. 2d ___, 705 N.W.2d 659. Applying that relatively low standard, the court needs to decide only whether "there exists a believable or plausible account" that the petitioner is no longer a sexually violent person, without making credibility determinations or resolving factual disputes and taking into account all reasonable inferences from the facts before it. *See generally* ***State v Dunn***, 121 Wis. 2d 389, 359 N.W.2d 151 (1984) (discussing probable cause standard at preliminary hearings); *see also* ***State v. Watson***, 227 Wis. 2d 167, ¶¶95-97, 595 N.W.2d 403 (1999) (applying preliminary hearing standard at initial probable cause hearings under WIS. STAT. § 980.04).

As a threshold matter, the State challenges this court's use of the plausible account standard for evaluating probable cause at a WIS. STAT. § 980.09(2)(a) hearing.[3] We do not find the State's argument on this point persuasive, however, and mention it only in passing as one possible means of resolving the dilemma faced by trial courts in considering re-evaluation reports.

In our view, the central dispute on these appeals is really the substance of the required probable cause showing. The State essentially argues that the statutory language requiring the court to hold a hearing "on whether the person is *still* a sexually violent person" and to determine whether "probable cause exists to believe that the committed person is *no longer* a sexually violent person" necessarily requires a comparison between the person's condition at the time of commitment and at the time of re-evaluation. WIS. STAT. §§ 980.09(2)(a) and (b) (emphasis added). In other words, the State believes the reevaluation reports must show something new—either in the form of treatment progress or some new scientific evidence or diagnostic or actuarial tool which was unavailable at the time of the initial commitment—and cannot merely be based on a new expert's

[3] The State points out that ***State v. Watson***, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), was the only published WIS. STAT. ch. 980 case before ***State v. Fowler***, 2005 WI App 41, 279 Wis. 2d 459, 694 N.W.2d 446, *review denied* (WI Oct. 3, 2005) (No. 2003AP3158), to explicitly use the plausible account standard, and ***Watson*** addressed the probable cause hearing under WIS. STAT. § 980.04, rather than WIS. STAT. § 980.09(2). The State then argues that ***Fowler***'s adoption of the plausible account standard conflicts with this court's previous statement in ***State v. Thayer***, 2001 WI App 51, ¶28, 241 Wis. 2d 417, 626 N.W.2d 811, that "some weighing of factual evidence must take place if the court is to determine if some evidence exists sufficient to warrant the evidentiary hearing," and that the probable cause burden should be higher to obtain a discharge hearing, since the committed person has already been adjudged to be sexually violent. We are not persuaded that the sentence from ***Thayer*** quoted by the State is inconsistent with' the application of the plausible account standard—which, after all, does still require the court to weigh whether the proffered evidence is believable and relevant to the issue before the court. In any event, any re-examination of the adoption of the plausible account standard would need to be done by the Wisconsin Supreme Court, since this court is now bound by ***Fowler***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

evaluation of the committed person using an approach similar to one that did not prevail in the original trial. The State asserts that its interpretation is bolstered by WIS. STAT. § 980.07(1), which states that the very purpose of periodic re-examinations is to determine "whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged."

Both Kruse and Combs point out that this court has already rejected the proposition that a committed person must show treatment progress in order to establish probable cause for a discharge hearing. In ***State v. Pocan***, 2003 WI App 233, ¶¶12-13, 267 Wis. 2d 953, 671 N.W.2d 860, we stated:

> We agree that progress in treatment is one way of showing that a person is not still a sexually violent person. However, we conclude that is not the only way. A new diagnosis would be another way of proving someone is not still a sexually violent person. A new diagnosis need not attack the original finding that an individual was a sexually violent person. Rather, a new diagnosis focuses on the present. The present diagnosis would be evidence of whether an individual is still a sexually violent person.
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> … If the court finds [the committed person] is not sexually violent now, that means he is not still sexually violent.

Because the focus of a discharge hearing is on the current status of the committed person, the appellants argue that the probable cause hearing should be focused solely on the current re-examination reports, and should not involve a comparison of the current reports with the evidence produced at trial. That position is problematic because it appears that a current evaluation, by necessity, involves an analysis of the committed person's past history and factors that have not changed. Nonetheless, we acknowledge ***Pocan*** could be read to support the appellant's contention.

Combs further contends the State's position that something new must be shown in order to obtain a discharge hearing following a re-examination report ignores other aspects of the statutory scheme. Under WIS. STAT. § 980.10,

> a committed person may petition the committing court for discharge at any time, but if a person has previously filed a petition for discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was still a sexually violent person, then the court shall deny any subsequent petition under this section without a hearing unless the petition contains facts upon which a court could find that the condition of the person had so changed that a hearing was warranted.

Combs argues the State is essentially attempting to shift the WIS. STAT. § 980.10 standard for obtaining a discharge petition outside of the re-evaluation procedure—*i.e.*, evidence regarding a change in the condition of the person—to the process for obtaining a hearing on a discharge petition following a periodic re-examination under WIS. STAT. § 980.09.

Although the parties do not phrase it precisely this way, one major problem we see is that there is some truth in each of the parties' characterizations as to whether the current reports offer anything new. On the one hand, the clear implication of Dr. Fields' re-examination reports is that she would not have found Kruse or Combs to be sexually violent in the first place, because she did not interpret the results of the available risk assessment instruments as showing a sufficient likelihood of dangerousness. In other words, she interpreted much of the same historical data that was previously available in a different way using the same tools. Thus, the State is correct that relying on her opinion for probable cause would contradict the prior adjudication. On the other hand, Dr. Fields did not present her opinions at the initial commitment proceedings and her re-examination reports are also based upon post-commitment information including

recent interviews and treatment notes. For instance, she noted that Kruse was approaching an age where recidivism typically begins to drop, that he had begun to show more insight and remorse about his behavior and that his behavior with staff had seemingly improved during the last year, while Combs had shown some ability to suppress deviant arousal patterns in recent penile plethysmograph testing, had developed some significant capacity to manage his impulses and had made some progress in previous cognitive distortions about victim motivations and female sexuality. Thus, the appellants are correct that the current reports focus on their present conditions, but those present conditions are viewed from the starting point that they should not have been committed in the first place.

How are trial courts to handle this conundrum? How far can they go in evaluating the basis for the opinion of a reexamining expert that a committed person does not meet the definition of a sexually violent person? Is it proper to compare the current re-examination reports with prior reports or evidence from the original commitment proceeding? If so, can trial courts find implausible the opinion of any expert who does not accept the premise that the committed person was properly committed in the first place or does not offer any new science or evidence of treatment progress to support his or her conclusion? Perhaps the reexamining experts should explicitly state in their reports the extent to which their conclusions are based upon changed conditions or new information versus disagreement with the initial adjudication.

If it is not proper to compare the re-evaluation reports with the evidence from the original commitment proceeding, are trial courts obligated to grant discharge hearings every year following a re-examination report in which a court-appointed expert concludes that the committed person does not meet the standard for a sexually violent person, in essence relitigating differences in expert

opinion about an individual's risk to reoffend? How are trial courts to determine whether a re-examination report contains sufficient new information to qualify as more than a relitigation of issues already determined in the original proceeding?

In sum, we believe it would be helpful to more clearly articulate the standard the trial court is to apply in deciding whether a re-evaluation report under WIS. STAT. § 980.07(1) submitted in support of a petition under WIS. STAT. § 980.09(2)(a) establishes probable cause to obtain a discharge hearing. Because the issue of what is required to establish probable cause is a recurring question of statewide importance whose resolution may require some revision or clarification of this court's past opinions, including ***Fowler*** and ***Pocan***, we believe this case is an appropriate candidate for certification to the Wisconsin Supreme Court.