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DISTRICT III

August 6, 2013

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

2012AP2720-NM

In re the commitment of Thomas H. Bush: State of Wisconsin v.
Thomas H. Bush (L. C. #1997CI1)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Thomas H. Bush has filed a no-merit report concluding there is no basis for appealing an order denying discharge or supervised release from a WIS. STAT. ch. 980¹ commitment. Bush filed a response arguing (1) he had no input into the selection of the psychologist the court appointed for him, (2) his counsel was ineffective for failing to pursue

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Bush's right to appointment of an examiner of his choice and for failing to prevent the court-appointed psychologist from testifying and (3) his trial counsel failed to communicate with him. Upon our independent review of the record, we conclude there is no arguable basis for appeal.

The record discloses no arguable basis for challenging the sufficiency of the evidence to support the court's decision. Doctor Scott Woodley testified that Bush was diagnosed with pedophilia, sexual sadism, exhibitionism, voyeurism, alcohol and cannabis abuse, and an antisocial personality disorder. Bush displayed a "high range of psychopathy." Although Bush made modest progress in treatment, he continued to suffer from a mental disorder that predisposed him to commit sexually violent acts and the risk of reoffending was greater than fifty percent. Woodley's testimony by itself would be sufficient to support the decision denying discharge or supervised release.

Bush's attorney requested appointment of an examiner. Bush gave his counsel a list of experts he would like contacted including Dr. Craig Rypma. Bush's attorney sent the court a letter suggesting the appointment of Rypma, who had already conducted an interview with Bush, or one of the other expert witnesses on the list, though none of the experts had responded to counsel's earlier correspondence requesting curriculum vitae. The court appointed Dr. Brian Stress as Bush's expert witness.

Doctor Stress sent his report to the court. However, before Stress testified, Bush's counsel objected to Stress testifying based on *State v. Rachel*, 224 Wis.2d 571, 572, 591 N.W.2d 920 (Ct. App. 1999), which gives the patient the right to refuse disclosure of an expert's report when the expert was appointed for the patient. Noting that there was no jury for this trial, the court allowed Stress to testify subject to the court disregarding the testimony if the court later

determined Bush's counsel's analysis of *Rachel* was correct. Stress then testified that Bush did not meet the criteria for discharge or supervised release. The court found sufficient reason to deny discharge or supervised release without considering Stress's report or opinions. Based solely on the testimony of Woodley and Bush himself, the court appropriately found Bush was still more likely than not to commit another sexual offense and had not made significant progress in treatment.

In his response to the no-merit report, Bush contends he has a right to an examiner of his choice. WISCONSIN STAT. § 980.031(3) allows the court to appoint a qualified and available expert for an indigent petitioner. It does not, however, give the petitioner the right to choose the expert. *State v. Thiel*, 2004 WI App 225, ¶23, 277 Wis. 2d 698, 691 N.W.2d 388.

Bush also argues ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Bush must prove both that his attorney's representation was deficient and prejudicial to his defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is based on an objective standard of reasonableness as measured against prevailing professional norms. *Id.* at 688. To establish prejudice, Bush must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694.

Because Bush had no right to appointment of an examiner of his choice, his counsel was not ineffective for failing to have Dr. Rypma appointed. His attorney suggested Rypma's appointment in a letter to the court, but the court elected to appoint Dr. Stress. Bush cannot

establish deficient performance from the fact that the court chose to disregard counsel's suggestion.

Bush cannot establish prejudice from his counsel's failure to prevent Dr. Stress from sending the report to the court and testifying at the trial. The court disregarded Stress's report and testimony, and Woodley's testimony was sufficient to support the court's findings. Therefore, the result of the proceedings would have been the same had counsel succeeded in preventing Stress from submitting a report or testifying.

Finally, citing a letter from his counsel, Bush argues that his attorney failed to make reasonable and sufficient contacts with him. Bush quotes correspondence from his attorney saying "despite my lack of communication with you, I have not been neglecting your case ... they have not responded to my requests for them. So, I have not written because I have nothing substantial to report." Bush focuses on the admission of "lack of communication," but ignores the rest of the paragraph that explains counsel's efforts on Bush's behalf and that there was no progress to report.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Bush in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals