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DISTRICT I

October 22, 2015

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

2013AP2561-NM In re the commitment of Steven William Bennett: State of Wisconsin v. Steven William Bennett (L.C. #2006CI1)

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

Steven William Bennett appeals from an order committing him to a secure mental health facility as a sexually violent person under WIS. STAT. ch. 980 (2003-04).[1] Appellate counsel, Jefren E. Olsen, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14). Bennett was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

required by ***Anders***, and counsel's report, we conclude that no issue of arguable merit for appeal exists. We therefore summarily affirm the order.

Background

In September 1993, Bennett was convicted by a jury on one count of child enticement. He had grabbed the arm of an eight-year-old girl outside her house, saying "Come on, come on, hurry fast, let's go to my house," and "come here, I'll give you some money and candy if you come to my house and suck my dick." He was sentenced to sixteen years' imprisonment. Bennett's release date was scheduled for January 17, 2006; the State filed the underlying commitment petition on January 13, 2006.

Dr. Anthony Jurek conducted Bennett's initial examination for WIS. STAT. ch. 980 purposes. He diagnosed Bennett with pedophilia, attraction to females, non-exclusive type; schizoaffective disorder, bipolar-type; and polysubstance dependence, in remission in a controlled environment. He explained that the schizoaffective disorder interfered with Bennett's ability to adjust to supervision and incarceration, and that Bennett had become resistant to the notion that he has any mental disorder at all, which limited treatment and risk-reduction options. Based on Bennett's scores on actuarial instruments, plus the pedophilia diagnosis and the schizoaffective disorder's impact on Bennett's willingness to participate in any remedial therapies, Jurek concluded that Bennett's risk of reoffense was consistent with the "more likely than not" standard applied to ch. 980 petitions. The trial court found probable cause to hold Bennett for trial on the State's petition.

The parties both initially requested a jury trial and waived statutory time limits. Meanwhile, Bennett filed two motions to challenge the constitutionality of WIS. STAT. ch. 980.

The trial court appointed additional examiners: an independent examiner, Dr. Luis Rosell, for Bennett, and Dr. Craig Monroe as an additional examiner under WIS. STAT. § 980.04(3).[2]

Rosell filed his report in September 2006, and the trial court set a jury trial for February 14, 2007. On January 30, 2007, Monroe filed his report, indicating he could not determine if Bennett suffered from pedophilia and stating that he could not offer an opinion on Bennett's risk to reoffend. The State requested an adjournment to seek another evaluation; the trial court granted the request over Bennett's objection, and the trial was set out to June 13, 2007. Bennett then asked his attorney to withdraw, necessitating another delay, and trial was set out to September 17, 2007. A series of additional delays followed. Trial on the petition was ultimately held before the trial court, rather than a jury, on July 1-2, 2013.

The State presented testimony from three witnesses: Rebecca Mahin, a probation and parole agent with the Department of Corrections, Jurek, and Dr. Richard Elwood, a psychologist who evaluated Bennett in late 2009 because Monroe had retired and was no longer willing to testify in cases for which he had conducted evaluations. Bennett presented Rosell's testimony.

Through Mahin, the State introduced a certified copy of Bennett's unreversed judgment of conviction for child enticement. Mahin also testified about Bennett's prior convictions for burglary and sexual assault, his prior parole revocations, and his prison disciplinary record of nineteen major and five minor incidents.

[2] "If the court determines after a hearing that there is probable cause to believe that the person named in the petition is a sexually violent person, the court … shall order the person to be transferred within a reasonable time to an appropriate facility for an evaluation as to whether the person is a sexually violent person." WIS. STAT. § 980.04(3).

Jurek testified that he diagnosed Bennett with pedophilia and schizoaffective disorder. He explained that the pedophilia made Bennett likely to commit sexually violent acts in the future and that the schizoaffective disorder, while not predisposing Bennett to offend sexually, reduced his ability to control his pedophilic urges and his ability to benefit from sex offender treatment. Jurek's opinion was based on Bennett's treatment records from Sand Ridge, which documented Bennett's expression of deviant sexual interest in children. The reports also documented Bennett's struggle with the schizoaffective disorder, including his difficulty maintaining compliance with his medication and his behavior when noncompliant. Jurek had utilized actuarial tools and, combining those scores with the other factors, concluded that Bennett was more likely than not to reoffend sexually.

Elwood did not diagnose Bennett with pedophilia, explaining that he could only confirm that one of Bennett's victims was a prepubescent child; a pedophilia diagnoses requires multiple prepubescent victims.[3] Elwood did, however, diagnose schizoaffective disorder, bipolar type, which he said caused Bennett difficulty in controlling his behavior. Based on the diagnosis, the actuarial scores Elwood obtained, Bennett's limited progress in and ongoing need for treatment, and Bennett's re-offense history and other adjustment problems while on supervision, Elwood concluded that Bennett was likely to commit further acts of sexual violence.

Bennett offered testimony from Rosell, who diagnosed Bennett with schizoaffective disorder, bipolar type; polysubstance dependence; and personality disorder not otherwise

[3] In 1983, Bennett had been convicted of second-degree sexual assault of a twelve-year-old girl. The experts disagreed over whether that victim was pre- or post-pubescent for clinical and diagnostic purposes.

specified with antisocial features. In Rosell's opinion, these disorders did not predispose Bennett to commit sexually violent offenses because most of Bennett's history of misconduct was not sexual, he was generally compliant with his medications, and he was voluntarily in treatment. Based on actuarial scores that Rosell obtained and treatment Bennett had already received, Rosell concluded that Bennett was not more likely than not to reoffend.

The circuit court determined that Bennett was sexually violent and ordered his commitment.

Discussion

I. Pretrial Delay

The first issue counsel discusses is whether there is any issue of arguable merit related to the delay between the petition's filing in January 2006 and the trial in July 2013. Proceedings under WIS. STAT. ch. 980 are civil, not criminal, but WIS. STAT. § 980.05(1m) extends "[a]ll constitutional rights available to a defendant in a criminal proceeding" to the subject of a ch. 980 petition. This includes the right to a speedy trial. *See* ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324.

Whether a defendant was denied the right to a speedy trial is a question of law we review *de novo*.[4] *See* ***id.***, ¶10. We utilize the four-factor test set out in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), to evaluate whether the right to a speedy trial has been violated. *See* ***State v.***

[4] We also accept the trial court's factual findings unless clearly erroneous. *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. In this case, the trial court was not asked to make any factual findings; however, all of the relevant facts are undisputed facts of record.

Leighton, 2000 WI App 156, ¶6, 237 Wis. 2d 709, 616 N.W.2d 126. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. *See* ***id.***

A. The length of the delay

A post-accusation, pre-trial delay that approaches one year is considered presumptively prejudicial. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). Here, the petition was filed in January 2006; Bennett's court trial began in July 2013. A delay of more than seven years is, thus, presumptively prejudicial and requires us to consider the remaining three factors. *See* ***Urdahl***, 286 Wis. 2d 476, ¶12.

B. The reason for the delay

Different causes of delay receive different weights. Deliberate attempts by the government to hamper the defense are to be weighed heavily against the State. *See* ***Borhegyi***, 222 Wis. 2d at 512. More neutral reasons, like negligence or a congested court calendar, do not weigh heavily against the State, although they are still attributed to the State. *See* ***id.*** Delays caused by the defendant are also not counted. *See* ***id.***

The petition was filed on January 13, 2006. The probable cause hearing was held about a month later. The first trial date was set for February 14, 2007, the delay accruing because both parties were waiting for reports from examiners. The February 2007 trial date was reset to June 13, 2007, at the State's request, after Monroe could not conclude Bennett was more likely than not to reoffend. The June 2007 date was reset to September 17, 2007, at Bennett's request, because of a change in counsel.

There were then thirteen additional periods of delay. Seven of those delays are directly attributable to Bennett. One of the delays was a joint request for the parties to review the impact of new case law. One period of time has no explanation in the record, but that delay, from August 18, 2008, to October 1, 2008, was just over six weeks. So far, none of these periods of time is directly or solely attributable to the State.

Four of these additional periods, though, do weigh against the State. The period between October 1, 2008, and February 2, 2009, came about because the district attorney was double-booked and had no substitute available. The period between September 14, 2009, and February 1, 2010, occurred because Monroe retired and was refusing to testify, so the State needed a new examiner. The third and fourth periods—June 1, 2010, through October 25, 2010, and January 31, 2011, through June 6, 2011—were because of unavailable witnesses. All told, it appears that a total of 655 days of delay can be attributed to the State, out of a total 2,726 days' delay. Bennett, however, is responsible for 1,441 days of the delay.[5]

C. Defendant's assertion of the right

Bennett never expressly asserted the right to a speedy trial. Though Bennett sent *pro se* letters to the court expressing concern about the time the case was taking, he never made a formal demand for a speedy trial. Failure to assert the right to a speedy trial makes it difficult to prove a deprivation of the right. *See* ***Barker***, 407 U.S. at 528, 532.

[5] These estimates may also be on the high side: ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324, indicates that delays "intrinsic to the case," like unavailable witnesses, should not be counted, and both the State and Bennett had delays because of unavailable witnesses.

