State of Wisconsin
Court of Appeals
District II
Appeal No. 2007AP002742

In re the commitment of Dennis R. Thiel:

State of Wisconsin,

Petitioner-Respondent,

v.

Dennis R. Thiel,

Defendant-Appellant.

Appeal from orders denying the appellant's petition for supervised release and petition for discharge from a Chapter 980 commitment, entered in the Fond du Lac County Circuit Court, the Hon. Robert J. Wirtz, presiding

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Defendant-Appellant's Brief

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Table of Authority

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Statement on Oral Argument and Publication

The issue presented by this appeal controlled by well-settled law and, therefore, the appellant does not recommend oral argument or publication.

Statement of the Issues

I. Whether the evidence was sufficient as a matter to law to sustain the court's order denying Thiel's petition for supervised release where all three expert witnesses testified that Thiel could be safely treated in the community.

Answered by the trial court: Yes.

II. Whether the court abused its discretion in overruling Thiel's hearsay objection to a state's expert testifying as to the details of Thiel's performance on a psycho-metric test where there was no foundation that the witness conducted the test himself?

Answered by the trial court: No.

Summary of the Argument

I. Sufficiency of the evidence. In 1999 Thiel filed a petition for supervised release. Whether to grant or to deny a petition for supervised release is governed almost totally by statute. Three doctors testified that Thiel met almost every statutory factor-significantly, all three doctors believed that Thiel could be safely treated in the community. The only points of disagreement were over: (1) how "substantial" was the treatment that Thiel received during the term of his commitment; and, (2) whether the community based treatment programs that were available to Thiel could be offered at a reasonable expense. In its bench ruling the trial court

inaccurately stated that the state's two doctors testified that Thiel could not be safely treated in the community. Thereafter, the court did not even mention the statutory factors. Thus, the evidence was insufficient as a matter of law to support the court's order denying Thiel's petition.

II. The admission of hearsay evidence. The State elicited testimony from Dr. Thornton concerning Thiel's performance on a PPG and on a subsequent polygraph. Thiel objected on the grounds of hearsay because there was no foundation that Dr. Thornton had personal knowledge of Thiel's performance on the test. The court overruled Thiel's hearsay objection. The evidence was plainly hearsay and it was not admissible simply because Dr. Thornton relied upon it is reaching his opinion. The admission of the evidence was not harmless because Thiel's performance on the PPG was one of the few facts that the court relied upon in denying Thiel's petition for supervised release.

Statement of the Case

I. Procedural background

If there were ever a case with a Byzantine procedural background this case is it. Following is counsel's best effort to make the procedural history of this case understandable.

A. The 1999 petition for supervised release

The defendant-appellant, Dennis Thiel ("Thiel"), filed in 1999 a petition pursuant to Sec. 980.08(1)1, Stats. for supervised release from his Chapter 980 commitment. The petition followed a long and tortuous procedural path. Among other issues, Thiel wrangled

with the trial court over the appointment of experts. The Court of Appeals granted Thiel's petition for leave to appeal the trial court's non-final order appointing an expert and, on November 17, 2004, the Court of Appeals issued an opinion that reversed the order of the trial court. The Court wrote:

> We conclude that the circuit court must appoint an examiner for the court under WIS. STAT. § 980.08(3) regardless of whether the court also appointed an examiner for the petitioner under WIS. STAT. § 980.03(4). We further conclude that an indigent party petitioning for supervised release under § 980.08 is not entitled to an examiner of his or her choice under § 980.03(4), but is entitled to a "qualified and available" court-appointed examiner. Finally, we conclude that the court's appointment of Dr. Kotkin as Thiel's examiner was an erroneous exercise of discretion. The matter is hereby remanded to the circuit court for appointment of an examiner for the court pursuant to § 980.08(3) and for appointment of a § 980.03(4) examiner who is qualified to opine on the PCL-R evaluation tool and the revised scoring policy.

(Court of Appeals opinion, 2003AP2659)

When the matter was remanded to the trial court, though, the court appointed Patricia Coffey as Thiel's expert pursuant to Sec. 980.03(4), STATS but, for some reason not placed on the record, the trial court ignored the order of the Court of Appeals to appoint a court expert pursuant to Sec. 980.08(3), STATS3. (R:248-12)

The case proceeded to a supervised release hearing on September 2, 2005. The State called two experts, David Warner and Lloyd Sinclair, both of whom offered the opinion that Thiel was still a sexually violent person and that he was not appropriate for supervised release (R:252-7; R:252-31). Thiel, on the other hand, also called two experts, Patricia Coffey and Hollida Wakefield. Both

Coffey and Wakefield testified that Thiel was appropriate for treatment in the community. (R:252-59 to 65; R:252-88)

The trial court found that State's experts to be more "convincing" and denied the petition for supervised release. (R: 252-109).

Thiel again appealed the trial court's order. (Appeal No. 2005AP2959). Thiel argued that even though the Court of Appeals directly ordered the Circuit Court to appoint an expert for the court pursuant to the mandatory provisions of Sec. 980.08(3), Stats., on remand, the trial court once again failed to do so.

Once again, on October 18, 2006 the Court of Appeals summarily reversed. The appeals court wrote, "We therefore reverse the order of the circuit court, and we remand the cause for a redetermination, directing the court to appoint its own examiner, as required by *Thiel,* 277 Wis. 2d 698, ~29" .*Thiel,* 2005AP2959, unpublished opinion p. 3.

B. The 2006 petition for discharge

While the circuit court was waiting for the appeal of the 1999 petition to be decided, in March, 2006 Thiel filed a so-called "annual review" petition for discharge from his Chapter 980 commitment.

The trial court began setting both of the petitions for hearing on the same dates. To counsel's knowledge, there was never a formal order joining the petitions for trial; however, Thiel moved the court to have the undersigned appointed as his attorney for the new petition for discharge. The court granted Thiel's request. (R:321-11) Therefore the court and counsel proceeded as though the petitions were joined.

At long last the court appointed Dr. Diane Lytton as the court's expert pursuant to Sec. 980.08(3), Stats.. (R:321-7)

The petitions were set for hearing on April 6, 2007 and the matter proceeded to hearing on that date.

C. The hearing

The state called David Thornton, Ph.D., as a witness. During Dr. Thornton's testimony the prosecutor asked the doctor to describe Thiel's performance on a penile plethysmograph.[1] Thiel objected on the grounds that there was no foundation that Dr. Thornton had administered the test (i.e. that Dr. Thornton had no personal knowledge of Thiel's performance). (R:323-14) Thiel conceded that Dr. Thornton could rely upon such information in forming his opinion but argued that Dr. Thornton's reliance on this information does not make the information admissible. (R:323-13, 14)

Thiel made a similar objection to Dr. Thornton testifying as to the details of the scoring of the actuarial instruments by other doctors. The court also overruled that objection. (R:323-19).

D. The decision hearing and thereafter

On June 21, 2007 the court denied both petitions.

Thiel timely filed a notice of appeal.[2]

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1 The penile plethysmograph (PPG) is a controversial type of plethysmograph that measures changes in blood flow in the penis in response to audio and/or visual stimuli. It is typically used to determine the level of sexual arousal as the subject is exposed to sexually suggestive content, such as photos, movies or audio. (www.wikipedia.org)

2 There were, of course, some bumps in the road. The circuit court clerk never entered an order denying the petitions following the June 21, 2007 decision hearing. Therefore, Thiel, proceeding *pro se*, submitted an order that the judge signed on August 3, 2007. Additionally, Thiel's counsel- unaware that Thiel had submitted an order- submitted another order on August 30, 2007 that the judge also signed. Before these two petitions were final yet another "annual review" petition for discharge was filed for 2007. Additionally, effective August 1, 2006 the Rule of Appellate Procedure were amended to require that the appellate process for Chapter 980 proceed under Sec. 809.30, Stats. by the filing of a notice of intent to pursue postconviction relief. The resulting confusion delayed the appointment of appellate counsel for Thiel. Once counsel was appointed and timely filed the notice of appeal in November, 2007, though, Thiel was worried that

II. Factual background

A. The testimony of David Thornton, Ph. D.

David Thornton, Ph.D., was called by the State. Dr. Thornton testified that he is employed as the treatment director at the Sand Ridge Secure Treatment Center. (R:323-8) As such, Dr. Thornton regularly worked with the patients at Sand Ridge including Thiel.

Over Thiel's hearsay objection Dr. Thornton described how Thiel had, in effect, "passed" the PPG[3] but then later "failed" a polygraph examination during which he was asked whether he was consciously suppressing sexual arousal during the PPG. (R:323-16)

Nonetheless, Dr. Thornton testified that if Thiel, "were released under the Sand Ridge supervised release program, then I think his risk for reoffending under those conditions is probably less than more likely than not." (R:232-18) According to Dr. Thornton, Thiel was otherwise qualified to be placed on the Sand Ridge supervision program if it were ordered by the court. (R:232-41)

On the other hand, Dr. Thornton testified that without supervision Thiel was more likely than not to reoffend. *Ibid.* In other words, Thiel was safe to released under supervision (R:323-41) but he was not yet appropriate for discharge. *Id.*

B. The testimony of Jane Page Hill, Ph.D.

Janet Page Hill was also called by the State. Dr. Hill testified

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the deadline for appeal had been blown and filed motion for the court to discharge the undersigned as appellate counsel. It turned out, though, that since no deadlines had been blown that Thiel as satisfied to have Jensen continue as his appellate attorney.

3 PPG- "penile plethysmograph"

that she was a psychologist in independent forensic practice. (R: 323-58).

Based on a review of Thiel's records Dr. Hill diagnosed Thiel with pedophilia and alcohol, cannabis, and cocaine abuse. (R: 323-63) Dr. Hill never personally interviewed Thiel. (R:323-65) Likewise, Dr. Hill has never been involved in any way with the treatment of Thiel. (R:323-70)

According to Dr. Hill, it was more likely than not that Thiel would engage in acts of sexual violence if he is not continued in institutional care. (R:323-61). Also, Dr. Hill said that Thiel had not made significant progress in treatment at Sand Ridge. *Id.* Dr. Hill reasoned that Thiel scored high in psychopathy and that "psychopathic sex offenders have, typically, a poor response to supervision." (R:323-67)

Significantly, though, Dr. Hill agreed that Thiel could be safely treated in the community under Sand Ridge's treatment program. Dr. Hill testified:

> Q Okay. So, he could be safely treated in the community?
>
> A Right. My concern is with the type of treatment.
>
> Q Okay. And you that that costs too much, right?
>
> A Well, I don't know what it costs, but I'm saying that the legislature has-- has deemed this to be within reasonable limits with a reasonable degree of resources in the community.
>
> Q You think he would be on community supervision for too long, is that your testimony?
>
> A Well, I'm puzzled as to how he would ever be able to receive treatment that I feel would be appropriate for him, given his level of psychopathy coupled with the sexual deviance, in the community.
>
> Q All right. So, let me make sure I understand what you're telling me. You're telling me he could be securely or safely treated in the community, right?

A Yes.

(R:323-82).

Dr. Hill's primary objection to the granting of Thiel's petition was that community-based treatment would take too long and would involve an unreasonable expense to the community. Dr. Hill admitted, though, that her opinion was based on anecdotal evidence about community-based programs and, unlike Dr. Thornton, she had no specific knowledge of such programs. (R:323-83)

C. The testimony of the court's expert, Diane Lytton, Ph. D.

Diane Lytton, Ph.D., was the doctor appointed by the court and was called as a witness by Thiel. Dr. Lytton strongly recommended that Thiel's petition for supervised release be granted. (R:323-106).

Dr. Lytton agreed that Thiel was a pedophile but told the court that, given Thiel's history, he could be safely treated in the community. (R:323-101). Dr. Lytton testified that Thiel was appropriate for supervised release because:

> [H]e has shown significant treatment progress. And that's just not me saying that. That was the review of the records demonstrated that he's shown-- he completed-- successfully completed a treatment program, a 2-year treatment program. After that, he successfully completed part one of the new program, the CT program, and is into the next phase of it. So, he has shown significant progress. There is treatment available in the community. I, again, am puzzled by what Dr. Hill said about there's no treatment in the community to meet his needs and that's just not true. . . . So, he can-- I do, also, believe that he can reasonably comply with treatment in the community and the rules in the community since he has demonstrated that at Sand Ridge.

(R:323-103, 104)

D. The court's ruling

THE COURT: I heard the testimony of Dr. Diane Lytton, Janet Page Hill and Dr. Thornton. Just a very brief recap. Dr. Thornton, it is basically as you've indicated Mr. Jensen. I think maybe that me be the most succinct way of summarizing the testimony. And my recollection and my notes indicate opinions of Dr. Thornton that Mr. Thiel is more likely than not to reoffend. Dr. Hill felt the same. That there were reasons set forth by Dr. Thornton. The one thing I sill had in the back of my mind was I think there was going to be a retest, Dr. Thornton was going to redo the penile plethysmograph with Mr. Thiel. I don't know the result of that or, frankly, if it's been done, but the-- the overall conclusion of those people, that is, Thornton and Hill, is that Mr. Thiel is more likely than not to reoffend; that in terms of treatment, possible release, and supervision, that some additional work needs to be done, he needs to complete Phase Two of the treatment; and that there needs to be some reasonable expectation, at least from Dr. Hill's perspective, that Mr. Thiel will be amenable to treatment. And I think, very pointedly, Dr. Thornton pointed out, what my notes indicate, are a lack of-- a lack of ability to be amenable to treatment. I think it was Dr. Thornton's conclusion that Mr. Thiel was not amendable to treatment. There is some-- some gradiosity and unrealistic expectations.

But overall-- I understand Dr. Lytton's opinions. I believe that given the history, given the testing that's been done, given the-- the state of where Mr. Thiel presently is with treatment, that the opinion of Dr. Hill that he is not-- that he's likely to reoffend, that he shouldn't be discharged, and that there are not reasonable measures for supervision in the community is, to me, convincing and I deny the request for supervised release, or discharge, or any-- or any provision that he be released on some kind of conditions.

(R:324-9, 10)

Argument

I. The evidence is insufficient as a matter of law to support the court's decision denying Thiel's petition for supervised release.

In 1999 Thiel filed a petition for supervised release. Whether to grant or to deny a petition for supervised release is governed almost totally by statute. Three doctors testified that Thiel met almost every statutory factor- significantly, all three doctors believed that Thiel could be safely treated in the community. The only points of disagreement were: (1) how "substantial" was the treatment that Thiel received during the term of his commitment; (2) whether the community based treatment programs that were available to Thiel could be offered at a reasonable expense. In its bench ruling the trial court inaccurately stated that the state's two doctors testified that Thiel could not be safely treated in the community. Thereafter, the court did not even mention the statutory factors. Thus, the evidence was insufficient as a matter of law to support the court's order denying Thiel's petition.

A. Standard of review

The standard of review for the sufficiency of the evidence to support a commitment under Wis. Stat. ch. 980 is the same as the standard of review for a criminal conviction. *State v. Curiel*, 227 Wis. 2d 389, 417, 597 N.W.2d 697 (1999). The test on appeal is whether the evidence adduced, believed, and rationally considered was sufficient to prove beyond a reasonable doubt that the respondent is a "sexually violent person." *See id*. at 418-19. Thus, the court will

not reverse a ch. 980 commitment unless the evidence, viewed most favorably to the State and the commitment, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the defendant to be a "sexually violent person" beyond a reasonable doubt. *See State v. Marberry*, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999).

B. All of the experts agreed that Thiel could be safely treated in the community and, therefore, there was no credible evidence in the record to support the judge's order denying Thiel's petition for supervised release.

A petition for supervised released is governed by Sec. 980.08(4)(cg), Stats. That section provides:

> (cg) The court may not authorize supervised release unless, based on all of the reports, trial records, and evidence presented, the court finds that all of the following criteria are met:
>
> 1. The person has made significant progress in treatment and the person's progress can be sustained while on supervised release.
>
> 2. It is substantially probable that the person will not engage in an act of sexual violence while on supervised release.
>
> 3. Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available.
>
> 4. The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department.
>
> 5. A reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release.

Dr. Thornton, who was in charge of developing and implementing the treatment program at Sand Ridge testified that if Thiel, "were released under the Sand Ridge supervised release program, then I think his risk for re-offending under those conditions is probably less than more likely than not." (R:232-18) According to Dr. Thornton, Thiel was otherwise qualified to be placed on the Sand Ridge supervision program if it were ordered by the court. (R: 232-41)

Dr. Lytton told the court that:

> [H]e has shown significant treatment progress. And that's just not me saying that. That was the review of the records demonstrated that he's shown-- he completed-- successfully completed a treatment program, a 2-year treatment program. After that, he successfully completed part one of the new program, the CT program, and is into the next phase of it. So, he has shown significant progress. There is treatment available in the community. I, again, am puzzled by what Dr. Hill siad about there's no treatment in the community to meet his needs and that's just not true. . . . So, he can-- I do, also, believe that he can reasonably comply with treatment in the community and the rules in the community since he has demonstrated that at Sand Ridge.

(R:323-103, 104)

Even Dr. Hill, whom the trial court relied upon in denying Thiel's petition, testified that Thiel could be safely treated in the community. (R:323-82). Dr. Hill's objection to Thiel's petition was that he had not completed "substantial" treatment and that, in her uneducated[4] opinion, supervision of Thiel in the community would

4 Even Dr. Hill admitted that her knowledge of community based treatment programs for Chapter 980 committees was anecdotal. (R:323-83) Certainly her opinion in this regard cannot carry more weight than the testimony of Dr. Thornton whose role it was to develop and implement the programs.

involve an unreasonable expense.

The trial court, in denying Thiel's petition, barely mentioned the factors set forth in Sec. 980.08(4)(cg), Stats. Rather, the court merely stated:

> And my recollection and my notes *indicate opinions of Dr. Thornton that Mr. Thiel is more likely than not to reoffend. Dr. Hill felt the same.*
>
> * * *
>
> the overall conclusion of those people, that is, Thornton and Hill, is that Mr. Thiel is more likely than not to reoffend; that in terms of treatment, possible release, and supervision, that some additional work needs to be done, he needs to complete Phase Two of the treatment; and that there needs to be some reasonable expectation, at least from Dr. Hill's perspective

(emphasis provided; R:324-9, 10)

With regard to the petition for supervised release, then, the experts were in nearly unanimous agreement. All three doctors believed that Thiel could be safely treated in the community[5]; that is, with supervision Thiel was not more likely than not to commit a crime of sexual violence. The only point of disagreement was with regard to how "substantial" Thiel's treatment has been during the period of his commitment and whether the community treatment programs that are currently available could be offered to Thiel for a "reasonable expense."

Firstly, it must be pointed out that the judge did not even mention these two points of disagreement in his bench decision. Rather, the judge *incorrectly* found that both Dr. Thornton and Dr.

5 The phrase "safely treated in the community" is intended to encompass all of the statutory factors all of which appeared to be designed to guarantee that the patient may be safely treated in the community.

Hill testified that Thiel was still more likely than not to reoffend.

Such a finding is wholly unsupported by the evidence. Dr. Thornton testified that if Thiel, "were released under the Sand Ridge supervised release program, then I think his risk for reoffending under those conditions is probably less than more likely than not." (R:232-18) Dr. Hill testified that,

> Q All right. So, let me make sure I understand what you're telling me. You're telling me he could be securely or safely treated in the community, right?
>
> A Yes.

(R:323-82) And, finally, Dr. Lytton testified that, given Thiel's history, he could be safely treated in the community. (R:323-101).

Thus, the trial court's finding that the state's two doctors testified that Thiel was more likely than not to reoffend is simply not accurate.

It is significant, too, that the judge failed to mention any of the other statutory factors. Although Thiel faces a lofty standard of appellate review, an important question is whether the trial court's findings of fact ought to be subject to this rigorous standard of appellate review where the judge offers no explanation for believing one fact over some other competing fact.

In another context, the appellate courts have recently held that even where a determination is discretionary the trial court must at least state on the record its reasons for proceeding as it did. For many years the trial court's sentencing discretion was reviewed for "abuse of discretion." Trial judges eventually took this to mean that the court could sentence the defendant to almost anything within the statutory range and the sentence would be appeal-proof.

In a concurring opinion in *State v. Taylor*, 2006 WI 22 ¶18

(Wis. 2006), Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." *Taylor*, 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in *State v. Gallion*, 270 Wis. 2d 535, 678 N.W.2d 197 (2004); "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." *Gallion*, 2004 WI 42, ¶46 (Wis. 2004)

The same is true with regard to the "sufficiency of the evidence" standard. Unless the trial judge offers some explanation as to *why* he believes one witness over another the review of the appellate court is nothing more than a rubber-stamp process.

Here, the one finding of fact that the trial court did make is clearly not supported by the record. The court made almost no other findings of fact much less did the judge fit these facts into the rubric of the statutory factors. How, then, can the appellate court meaningfully review this case?

II. The trial court abused its discretion in permitting Dr. Thornton to describe Thiel's performance on the PPG and the error was not harmless because the court relied upon the evidence in making its decision.

The State elicited testimony from Dr. Thornton concerning Thiel's performance on a PPG and on a subsequent polygraph examination. Thiel objected on the grounds of hearsay because there was no foundation that Dr. Thornton had personal knowledge of Thiel's performance on the test. The court overruled Thiel's hearsay objection. The evidence was plainly hearsay and it was not

admissible simply because Dr. Thornton relied upon it is reaching his opinion. The admission of the evidence was not harmless because Thiel's performance on the PPG was one of the few facts that the court relied upon in denying Thiel's petition for supervised release.

A. Standard of review

Whether to admit evidence is discretionary with the trial court. *State v. Evans*, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). The court of appeals must uphold a trial court's decision to admit or exclude evidence if the trial court examined the relevant facts, applied the proper legal standard to those facts, and used a rational process to reach a conclusion that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

B. The court abused its discretion

Although under sec. 907.03, STATS., an expert's opinion may be *based* upon hearsay and other forms of inadmissible evidence, the evidence itself does not become admissible because of the fact that the expert relied upon it.

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.

This statute is frequently mis-cited as standing for the proposition that an expert witness is permitted to relate to the jury *all underlying facts* upon which she based her opinion- whether or not the underlying facts are admissible evidence or whether they have ever been established.

In, *State v. Weber*, 174 Wis.2d 98, 496 N.W.2d 762, 767 (Wis .App. 1993) the court of appeals put this myth to rest. The court wrote:

> Though the trial court correctly recognized that sec. 907.03, Stats. (1989-90), allowed Dr. Fosdal to offer an opinion based in part upon hearsay data that was otherwise inadmissible, the court erred in its apparent belief that the statute also permits the underlying hearsay data to be admitted as evidence. While Dr. Fosdal was clearly permitted under sec. 907.03 to rely upon the statement for his ultimate opinion as to Weber's mental responsibility, the state was obliged to qualify the statement under some exception to the hearsay rule before the statement itself could be admitted into evidence and used substantively for the truth of the matter asserted.

A party calling an expert witness *is* entitled to have the expert witness explain the bases for his or her opinion because the trier of fact is required to assess the validity of the opinion. *See Heyden v. Safeco Title Ins. Co*., 175 Wis.2d 508, 522, 498 N.W.2d 905, 909-10 (Ct.App.1993).

Here, though, over Thiel's hearsay objection, Dr. Thornton was allowed to describe Thiel's performance on the PPG and also his performance on a subsequent polygraph. This goes well-beyond permitting Dr. Thornton to "explain" the basis for his opinion. Explaining the basis for an opinion would be, for example, explaining

that the doctor relied upon psychometric testing administered at Sand Ridge.

The unfairness of allowing this testimony is obvious. Where Dr. Thornton was not present for either the PPG or the polygraph how is Thiel to cross-examine the doctor in this regard?

C. The error was not harmless

"An error is harmless and does not justify reversal if we can be sure that the error did not contribute to the guilty verdict." *Weber*, 174 Wis.2d at 109, 496 N.W.2d at 767 (citing *State v. Dyess*, 124 Wis.2d 525, 547, 370 N.W.2d 222, 233(1985)). The supreme court articulated the test for harmless error as whether there is a reasonable possibility that the error contributed to the conviction. *Dyess*, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

The trial court's bench decision was sparse; however, the PPG was one of the few things that the judge mentioned. The judge said, "The one thing I still had in the back of my mind was I think there was going to be a retest, Dr. Thornton was going to redo the penile plethysmograph with Mr. Thiel. I don't know the result of that or, frankly, if it's been done . . . " (R:324-9, 10)

Plainly, the court relied upon Dr. Thornton's testimony concerning Thiel's performance on the PPG and on the subsequent polygraph examination. The fact that there was no evidence of a subsequent re-test was one of the few things that the court mentioned in denying Thiel's petition.

Conclusion

For these reasons it is respectfully requested that the court of appeals reverse the trial court's order denying Thiel's petition for

supervised release and order that the petition be granted. In the alternative, the court should reverse the trial court's order denying both the petition for supervised release and the petition for discharge because the trial court abused its discretion in admitting hearsay evidence and remand the matter for a new hearing.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2008.

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Certification

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 4868 words.

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

Dated this _____ day of _____, 2008:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District II
Appeal No. 2007AP002742

In re the commitment of Dennis R. Thiel:

State of Wisconsin,

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Appendix Certification

A. Record on Appeal

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

C. Excerpt of trial court's ruling on hearsay objection.

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

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008

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