



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 12, 2014

To:

Hon. Richard J. Nuss
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy St.
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy St.
Fond du Lac, WI 54935

Leonard D. Kachinsky
Sisson & Kachinsky Law Offices
103 W. College Ave., #1010
Appleton, WI 54911-5782

Eric Toney
District Attorney
Fond du Lac County
160 South Macy St.
Fond du Lac, WI 54935

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2013AP1200-CR

State of Wisconsin v. James Broeders (L.C. #2007CI1)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

James Broeders' petition for discharge from his commitment as a sexually violent person (SVP) was denied without a hearing. His motion for reconsideration also was summarily denied. Broeders appeals the order denying reconsideration on grounds that the trial court erroneously concluded that he presented insufficient evidence from which the court or a jury could find that

he no longer met the SVP criteria. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

Broeders was committed in 2007 as an SVP after a jury trial. He has had yearly reexaminations since that time. Broeders' 2009 discharge petition initially was denied without a hearing. For reasons not germane to this appeal, a jury trial ultimately was held on the petition in March 2012. It again was denied. This court affirmed the denial in a no-merit appeal.

Broeders filed a pro se petition for discharge after his September 2012 reevaluation. The examiner, Dr. William A. Schmitt, Ph.D., concluded that Broeders was more likely than not to reoffend and still would be so in fifteen to twenty years. Schmitt reached that conclusion by extrapolating from the usual five- and ten-year values to predict Broeders' long-term recidivism risk. The circuit court denied Broeders' pro se petition without a hearing.²

Newly appointed counsel then filed a motion for reconsideration alleging that the court's "primar[y], if not sole[]" reliance on Schmitt's report constituted a manifest error of law. Counsel attached a 2011 article authored by psychologists Richard Wollert and Elliot Cramer criticizing extrapolation as scientifically unsound. The motion was summarily denied. Broeders appeals only the denial of the motion for reconsideration.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Broeders concedes that the "procedural irregularit[y]" of the court denying his pro se petition before counsel was appointed was rendered harmless and moot because counsel was appointed shortly thereafter. While counsel filed only a motion for reconsideration, he was not foreclosed from requesting an independent evaluation and filing a new petition. *See* WIS. STAT. §§ 980.031(3), 980.09(1).

In reviewing a circuit court's decision on a motion for reconsideration, we apply the erroneous exercise of discretion standard. *State v. Kennedy*, 2008 WI App 186, ¶21, 315 Wis. 2d 507, 762 N.W.2d 412. The court properly exercises its discretion if it examines the pertinent facts, applies the correct legal standard, and employs a rational process to reach a reasonable conclusion. *Id.*

To prevail on a motion for reconsideration, a petitioner must establish either newly discovered evidence or a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. Broeders does not allege manifest error on appeal. To earn a discharge hearing, therefore, he must set forth “new evidence—[a] new fact, new professional knowledge, or new research—not considered by a prior trier of fact, [from] which a reasonable trier of fact could conclude that the petitioner currently does not qualify for commitment under WIS. STAT. ch. 980.” *State v. Schulpius*, 2012 WI App 134, ¶36, 345 Wis. 2d 351, 825 N.W.2d 311.

Broeders asserts that the Wollert and Cramer research article discrediting extrapolation was not previously considered as to him. The record shows otherwise. Indeed, Broeders' own expert testified at the March 2012 discharge trial about extrapolating beyond the ten-year mark generally and about the Wollert and Cramer article specifically. One of the State's witnesses, a psychologist who examined Broeders at several of his annual reevaluations, also testified that he was aware of the article from a staffing reviewing new research. Broeders did not establish new evidence. The circuit court therefore did not erroneously exercise its discretion by summarily denying his motion for reconsideration.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals