COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2331 **Cir. Ct. No. 1994CF194**

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

IN RE THE COMMITMENT OF JOSEPH A. PRELLWITZ:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOSEPH A. PRELLWITZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Joseph A. Prellwitz appeals from an order denying his petition for discharge from his commitment as a sexually violent person under

WIS. STAT. ch. 980 (2009-10).[1] The issue is whether the report of an independent examiner entitled Prellwitz to a full discharge hearing. We conclude that even considering the report's new and lower Static-99R score, no reasonable fact finder could find that Prellwitz is no longer a sexually violent person. We affirm the trial court's order dismissing the discharge petition without a hearing.

¶2 Prellwitz's criminal record includes convictions for sexually assaulting three young girls ranging in age from three months to eleven years old. Following a jury trial in 1994, Prellwitz was committed as a sexually violent person under WIS. STAT. ch. 980. In February of 2010, Dr. William A. Merrick completed an annual reexamination report under WIS. STAT. § 980.07 and concluded to a reasonable degree of psychological certainty that Prellwitz remained more likely than not to reoffend. Merrick's conclusion was based on Prellwitz's actuarial test scores and his dynamic risk factors. Merrick's report diagnosed Prellwitz with pedophilia and antisocial personality disorder and assigned a score of six on the Static-99,[2] which corresponded to a recidivism rate of twenty-two percent within five years and thirty-two percent within ten years. Merrick concluded:

> Mr. Prellwitz has not made changes in those dynamic risk factors that could potentially lower his risk of future violent sex offending as reflected by the actuarial instruments, and the combination of high psychopathy and sexual deviance increases his risk over that reflected by the actuarial measures alone. Therefore, Mr. Prellwitz's lifetime risk of committing another violent sexual offense over the course

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

[2] The Static-99 relies on an offender's static historical information to assign a score between zero and twelve, with twelve representing the highest risk. The offender's score is compared with a sample group and the offender is assigned a predicted recidivism rate based on the known recidivism rates of group members with the same score.

> of his lifetime exceeds the standard of "more likely than not."

¶3 Prellwitz filed a pro se petition for discharge and the trial court appointed Dr. Hollida Wakefield to perform an independent examination. Like Merrick, Wakefield diagnosed Prellwitz with pedophilia and antisocial personality disorder and stated that this combination predisposed Prellwitz to committing sexually violent acts and made it especially difficult for Prellwitz to control his behavior. Wakefield and Merrick both reported that Prellwitz had made little to no progress in treatment. However with regard to actuarial testing, Wakefield used a revised version of the Static-99, known as the Static-99R. Wakefield's report explained that according to new research, the original Static-99 may have overestimated risk by failing to properly account for an offender's age. Using the Static-99R, Prellwitz scored a five due to his age. Based on this one-point reduction, Wakefield concluded that Prellwitz was "not more likely than not to sexually reoffend" and recommended discharge. Wakefield did not assert that her opinion was to any particular degree of certainty.

¶4 The court held a hearing under WIS. STAT. § 980.09(2) to determine whether Prellwitz's petition was sufficient to entitle him to a discharge hearing. Based on the arguments of counsel, the reexamination reports, and the record as a whole, the trial court concluded that the Wakefield report did not compel a discharge hearing because "there is not sufficient evidence such that a reasonable finder of fact could find that the respondent is no longer a sexually violent person."

¶5 An offender who is committed as a sexually violent person under WIS. STAT. ch. 980 may petition the trial court for discharge at any time under WIS. STAT. § 980.09(1).[3] In order to obtain a discharge hearing, the petitioner must demonstrate a factual basis "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." Sec. 980.09(1). The petition may be based on a change in the professional knowledge and research used to evaluate that person's mental disorder or dangerousness. *See* ***State v. Ermers***, 2011 WI App 113, ¶1, 336 Wis. 2d 451, 802 N.W.2d 540; *see also* ***State v. Pocan***, 2003 WI App 233, ¶12, 267 Wis. 2d 953, 671 N.W.2d 860.

¶6 The trial court engages in a two-step process to determine whether a petitioner is entitled to a discharge hearing. First, the court engages in a paper review of the discharge petition and any attachments. The purpose of this first step is "to weed out meritless and unsupported petitions." ***State v. Arends***, 2010 WI 46, ¶28, 325 Wis. 2d 1, 784 N.W.2d 513. If the petition alleges sufficient facts, then the trial court proceeds to a review of the record under § 980.09(2). ***Arends***, 325 Wis. 2d 1, ¶30.

¶7 WISCONSIN STAT. § 980.09(2) directs the court to consider evidence other than the petition in deciding whether sufficient facts would allow the fact finder to conclude that the person does not meet the commitment criteria. The court must consider: (1) any current and past reexamination reports or treatment

[3] While the first subsection of WIS. STAT. § 980.09 is not numbered, the next subsection is listed as § 980.09(2). We will therefore refer to the first section of § 980.09 as § 980.09(1). *See* ***State v. Arends***, 2010 WI 46, ¶23 n.16, 325 Wis. 2d 1, 784 N.W.2d 513.

progress reports filed under WIS. STAT. § 980.07, (2) relevant facts in the petition and in the State's written response, (3) arguments of counsel, and (4) any supporting documentation provided by the person or the State. *See* § 980.09(2). If, after this second step, the trial court determines that a fact finder could conclude that an offender no longer meets the commitment criteria, the offender is entitled to a discharge hearing. ***Arends***, 325 Wis. 2d 1, ¶43. The task of the trial judge is not to "weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner," but to determine "whether the enumerated items contain facts that would allow a factfinder to grant relief for the petitioner." ***Id.***, ¶40.

¶8 Resolving whether Prellwitz was entitled to a discharge hearing requires us to determine whether any reasonable fact finder could find that Prellwitz is no longer a sexually violent person. The application of facts to a legal standard is a question of law subject to independent review. *See* ***State v. Thayer***, 2001 WI App 51, ¶22, 241 Wis. 2d 417, 626 N.W.2d 811.

¶9 Prellwitz argues that Wakefield's report is based on new research and that relying on her lower actuarial score, a fact finder could find he no longer meets the criteria for commitment. We agree with Prellwitz that Wakefield's report was based on new scientific research not available at the time of his original commitment hearing, and that based on this new research and Prellwitz's age, his

Static-99R score is reduced by one point.[4] However, the relevant question is not simply whether there exists new research lowering Prellwitz's actuarial score. Rather, Prellwitz must allege a material change such that a reasonable fact finder could find he no longer meets the commitment criteria. *See* ***Ermers***, 336 Wis. 2d 451, ¶1 (a change in professional knowledge and research may support a petition for discharge "*if the change is such that a fact finder could conclude the person does not meet the criteria for a sexually violent person*" (emphasis added)). We agree with the trial court that even with the inclusion of Wakefield's report, no reasonable fact finder could find that Prellwitz does not meet the criteria for commitment as a sexually violent person.

¶10 The Merrick and Wakefield reports are remarkably similar. Prellwitz's background information is undisputed. Like Merrick, Wakefield reports that Prellwitz suffers from two mental disorders that, in her words, "predispose him toward committing a sexually violent act as defined by Chapter 980 and represent serious difficulty in controlling his behavior." Both evaluators report that since his commitment in 1994, Prellwitz has not significantly progressed in sex offender treatment and has yet to complete even the first institutional phase of treatment.

[4] At Prellwitz's original commitment hearing, there was no evidence of actuarial scores presented to the jury. The testifying experts concluded that Prellwitz was likely to reoffend due to his various diagnoses and a myriad of risk factors, such as the nature and number of his offenses. Over the years, evaluations relying in part on actuarial testing have served as the basis to continue Prellwitz's original commitment and to deny discharge petitions. Therefore, we will accept that Wakefield's evaluation with its application of the Static-99R to Prellwitz qualifies as new research that might constitute a change under WIS. STAT. § 980.09. *See* ***State v. Pocan***, 2003 WI App 233, ¶¶4, 11-14, 267 Wis. 2d 953, 671 N.W.2d 860 (expert evaluation which recommended discharge based on actuarial tools not available at the time of the original commitment hearing was sufficient to entitle petitioner to further review at probable cause hearing).

¶11 Both reports discuss the same dynamic risk factors, which Wakefield labels as follows: (1) sexual interest and preoccupations, (2) distorted attitudes, (3) socio-affective functioning, (4) self-management, and (5) noncompliance with supervision. Both evaluators make substantially similar findings and report that Prellwitz has made little to no progress in these areas. With regard to sexual interest/preoccupations and distorted attitudes, Wakefield notes that Prellwitz "has a long history of sexual preoccupation, beginning at age 11," as well as a record of repeated inappropriate sexual behavior with a variety of different-aged children. Wakefield concludes that she is unable to assess whether this has improved "since it hasn't yet been addressed in treatment and he minimizes or denies these behaviors." Wakefield states that Prellwitz's distorted attitudes contributed to his offenses. She notes a recent treatment report stating that "he seems to believe that if he isn't caught for breaking rules, it's not a problem." Wakefield's assessment supports Merrick's explicit conclusion that Prellwitz "has not made any progress in [either] dynamic factor."

¶12 With regard to Prellwitz's socio-affective functioning and self-management, Wakefield reports longstanding difficulties in both areas. She acknowledges Prellwitz's "long history of self-management problems that are continuing" and that Prellwitz has had "12 Behavior Disposition reports in the last year." Similarly, with regard to his ability to comply with supervision, she reports that Prellwitz "has difficulty following the unit rules, is often disrespectful to the staff, and has problems taking redirection. He is likely to have problems with supervision." Again, Wakefield's report supports Merrick's express conclusions that Prellwitz has made little progress in these areas.

¶13 Both reports also discuss the limited utility of actuarial risk instruments. Wakefield herself acknowledges that actuarials have only "modest

accuracy" and that because they can only tell to which risk group an offender belongs, they "don't permit an evaluator to make a numerical prediction of a given *individual's* level of risk." Wakefield also reports that there is a large variability across the sample groups used for comparison such that Prellwitz's score of "five" correlates with a ten-year recidivism rate of anywhere between ten percent and thirty-five percent. Like Merrick, Wakefield states that "[d]ynamic factors, such as criminal attitudes and treatment progress, are potentially changeable" and "can modify the prediction."

¶14 As to their use of actuarial instruments, the reports differ in that Merrick used two tests and assigned a score of six on the Static-99. Wakefield used only the Static-99R and assigned a score of five. This change is insignificant on the facts of this case. Wakefield never says how she arrived at a five or which comparison group she used in order to conclude that Prellwitz is not likely to reoffend. Using the recommendations of the Static-99R authors, the same authors whose research Wakefield relies on to advocate for using the revised test, Prellwitz's lower score of five assigns him to a group with a ten-year recidivism rate of thirty-five percent, a *higher* number than in Merrick's report. Even using the overall group for comparison, a score of five correlates to a ten-year recidivism rate of twenty-five percent which is lower but not radically different from Merrick's number. Further, all of these predictions underestimate risk in that they predict over ten years rather than an offender's lifetime, which is the standard for commitment. Additionally, the original jury committed Prellwitz without reference to static tables. The original commitment was based on Prellwitz's diagnoses and historical information about his background, offenses, and attitudes. None of this has changed.

¶15 More importantly, although Wakefield's report provides a number, it fails to tie any other relevant information into its conclusion. Wakefield reports that Prellwitz's diagnoses put him at a high risk of reoffense and that he has made little to no progress in treatment and is difficult to supervise. Her conclusion that Prellwitz is not likely to reoffend rests solely on a one-point reduction in a twelve-point scale using a single actuarial test. Her conclusion is also immediately qualified by the recommendations in her report: "However, he is unlikely to be capable of functioning independently. If the court should find he no longer is a sexually violent person, his needs would be better served if he were given a period of supervision before he is released to the community." There is a disconnect between the substance of Wakefield's report and her ultimate opinion supporting discharge.

¶16 Prellwitz argues that the trial court improperly weighed the credibility of the expert reports in denying a full discharge hearing. We disagree. The trial court considered Wakefield's opinion in the context of the other information presented in her report, such as Prellwitz's high-risk diagnosis and lack of treatment progress. Looking at the report as a whole, the court noted that in order to arrive at her favorable recommendation, Wakefield placed "a tremendous emphasis on the research project" rather than on Prellwitz himself. The trial court's comment supports its conclusion that the one-point actuarial reduction is an insufficient factual basis on which to find that Prellwitz no longer meets the commitment criteria.

¶17 In sum, on the facts of this case, no reasonable fact finder could conclude that a one-point change in Prellwitz's actuarial score renders him unsuitable for commitment as a sexually violent person. Merrick and Wakefield both report that Prellwitz's combination of pedophilia and high psychopathy place

him at a high risk of reoffense, he has made little to no progress in treatment, his dynamic risk factors have not improved, and he is difficult to supervise. Wakefield's opinion was qualified by and inconsistent with the terms of her own report and was based on statistics not significantly different from those offered by Merrick. The trial court properly denied Prellwitz's discharge petition without requiring a hearing.

By the Court.—Order affirmed.

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