COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2792 **Cir. Ct. No. 1997CV388**

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

IN RE THE COMMITMENT OF HENRY POCAN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HENRY POCAN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Henry Pocan appeals a judgment denying him an evidentiary hearing on his petition for discharge from a WIS. STAT. ch. 980

commitment.[1] Pocan argues the court erred both when it discounted his expert's evaluation and when it concluded the facts did not warrant a hearing on whether he is still a sexually violent person. *See* WIS. STAT. § 980.09(a). We reject Pocan's arguments and affirm the judgment.

Background

¶2 Pocan was found to be a sexually violent person under WIS. STAT. § 980.06 and was committed in 1998 to the custody of the Department of Health and Family Services. At the time of his first evaluation in 1997, the State's experts did not agree on whether Pocan met the statutory criteria for commitment. One psychologist concluded that Pocan had two conditions, schizophrenia and antisocial personality disorder, that predisposed him to commit acts of sexual violence and that there was a substantial probability that he would engage in such acts if he were released. A second psychologist diagnosed Pocan with the same disorders, but could not conclude Pocan was sexually violent. A third psychologist, retained by Pocan, similarly determined that there was insufficient evidence to confine Pocan as a sexually violent person.

¶3 Between 1998 and 2001, Pocan was periodically reexamined by psychologists who did not recommend either his discharge or his supervised

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

release. In 2002, a psychologist who examined Pocan using actuarial instruments[2] unavailable at the time of his initial commitment concluded:

> [A] research based assessment of Mr. Pocan does not provide clear evidence that he is presenting with a level of risk that is in the "much more likely than not" range for sexual reoffending....
>
> … In sum … this evaluator cannot conclude, to a reasonable degree of professional certainty, whether or not there continues to be a substantial probability that Mr. Pocan will reoffend sexually if he is not continued in institutional care.

¶4 In response to that evaluation, Pocan petitioned for discharge and requested a probable cause hearing. After the circuit court found that Pocan had previously filed a petition without the secretary's approval that had been denied as frivolous, it rejected Pocan's motion.[3] Pocan appealed and we reversed the circuit court's order and remanded for a WIS. STAT. § 980.09(2)(a) probable cause

[2] This psychologist, Dr. Patricia Coffey, used four instruments for risk assessment: the Hare Psychopathy Checklist-Revised (PCL-R); the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR); the Static-99; and the Minnesota Sex Offender Screening Tool-Revised (MnSost-R).

[3] The first time a person petitions for discharge without the approval of the secretary of the Department of Heath and Human Services, he or she is entitled to a paper review probable cause hearing. WIS. STAT. § 980.09(2)(a). After that initial petition, the circuit court proceeds under WIS. STAT. § 980.10, which says that if a court has denied a previous petition for discharge "as frivolous" or has determined the individual is still a sexually violent person, all subsequent petitions can be denied 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."

hearing. ***State v. Pocan***, 2003 WI App 233, ¶¶1, 14, 267 Wis. 2d 953, 671 N.W.2d 860.[4]

¶5 On remand, the circuit court conducted a paper review of the reexamination reports, heard argument from the attorneys, and concluded that the facts did not warrant an evidentiary hearing under WIS. STAT. § 980.09(2)(b) because "[a] plausible argument has not been made that there is a substantial basis for the petition." Pocan now appeals.

Discussion

¶6 We have held that a probable cause determination under WIS. STAT. § 980.09(2)(a) is the same as a probable cause determination in a criminal bindover proceeding and, accordingly, subject to the same standard of review. *See* ***State v. Paulick***, 213 Wis. 2d 432, 437, 570 N.W.2d 626 (Ct. App. 1997). When considering the facts before it, the circuit court must thus decide whether a reasonable inference supports a determination of probable cause. In Pocan's case, that means the court will grant an evidentiary hearing if "there exists a believable or plausible account" that Pocan is not still a sexually violent person. ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). Our standard of review for the circuit court's decision has been clearly stated in another context by the supreme court. We must

[4] On that appeal, the State conceded that Pocan had never filed a motion for discharge and was entitled to a probable cause hearing. ***State v. Pocan***, 2003 WI App 233, ¶9, 267 Wis. 2d 953, 671 N.W.2d 860. The State argued that the circuit court's error did not require reversal, however, because "Pocan's petition does not show he … is no longer a sexually violent person." ***Id.*** We rejected the State's argument because we concluded that either progress in treatment or a new diagnosis might be used to prove someone is not still sexually violent. ***Id.***, ¶12.

> examine the factual record ab initio and decide, as a matter of law, whether the evidence constitutes probable cause …. As such … review of the circuit court's … decision is de novo …. [We] will search the record for any substantial ground based on competent evidence to support the circuit court's … decision….

State v. Anderson, 2005 WI 54, ¶36, 695 N.W.2d 731.

¶7 The circuit court's examination of the paper record focused on four reports: Dr. Patricia Coffey's 2002 reevaluation; Dr. Christopher Synder's 2003 reevaluation; Dr. Christopher Tyre's 2004 special evaluation;[5] and the 2004 evaluation of Pocan's expert, Dr. Diane Lytton. The court's written decision identifies the proper standard for its decision. "If a 'plausible' argument can be made that Pocan is no longer sexually violent, then the case should be set for an evidentiary review." The sole question before us on review, therefore, is whether there is a substantial ground based on competent evidence to support that decision.

¶8 Pocan argues that he is entitled, like the State in probable cause hearings for bindover, to "rely on all reasonable inferences that can be drawn from the facts in evidence." He correctly notes that the probable cause question is not whether he has made progress in treatment, but whether he is still a sexually violent person. Pocan then contends that Coffey's reevaluation, which includes the opinion that she cannot conclude on a research-based assessment that Pocan is still a sexually violent person, constitutes a fact that raises the question of whether he still is a sexually violent person. He also contends the court erred when it discounted Lytton's opinion based on what he describes as a flawed extension of a

[5] Tyre's report was specifically prepared for the probable cause hearing. It relied heavily on prior reevaluations and particularly on Snyder's 2003 report.

narrow legal principle established in ***State v. Adams***, 223 Wis. 2d 60, 68-69, 588 N.W.2d 336 (Ct. App. 1998).

¶9 The State responds that while Snyder, Coffey, and Tyre disagreed over certain aspects of Pocan's diagnosis, they agreed that he had an antisocial personality disorder, that he was dangerous, and that he had done nothing to reduce his risk of reoffense since his initial commitment. The State also argues the circuit court was entitled to disregard Lytton's opinion because it was based on an incorrect interpretation of what constitutes mental disorder in ch. 980 proceedings. The State thus concludes that "Pocan's diagnosis and dangerousness … remain essentially unchanged from what it was when he was committed."

¶10 Paper review probable cause hearings do not shift the burden to the committed person to prove he or she is no longer dangerous. *See* WIS. STAT. § 980.09(2)(a). They rather constitute a hurdle that can be overcome by the presentation of "some evidence there is a real question" whether the petitioner is still a sexually violent person. *See* ***Paulick***, 213 Wis. 2d at 437 n.2. We have associated "some evidence" with "a plausible account" that there is a substantial basis for that position. *See* ***State v. Watson***, 227 Wis. 2d 167, 205, 595 N.W.2d 403 (1999).

¶11 In applying this standard to the record, the circuit court first determined that it could disregard Lytton's report because it did not comment on Pocan's level of dangerousness or his risk for recidivism. Lytton's report rejects the idea of any generalized nexus between antisocial personality disorder and the predisposition to commit acts of sexual violence. It also characterizes the diagnosis' use in WIS. STAT. ch. 980 commitment proceedings as "controversial," noting that antisocial personality disorder is not a mental disorder specific to

sexual deviation. Under Wisconsin law, however, "the key to the constitutionality of the definition of mental disorder" is a nexus between the subject of a petition and a mental disorder that has the specific effect of disposing that particular individual to engage in sexual violence. *See* ***State v. Post***, 197 Wis. 2d 279, 306, 541 N.W.2d 115 (1995). Thus the first part of Lytton's opinion is irrelevant.[6] Lytton's second conclusion is either equally irrelevant or so undeveloped as to have no evidentiary value. Nothing in our statutes or the United States Constitution requires that a person be diagnosed with a disorder specific to sexual deviation in order to be found sexually violent. *See* ***id.*** And while a controversy about the link between sexual violence and antisocial personality disorder might constitute a fact that raises questions about Pocan's evaluation, Lytton's report provides no evidence to support such a suggestion. We thus conclude the circuit court did not err when it gave Lytton's opinion no factual weight.

¶12 After dismissing the Lytton report, the circuit court considered Coffey's 2003 reevaluation, Synder's 2003 reevaluation, and Tyre's 2004 special evaluation.[7] It noted that while Coffey was unable to conclude that the actuarial instruments provided a basis for an opinion to a degree of medical certainty that Pocan was still a sexually violent person, she indicated "there are numerous

[6] It is doubly irrelevant because we have already agreed that a diagnosis of antisocial personality disorder, standing alone without any other diagnosis or evidence, "could never lead to a finding that a defendant, without a history of sex offenses, is a 'sexually violent person.'" ***State v. Adams***, 223 Wis. 2d 60, 70, 588 N.W.2d 336 (Ct. App. 1998) (citation omitted). The Lytton report's failure even to address risk factors or Pocan's sexual history thus constitutes a failure to address the precise factors which establish, or fail to establish, a legal nexus between a condition and dangerousness.

[7] The circuit court also commented briefly on the 1977 reevaluations of Drs. Craig Monroe and Howard Porter, stressing what both experts agreed on: Pocan's refusal to participate in treatment and his history of "sexual deviance."

reasons from a clinical perspective" to be concerned that Pocan would offend again. The court also noted that Tyre concluded Pocan did meet the statutory requirement for "substantially probable" to reoffend based on his interpretation of the same actuarial instruments used by Coffey. Finally, the court stressed its authority to rely on behavioral history, finding that Pocan had never completed any treatment successfully, had refused to adhere to program guidelines, and possessed images of women in bras and underwear apparently cut from magazines or lingerie advertisements.

¶13 While it might be possible to read the psychologists' reports in this case as presenting evidence of sustained disagreement over Pocan's level of dangerousness and his likelihood to reoffend,[8] the circuit court's decision focused on the fact that a majority of the evaluators agreed he is still a sexually violent person. Even Coffey, who could not endorse that conclusion from a research based approach, indicated that Pocan's behavior raises significant fears, from a clinical point of view, that he is a danger to reoffend.

¶14 We will uphold the trial court's findings of fact about such issues as Pocan's behavioral history unless they are clearly erroneous. *See* ***State v. Thayer***, 2001 WI App 51, ¶22, 241 Wis. 2d 417, 626 N.W.2d 811. The application of these and other facts to the probable cause standard is a question of law we review independently of the circuit court. ***Id.*** The issue is thus whether, in light of the circuit court's findings about Pocan's behavioral history, Coffey's inability to conclude there was enough evidence to find Pocan "much more likely than not" to

[8] As Coffey observed, Pocan's evaluators and providers have characterized him as a diagnostic enigma.

reoffend establishes a plausible basis for his claim that he is not still a sexually violent person. We conclude it does not. The application of actuarial instruments to Pocan's case has not produced a "new diagnosis," and while differences between experts on how to assess the results of instruments might under some circumstances establish probable cause, here, where Tyre and Coffey finally both agreed not to recommend Pocan's release, they do not.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.