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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP950

IN RE THE COMMITMENT OF THORNON F. TALLEY

STATE OF WISCONSIN,

Petitioner-Respondent,

vs.

THORNON F. TALLEY,

Respondent-Appellant.

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

REPLY BRIEF OF RESPONDENT-APPELLANT

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Re: Statements of the Case

Mr. Talley accepts the updated facts discussed by the State concerning Mr. Talley's prior appeal in 2013AP492.

State br. 4. He also acknowledges that the correct date of Dr. Elwood's report is July 3, 2012, rather than July 23, 2011. *See* State br. at 5. Finally, Mr. Talley acknowledges that the record from the Mr. Talley's appeal in 2011AP1287-NM remained in the Court of Appeals, so that a motion to supplement the record was unnecessary. *See* State br. at 3 n. 1, also R290; R-Ap. 106-107. It was however, the State, rather than Mr. Talley, who moved to stay the instant appeal. *See State v. Talley*, 2013AP950, motion filed by Daniel J. O'Brien November 7, 2013.

Argument

Dr. Elwood's July 3, 2012 report did much more than merely repeat the same evidence that Mr. Talley previously presented in support of his discharge, and, as such, Mr. Talley was entitled to a trial on his petition for discharge.

The State rejects Mr. Talley's argument that Dr. Elwood's opinion contains a new and crucial piece of information. The State is wrong. Dr. Elwood opined that Mr. Talley had made "recent progress" to reduce his risk in the important area of "social and emotional functioning," as well as

Mr. Talley's no longer isolating himself socially. Dr. Elwood's report also noted Mr. Talley's abandonment of acting out sexually.

The State belittles Dr. Elwood's conclusion, arguing that the emotional and social progress was minimal in the State's estimation. State br. 10. But, saying it is minimal does not mean it is not new. The State does not present authority to say that the professional opinion needs to rely only on what the State deems to be substantial progress. But the bigger point lies in what the State does not address in its brief, which is the lack of recent sexual acting out. For someone of Mr. Talley's profile, who previously could not abstain from exposing himself in an institution, this is significant and substantial. *Cf. State v. Talley*, 2011AP1287-NM at 4, R.-Ap. 104, also App. 30-45. Dr. Elwood reported that Mr. Talley had stopped exposing himself and openly masturbating. Given Mr. Talley's offense history, it is significant that Dr. Elwood's report signals that Mr. Talley seems changed in that he is now able to regulate his sexuality better.

Dr. Elwood's report was not based "solely on evidence that had already formed the basis for the denial of a previous

discharge petition." The 2012 petition was sufficient. Mr. Talley was entitled to an evidentiary hearing on that petition.

The State would have the Court uphold the circuit court's decision under § 980.09(1), despite that fact that the circuit court based its decision on § 980.09(2). R248:1-2, App. 4-5. The circuit court referred to the thirty-day provision of § 980.09, which is in sub. 2. R248:1, App. 4. The circuit court also quoted from *State v. Kruse*, 2006 WI App 179, ¶35, 296 Wis.2d 130, 722 N.W.2d 742, specifically mentioning sub. 2:

> We have recently resolved the same issue the parties debate here. In *State v. Combs,* [2006 WI App 137, 295 Wis.2d 457,]720 N.W.2d 684, we held that the legislature intended that, in order to provide a basis for probable cause to believe a committed person is no longer sexually violent under WIS. STAT. § 908.09(2), "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." *Id.,* ¶ 32, 720 N.W.2d 684 (footnote omitted). We rejected the proposition that the legislature intended that probable cause may be established by an expert's opinion "without regard to whether that opinion is based on matters that were already considered by experts testifying at the commitment trial or a prior evidentiary hearing. *Id.*

Kruse, 2006 WI App 179 at ¶35; R248:2, App. 5 (footnote omitted).

A petition passes muster under subsection one if it alleges that the committed person does not have a mental disorder that predisposes him or her to acts of sexual violence, and/or the committed person is not more likely than not to commit a sexual offense. *See State v. Richard*, 2014 WI App 28, ¶12, 353 Wis.2d 219, 844 N.W.2d 370. Such averments would make the petition facially sufficient under subsection one, at which point the circuit court progresses to

> a review under Wis. Stat. § 980.09(2), which is a second level of review before the petitioner is entitled to a discharge hearing. In this step, the court must examine the record *in toto,* including any current or past examination reports or treatment progress reports, the petition and any written response, the arguments of counsel, and any other documentation filed by either party. The standard is the same as the facial review under § 980.09(1); that is, the court must determine whether there are facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment.

Richard, 2014 WI App 28 at ¶13.

In order to make the decision it did, the circuit court had to act under sub. 2. However, the circuit court's review was

unsatisfactory because the court's order does not reflect that the judge reviewed "*all* past *and* current reports filed under § 980.07." *State v. Arends*, 2010 WI 46, ¶ 5, 325 Wis. 2d 1, 784 N.W.2d 513. The State makes a multi-faceted argument that amounts to a claim that this error was harmless. State br. 12 n. 6. The State asserts the petition was deficient on its face under sub. 1. That is patently incorrect, because looking *just* at the petition and the attached report by Dr. Elwood, a court must certainly find a factual basis, and not merely conclusions, from which a trier of fact could certainly conclude that Mr. Talley did not meet the criteria for being a sexually violent person.

The State also in essence argues waiver, asserting that Mr. Talley did not submit other reports to the circuit court. To this effect, the State quotes one sentence from *Arends*, to wit: "The circuit court need not, therefore, seek out evidence not currently before it." *Arends,* 2010 WI 46 at ¶ 33. However, the State fails to acknowledge the sentence preceding: "The most reasonable reading of this statute is that the court must review all the items enumerated in § 980.09(2) that are in the record at the time of review." *Id.* Further, the State omits mention of the footnote, which reads, "The Department must provide all

§980.07 reports to the court when they are created. Wis. Stat. §980.07(6). The other items (the petition and response, arguments of counsel, and supplemental documents) originate from the parties." *Id.,* n. 18. In other words, the statute puts the burden on the trial court to review "*all* past *and* current reports filed under § 980.07 [by the Department]." The detainee does not need to provide to the court that which the court already possesses.[1]

The State's argument that Mr. Talley did not point out how compliance with sub. 2 would benefitted Mr. Talley is an allegation of harmless error. The State would need to show beyond a reasonable doubt that such error was harmless. *See, e.g., State v. Harrell*, 2008 WI App 37,¶¶ 37, 43, 308 Wis.2d

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[1]The appeal in *State v. Talley*, 2011AP1287-NM, was pending at the time of the trial court's review of the July 10, 2012 petition. The record in *State v. Talley*, 2013AP492, was filed in the Court of Appeals on April 1, 2013. While the reports relevant to 2011AP1287-NM (Docket #1-200) were in the Court of Appeals at the time of the circuit court's review of the July 10, 2012 petition, the circuit court judge could have reviewed them in the clerk's office, or requested copies, or asked for the record to be returned for a Wis. Stat. § 980.09(2) review.

166, 747 N.W.2d 770. The State here has not met its burden to demonstrate beyond a reasonable doubt that the trial court's failure to comply with the requirements of sub. 2 was harmless. In any case, Mr. Talley would have certainly benefitted from the circuit court's reviewing all past reports so that the court could note how Mr. Talley had improved over time. It should have struck the trial court that Mr. Talley's sexual acting out had abated.

Conclusion

For the reasons stated above, as well as those reasons Mr. Talley stated in his main brief, the Court of Appeals should reverse the order denying Mr. Talley's petition for discharge without an evidentiary hearing, and remand this case to the circuit court for trial. In the alternative, the Court should remand to the circuit court in order for the circuit court to conduct a review under § 980.09(2).

Respectfully submitted this 30th day of April, 2015.

/s/David R. Karpe

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SECTION 809.19(8) CERTIFICATE

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2033 words.

Signed,

/s/David R. Karpe

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David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 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.

Signed,

/s/David R. Karpe

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David R. Karpe