

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP809

Cir. Ct. No. 1998CI12

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF KENNETH R. PARRISH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KENNETH R. PARRISH,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Kenneth R. Parrish appeals from an order dismissing his petition for discharge as a sexually violent person under Chapter 980 of the

Wisconsin Statutes on the grounds that: (1) the trial court prematurely dismissed his petition even though he requested and was entitled to the appointment of an examiner pursuant to WIS. STAT. § 980.07(1) (2009-10)¹ before an evaluation of his petition; and (2) the trial court erred in dismissing the petition because the allegation of a change in diagnosis was sufficient to require a hearing on the petition. We affirm.

BACKGROUND

¶2 On June 20, 2000, following a court trial, Parrish was committed to the Department of Health and Family Services (DHS)² pursuant to WIS. STAT. ch. 980 as a sexually violent person. Parrish’s commitment was based on his initial diagnosis of borderline personality disorder and antisocial personality disorder—both qualifying mental disorders for ch. 980 purposes.

¶3 Pursuant to WIS. STAT. § 980.07, Parrish underwent yearly evaluations by psychological examiners to determine whether he continued to meet the criteria for commitment as a sexually violent person. In April 2008, Dr. Robert Barahal evaluated Parrish and in his report, diagnosed Parrish as only having antisocial personality disorder and stated “Rule out ‘Paraphilia NOS.’” Parrish was again evaluated by Dr. Barahal the following year. Dr. Barahal’s report, filed by the Sand Ridge Secure Treatment Center on April 30, 2009, reiterated his findings from the previous year, and clarified the meaning of the designation “rule out,” stating:

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The Department of Health and Family Services is now known as the Department of Health Services, effective July 1, 2008. *See* 2007 Wis. Act 20, § 9121(6) (a)-(b). We refer to the department as the Department of Health Services in this opinion.

The “rule out” designation simply means there is still insufficient evidence to confidently rule out (or rule in) sexual deviance, and consideration of a paraphilia in addition to antisocial personality remains an unresolved diagnostic issue with important treatment implications.

Antisocial Personality Disorder is a mental disorder as defined by Chapter 980, and predisposes Mr. Parrish to sexual violence.

Dr. Barahal’s report also stated that Parrish’s diagnosis of antisocial personality disorder “affects [Parrish’s] emotional or volitional capacity, and predisposes him to commit sexually violent acts as defined by Chapter 980.”

¶4 Prior to Dr. Barahal’s 2009 evaluation, in February 2009, Parrish was given a “Request For Appointment Of Counsel And/Or Examiner” form prepared by the DHS, which Parrish left blank and did not sign.

¶5 On March 30, 2009, Parrish filed a Petition for Discharge, stating that his condition had changed since his initial commitment trial and he no longer met the criteria for commitment as a sexually violent person. Parrish’s petition argued that the evaluations of both Dr. Barahal as well as Dr. Hollida Wakefield, his previous independent examiner from 2007, supported his contention that a change in diagnosis no longer rendered him sexually violent and in need of commitment. On April 16, 2009, Parrish filed a document entitled “The Facts in Support Of The Alleged Error(s) Upon Which The Motion Is Based Are Follows ‘Diagnosis,’” in which he again argues the change in diagnosis as the basis of his petition.

¶6 A hearing was held on May 1, 2009, at which Parrish appeared, *pro se*, by video conference. The court questioned Parrish as to whether he would like an attorney, to which Parrish responded:

I don't want a attorney representing me because the State doctors agreed saying the same thing that I'm saying.

On the second page of the report the State doctor filed with this court ... he says four ways you can get out and grant a new trial ... the second was a change of a diagnosis, and my diagnosis has been changed, and that's why I'm requesting a jury trial based on discharge, your Honor, because my diagnosis has been changed.

(Grammar as in original transcript.)

¶7 Parrish eventually requested a court-appointed attorney at the hearing and the court extended the time limits for hearing the petition for discharge. Parrish did not request an independent examiner at the hearing.

¶8 Between the May 1, 2009 hearing and the final hearing on September 17, 2009, three status conferences were held at which Parrish was represented by Attorney Mike Plaisted, and Parrish filed two documents on his own, both arguing that his change of diagnosis entitled him to a discharge hearing. No mention of an independent examiner was made at any of the conferences, nor did Parrish request an examiner in either document.

¶9 On September 17, 2009, a hearing on the State's motion to dismiss Parrish's petition was held at which Parrish appeared by video conference. Parrish again argued his change in diagnosis and for the first time since his evaluation process began in February 2009, made mention of an independent examiner by stating, "I talked to a doctor on the phone last week, Michael B. First, that is willing to be my expert." The trial court dismissed the petition, finding that no basis existed to support the petition at that time, but that Parrish could re-file his petition at any time so long as he provided support for his grounds. This appeal follows. Additional facts are included in the discussion as necessary.

DISCUSSION

¶10 Parrish argues on appeal that he requested and was entitled to an independent examination prior to the court’s evaluation of his petition. He also argues that the change in his diagnosis was sufficient to entitle him to a hearing on his petition. We disagree.

¶11 WISCONSIN STAT. ch. 980 “provides a process for the civil commitment of persons, previously convicted of a sexually violent offense, who currently suffer from a mental disorder that predisposes them to repeat such acts.” *State v. Kaminski*, 2009 WI App 175, ¶11, 322 Wis. 2d 653, 777 N.W.2d 654 (citation omitted; one set of quotation marks omitted). Once committed to the custody of the DHS, “an individual’s primary procedural protections are established by WIS. STAT. §§ 980.07 and 980.09.” *State v. Beyer*, 2006 WI 2, ¶11, 287 Wis. 2d 1, 707 N.W.2d 509.

¶12 WISCONSIN STAT. § 980.07(1) provides that committed individuals are to undergo an annual mental examination conducted by a department examiner and also provides the individual with the right to request a court-appointed independent examiner. Such requests must be made at the time of the department-conducted annual examination. The statute provides in relevant part:

If a person is committed under s. 980.06 and has not been discharged under s. 980.09(4), the department shall appoint an examiner to conduct a reexamination of the person’s mental condition within 12 months after the date of the initial commitment order under s. 980.06 and again thereafter at least once each 12 months 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. ... *At the time of a reexamination under this section, the person who has been committed may retain or have the court appoint an examiner as provided under s. 980.031 (3).*

(Emphasis added.)

¶13 Committed individuals may petition the committing court for discharge at any time. *See* WIS. STAT. § 980.09. Petitions must be denied 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.” *Id. See State v. Arends*, 2010 WI 46, ¶30, 325 Wis. 2d 1, 784 N.W.2d 513.

A. The Trial Court did not Prematurely Dismiss Parrish’s Petition.

¶14 Parrish contends that the trial court prematurely dismissed his petition for discharge even though he requested and was entitled to a court-appointed examiner prior to an evaluation of his petition. Because we find Parrish’s request equivocal and untimely, we disagree.

¶15 Parrish’s first mention of an independent examination came on September 17, 2009, at the hearing on the State’s motion to dismiss the petition. However, his statements cannot be construed as an unequivocal request for a court-appointed examiner. Parrish, who appeared by video, and his counsel had the following exchange at the hearing:

Attorney: I guess I will ask Mr. Parrish to address some of this, but I have not asked that the Court appoint a doctor to examine Mr. Parrish because my understanding is that he does not want a doctor to examine him as far as our support of the petition if we can get it from an expert. So that’s why nothing has been requested at this point.

Court: I guess if he doesn’t want a doctor to evaluate him, then we don’t get to go any further.

....

Parrish: Yeah. You know, your honor, first of all, I do have a doctor to appoint to be examining me, his name is Michael B. First. I have talked to him on the phone and I have written to him.

....

Parrish: I talked to a doctor on the phone last week, Michael B. First, that is willing to be my expert.

....

Parrish: If you review my file, I was committed with several diagnosis. I am no longer suffering from any of them diagnosis... And I got support behind me, the head doctor, Mike B. First, in New York. I talked to him on the phone, I wrote him a letter.

