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DISTRICT IV

August 22, 2024

To:

Hon. Michael D. Zell
Circuit Court Judge
Electronic Notice

Chris Marfilius
Register in Probate
Portage County Courthouse
Electronic Notice

Christian Allen
Electronic Notice

Carlos Bailey
Electronic Notice

K.M.N.

You are hereby notified that the Court has entered the following opinion and order:

2024AP277-NM In the Matter of the Condition of K.M.N.: Portage County v. K.M.N. (L.C. # 2021ME99)

Before Nashold, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Carlos Bailey, appointed counsel for K.M.N., has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 seeking to withdraw as appellate counsel. The report addresses whether there is any arguable basis to challenge either the order extending K.M.N.'s WIS. STAT. ch. 51 commitment or the order for K.M.N.'s involuntary medication and treatment. K.M.N. was sent a copy of the report and has not filed a response. In response to an order of this court, counsel has filed a supplemental no-merit report. Based upon the report, the supplemental

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

report, and an independent review of record, I conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, I affirm.

While K.M.N. was still subject to a previous commitment order, Portage County petitioned for recommitment. The circuit court held a hearing prior to the date that her commitment would have otherwise expired. A court-appointed examiner submitted a written report in advance of the final hearing, and the examiner testified at the hearing. K.M.N.'s social worker and K.M.N. also testified. The court extended her commitment for twelve months and ordered involuntary medication and treatment during the commitment period.

The no-merit report addresses whether the evidence was sufficient to support the order extending K.M.N.'s commitment and the order for involuntary medication and treatment. As to each order, the County had the burden of proof by clear and convincing evidence. *See* ***Langlade County v. D.J.W.***, 2020 WI 41, ¶23, 391 Wis. 2d 231, 942 N.W.2d 277; ***Outagamie County v. Melanie L.***, 2013 WI 67, ¶37, 349 Wis. 2d 148, 833 N.W.2d 607. Without reciting all of the evidence here, I agree with counsel that it would be frivolous to argue that the evidence was insufficient as to either order. It would also be frivolous to argue that the circuit court failed to make the findings required by ***D.J.W.***, 391 Wis. 2d 231, ¶40.

As noted, counsel submitted a supplemental report in response to this court's order. The order requested further input from counsel "relating to whether K.M.N. may have any arguably meritorious grounds to challenge the extension of her commitment based on the admission of hearsay evidence of her alleged dangerousness." In the supplemental report, counsel contends that "[t]here is no meritorious claim that the court erroneously exercised its discretion by admitting hearsay evidence of K.M.N.'s dangerousness."

I conclude that there is no arguable merit to any issue relating to the hearsay evidence, but my analysis is somewhat different from counsel's analysis in the supplemental no-merit report. Trial counsel did not object to the hearsay evidence, thereby forfeiting direct review of the issue of whether the evidence was erroneously admitted. The question thus becomes whether K.M.N. could pursue a non-frivolous claim that the admission of the evidence was plain error or, alternatively, a claim that trial counsel was ineffective by failing to object to the evidence.

The plain error doctrine applies when an error is "'obvious and substantial'" and "'so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" ***State v. Bell***, 2018 WI 28, ¶12, 380 Wis. 2d 616, 909 N.W.2d 750 (quoted source omitted). To show ineffective assistance of counsel, the proponent must establish both that counsel performed deficiently and that counsel's deficient performance prejudiced the defense. ***Winnebago County v. J.M.***, 2018 WI 37, ¶29, 381 Wis. 2d 28, 911 N.W.2d 41. Prejudice means "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.***, ¶31 (quoted source omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

Here, based on the supplemental no-merit report and my independent review of the record, I conclude that there is no arguable merit to a claim for plain error or ineffective assistance of counsel based on the hearsay evidence. There was sufficient admissible, non-hearsay evidence to defeat any argument that admission of the hearsay evidence was "so fundamental" as to require a new trial. Likewise, there was sufficient admissible, non-hearsay evidence to overcome any argument that trial counsel's failure to object to the hearsay evidence was prejudicial.

Therefore,

IT IS ORDERED that the circuit court's orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carlos Bailey is relieved of any further representation of K.M.N. in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not published.

Samuel A. Christensen
Clerk of Court of Appeals