COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2005AP1295
2006AP1803

Cir. Ct. No. 2002CI2

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

IN RE THE COMMITMENT OF MARK J. STAATS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MARK J. STAATS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Dismissed*.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Reversed and cause remanded*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Mark Staats appeals a pair of orders denying his successive annual petitions for discharge from a WIS. STAT. ch. 980 (2003-04),[1] commitment. Because we conclude that Staats was entitled to an evidentiary hearing on the second petition, we reverse the order denying that petition and remand for further proceedings.

BACKGROUND

¶2 Staats was initially found to be a sexually violent person and committed to a secure mental health facility on November 20, 2003. The determination was supported by testimony at trial from Dr. Anthony Jurek, who diagnosed Staats with Personality Disorder, Not Otherwise Specified (NOS), and Paraphilia. The testimony of defense expert Dr. Gerald Thomas disputed those diagnoses.

¶3 Dr. William Schmitt conducted a periodic reexamination of Staats in May 2004. He diagnosed Staats with Personality Disorder, NOS with antisocial features, and could not rule out Paraphilia, NOS, Hebephilia. Dr. Schmitt concluded that Staats still met the criteria for a sexually violent person. Dr. Diane Lytton also examined Staats as part of the periodic review process in early 2005, and she disputed the diagnosis that Staats suffered from a mental disorder that predisposed him to commit sexual offenses. In particular, she thought it possible that Staats's conduct could be attributed to past abuse and neglect, rather than a personality disorder, and that the paraphilia diagnosis might not fit because Staats was an adolescent when his assaults on girls occurred, and because she did

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

not consider it deviant for him to continue to be attracted to adolescent girls. These conclusions mirrored the opinions of the defense expert at trial. On March 28, 2005, after reviewing the two new reports and hearing argument on the issue of probable cause, the circuit court, without taking evidence, denied Staats's first petition for release.

¶4 Dr. Schmitt conducted a second periodic reexamination of Staats in May 2005, reaching essentially the same conclusions as in his prior report. Dr. Lytton also reexamined Staats at his attorney's request. In a report dated March 22, 2006, she reiterated her opinion from her prior report that Staats did not have a mental disorder that predisposed him to commit sexual offenses. Dr. Lytton went on:

> Also consistent with my evaluation last year, I did not find strong evidence to support a diagnosis of a Personality Disorder at this time. In the past, such a diagnosis might have been relevant based on Mr. Staats'[s] sexual offenses, rule breaking and other behaviors. However, Mr. Staats'[s] behaviors continued to be stable this past year, which might be consistent with a reduction in dysfunctional traits of a Personality Disorder as a person ages.

The circuit court considered the reports and again concluded they were insufficient to establish probable cause to believe that Staats was no longer sexually violent. Staats appeals both decisions. We have consolidated the appeals for briefing and disposition.

DISCUSSION

¶5 As a threshold matter, the State argues we must decide the appeals sequentially because the second set of reexaminations was not in the record of the first reexamination proceeding. We see nothing, however, that compels us to consider the appeals in chronological order. Rather, we are persuaded that judicial

economy is best served by first considering the more recent reexamination proceeding. The record in the second appeal properly includes everything from the first reexamination proceeding as well as from the original trial. Furthermore, there is little point in our deciding whether Staats was entitled to an evidentiary hearing on the earlier reexamination reports if he is now entitled to a hearing based on the more recent report from Dr. Lytton. In other words, the dispositive question is whether Staats is entitled to an evidentiary hearing on his petition for discharge based on the present state of the record.

¶6 At the time Staats filed his petitions for discharge, a person committed under WIS. STAT. ch. 980 was entitled to periodic reexamination under WIS. STAT. § 980.07 and, unless the person waived the right to petition for discharge following such an examination, the court was required to "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).[2] The probable cause hearing set forth in § 980.09(2)(a) is "a paper review of the reexamination 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). The probable cause proceeding is not an evidentiary hearing but rather "a hurdle for the committed person to clear" in order to obtain an evidentiary hearing on a discharge petition. ***Id.*** at 437. Although the statute does not assign a burden of persuasion to either

[2] WISCONSIN STAT. § 980.09 has been repealed and recreated by 2005 Wis. Act 434, § 123, making the new standard whether "the person's condition has changed." The State does not contend that the new standard applies to Staats's petitions. *See* 2005 Wis. Act 434, § 131(2).

the petitioner or the State at the probable cause hearing, the petitioner must "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, 28, 241 Wis. 2d 417, 626 N.W.2d 811. The court then determines "whether sufficient facts exist to warrant a full evidentiary hearing on whether the committed person is still a sexually violent person." ***Id.***, ¶17.

¶7 In making the determination whether an evidentiary hearing is warranted, a circuit court must apply the same probable cause standard as 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, 286 Wis. 2d 98, 705 N.W.2d 659. Applying this 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). However, "in order to provide a basis for probable cause to believe a person is no longer sexually violent under § 980.09(2), an expert's opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent." ***State v. Combs***, 2006 WI App 137, ¶32, ___ Wis. 2d ___, 720 N.W.2d 684. "[A]n opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication would meet this

standard, as would an opinion based at least in part on new professional knowledge about how to predict dangerousness." ***Id.***

¶8 The State argues that Dr. Lytton's second reexamination report is insufficient to create probable cause that Staats is no longer sexually violent because it merely reiterates opinions that were rejected at trial—namely that Staats did not, in fact, suffer from a personality disorder or paraphilia. We agree that Dr. Lytton's disagreement with the two prior diagnoses would be insufficient, in and of itself, to satisfy the ***Combs*** standard. However, those were not the only opinions expressed in Dr. Lytton's report.

¶9 Dr. Lytton also expressed the opinion that, if Staats did actually suffer from a personality disorder at an earlier time, his stable conduct in the mental health institution "might be consistent with a reduction in dysfunctional traits of a Personality Disorder as a person ages." This opinion satisfies the ***Combs*** standard because it is based in significant part on facts that did not occur until after the trial—namely, Staats's postcommitment behavior and response to treatment. In other words, allowing Staats to present evidence that his dysfunctional symptoms have decreased would not merely relitigate the issues already tried, but would instead properly focus on whether Staats has progressed to the point where he no longer presents a significant risk to the community.

¶10 In sum, Dr. Lytton's second report establishes probable cause that requires an evidentiary hearing because the report provides a plausible account that Staats is no longer sexually violent. Accordingly, we reverse the order denying Staats's second petition for release and remand for a hearing on whether Staats is still sexually violent. Because we grant relief in the appeal concerning Staats's second petition for discharge, we dismiss his first appeal as moot.

By the Court.—Appeal dismissed in No. 2005AP1295; order reversed and cause remanded in No. 2006AP1803.

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