¶16 Parrish’s statements do not affirmatively ask the court to appoint an independent examiner, nor did his counsel’s, as his counsel was apparently under the impression that Parrish was not going to make such a request at all. Parrish’s statements seem to imply that he may have retained Dr. First himself and are unclear with regard to whether he was requesting that the court appoint an examiner for him.

¶17 Even if we consider Parrish’s statements at the hearing as a request for an independent examination, his request was woefully late. While WIS. STAT. § 980.07 does allow petitioners the right to request independent examinations by court-appointed examiners, such a request should be made “[a]t the time of a reexamination.” *Id.* Parrish’s annual reexamination report was filed by Dr. Barahal on April 30, 2009. In February 2009, Parrish received a form prepared by the DHS on which he could request the appointment of counsel and/or an examiner. Parrish, who had been committed since 2000 and who had previously requested an independent examiner on the form, did not sign the February 2009 form. Parrish had also filed a written request for an independent examiner with

the court in 2007. The record demonstrates that Parrish knew the process for making examination requests. However, Parrish made no request for an independent examination until the hearing on September 17, 2009. There is no evidence in the record that Parrish requested an independent examiner at or about the time of the reexamination, as required by § 980.07. See *State v. Thayer*, 2001 WI App 51, ¶15, 241 Wis. 2d 417, 626 N.W.2d 811.

B. Change in Diagnosis.

¶18 Parrish also argues that the trial court erred in dismissing the petition because the allegation of a change of diagnosis was sufficient to warrant a hearing on Parrish's discharge petition. We disagree.

¶19 Parrish's initial diagnosis of two qualifying mental disorders for WIS. STAT. ch. 980 purposes were: (1) borderline personality disorder; and (2) antisocial personality disorder. Parrish's 2009 evaluation by Dr. Barahal indicated only one qualifying disorder: antisocial personality disorder. Parrish contends that this change in diagnosis was sufficient to survive dismissal of his petition. He is mistaken.

¶20 WISCONSIN STAT. § 980.09 requires not merely that the mental disorder diagnosed is changed, but also that there are facts from which a jury could conclude that "the person does not meet the criteria for commitment as a sexually violent person." *Id.* Dr. Barahal's report does not provide facts which support the conclusion that Parrish no longer meets the criteria for commitment as a sexually violent person. Specifically, Dr. Barahal states:

It is my opinion to a reasonable degree of psychological certainty that Mr. Parrish is diagnosed with Antisocial Personality Disorder, which is an acquired or congenital mental disorder, affects his emotional or

volitional capacity, and predisposes him to commit sexually violent acts as defined by Chapter 980.

....

It is my opinion to a reasonable degree of psychological certainty that Mr. Parrish does not meet criteria for supervised release under Chapter 980.07(4).

It is also my opinion to a reasonable degree of psychological certainty that Mr. Parrish is still “more likely than not” to commit sexually violent acts.

Therefore, I am recommending that the court not consider Mr. Parrish for supervised release or discharge.

¶21 Our supreme court recently clarified the process trial courts are to employ in determining whether an individual committed under WIS. STAT. ch. 980 should get a hearing after filing a petition for discharge. In *Arends*, the court held that under WIS. STAT. § 980.09(1), trial courts are to engage in a “paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.” *Id.*, 325 Wis. 2d 1, ¶4. If the petition alleges sufficient facts, the trial court proceeds to a review under WIS. STAT. § 980.09(2), which requires the court to review the items listed in the subsection, including all reports filed under § 980.07. *Arends*, 325 Wis. 2d 1, ¶5; *see also* WIS. STAT. § 980.09(2). The trial court’s ruling is consistent with *Arends*.

¶22 Parrish’s petition for discharge is based entirely on his change of diagnosis; Dr. Barahal’s report establishes a changed diagnosis, but the remaining diagnosis does not preclude a finding of sexual violence. In addition, Dr. Barahal indicates that Parrish remains “more likely than not” to commit sexually violent acts. The petition does not otherwise allege facts from which a trier of fact could conclude that Parrish no longer meets the criteria for commitment as a sexually

violent person. The trial court correctly found that no support for the discharge petition existed.

CONCLUSION

¶23 For all the foregoing reasons we conclude that the trial court did not err in dismissing Parrish's petition for discharge.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

