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 Reply Brief

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Argument

I. In *Hager* the supreme court held that, in reviewing the sufficiency of a discharge petition, the judge may not weigh the evidence; but it is impossible for the judge to determine whether a jury is likely to reach a different conclusion without weighing the evidence. The judge in the present case clearly did weigh the evidence; and, therefore, the circuit court violated the mandate of *Hager*.

In this appeal, O'Neal's central argument is that, in finding that his petition was not sufficient to warrant a trial, the circuit court plainly *weighed* the evidence. The judge *admitted* he was weighing the evidence when he remarked that O'Neal's time in the community was just "not enough." Further, it is logically impossible to determine whether a jury is "likely" to reach a different result without weighing the evidence. Thus, the circuit court's decision in this case is plainly contrary to the mandate of *State v. Hager*, 2018 WI 40, 381 Wis. 2d 74, 911 N.W.2d 62.

Concerning whether the court may weigh the evidence, the state asserts that, "Contrary to this interpretation [that the circuit court may not weigh the evidence], the supreme court's fractured decision in *Hager* does not resolve how a circuit court should apply section 980.09(2)'s increased burden of production when it reviews a discharge petition." (Resp. brief p. 10) In other words, according to the state, maybe a circuit

judge is permitted to weigh the evidence.

Thus, while professing to believe that the judge cannot weigh the evidence[1], the state nevertheless leaves the door slightly ajar; perhaps hoping that the court of appeals-- or, more likely, the supreme court-- will ultimately settle the issue by holding that the circuit court may, in fact, weigh the evidence.

The remainder of the state's argument on this point is devoted to a meticulous, but perhaps a bit pedantic, discussion of whether the supreme court's holding in *Hager is actually a holding*.

It is not important here to argue about whether the language in *Hager* amounts to a holding or not. Suffice it to say that the supreme court apparently thought it was a *holding*. The court wrote, "We *hold* 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 include facts both favorable as well as unfavorable to the petitioner." (emphasis provided) *Hager,* 381 Wis. 2d 74, 85-86, 911 N.W.2d 17, 23.

Similarly, in the unpublished decision referred to by the

[1] Ultimately, the state comes around to concede that, in reviewing the sufficiency of a discharge petition, the law is that the court may not weigh the evidence. (Resp. brief p. 12) Strangely, though, that seemingly important concession is mostly relegated to a footnote. In the footnote, the state underscores the point that the concession is purely a matter of consistency. That is, the state took that position before the supreme court in *Hager (In re Hager),* 2018 WI 40, P4, 381 Wis. 2d 74, 85-86, 911 N.W.2d 17, 23, 2018 Wisc. LEXIS 218, *3, 2018 WL 1865941 .

state in its brief, the court of appeals likewise recognized the language in *Hager* as a *holding*. The court of appeals wrote, “Contrary to what the parties' advocate here, we are bound by the *Hager* decision—at least insofar as we must adhere to the court's mandate, which clearly garnered a majority of the justices. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").” *State v. Timm (In re Commitment of Timm),* 2020 Wisc. App. LEXIS 329, *17, 2020 WI App 55, 393 Wis. 2d 839, 948 N.W.2d 490, 2020 WL 4192075

This is more or less an academic discussion, but so as to avoid being accused of conceding a point by not replying to it, O’Neal will address the controversy.[2]

Plainly, in reviewing the sufficiency of a discharge petition to warrant a trial, the judge ought not be permitted to weigh the evidence. Everyone seems to agree on that point.

The real problem with the *Hager* standard is the second prong of the analysis. As Justice Abrahamson rhetorically asked in her dissent, “How can a court determine what a jury ‘would likely conclude’ without weighing the evidence favorable to discharge against the evidence unfavorable to discharge?” *Hager,* 381 Wis. 2d at 122, 911 N.W.2d at 41.

[2] The failure of an appellant to reply to an argument made by the respondent rsks conceding the point made in the respondent's brief, *see United Co-op. v. Frontier FS Co-op.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession),

And, really, that is the problem in O'Neal's case. All agree that the judge should not weigh the evidence. Nevertheless, the judge here determined that O'Neal's two additional years in the community was "just not enough" to make it likely that a new trial would result in a different conclusion. There is no way to characterize the judge's remark other than an evaluation of the weight of the evidence alleged in the petition ("just not enough").

To the extent that the state is arguing in its brief that the supreme court should revisit the *Hager* standard, O'Neal agrees. It appears to be quite impossible to determine whether new evidence is likely to result in a new outcome without weighing the evidence.[3]

Of course, O'Neal is not asserting that a circuit judge ought to be permitted to weigh the evidence. Rather, O'Neal's position is that the second prong of the analysis-- requiring the judge to determine whether a jury would be "likely to conclude" that O'Neal is no longer a sexually violent person-- ought to be revisited.

In its brief, the state suggests what it believes to be a better standard. The state draws an analogy to the criminal standard for newly discovered evidence.

A more apt analogy, though, is the standard for deciding

[3] As such, as O'Neal asserted in his opening brief, the circuit judge in this case clearly violated the holding of *Hager*. The judge did weigh the evidence. That is the only way he could have determined that the new evidence would not result in a different verdict.

whether a postconviction motion ought to be granted an evidentiary hearing. Concerning a postconviction motion in a criminal case, the court must hold a hearing if the motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion meets this standard is a question of law. *See id.* "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the postconviction court has the discretion to deny the defendant's motion without a hearing. *Id.*

Concerning the sufficiency of a discharge petition in a Chapter 980 case, then, the question that the court should ask is: Does the petition allege sufficient facts which, if true, would show that the person's condition has changed since the last discharge trial; and, in light of those changes, is it likely that a trier fact would would conclude that the respondent is not a sexually violent person?

By way of brief summary, O'Neal's petition alleged that, since his last discharge trial, he has made a "large amount of treatment change" (R:143-1); and, further, his time in the community has further reduced his risk to reoffend. *Id.*

Under this standard, assuming the factual allegations of O'Neal's petition to be true, O'Neal's condition certainly has

changed since that last discharge trial, and, in light of these changes, it is likely that a trier of fact would conclude that he is not a sexually violent person. (See Sec. II for further argument on this point)

The state's attempt to explain what the standard ought to be hopelessly conflates the role of the judge in reviewing the petition, with the role of the trier of fact at a discharge trial.

The state's discussion begins with a bewildering analogy to the criminal standard for newly discovered evidence. Ultimately, the state concludes, "The person must show [in his petition] that a trier of fact [evidently at trial], looking at the evidence available when the person was committed or not discharged, and the new evidence now available to the person, would find that the new evidence changes the factual picture so significantly that it would have a consequential doubt about whether the person was sexually violent." (Resp. brief p. 14)

This, of course, is most assuredly *not* the function of the trier of fact at a discharge trial. At a discharge trial, " [T]he state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." § 980.09(3), Stats. The statute does not require, and it arguably does not even permit under the rules of relevance, the trier of fact to compare the respondent's present condition with his condition as it existed at his last discharge trial, and ask: Has his condition sufficiently changed? That is

not the question at a discharge trial. The question at a discharge trial is whether the person is *currently* a sexually violent person.

II. The state's arguments concerning the facts alleged in O'Neal's petition are unpersuasive.

Having completed its lengthy, and, at times, baffling dissertation on the finer legal points in Chapter 980, at page nineteen of the brief, the state eventually gets around to discussing the factual allegations of O'Neal's petition.

According to the state, the new "time free" evidence was only one component of Dr. Kelley's risk assessment. (Resp. brief p. 16) The state then asserts that comparing Kelley's current actuarial scores with the scores from his 2018 trial shows that the prediction of O'Neal's risk to reoffend has not sufficiently changed. (Resp. brief p. 17)

This, of course, is a logical sleight of hand.

First off, it must be emphasized that both sets of actuarial scores predict that O'Neal's risk to reoffend is substantially below the "more likely than not" standard.

But, as the state points out, at the 2018 trial, "The factfinder *rejected Lodl's and Thornton's assessment of O'Neal's risk.*" (Resp. brief p. 17) In other words, the trier of fact found that the 2018 actuarial scores did not accurately predict O'Neal's true risk to commit a sexually violent act.

The question, then, is not whether the *prediction of risk* has changed. Rather, the question is whether there is new evidence that might convince the trier of fact that the actuarial prediction is now *accurate*.

There is such evidence. There is the allegation of the petition that O'Neal has lived in the community for two years, and he has not committed a new sexually violent act. Under the research, whether the research is new or not, this is strong evidence that the jury likely would not reject Dr. Kelley's actuarial predictions.

Next, the state puts a slightly different spin on its assertion that O'Neal's risk has not changed since the 2018 trial. This time, though, the state contends that the "time fee" research is not new. According to the state, "O'Neal makes no effort to explain how the 2019 article Kelley authored with Hanson and Thornton does anything more than repeat the research summarized in the STATIC-99 Coding Rules. Each evaluator, including Thornton who co-authored the Coding Rules, relied on the STATIC-99R when they conducted their 2018 evaluations. There simply is no reason to believe that the Pflugradt, Thornton, and Lodl did not account for O'Neal's "time free" when they evaluated him in 2018." (Resp. brief p. 20)

The doctors in 2018 may very well have taken into account O'Neal's "time free" as it existed in 2018. The difference is that now there is evidence that O'Neal has two

more years of time free in the community; and, according to the research, whether it is new or not, this makes it that much more unlikely that O'Neal will commit a sexually violent act. This new evidence was not available to the doctors in 2018 because it did not exist.

Dated at Milwaukee, Wisconsin, this 2nd day of January, 2021.

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Dated at Milwaukee, Wisconsin, this 2nd day of January, 2021.

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