COURT OF APPEALS DECISION DATED AND FILED

December 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2010AP3134

Cir. Ct. No. 2005CI1

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE COMMITMENT OF KEVIN J. HAEN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEVIN J. HAEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Kevin Haen appeals from a circuit court order denying his WIS. STAT. ch. 980 (2009-10)[1] petition for discharge from his

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

commitment as a sexually violent person. Haen argues that he met the discharge criteria. We disagree and affirm.

¶2 At the WIS. STAT. § 980.09 discharge hearing, the State had "the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." Sec. 980.09(3). The State needed to show that Haen 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. The State had to demonstrate a "nexus between the mental disorder and the individual's dangerousness." ***State v. Laxton***, 2002 WI 82, ¶22, 254 Wis. 2d 185, 647 N.W.2d 784. The nexus may be shown by evidence that "the mental disorder predispose[s] the individual to engage in acts of sexual violence." ***Id.***

¶3 In reviewing the sufficiency of the evidence in a WIS. STAT. ch. 980 proceeding, we defer to the circuit court's assessment of the credibility of witnesses and its evaluation of the evidence. ***State v. Brown***, 2005 WI 29, ¶44, 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 and the commitment, 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).

¶4 In 2006, Haen was committed under WIS. STAT. ch. 980 as a sexually violent person. In July 2009, Dr. Janet Page Hill submitted a report in which she recommended that Haen be discharged from his commitment. In her report, Hill noted that for the duration of his commitment, Haen had declined to participate in the sexually violent person treatment program. Hill considered the results of various risk assessment instruments. Haen scored 3 out of 6 on the Rapid Risk Assessment of Sexual Offense Recidivism (RRASOR), a score "associated with a moderate-high risk for sexually reoffending." He scored 5 out of 12 on the Static-99, a score also "associated with a moderate-high risk for sexually reoffending." He scored 12 on the PCL-R which translated to sexual deviance without a high degree of psychopathy. She noted Haen's diagnoses of pedophilia (attracted to prepubescent females), paraphilia (not otherwise specified), and borderline personality disorder. Hill noted Haen's previously sexually deviant interests and activity, but stated that his current interests and activity could not be ascertained because Haen had declined to participate in treatment. Therefore, Hill opined that Haen had not made substantive progress and his refusal of treatment did not significantly lower his risk relating to his distorted attitudes supportive of sexual offending. He also had not significantly lowered his risks associated with his impaired socio-affective functioning, general self-regulation problems or relevant dynamic risk factors.

¶5 Hill considered the discharge criteria under WIS. STAT. § 980.09(3) and found that there are "facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person." She concluded that Haen's degree of risk was below the legal threshold of "more likely than not" to commit another sexually violent offense after discharge. Hill based this conclusion on "the actuarial findings …, individually potentially protective and aggravating factors, including dynamic risk factors."

¶6 On January 14, 2010, Hill filed an addendum to her 2009 evaluation. Haen had continued to refuse sex offender treatment. Hill employed a revised version of the Static-99, the Static 99-R. On that instrument, Haen scored a 6 (an additional point due to his age), which placed him in a group of sex offenders who showed a forty-two percent rate of sexual re-arrest/reconviction after ten years. Hill opined that Haen's re-evaluated degree of risk was above the legal threshold of "more likely than not" to sexually reoffend upon discharge. Hill opined that Haen should not be discharged.

¶7 The court-appointed independent examiner, Dr. Diane Lytton, reached the opposite conclusion and recommended discharge. Lytton interviewed Haen, who denied any current sexually deviant interests or practices. Haen received individualized therapy, although he did not participate in sex offender treatment. Lytton found that Haen did not have a current mental disorder, although he continued to have symptoms of borderline personality disorder. Even with new scoring under the Static-99R, Haen still did not approach a fifty percent reoffense risk at ten years. Rather, Haen had a thirty percent risk of reoffending. Lytton opined that "current risk assessment based on new research does not support that Mr. Haen's risk is 'more likely than not.'" Therefore, Haen should be discharged from his WIS. STAT. ch. 980 commitment.

¶8 Both psychologists testified at Haen's discharge hearing. The circuit court considered the credibility of the witnesses and found that nothing had changed in the four years since Haen was committed as a sexually violent person. The court placed great weight on Haen's relatively recent commitment and his refusal to participate in sex offender treatment. The court found that Hill's first evaluation, which recommended discharge, followed the then-current research. However, upon re-evaluation, Hill followed and applied newer research and concluded that Haen did not meet the criteria for discharge. In the circuit court's view, Hill's credibility was enhanced because she followed the research.

¶9 The court found that Haen suffers from the mental disorders of pedophilia and borderline personality disorder. The court concluded that the State met its burden to establish by clear, satisfactory and convincing evidence that Haen remains a sexually violent person and is dangerous to others because of his mental disorder, which disorder makes it more likely than not that he would engage in future acts of sexual violence. The court denied Haen's discharge petition, and Haen appeals.

¶10 Haen argues that the evidence was not sufficient to show that he was dangerous due to his mental disorder. We disagree. Hill, whose testimony the circuit court found credible, opined that Haen has a mental disorder, pedophilia, and borderline personality disorder, both of which predispose him to commit sexually violent acts. She further opined that pedophilia, a chronic lifelong condition, does not spontaneously remit, and Haen has refused sex offender treatment, which would have reduced his risk to reoffend. Hill placed Haen in a subsample group that yielded a more likely than not to reoffend percentage in excess of fifty percent when taking into account extrapolations and multipliers. Hill's testimony was sufficient to meet the State's burden to show that Haen had a mental disorder which predisposed him to commit sexually violent offenses and that he was more likely than not to reoffend.

¶11 Haen next argues that the circuit court applied the wrong standard in denying his discharge petition. Haen characterizes the circuit court's decision as based solely on Haen's failure to participate in sex offender treatment during his four-year commitment. Haen is wrong. As discussed above, the court found that Haen suffers from pedophilia and borderline personality disorder. The court concluded that the State met its burden to establish by clear, satisfactory and convincing evidence that Haen remains a sexually violent person and dangerous to others because of his mental disorders which make it more likely than not that he would engage in future acts of sexual violence. The court applied the proper legal standard when it determined that Haen was not a proper subject for discharge.

By the Court.—Order affirmed.

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