COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1668 **Cir. Ct. No. 2011CI3**

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

IN RE THE COMMITMENT OF OLLAR BERRY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

OLLAR BERRY,

RESPONDENT-APPELLANT.

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

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Ollar Berry appeals from an order of the circuit court that denied his petition for discharge from a WIS. STAT. ch. 980 commitment

without a trial. Berry argues his petition sufficiently alleged new information to warrant a discharge trial. We disagree and affirm.

¶2 Berry was originally committed as a sexually violent person in June 2013. In January 2015, he petitioned for discharge, alleging he no longer met the criteria for commitment because he is not predisposed to commit acts of sexual violence. The circuit court granted Berry an initial hearing on the petition, but concluded he "has not met the criteria under the new statutory language" of WIS. STAT. § 980.09 (2013-14)[1] to warrant a discharge trial, so it denied the petition. Berry appeals.

¶3 An individual committed under WIS. STAT. ch. 980 may petition for discharge at any time. *See* WIS. STAT. § 980.09(1). A petition for discharge triggers a two-step review process. *See* ***State v. Richard***, 2014 WI App 28, ¶11, 353 Wis. 2d 219, 844 N.W.2d 370. The circuit court first conducts a "paper" review of the petition, which shall be denied unless it "alleges facts from which the court or jury would likely conclude the person's condition has changed … so that the person no longer meets the criteria for commitment as a sexually violent person."[2] *See* WIS. STAT. § 980.09(1). "'Likely' means more likely than not." WIS. STAT. § 980.01(1m).

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[1] WISCONSIN STAT. § 980.09 was amended effective December 14, 2013. *See* 2013 Wis. Act 84, §§ 21-25. The "new statutory language" is a reference to the revision.

All references to WIS. STAT. § 980.09 are to the version as amended effective December 14, 2013. All other references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] "Would likely conclude" is the new statutory standard on which the circuit court relied. The prior version of the statute required the petitioner to allege facts from which the court or jury "may conclude" he or she no longer meets the commitment criteria. *See* WIS. STAT. § 980.09(2) (2011-12). Berry has not contended that the prior standard applies.

¶4 If the petition is facially sufficient, the circuit court may hold a hearing to determine whether the petition is indeed sufficient. *See* WIS. STAT. § 980.09(2). In this second stage of review, the circuit court "may consider the record, including evidence introduced at the initial commitment trial," current or past reports, relevant facts in the petition and in the State's response, arguments of counsel, and any supporting documentation provided.[3] *See* ***id.*** The standard is the same at this second stage: whether the petition alleges facts from which the court or jury would likely conclude the person's condition has changed so that the person no longer meets the criteria for commitment as a sexually violent person. *See* ***Richard***, 353 Wis. 2d 219, ¶13.

¶5 The criteria for commitment as a sexually violent person are that the person: (1) has been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See* WIS. STAT. § 980.01(7); WIS JI—CRIMINAL 2502. If there are facts from which the court or jury would likely conclude the person no longer satisfies these criteria, the circuit court shall set the matter for a trial; otherwise, it shall deny the discharge petition. *See* WIS. STAT. § 980.09(2). Berry's discharge petition focuses only on the third criterion; his expert did not believe Berry was a sexually violent person because he "does not meet the criteria of 'more likely than not' required for commitment[.]"

[3] Prior to the 2013 revision, the statute indicated that a circuit court "shall consider" these other sources of information. *See* WIS. STAT. § 980.09(2) (2011-12).

¶6 When determining whether to grant a trial on a discharge petition, "the circuit court must determine whether the petitioner has 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." *See* ***State v. Schulpius***, 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311. However, this "new evidence" consideration is not without limits. "[I]n order to provide a basis … to believe a person is no longer sexually violent … an expert's opinion must depend upon something more than facts, professional knowledge, or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent." ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. For example, "an opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication" would satisfy this standard, "as would an opinion based at least in part on new professional knowledge about how to predict dangerousness." *See* ***id.*** Whether the information alleged in a discharge petition is sufficient to warrant a trial is a question of law we review *de novo*. *See* ***State v. Kruse***, 2006 WI App 179, ¶36, 296 Wis. 2d 130, 722 N.W.2d 742.

¶7 On appeal, Berry argues that he was entitled to a discharge trial because he alleged new evidence not previously presented to the jury at his commitment trial. Specifically, Dr. Charles Lodl, in preparing his report and reaching his conclusions about Berry, utilized the Structured Risk Assessment—Forensic Version (SRA-FV) and the Violence Risk Assessment—Sex Offender Version (VRA-SO) actuarial tools. Berry asserts that the results of both tests have not been previously presented to a fact-finder. However, we agree with the State that these results do not qualify as new evidence.

¶8 Dr. Robert Barahal and Dr. Christopher Tyre had both applied the SRA-FV to Berry when preparing their reports for his initial commitment. Although the results themselves were not directly presented to the jury, the reports were admitted as evidence. Lodl's application of the SRA-FV is not new in the sense of being based on new research or new professional knowledge on how to use the SRA-FV; it is only new because Lodl has not previously evaluated Berry with this test. *See* ***Combs***, 295 Wis. 2d 457, ¶27; *see also* ***Richard***, 353 Wis. 2d 219, ¶¶19-20. Lodl's use of the SRA-FV thus is insufficient new evidence to support a discharge trial. *See* ***Kruse***, 296 Wis. 2d 130, ¶¶38-39.

¶9 None of the experts from the original commitment proceedings utilized the VRS-SO. However, the VRS-SO was an available tool at the time of the original commitment. *See* ***Combs***, 295 Wis. 2d 457, ¶25 (The point of ***State v. Pocan***, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 860, is that the need for a discharge trial "may be established by a method professionals use … that was not available at the time of the prior examination."). Further, when Lodl scored the VRS-SO, that analysis depended on historical facts about Berry, not any new facts or other changes to Berry himself. That is, the score relied on facts that were already in existence at the time of the prior adjudication. *See* ***Combs***, 295 Wis. 2d 457, ¶32. "An expert's opinion that is not based on some new fact … is not sufficient" for a discharge trial under WIS. STAT. § 980.09(2). *See* ***Schulpius***, 345 Wis. 2d 351, ¶35; *see also* ***Kruse***, 296 Wis. 2d 130, ¶38.

¶10 Because there is no new evidence at this time, we cannot say that a court or a jury would be likely—that is, more likely than not—to conclude that Berry no longer meets the criteria for commitment as a sexually violent person. Permitting a new discharge hearing when there are no new facts "violates essential principles of judicial administration and efficiency." *See* ***Schulpius***, 345 Wis. 2d

351, ¶35. Thus, we conclude the circuit court properly denied the petition for discharge without a trial.

By the Court.—Order affirmed.

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