STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

THORNON F. TALLEY,

Respondent-Appellant.

APPEAL FROM AN ORDER DENYING A PETITION FOR DISCHARGE FROM A CHAPTER 980 COMMITMENT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, HONORABLE SARAH B. O'BRIEN, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER-RESPONDENT

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ISSUE PRESENTED

Was Talley's 2012 discharge petition facially sufficient to merit a discharge trial under Wis. Stat. § 980.09?

The trial court denied the petition without an evidentiary hearing after determining that Talley's 2012 petition relied on the same facts as his unsuccessful 2011 petition.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. This case involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

Thornon Talley was committed as a "sexually violent person" pursuant to Wis. Stat. § 980.06 January 3, 2005. Talley filed a petition for discharge pursuant to Wis. Stat. § 980.09 October 12, 2010. Talley alleged in his petition that an annual evaluation prepared by a Dr. Richard Elwood pursuant to Wis. Stat. § 980.07 supported his position that he was no longer a "sexually violent person" and was thereby entitled to discharge. The Dane County Circuit Court, the Honorable Sarah B. O'Brien, presiding, denied the discharge petition without a hearing.

Appointed counsel for Talley filed a "no-merit" brief on appeal and this court summarily affirmed. *In re the commitment of Thornon F. Talley, State of Wisconsin v. Thornon F. Talley,* No. 2011AP1287-NM (Wis. Ct. App. Feb. 20, 2013) (R-Ap. 101-05). This court agreed with Judge O'Brien that Dr. Elwood's opinion that Talley posed a high risk to commit another sex act, but not a high risk to commit another act of sexual violence, was similar to an opinion from another doctor presented at a hearing on Talley's 2009 discharge petition, which Judge O'Brien "had not found persuasive." *In Re the Commitment of Talley*, slip op. at 4 (R-Ap. 104). This court also agreed with Judge O'Brien that Elwood's conclusion about Talley's low risk of sexual violence was not "based upon new professional knowledge, but rather upon a professional disagreement with the expert opinions of

a number of the other prior evaluators" (*Id.* at 4-5; R-Ap. 104-05). This court agreed that Elwood's analysis "did not provide any basis for a fact finder to conclude that there had been any change in Talley himself" (*Id.* at 5; R-Ap. 105). And, because Elwood's opinion about Talley's risk of sexual violence had already been addressed at a previous evidentiary hearing, "the court was not obligated to hold another hearing on those same issues" (*Id.;* R-Ap. 105).

Talley filed a second discharge petition in Dane County Circuit Court June 30, 2011, relying almost exclusively on yet another evaluation and report by Dr. Elwood June 23, 2011 (203; 205;[1] A-Ap. 22-29[2]). This time, a jury trial was held on the petition January 9-12, 2012, before Dane County Circuit Judge O'Brien. The jury found that Talley was still a "sexually violent person" (235; 277:47). Based on that verdict, Judge O'Brien issued an order

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[1] These are citations to documents in the appeal record for Appeal No. 2013AP492, which has been incorporated into the appeal record for this case, as has the appeal record for Appeal No. 2011AP1287-NM. In an order issued May 16, 2013, this court denied Talley's motion to consolidate this appeal with Appeal No. 2013AP492. In an order issued November 22, 2013, this court denied Talley's motion to "supplement" the record in this appeal with the record in Appeal Nos. 2013AP492 and 2011AP1287-NM (the no-merit appeal discussed above). Although this court denied that motion, this court acknowledged that "the record materials are sequentially numbered as if they were one record." Nov. 12, 2013 Order at 2; R-Ap. 107. This court held that it is "not necessary" to supplement this record with the records in those other two appeals, "because our clerk has already retained the record from 2011AP1287 for 2013AP492." This court then directed that the Clerk of the Court of Appeals "shall cross-reference and retain the records from 2011AP1287 and 2013AP492 until this appeal has been decided" (*Id.*; R-Ap. 107). Because most of the documents cited in this brief are from the record in Appeal No. 2013AP492, all citations to the record in this brief will be to documents from the record in Appeal No. 2013AP492, unless otherwise specifically indicated. *See* Talley's brief at 5 n.1.

[2] This is a citation to a document in the appendix to Talley's brief on this appeal. All citations to documents in his appendix will be in this form.

April 23, 2012, denying the discharge petition and also concluding that Talley was not a proper candidate for supervised release (238).

Talley filed a Motion for Postcommitment Relief December 10, 2012 (255). Dane County Circuit Judge William Foust denied the motion in an order issued February 15, 2013 (264). Judge Foust rejected Talley's claim that the statutory "clear and convincing evidence" standard of proof at a trial on a petition for discharge is unconstitutional, holding that this standard has been expressly approved by the Wisconsin Supreme Court (*Id.*).

Talley appealed (266; A-Ap. 1-2). He argued that Wis. Stat. § 980.09(3) is unconstitutional on its face because it imposes the lower "clear and convincing evidence" standard of proof on the state regarding his potential for continued sexual violence, rather than the "beyond a reasonable doubt" standard imposed on the state for initial commitment as a "sexually violent person." The state argued that Talley forfeited his constitutional challenge on appeal by not raising the issue before or at his discharge trial. The state argued in the alternative that the "clear and convincing evidence" standard of proof imposed on it at a discharge trial satisfies due process.

This court affirmed in a published decision issued December 4, 2014. *In re the Commitment of Talley,* 2015 WI App 4, 359 Wis. 2d 522, 859 N.W.2d 155. This court rejected the state's argument that Talley forfeited his right to raise a constitutional challenge to § 980.09(3) (*Id.* ¶¶ 8-17). It agreed with the state on the merits, however, holding that the "clear and convincing evidence" standard of proof at a discharge trial does not violate due process (*Id.* ¶¶ 18-35). The Wisconsin Supreme Court denied Talley's petition for review February 10, 2015.

Talley filed his third discharge petition pro se in Dane County Circuit Court July 12, 2012 (244; A-Ap. 7). That petition is the subject of this appeal.[3] That 2012 petition relied entirely on yet another report prepared by Dr. Elwood July 3, 2012, which practically mirrors his two preceding reports setting forth his diagnoses and findings regarding Talley's disorders and his potential for sexual violence (*Compare* A-Ap. 14-21, *with* A-Ap. 22-29; R-Ap.103-05). Judge O'Brien again presiding denied this latest discharge petition without a hearing August 22, 2012 (248; A-Ap. 4-6). Judge O'Brien held: "The conclusions reached by Dr. Elwood in his latest report are the same as in his two previous reports" (A-Ap. 5); the new information offered by Talley did not present "significant factors reducing the risk of re-offense" (*id.*); and "[t]he opinions given in that report are the same opinions testified to at two prior discharge trials" (*id.* at 6). Talley appealed from that order April 22, 2013 (Appeal No. 2013AP950; 279; A-Ap. 1-2), and filed his opening brief in October, 2013.[4] The state now files this brief in opposition thereto.

Additional relevant facts will be developed and discussed in the Argument to follow.

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[3] Talley filed yet another unsuccessful discharge petition in 2013, and has now appealed that order. That case, Appeal No. 2014AP1806, was stayed pending the outcome of the now-concluded Appeal No. 2013AP492. In an order issued February 4, 2015, this court continued the stay in Appeal No. 2014AP1806 pending the outcome of this appeal. It remains to be seen whether the outcome of this appeal will render that appeal moot.

[4] This appeal was stayed after Talley filed his brief in October 2013, pending resolution of Talley's petition for Wisconsin Supreme Court review in Case No. 2013AP492. That stay was lifted by this court February 24, 2015, after the Wisconsin Supreme Court denied review.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED TALLEY'S 2012 DISCHARGE PETITION WITHOUT AN EVIDENTIARY HEARING BECAUSE IT WAS DEFICIENT ON ITS FACE; THE PETITION PRESENTED NO NEW INFORMATION FROM PREVIOUSLY REJECTED PETITIONS AS TO WHETHER TALLEY REMAINS A SEXUALLY VIOLENT PERSON.

A. The applicable law and standard for review.

This case involves the trial court's application of Wis. Stat. § 980.09 to the facts presented. The trial court's ruling is subject to independent review in this court. *In re the Commitment of Arends,* 2010 WI 46, ¶ 13, 325 Wis. 2d 1, 784 N.W.2d 513.

