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 IV

October 19, 2015

To:

Hon. Sarah B. O'Brien
Circuit Court Judge, Br 16
Dane County Courthouse
215 South Hamilton, Rm. 6105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

David R. Karpe
Karpe Law Office
448 W. Washington Ave.
Madison, WI 53703

Daniel J. O'Brien
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ismael R. Ozanne
District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Anthony C. Rios
Asst. State Public Defender
P.O. Box 7884
Madison, WI 53707-7884

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

2013AP950 In re the commitment of Thornon F. Talley: State of Wisconsin v. Thornon F. Talley (L.C. # 2004CI1)

Before Lundsten, Higginbotham and Sherman, JJ.

Thornon Talley appeals an order denying his 2012 petition for discharge from his commitment as a sexually violent person.[1] The circuit court denied the petition without a hearing, concluding that the report by Dr. Richard Elwood that Talley relies on in his 2012 petition was not sufficiently different from the report Talley relied on in his 2011 petition that

[1] This appeal was stayed pending disposition of Talley's appeal from the order denying his 2011 petition.

was rejected by a jury. Talley argues that the 2012 report establishes sufficient progress regarding Talley's social and emotional functioning to justify a hearing. Upon our review of the parties' briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[2] We affirm.

Under WIS. STAT. § 980.09(1), the circuit court "shall deny" a discharge petition without an evidentiary hearing unless the petition alleges facts from which the court or jury may conclude that the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits, or since the date of his or her initial commitment order, so that the person no longer meets the criteria for commitment as a sexually violent person. If the petition repeats only the same evidence presented in support of previously unsuccessful discharge petitions, the petition must be summarily denied. *See* ***State v. Kruse***, 2006 WI App 179, ¶¶34-37, 42, 296 Wis. 2d 130, 722 N.W.2d 742. Whether the petition alleges sufficient new facts to justify a hearing is a question of law that we review de novo.[3] *See* ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

The 2012 Elwood report Talley relies on is nearly identical to Dr. Elwood's 2011 report. Dr. Elwood's diagnosis, actuarial risk assessment, and conclusions were the same. The only changes were contained in the portion of the report titled "Dynamic Risk Factors." In the 2011

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] Because we review the issue de novo, we need not decide Talley's alternative argument that the matter should be remanded to the circuit court for consideration of the entire record. At the time the circuit court reached its decision, parts of the record had been transmitted to this court for Talley's previous appeal. This court has access to the entire record and we conclude that, as a matter of law, Talley's petition and supporting report do not raise sufficient facts to distinguish his present condition from the condition described in the 2011 petition.

report, Dr. Elwood reported that Talley had, in the prior six months, received four behavior disposition reports for failure to follow the rules, disrespect and sexual contact, disruptive behavior, and failure to follow staff directives. Talley also received six warnings for minor incidents. In the 2012 report, Dr. Elwood noted that, in the prior twelve months, Talley received nine behavior disposition reports—five for failing to follow directions and four for disruptive conduct. We reject Talley's argument that the absence of sexual misconduct in the 2012 report constitutes a significant change.[4] In this section of the 2012 report, Dr. Elwood himself concluded: "I concluded that Mr. Talley has not reduced his risk on this factor."

Talley relies substantially on Dr. Elwood's statement that Talley "made recent progress to reduce his risk" based on a change to his social and emotional functioning. In the 2011 report, Dr. Elwood noted: "Mr. Talley told me he tends to isolate at [Wisconsin Resource Center] but socializes with two friends and regularly corresponds with his family ...." In the 2012 report, Dr. Elwood reported: "Mr. Talley told me he tends to isolate at [Sand Ridge Secure Treatment Center] but has begun to socialize more with peers in his treatment group and joined a fitness group …. He has not had a family member visit him in the last three years … but he said his [sic] more members of his family have recently began communicating with him …." Although Dr. Elwood described these changes as "progress to reduce his risk on this factor," we conclude that Talley's self-reporting that he has begun socializing with more peers and joined the fitness

[4] Although Talley mentioned the absence of sexual misconduct disposition reports in his brief-in-chief, he did not develop the argument until he filed his reply brief. Generally this court does not consider undeveloped arguments or arguments raised for the first time in a reply brief. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). Nonetheless, we address the argument because we conclude it is meritless.

group, and that he continues to correspond with some unknown number of family members, does not constitute a significant change from the facts that the jury rejected in the 2011 petition.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals