IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

---

BILLY W. GLADNEY, JR.,

Petitioner,

v.

STEVE WATTERS, Director, Sand Ridge Treatment Center,

Respondent.

OPINION AND ORDER

03-C-0724-C

---

This is a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. Billy W. Gladney, Jr., who is presently confined at the Sand Ridge Treatment Center in Mauston, Wisconsin, is serving an indeterminate term of commitment under Wisconsin's sexual predator law, Wis. Stat. Ch. 980. Petitioner is challenging a July 12, 2002 decision by the Circuit Court for Milwaukee County denying his petition for discharge. Petitioner has paid the five dollar filing fee. Because I conclude that the petition fails to state a claim that is cognizable on federal collateral review, I am dismissing the petition summarily under Rule 4 of the Rules Governing Section 2254 Cases.

The following facts are drawn from the Wisconsin Court of Appeals's opinion in In re Commitment of Gladney, 02-2166 (Ct. App. June 18, 2003) (summary disposition) and from the attachments to the petition.

FACTS

On August 25, 1999, petitioner was committed to institutional care under Chapter 980 as a sexually violent person. The statute defines a "sexually violent person" as "a person who has been convicted of a sexually violent offense . . . and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." Wis. Stat. § 980.01(7). A "mental disorder" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."

Under Chapter 980, a committed person is entitled to a reexamination within 6 months of his initial commitment and again thereafter every 12 months for the purposes of determining whether he has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged. Wis. Stat. § 980.07. At the time of the reexamination, the committed person may request the court to appoint a second examiner. Id. Furthermore, the petitioner is entitled to petition the court for discharge. Wis. Stat. § 980.09(2). Pursuant to Wis. Stat. § 980.09(2), a committed person who petitions for discharge without the secretary's approval is entitled to a probable cause hearing to determine "whether facts exist that warrant a hearing on whether the person is still a sexually violent person." Id. The committed person is entitled to have an attorney represent him at the hearing, but he is not entitled to be present. Id. If the court determines that probable cause exists to believe that the committed person is no longer a sexually violent

person, it shall set the matter for an evidentiary hearing, at which the petitioner is entitled to be represented by an attorney, present and cross-examine witnesses and request a jury trial. Id.; Wis. Stat. § 908.03(2). At the hearing, the state has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person. Wis. Stat. § 980.09(2)(b). The Wisconsin courts have found that the probable cause hearing is a "gatekeeping" procedure, describing it as a "paper review of the reexamination report(s) with argument that provides an opportunity for the committing court to weed out frivolous petitions by committed persons alleging that they are no longer dangerous and are fit for release." In re Commitment of Paulick, 213 Wis.2d 432, 438-439, 570 N.W.2d 626, 629 (Ct. App. 1997).

In accordance with the statute, on or about March 1, 2002, Dr. Stephen Dal Cerro conducted an annual reexamination of petitioner and filed his reexamination report in Milwaukee County. Dr. Dal Cerro diagnosed petitioner with alcohol abuse and a personality disorder not otherwise specified with antisocial features. Dr. Dal Cerro's report concluded that it was substantially probable that petitioner would commit another sexual offense if he was released from secure confinement.

After Dr. Dal Cerro's report was filed, petitioner filed a petition for discharge under Wis. Stat. § 980.09(2) and requested the appointment of a second examiner. The circuit court appointed Dr. Lynn Maskel, a psychiatrist, to conduct an independent examination of petitioner. Dr. Maskel examined petitioner and filed a report with the court.

Dr. Maskel disputed the underlying justification for petitioner's continued commitment, concluding that he did not have a mental disorder that predisposed him to commit sexually violent acts. Dr. Maskel disagreed with Dr. Dal Cerro that a diagnosis of antisocial personality disorder could support petitioner's continued confinement, in that the disorder was "not typically viewed by forensic psychiatrists as a disorder in which there is significant impairment in volitional control." She concluded that including that disorder as a mental disorder affecting volitional capacity in persons committed as sexually violent was "a novel interpretation of this disorder and inconsistent with both other forensic as well as clinical applications." Because Dr. Maskel was of the opinion that petitioner did "not have a requisite mental disorder as defined under Chapter 980," she did not address the issue whether it was substantially probable that petitioner would reoffend. She noted, however, that the actuarial tests employed by Dr. Dal Cerro to predict petitioner's risk of committing future sexually violent acts were not "scientifically valid enough to give absolute risk predictions for future sexually violent acts."

On July 12, 2002, a hearing was held before the circuit court pursuant to Wis. Stat. § 980.09(2)(a) on the issue whether probable cause existed to find that petitioner was no longer a sexually violent person. After reviewing the reports from Dr. Dal Cerro and Dr. Maskel, the court found that petitioner was still a sexually violent person and there was no probable cause to set the matter for a discharge hearing. In reaching its conclusion, the court relied heavily on Dr. Dal Cerro's report, finding it "particularly persuasive." The court also

noted that petitioner's previous sexually violent offenses had occurred within a relatively short period of time; he had failed to follow up with treatment in the past; he had a substance abuse problem; and he had a high degree of psychopathy.

Petitioner appealed. He argued that in order to give meaning to petitioner's right to periodic review, the trial court was obligated to view the proffered medical reports in the light most favorable to the committed person when determining whether probable cause existed to warrant a discharge hearing. Petitioner argued that by choosing Dr. Dal Cerro's report over Dr. Maskel's, the circuit court had engaged in a credibility determination that was improper at the probable cause stage of the proceedings.

On June 16, 2003, the court of appeals issued an opinion and order disposing of petitioner's appeal summarily. The court did not address directly petitioner's arguments concerning the proper inquiry at the probable cause stage of a petition for discharge. Instead, it found that it was proper for the trial court to have relied on Dr. Dal Cerro's report because Dr. Maskel's opinion was premised upon the incorrect assumption that an antisocial personality disorder would not qualify as a disorder under Chapter 980. In re Commitment of Gladney, 02-2166 (Ct. App. June 16, 2003), at 3 (unpublished opinion). The court noted that in State v. Adams, 223 Wis. 2d 60, 67-69, 588 N.W. 2d 336 (Ct. App. 1998), it had held that a diagnosis of antisocial personality disorder, standing alone, could support a Chapter 980 commitment provided there was also evidence specifically linking that disorder to a substantial probability that the person will engage in acts of sexual violence. Id.

Therefore, Dr. Maskel's conclusion that petitioner did not have a requisite mental disorder as defined under Chapter 980 was flawed, making it proper for the trial court to have relied on Dr. Dal Cerro's report. Id. at 3-4.

On October 1, 2003, the Wisconsin Supreme Court denied petitioner's petition for review.

## OPINION

As an initial matter, I note that two of petitioner's four claims are not articulated clearly enough for this court to consider them. In claim three, petitioner complains that the trial court admitted testimony regarding "actuarial instruments." In claim four, he complains that he was denied due process "because of jury instruction." However, petitioner does not explain the basis for his jury instruction challenge or why the admission of actuarial instruments violated any of his constitutional rights. Further, petitioner's claims make no sense in light of the fact that the trial court did not hold any jury trial on petitioner's discharge petition. It is possible that claims three and four are directed at petitioner's initial commitment in 1999 and not his 2002 petition for discharge. However, all the documents that petitioner has attached to the petition relate to the July 12, 2002 order of the Milwaukee Circuit Court finding no probable cause for a discharge hearing. Absent any clear indication that petitioner is seeking to challenge his original 1999 commitment in this petition, I have construed the petition as challenging the July 12, 2002 order only. If

petitioner also seeks habeas relief on his original commitment, he should file a separate petition.

In order for this court to entertain petitioner's application for habeas relief under 28 U.S.C. § 2254, the petition must state a cognizable claim that the applicant is "in custody in violation of the Constitution or laws or treaties of the United States." Reading the petition in the light most favorable to petitioner, I am unable to find that it states such a claim.

Petitioner appears to be raising the same claim he made before the state court of appeals, namely, that by selecting Dr. Dal Cerro's report over Dr. Maskel's, the trial court usurped the role of the jury and deprived petitioner of a meaningful periodic review as guaranteed by Wis. Stat. § 980.09(2). However, petitioner overlooks the decision of the state court of appeals, which issued the last reasoned opinion affirming petitioner's continued confinement. That court affirmed the trial court's decision to deny petitioner a full evidentiary hearing, not because it agreed that Dr. Dal Cerro's report was more persuasive than Dr. Maskel's, but rather because it found that Dr. Maskel's opinion in favor of discharge was based upon her misunderstanding regarding whether an antisocial personality disorder could qualify as a "mental disorder" as defined under Chapter 980. None of the grounds for relief that petitioner asserts in his petition is directed at the court of appeals' decision.

For that reason alone, the petition must be dismissed. However, even if I assume that petitioner is challenging the court of appeals' decision, the petition is not saved. The court of appeals did not violate any constitutional right of petitioner's when it held that, insofar as Dr. Maskel's report was premised on a legal conclusion that the court had repudiated, it was entitled to no weight in the probable cause determination. Indeed, it would have made little sense for the trial court to have convened a jury to hear the competing opinions of Dr. Dal Cerro and Dr. Maskel, only to inform the jury that it was to disregard Dr. Maskel's opinion.

Petitioner suggests that the jury should have been allowed to hear Dr. Maskel testify regarding her opinion that the actuarial instruments used by Dr. Dal Cerro for risk prediction were not scientifically valid enough. However, in spite of her criticism of the tests employed by Dr. Dal Cerro, Dr. Maskel did not offer any risk predictions of her own, having taken the position that petitioner did not have a requisite mental disorder. Thus, there was no evidence in the record to suggest that petitioner was *not* likely to commit another sexually violent act. In the absence of such evidence, a full blown evidentiary hearing was unnecessary.

In any case, this court cannot conceive how the state courts' conclusion that petitioner was not entitled to an evidentiary hearing on his petition for discharge deprived petitioner of any constitutional right, which is the operative question under § 2254. Read most broadly, the instant habeas petition could be read to assert a claim that the state courts

denied petitioner of a right to an adversary proceeding on the issue whether his condition had improved enough to warrant discharge. The Supreme Court has held that involuntary commitment requires due process protection, Addington v. Texas, 441 U.S. 418, 425 (1979), and the state may not confine a person after the justification for the initial commitment ceases to exist. See, e.g., Foucha v. Louisiana, 504 U.S. 71 (1992); O'Connor v. Donaldson, 422 U.S. 563 (1975). Most courts have agreed that these cases and others together stand for the principle that due process requires periodic reviews of a committed person's condition in order to continue his involuntary confinement. See, e.g., Doe by Doe v. Austin, 848 F.2d 1386, 1395-96 (6th Cir. 1988); Clark v. Cohen, 794 F.2d 79, 86 (3rd Cir. 1986). However, the Supreme Court has never held that due process requires the state to afford the committed person an adversarial hearing as part of its periodic review process. So far, it has left it to the states to prescribe specific procedures for continuing evaluation of the committed person's condition. See Addington, 441 U.S. at 431; Villanova v. Abrams, 972 F.2d 792, 798 (7th Cir. 1992). Courts reviewing commitment statutes in other states have found due process to be satisfied by nonadversarial periodic review procedures. See, e.g.,Williams v. Wallis, 734 F.2d 1434, 1437 (11th Cir. 1984) (reviewing Alabama statute); Hickey v. Morris, 722 F.2d 543, 548-549 (9th Cir. 1983) (reviewing Washington statute). See also United States v. LaFromboise, 836 F.2d 1149, 1151-52 (8th Cir. 1988) (Insanity Defense Reform Act's provision requiring hospital director to prepare annual report regarding insanity acquittee's condition and submit it to district court satisfied due process).

In this case, petitioner had an annual examination, a report prepared by the examining doctor, an independent psychiatric evaluation, representation by an attorney and a judicial review of the competing reports. In the absence of any Supreme Court precedent holding that the due process clause requires more, petitioner is not entitled to relief from this court insofar as his petition can be read as asserting a procedural due process claim. See Teague v. Lane, 489 U.S. 288, 301 (1989) (federal courts may not create new constitutional rules of procedure on habeas review). Further, insofar as petitioner contends that the state courts violated the terms or spirit of Chapter 980 when it denied him an evidentiary hearing on his discharge petition, that also is a claim that is not cognizable on habeas review. Federal habeas corpus relief does not lie for errors of state law and federal courts are bound by the state court's interpretations of state law. Lechner v. Frank, 341 F.3d 635, 642 (7th Cir. 2003) (citations omitted).

ORDER

IT IS ORDERED that the petition of Billy W. Gladney, Jr. for a writ of habeas corpus is DISMISSED WITH PREJUDICE pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Entered this 3rd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge