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DISTRICT IV

February 20, 2013

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

2011AP1287-NM In re the commitment of Thornon F. Talley: State of Wisconsin v. Thornon F. Talley (L.C. #2004CI1)

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

Thornon Talley appeals an order that denied his October 12, 2010 petition for discharge from a 2004 commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes. Attorney Jefren Olsen has filed a a no-merit report seeking to withdraw as appellate

counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1]; ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). The no-merit report addresses whether Talley was entitled to a hearing on his petition. Talley was sent a copy of the report, and has filed a response explaining why he believes he should receive a hearing. Upon reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

A person committed under Chapter 980 is entitled to periodic reexamination under WIS. STAT. § 980.07, and may petition the court for discharge at any time. However, the court shall deny a discharge petition without a hearing unless the petition alleges facts from which the court or a jury could conclude that the petitioner's condition has changed since the initial commitment, such that he or she no longer meets the criteria for a sexually violent person—that is, that the subject: (1) committed a sexually violent offense; (2) currently has a mental disorder affecting emotional or volitional capacity and predisposing the subject to engage in acts of sexual violence; and (3) is dangerous because the mental disorder makes it more likely than not that the subject will engage in future acts of sexual violence. WIS. STAT. § 980.09(3); WIS JI—CRIMINAL 2506.

In making its determination as to whether an evidentiary hearing is warranted, the court may consider the facts alleged in the petition and the State's response, any past or current evaluations in the record or other documents provided by the parties, and arguments by counsel.

[1] All further references in this order to the Wisconsin Statutes are to the 2010-11 version, unless otherwise noted.

WIS. STAT. § 980.09(2). This limited paper review to test the sufficiency of the petition is aimed at weeding out meritless or unsupported claims. ***State v. Arends***, 2010 WI 46, ¶¶26-30, 325 Wis. 2d 1, 784 N.W.2d 513.

An expert opinion that the petitioner is no longer sexually violent may provide sufficient grounds to warrant a hearing if based upon "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," such as information about the committed person that did not occur until after the prior adjudication or new professional knowledge about how to predict dangerousness. ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. Put another way, a circuit court can deny a discharge petition based upon a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that lead to the original commitment, but must grant a hearing if the petition alleges any change in either the person himself, or in the professional knowledge or research used to evaluate a person's mental disorder or dangerousness, from which a fact finder could determine that the person does not meet the current criteria for commitment. ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540.

Talley's October 12, 2010 discharge petition was based upon an annual evaluation by Dr. Richard Elwood. Dr. Elwood diagnosed Talley with Antisocial Personality Disorder and Borderline Personality Disorder, both of which Dr. Elwood concluded predisposed Talley to commit sexually violent acts, although Dr. Elwood did not believe, as had prior evaluators, that Talley met the criteria for Paraphilia Not Otherwise Specified.

With regard to dynamic risk factors, Dr. Elwood noted that Talley continued to expose himself and masterbate in view of female staff, and concluded that Talley had not reduced his risk as to self-regulation, social and emotional functioning, modifying attitudes that justify or excuse sexual offending, or completion of a treatment program. Based primarily on Talley's lack of treatment progress, Dr. Elwood concluded that Talley did not satisfy the criteria for supervised release.

With regard to static risk factors, while Dr. Elwood noted that Talley had previously been scored in the moderate to high range of psychopathy, Dr. Elwood did not agree with previous evaluators that Talley's prior offenses clearly demonstrated sexual deviance. Using the Static-99R actuarial instrument, Dr. Elwood assessed Talley's risk of committing another sexual offense at 68% over the ten years following his release. However, because recent studies also indicate that only 0-31% of exhibitionists were also charged for a physical contact sex offense, Dr. Elwood concluded that the actuarial instrument did not show Talley posed a high risk of *violent* sexual recidivism as defined in Chapter 980, and therefore met the criteria for discharge.

The circuit court viewed Dr. Elwood's opinion that Talley presented a high risk of recidivism as an exhibitionist, but not a high risk to commit sexually *violent* offenses, to be in line with the expert opinion presented by Dr. Wakefield at a hearing held in 2009 on a prior discharge petition, which the court had not found persuasive. Similarly, the circuit court had determined during the 2009 discharge proceeding that Talley had the dangerous combination of high psychopathy and sexual deviance, despite a difference of expert opinion on that point. Therefore, the court did not deem Dr. Elwood's conclusion that Talley does not satisfy the criteria of a sexually violent person to be based upon new professional knowledge, but rather

upon a professional disagreement with the expert opinions of a number of the other prior evaluators.

We are satisfied that it was proper for the circuit court to evaluate the evidence as to any change in Talley's condition or professional knowledge since the time of Talley's last discharge hearing. First, Dr. Elwood's analysis of Talley's dynamic factors did not provide any basis for a fact finder to conclude that there had been any change in Talley himself. Second, since the circuit court had already taken evidence and evaluated nearly identical allegations that Talley did not meet the criteria for a sexually violent person based upon new diagnoses or research indicating that his exhibitionism did not demonstrate sexual deviance or predict a high risk of future violent sexual acts, the court was not obligated to hold another hearing on those same issues.

Upon our independent review of the record, we have found no other arguable basis for reversing the order of commitment. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the commitment order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of any further representation of Thornon Talley in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals