State of Wisconsin
Court of Appeals
District 2
Appeal No. 2010AP002348

In re the commitment of Jamerrel V. Everett

State of Wisconsin,

Petitioner-Respondent,

v.

Jamerrel Everett,

Defendant-Appellant.

On appeal from a judgment of the Waukesha County Circuit Court, The Honorable Robert Mawdsley, presiding

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Respondent-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

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

Statement of the Issues

Where the trial court determines, under Sec. 980.09(2), Stats., that a petition for discharge from a Chapter 980 commitment alleges facts from which a court or a jury could conclude that the person does not meet the criteria for commitment (i.e. the case is set for hearing), and where at the hearing the State fails to present any evidence, is the evidence sufficient, as a matter of law, to support the trial court's decision denying the petition?

Answered by the trial court: Yes.

Summary of the Argument

The evidence was insufficient as a matter of law to establish that the appellant, Jamerrel Everett, was still a sexually violent person at the time of his discharge hearing.

Everett filed a petition for discharge pursuant to Sec. 980.09, Stats. The trial court reviewed the petition, and determined that it alleged sufficient facts from which the finder

of fact could conclude that Everett was no longer a sexually violent person. Thus, the court ordered a hearing.

Once a hearing into a discharge petition is ordered, under Sec. 980.09(3), Stats., the burden in on the State to prove that "the person meets the criteria for commitment as a sexually violent person."

Here, the State presented no evidence. Rather, the only witness was Everett's expert, Hollida Wakefield, who testified that Everett had antisocial personality disorder, but that he was not more likely than not to commit a crime of sexual violence in the future; that is, that Everett did not meet the criteria for commitment under Chapter 980.

Nonetheless, the trial court denied Everett's petition for discharge.

The evidence was insufficient as a matter of law because: (1) Even though Wakefield considered the reports of other state experts, this does not permit the trial court to consider the reports of the other experts as substantive evidence; (2) Expert testimony is required on the issue of future dangerousness and, here, there was no such testimony.

Statement of the Case

I. Procedural History

The respondent-appellant, Jamerrel Everett

(hereinafter "Everett") was originally committed under Chapter 980 as a sexually violent person in 2004. (R:34)

On On May 7, 2009, Everett filed a petition for discharge pursuant to Sec. 980.09, Stats. (R:71) As required by the statutes, the trial court conducted a probable cause review hearing on June 22, 2009. The trial court concluded that Everett's petition contained facts upon which the court or the jury could conclude that he did not meet the criteria for commitment, and the court ordered a hearing on the petition. (R:89-8)

A hearing on the discharge petition took place on November 13, 2009. At the outset of the hearing, Everett's attorney told the court that he would be calling a witness out of order. He said:

> We would like to take a witness first. Before we do that, I would ask the Court take judicial notice of Dr. Wakefield's report previously filed in-- I believe on or about September 14 in this Court, and counsel and I have stipulated that that would be appropriate and the same would go with his-- that he's going to mark his, and if you wish me to mark a separate report I would.

(R:89-3). Apparently, it was the agreement of the attorneys that the reports of the experts would be marked, and then admitted by stipulation. Although the State's report was marked (R:89-13), it was never received into evidence, by stipulation or otherwise. The only reference to the State's report was by Everett's expert, Dr. Wakefield; however, when

Everett's counsel moved the report into evidence, the State's attorney objected. He argued:

> At this stage of the proceeding because Mr. Everett has already been committed, the expert's opinion must depend on something more than fact . . . . What case law says is that the Court must consider an expert's opinion . . . . Basically something must have changed. *That's State v. Combs*--

(R:89-14).[1]

The court made no ruling on the request for admission. The State presented no witnesses at the hearing. Everett, however, called Hollida Wakefield, who offered the opinion that Everett was no longer a sexually violent person because he was not more likely than not to commit a crime of sexual violence in the future.

At the conclusion of the hearing, the court found that Everett was still a sexually violent person, and the court denied the petition. The judge reasoned:

> She (Hollida Wakefield) says that, well, just because he has a [sic] antisocial personality disorder that doesn't-- and because he committed these offenses through adolescence it doesn't necessarily mean now that he's an adult that -- He may commit other offenses, he may violate the law in other ways, but it's not

[1]*State v. Combs,* 2006 WI App 137, P19 (Wis. Ct. App. 2006), as will be discussed in more detail, is largely inapplicable to the issue on this appeal. In *Combs*, the court dismissed the petition for failing to allege sufficient facts upon which a jury could conclude that Combs was no longer a sexually violent person. In the present case, the trial court found the petition to be sufficient; and, therefore, the process moved on to a contested hearing where it is the State's burden to prove that Everett is a sexually violent person.

> gonna [sic] be in terms of sexual assault, sexual exposure or some type of situation like that.
>
> Well, based on this court's experience with juveniles in juvenile court and reading research and on the the particular recidivism rates, yes, there is a recidivism rate that's lower when the offense are committed at tender ages, but here as I see it we have a withering patter of assaults and also exposures and basically it might be to deviance, but it's done based on impulsivity and opportunism, and even Dr. Wakefield used the term opportunistic and then in spills over into all the violations list on the non-sexual offender, okay, the party to operating a vehicle without owner's consent, trespass, burglary, battery, et cetera. Your pattern of offenses involving either sexual exposure, sexual contact, okay, sexual assault were committed for a long period of time. Yes, you were in institutions, but the court finds that this is not the kind of adolescent tender age sex offense on either an isolated or one-- or two event situation that they're talking about when they say, well, the recidivism rate's a lot lower because of the age in which it was created and the numbers, okay.

Ibid p. 88-89.

Appointed postconviction counsel initially filed a no merit report to the Count of Appeals. The Court of Appeals rejected the no merit report, and instructed counsel to consider the issue that is presented in this appeal.

II. Factual Background

Hollida Wakefield testified as an expert on Everett's behalf. The State did not call an expert. Wakefield noted that all of Everett's sexual offenses occurred when he was an

adolescent, and therefore, she studied the new recidivism literature, and came to the conclusion that juvenile sexual offenses should not have been considered by the original examiners. (R:89-9) Wakefield explained that among the experts, and based on new research, there is presently a real question as to whether juvenile sexual offenses ought to be treated the same of adult sexual offenses for the purpose of predicting future sexual offenses. *Ibid* p. 11 She noted that most adolescent sex offenders do not go on to become adult sex offenders. *Id*. Over the State's objection, Wakefield explained that, since the Everett was originally committed, more research has been done concerning the actuarial instruments used to predict future dangerousness; and the overall understanding of the experts is that the rates of recidivism are lower under the new data. *Ibid* p. 18 Wakefield admitted, though, that under the newest iteration of the Static 99 instrument, Everett's risk actually went up because of his relatively young age. *Ibid* p. 37 risk on the Static 99 was "very high". *Ibid* p. 38

Wakefield also noted that while at the Wisconsin Resource Center, Everett involved himself in the moral reconation [sic] program, and seemed to be "doing well." *Id.* Wakefield, though, noted that Everett has not addressed the treatment factors that are in the statutes for significant progress. *Ibid.* p. 27

Concerning dangerousness, Wakefield explained that no

examiner has ever found Everett to be a psychopath. *Ibid* p. 24. This is significant because the combination of deviant sexual arousal and psychopathy make a person very dangerous. *Id.*

Wakefield testified that Everett was not more likely than not to reoffend. According to Wakefield, this is because he was an adolescent offender. *Ibid.* p. 27 Thus, in Wakefield's opinion, Everett is not a sexually violent person, and he meets the conditions for discharge. Signficantly, though, Wakefield told the court that Everett would be "better off with supervised release because of the assistance" (that Everett would need). *Ibid.* p. 33

Everett also testified at the hearing concerning his activities while at the Wisconsin Resource Center.

Argument

I. The evidence was insufficient, as a matter law, to prove that Everett was still a sexually violent person and, therefore, the trial court should have dismissed the petition.

A. Standard of Appellate Review

When a person committed under Chapter 980, Stats., files a petition for *discharge* from the commitment, "The court shall hold a hearing within 90 days of the determination

that the petition contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person. *The state has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person*." Sec. 980.09(3), Stats. [emphasis provided]

To prove that an individual is a sexually violent person who warrants commitment, the State must prove that that individual: (1) has been convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not, because of that mental disorder, to engage in at least one future act of sexual violence ("dangerous or dangerousness"). *See* Sec. 980.01(7), Stats.,

Appellate review of the sufficiency of the evidence to support a SVP commitment order is the same as that applicable to support a judgment of conviction. *See State v. Curiel*, 227 Wis. 2d 389, 418-19, 597 N.W.2d 697 (1999). In other words,

> an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the *conviction*[commitment], is so lacking in probative value and force that no trier of fact, acting reasonably, could have found *guilt* [that respondent was a sexually violent person] beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find *the requisite guilt* [that respondent was a sexually violent person], an appellate court may not overturn a verdict even

> if it believes that the trier of fact should not have found guilt [that respondent was a sexually violent person] based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted) (italicized word(s) from criminal context modified to those in brackets for commitment context).

B. Regardless of the standard, because the State presented no evidence, the evidence was insufficient as a matter of law to support the trial court's determination that Everett is still a sexually violent person.

The only expert who testified at the discharge hearing was Hollida Wakefield, whose opinion was that Everett was not a sexually violent person. Although Wakefield agreed that Everett has antisocial personality disorder (R:89-34); nonetheless, it was also her opinion that he was not "more likely than not" to commit a crime of sexual violence in the future. (R:89-27 and 44) Thus, when considering whether the evidence was sufficient as a matter of law to support the trial court's judgment denying the petition, there are two questions raised: (1) Because Wakefield testified that the reviewed the reports of the other doctors, and that she "agreed" with their diagnoses, may the trial court properly consider the other reports as substantive evidence and, if not, (2) In the absence of expert testimony, may the trial court properly make a finding that Everett is a sexually violent person, particularly on the

issue of future dangerousness?

1. The fact that Wakefield read the other reports, and agreed with the diagnoses contained in the reports, does not constitute substantive evidence of the opinions expressed in those reports.

Wakefield testified that among the things she relied upon in reaching her opinion was Exhibit 1, a pack of materials which included the report of Dr. Caton Roberts. Dr. Wakefield noted that Dr. Robert relied upon out-dated juvenile recidivism rates. The State objected. (R:89-15, 16) On this point, the trial court ruled, "I think is-- this particular section of the report, *not anything else part of the report*, I'll overrule the objection." *Id.* Additionally, Wakefield admitted that she had read Dr. Snyder's report, but that she did not agree with his opinion. (R:89-38).

During his closing argument, the State's attorney argued that, "To briefly summarize, based on the evaluation done by Dr. Snyer *which Miss Wakefield adopted* . . ." (R:89-80) Unfortunately, though, for Mr. Everett, *nothing has changed since his original commitment to provide grounds to believe that he is no longer a sexually violent person . . ."* (R:89-81)

Firstly, the fact that Wakefield reviewed Dr. Snyder's report does not make Snyder's report substantive evidence; and, secondly, on a petition for discharge, the State must prove that Everett is a sexually violent person (it is not Everett's burden to prove that "something has changed").

Sec. 907.03, Stats., provides:

> **907.03 Bases of opinion testimony by experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

"However, sec. 907.03 is not a hearsay exception. (internal citation omitted) Hearsay data upon which the expert's opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay rule." *State v. Weber*, 174 Wis. 2d 98 (Wis. Ct. App. 1993).

Thus, even if Dr. Wakefield did rely upon Dr. Snyder's report, this does not mean that the trial court was permitted to consider Dr. Snyder's report for the truth of the matters asserted in the report-- especially since Wakefield specifically testified that she did not agree with Dr. Snyder's opinion.

Likewise, the fact that Wakefield relied upon one small part of Dr. Roberts' report, does not transform that information

into admissible evidence.

Finally, even if the reports of the State doctors were admitted, the reports are insufficient to establish that Everett is still a sexually violent person, as is required by Sec. 980.09(2), Stats. As the Court of Appeals explained in, *State v. Pocan*, 2003 WI App 233, P12 (Wis. Ct. App. 2003):

> We agree that progress in treatment is one way of showing that a person is not still a sexually violent person. However, we conclude that is not the only way. A new diagnosis would be another way of proving someone is not still a sexually violent person. A new diagnosis need not attack the original finding that an individual was a sexually violent person. Rather, a new diagnosis *focuses on the present.* The present diagnosis would be evidence of whether an individual is still a sexually violent person.

(emphasis provided). Thus, simply because Everett was found to be a sexually violent person at the time Dr. Roberts and Dr. Snyder wrote their reports, does not meet that Everett was still a sexually violent person at the time of his discharge hearing.

2. In the absence of expert testimony, the trial judge may not find that Everett is a sexually violent person.

Thus, the remaining question is whether, in the absence of expert testimony, the trial court may properly make a finding that Everett is a sexually violent person. In this case, it was agreed that Everett had a mental condition (antisocial personality disorder) and, therefore, specifically the question is whether expert testimony is required on the issue of future

dangerousness.

As is set forth in more detail below, the tenor of Chapter 980 anticipates that the issues in a SVP commitment will be proved by expert testimony. Moreover, due process requires that the issue not be left to the whim of the finder of fact.

It is well-settled that the trier of fact is never bound by the opinion of an expert; rather, it can accept or reject the expert's opinion. *State v. Kienitz*, 227 Wis. 2d 423, 597 N.W.2d 712 (1999). However, the Supreme Court, in *Kienitz*, specifically declined to address the issue of whether expert testimony is absolutely required on the issue of future dangerousness. The court wrote:

> Neither this court, nor the United States Supreme Court have squarely addressed whether expert testimony is required for a determination on the question of future dangerousness. In a decision addressing the standard of proof in civil commitments, the Supreme Court commented "whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). This was not, however, the holding in the case. Id. at 432-33. The Supreme Court has also held that expert testimony about a defendant's future dangerousness, while not required at the penalty phase of a capital murder trial, is admissible.

227 Wis. 2d at 439-440. Ever since *Kienitz* mentioned the

issue, It does not appear that the appellate courts in Wisconsin have ever squarely addressed the issue of whether expert testimony on the issue of dangerousness is required.

A review of Chapter 980, and a consideration of general principles of due process, though, strongly suggests that the finder of fact in a Chapter 980 proceedings is not free to make its own determinations about dangerousness in the absence of expert testimony.

Firstly, Sec. 980.31, Stats., which governs the appointment of examiners for the purpose of a SVP commitment proceeding, consistently speaks in terms of a "qualified licensed physician, licensed psychologist, or other mental health professional" to examine the respondent, and to testify at the hearing.

Moreover-- though not on directly on the issue of future dangerousness-- the Seventh Circuit recently wrote, "Whether a legitimate mental health diagnosis must be based on the DSM *is a question for the members of the mental health profession,* and, therefore, one to which we do not address ourselves." *McGee v. Bartow*, 593 F.3d 556, 576 (7th Cir. Wis. 2010). (emphasis provided)

Thus, in the absence of expert testimony on the issue of dangerousness, the evidence is insufficient as a matter of law to sustain a judgment denying a petition for discharge. For this reason, the evidence in this case was insufficient as a matter of law.

Conclusion

` For these reasons, it is respectfully requested that the court reverse the order of the trial court denying Everett's petition for supervised release.

Dated at Milwaukee, Wisconsin, this _____ day of May, 2011.

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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 3,291 words.

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Dated this _____ day of _____, 2011:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
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Respondent-Appellant's Appendix

A. Record on Appeal

B. Excerpt of trial court's bench decision denying the petition

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 November, 2010.

_____

Jeffrey W. Jensen