D. Prejudice from the delay

Prejudice is assessed in light of the defendant's interests that the speedy trial right is supposed to protect. *See* ***Borhegyi***, 222 Wis. 2d at 514. These interests are preventing oppressive pretrial incarceration; minimizing the accused's anxiety and concern; and limiting the possibility that the defense will be impaired. *See* ***Leighton***, 237 Wis. 2d 709, ¶22.

Bennett was confined at Sand Ridge, though as a patient, not a prisoner. *See* WIS. STAT. § 51.61. Bennett's anxiety and concern were also clear from his letters. However, "impairment to the defense is the 'most serious [concern] … because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *See* ***Leighton***, 237 Wis. 2d 709, ¶23 (citation omitted; ellipsis in ***Leighton***).

The primary way that Bennett might claim impairment to his defense is by Monroe's retirement, because Monroe had not diagnosed pedophilia and was unable to conclude that Bennett was more likely than not to reoffend. This would have made him a valuable witness and his report valuable evidence. Also, because of the delay, Bennett had made certain statements during the course of his treatment that could be used against him to bolster Jurek's pedophilia diagnosis.

However, Monroe's replacement, Elwood, also did not diagnose pedophilia but, rather, made a diagnosis similar to Rosell's, even though the conclusion from that diagnosis differed. In addition, despite Bennett's additional statements during treatment, neither Jurek nor Rosell varied their opinions in any appreciable way from the case's inception to the trial, diminishing the clinical significance of those statements. The length of time that passed also allowed Bennett to argue that ongoing treatment had mitigated his risk.

Upon consideration of the ***Barker*** factors, then—notably, the proportionately minimal delay attributable to the State, the lack of an express assertion of the speedy trial right, and the minimal impact of the delay on Bennett's ability to try the case—we agree with counsel that there is no arguable merit to raising a speedy trial violation.

II. Pretrial Motions

Bennett filed three pretrial motions. Two of the motions challenged the constitutionality of portions of WIS. STAT. ch. 980, and one of the motions, filed during the ongoing period of delay, addressed the applicability of new expert testimony requirements. The constitutional questions were not ruled on, so appellate counsel addresses whether trial counsel was ineffective for failing to obtain a ruling on the motions.

A. 2003 Wis. Act 187

One of Bennett's constitutional challenges related to the passage of 2003 Wis. Act 187, §§ 1-4, which changed the dangerousness standard from variations of "substantially probable," which meant "much more likely than not," to "likely," defined as "more likely than not." Bennett alleged that this change meant that Chapter 980 was no longer adequately "narrowly tailored."[6] This argument was rejected by ***State v. Nelson***, 2007 WI App 2, ¶18, 298 Wis. 2d 453, 727 N.W.2d 364. Trial counsel was not ineffective for failing to seek a ruling on an argument that would have ultimately been rejected. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

[6] Three additional arguments regarding changes in the standards for supervised relief were rendered moot by the passage of 2013 Wis. Act 84.

B. "Imminent danger"

Bennett's other constitutional challenge claimed that WIS. STAT. § 980.02(2)(c) was "vague and fails to provide a temporal context in which to [assess] if respondent is … more likely than not to engage in acts of sexual violence" and that the law should have to require that the defendant presents an imminent danger. This challenge to the law was rejected in ***State v. Olson***, 2006 WI App 32, ¶1, 290 Wis. 2d 202, 712 N.W.2d 61, five days after Bennett filed his motion. Counsel is not ineffective for failing to pursue a ruling on that motion.

C. Expert testimony

In 2011, the legislature amended the rules for the admission of expert testimony to conform to ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 597 (1993) (expert testimony must be reliable and relevant to be admissible). *See* 2011 Wis. Act 2, § 34m. Bennett brought a motion claiming the revision was unconstitutional because its effective date created two classes of WIS. STAT. ch. 980 litigants. The trial court denied this motion, finding a rational basis for the application of the effective date.

The supreme court has concluded that ***Daubert*** does not apply to discharge petitions where the original WIS. STAT. ch. 980 petition predates Act 2, because the action commenced with the original petition, not the discharge petition. *See* ***State v. Alger***, 2015 WI 3, ¶4, 360 Wis. 2d 193, 858 N.W.2d 346. The same reasoning necessarily applies when we are addressing

an original commitment petition that also predates Act 2.[7] There is no arguable merit to a further challenge of this issue.

III. Jury Waiver

Bennett agreed to a court trial but the trial court did not engage him in a colloquy to confirm a knowing and voluntary waiver of the right to a jury trial. However, in ***State v. Denman***, 2001 WI App 96, 243 Wis. 2d 14, 626 N.W.2d 296, we concluded that no such process was required. *See* ***id.***, ¶¶11-12; *cf.* ***State v. Resio***, 148 Wis. 2d 687, 694, 436 N.W.2d 603 (1989) (discussing jury waiver requirements in criminal cases).

IV. Evidentiary Issues

When Bennett began his cross-examination of Elwood, he attempted to ask about now-retired Monroe's report, which Elwood had used in crafting his own report. When Elwood could not recall what he had read in Monroe's report, Bennett attempted to refresh his recollection with the report. The State objected on hearsay grounds, arguing that Bennett was trying to admit the substance of Monroe's report because Monroe was not there to testify about the report himself. The trial court sustained the objection.

Counsel suggests that the State's objection was premature: refreshing recollection is permitted by WIS. STAT. § 906.12 (2013-14), and Elwood could properly rely on Monroe's report to craft his own, *see* WIS. STAT. § 907.03 (2013-14). Until Elwood was asked a question that

[7] In any event, new legislation will always result in two separate classes of citizens: those subject to the new law and those subject to the old law. *See, e.g.*, ***Dobbert v. Florida***, 432 U.S. 282, 301 (1977) (state "obviously had to draw the line at some point" between those subject to new legislation and those subject to old legislation).

required him to expressly state what Monroe's report said, Bennett had not attempted to introduce any hearsay evidence, so the trial court should not have sustained the objection. Counsel concludes, however, that this error was harmless.

Exclusion of testimony is subject to the harmless error rule. *See* WIS. STAT. § 901.03(1) (2013-14); ***State v. Magett***, 2014 WI 67, ¶¶29-30, 355 Wis. 2d 617, 850 N.W.2d 42. An erroneous evidentiary ruling is harmless "if there is no reasonable possibility that the error contributed to the" verdict. *See* ***State v. Everett***, 231 Wis. 2d 616, 631, 605 N.W.2d 633 (Ct. App. 1999).

Testimony from Jurek and Rosell had already made it evident that Monroe had rejected a pedophilia diagnosis, and Rosell and Elwood both testified that they did not diagnose pedophilia. While Monroe could not conclude whether Bennett was more likely than not to reoffend, that information could not have been offered for its truth even if the State's premature objection had been overruled. Further, the testifying experts all disagreed in various aspects of their diagnoses and conclusions; another expert's disagreements were not necessary to highlight the lack of consensus. Accordingly, we agree that sustaining the State's premature objection had no impact on the verdict, so there is no arguable merit to an appellate challenge to the ruling.[8]

[8] Counsel also points out that, at various points, the expert witnesses offered testimony that may or may not be considered hearsay—specifically, portions of Department of Corrections and Department of Health Services records that might or might not satisfy a hearsay exception. We agree with counsel that there is no arguable merit to challenging any lack of objection by trial counsel when the State was offering the evidence: Bennett's expert had to rely on the same documentation.

V. Sufficiency of the Evidence

In order to commit Bennett as a sexually violent person under WIS. STAT. ch. 980, the State had to show that he: (1) had been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because he has a mental disorder that makes it more likely than not he will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502; 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, 434-35, 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 fact-finder. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The decision "'will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). "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" includes any crime under WIS. STAT. § 948.07. *See* WIS. STAT. § 980.01(6)(a). Through agent Mahin, the State introduced a certified copy of Bennett's unreversed judgment of conviction for child enticement contrary to § 948.07.

A "'[m]ental disorder' 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). Though varying diagnoses were presented, the trial court expressly indicated that it found the State's experts more persuasive. Whether Bennett had pedophilia as diagnosed by Jurek only or schizoaffective disorder diagnosed by all three examiners, the trial court noted that either one was a qualifying mental disorder that predisposed Bennett to engage in sexual violence.[9]

A defendant is more likely than not to engage in future acts of sexual violence if he is more than 50% likely to commit another sexually violent offense. *See* ***State v. Smalley***, 2007 WI App 219, ¶¶3, 10, 305 Wis. 2d 709, 741 N.W.2d 286. Jurek's testimony, Elwood's testimony, and their reports that were admitted as exhibits provide adequate evidence from which the trial court could conclude that Bennett's mental disorder caused him to lack control over his sexual desires, *see* ***State v. Laxton***, 2002 WI 82, ¶22, 254 Wis. 2d 185, 647 N.W.2d 784, meaning he was more likely than not to reoffend sexually. There is no arguable merit to a challenge to the sufficiency of the evidence.

Our independent review of the record reveals no other issues of arguable merit.

Therefore,

[9] It was not necessary for the trial court to have specifically determined *which* mental disorder Bennett has, only that he has one. *See* ***State v. Pletz***, 2000 WI App 221, ¶¶18-19, 239 Wis. 2d 49, 619 N.W.2d 97 (a specific mental disorder, like a mode of committing a crime, is not an element that must be definitively proven; a jury need not agree on which mental disorder a defendant has, only that he has one).

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved of any further representation of Bennett in this matter. *See* WIS. STAT. RULE 809.32(3) (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals