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DISTRICT I

April 8, 2014

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

2013AP1446-NM

In re the commitment of David Fitzgerald Duke: State of Wisconsin v. David Fitzgerald Duke, (L.C. #2009CI2)

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

David Fitzgerald Duke appeals an order, entered following a bench trial, committing him to the Wisconsin Department of Health Services as a sexually violent person under WIS. STAT. ch. 980 (2011-12).¹ Duke's appellate counsel, Attorney Russell D. Bohach, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Duke was advised of his right to file a response, but he has not done so. After reviewing the no-

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

merit report and the record, we conclude that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the commitment order. *See* WIS. STAT. RULE 809.21(1).

The no-merit report first addresses whether the State established beyond a reasonable doubt that Duke was a sexually violent person. The State was required to prove beyond a reasonable doubt that Duke: (1) was previously convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not to engage in at least one future act of sexual violence because of the mental disorder. *See* WIS. STAT. §§ 980.01(1m), 980.01(7), 980.05(3)(a).

When we review a challenge to the sufficiency of the evidence that a person is sexually violent, we will uphold the finding:

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. Kienitz, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999) (citations and two sets of brackets omitted, one set of brackets added). We will not disturb the verdict “[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find that the defendant is a sexually violent person.” *Id.* at 434-35 (brackets and citation omitted). Further, “[t]he trier of fact determines issues of credibility, weighs the evidence and resolves conflicts in [the] testimony.” *Id.* at 435.

Dr. Cynthia Marsh, a psychologist, testified that Duke was previously convicted of both first-degree sexual assault and second-degree sexual assault in separate incidents, a fact that

Duke did not contest. Both crimes are sexually violent offenses for purposes of commitment as a sexual predator. *See* WIS. STAT. § 980.01(6)(a).

Dr. Marsh testified that Duke suffers from two mental disorders, pedophilia, sexually attracted to females, and anti-social personality disorder, that predispose him to acts of sexual violence. 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. Marsh testified that she evaluated Duke by interviewing him, reviewing legal, institutional, and psychiatric records, and conducting risk assessments. Her diagnosis of pedophilia was based on Duke’s assault of a five-year-old child and his repeated assaults of a second child beginning when the child was seven years old. Dr. Marsh used three different actuarial tools to evaluate Duke’s risk for future acts of sexual violence and also looked at his psychopathy score to assist in determining Duke’s risk of reoffending. Dr. Marsh explained that individuals with high psychopathy scores and behavioral histories similar to Duke’s have a higher rate of committing new offenses, and she described a study that found a sixty percent recidivism rate among such individuals. Based on Duke’s history, his scores on the assessment tools, and Duke’s failure to complete sex offense treatment, Dr. Marsh opined that Duke was more likely than not to engage in future acts of sexual violence.

Duke called two witnesses, Dr. Craig Rypma and Dr. Richard Elwood, both psychologists with extensive experience conducting evaluations under ch. 980. Both men testified that Duke suffers from anti-social personality disorder; however, they differed on whether that disorder predisposed Duke to acts of sexual violence. Dr. Rypma testified that he did not believe Duke’s anti-social personality disorder predisposed him to acts of sexual violence. He testified at great length about the risk assessment tools he used to evaluate Duke’s

likelihood of reoffending. He testified that on the Static-99 risk assessment, he scored Duke at a 5, the same score that Duke received from the other two psychologists. However, Dr. Rypma testified that he discounted that score to a certain degree because the test has been criticized for overestimating risk by failing to adequately account for how age affects sex offense recidivism. Moreover, even with a score of 5, Dr. Rypma did not believe that Duke had more than a thirty-five percent risk for reoffending.

Dr. Elwood testified that he believed that Duke's anti-social personality disorder and alcohol and drug abuse history, which were in remission in a controlled environment, predisposed Duke to acts of sexual violence. Dr. Elwood testified that Duke's status as HIV positive would reduce his life expectancy, and therefore any risk assessment regarding Duke's future likelihood of offending should consider only the next ten years because Duke would not likely live beyond that point. Dr. Elwood opined that Duke was *not* more likely than not to commit future acts of sexual violence in that time frame.

After hearing Dr. Elwood's testimony that he believed that Duke had a reduced life expectancy that affected his risk for recidivism, the court adjourned the trial to allow the State to present testimony on the issue. At the continued hearing, the State called Dr. Neena Thomas-Gosain, who is an expert in infectious diseases and, in particular, HIV. She testified that Duke did not suffer from AIDS and that his HIV was under control. She testified that the HIV condition would have only a minimal affect on his life expectancy and that he had a life expectancy of twenty to thirty years even though he is HIV positive.

In a lengthy and well reasoned oral decision, the circuit court concluded that Duke met the criteria for commitment under ch. 980. Stating that all three psychologists were respected in

their field, the circuit court noted that both Dr. Marsh and Dr. Elwood concluded that Duke had a mental disorder that predisposed him to acts of sexual violence. The circuit court concluded that, between the two, Dr. Marsh was more credible than Dr. Elwood in her diagnosis of Duke as suffering from pedophilia and antisocial personality disorder that would make him more likely than not to commit future acts of sexual violence. Although defense counsel attempted to discredit Dr. Marsh's conclusions, the circuit court as the finder of fact is the ultimate arbiter of the credibility of the witnesses and the weight of their testimony. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). The circuit court was free to accept Dr. Marsh's professional opinion over the opinion of the other two psychologists. Therefore, we agree with appellate counsel that the State proved beyond a reasonable doubt that Duke was a sexually violent person. An appellate challenge to the circuit court's finding would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Russell J. Bohach is relieved of any further representation of Duke on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals