

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2014

Diane M. Fremgen
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. 2013AP1789

Cir. Ct. No. 2009CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF PHILLIP J. GADZINSKI:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

PHILLIP J. GADZINSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Phillip Gadzinski appeals an order denying his petition for discharge from a WIS. STAT. ch. 980 commitment.¹ The circuit court denied Gadzinski’s petition without a discharge hearing, concluding the petition did not set forth any new evidence, not considered at the original commitment trial, from which a reasonable fact finder could conclude Gadzinski did not meet the criteria for commitment as a sexually violent person. Gadzinski argues his petition was sufficient to warrant a discharge hearing. We reject his argument and affirm.

BACKGROUND

¶2 On June 8, 2009, the State filed a petition seeking Gadzinski’s commitment as a sexually violent person, pursuant to WIS. STAT. ch. 980. For purposes of ch. 980, the term “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.” WIS. STAT. § 980.01(7). The case was tried to a jury in March 2010.

¶3 At trial, the State presented testimony from psychologists Lori Pierquet and Christopher Snyder. Pierquet diagnosed Gadzinski with antisocial personality disorder and alcohol abuse. She testified his antisocial personality disorder made it difficult for him to control his behavior and predisposed him to engage in acts of sexual violence. Pierquet evaluated Gadzinski’s risk to reoffend using several actuarial instruments. Based on the results of these tests, along with

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

other factors, she concluded it was more likely than not Gadzinski would commit future acts of sexual violence.

¶4 Pierquet acknowledged that, in addition to antisocial personality disorder, Gadzinski had reported symptoms consistent with bipolar disorder. However, she was unable to formally diagnose him with bipolar disorder because he refused to consent to an interview. In addition, Pierquet explained that Gadzinski's behavior was inconsistent with the symptoms of bipolar disorder. She testified, "I don't doubt that there's some kind of problem with him, but I just don't see it as bipolar being the predominant problem as much as antisocial personality or psychopathy." She further stated it is possible for a person to have both bipolar disorder and antisocial personality disorder, with the antisocial personality disorder being the primary cause of the person's sexually violent behavior. Based on her assessment, Pierquet concluded Gadzinski's bipolar disorder "wasn't terribly salient in terms of looking at Chapter 980 commitment."

¶5 Like Pierquet, Snyder diagnosed Gadzinski with both alcohol abuse and antisocial personality disorder. He also agreed with Pierquet that it was more likely than not Gadzinski would commit future acts of sexual violence. Snyder acknowledged Gadzinski's symptoms showed some indication of bipolar disorder, but he testified he did not believe Gadzinski's record was adequate to support that diagnosis. Further, Snyder felt Gadzinski's behavior was "more readily and simply attributed to this [antisocial] personality disorder and to substance abuse than to ... bipolar disorder[.]" He opined that bipolar disorder "certainly [is] a consideration in this case. There may be elements of it, but I think other diagnoses, particularly ... antisocial personality disorder, [are] more reflective of his entire functioning."

¶6 Psychologist Hollida Wakefield testified on Gadzinski's behalf. Wakefield diagnosed Gadzinski with antisocial personality disorder, alcohol abuse, and bipolar disorder. However, she opined that none of those disorders “[met] the [WIS. STAT. ch.] 980 statutory definition of a mental disorder[,] which is a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.” *See* WIS. STAT. § 980.01(2). Wakefield testified both bipolar disorder and antisocial personality disorder would predispose Gadzinski to “act out and get in all sorts of trouble,” but she did not believe they predisposed him to commit sexually violent acts.

¶7 Wakefield also testified Gadzinski was first diagnosed with bipolar disorder in 2007 and was prescribed lithium to control its symptoms. She testified his behavior improved significantly when he took lithium as prescribed. She stated Gadzinski's “inappropriate behavior,” whether caused by bipolar disorder or antisocial personality disorder, was likely to decrease if he continued taking lithium. She concluded, “If he is medication compliant, he should not have serious difficulty in controlling his behavior.”

¶8 The jury ultimately found that Gadzinski was a sexually violent person, and the circuit court entered an order committing him to the Department of Health Services for control, care, and treatment. On March 20, 2012, Gadzinski petitioned for discharge from his commitment. He submitted an amended discharge petition on about May 9, 2012, along with an April 24, 2012 report authored by Wakefield.² The opinions in the report were generally consistent with

² Gadzinski's amended discharge petition is dated May 9, 2012, but has a filing date of November 1, 2012. The parties agree the petition was actually submitted to the court on or about May 9, 2012. This makes sense, given that the court held a hearing on the petition on May 11, 2012.

Wakefield's testimony at the commitment trial. Wakefield again diagnosed Gadzinski with antisocial personality disorder, alcohol abuse, and bipolar disorder, and she again opined that none of these disorders predisposed Gadzinski to commit sexually violent acts. Wakefield also opined that, if Gadzinski were compliant with his medication for bipolar disorder, he would not have serious difficulty controlling his behavior. She therefore concluded Gadzinski was not more likely than not to commit future acts of sexual violence.

