

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 20, 2021**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2019AP1253**

**Cir. Ct. No. 2015CI3**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE COMMITMENT OF GREGORY H. SMITH:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**GREGORY H. SMITH,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
GLENN H. YAMAHIRO, Judge. *Affirmed.*

Before Brash, P.J., Donald and White, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Gregory H. Smith appeals an order denying his motion for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980 (2019-20).<sup>1</sup> Smith argues that: (1) he was entitled to a trial on his discharge petition; and (2) the circuit court erred in considering judicial economy when deciding whether to grant him a discharge trial. Upon review, we affirm.

¶2 Smith was committed as a sexually violent person on March 16, 2016. Smith filed a *pro se* petition seeking discharge on April 9, 2018. *See* WIS. STAT. § 980.09(1). The circuit court denied his petition without holding a trial on November 27, 2018.

¶3 Smith first argues that he was entitled to a trial on his discharge petition. As applicable here, WIS. STAT. § 980.09(1) provides that the circuit court “shall deny the [discharge] petition ... without a hearing unless the petition alleges facts from which the court or jury *would likely conclude the person’s condition has changed* ... since the date of his or her initial commitment order ... *so that the person no longer meets the criteria for commitment* ....” *Id.* (emphasis added). A petitioner seeking a discharge trial must “set forth new evidence[] not considered by a prior trier of fact[.]” *State v. Schulpius*, 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311. “An expert’s opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under § 980.09(2).” *Id.*, ¶34. “We review the circuit court’s determination of whether the statutory criteria for a discharge trial have been met

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

*de novo.*” *State v. Hager*, 2018 WI 40, ¶19, 381 Wis. 2d 74, 911 N.W.2d 17 (emphasis added).

¶4 Smith contends that his petition alleges that his condition has sufficiently changed since his commitment trial so as to warrant a discharge trial. Smith points to a report submitted by Dr. Courtney Endres, who opined that the symptoms of Smith’s personality disorder with anti-social features have remitted due to the aging process. Smith contends that the fact that he no longer has a personality disorder with anti-social features makes it likely that a jury would conclude that he is no longer a sexually violent person.

¶5 Smith, however, has not satisfied his burden of production to show that his condition has sufficiently changed to warrant a trial on his discharge petition.<sup>2</sup> Dr. Endres’s opinion that Smith no longer has a mental disorder was not based on some new fact, new professional knowledge, or new research. Beyond Dr. Endres’s references to Smith’s largely positive conduct over the two years since his initial commitment, her opinion was based on research about the effect of aging on Smith’s personality disorder and other information about Smith that existed at the time of Smith’s trial. *Schulpius* teaches that “[a]n expert’s opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under [WIS. STAT.] § 980.09(2).” *Id.*, 345 Wis. 2d 351, ¶35. Therefore, we conclude that Smith did not set forth new evidence from which a reasonable trier of fact would likely conclude that he did not meet the criteria for commitment as a sexually violent person.

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<sup>2</sup> “The party carrying the burden of production must ‘introduce enough evidence on an issue to have the issue decided by the fact-finder’ and not by the court in a pre-trial ruling.” *State v. Hager*, 2018 WI 40, ¶2 n.5, 381 Wis. 2d 74, 911 N.W.2d 17 (citation omitted).

¶6 Smith next argues that the circuit court erred because it mentioned judicial economy when deciding whether to grant him a trial on the discharge petition. Smith argues that judicial economy is not one of the items listed in WIS. STAT. § 980.09(2) that the circuit court may consider when reviewing a discharge petition. That statute provides that “the court may consider the record, ... relevant facts in the petition and in the [S]tate’s written response, arguments of counsel, and any supporting documentation provided by the person or the [S]tate.” *Id.*

¶7 This argument misses the mark. The circuit court’s ruling shows that it denied Smith’s petition based on the appropriate criteria set forth in WIS. STAT. § 980.09(2). To the extent that the circuit court made a brief reference to judicial economy, the circuit court’s comment was in keeping with *Schulpius*, where the Wisconsin Supreme Court discussed the interests served by § 980.09: “Permitting a new discharge hearing on evidence already determined insufficient by a prior trier of fact violates essential principles of judicial administration and efficiency.” *Id.*, 345 Wis. 2d 351, ¶35. Moreover, Smith’s argument that the circuit court should not have considered the interests of judicial economy ignores our standard of review. On appeal, we consider whether the statutory criteria for a discharge trial have been met *de novo*. See *Hager*, 381 Wis. 2d 74, ¶19. Based on our *de novo* review, we have concluded that Smith has not met the criteria for a discharge trial.

*By the Court.*—Order affirmed.

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

