State of Wisconsin
Court of Appeals
District 3
Appeal No. 2020AP1270

In re the commitment of Roy C. O'Neal:

State of Wisconsin,

Petitioner-Respondent,

v.

Roy C. O'Neal,

Respondent-Appellant.

On appeal from a judgment of the Brown County Circuit Court, The Honorable Beau Liegeois, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issue

O'Neal filed a petition for discharge from his Chapter 980 commitment. The petition alleged that, since his last discharge trial in 2018, there has been new research that offers a better professional understanding of "time free" in the community on a sex offender's risk to reoffend; and, further, the petition alleged that O'Neal has spent approximately two additional years in the community without committing an offense. Nevertheless, the circuit court denied the petition without a trial.

Did the circuit court err in denying O'Neal's discharge petition without conducting a trial?

Answered by the circuit court: No. The new research is not "significant", and the time that O'Neal has spent in the community is "just not long enough."

Summary of the Argument

In denying O'Neal's petition without conducting a trial, the circuit judge did precisely what the supreme court has instructed the circuit courts not to do. The judge *weighed* the facts alleged in the petition. That is, the judge dismissed the new research data asserting that it was not "significant"; and, further, the judge formed the opinion that O'Neal's crime-free time in the community was not "long enough."

Therefore, the circuit court erred in denying O'Neal's petition without conducting a trial.

Statement of the Case

The respondent-appellant, Roy C. O'Neal (hereinafter "O'Neal") was committed 1996 as a sexually violent person under Chapter 980 Wis. Stats. O'Neal was released into the community on supervised release in 2015. He has been on supervised release since then.

On December 11, 2019, O'Neal filed a petition pursuant to § 980.09, Stats. for discharge from his commitment. (R:143; Appendix A) In a nutshell, the petition alleged that O'Neal was no longer a sexually violent person, and there was evidence of a change in his status since the last time the court conducted a discharge trial in 2018. Specifically, the petition alleges that a

2019 study concerning the effect of a sex offender's "time free" in the community on the offender's risk to reoffend was a new factor. *Id.* Further, the petition alleged that O'Neal has continued on supervised release since the last discharge trial, and he has committed no new offenses.

The petition incorporated a report filed by Dr. Sharon Kelley. (R:144) Dr. Kelley's report discussed the "time free" research, and pointed out that, "Research demonstrates that for each year in an average community setting in which the individual has not received further convictions for sexual and non-sexual reoffending, risk for future sexual offenses decreases in a linear and incremental manner." (R:144-15) Thus, Dr. Kelley concluded that O'Neal is no longer a sexually violent person.

The court heard arguments from the parties concerning the sufficiency of the petition on January 28, 2020. Thereafter, the court took the matter under advisement.

On February 14, 2020, the court issued a memorandum decision denying O'Neal's discharge petition without a trial. (R:147; Appendix B) According to the circuit court, the new "time free" research was not a change in circumstances because, "No reasonable court or jury would determine that enough time has passed to study Mr. O'Neal with this new instrument for analyzing recidivism risk. The study itself is only cited as a footnote in Dr. Kelley's report on page 15, and then

the report goes on to discuss Mr. O'Neal's freedoms in the community since his release in 2015." (R:147-4) Noting that O'Neal has "only" been free on supervised release for four-and-a-half years, the circuit judge concluded, "This is just not a long enough period of time for a reasonable court or jury to likely conclude that there is enough data to determine that Mr. O'Neal no longer meets the criteria for commitment at this point in time. There is an insufficient analysis of the purported 2019 new study cited by Dr. Kelley on page 15 to Mr. O'Neal individually over an extended period of time." (R:147-5)

Argument

I. The circuit court erred in denying O'Neal's discharge petition without conducting a hearing because the judge did exactly what the supreme court forbids in *Hager*: the judge "weighed" the evidence rather than merely determine *whether* there was a change in circumstances.

O'Neal filed a petition for discharge from his Chapter 980 commitment. The petition alleges that there has been a change in circumstances since his last discharge trial in 2018: (1) an article was published in 2019 that increases the professional understanding of the effect of "time free" in the community on a sex offender's risk to reoffend; and, (2) since his last discharge

trial in 2018, O'Neal has spent approximately two additional years in the community without reoffending.

In denying O'Neal's petition without conducting a trial, the circuit judge did precisely what the supreme court has instructed the circuit courts not to do. The judge *weighed* the facts alleged in the petition. That is, the judge dismissed the new research data asserting that it was not "significant"; and, further, the judge formed the opinion that O'Neal's crime-free time in the community was not "long enough."

Therefore, the circuit court erred in denying O'Neal's petition without conducting a trial.

A. Standard of appellate review

"We review the circuit court's determination of whether the statutory criteria for a discharge trial have been met *de novo*." *In re Commitment of Hager*, 381 Wis.2d 74, 93, 911 N.W.2d 17, 27 (Wis., 2018)

B. The standard for review of the petition

§ 980.09(2), Stats., provides that:

> 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.

As the supreme court noted in *Hager*, the current version of the statute, as amended by Act 84, represents a fairly significant departure from the prior procedure. The court may consider the entire record, and the burden of production[1] is now upon the committed person to demonstrate that there is evidence of a sufficient charge since the last trial such that a jury would "likely conclude" that the person no longer meets the criteria for commitment.

> The result of a plain reading of "the court may consider the record" is that courts are free to review everything in the record, no matter whether it is beneficial or detrimental to the petitioner's cause. In order to illustrate the breadth of materials circuit courts may consider, the legislature included a host of examples of such materials, which by their nature will contain facts detrimental to the petitioner, including (1) "evidence introduced at the initial

[1] However, in order to avoid constitutional issues of shifting the burden of persuasion to the committed person, the court may not weigh the evidence presented.

> commitment trial or the most recent trial on a petition for discharge"; (2) "any current or past reports filed under § 980.07"; (3) "relevant facts ... in the state's written response"; (4) "arguments of counsel"; and (5) "any supporting documentation provided by ... the state." Id. If, as Hager and Carter contend, circuit courts were limited to considering the facts favorable to the petitioner, the legislature would have had no reason to list these materials as examples of what courts may consider during their review of the discharge petition.

Hager, 2018 WI 40, ¶ 27, 381 Wis. 2d at 97–98, 911 N.W.2d at 29.

Significantly, though, in *Hager*, the supreme court held, "This leads us to the conclusion that when they review petitions for discharge, courts are to carefully examine, but not weigh, those portions of the record they deem helpful to their consideration of the petition, including facts both favorable as well as unfavorable to the petitioner." *Hager* 381 Wis. 2d at 99-100, 911 N.W.2d at 30.

C. O'Neal's petition is sufficient to require a trial

O'Neal's petition alleges that there is new research, published in an article in 2019, that demonstrates an increased professional understanding of the effect of "time free" in the community on a sex offender's risk to reoffend. These data were not considered by the court, nor the professionals, at O'Neal's last discharge trial in 2018[2].

[2] Obviously, because the study had not yet been published

Nevertheless, the circuit judge dismissed the new data, writing, “A study that concludes that each year an offender remains crime-free reduces their recidivism risks does not sound like a significant new scientific finding . . .” (R:147-4, 5)

The very language chosen by the judge demonstrates that the court *weighed* the new research data. The judge apparently concedes that the data is new, but dismisses it as not “significant.” This is a value judgment on the data. In other words, the court weighed the value of the new data and rejected it.

Whether the new data is significant or not, there still is the fact that O’Neal had been in the community approximately two additional years since his last discharge trial, and he had not committed any new sexual offenses. This, too, is a change of circumstances because, as Dr. Kelley wrote, “Research demonstrates that for each year in an average community setting in which the individual has not received further convictions for sexual and non-sexual reoffending, risk for future sexual offenses decreases in a linear and incremental manner.” (R:144-15) Thus, O’Neal’s risk to reoffend decreased in a linear and incremental fashion since his last discharge trial.

Once again, the language used by the circuit judge reveals a process of weighing the evidence. Concerning the two additional years that O’Neal spent in the community, the judge wrote, “This is just not a *long enough* period of time . . .”

(R:147-5)

In denying O'Neal's petition, then, the circuit court plainly weighed the facts alleged. Following a trial, having heard the testimony of the experts, the judge certainly is permitted to form the opinion that the new data is *not significant*, or that the time O'Neal has spent in the community is *not long enough*. However, the court is not permitted to do so in reviewing the sufficiency of O'Neal's petition. The circuit court erred in denying the petition without a trial.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying O'Neal's discharge petition without a trial; and remand the matter to the circuit court with instructions to conduct a trial into the petition.

Dated at Milwaukee, Wisconsin, this 11th day of October.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2429 words.

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I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy. .

Dated at Milwaukee, Wisconsin, this 11th day of October.

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