¶9 Wakefield stated the "major change" since the commitment trial was that Gadzinski had been formally diagnosed with bipolar disorder by a practitioner at Sand Ridge Secure Treatment Center and by psychologist Carolyn Hensel-Fixmer, who performed Gadzinski's annual reexamination in 2012. Wakefield observed that, at the time of trial, neither of the State's experts diagnosed Gadzinski with bipolar disorder. She therefore asserted Gadzinski's bipolar diagnosis was "a change occurring since he was committed" and, consequently, his discharge petition was not "a revisiting of his commitment trial."

¶10 The circuit court held a hearing on Gadzinski's discharge petition on May 11, 2012. The State stipulated that the petition and attached report were facially sufficient under WIS. STAT. § 980.09(1), triggering further review under § 980.09(2). However, the State argued the court should deny Gadzinski's petition without a discharge hearing under § 980.09(2) because the petition did not contain new evidence from which a reasonable fact finder could conclude Gadzinski did not meet the criteria for commitment as a sexually violent person. Specifically, the State asserted the opinions in Wakefield's report were identical to her testimony from the commitment trial.

¶11 In response, Gadzinski conceded Wakefield’s opinions were the same, and the only significant change identified in her report was the new bipolar diagnosis by the State’s psychologists. However, Gadzinski argued he was entitled to a discharge hearing based on that change alone because, at the commitment trial, the State’s experts did not adequately address the effects of his bipolar disorder. In particular, Gadzinski argued the State’s experts failed to address whether he “would still have a qualifying mental disorder if he had a properly diagnosed and properly treated bipolar disorder diagnosis.” (Some capitalization omitted.)

¶12 The circuit court denied Gadzinski’s petition without a discharge hearing on November 2, 2012. The court explained:

Ultimately, the Court cannot conclude that Ms. Wakefield’s opinion is based upon any different facts, professional knowledge, or research that was not already considered at trial. The change that Gadzinski points to is that he has now been diagnosed with and is medicated for bipolar disorder. However, Ms. Wakefield had already reached the conclusion that Gadzinski had bipolar disorder and testified to that at trial. Though the State’s trial experts disagreed with the bipolar diagnosis, it was the antisocial personality disorder that was determined to be the disorder that predisposed Gadzinski to engage in acts of sexual violence.

Ms. Wakefield is not now opining that Gadzinski only has bipolar disorder and does not have antisocial personality disorder. Rather, as before, she determines that Gadzinski has both disorders, and that the antisocial personality disorder does not predispose Gadzinski to engage in acts of sexual violence. Ms. Wakefield has presented no new factors to suggest that Gadzinski’s antisocial personality disorder has changed. Instead, she reasserts the same opinion she presented at trial—that she does not feel the antisocial personality disorder predisposes Gadzinski to engage in acts of sexual violence—an opinion directly contrary to that of the State’s experts with whom the jury ultimately agreed at trial.

¶13 The circuit court also observed that Pierquet acknowledged Gadzinski’s history of symptoms consistent with bipolar disorder during the commitment trial, but she ultimately concluded those symptoms were irrelevant because, even without a diagnosis of bipolar disorder, Gadzinski’s antisocial personality disorder predisposed him to engage in acts of sexual violence. Accordingly, the court concluded there was “no new basis from which a court or jury could conclude [that] Gadzinski does not meet criteria for commitment[.]” Gadzinski now appeals, arguing the court erred by denying his petition without a discharge hearing.

DISCUSSION

¶14 To determine whether the circuit court properly denied Gadzinski’s petition without a discharge hearing, we must interpret WIS. STAT. § 980.09 and apply it to the facts of this case. Interpretation and application of a statute are questions of law that we review independently. *See State v. Arends*, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

¶15 Determining whether to grant a discharge hearing under WIS. STAT. § 980.09 involves a two-step process. *Arends*, 325 Wis. 2d 1, ¶¶3, 22. First, the circuit court conducts a “paper review” of the petition and its attachments, pursuant to WIS. STAT. § 980.09(1). *Arends*, 325 Wis. 2d 1, ¶¶4, 25. The court must deny the petition without a hearing unless the petition alleges facts “from which a reasonable trier of fact could conclude that the petitioner does not meet

the criteria for commitment as a sexually violent person.” *Id.*, ¶4; *see also* WIS. STAT. § 980.09(1).³

¶16 If the petition is facially sufficient, the circuit court performs a more comprehensive review under WIS. STAT. § 980.09(2). *Arends*, 325 Wis. 2d 1, ¶¶30, 32. In this step, the court must examine the entire record, including any current or past examination reports or treatment progress reports, the petition and any written response, the arguments of counsel, and any supporting documentation filed by either party. *Id.*, ¶38. As under § 980.09(1), the court must determine whether there are facts from which a reasonable trier of fact could conclude the petitioner does not meet the criteria for commitment. *See* WIS. STAT. § 980.09(2).

¶17 To meet this standard, a petition for discharge must

set forth new evidence, not considered by a prior trier of fact, from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. An expert’s opinion that is not based on some new fact, new professional knowledge, or new research is not sufficient for a new discharge hearing under [WIS. STAT.] § 980.09(2). This result is the only reasonable one. Permitting a new discharge hearing on evidence already determined insufficient by a prior trier of fact violates essential principles of judicial administration and efficiency.

State v. Schulpius, 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311 (citation omitted). Thus, a new expert opinion may be sufficient to entitle the petitioner to a discharge hearing, but only if it is based on “something more than

³ WISCONSIN STAT. § 980.09 was amended after the circuit court denied Gadzinski’s discharge petition. The statute now requires the court to deny a discharge petition without a hearing if the petition does not contain facts from which a court or jury “would likely conclude” the person no longer meets the criteria for commitment. *See* 2013 Wis. Act 84, §§ 21, 23.

facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding.” *Id.*, ¶39 (quoting *State v. Combs*, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684).

¶18 Here, the State stipulated that Gadzinski’s discharge petition was facially sufficient under WIS. STAT. § 980.09(1). The circuit court therefore proceeded to review the entire record, as required by § 980.09(2). Based on this review, the court determined Gadzinski was not entitled to a discharge hearing because his petition did not set forth any new facts, not considered by the jury during the original commitment trial, from which a reasonable fact finder could conclude he did not meet the criteria for commitment as a sexually violent person. We agree with the circuit court’s conclusion.

¶19 Gadzinski asserts he was entitled to a discharge hearing based on Wakefield’s April 24, 2012 report. However, the opinions set forth in that report were identical to Wakefield’s testimony at the commitment trial. In both instances, Wakefield diagnosed Gadzinski with antisocial personality disorder, alcohol abuse, and bipolar disorder and opined that none of those disorders would predispose him to commit sexually violent acts. In addition, Wakefield consistently opined that Gadzinski’s inappropriate behavior would decrease if he were compliant with his medication for bipolar disorder, and taking the medication would allow him to control his behavior. The jury rejected these opinions at the commitment trial and instead agreed with the State’s experts that Gadzinski’s antisocial personality disorder made it more likely than not he would commit future acts of sexual violence.

¶20 The only “major change” Wakefield identified in her April 24, 2012 report was the fact that two State psychologists had diagnosed Gadzinski with

bipolar disorder since the commitment trial. Gadzinski argues this new diagnosis is significant because the State's experts at the commitment trial refused to diagnose him with bipolar disorder and failed to address whether, if diagnosed with bipolar disorder, he would still have a qualifying mental illness for purposes of commitment under WIS. STAT. ch. 980.

¶21 We do not agree that Gadzinski's bipolar disorder diagnosis constitutes new evidence from which a reasonable trier of fact could conclude he does not meet the criteria for commitment as a sexually violent person. All of the experts who testified at the commitment trial considered Gadzinski's bipolar disorder. While Pierquet and Snyder declined to make that diagnosis, they both acknowledged that Gadzinski's history and symptoms were consistent with bipolar disorder. They nevertheless opined that Gadzinski's antisocial personality disorder predisposed him to commit sexually violent acts and made it more likely than not he would commit future sexually violent offenses. Whether Gadzinski had bipolar disorder was essentially irrelevant to that conclusion. Although Hensel-Fixmer subsequently diagnosed Gadzinski with bipolar disorder, her opinions are otherwise identical to those of Pierquet and Snyder. Specifically, Hensel-Fixmer concluded Gadzinski's antisocial personality disorder predisposes him to commit sexually violent acts, and it is more likely than not he will commit another sexually violent act if discharged.

¶22 We therefore agree with the circuit court that Wakefield's "new" expert opinion was not based on any facts, professional knowledge, or research not considered by the experts who testified at the commitment trial. *See Schulpius*, 345 Wis. 2d 351, ¶35. Consequently, Gadzinski's petition failed to set forth "new evidence, not considered by a prior trier of fact, from which a reasonable trier of fact could conclude that [he] does not meet the criteria for commitment as a

sexually violent person.” *See id.* Accordingly, the circuit court properly denied Gadzinski’s petition without a discharge hearing.⁴

By the Court.—Order affirmed.

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

⁴ On appeal, Gadzinski suggests he was entitled to a discharge hearing on several other grounds. For instance, he argues the record shows he has progressed in treatment since the commitment trial. He also notes that Wakefield’s April 24, 2012 report “discussed new research ... regarding the status of Gadzinski’s sexual offenses as an adolescent regarding the reliability of the Static 99 norms.” (Record citation omitted.) However, it does not appear that Gadzinski raised these arguments in the circuit court. We generally refuse to address arguments raised for the first time on appeal. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

