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April 19, 2019

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

2018AP798-NM In re the commitment of Matthew Tyler:
State of Wisconsin v. Matthew Tyler (L.C. # 2008CI5)

Before Kessler, P.J., Brennan and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Matthew Tyler appeals an order that denied his petition for discharge from commitment as a sexually violent person without allowing him a trial. Attorney Jeffrey W. Jensen filed a no-merit report, Tyler filed two responses, and Attorney Jensen file a supplemental no-merit report.

See WIS. STAT. RULE 809.32 (2017-18).[1] Upon review of the reports, the responses, and the record, we conclude that Tyler could pursue an arguably meritorious challenge to the circuit court's decision denying him a trial. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for filing a postdisposition motion or notice of appeal.

Tyler is in the custody of the Department of Health Services pursuant to his 2010 commitment as a sexually violent person. *See* WIS. STAT. ch. 980. He did not prevail in a 2015 discharge trial. Pursuant to WIS. STAT. § 980.07, the Department must conduct an annual re-examination to determine whether a committed person meets the criteria for supervised release or discharge. The Department appointed Dr. Donn R. Kolbeck to conduct an annual review, examine Tyler, and determine whether the circuit court should consider whether he should be placed on supervised release or discharged.[2] Dr. Kolbeck filed a report on February 28, 2016, concluding that Tyler did not meet the criteria for supervised release but, as to discharge, he was "below the legal threshold of 'more likely than not' that he will commit another sexually violent offense."

Additionally, the circuit court appointed Dr. David Thornton to examine Tyler pursuant to WIS. STAT. § 980.031. Dr. Thornton prepared a report, dated November 2, 2016, concluding that Tyler "no longer meets the legal criteria for continued commitment as a sexually violent person under chapter 980 and therefore he meets the criteria for being discharged from his

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The date of appointment is not in the record. The record indicates, however, that the review period spans from the end of January 2015 through February 26, 2016.

commitment" because: (1) "the available evidence indicates that [Tyler's] disorders are currently in remission so that it is no longer possible to affirm to a reasonable degree of psychological certainty that they impair his emotional and volitional capacity in a way that predisposes him to new acts of sexual violence"; and (2) "Tyler's lifetime risk for new acts of sexual violence if discharged is now estimated as being under 20%" and therefore "the level of risk he now presents is well below the 'more likely than not' threshold."

Tyler petitioned for discharge pursuant to WIS. STAT. § 980.09, relying on the reports prepared by Dr. Kolbeck and Dr. Thornton. Tyler contended that, as required, he had presented "new evidence, not previously considered by a prior trier of fact." *See* ***State v. Schulpius***, 2012 WI App 134, ¶4, 345 Wis. 2d 351, 825 N.W.2d 311. He stated that Dr. Kolbeck had scored Tyler's risk of reoffending using an actuarial instrument, the Static 2002-R, not used by any previous examiner and which predicted a ten-year recidivism rate of 17.2 percent. Further, said Tyler, Dr. Thornton used the "Tanner stages of development to offer an in-depth analysis of any paraphilia diagnosis, something not done by previous examiners," and Dr. Thornton, unlike any previous examiner, "used the SRA-FV instrument as an objective instrument validating the decision to assign Mr. Tyler to the Routine norms when scoring the Static 99-R. Using the Routine norms for the Static-99R, Dr. Thornton concludes that Mr. Tyler's risk is 'certainly below 20%.'" Moreover, unlike any previous examiner, Dr. Thornton opined that Tyler's mental disorders are in remission, based on Tyler's behavior over time.

The circuit court rejected Tyler's claim. The circuit court concluded that the petition and supporting materials that Tyler presented were insufficient to earn him a discharge trial.

As Jensen correctly notes in the no-merit report, Tyler is not entitled to a trial unless he brings forth "something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent." *See* ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684; *see also* ***Schulpius***, 345 Wis. 2d 351, ¶¶35, 40 (expert opinion must be based on new fact about committed person, new professional knowledge, or new research). Jensen goes on to assert that the experts' reports on which Tyler relies "do not appear to be based upon any new factors." In Jensen's view, "Dr. Thornton's opinion was based on the fact that Tyler has not reoffended in a number of years; however, that fact was known during the 2015 trial." Jensen does not assess the basis for Dr. Kolbeck's conclusions in either the no-merit report or the supplemental no-merit report.[3]

We recently concluded—and the State did not dispute—that an expert opinion was sufficiently "new" when it relied on the application of two actuarial risk instruments that experts had not considered at the time of a committed person's original trial, coupled with changes in the person following his commitment. *See* ***State v. Hager*** (***Hager I***), 2017 WI App 8, ¶¶5, 45-46, 373 Wis. 2d 692, 892 N.W.2d 740, *reversed on other grounds*, ***State v. Hager*** (***Hager II***), 2018 WI 40, ¶64, 381 Wis. 2d 74, 911 N.W.2d 17 (holding that this court erred in concluding that circuit courts may consider only evidence favorable to the petitioner when deciding whether an

[3] The only mention of Dr. Kolbeck in either the no-merit report or the supplement is the observation in the former that "Tyler alleged [in his petition] that Dr. Kolbeck believed that Tyler's risk of re-offense was no longer more likely than not."

evidentiary hearing is required to resolve a discharge petition).[4] In light of the content of the expert reports prepared by Drs. Kolbeck and Thornton, summarized above, we conclude that Tyler can make an arguably meritorious claim that the information in the reports is sufficiently "new" as to satisfy ***Combs*** and ***Schulpius***.

We also observe that appellate counsel's no-merit report and supplement do not acknowledge, much less discuss, questions about the mechanics of evaluating any allegedly new information in a discharge petition filed under WIS. STAT. § 980.09. *Compare* ***Hager II***, 381 Wis. 2d 74, ¶31 (Gableman, J., writing for three justices) (stating that under WIS. STAT. § 980.09(2), circuit courts are not allowed to weigh the evidence when assessing a discharge petition because doing so would impermissibly shift the burden of persuasion to the committed person and thereby violate the person's right to due process), *with* ***Hager II***, 381 Wis. 2d 74, ¶77 (Kelly, J., concurring, with one other justice) (stating that circuit courts must weigh the evidence when considering a discharge petition and doing so does not violate the committed person's due process right), *and* ***Hager II***, 381 Wis. 2d 74, ¶84 (Abrahamson, J., dissenting, with one other justice) (indicating that circuit courts are required to weigh the evidence when considering a discharge petition, which renders the procedure for evaluating discharge petitions "constitutionally suspect").

Here, the circuit court opined that Dr. Kolbeck's conclusions would not "have a lot of weight with any ultimate fact finder." As to Dr. Thornton, the circuit court similarly opined that his analyses "don't hold a lot of water," that his conclusions "just would not hold any water,"

[4] "Holdings not specifically reversed on appeal retain precedential value." ***State v. Delebreau***, 2014 WI App 21, ¶14, 352 Wis. 2d 647, 843 N.W.2d 441 (citations omitted).

and that his conclusions are "not going to hold a lot of weight." Accordingly, because a majority of justices in ***Hager II*** apparently concluded that circuit courts may not assess discharge petitions by weighing the evidence, we are satisfied that the record permits an arguably meritorious claim that the circuit court improperly assessed the petition here.

Finally, it appears that Tyler could mount an arguably meritorious claim that it is not clear precisely how the circuit court should assess discharge petitions based on expert reports such as he presented in this case. *Compare* ***Hager II***, 381 Wis. 2d 74, ¶64 (Gableman, J., writing for three justices) ("circuit courts are to carefully examine, but not weigh, those portions of the record they deem helpful to their consideration of the petition"), *with* ***Hager II***, 381 Wis. 2d 74, ¶71 (Kelly, J., concurring) ("[T]he purpose of our examination is to determine what a fact-finder would likely conclude from the evidence of record [but t]he court says nothing about how to conduct this analysis except that we are not to 'weigh' the evidence."), *and* ***Hager II***, 381 Wis. 2d 74, ¶85 (Abrahamson, J., dissenting) ("If the amended statute truly does not necessitate the weighing of the evidence then the majority should better explain how a judge is to accomplish what WIS. STAT. § 980.09 now requires without weighing evidence.").

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988). In light of the foregoing, we must reject the no-merit report filed in this matter.

We add that our obligation to reject the no-merit report for the reasons discussed in this order does not mean we have reached a conclusion about the ultimate merit of an appeal in this matter or about the arguable merit of any other potential issue in the case. Tyler is not precluded from raising any issue in postdisposition proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Tyler, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Tyler or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Tyler to file a postdisposition motion or notice of appeal is extended until forty-five days after the date on which this court receives notice from the state public defender's office advising either that it has appointed new counsel for Tyler or that new counsel will not be appointed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals