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

2013AP1185-NM In re the commitment of John K. Smith, Jr.: State of Wisconsin v. John K. Smith, Jr. (L.C. #2011CI1)

Before Curley, P.J., Kessler and Brennan, JJ.

John K. Smith, Jr., appeals from an order committing him to a secure mental health facility as a sexually violent person. *See* WIS. STAT. ch. 980 (2011-12).[1] Appellate counsel, Attorney Leonard D. Kachinsky, has filed a no-merit report pursuant to ***Anders v. California***,

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

386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Smith responded to the report. After considering the report and the response, and after conducting an independent review of the record as mandated by ***Anders***, we conclude that there are no arguably meritorious issues. Therefore, we affirm the commitment order.

The no-merit report first addresses whether there was sufficient evidence for the circuit court to conclude that Smith is a sexually violent person as that term is used in WIS. STAT. ch. 980. In order to commit Smith as a sexually violent person under ch. 980, the State had to show that Smith: (1) had been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because his mental disorder makes it more likely than not that he will engage in acts of sexual violence. *See* WIS. STAT. § 980.02(2).

"We utilize the criminal standard of review to determine whether there is sufficient evidence to prove a person was a sexually violent person subject to commitment." ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999). We view the evidence in the light most favorable to the decision, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the circuit court as the trier of fact. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

A "sexually violent offense" for purposes of WIS. STAT. ch. 980 commitment includes first-degree sexual assault and second-degree sexual assault. *See* WIS. STAT. § 980.01(6)(a).

Smith's probation and parole agent, Jennifer Priekschat, testified that Smith was convicted of second-degree sexual assault in 1983, a second count of second-degree sexual assault in 1984, and five counts of first-degree sexual assault in 1992, with additional read-ins and uncharged incidents from four different counties. Priekschat also testified that, according to records from the Department of Corrections, Smith admitted to repeated acts of incest and forcing his wife to have sex with him by being physically violent. Priekschat's testimony establishes that Smith committed qualifying sexually violent offenses within the meaning of the statute.

A "mental disorder" for purposes of WIS. STAT. ch. 980 "means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." WIS. STAT. § 980.01(2). Dr. Christopher Tyre, a psychologist, testified that Smith suffered from pedophilia, paraphilia not otherwise specified, and antisocial personality disorder. Dr. Tyre used three different assessment tools to evaluate Smith's risk for future acts of sexual violence and Smith showed a high risk on all of them. Dr. Tyre said Smith received the maximum score a person Smith's age, fifty-six, could receive on the RRASOR, which showed that there was a seventy-three percent risk that Smith would reoffend within ten years. Dr. Tyre testified that on an assessment tool called the Static-99, Smith's score was associated with a group of offenders who displayed rates of sexual recidivism of forty percent over fifteen years. Dr. Tyre explained that this forty percent figure included only offenders who were actually *reconvicted* within that time frame, so the likelihood that Smith would commit an act of sexual violence, as opposed to be *reconvicted* for a sexually violent act, was much greater than forty percent because experts estimate that only ten to fifty percent of sexual assaults are actually reported. Finally, Dr. Tyre used the Static-99R, a risk assessment tool that attempts to incorporate what happens to offenders as they age. Smith had a thirty percent risk of

reconviction within ten years based on that diagnostic tool, which placed him in the high risk/high needs group.

Dr. Tyre testified that Smith had a long-standing history going back to the 1970s of documented sexual assaults on prepubescent children as young as ten years old. Based on this history, his scores on the assessment tools, Smith's failure to complete sex offender treatment, and multiple other factors in his history, Dr. Tyre opined that Smith was likely to engage in acts of sexual violence. He further opined that Smith's disorder caused him to lack control over his sexual desires, thereby establishing a nexus between Smith's mental disorder and his likelihood of reoffense. *See* ***State v. Laxton***, 2002 WI 82, ¶22, 254 Wis. 2d 185, 647 N.W.2d 784.

Dr. Lakshmi Subramanian, a psychologist, testified that Smith suffered from pedophilia, sexual sadism, and adjustment disorder with anxiety. She testified that she gave Smith a 6 on the Static-99R, based on her assessment of his prior offenses and personal history, which meant that he fell into the highest risk category for reoffending. On the Structured Risk Assessment Forensic Version (SRAFV), which she also used to predict Smith's risk of reoffending, Smith's risk *exceeded* that of the norm in the high risk group. The high risk group was associated with a group of offenders who had a forty-two percent risk of offending again within ten years. Dr. Subramanian testified that Smith had significant problems regulating his emotions and controlling his aggression, that he had responded poorly to treatment, and that he lacked insight into his problems. Dr. Subramanian concluded that Smith was more likely than not to sexually reoffend.

Dr. Craig Rypma, another psychologist, diagnosed Smith as suffering from pedophilia. Dr. Rypma testified that Smith received a score of 4 on the Static-99R, which showed a

recidivism rate of thirty percent over ten years, and pointed out to the circuit court that there is a measure of subjectivity in scoring these risk assessment tools, as was evidenced by the fact that Smith received a different score from each of the three psychologists on the Static-99R. Dr. Rypma explained in detail why he scored the Static-99R as he did, pointing out his specific areas of disagreement with the other two psychologists. He also testified that, while he agreed with the other doctors in many respects, he disagreed about the degree to which Smith's mental illness would be likely to cause him to reoffend, especially given his relatively advanced age. He concluded that Smith was *not* more likely than not to reoffend.

In its oral decision, the circuit court first stated that it was undisputed that Smith met the first two criteria for commitment; he had been convicted of a sexually violent offense and he had a mental disorder. The circuit court said that the only real question was whether Smith was sexually violent—that is, whether he was dangerous to others because his mental disorder made him more likely than not to engage in future acts of sexual violence. Weighing the testimony of the three psychologists, the circuit court said that while he understood why Dr. Rypma reached the conclusions that he did, the circuit court found the testimony of Dr. Tyre and Dr. Subramanian more persuasive. The credibility of the witnesses and the weight of the evidence are matters for the trier of fact to decide. ***Poellinger***, 153 Wis. 2d at 504. Their testimony showed that Smith's mental disorder did, in fact, make him sexually violent and more likely than not to commit a future act of sexual violence. Our review of the record as a whole satisfies us that there is no arguable merit to a challenge to the sufficiency of the evidence necessary to support that conclusion.

The no-merit report next addresses whether there were evidentiary rulings or other irregularities that would provide a basis for appeal. After reviewing the transcript of the trial, we

agree with the no-merit report that the record does not reveal any procedural irregularities or disputes about the admissibility of evidence at trial that would be grounds for an appellate challenge. There would be no arguable merit to these claims.

Smith contends in his response that his trial lawyer ineffectively represented him because he would not ask questions Smith wanted him to ask and would not raise the issues Smith wanted him to raise. Before turning to the specifics of Smith's arguments, we first note that, as a general matter, Smith does not have the right to force his attorney to raise the issues Smith believes should be raised and "we will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

Turning to the particulars, Smith contends in his response that his lawyer should have raised the fact that the trial was supposed to focus on his frame of mind now, rather than his frame of mind twenty years ago when he committed these crimes. Our review of the transcript shows that the trial *did* focus on Smith's current likelihood of committing future acts of sexual violence and the information about Smith's past was properly brought in only to the extent that it informed the issue of his current likelihood of reoffending. Moreover, Smith's lawyer urged the circuit court during closing argument to focus on the actuarial tool that would give the court the "best measurement of [Smith's likelihood of re-offense] *at the current time*." (Emphasis added.) There would be no arguable merit to a claim that Smith's lawyer did not sufficiently argue that Smith's current frame of mind should be considered at the trial.

Smith contends in his response that Dr. Tyre's testimony that Smith was "described as being very litigious and argumentative" while in prison was not accurate. Smith points out that inmates get tickets for arguing in prison, but his record shows that his last disciplinary action was fifteen or twenty years ago. Dr. Tyre was reporting information he found in Smith's correctional records. Smith could have been characterized in those records, which are not before us, as argumentative without this behavior rising to the level where disciplinary action was warranted. Moreover, Dr. Tyre's comments were insignificant in the context of all of his testimony and in no way influenced the outcome in this case. To establish a claim of ineffective assistance of counsel, a litigant must show that he was prejudiced; that is, that there is a reasonable probability that, but for the lawyer's act or omission, "the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). Because the result of the proceeding would not have been different if Smith's lawyer had objected to Dr. Tyre's comments, there would be no arguable merit to this claim.

Smith next argues in his response that Dr. Subramanian and Dr. Tyre both incorrectly testified that he was reoffending while in treatment. Smith contends that he reoffended after treatment stopped when he moved from Madison, where the treatment group was, to Portage County, where he could no longer afford treatment. He points to Dr. Subramanian's testimony that Smith "completed treatment on one occasion, but continued to reoffend at that time." Smith reads Dr. Subramanian's testimony too narrowly if he construes it to mean that he was reoffending on the exact same days that he was attending treatment. In context, Dr. Subramanian meant that he continued to reoffend despite completing treatment. This is not inconsistent with Smith's claim that he did not begin to reoffend until he moved to Portage County. As for Dr. Tyre, he testified that Smith "either sexually reoffended after treatment or, according to the

records, *appeared to be* sexually reoffending while he was participating in treatment." (Emphasis added.) Dr. Tyre did not make an unequivocal statement that Smith was reoffending during treatment; he explained what the records suggested to him in light of the fact that Smith would not allow himself to be interviewed. There would be no arguable merit to this claim.

Smith next challenges Dr. Subramanian's testimony that that he was having a hard time replacing his masturbation with another goal and that when he masturbates he slips into inappropriate fantasies. Dr. Subramanian based her testimony on the sexual offender treatment records from Sand Ridge Secure Treatment Center dated October 3, 2011. Because Dr. Subramanian's testimony was based on relatively recent treatment notes, there would be no arguable merit to a challenge to this testimony.

After conducting an independent review of the record and considering all of the assertions in Smith's response, we have found no potential issues of arguable merit. Therefore, we affirm the order committing Smith as a sexually violent person and relieve Attorney Leonard D. Kachinsky of further representation of Smith in this matter.

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

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals