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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE No. 2018AP001922

In re the commitment of Rodney Timm:

STATE OF WISCONSIN,
Petitioner-Respondent,

v.

RODNEY TIMM,
Respondent-Appellant

APPEAL FROM THE ORDER DENYING PETITION FOR DISCHARGE WITHOUT A TRIAL

THE HONORABLE JUDGE MICHAEL T JUDGE PRESIDING

Oconto County Case No. 2004CI000001

APPELLANT'S BRIEF AND APPENDIX

Respectfully submitted by:
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STATEMENT OF THE ISSUE PRESENTED

Whether the petition for discharge alleged facts from which a court or jury would likely conclude that Timm's condition has changed since the date of Timm's initial commitment order so that Timm no longer meets the criteria for commitment as a sexually violent person.

The trial court said no.

STATEMENT ON PUBLICATION

Publication is appropriate as the decision in this matter will provide guidance to circuit courts throughout the state considering Chapter 980 discharge petitions.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the court believes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE

On September 3, 2004, the State filed a petition alleging that Rodney Timm was a sexually violent person under Chapter 980 of the Wisconsin Statutes. (R.4 at 1 – 3) Wisconsin Statute § 980.01(7) defines a sexually violent person as "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 a person will engage in one or more acts of sexual violence." The focus of this appeal is on the third prong of this definition; whether Timm is more likely than not to commit a sexually violent offense over the course of his lifetime.

Attached to the State's petition was a Chapter 980 evaluation report prepared by Dr. Anthony Jurek. (R.4 at 4 – 13) Dr. Jurek used multiple actuarial instruments to assess Timm's risk for committing a sexually violent offense. *Id*. at 10 – 13. One of these instruments was the Static-99 (SRA 99). *Id.* at 12. Dr. Jurek scored Timm a "4" on this instrument. *Id.* He stated that "Within the original sample upon which the SRA 99 was constructed scores of four were associated with reconviction for future sexual offenses at rates of 26, 31 and 36 percent over 5, 10 and 15 years respectively." *Id.* Timm's scores from the other actuarial instruments, the RRASOR and MnSost-R, showed varying recidivism rates, with the highest number being 73.1 percent at a 10 year follow up. *Id*. at 10 – 12.

Dr. Jurek also discussed Timm's sex offender treatment (SOT). *Id.* at 12 – 13. He stated that Timm entered into SOT on 06/03/03 but was terminated from the program on 09/11/03. *Id.* at 12. Timm was terminated because his treatment needs were beyond the parameters of the program. *Id*. There was no indication of any other sex offender treatment beyond approximately three months in this uncompleted program. Dr. Jurek opined that Timm "…suffered from a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence."

Id. at 13. On 05/10/06, Timm entered an admission to the petition without a trial and he was committed as a sexually violent person under Chapter 980. (R.31 at 1 – 5 and R.32 at 1)

Subsequent annual re-evaluation reports reflected changes in the actuarial instruments used to assess the risk of recidivism. In her Chapter 980 evaluation report dated 04/10/17, Dr. Carolyn Fixmer did not use the RRASOR and MnSost-R instruments. (R.123 at 1 – 18) Additionally, Dr. Fixmer stated that the Static-99 instrument (which Dr. Jurek relied on) over-estimated the subject's risk. *Id.* at 4. She scored Timm a 3 on a newer instrument, the Static-99R, and indicated that Timm had a 10 year recidivism rate of approximately 23 percent. *Id.* at 4 – 6. Dr. Fixmer's report documented at length Timm's current struggles with his deviant sexual thoughts and fantasies. *Id.* at 11 – 12. She opined that Timm was still more likely than not to commit a sexually violent offense should he be discharged. *Id.* at 18.

Timm's attorney, Melissa Fitzsimmons, filed a petition for discharge on 02/16/18. Dr. Charles Lodl's Chapter 980 re-examination report was attached to this petition. (R.125 at 1 – 14) The discharge petition stated that the Static-99 was revised to the Static-99R in 2009 and that the Static-99R norms were revised in 2015. *Id.* at 4. The petition stated that Timm's "…risk prediction was significantly lower than those offered at the time Mr. Timm entered an admission to the original petition." *Id.* Dr. Lodl used an actuarial instrument to assess the effect that Timm's treatment had on his dynamic risk factors, the VRS-SO. *Id.* at 5. Dr. Lodl assigned Timm a score of 39 on this instrument, which correlated to an 11.1 percent to 24.2 percent risk for re-offense over 5 and 10 years respectfully. *Id*. When combined with his Static-99R score, Timm's predicted recidivism range was 7.4 percent – 19.4 percent over a five and ten year period respectively.

Timm's petition for discharge also stated that Timm has made great advances in treatment and that he had

advanced to Phase III. *Id.* at 4. Dr. Lodl's report acknowledged that Timm continued to experience deviant thoughts about children and violence or force and his masturbatory imagery. *Id.* at 14. However, he also wrote Timm "…continues to be engaged with his facilitators to address these issues." *Id.* Dr. Lodl opined that given Timm's age, his physical condition, and progress in treatment, that "…it has become too much of a stretch to conclude that he remains at substantial risk." *Id.*

On April 17, 2018, the circuit court held a hearing on whether there should be a discharge trial. The Honorable Judge Michael T. Judge presided. (R.143 at 1 – 12) Special prosecutor Kevin Greene objected to the court ordering a trial based simply on the language in Dr. Lodl's report. *Id.* at 2:18 – 21. Greene argued that weighing of the reports should be allowed, although he acknowledged that this wasn't the current standard. *Id.* at 2:22 – 3. Greene's sole factual argument concerned Timm's deviant thoughts. *Id.* at 3:4 – 14. Greene argued that given Timm's thoughts about children and violence or force, he did "…not believe that it is at all likely that the respondent is likely to prevail at a hearing." *Id.* at 3:7 – 14.

Attorney Fitzsimmons stated that "we don't weigh examiners in this case." *Id*. at 3:18 – 19. She argued that the court should look at the changes in Timm's circumstances since he was committed in 2006 as there was never a trial in this case. *Id*. at 3:24 – 4:12. Although Fitzsimmons incorrectly stated that the Static-99 was not available in 2006, she correctly stated that the instrument had gone through several changes. *Id*. at 4:12 – 20. She argued that the norms were revised "…because there was evidence that the risk for re-offense was dropping." *Id.* at 4:20 – 22. She discussed Dr. Lodl's use of the Static-99R and VRS-SO which combined to predict an overall risk percentage of 7.4 – 19.4 (percent) over a five and ten year period. *Id.* at 4:23 – 6:5. Fitzsimmons argued that the standard wasn't that Timm had deviant

arousal, but instead whether Timm met the criteria (for Chapter 980 commitment). *Id.* at 8:2 – 17.

The court stated that Timm had a heavy burden and then started an analysis of the criteria for supervised release. *Id*. at 9:3 – 23. Attorney Fitzsimmons then corrected the court and stated that this was for a discharge trial. *Id.* at 9:24 – 10:7. The court then gave a short statement that did not even mention any of the actuarial instruments or their attendant risk percentages. *Id.* at 10:8 – 11:6. The court noted that Timm "…continues to experience deviant sexual thoughts about children and violence or force and reports masturbating to the imagery." *Id.* at 10:8 – 14. The court stated that Timm's progress in treatment, if any, has been extremely slow after being confined for 13 or 14 years. *Id.* at 10:21 – 11:1. The court stated "I still believe at this point that it has not reached that point where Mr. Timm can satisfy this court that he meets the requirements for a discharge, and for that reason, the petition for discharge is denied." *Id.* at 11:2 – 6. The court signed a written order denying Timm's petition for discharge on April 20, 2018. (R.129) Timm appeals that decision.

ARGUMENT

The circuit court erred by denying Timm's petition for discharge despite a significant reduction in Timm's risk to recidivate and also Timm's progress in treatment.

Wisconsin Statute § 980.09 states when a committed person is entitled to a discharge trial. The statute states in relevant part:

> (1) A committed person may petition the committing court for discharge at any time. 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, or since the date of his or her initial commitment order if the person has never received a hearing on the merits of a discharge petition, so that the person no longer meets the criteria for commitment as a sexually violent person.

(2) 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…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 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 documents 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.

See Wisconsin Statute § 980.09(1) and (2)

The Wisconsin Supreme Court's most recent decision on the circuit court's duties when analyzing a petition for discharge failed to produce a standard supported by a majority of the court. See *In re Commitment of Hager*, 381 Wis. 2d 74, 911 N.W.2d 17, 2018 WI 40. Prior to the *Hager* decision, the leading case on this issue was *In re Commitment of Arends*, 325 Wis. 2d 1, 784 N.W.2d 513, 2010 WI 46. At the time of the *Arends* case, Wisconsin Statutes § 980.09(1) and (2) set a lower bar for the petitioner to achieve a discharge trial. Instead of the current standard where the court decides whether the discharge petition alleges facts such that a court or jury would likely conclude that the person has changed so that he no longer meets the criteria for commitment, the prior standard was whether the petition alleged facts such that a court or jury may conclude that the person has changed so that he no longer meets the criteria for commitment. *Arends*, 2010 WI 46, ¶ 23.

The *Arends* court described a two-step process where the circuit court would weed out meritless and unsupported petitions. The first step, pursuant to § 980.09(1), "…is a paper review by the court only of the petition and its attachments." *Id.* at ¶ 25. The second step, under § 980.09(2), allows the court to hold a hearing where the court may consider "all the items enumerated in [the statute] that are in the record at the time of review." *Id.* at ¶ 32 - ¶ 33. However, the *Arends* decision prohibited the courts from weighing "…evidence favoring the petitioner directly against evidence disfavoring the petitioner. This is impermissible because the standard is not whether the evidence more heavily favors the petitioner, but whether the enumerated items contain facts that would allow a factfinder to grant relief for the petitioner." *Id.* at ¶ 40.

The *Hager* court considered whether courts could weigh the evidence in light of changes to § 980.09(1) and (2). In the lead opinion adopted by a three-justice plurality, the Wisconsin Supreme Court held that "…circuit courts are to carefully examine, but not weigh, those portions of the record

they deem helpful to their consideration of the petition, which may conclude facts both favorable as well as unfavorable to the petitioner." *Hager*, 2018 WI 40, ¶ 4. The court further explained that a reading of the statutes that allowed weighing the evidence would violate the petitioner's due process rights. *Id.* at ¶ 31.

Unfortunately, the lead opinion in *Hager* on the issue of weighing did not have the support of the majority of the court. Additionally, the *Hager* court does not explain the practical difference between carefully examining the evidence vs. weighing the evidence. However, it is clear that there is no precedent in Wisconsin that allows the circuit court to weigh the evidence. The basic two-step process for examining a discharge petition, along with the appropriate difference toward any new facts showing that the petitioner is no longer a sexually violent person, as provided by the *Arends* decision, is still good law.

In the instant case, it is clear that the circuit court did not carefully examine the evidence as required by *Hager*. Nor did it look at all the enumerated items in the statute to look for facts that would allow a fact finder to grant relief to the petitioner as advised by the *Arends* court.

Timm was 46 year years old when Dr. Jurek examined him in 2004. (R.4 at 4) At this time, Timm's sex offender treatment consisted only of three months before he was removed from that program. *Id.* at 12. Additionally, Dr. Jurek relied on multiple actuarial instruments that are not currently relied on and / or have undergone significant revisions.

Timm has never had a discharge trial since he was committed in 2006. Dr. Lodl examined his risk when he was 60 years old. (R.125 at 10) In the ensuing 14 years, the Static-99 instrument used to assess his risk had gone through numerous changes as the original norms had overestimated the offender's risks. (R.123 at 4 – 6) Using the Static-99R,

Timm's risk for recidivism over a ten year period is approximately 23 percent. *Id.* at 6. The RRASOR and MnSost-R actuarial tools used in 2004 are not even referred to in Timm's recent evaluation reports. (R.123 and R.125) Dr. Lodl used another instrument to assess Timm's dynamic risk factors, the VRS-SO. (R.125 at 13) This instrument did not exist in 2004. Combining the VRS-SO with Timm's Static-99R score of 3 shows a ten years recidivism risk of only 12.7 percent to 19.4 percent. *Id.*

Of course, Chapter 980 looks at a person's lifetime risk. It is mathematically obvious that Timm's predicted lifespan would be less in 2018 than it was in 2004. "[A] petition alleging a change in a sexually violent person's status based upon a change in research or writings on how professionals are to interpret and score actuarial instruments is sufficient for a petitioner to receive a discharge hearing." *In re Commitment of Richard*, 353 Wis. 2d 219, 844 N.W.2d 370, 2014 WI App 28, ¶ 20.

Additionally, Timm has advanced to Phase III of his treatment after many years of intensive therapy. Phase III is the highest level of treatment that a person can enter while committed at the Sand Ridge Secure Treatment Center. (R.120 at 1 – 2) Admittedly, Timm clearly still has problems with his deviant thoughts and fantasies about violence and children. It was proper for the court to consider this problem. Yet, Timm is still in treatment despite these thoughts and is working with his treatment providers to address the issue. (R.125 at 14) Progress in treatment is one way of showing that a person is ….[no longer] a sexually violent person." *In re Commitment of Pocan*, 267 Wis. 2d 953, 959, 671 N.W.2d 680, 2003 WI App 233.

The only argument that the State made to deny the petition for discharge without a trial is that Timm was having deviant thoughts and fantasies. This was the sole reason why the court denied Timm's petition for discharge. (R.129 at 10:8 – 11:6) Neither the State nor the court even looked at

the obvious changes in Timm's actuarial scores, the actuarial instruments themselves, or Timm's current life expectancy. It is noteworthy that when the court started to make its decision, it discussed the supervised released procedures, which were unrelated to the issues at hand. *Id.* at 9:3 – 10:6. This record does not show that the court carefully examined the record or even considered evidence that favored Timm's petition. Timm's petition alleged facts from which a court or jury would likely conclude that Timm no longer meets the criteria for commitment as required under § 980.09(2). Consequently, the circuit court failed in its duties as required by the *Arends* and *Hager* decisions.

CONCLUSION

Timm requests that he be granted his first trial for discharge since his commitment in 2006. There have been significant changes in how professionals assess a person's risk to commit a sexually violent offense. The leading instruments to assess risk did not exist in 2004. The underlying statistical data has also changed in Timm's favor. The actuarial tools supporting his original commitment do not apply to Timm now. Additionally, despite his challenges, Timm has undergone many years of treatment in a secure facility that is completely geared to treating sex offenders. The circuit court did not consider these facts and improperly denied Timm's petition for discharge without a trial.

Timm respectfully requests that this Honorable Court overturn the decision and remand the case back to the circuit court.

Dated this 25th day of January, 2019

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Michael Covey
Attorney for the Respondent-Appellant
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CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 3244 words as counted by the commercially available Microsoft Word Processor.

_____

Attorney for the Respondent-Appellant

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, 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.

_____

Attorney for the Respondent-Appellant

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

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