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 I

January 31, 2013

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jeffrey W. Jensen
735 W. Wisconsin Ave., 12th Fl.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Jacob J. Wittwer
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:

2011AP2778 In re the commitment of Edward Cotton: State of Wisconsin v. Edward Cotton (L.C. #2002CI4)

Before Curley, P.J., Fine and Brennan, JJ.

Edward Cotton appeals from an order of the circuit court, which dismissed his petition for discharge from his WIS. STAT. ch. 980 commitment as a sexually violent offender. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. The appeal is summarily dismissed as moot.

Cotton was convicted of one count of second-degree sexual assault in 1998 and two counts in 1992. In March 2004, Cotton was ordered committed as a sexually violent person as a result of the State's petition. Cotton petitioned for release on September 30, 2010, following an

annual review by Dr. Richard Elwood. Elwood opined that Cotton was not more likely than not to commit another sexually violent offense.

Following its initial review of the petition and a short hearing, the circuit court determined that Cotton should receive a discharge hearing. The State moved for reconsideration. The circuit court then reversed itself and dismissed Cotton's discharge petition. Cotton appealed by notice dated November 30, 2011.

Meanwhile, Cotton had another annual review, and he petitioned again for discharge on September 8, 2011. The State moved to dismiss the petition, but the circuit court denied that motion and granted a discharge hearing. On June 1, 2012, following a bench trial, the circuit court determined that Cotton was still sexually violent and denied the 2011 discharge petition.

In determining whether to grant a discharge hearing, the circuit court must determine whether there are "facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person." ***State v. Arends***, 2010 WI 46, ¶43, 325 Wis. 2d 1, 21, 784 N.W.2d 513, 523. We have, however, rejected the notion that this standard "may be established by an expert's opinion 'without regard to whether that opinion is based on matters that were already considered by experts testifying at the commitment trial or a prior evidentiary hearing.'" ***State v. Kruse***, 2006 WI App 179, ¶35, 296 Wis. 2d 130, 150, 722 N.W.2d 742, 752 (citation omitted). Thus, a report "based solely on evidence that had already formed the basis for the denial of a previous discharge petition" is insufficient to warrant a hearing on a new discharge petition. *See* ***Arends***, 2010 WI 46, ¶39 n.21, 325 Wis. 2d at 19 n.21, 784 N.W.2d at 522 n.21 (paraphrasing holding of ***Kruse***, 2006 WI App 179, 296 Wis. 2d 130, 722 N.W.2d 742).

Here, Cotton's 2010 and 2011 discharge petitions were both based on reports from Dr. Elwood, and those reports were based on the same facts. Specifically, both discharge petitions alleged: (1) Cotton's score of 5 on the Static 99-R corresponds to the 36% chance of Cotton being charged or convicted of another sex offense within ten years of release; (2) Cotton's score of 8 on the MnSOST-R corresponds to a 54% chance he would be arrested for a physical contact sexual offense within six years of release; (3) Cotton's score of 20 on the PCL-R means that he does not possess a high risk combination of psychopathy and sexual deviance; (4) Cotton's behavior in his institution and progress and treatment were both acceptable enough to reduce his risk of reoffense; and (5) Cotton's completion of sex offender treatment in 1998 substantially reduced his risk of reoffense.

When Cotton received a discharge hearing on his 2011 petition, all of the critical facts of his 2010 petition were necessarily considered. Accordingly, any appeal of the denial of a discharge hearing on the 2010 petition is moot. *See* ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶19, 252 Wis. 2d 404, 418, 643 N.W.2d 515, 523 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). The 2010 petition is based only on evidence that has already formed the basis for denial of the 2011 petition; the outcome of a hearing on the 2010 petition would "not depend upon any fact or professional knowledge or research that was not [already] considered" in the hearing on the 2011 petition. *See* ***State v. Combs***, 2006 WI App 137, ¶35, 295 Wis. 2d 457, 480, 720 N.W.2d 684, 694.[1]

[1] It makes no difference that the resolutions of the 2011 and 2010 petitions are not in chronological order, as it remains a maxim that issues once litigated cannot be relitigated. *See* ***State v. Combs***, 2006 WI App 137, ¶33, 295 Wis. 2d 457, 479, 720 N.W.2d 684, 695; ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

Therefore,

IT IS ORDERED that this appeal is summarily dismissed as moot.

Diane M. Fremgen
Clerk of Court of Appeals