COURT OF APPEALS DECISION DATED AND FILED

June 10, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2843 **Cir. Ct. No. 1994CF1217**

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

IN RE THE COMMITMENT OF RONALD KEITH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RONALD KEITH,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Ronald Keith appeals the order denying his petition for discharge from a Chapter 980 commitment, and an order directing him

to reimburse the county for the cost of a court-appointed mental health expert. We affirm for the reasons discussed below.

¶2 The first issue Keith raises is the sufficiency of the evidence. At a hearing on a petition for discharge, the State bears the burden of proving by clear and convincing evidence that the petitioner still meets the criteria for commitment as a sexually violent person. WIS. STAT. § 980.09(3) (2007-08).[1] That means the State needed to show that Keith had a prior conviction for a sexually violent offense; that he had a mental disorder which predisposed him to commit sexually violent offenses; and that he was more likely than not to reoffend. *See* WIS. STAT. § 980.01(7); WIS JI—CRIMINAL 2502. In reviewing the sufficiency of the evidence in a Chapter 980 matter, we give deference to the circuit 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 court's denial of a discharge petition unless the evidence, viewed most favorably to the State, was so lacking in probative value that no reasonable trier of fact could have found the burden of proof to have been satisfied. ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999) (citations omitted).

¶3 The State produced prior judgments of conviction to establish that Keith had been convicted of four sexually violent offenses. To address the remaining elements, the State presented expert testimony from psychologist Dr. Richard Elwood, who, like other examiners before him, diagnosed Keith with: (1) paraphilia not otherwise specified, sexually attracted to adolescent males, non-

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

exclusive; and (2) personality disorder not otherwise specified with antisocial and narcissistic features. Elwood opined to a reasonable degree of professional certainty that these mental disorders predisposed Keith to commit sexually violent acts, and that it was still more likely than not that he would engage in additional acts of sexual violence if not confined.

¶4 Elwood based his assessment of Keith's risk of reoffending in large part upon three widely used and studied actuarial instruments: the RRASOR, which showed a 73% chance that Keith would be convicted of another sexual offense within 10 years of release; the Static-99, which showed a 52% chance that he would be convicted of another sexual offense within 15 years of release; and the MnSOST, which showed a 54% chance that Keith would be arrested for another sexual offense within 6 years of release. Elwood pointed out that the instruments underestimate the actual risk of reoffending because they are based upon arrest and conviction rates, and sexual assaults often go unreported.

¶5 Elwood considered other factors beyond the actuarial instruments in making his ultimate risk assessment. In addition to the paraphilia and antisocial personality diagnoses, Elwood noted that Keith scored high on the psychopathy scale, which refers to individuals who lack empathy and use charm, manipulation, intimidation or violence to control others and satisfy their own needs, and that he had exhibited a pattern of behavior demonstrating sexual deviance, which persists throughout life. Elwood explained that the combination of psychopathy and sexual deviance is a consistently high predictor of sexual reoffending. Elwood next went through a series of dynamic factors relating to Keith's progress since his commitment, including treatment for sexual deviance, compliance with supervision, lifestyle instability, lack of stable bonding, attitudes that justify or excuse offending and age. Elwood concluded that Keith had not made sufficient

progress in any of those areas to significantly lower his risk. Finally, Elwood explained why he could not attribute Keith's behavior to post-traumatic stress disorder.

¶6 Elwood's testimony covered all of the elements the State needed to prove. Keith contends that the evidence was nonetheless insufficient to satisfy the burden of proof because: (1) Elwood's report and the actuarial scores were based in part upon inaccurate information, and (2) the validity of a paraphilia-NOS diagnosis is not agreed upon in the mental health community. The primary inaccuracies Keith complains about are that Elwood misstated the number of Keith's sexual assault convictions and the ages of his victims. Elwood further argues that the reliance upon inaccurate information and an invalid diagnosis demonstrates a bias toward keeping sexual offenders locked up rather than impartially reviewing the risk factors.

¶7 We note that Elwood clarified several of the inaccuracies Keith complains about on cross-examination and rebuttal. Elwood also explained that index offenses for the purpose of calculating the actuarial scores do not need to be actual convictions; they can include things like revocation offenses. Since Elwood's report included a chart with only four sexual assault convictions, and three other indexed offenses, and Elwood noted that he disregarded one of those other offenses after speaking with Keith, Keith has not shown that Elwood's misstatement at trial that Keith had seven sexual assault convictions actually changed the actuarial scores. In short, the court was made aware of the errors and could take them into account when deciding what weight to give Elwood's testimony. This court does not reconsider what weight to give to conflicting testimony.

¶8 Elwood acknowledged that his diagnoses were not universally accepted, but testified that they were well established in the profession. He similarly acknowledged that there was a difference of opinion in the mental health community as to whether there is any significant correlation between increased age and decreased risk of reoffending. Therefore, again, the trial court was permitted to decide what weight it would give Elwood's diagnoses and assessment of the risk factors. We see nothing in the record that would compel the conclusion that the trial court's determination was the result of bias, as opposed to its view of the relative strength of the opinions before it.

¶9 Next, Keith complains that the circuit court ordered him to reimburse the county for a court appointed medical expert, after Keith's financial situation improved somewhat due to a modest inheritance and the receipt of disability benefits. The independent examiner was appointed at Keith's request under WIS. STAT. § 980.031(3), which permits the costs to be charged to the county "[i]f the person is indigent." Here, the problem is that Keith was indigent at the time the appointment was made, but lost his indigency status during the pendency of his discharge petition. We are persuaded by the State's analogy to situations in which the county may seek reimbursement for the appointment of counsel in criminal cases, where the defendant is later found to be nonindigent. The authority cited by Keith is not on point because it deals with different sections of the statutes. We therefore conclude that the reimbursement order was proper, particularly since it took Keith's actual financial situation into account by requiring he pay only $50 per month toward the bill.

By the Court.—Orders affirmed.

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