

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP303

Cir. Ct. No. 2000CI3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF JAMEEL H. ALI:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMEEL H. ALI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 PER CURIAM. Jameel H. Ali, previously committed as a sexually violent person under WIS. STAT. ch. 980 (2003-04),¹ appeals from an order that dismissed his petition for discharge without allowing him an evidentiary hearing. The circuit court determined that Ali did not demonstrate probable cause to believe that he was no longer sexually violent because he failed to support his petition with an expert opinion based on any new facts, professional knowledge, or research. *See State v. Combs*, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. We affirm.

Background

¶2 In 1995, a jury found Ali guilty of two counts of second-degree sexual assault of a child. The circuit court sentenced him to an indeterminate ten-year term of imprisonment.

¶3 The State sought to commit Ali as a sexually violent person before his scheduled release from prison. *See* WIS. STAT. ch. 980. At the February 2004 commitment trial to the court, the State presented expert testimony from two psychologists. Both of the State's experts testified that Ali had a mental disorder, namely, personality disorder not otherwise specified, that predisposed him to commit acts of sexual violence. One expert testified that Ali also suffered from an additional mental disorder, paraphelia not otherwise specified, which similarly predisposed him to commit sexually violent acts. Both experts assessed Ali's risk to re-offend as high based on multiple actuarial instruments used to predict the likelihood of future offenses. In response, Ali offered expert testimony from a

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

psychiatrist in an effort to undermine the value of risk assessment tools as predictors of future offenses.

¶4 The circuit court found that Ali had mental disorders that predisposed him to commit acts of sexual violence and that created a substantial probability of his engaging in such acts in the future. The court committed Ali to the custody of the Department of Health and Family Services (DHFS) as a sexually violent person pursuant to WIS. STAT. § 980.06.

¶5 In September 2004, pursuant to WIS. STAT. § 980.07(2), the DHFS submitted a reexamination report reflecting that Ali continued to meet the statutory definition of a sexually violent person and could not safely be released into the community. At Ali's request, the circuit court appointed Dr. Diane Lytton to conduct an additional examination on Ali's behalf.

¶6 Circuit court docket entries reflect that in March 2005, the circuit court held a hearing and reviewed the reexamination reports.² The court found no probable cause to believe that Ali had ceased to be a sexually violent person and it did not schedule any further proceedings.

¶7 In October 2005, Ali petitioned for discharge pursuant to WIS. STAT. § 980.09.³ The DHFS submitted a second reexamination report, again concluding that Ali met the statutory definition of a sexually violent person and was "more likely than not" to re-offend. *See* WIS. STAT. §§ 980.01(1m), (7). In March 2006,

² The appellate record does not contain a transcript of the March 14, 2005 hearing.

³ 2005 Wis. Act 434 amended WIS. STAT. § 980.09 (2003-04). The amendments do not apply to Ali's 2005 petition for discharge at issue in this case. *See* 2005 Wis. Act 434, §§ 131-32 (act first applies to proceedings commenced on August 1, 2006).

the circuit court reappointed Dr. Lytton to examine Ali pursuant to the parties' stipulation.

¶8 Dr. Lytton's 2006 report contains an "opinions" segment that states, in pertinent part:

I conducted a similar examination of Mr. Ali in 2005. Despite my review this year of additional police records that I requested about Mr. Ali's criminal offenses, I am still unable to find a mental disorder that affects his emotional or volitional control and predisposes him to commit acts of sexual violence.

My opinion is that, to a reasonable degree of psychological certainty, Mr. Ali does not have a mental disorder that predisposes him to commit sexual offenses. Because risk to reoffend [sic] under WSS Chapter 980 flows from a mental disorder, further risk assessment was not done. However, research published this past year supports that a sex offender's risk to reoffend [sic] likely decreases with increasing age, similar to the strongly-supported research findings in general criminality. Most likely the risk to reoffend [sic] in sex offenders of Mr. Ali's current age of 57 is quite low, and below the risk standard described in Chapter 980 of "more likely than not" to reoffend [sic].

¶9 Pursuant to WIS. STAT. § 980.09(2), the circuit court held a hearing to review the reexamination reports and determine if they showed probable cause to believe that Ali was no longer a sexually violent person. Ali contended that Dr. Lytton's report constituted the necessary probable cause. The circuit court disagreed and dismissed the petition. This appeal followed.

Discussion

¶10 A probable cause hearing pursuant to WIS. STAT. § 980.09(2)(a) "is a paper review of the reexamination report(s) with argument that provides an opportunity for the committing court to weed out frivolous petitions" *State v. Paulick*, 213 Wis. 2d 432, 438-39, 570 N.W.2d 626 (Ct. App. 1997). The circuit

court must determine “whether probable cause exists to establish that an individual seeking discharge is no longer a sexually violent person.” *State v. Fowler*, 2005 WI App 41, ¶8, 279 Wis. 2d 459, 694 N.W.2d 446. If probable cause does not exist, the individual is not entitled to an evidentiary hearing. *See id.*, ¶32. Whether reexamination reports show probable cause presents a question of law that we review *de novo*. *See State v. Kruse*, 2006 WI App 179, ¶36, 296 Wis. 2d 130, 722 N.W.2d 742, *review denied*, 2007 WI 16, 298 Wis. 2d 94, 727 N.W.2d 34.

¶11 “[I]n order to provide a basis for probable cause to believe a person is no longer sexually violent under [WIS. STAT.] § 980.09(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” *Combs*, 295 Wis. 2d 457, ¶32. The petitioner can satisfy this standard when the expert’s opinion is “based at least in part on new professional knowledge about how to predict dangerousness.” *Id.*

¶12 Ali contends that Dr. Lytton’s opinion is based on new research as to how aging affects recidivism. It plainly is not. Although Dr. Lytton cites a 2006 research publication regarding the effect of aging on the risk to re-offend, her report unequivocally reflects that this research did not influence her opinion.⁴ Rather, Dr. Lytton states that her examination was similar to the examination that

⁴ On July 25, 2007, we granted Ali’s uncontested motion to supplement the record with Dr. Lytton’s amended 2006 report. The amended report differs from the original only in its inclusion of endnotes with citations to research references. While both the amended and the original reports were before the circuit court, we recognize that the cited articles were not themselves ever made a part of the circuit court record. Appellate counsel nonetheless submitted a copy of one such article with the appendix to Ali’s brief. We accept appellate counsel’s explanation that the material was included in the appendix as a convenience to this court.

she conducted in 2005 and that she reached the same conclusion in 2006, namely, that Ali “does not have a mental disorder that predisposes him to commit sexual offenses.” She therefore did not undertake a further risk assessment. Dr. Lytton’s conclusions about Ali in 2006 are not based on the effect of aging on the risk to re-offend, and they are entirely unrelated to any 2006 research on that subject.

¶13 Moreover, Dr. Lytton acknowledges in the “summary” segment of her report that Ali carries a diagnosis of personality disorder, but she advises that “such a personality disorder generally does not ... predispose a person to commit sexual offenses.” Further, she states that “use of the reoffense risk percentages from the actuarial tests is questionable, and the limitations of those instruments should be explained.” The report thus reflects Dr. Lytton’s professional disagreement with the State’s experts, who testified in the original commitment proceedings that Ali’s condition predisposed him to commit acts of sexual violence. These competing positions were previously considered and resolved by the circuit court. As Ali concedes, he presented expert testimony at his commitment hearing that critiqued the actuarial instruments used to measure risk and described the limitations of those instruments in assessing future dangerousness.

¶14 We conclude that Dr. Lytton’s 2006 opinion did not depend upon any fact, professional knowledge, or research that was not considered during earlier proceedings. First, the 2006 research that Dr. Lytton referenced did not form any part of the basis for her opinions; and second, the substance of her opinions was previously submitted to and considered by the court. Therefore, her reexamination report was insufficient to establish probable cause for an evidentiary hearing on Ali’s discharge petition.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2005-06).

