COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP105 **Cir. Ct. No. 2005CI5**

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

IN RE THE COMMITMENT OF JEROME EDWARDS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JEROME EDWARDS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Jerome Edwards appeals an order dismissing his petition for discharge from a WIS. STAT. ch. 980 (2013-14) commitment.[1] He contends that the trial court erred in dismissing his petition without a trial. We affirm.

¶2 In 1995, Edwards was convicted of second-degree sexual assault of a child and sentenced to ten years in prison. During his time in prison, Edwards participated in the Beacon Sex Offender Treatment Program in Racine, Wisconsin.

¶3 In 2005, the State filed a WIS. STAT. ch. 980 petition seeking to commit Edwards as a sexually violent person. Edwards waived his right to a jury trial and the case was tried to the trial court in May 2006. Two psychological experts, Dr. Charles Lodl and Dr. Cynthia Marsh, testified on Edwards's behalf. Lodl testified that Edwards's risk of reoffending was "below the standards of … more likely than not."[2] Marsh said that she did "not think it's likely that [Edwards] will reoffend in a sexually violent way." The trial court found in favor of the State and ordered Edwards to be committed as a sexually violent person. We affirmed. *See* ***State v. Edwards***, No. 2006AP2030, unpublished slip op. (WI App July 17, 2007).

¶4 After he was committed, Edwards refused to participate in additional sex offender treatment. In 2009, he filed a petition for discharge from his

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN STAT. § 980.01(7) defines a "'[s]exually violent person'" as "a person who has been convicted of a sexually violent offense … 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." Section 980.01(1m) explains that "'[l]ikely' means more likely than not."

commitment. The trial court subsequently determined that a discharge trial was necessary. After several delays, Edwards waived his right to a jury trial and the matter was tried to the trial court in 2012.[3]

¶5 At the 2012 discharge trial, the State offered the testimony of Dr. Christopher Snyder that Edwards was "more likely than not to engage in future acts of sexual violence." Edwards called three doctors on his behalf, including Marsh and Lodl, who testified at his initial commitment trial. Dr. Sheila Fields testified that she could not say whether the likelihood of Edwards reoffending was more likely than not. Marsh said that she could not "say that it is likely that [Edwards] will commit an act of sexual violence in the future." At one point in Marsh's testimony, she estimated Edwards's risk of reoffending at forty percent. Finally, Lodl testified that he had "concluded that [Edwards] no longer or did not meet the criteria of being more likely than not at this point to reoffend."

¶6 Ultimately, the trial court found Snyder's testimony more persuasive and agreed with Snyder's conclusion that Edwards remained a sexually violent person. Accordingly, it denied the petition for discharge. Edwards did not pursue an appeal. He did, however, agree to begin sex offender treatment at Sand Ridge Secure Treatment Center, which he had previously refused.

¶7 In May 2013 and May 2014, the Department of Health Services filed its annual reexamination reports of Edwards. Fields was the psychologist who completed both reports. In those reports, she reiterated her conclusion that Edwards did not satisfy the standard for commitment as a sexually violent person

[3] The Honorable Jeffrey Wagner presided over the discharge trial.

and should be discharged. In her 2014 report, Fields noted that Edwards had begun Phase II of the Sand Ridge sex offender treatment program in July 2013. Fields opined: "[C]umulative treatment since his incarceration is likely to have at least modest risk-reducing effects." She concluded: "Edwards'[s] actual lifetime risks of sexual violence, detected or otherwise, will most likely not exceed 50%, the threshold requirement for continued civil commitment…. Edwards'[s] sexual recidivism risks are most probably lower than 50% at this point."

¶8 While both of Fields's reports opined that Edwards was not "more likely than not" to reoffend, she also concluded that Edwards had not yet satisfied the statutory standards for supervised release. Fields's 2014 report explained that by beginning Phase II of sex offender treatment at Sand Ridge, Edwards "ha[d] only more recently begun to more intensively analyze sexual offending dynamics per se." Fields concluded: "When Mr. Edwards has completed more of these standard Phase II procedures, and if his overall institutional behavior remains largely non-problematic, I would likely consider him to have adequately met statutory requirements that define 'significant progress' in treatment."

¶9 In June 2014, Edwards filed the petition for discharge that is at issue in this appeal.[4] He referenced the 2013 and 2014 reports and asserted that he should be discharged because his risk of reoffending was lower than fifty percent. Edwards sought a trial on his discharge petition.

[4] Edwards also filed a petition for supervised release, but it does not appear that he ultimately pursued that petition.

The Honorable M. Joseph Donald was the judge who considered Edwards's 2014 petition for discharge.

¶10 At a hearing on Edwards's request for a trial on his discharge petition, counsel for Edwards argued that the factor that had changed since Edwards's 2012 discharge trial was his decision to begin sex offender treatment at Sand Ridge. Counsel asserted that Fields's recent opinions were based on the "reduction in risk" associated with that treatment. He concluded: "[T]he report contains enough information for the Court to be satisfied that [Edwards] has met this very low standard to get a discharge trial based on the paper review of the report."

¶11 The trial court considered the reports of Fields, as well as a 2012 report from Marsh and the transcript of the 2012 discharge trial. Ultimately, the trial court denied Edwards's petition for discharge without a trial. In so doing, the court stated:

> In reviewing Dr. Fields'[s] report, it is, and the only way I can describe it is almost schizophrenic in its assessment, in that it says that Mr. Edwards doesn't meet the need for supervised release, and that he still needs to make progress in certain areas, and indicates that he doesn't even come close to meeting all of the statutory requirements for supervised release. But further goes on to state, however, that she feels that somehow he is now, because his risk of sexual recidivism is less than or most probably lower than 50 percent, although she doesn't state what that figure is at this point in time, therefore, he is not more likely than not to commit further acts of sexual violence. I find this to be, although a fact that a jury would hear, it's the same information. And as indicated, the Court finds that a jury would not, acting reasonably, would not essentially find that Mr. Edwards is appropriate for discharge. Therefore, the Court at this time is going to deny the petition.

The trial court subsequently entered a written order denying the petition. This appeal follows.

DISCUSSION

¶12 On appeal, Edwards contends that the trial court erred in dismissing his petition for discharge without a trial. He explains:

> Plainly, the judge's characterization of [Fields's] report as "schizophrenic" is a credibility determination[,] which the judge is not permitted to do on a review of the sufficiency of the petition.[5] Moreover, there is nothing incongruous about Dr. [Fields]'s opinions. A person who petitions for supervised release is assumed to still be a sexually violent person. Thus, he must demonstrate, among other things, that he has made significant progress in treatment. Here, Dr. [Fields] was of the opinion that Edwards had not made significant progress in treatment and, therefore, he did not meet the statutory criteria for supervised release; but, nevertheless, Edwards was no longer a sexually violent person and, therefore, he was appropriate for discharge.

¶13 To determine whether the trial court properly dismissed Edwards's petition for discharge without holding a trial, we must examine the statute governing such petitions, WIS. STAT. § 980.09, and apply it to the facts of this case. Interpretation and application of § 980.09 are questions of law that we review *de novo*. ***State v. Arends***, 2010 WI 46, ¶13, 325 Wis. 2d 1, 784 N.W.2d 513.

¶14 Determining whether to hold a discharge trial under WIS. STAT. § 980.09 involves a two-step process. ***Arends***, 325 Wis. 2d 1, ¶¶3, 22. First, the trial court conducts a "paper review" of the petition and its attachments pursuant to § 980.09(1). ***Arends***, 325 Wis. 2d 1, ¶¶4, 25. The current version of

[5] Edwards's brief refers to the author of the report as "Marsh," but it is clear from the language quoted that he is referring to Fields's reports, rather than the 2012 report by Marsh.

§ 980.09(1), which was amended after ***Arends*** and was in effect at the time the trial court considered Edwards's discharge petition, provides in relevant part:

> The court shall deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury would likely conclude the person's condition has changed since the most recent order denying a petition for discharge after a hearing on the merits … so that the person no longer meets the criteria for commitment as a sexually violent person.

¶15 If sufficient facts are alleged, the trial court performs a more comprehensive review under WIS. STAT. § 980.09(2). ***Arends***, 325 Wis. 2d 1, ¶¶30, 32. In this second step, the court must examine the entire record, including all 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 trial 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 as a sexually violent person." *See* ***Arends***, 325 Wis. 2d 1, ¶5. Section 980.09(2) provides:

> In reviewing the petition, the court may hold a hearing to determine if the person's condition has sufficiently changed such that a court or jury would likely conclude the person no longer meets the criteria for commitment as a sexually violent person. In determining under this subsection whether the person's condition has sufficiently changed such that a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court may consider the record, including evidence introduced at the initial commitment trial or the most recent trial on a petition for discharge, any current or past reports filed under s. 980.07, relevant facts in the petition and in the state's written response, arguments of counsel, and any supporting documentation provided by the person or the state. If the court determines that the record does not contain facts from which a court or jury would likely conclude that the person no longer meets the criteria for commitment, the court shall deny the petition. If the court determines that the record contains facts from which

> a court or jury would likely conclude the person no longer meets the criteria for commitment, the court shall set the matter for trial.

¶16 As we explained in ***State v. Schulpius***, 2012 WI App 134, 345 Wis. 2d 351, 825 N.W.2d 311, in order to meet the standard outlined in WIS. STAT. § 980.09(2), 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 § 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.

Schulpius, 345 Wis. 2d 351, ¶35 (citation omitted; emphasis added). Accordingly, a new expert opinion may be sufficient to entitle the petitioner to a discharge trial, but only if it is based on "'something more than 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).

¶17 Applying those standards here, even if we assume that Edwards's petition satisfied WIS. STAT. § 980.09(1)—as the trial court implicitly found—and proceed to the § 980.09(2) analysis that considers the entire record, we conclude that Edwards has not shown that his petition is based on a new fact, new professional knowledge, or new research. Therefore, he is not entitled to a trial on his discharge petition. *See* ***Schulpius***, 345 Wis. 2d 351, ¶35.

¶18 As noted above, Edwards argued at the trial court that his recent treatment at Sand Ridge—which he had not yet completed—was a "new fact" that justified a trial. On appeal, however, Edwards does not advance that argument, as the State points out in its brief.[6]

¶19 In response to the State's suggestion that Edwards is no longer advancing his sex offender treatment as the "new fact" that justified a trial, Edwards argues in his reply brief that the "basis for Dr. Fields'[s] changed opinion" was his age. Edwards states: "The psychosexual risk section of [Fields's] report demonstrates that her current opinion was based upon a change in Edwards'[s] condition as he has grown older." (Bolding omitted.) Edwards further explains: "According to the report, as Edwards ages, his level of aggression naturally decreases." Edwards also quotes Fields's report, which stated:

> Offenders with high levels of impulsivity and poor inhibition of anger are at increased recidivism risk. Mr. Edwards'[s] aggression when younger, which in addition to his crimes included a major conduct report for fighting in prison, has declined over the past several years, as is fairly common with antisocial criminals as they age. There have been no concerns about belligerence, impulsivity, resistance to staff, or emotional volatility in recent years. He has had no serious disciplinary citations … for the past several years. He has had no sexual misconduct and his interactions with female staff have been respectful.

¶20 By arguing in his reply brief that Edwards's age—rather than his progress in treatment—is the new fact Fields relied on, and by not responding to

[6] The State also explains why Edwards's treatment at Sand Ridge was not a "new fact" justifying a new trial. Because Edwards has not pursued the treatment argument on appeal, we do not discuss the State's analysis.

the State's argument, Edwards has abandoned his trial court argument that his progress in sex offender treatment was the new fact that justified a trial. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted); ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 307 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

¶21 There are two reasons why Edwards's age argument fails. First, the assertion that Edwards's increased age was a new fact relied upon by Fields was not an issue addressed at the trial court or in Edwards's opening appellate brief. We generally do not review an issue raised for the first time on appeal, *see* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997), or raised for the first time in a reply brief, *see* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶22 Second, even if we overlook the fact that Edwards has now, for the first time, asserted that his increased age is the new fact that justifies a discharge trial, we are not persuaded that the increase in Edwards's age was a new fact "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." *See* ***Schulpius***, 345 Wis. 2d 351, ¶35. At the 2012 discharge trial, both Snyder and Fields testified that when they applied one of the sex offender actuarial tests, the Static-99R, they reduced Edwards's score by one point because he had achieved the age of forty.[7] Fields testified about why the Static-99R takes an individual's age into account:

[7] Edwards was forty-five years old at the 2012 discharge trial.

> As men age, as we know with most criminals, criminal recidivism as well as sexual recidivism declines. Sexual drive declines, testosterone declines so this simply takes that into consideration.
>
> ….
>
> … So at [age] 40 is when one point is removed [from the Static-99R test] and then again at [age] 60 two more points are removed.

¶23 Thus, Fields had already taken into account the fact that Edwards had turned forty when she offered her opinion at the 2012 discharge trial. We recognize that Fields's 2014 report briefly references age and the passage of time, such as when she states that Edwards's "aggression when younger … has declined over the past several years, as is fairly common with antisocial criminals as they age." These references do not persuade us that Edwards's increased age of two years between his 2012 discharge trial and Fields's 2014 report was a "new fact" that justified a trial on Edwards's discharge petition.

¶24 Finally, we consider Edwards's argument that the trial court erroneously made a credibility determination of Fields when he characterized her report as "schizophrenic" because Fields opined that Edwards should be discharged outright, but had not yet met the criteria for supervised release. We do not read the trial court's comments as a credibility assessment. Rather, the trial court was pointing out what appeared to be an inconsistent position: that one's progress in treatment could be sufficient to justify outright discharge, but would still be insufficient to meet the criteria for supervised release. In any event, we have applied a *de novo* review to the interpretation and application of the applicable statutes, *see* ***Arends***, 325 Wis. 2d 1, ¶13, and we have concluded that Edwards was not entitled to a discharge hearing, for the reasons outlined above. Accordingly, we affirm.

By the Court.—Order affirmed.

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