Wis. Stat. § 980.09(1) provides that the trial court "shall deny" a discharge petition without an evidentiary hearing "unless the petition alleges facts from which the court or jury may conclude the person's condition has changed . . . since the date of his or her initial commitment order . . . so that the person no longer meets the criteria for commitment as a sexually violent person." This is a "paper review" of the petition and any supporting documents filed along with it. *In re the Commitment of Arends*, 325 Wis. 2d 1, ¶ 25.

> The statute further specifies that the petition must allege *facts*, not just legal conclusions. A petition which merely states "I am no longer a sexually violent person" without any supporting facts must fail. Conclusory allegations alone are not enough.

Id. (emphasis in original).

Even when the petition is supported by a report favorable to the petitioner, as here, it must still be summarily denied if it only repeats the same evidence presented in support of previously unsuccessful discharge petitions. *State v. Kruse,* 2006 WI App 179, ¶¶ 41-42, 296 Wis. 2d 130, 722 N.W.2d 742; *State v. Combs,* 2006 WI App 137, ¶¶ 26-27, 35, 295 Wis. 2d 457, 720 N.W.2d 684. *See State v. Schulpius,* 2012 WI App 134, ¶¶ 29-32, 345 Wis. 2d 351, 825 N.W.2d 311.

An allegation that the petitioner's "condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person," is deficient if not supported by new information pertinent to the issues whether (a) the person has changed; or (b) there has been a change in professional knowledge and research used to evaluate the person's disorder or dangerousness, if either change is such that the finder of fact could conclude the person is no longer sexually violent. *In re the Commitment of Ermers,* 2011 WI App 113, ¶ 34, 336 Wis. 2d 451, 802 N.W.2d 540. *See State v. Richard,* 2014 WI App 28, ¶ 1, 353 Wis. 2d 219, 844 N.W.2d 370 ("We conclude that when a petitioner alleges that he or she is no longer a sexually violent person, and supports his or her petition with a recent psychological evaluation applying new professional research to conclude that the petitioner is no longer likely to commit acts of sexual violence, the petitioner is entitled to a discharge hearing under Wis. Stat. § 980.09").

> We emphasize that the "change" referred to in Wis. Stat. § 980.09(1) does not include an expert opinion that depends only on facts or professional knowledge or research that was considered by the experts testifying at the commitment trial. *Combs,* 295 Wis. 2d 457, ¶ 1. In *Combs,* we concluded that such an expert opinion was inadequate to establish probable cause that the committed person was no longer a sexually violent person under § 980.09 (2003-04) (*Id.*). The court in *Arends* stated that *State v. Kruse,* 2006 WI App 179, 296 Wis. 2d 130,

> 722 N.W.2d 742, which relied on *Combs* for this proposition, was still applicable under the current § 980.09. *Arends,* 325 Wis. 2d 1, ¶ 39 n.21. Although the *Arends* court was at that point specifically addressing § 980.09(2), we understand the court to mean that such a report would also be inadequate to meet the pleading requirements in § 980.09(1).

In re the Commitment of Ermers, 336 Wis. 2d 451, ¶ 35.

B. Talley's petition failed to satisfy Wis. Stat. § 980.09(1) because it presented no new information.

Talley's discharge petition makes only the conclusory allegation that he is no longer a sexually violent person (244; A-Ap. 7). The only factual support Talley provides is the July 3, 2012 report by Dr. Elwood. It is virtually identical to the report prepared by Dr. Elwood June 23, 2011, and rejected by the jury in 2012, as well as the one prepared by Dr. Elwood and rejected by Judge O'Brien in 2010. Talley insists there is a material difference: Talley's "recent progress in 'social and emotional functioning.'" Talley's brief at 14. By negative inference, Talley can find no other differences in those reports.

Here is what Dr. Elwood had to say about that "progress" in his July 2012 report upon which this appeal is based:

> Mr. Talley said he started MAP (Motivational Assessment Program) in early April and individual treatment for PTSD (Posttraumatic Stress Disorder) a month ago. He said he is now less impulsive, has started to care about the effect of his behavior on other people, and has accepted treatment. He acknowledged having received nine BDRs (Behavior Disposition Reports) in the last 12 months but said he now has had fewer verbal outbursts and his last BDR was seven weeks ago. Mr. Talley said he still

> tends to stay to himself but has tried to socialize more and joined a fitness group. He told me in the last few months he began corresponding with his siblings, an uncle, and his cousins.

(A-Ap. 15). In that same report Dr. Elwood found: "In the past 12 months Mr. Talley received nine BDRs . . ., five for failing to follow a directive and four BDRs for disruptive conduct" (*Id.* at A-Ap. 18). Dr. Elwood also found that Talley, "has not had a family member visit him in the last three years . . . but he said his [sic] more members of his family have recently began [sic] communicating with him" (*Id.*).

Here is what Dr. Elwood had to say about Talley's "progress" in June 2011:

> Mr. Talley told me he has since regained his focus. He said he [sic] his treatment team removed him from MRT (Moral Reconation [sic] Therapy) because he was stressed in the large group and was not receptive to feedback. He said he completed individual therapy and is now in MAP (Motivational Assessment Program). Mr. Talley has two friends at WRC with whom he socializes, exercises, and plays game [sic] and regularly phones and writes members of his family.

(*Id.* at A-Ap. 23).

In that June 2011 report, Dr Elwood revealed that Talley, "received four BDRs . . . in the last six months: failure to follow rules (12/17/2010), disrespect and sexual conduct (05/16/2011), and disruptive and fail[ure] to follow staff directive (05/18/2011 & 05/20/2011). He was also warned six times for minor incidents" (*Id.* at A-Ap. 26). The June 2011 report also indicated that Talley told Dr. Elwood "he tends to isolate at WRC but socializes with two friends and regularly corresponds with his family (980 interview 6/22/2011)" (*Id.*).

The emotional and social "progress" reported in Dr. Elwood's two reports over a year apart was minimal and, for all intents and purposes, inconsequential. Talley had multiple behavior discipline reports on both occasions; they actually *increased* from four in 2010-11 to nine in 2011-12. Talley continues to isolate himself in the institution, but claimed on both occasions to have made minimal contacts with fellow inmates and family members during both time frames. No family member has, however, visited him in three years. Also, Dr. Elwood does not explain his contradictory findings that Talley "is now in MAP" as of June 23, 2011, yet he "*started* MAP . . . in early April [2012]." (*Compare* A-Ap. 15, *with* A-Ap. 23.)

Any slight differences one might perceive did not cause Dr. Elwood to change his ultimate conclusions in both reports. Talley suffers from antisocial personality disorder "that affects Mr. Talley's emotional and volitional capacity, [and] predisposes him to commit sexually violent acts" (*Id.* at A-Ap. 16, 24). Talley also suffers from borderline personality disorder "that affects Mr. Talley's emotional and volitional capacity, [and] predisposes him to commit sexually violent acts (*Id.* at A-Ap. 17, 25). Both reports conclude that Talley remains a high risk to commit another sex offense, but not a sexually violent offense (*Id.,* A-Ap. 18, 26). Due to the number of behavior discipline reports in both time frames, Dr. Elwood concluded in both reports that "Talley has not reduced his risk on this factor" ("Self-Regulation/Lifestyle Instability") (*Id.*). In short, what little emotional and social progress Talley may have made was not enough to cause Dr. Elwood to change his opinion regarding the risks of releasing him.

It is true that the minimal social progress discussed above caused Dr. Elwood to find in 2012 that "Talley has made recent progress to reduce his risk on this factor" ("Social and Emotional Functioning"), (*id.,* A-Ap. 18), after having found in his 2011 report that "Talley has not reduced his risk on this factor" (*Id.,* A-Ap. 26). But, this did not, as Judge O'Brien observed, cause Elwood to change his

ultimate conclusion in both reports that Talley remains a "low risk of . . . committing *sexually violent* acts" if released (*Id.,* A-Ap. 5, 19, 27).[5]

Of far greater significance is that both reports found that Talley "has not completed treatment and therefore has not reduced his risk on this factor" (*Id.,* A-Ap. 19, 27). With respect to his participation in MAP, Dr. Elwood found in both reports that Talley "has not shown that he understands or has changed the thoughts, attitudes, emotions, behaviors and sexual arousal linked to his sexual offending," thus "Mr. Talley has *not* made significant progress in treatment" (*Id.,* A-Ap. 19, 27) (emphasis in original). Both reports found further, "that because Mr. Talley has *not* made significant progress in treatment he does not meet the § 980.08 criteria for supervised release" (*Id.,* A-Ap. 20, 28) (emphasis in original).

Both reports favorably found "to a reasonable degree of psychological certainty that Talley is *not* a sexually violent person and therefore meets the criteria for discharge" (*Id.,* A-Ap. 20, 29) (emphasis in original). Both reports found, however, that "Talley *would* more likely than not commit another sex offense but would *not* more likely than not commit another *sexually violent* offense" (*Id.,* A-Ap. 19, 28) (emphasis in original).

The jury at Talley's 2012 discharge trial flatly rejected Dr. Elwood's last finding from the June 2011 report with regard to Talley's likelihood of committing another sexually violent offense. The trial court correctly determined in this case that Talley cannot now get another trial to present the identical findings from the same doctor based on the same facts as in his two prior reports. Talley still suffers from the same mental disorders, still violates institutional rules

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[5] Both of Elwood's reports found there was a "very high risk" that Talley would be charged with a sex offense within ten years if released (around 68%), but there was a low risk that he would commit a *violent* sex offense if released (between 0 and 31%) (*Id.* at A-Ap. 17, 25).

routinely, still isolates himself from others at the institution, still has not seen family members, still has not completed treatment, remains a high risk to commit another sex offense if released, is not even a good risk for *supervised* release, but (in Elwood's thrice rejected opinion) is a low risk to commit a sexually violent offense if released (0-31%).

Nothing much has changed between June 2011 and July 2012 in Talley's world. The trial court properly determined that the minor social and emotional adjustments claimed by Talley did not in Dr. Elwood's opinion "change[ ] the degree of risk posed by Talley" (*Id.*, A-Ap. 6). Moreover, Dr. Elwood did not in his 2012 report identify any scientific advances since his 2011 report to lead a court to reasonably find that Talley is no longer dangerous. *See In re Commitment of Ermers,* 336 Wis. 2d 451, ¶ 31. The trial court was, accordingly, required by § 980.09(1) to summarily deny without a trial Talley's latest discharge petition that relied on the same opinions of the same doctor based on essentially the same facts as his two previously-rejected discharge petitions. *In re Commitment of Arends,* 325 Wis. 2d 1, ¶ 30.[6]

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[6] Talley argues at "II" of his brief that because the trial court applied Wis. Stat. § 980.09(2), this appeal should be reviewed under that section, and Judge O'Brien erred because she did not consider enough documents to satisfy it. Talley wants a remand for the trial court to consider more documents. Talley's Brief at 18-19. There are several responses: (1) This case need not be decided under the broader § 980.09(2) because it is so plain that Talley's petition, with the attached 2012 report by Dr. Elwood, is deficient on its face under Wis. Stat. § 980.09(1). That is essentially what Judge O'Brien held when she denied the petition without a hearing. Even assuming she decided the case under § 980.09(2), and under the now-inapplicable "probable cause" standard, this court may affirm because (a) its review is independent, and (b) the trial court's decision was correct. *See State v. Alles*, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982); *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (trial court can be correct for wrong reason); (2) if Talley wanted Judge O'Brien to consider more documents, it behooved him to place them before her. *See In re the Commitment of Arends,* 2010 WI 46, ¶ 33, 325 Wis. 2d 1, 784 N.W.2d 513 ("The circuit court need not, therefore, seek out

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the trial court's order summarily denying the 2012 discharge petition be AFFIRMED.

Dated at Madison, Wisconsin this 25th day of March, 2015.

Respectfully submitted,

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evidence not currently before it"); (*id.* ¶ 52) ("The circuit court need not, however, seek out these items if they are not already within the record"); (3) Talley does not specify what additional documents were needed or why they would have made any difference; (4) Judge O'Brien's record review was sufficient to satisfy § 980.09(2). She considered Elwood's 2010, 2011 and 2012 reports, Talley's discharge petitions, the written arguments of counsel, and the evidence adduced at the January 2012 jury trial over which Judge O'Brien presided and at which Dr. Elwood testified (A-Ap. 4, 12).

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,657 words.

Dated this 25th day of March, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of March, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of March, 2015.

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