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DISTRICT II/IV

September 13, 2013

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

2012AP1000-NM In re the commitment of Dale H. Peshek: State of Wisconsin v.
Dale H. Peshek (L.C. # 2005CI2)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Attorney Russell Bohach, appointed counsel for Dale Peshek, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether the evidence was sufficient to support the court's order denying Peshek's petition for discharge from commitment under WIS. STAT. ch. 980. Peshek was sent a copy of the report, but has not filed a

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

response. Upon our independent review of the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

In June 2006, Peshek was committed as a sexually violent person under WIS. STAT. ch. 980. In June 2010, Peshek petitioned for discharge from commitment. *See* WIS. STAT. § 980.09. The court denied the petition in July 2011 following a trial to the court.

The no-merit report addresses whether the evidence was sufficient to support the court's decision denying Peshek's petition for discharge from commitment. *See State v. Brown*, 2005 WI 29, ¶¶42-46, 279 Wis. 2d 102, 693 N.W.2d 715 (applying sufficiency of the evidence test in WIS. STAT. ch. 980 context). Evidence is sufficient to support an order as to ch. 980 commitment “unless the evidence, viewed most favorably to the [S]tate 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.” *State v. Marberry*, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999) (quoted source omitted). If a person committed under ch. 980 petitions for discharge and the court holds a hearing on the petition, as here, the State has the burden to prove by clear and convincing evidence that the petitioner meets the criteria for commitment as a sexually violent person. *See* WIS. STAT. § 980.09(3) and (4). Those criteria are: (1) the person has been convicted of a sexually violent offense, adjudicated delinquent of a sexually violent offense, or found not guilty by reason of insanity of a sexually violent offense; (2) the person has a mental disorder—that is, a congenital or acquired condition affecting the person's emotional or volitional capacity—predisposing the person to engage in sexual violence; and (3) the person is dangerous because his or her mental disorder makes it more likely than not that he or she will engage in sexual violence. *See* WIS. STAT. §§ 980.01(1m), (2), (6) and (7) and 980.06.

At the June 2011 trial on Peshek's petition for discharge, the State presented testimony by expert witness Dr. Lakshmi Subramanian, who conducts WIS. STAT. ch. 980 evaluations for the Sand Ridge Evaluation Unit. Dr. Subramanian identified two judgments of conviction against Peshek that the State offered into evidence, for child enticement-sexual contact and second-degree sexual assault of a child, and opined that both offenses are sexually violent offenses. Dr. Subramanian also testified that she evaluated Peshek and prepared a report of that evaluation. Dr. Subramanian testified that she concluded, to a reasonable degree of psychological certainty, that Peshek has the qualifying mental disorders of pedophilia and antisocial personality disorder, and that Peshek is more likely than not to commit another sexually violent act. Dr. Subramanian testified as to the procedure she used to evaluate Peshek. Dr. Subramanian's report, dated May 23, 2011, was admitted into evidence.

Peshek presented expert testimony by Dr. Craig Rypma. Dr. Rypma testified that he conducted a sexually violent person evaluation of Peshek and prepared a report dated June 1, 2011. Dr. Rypma testified that he determined that Peshek does not suffer from pedophilia or antisocial personality disorder; rather, according to Dr. Rypma, Peshek has attention deficit hyperactivity disorder and adult antisocial behavior, which Dr. Rypma opined are mental disorders that do not predispose Peshek to engage in sexual violence. Dr. Rypma also testified that he concluded, to a reasonable degree of professional certainty, that Peshek is not more likely than not to engage in future acts of sexual violence. Dr. Rypma's report was admitted into evidence.

The court concluded that Dr. Subramanian was the more credible witness, and that the State had met its burden of proof by clear and convincing evidence. Accordingly, the court denied Peshek's petition for discharge.

We agree with counsel's assessment that a challenge to the sufficiency of the evidence would lack arguable merit. Dr. Subramanian's testimony supports the court's finding that the elements for WIS. STAT. ch. 980 commitment were met by clear and convincing evidence. Peshek's expert provided a different opinion, but the court was entitled to accept the testimony of one expert over the testimony of another. We discern no arguably meritorious appellate issues on this basis.

Upon our independent review of the record, we have found no other arguable basis for reversing the court's orders. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Bohach is relieved of any further representation of Peshek in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals