

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP452

Cir. Ct. No. 2002CI4

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF EDWARD COTTON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

EDWARD COTTON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JONATHAN D. WATTS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Edward Cotton appeals the order denying his petition for discharge from a Chapter 980 commitment. Cotton claims there was insufficient evidence to prove he is still dangerous. We affirm.

I.

¶2 In the 1980s and 1990s, Cotton committed sexually violent crimes for which he was imprisoned. In 2004, Cotton was committed under Chapter 980. As material to this appeal, in September of 2011, Cotton filed a petition for discharge from commitment and the circuit court was the factfinder at the discharge hearing.

¶3 At the discharge hearing, two psychologists testified for the State, Dr. Richard McKee and Dr. Christopher Tyre. Psychologist, Dr. Richard Elwood, testified for Cotton. Dr. McKee testified, as material:

- Psychologists consistently have diagnosed Cotton with two mental disorders that predispose him to engage in acts of sexual violence: (1) paraphilia not otherwise specified and (2) anti-social personality disorder.
- Actuarial tools, such as the PCL-R test, help psychologists determine whether a patient is psychopathic. A score of “25 and above ... is considered in research circles to be an indication of psychopathy.”
- On the PCL-R test, Cotton scored a 31 in 2005 when tested by Dr. Tyre; a 26 in 2006 when tested by Dr. Warner, a 32 in 2007 when tested by a team of doctors, and a 20 when tested by Dr. Elwood in 2010.

- The 2007 score is the most accurate because it was a team assessment.
- When the scores vary, the best approach is to average all the scores; here, that gives Cotton a “score of 25.6.”
- A “PCL-R score of 25 or above and the history of sexual deviance” is considered “high-risk to future acts of sexual violence.”
- Although Cotton completed sex offender treatment programs while in prison, these programs were not “designed to deal with the intensity, the risk level of his ... [t]reatment needs because he is a high- -- fairly high-risk -- high-risk sex offender.”
- “In 1998, when Mr. Cotton graduated from the [Sexual Offender Treatment Program], there was no program in the world that I know of that was designed to successfully treat high-psychopathy sex offenders.”
- The treatment facility where Cotton currently resides, Sand Ridge, now offers a Sex Offender Treatment program that targets the high-psychopathy sex offenders. Sand Ridge “repeatedly and periodically offered the opportunity to participate in Sex Offender Treatment at Sand Ridge” but Cotton refused.
- Using the most recent PCL-R is not reliable; instead, the “best method” is to take the average of all the scores available over time.

- Prisoners who have completed sexual offender treatment programs “general[ly] show about a 20 percent reduction in recidivism risk” when compared to those who have not completed those programs.
- The treatment programs that Cotton completed, however, did not reduce his recidivism risk “because of his high psychopathy -- the characteristics that he has of high psychopathy.”

¶4 Dr. Tyre testified, as material:

- He has done over 400 “special-purpose evaluations” “to offer opinions regarding potential for either supervised release or discharge” in Chapter 980 cases.
- He met with Cotton for “the initial special-purpose evaluation.”
- He reviewed “all of [Cotton’s] available files and records.”
- All of Cotton’s records show “that doctors have been unanimous in” “diagnosing [Cotton with] both paraphilia and Antisocial Personality Disorder” that predispose him “to future acts of sexual violence.”
- Cotton “currently meets that standard of more likely than not” to commit sexual crimes in the future.
- “[A]ctuarial tools, objective measures of factors empirically established to be associated with individuals who display future violent -- or future sexual violent behavior[,] assist in that process” or risk assessment.

- The Static-99R actuarial tool “is probably the most widely used.” Tyre gave Cotton a “6” on the 99R, but Dr. Elwood gave Cotton a “5” because of Cotton’s claim in the presentence investigation report that he “had a live-in relationship with an intimate partner that was two-plus years.”
- Dr. Tyre explained why he did not credit Cotton for any long-term relationship:

Originally, it was based upon my interview with Mr. Cotton. I asked him if he had ever had a stable relationship or if he had ever been married.

Subsequent to reviewing records in the preparation of this report, I went back to the original reports by Dr. Coffey and Dr. Lodl, my report, my notes and I reviewed the annual examinations that have been done, and I didn’t find any evidence to [credit Cotton for a marital-type relationship.]

Given the very limited time available to Mr. Cotton that he was on the street between 18 and approximately 21 or [2]2 when he was then arrested and subsequently put in the prison system as an adult, there didn’t seem to be any time available for him to have established what would be akin to a marriage.

- The 99R credits a person who has a marital-type relationship because “the relative risks to sexually reoffend is lower in men who have been able to form intimate partnerships.”
- When a person scores a 6 or more on the 99R, it places that person in “High Risk/High Need sample.” In adjusting that sample for underreporting, “Chapter 980[’s requirement to assess] for the likelihood of reoffending over a person’s lifetime” and other factors, that person “sit[s] at about 62 percent” likely to reoffend.

- He also looked at Cotton's PCL-R scores, which assess psychopathy. He did so because "elevated psychopathy is a risk factor for sexual recidivism." "[W]hen you combine those factors of sexual deviance [as evidenced by a diagnosis of paraphilia] and psychopathy, individuals with those characteristics seem to sexually recidivate at rates much higher than what is captured by the actuarial instruments."
- "[R]esearch show[s]" a PCL-R "score of 25 and above" with sexual deviance is a "highly dangerous combination."
- Cotton "has demonstrated sexual deviance" both with his diagnosis of paraphilia and "the facts of the cases with the victims being nonconsenting."
- Dr. Tyre scored Cotton at 31.

The State then went through each question on the PCL-R where Dr. Tyre's score differed from Dr. Elwood's and asked Dr. Tyre why he gave a higher score than Dr. Elwood's. Before explaining the reason for each difference in score, Dr. Tyre testified: "I would assume that probably the majority of the difference in our scoring on this is the fact that I had an interview with Mr. Cotton," whereas Cotton refused an interview to Dr. Elwood. Dr. Tyre explained that some of the questions on the test are "very sensitive to the presence of an interview because a person is actually demonstrating these types of characteristics or traits with you at the time, and it's harder to assess if you don't sit down and talk with a person." For example, one question is to "observe indicia of Glibness and Superficial Charm." Dr. Tyre explained that when a doctor does a PCL-R assessment without a personal interview, the scores tend to be lower.

¶5 Dr. Tyre also testified that:

- When different PCL-R scores are recorded, the best practice is to average all of them; he agreed with Dr. McKee that the most accurate score is the one found by the 2007 team of “32.”
- The records showed Cotton “had some success” in “changing his behavior” through “sex offender treatment in the past” but “staff involved in his care over the last year suggest that he has either forgotten or disregarded some of the skills he learned.” Staff “recommended [that Cotton] participate” in “the S[exual] O[ffender] T[reatment] P[rogram]” but “Cotton ... refus[ed] treatment.”
- His opinion, that Cotton was more likely than not to reoffend if discharged, apply to “Cotton’s condition today” “to a reasonable degree of psychological certainty.”

On cross-examination, Dr. Tyre testified that:

- He disagreed with Dr. Elwood’s reliance on the long-term relationships Cotton described in the presentence investigation report because “it didn’t add up.” “[W]hen I also factored in the times that Mr. Cotton had been incarcerated,” “I couldn’t come up with, arithmetically if you will, a long enough period of time that would have qualified for a live-in, marriage-like relationship.”
- He would still put Cotton at “more likely than not” even if he changed the 99R score to “5” because of the other factors.

- He does not agree with Dr. Elwood's reliance on the recent articles that say recidivism is reduced by 20% for individuals who complete treatment programs because "we can[not] calculate a specific number. It seems as though for some individuals there is a risk attenuating effect for participating in treatment, but there's also research that shows that there is no effect at all."

Dr. Tyre also testified that the treatment programs Cotton completed in the 1990s have changed significantly, and as a result, any program completed before the changes are not likely to "reduce his percentage of recidivism."

¶6 Dr. Elwood testified for the defense, as material:

- He prepared a report for this case from reviewing records. He did not interview Cotton.
- Cotton has two diagnoses that predispose him to commit sexually violent acts: "Paraphilia, Not Otherwise Specified and Antisocial Personality Disorder."
- He scored Cotton as a "5" on the Static-99R, which "would be the equivalent of a 36 percent likelihood of being charged with another sex offense within ten years of release from custody." Cotton has a "56 percent probability of ... actually committing another sex offense over the next 15 years from release."
- He used the presentence investigation report for information about Cotton's long-term relationships even though the doctors' reports in the Record said Cotton "had not lived with someone for a significant period of time" because he thought "the weight of evidence certainly

suggested a credible inference that he had sustained a marital-type relationship for at least two years, though the data was somewhat inconsistent.”

- On the PCL-R, he scored Cotton at a “20,” “moderate level of psychopathy,” much below the “high [psychopathy] range” of “between 25 and 32.”
- He assessed “Glibness and Superficial Charm” from other doctors’ reports who had interviewed him, specifically referencing Dr. Coffey’s note that Cotton “did not present as glib or superficially charming during the interview.”

¶7 In regard to medical articles on how treatment reduces risk for re-offending, he testified:

- “[T]here has been a flurry of activity, probably since 2009, including some last year, that consistently show a substantial reduction in risk by prison-based Sex Offender Treatment even for high-risk, high-psychopathy individuals. So I just took the average reduction in risk, and it’s about 25 percent.” “[T]he studies that show a good treatment effect even for high-psychopathy individuals themselves go back to the 1990 or early 2000 decades, which was when [Cotton] was being treated.” “So I think it’s a very compelling argument that Sex Offender Treatment is effective even for high-psychopathy or high-risk offenders.”

- Using the 25 percent risk reduction as a result of Cotton’s treatment, his 56 percent risk of re-offending would drop to under 40 percent, putting Cotton “well under more likely than not.”

¶8 When asked if he reached “an ultimate conclusion on the issue of whether or not you would recommend to the Court that Mr. Cotton should be discharged from his commitment under 980?” Dr. Elwood answered: “I’m reluctant to make a recommendation to the Court. I would simply say that, in my opinion, he’s not a sexually violent person as defined by statute.”

¶9 The circuit court questioned Dr. Elwood about the change in the risk he listed in his reports. The circuit court asked why the risk of re-offending changed from “65 percent in the August 2010 report to 48 to 56 in the August 2011 report?” Dr. Elwood answered:

That’s a good question.

In 2011, I lowered his risk of committing another offense. What I also did is I used a similar extrapolation for the [actuarial test] that I did for age. In other words, the [actuarial test] has categories. And so there’s a difference in risk between being the lowest number in that range versus being the highest number in that range.

So now, I do the same thing on the [actuarial test] that I do for age to get, I think, a closer, more accurate estimate of risk. So I believe -- I like to think that I get better every year, and I refine my procedures. So I believe the 2011 is the more accurate, but it’s very close to the one in the previous year.

¶10 The circuit court found that the State had satisfied its burden of proving: (1) Cotton had been convicted of a sexually violent offense; (2) Cotton currently has two mental disorders (paraphilia not otherwise specified and anti-social personality disorder) that affect his emotional or volitional capacity and

predispose him to engage in acts of sexual violence and causes serious difficulty in controlling behavior; and (3) Cotton is dangerous to others because he is more likely than not to engage in future acts of sexual violence. The circuit court based its findings in part on:

- “Dr. Tyre testified credibly and thoughtfully throughout this hearing, and the Court gives great weight to both his oral testimony and his report.”
- Dr. Elwood scored Cotton a “5” on the Static-99R by using information in the presentence investigation report that the circuit court “places little weight on the reliability of [Cotton’s] statements in the” presentence investigation report because Cotton’s statements there are “confusing, self-serving, and contradictory.”
- “[E]ven with the reduced score [for treatment], Dr. Elwood’s conclusions are still very close to or greater than the standard of more likely than not, which is the Wisconsin threshold.”
- “Dr. Tyre’s testimony and report conclude that Respondent Cotton is more likely than not to recidivate.”
- “This Court has greater confidence in Dr. Tyre’s report and methodology than Dr. Elwood’s. Dr. Elwood’s report had typos, he’s grasping at supposed supporting documentation in a [presentence investigation report] when the facts clearly don’t support those conclusions, and the other doctors expressly rejected Dr. Elwood’s approach.”

- The circuit court “adopt[ed] the testimony of Dr. McKee that taking the average of the [PCL-R] score is accepted by psychologists as a valid way to resolve” “different scores,” “that recency of score was not a factor[,] and that” “averaging” is “preferred.”
- The circuit court found the PCL-R score of 32 given by the “group of psychologists” “would have more weight [than Dr. Elwood’s] because scoring would have been a consensus.”
- Dr. Tyre’s PCL-R score of 31 more closely matched that of all the other psychologists who scored Cotton, besides Dr. Elwood.
- “Dr. Elwood’s score of 20 carries less weight. Dr. Elwood did not have a clinical interview, just records, because the respondent refused to have an interview, and Dr. Tyre testified that research shows that PCL-R scores are lower when the examiner does not have a personal interview but only records.”
- The circuit court found “by clear and convincing evidence that [Cotton’s] score on the ... PCL-R is greater than 25.”

¶11 The circuit court then ruled: “Therefore, [Cotton] manifests the combination of elevated psychopathy and sexual deviance, and that research has found this to be an indicator of elevated risk of sexual recidivism. And this, Mr. Cotton, is an important fact that shows you’re still a sexually violent person.”

¶12 In addressing whether the treatment Cotton completed reduced his risk to reoffend, the circuit court said:

- “[W]hile at Sand Ridge, [Cotton] has consistently refused Sexual Offender Treatment.”
- “Both doctors [Elwood and Tyre] testified to their general knowledge of research regarding Sexual Offender Treatment. Dr. Tyre felt that the effect on the reduction of risk of recidivism when a person completes Sexual Offender Treatment is still being studied,” and “disagreed with Dr. Elwood that completion of a prison-based Sexual Offender Treatment Program can reduce risk by a fixed percentage.”
- “[I]t’s difficult for this Court to assess who gets more weight on this issue. It’s somewhat of a draw or inconclusive, but there’s more in this record that does assist this Court in making a decision about prison-based Sexual Offender Treatment.”
- “Dr. McKee testified that” Cotton started treatment “well before” effective treatment for “high psychopathy” was available and the treatment Cotton completed “was not designed to deal with high psychopathy” and did not use any “independent verification” to measure “efficacy of the Sexual Offender Treatment.”
- “[T]he Court finds, again by clear and convincing evidence on this record that [the treatment Cotton completed] was not designed or adapted to deal with Mr. Cotton’s high psychopathy” and the lack of “verification” “takes away” “the efficacy of Sexual Offender Treatment.”

¶13 The circuit court then discussed Cotton’s actions long after he had completed the treatment showing that the treatment had either been “forgotten or disregarded,” that he clearly needed more treatment, but refused to accept the invitation to go to the new and improved treatment programs, finding:

- (1) “[Cotton] is not demonstrating an understanding of Sexual Offender Treatment that he had earlier.”
- (2) “[T]he Sexual Offender Treatment [Cotton completed before coming to Sand Ridge] was not adapted to [Cotton] because he still presents with high psychopathy.”
- (3) “Despite completion of Sexual Offender Treatment, [Cotton] is not showing an understanding or application of the treatment.”

¶14 The circuit court then concluded:

When this Court reviews the mountain of evidence that’s in this record with particular weight to Dr. Tyre’s testimony and reports and you look at the conclusions that Dr. Tyre felt [Cotton] was more likely than not to recidivate if released.

And then you consider Dr. Elwood’s testimony and his reports with its flaws and its lesser weight, and I accept the argument that where he differs, he’s an outlier as compared to the other doctors, the Court places much less weight in Dr. Elwood’s testimony and report.

The Court finds that the State has met its burden of proof by clear and convincing evidence as to the establishment of the third fact [dangerousness]. The State has prevailed on all three facts, and [Cotton’s] petition for discharge is denied.

II.

¶15 We will not reverse a WIS. STAT. ch. 980 commitment ““unless the evidence, viewed most favorably to the state and the [commitment], is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [the defendant to be a sexually violent person] beyond a reasonable doubt.”” *State v. Marberry*, 231 Wis. 2d 581, 593, 605 N.W.2d 612, 619 (Ct. App. 1999) (quoted source omitted; brackets in *Marberry*). To defeat a petition for discharge under ch. 980, the State must prove that the person seeking discharge: (1) has been convicted of a sexually violent offense; (2) currently has a mental disease that predisposes him to engage in acts of sexual violence; and (3) is dangerous to others and, because of the mental disorder, more likely than not to engage in future acts of sexual violence. *See* WIS. STAT. § 980.01(7) (“‘Sexually violent person’ means a person who has been convicted of a sexually violent offense ... and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.”). “‘Likely’ means more likely than not.” WIS. STAT. § 980.01(1m).

¶16 Cotton does not argue that the evidence is insufficient on the first two elements. He contends only that the State did not prove the third: that his mental disorders render him currently dangerous—more likely than not to engage in future acts of sexual violence.

¶17 As we have seen from the lengthy recitation of the testimony at the discharge, the evidence is clearly sufficient to support the circuit court’s finding that the State met its burden to show that Cotton is currently dangerous and more likely than not to engage in future acts of sexual violence. Dr. Tyre testified that

Cotton's actuarial scores together with his clinical findings showed that if discharged, Cotton is more likely than not to commit acts of sexual violence because of his mental disorders. Dr. McKee's testimony supported Dr. Tyre's. The circuit court appropriately weighed the experts' opinions, and found Dr. Tyre's testimony and report more credible than Dr. Elwood's. We are bound by the factfinder's determination on credibility. *State v. Kienitz*, 227 Wis. 2d 423, 435, 597 N.W.2d 712, 717–718 (1999) (“The trier of fact has the ability to accept so much of the testimony of a medical expert that it finds credible, and it then weighs the evidence and resolves any conflicts in testimony.”) (citation omitted). Dr. Tyre's testimony is sufficient to uphold the circuit court's ruling denying Cotton's petition for discharge.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

