

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2011AP002778**

In re the commitment of Edward Cotton:

State of Wisconsin,

Petitioner-Respondent,

v.

Edward Cotton,

Respondent-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Jeffrey Conen, presiding**

Respondent-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is not controlled by well-settled law. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

Whether the trial court erred in dismissing the appellant's discharge petition without conducting a hearing.

Answered by the trial court: No.

Summary of the Argument

The trial court erred in denying Cotton's petition without a hearing. Cotton's petition alleged that Dr. Richard Elwood was of the opinion that Cotton was no longer a sexually violent person because it was not more likely than not that Cotton would commit a sexually violent offense if not confined. Initially, following a "paper review" of the petition, the court granted Cotton a hearing. However, the state moved to reconsider on the grounds that the petition did not allege a change in Cotton's condition; rather, the petition merely alleged that Dr. Elwood had a different opinion of Cotton. Thereafter, the court dismissed the petition. This was error, though, because the petition alleged several facts that constituted new evidence: (1) that in scoring one actuarial instrument, Dr.

Elwood used recidivism data that was not available at the time of Cotton's original trial; and, (2) that since the time of Cotton's trial, additional data has been developed suggesting that sex offender treatment has a greater effect on recidivism than was originally believed.

Statement of the Case

I. Procedural History¹

The appellant, Edward Cotton (hereinafter "Cotton") was committed under Chapter 980 in 2004. On September 2, 2010, Cotton filed a petition for discharge from the commitment pursuant to Sec. 980.09, Stats.² (R:127) Cotton waived the statutory time limits and, on December 16, 2010, the court found that Cotton's petition was sufficient, and ordered the matter set for a contested discharge hearing. (R:158-4)

The petition was supported by the report of Dr. Richard Elwood. (R:126) Dr. Elwood diagnosed Cotton with paraphelia not otherwise specified, and also with antisocial personality disorder. (R:126-8) However, Dr. Elwood was of the opinion

¹ The issue presented by this appeal is entirely procedural in nature; and, therefore, there will not be a separate factual history. The facts will be presented, as necessary, during the presentation of the procedural history

² Sec. 980.09(1), Stats., provides, "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 may conclude the person's condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person."

that, if released into the community, Cotton was *not* more likely than not to commit a crime of sexual violence. *Id.* Dr. Elwood's opinion was based upon new data underlying the actuarial instruments³, and Dr. Elwood specifically noted that, "In her 2003 examination, Dr. Patricia Coffey stated that studies had not yet shown how much SOTP lowered the risk of high risk offenders like Mr. Cotton . . . subsequent studies have established that completing SOTP typically lowers the risk by 40%." (R:126-7) Additionally, Dr. Ellwood's opinion was largely based on the fact that Cotton had behaved well in the institution, and that he had completed sex offender treatment while in prison (i.e. prior to his Chapter 980 commitment).

On February 24, 2011, though, the State filed a motion asking the court to reconsider its probable cause finding. (R:134) In effect, the State argued that Cotton's petition does not demonstrate that there has been any change in his *condition*; rather, Dr. Elwood merely recalculated the static risk factors based upon new data (i.e. Dr. Elwood used a newer version of the actuarial instruments used to predict risk of reoffense.)⁴

The court conducted a hearing into the State's motion on May 31, 2011. The court did reconsider its earlier ruling, and it dismissed Cotton's discharge petition without a hearing. The

³ Dr. Elwood indicated that he used the November, 2009 high risk/recidivism rates (R:126-5) By definition, the November, 2009 data could not have been used by the experts who testified at Cotton's original commitment trial.

⁴ In support of the motion, the State cited to recent decisions from the Court of Appeals in *State v. Sugden*, 2010 WI App 166, and *State v. Arends* 2010 WI 46.

judge reasoned that there were no new facts. The completion of the sex offender treatment occurred prior to his commitment, and the remaining basis was simply a recalculation of the actuarial instruments. (R:162-8)

Argument

I. The trial court erred in dismissing Cotton's petition without a hearing.

A. Standard of Appellate Review

Whether Dr. Elwood's report is sufficient to establish probable cause to believe that Cotton is not "still ... sexually violent" or is "no longer ... sexually violent" requires a construction of Sec. 980.09(2), Stats. This presents a question of law, which the appellate court reviews de novo. *State v. Pocan*, 2003 WI App 233, P5, 267 Wis. 2d 953, 671 N.W.2d 860 (2003).

The standard under § 980.09(1), then, provides for a very limited review aimed at ensuring the petition is sufficient--that is, whether relief for the petitioner is possible based on the factual allegations in the petition. The clear purpose of such a review is to weed out meritless and unsupported petitions, which is especially important in light of the statute's proviso that petitions for discharge may be filed at any time.

State v. Arends (In re Arends), 2010 WI 46, P28 (Wis. 2010). The question of what facts must be alleged in order to get past

the so-called “paper review” has also been addressed recently:

[W]e conclude that the legislature intended that, in order to provide a basis for probable cause to believe a person is no longer sexually violent under § 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 that determined the person to be sexually violent. By way of example, an opinion that a person is not sexually violent based at least in part on facts about the committed person that did not occur until after the prior adjudication would meet this standard, as would *an opinion based at least in part on new professional knowledge about how to predict dangerousness*.

State v. Combs, 2006 WI App 137, P32 (Wis. Ct. App. 2006)

Before the trial court in this case, the State relied heavily on *State v. Sugden (In re Sugden)*, 2010 WI App 166, P29 (Wis. Ct. App. 2010). *Sugden*, though, does not involve the sufficiency of the facts alleged in discharge petition. Rather, *Sugden* involved the issue of whether new actuarial data may be considered as newly discovered evidence in a motion for a new trial. The court's holding reveals just how inapplicable that case is to the present issue. The court wrote:

In short, we conclude that the evidence of the new risk percentages for the Static-99 is not sufficient to alter the opinions of Dr. Hill or Dr. Pierquet that Sugden is more likely than not to reoffend, and this new evidence has no impact on the other evidence presented at this trial. We therefore conclude there is not a reasonable probability that this new evidence *would raise a reasonable doubt that Sugden meets the standard for commitment*

as a sexually violent person.

2010 WI App 166. *Sugden* is similar to the present case only in that the new evidence was new recidivism rates. However, the standard for granting a new trial on the grounds of newly-discovered evidence, is much greater than what is required to pass a paper review on a discharge petition. Where the issue is whether the newly discovered evidence warrants a new trial, the court must consider whether there is a reasonable possibility that the new evidence would result in a different verdict. In order to be entitled to a hearing on a petition for discharge, the respondent need only allege sufficient facts to establish that “relief for the petitioner is possible.”

This is very different from the proposition for which the State cited *Sugden*. The unmistakable implication of the State’s discussion of *Sugden* is that new actuarial data can *never* be the basis for conducting a discharge hearing. This is simply not the case, and it is directly contrary to what the court held in *Combs*, that new data that helps an expert interpret dangerousness is precisely the sort of change that would, at least, require a hearing.

Here, Dr. Elwood’s opinion was based on two important sets of new data: (1) In scoring the Static 99R, he used the November 2009 high risk estimated recidivism rates; and, (2) in her 2003 examination, Dr. Patricia Coffey stated that studies had not yet shown how much SOTP lowered the risk of high risk offenders like Mr. Cotton . . . *subsequent studies*

have established that completing SOTP typically lowers the risk by 40%. The November 2009 recidivism data could not possibly have been considered by the experts at the original commitment trial. Additionally, as Dr. Elwood himself notes, the effect of sex offender treatment on recidivism was not known at the time of the original trial.

Thus, Dr. Elwood's opinion is, by its terms, based upon precisely the sort of new data that the *Combs* court mentioned as requiring a discharge hearing.

It must also be emphasized that the question at the "paper review" is not whether there has been a significant change, or whether other experts may disagree. Rather, the questions are whether a doctor offers the opinion that the respondent is no longer sexually violent, and whether that opinion is based either on a change in the respondent's condition, or a change in the data that the experts use to predict dangerousness.

Here, then, Cotton's petition is plainly sufficient. Dr. Elwood offers the opinion that he is no longer more likely than not to commit a crime of sexual violence; and that opinion is based upon new recidivism data, and upon a better understanding of how sex offender treatment affects recidivism.

Conclusion

For these reasons, it is respectfully requested that the court reverse the trial court's order dismissing Cotton's petition,

and remand the matter for an evidentiary hearing on the petition.

Dated at Milwaukee, Wisconsin, this _____ day of April, 2012.

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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 1559 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of _____, 2012:

Jeffrey W. Jensen

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Respondent-Appellant's Brief and Appendix

- A. Record on Appeal
- B. Petition for Discharge (R:128)
- C. Dr. Elwood's report (R:126)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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.

Dated this ____ day of April, 2012.

Jeffrey W. Jensen