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DISTRICT II

May 25, 2016

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

2015AP521 In re the commitment of Roger L. Eternicka:
State of Wisconsin v. Roger L. Eternicka (L.C. #2002CI1)

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

Roger L. Eternicka appeals an order denying his petition for discharge from his WIS. STAT. ch. 980 (2013-14)[1] commitment as a sexually violent person (SVP). He contends the State failed to present sufficient evidence to deny his discharge petition. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21.

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

Eternicka was committed as an SVP in 2003. Trial on his petition for discharge was to the court. The State presented the testimony of Cynthia L. Marsh, Ph.D., who evaluated Eternicka first in 2002 for his civil commitment proceeding and again in 2012 in regard to his discharge petition. Eternicka's essential argument is that Dr. Marsh's analysis and ultimate conclusions were not credible.

The State bears the burden of proving by clear and convincing evidence that the petitioner still meets the criteria for commitment as an SVP. WIS. STAT. § 980.09(3). While it would have had to show that Eternicka (1) had a prior conviction for a sexually violent offense, (2) a mental disorder that predisposed him to commit sexually violent offenses, and (3) was more likely than not to reoffend, *see* WIS. STAT. § 980.01(7) and WIS JI-CRIMINAL 2502, only the third criterion was in dispute here.

In reviewing the sufficiency of the evidence in a ch. 980 matter, we give deference to the trial court's assessment of the credibility of witnesses and evaluation of the evidence. ***State v. Brown***, 2005 WI 29, ¶46, 279 Wis. 2d 102, 693 N.W.2d 715. We will not set aside the denial of a discharge petition unless the evidence, viewed most favorably to the State, is so lacking in probative value that no reasonable trier of fact could have found the burden of proof to have been satisfied. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 434-35, 597 N.W.2d 712 (1999). We do not substitute our judgment for the fact finder's unless the evidence is inherently or patently incredible. *See* ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

The evidence, viewed most favorably to the State, included Eternicka's Antisocial Personality Disorder diagnosis; Dr. Marsh's expert opinion that Eternicka's diagnosis and high psychopathy and actuarial scores made him dangerous; his physically and verbally violent sexual

offense history; his failure to successfully complete a term of community supervision; his recent violent threats to staff and other patients; his own admissions that he remained unchanged and that he was simply "playing the game" in terms of completing his sex offender treatment; and Dr. Marsh's conclusion that she believed there is "at least a 51 percent chance" that Eternicka would reoffend in the future. The court expressly found Eternicka's two experts less credible, in part because one held "concerning" opinions on sexual violence, and the other based her assessment of Eternicka on a polygraph result, despite polygraphs' "scanty and scientifically weak" evidence of reliability.

The court was not obliged to accept the testimonies of Eternicka's experts. *See* ***State v. Wenk***, 2001 WI App 268, ¶9, 248 Wis. 2d 714, 637 N.W.2d 417. Expert testimony still must "pass through the screen of the fact trier's judgment of credibility." ***Pautz v. State***, 64 Wis. 2d 469, 476, 219 N.W.2d 327 (1974) (citation omitted). The evidence on which the court relied in denying Eternicka's petition for discharge from his commitment is not inherently or patently incredible. Therefore,

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