COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1810 **Cir. Ct. No. 2003CI2**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

GREGORY JELKS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gregory Jelks appeals from an order denying his 2006 discharge petition, and granting reconsideration and vacating the trial court's prior order that determined there was probable cause to proceed to trial on his 2005 discharge petition. The issue is whether Jelks's discharge petitions

demonstrate probable cause, as interpreted by ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684, which was decided after the trial court's probable cause determination on the 2005 petition, prompting the reconsideration motion and guiding the probable cause determination on the 2006 petition. We conclude that Jelks has not demonstrated that what he characterizes as "new research" is "new"; it is merely a "new way to interpret" the same results, that were in fact used previously and does therefore not constitute probable cause pursuant to ***Combs***. Therefore, we affirm.

¶2 Jelks was found guilty of the second-degree sexual assault of a child that occurred in late 1991. In September of 2003, the State filed a civil commitment petition pursuant to WIS. STAT. § 980.02 (2001-02). At trial, Debra L. Anderson, Ph.D., and Sheila Fields, Ph.D., testified on behalf of the State and Jelks respectively. Dr. Anderson opined that there was a substantial probability that Jelks "will engage in sexually violent behavior in the future." Dr. Anderson's assessment was based on "the results of this evaluation, using actuarial instruments anchored in clinical judgment." The actuarials to which Dr. Anderson referred are the Rapid Risk Assessment for Sexual Offense Recidivism ("RRASOR"), the Static Risk Assessment 99 (known as "Static 99" or "SRA 99"), and the Minnesota Sex Offender Screening Tool-Revised ("MnSOST-R"). In her report, Dr. Anderson commented "that actuarial methods are generally as good as and in some cases better than purely clinical estimates of offender risk." Dr. Fields, testifying on Jelks's behalf, concluded that commitment was not warranted because Jelks was not substantially probable to commit acts of sexual violence. Dr. Fields relied on the RRASOR, the Static 99, the Violence Risk Assessment Guide, the Hare Psychopathy Checklist ("PCL-R"), discussion with staff at the institution where Jelks was residing, a review of the Department of Corrections

records, and previously prepared evaluations by Dr. Anderson and by a Dr. Craig Monroe. Jelks declined to be interviewed by Dr. Fields and she reported that she drew no inferences from his refusal. Dr. Fields explained that her evaluation process was "anchored in actuarials, but also [her] clinical judgment and experiences also weigh[ed] in." The trial court adjudged Jelks a sexually violent person and ordered him committed to the Department of Health and Family Services until he was no longer a sexually violent person.

¶3 A person who is civilly committed pursuant to WIS. STAT. ch. 980 is entitled to periodic (generally annual) reexaminations. WIS. STAT. § 980.07(1).[1] Lori Pierquet, Psy. D., periodically reexamined Jelks, once in 2005, and a year later in 2006. Dr. Pierquet concluded in both 2005 and 2006 that because of Jelks's personality disorder he was "more likely than not" to commit another act of sexual violence.

¶4 Jelks filed a default petition in 2005 for his discharge pursuant to WIS. STAT. § 980.09(2)(a) (2003-04).[2] In support of his 2005 petition, Jelks was examined by William A. Schmitt, Ph.D. Dr. Schmitt concluded that Jelks "generally indicate[d] risk below the 'more likely than not' threshold," or that he "does not meet criteria for civil commitment under Ch. 980." Dr. Schmitt based

[1] The State's original civil commitment petition pursuant to WIS. STAT. ch. 980 was filed in 2003, and the order that Jelks now appeals was entered in 2007. The parties do not dispute the applicable versions of the Wisconsin Statutes. We consequently do not indicate each version of the Wisconsin Statutes that we cite generically as background.

[2] At the relevant times, Jelks received a notice from the Secretary of the Department of Health and Family Services of his right to petition the trial court to discharge him from the WIS. STAT. ch. 980 commitment, despite the Secretary's objection to his discharge at that time. *See* WIS. STAT. § 980.09(2)(a) (2003-04). Jelks would not affirmatively waive his right to petition, consequently, he filed what is known as a default petition. *See* ***id.***

his conclusion on an "extensive file review, two clinical interviews (9/23/05, 9/30/05) … and completion of an actuarial risk assessment and the PCL-R." The parties agreed on January 18, 2006, that Jelks had shown probable cause. A trial was scheduled for May 12, 2006, but was vacated at Jelks's request.

¶5 In 2006, Jelks filed another default petition, and the trial court ordered an evaluation by Patricia Coffey, Ph.D., who concluded that Jelks did not present "a 'more likely than not' risk to recommit a sexually violent act." Dr. Coffey's conclusion was based on a clinical interview in September of 2006, a review of the institutional records and prior WIS. STAT. ch. 980 evaluations, and results from the RRASOR, Static-99 and the PCL-R.

¶6 On June 29, 2006, this court decided ***Combs***, in which we interpreted the threshold determination of what constitutes probable cause to warrant a hearing on whether a person is "still … sexually violent," pursuant to WIS. STAT. § 980.09(2). *See* ***Combs***, 295 Wis. 2d 457, ¶21. In ***Combs***, we held that

> in order to provide a basis for probable cause to believe a person is no longer sexually violent under § 980.09(2), an expert's opinion must depend 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. By way of example, an opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication would meet this standard, as would an opinion based at least in part on new professional knowledge about how to predict dangerousness. These examples are not exhaustive.

Id., ¶32 (footnote omitted). Stated otherwise, ***Combs*** held that a change in the committed person's condition, or "new research" since the person was originally committed is warranted to demonstrate probable cause. Requiring a change in the

person's condition or "new research" "serves the purpose of ensuring that a person who is not sexually violent does not continue in commitment, while avoiding continual relitigation of issues." ***Id.***, ¶33.

¶7 As a result of ***Combs***, the State moved for reconsideration of the earlier probable cause determination. Also before the trial court was Jelks's 2006 discharge petition. The trial court considered these together, and applied the recently decided ***Combs*** standard and ruled that Jelks had not shown "any new data," or "that things occurred since the original determination in applying various risk assessment factors that would also result in a lowering of risk assessment." It is from this order granting the State's reconsideration motion and denying Jelks's 2006 discharge petition, that Jelks appeals.

¶8 Whether the reports of Drs. Schmitt and/or Coffey individually or collectively establish probable cause to believe that Jelks is "no longer a sexually violent person" pursuant to WIS. STAT. § 980.09(2)(b), and entitle Jelks to a hearing on his discharge petitions is a question of law that we review independently of the trial court's decision. *See* ***Combs***, 295 Wis. 2d 457, ¶21. We consequently review the two opinions of Drs. Schmitt and Coffey who support Jelks's discharge petitions.

¶9 Dr. Schmitt's conclusion was based on an "extensive file review, two clinical interviews (9/23/05, 9/30/05) … and completion of an actuarial risk assessment and the PCL-R." Dr. Coffey's conclusion was based on a clinical interview in September of 2006, a review of the institutional records and prior WIS. STAT. ch. 980 evaluations, and results from the RRASOR, Static-99 and the PCL-R.

¶10 Jelks contends that the "new" information in the opinions of Drs. Schmitt and Coffey were their recent (postcommitment) clinical interviews and the "new research," namely that "[a]ctuarial risk instruments were consistently more accurate than unguided clinical opinion in predicting sexual, violent, and general recidivism." Stated otherwise, this "new research" indicates that "[a]t this point in time, only the actuarial instruments are able to provide reliable probability estimates associated with a particular combination of factors." The actuarial tests and the results were essentially the same, although they produced different diagnoses; Jelks claimed that the difference or "new interpretation" was that one should rely on the actuarial instruments more so than the clinical opinions. Other than the recency of the interviews with Jelks, neither Drs. Schmitt nor Coffey expressly claimed that their respective conclusions were based on any significant change in Jelks's condition.

¶11 None of the reports, most notably those of Drs. Schmitt and/or Coffey, establish probable cause as defined in ***Combs***. Each doctor used the same actuarial instruments used in Jelks's original commitment trial, and relied on them more heavily than they did on their clinical opinions. There is nothing "new" about the theory that actuarial tests are more accurate predictors of future recidivism than clinical opinions. *See* ***State v. Kienitz***, 221 Wis. 2d 275, 287-88, 585 N.W.2d 609 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 423, 597 N.W.2d 712 (1999). As a matter of fact, at Jelks's original commitment trial, Dr. Anderson addressed that theory, and Dr. Fields explained that her assessment was "anchored in actuarials," although her "clinical judgment and experiences also weigh[ed] in." Dr. Fields had not interviewed Jelks.

¶12 ***Combs*** seeks to accommodate discharging those who are committed but no longer sexually violent, without continually relitigating or rehashing the

same information at periodic points in time. *See* ***Combs***, 295 Wis. 2d 457, ¶33. Jelks has not established probable cause to proceed to a discharge hearing because he has not presented a significant change in his condition, or demonstrated that there has been "new research"; he claims that the same information should be interpreted differently, although this claimed "new" interpretation was an interpretation addressed at the original commitment hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).