OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

April 29, 2014

To:

Hon. David A. Hansher
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Leonard D. Kachinsky
Sisson & Kachinsky Law Offices
103 W. College Ave. #1010
Appleton, WI 54911-5782

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Ellis Johnson
Sand Ridge Secure Treatment Center
P.O. Box 800
Mauston, WI 53948

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

2013AP501-NM In re the commitment of Ellis Johnson: State of Wisconsin v. Ellis Johnson (L.C. # 2005CI8)

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

Attorney Len Kachinsky has filed a no-merit report seeking to withdraw as appellate counsel for Ellis Johnson in this case concerning Ellis' commitment under WIS. STAT. ch. 980 (2011-12).[1] *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses the sufficiency of the evidence to support the court's determination that Johnson is still a sexually violent person. Johnson was sent a copy of the report, but has not

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

filed a response. Upon 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.

The no-merit report addresses whether the evidence was sufficient to support the court's decision denying Johnson'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 a ch. 980 commitment order

> unless the evidence, viewed most favorably to the state 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 who is 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.

The court held a bench trial on Johnson's petition for discharge. There was no dispute at trial that Johnson has been convicted of a sexually violent offense and that he has an antisocial personality disorder, which predisposes him to engage in sexual violence. The only disputed issue was whether his mental disorder makes it more likely than not that he will engage in sexual violence in the future.

The State presented testimony from James Tomony, a treatment evaluator at Sand Ridge Secure Treatment Facility. Tomony testified that Johnson had routinely declined sex offender treatment during his commitment.

The State also presented testimony from Christopher Snyder, a psychologist who conducts WIS. STAT. ch. 980 evaluations for the Department of Corrections and the Department of Health Services. Snyder testified as to the methodology he employed to evaluate Johnson and that, to a reasonable degree of psychological certainty, he believed that Johnson is more likely than not to reoffend.[2]

Johnson presented testimony by two psychologists, James Harasymiw and Charles Lodl, who evaluated Johnson. Both Harasymiw and Lodl determined that, to a reasonable degree of psychological certainty, Johnson is not more likely than not to reoffend.

[2] The transcript of the court trial in the record on appeal is missing one page from Snyder's direct testimony. We are able to determine that there would be no arguable merit to any postdisposition issues despite the missing page in the transcript. The missing page is only one page in many pages of Snyder's direct testimony, during which Snyder clearly explains his reasoning in concluding that Johnson is more likely than not to reoffend. Additionally, Snyder's report is also in the record, and Snyder's testimony was consistent with his report.

The circuit court explained that it found the State's witnesses more persuasive than Johnson's witnesses. Because the circuit court's credibility determination on the question of whether Johnson is a sexually violent person is supported by the evidence in the record, any challenge to that determination would lack arguable merit.

In his no-merit response, Johnson asserts that the recent decision by this court establishes that a court may not deny a petition for discharge without a hearing if there is a conflict among the expert opinions. *See* ***State v. Maher***, No. 2013AP1815 (WI App Apr. 3, 2014). Here, however, the circuit court held a discharge hearing and made appropriate credibility determinations before denying Johnson's petition. Accordingly, ***Maher*** does not apply here.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying Johnson's petition for discharge. 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 under WIS. STAT. RULE 809.21(1).

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

Diane M. Fremgen
Clerk of Court of Appeals