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DISTRICT IV

February 18, 2015

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

2013AP1195-NM

In re the commitment of Homer L. Perren, Jr.: State of Wisconsin
v. Homer L. Perren, Jr. (L.C. # 2010CI3)

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

Homer Perren, Jr., appeals the order committing him to the care and custody of the Department of Health Services following his adjudication as a sexually violent person pursuant to Chapter 980 of the Wisconsin Statutes. Attorney Steven Phillips has filed a no-merit report

seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);¹ *see also Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses pretrial evidentiary rulings and the sufficiency of the evidence. Perren was sent a copy of the report, and has filed a response alleging that counsel provided ineffective assistance by failing to seek or present an expert witness on Perren's behalf, as well as offering additional arguments on the evidentiary rulings. Upon reviewing the entire record, as well as the no-merit report, Perren's response, and counsel's supplement to the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Perren filed a series of pretrial motions seeking to exclude expert testimony related to a number of actuarial instruments and statistical principles, on the grounds that they were not scientifically reliable. *See* WIS. STAT. § 907.02(1); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). After holding hearings, the circuit court excluded testimony relating to the Static-99R or RRASOR, but allowed the introduction of testimony related to the MnSOST-R, the Static 99, the PCL-R, and the principle of extrapolation. The circuit court's decision was based on expert testimony that the MnSOST-R had been the subject of at least 12 cross-validation studies involving 4600 subjects, was found to have moderately high predictive accuracy, and was used by about 74% of evaluators; that the Static-99 uses very precise standards for scoring, had been published in a peer-reviewed journal, was replicated in at least 75 studies in 22 countries involving over 20,000 subjects, and was the most widely used and best available instrument; that the PCL-R has been subjected to peer review over a thousand times, is considered the "gold

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

standard” for empirical measurement of psychopathy, and has been shown in multiple studies to correlate with sexual recidivism when in combination with sexual deviance; and that the principle of extrapolating a subject’s lifetime risk of committing another sexual offense from studies measuring recidivism based upon arrests or convictions for periods generally between five and fifteen years has been discussed in peer-reviewed journals and is generally accepted in the scientific community. We agree with counsel that the record shows that the circuit court reasonably applied the applicable law to the facts of record, and there is no arguable basis to challenge the court’s exercise of discretion on appeal.

As to presenting an expert witness on Perren’s behalf, counsel avers in an affidavit attached to the supplement to his no-merit report that trial counsel *did* obtain an independent evaluation of Perren at county expense, as well as hiring a defense expert to evaluate Perren. Neither expert was able to support Perren’s defense. Nor has Perren identified any other expert or witness who would have provided favorable testimony if called. Therefore, counsel did not provide ineffective assistance by failing to call any witnesses at trial.

With regard to the sufficiency of the evidence, the State needs to prove beyond a reasonable doubt that the subject had a prior conviction for a sexually violent offense; that he had a mental disorder that predisposed him to commit sexually violent offenses; and that he was more likely than not to reoffend. *See* WIS. STAT. §§ 980.01(7) and 980.05(3); WIS JI—CRIMINAL 2502.

Here, the State produced prior judgments of conviction to establish that Perren had been convicted of sexually violent offenses. The State also presented testimony from two expert witnesses, one of whom diagnosed Perren with the mental disorders of pedophilia-non-exclusive type and paraphilia-not otherwise specified, while the other diagnosed Perren with the mental

disorders of pedophilia-sexually attracted to females, non-exclusive, and antisocial personality disorder. Both experts testified that Perren's mental disorders predisposed him to commit sexually violent offenses, and that, based both upon the results of actuarial instruments and clinical evaluation of risk factors, it was more likely than not that Perren would commit additional sexually violent offenses in the future.

Perren takes issue with the conclusions drawn by the expert witnesses. However, the experts discussed at length the information on which they relied to reach their conclusions, including that Perren was indiscriminate with regard to the age and gender of his victims, who included adult females as well as male and female children; that Perren estimated that he had at least 30 victims, and continued to commit additional offenses even while on supervision; and that Perren admitted he was still attracted to prepubescent boys and teenaged girls and continued to evince a number of "pro-offending" attitudes—for instance, rationalizing that rapists rape because they have been denied sex by people in their lives and that some children enjoy sexual activity. Although trial counsel vigorously attempted to highlight the limitations of the statistical instruments and those factors that would indicate a lower risk of recidivism, the circuit court was entitled to rely on the experts' opinions as to the significance of the evidence.

In sum, we agree with counsel that the evidence was sufficient to support the circuit court's determination that Perren was a sexually violent person, and that the court's subsequent disposition committing Perren to the custody of the Department of Health Services was properly based upon the verdict that he was a sexually violent person. *See* WIS. STAT. § 980.06.

Upon our independent review of the record, we have found no other arguable basis for reversing the commitment order. *See State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786

N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Therefore,

IT IS ORDERED that the commitment order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Steven Phillips is relieved of any further representation of Homer Perren, Jr., in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals