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DISTRICT IV

December 11, 2013

To:

Hon. Diane M. Sorensen
Reserve Judge

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

2012AP2650-NM In the matter of the mental commitment of Thomas F. W.: Dane County v. Thomas F. W. (L.C. # 2001ME263)

Before Kloppenburg, J.[1]

Attorney Andrew Hinkel, appointed counsel for Thomas F.W., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) whether the circuit court lost competency to proceed in Thomas's recommitment trial when it failed to comply with statutory time limits; (2) whether the circuit court erred by requiring Thomas to wear restraints during trial, by denying Thomas's request to strike a juror for cause, or by denying Thomas's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

motion for mistrial; and (3) the sufficiency of the evidence to support the orders extending Thomas's involuntary commitment and for involuntary medication.[2] Thomas was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

On February 20, 2012, Marquette County filed a petition to extend Thomas's involuntary commitment under WIS. STAT. § 51.20. The circuit court held a jury trial on the petition on April 9 and 11, 2012. Following trial, the jury returned a special verdict finding that Thomas was mentally ill, dangerous, and a proper subject for treatment. The circuit court entered orders extending Thomas's involuntary commitment and for involuntary treatment.

The first issue addressed in the no-merit report is whether the circuit court lost competency to proceed when it failed to hold a hearing on the county's petition within fourteen days of Thomas's demand for a jury trial. *See* WIS. STAT. § 51.20(11)(a). Thomas filed his jury demand on March 9, 2012. The circuit court scheduled trial for March 19, 2012. However, prior to the scheduled trial date, Thomas's counsel moved to withdraw. At the hearing held on March 19, 2012, Thomas confirmed that he wanted his present attorney to withdraw, and that he understood that allowing his attorney to withdraw would result in delay of his jury trial. We agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's competency. *See* ***Milwaukee County v. Edward S.***, 2001 WI App 169, ¶¶5-12, 247 Wis. 2d 87, 633 N.W.2d 241.

[2] Although the orders appealed have now expired, we address their validity because issues arising from these orders may affect subsequent orders.

The next issues addressed in the no-merit report are whether the circuit court erred by requiring Thomas to wear restraints during trial, by denying Thomas's motion to strike a potential juror for cause, or by denying Thomas's motion for mistrial.

The circuit court determined that it was necessary to have Thomas wear hand and foot restraints during trial based on Thomas's history of unpredictable outbursts of violence during court proceedings. The court also ensured that the restraints would not be visible to the jury. We agree with counsel that a challenge to the circuit court's exercise of discretion in requiring restraints would lack arguable merit. *See* ***State v. Grinder***, 190 Wis. 2d 541, 550-53, 527 N.W.2d 326 (1995).

During jury voir dire, a potential juror stated his concern that, in this type of case, "whatever the verdict is, [the patient is] probably going to need care." Thomas's counsel moved to strike the juror for cause. The court questioned the potential juror as to his ability to be fair and reach a verdict based on the evidence. The potential juror indicated that he had not preformed a decision and would be able to be fair and reach a decision based on the evidence. The court denied the motion to strike for cause, and Thomas exercised a preemptory strike to strike the potential juror. We agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's exercise of discretion in denying Thomas's motion to strike the potential juror for cause. *See* ***State v. Lindell***, 2001 WI 108, ¶¶109-113, 245 Wis. 2d 689, 629 N.W.2d 223.

During trial, Thomas moved for mistrial on grounds that the County's expert witness, Dr. Leslie Taylor, had looked at her report during her direct testimony. Taylor testified via telephone, and in cross-examination agreed that she had looked at her report during her entire

direct testimony. Thomas's counsel argued that Taylor should have used the report only to refresh her recollection, and that Taylor's reliance on her report through her entire testimony was prejudicial to Thomas. The court determined that Taylor had properly referred to her report during her testimony, and that there was no indication that Taylor had relied on information outside of the report. We agree with counsel that there would be no arguable merit to a challenge to the circuit court's decision on this issue. *See* WIS. STAT. § 907.07 (an expert witness may read his or her entire expert report into evidence).

Next, the no-merit report addresses the sufficiency of the evidence to support the orders to continue Thomas's involuntary commitment and for involuntary treatment. Under WIS. STAT. § 51.20(13)(g)3., the county department that has custody of an individual under an order for commitment may petition to extend the order for commitment, and has the burden to prove that the criteria for commitment are met. The criteria for mental health commitment are that the individual is: (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. *See* WIS. STAT. § 51.20(1)(a). Because Thomas was under an order for involuntary commitment immediately prior to the current proceedings, dangerousness may be established "by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." *See* WIS. STAT. § 51.20(1)(am).

Here, the County presented testimony by three expert witnesses to establish that the criteria for mental health commitment were met. The County's witnesses testified that Thomas has been diagnosed with the mental illness of schizophrenia or schizoaffective disorder; that Thomas's mental illness is treatable by medication; and that, based on Thomas's treatment records, there was a substantial likelihood that Thomas would become a proper subject for

commitment if treatment were withdrawn. Accordingly, we agree with counsel's assessment that a challenge to the evidence supporting involuntary commitment would lack arguable merit.

Under WIS. STAT. § 51.61(1)(g)4.a., a court may order involuntary treatment for a person subject to commitment if the person is not competent to refuse medication or treatment because he is "incapable of expressing an understanding of the advantages and disadvantages" of treatment or substantially incapable of applying an understanding of the advantages and disadvantages of treatment to his own mental illness in order to make an informed decision regarding treatment. Here, Taylor testified that Thomas has a minimal understanding of his mental illness and suffers delusions regarding his prescribed medication. Taylor opined that Thomas's mental illness rendered him incapable of expressing an understanding of the advantages and disadvantages of treatment or applying an understanding of those advantages and disadvantages to his own mental illness. Again, we agree with counsel that a challenge to the evidence supporting involuntary treatment would lack arguable merit.

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 orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals