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DISTRICT I

October 29, 2015

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

2014AP1104-NM In re the commitment of Paschall Lee Sanders: State of Wisconsin v. Paschall Lee Sanders (L.C. #2004CI4)

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

Paschall Lee Sanders appeals from an order denying his petitions for discharge or supervised release from a WIS. STAT. ch. 980 (2011-12)[1] commitment. Appellate counsel, Hannah Schieber Jurss, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14). Sanders 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 2011-12 version unless otherwise noted.

mandated by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit that could be raised on appeal. We therefore summarily affirm the order.

Sanders was originally committed as a sexually violent person in 2009. He filed petitions for discharge and supervised release in December 2011, and amended petitions in May 2012. The amended petitions were supported by a January 2012 evaluation performed by Dr. Sheila Fields, who reported that although Sanders did not meet the criteria for supervised release, he no longer met the criteria for commitment. The State conceded the petitions were sufficient to warrant a hearing. *See* WIS. STAT. § 980.09(2). Neither party sought a jury so the hearing proceeded as a bench trial. After the trial, at which four witnesses testified, the circuit court found that Sanders remained sexually violent and that he failed to meet the criteria for supervised release. Thus, the circuit court denied the petitions for discharge and supervised release.

Counsel first discusses whether the circuit court erred in denying the discharge petition. If the circuit court has granted a hearing on the discharge petition, the State at that hearing "has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." WIS. STAT. § 980.09(3). To prove a petitioner is a sexually violent person, the State must show three things: that the person has been convicted of a sexually violent offense; that the person has a mental disorder; and that the person is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502; WIS. STAT. § 980.01(7).

We review the verdict under a sufficiency-of-the-evidence standard. *See* ***State v. Brown***, 2005 WI 29, ¶¶38-45, 279 Wis. 2d 102, 693 N.W.2d 715. We may not reverse the order denying

discharge unless the evidence, viewed most favorably to the State, 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 that Sanders remains sexually violent. *See* ***id.***, ¶¶39-40. Witness credibility and the weight of evidence are left to the fact-finder. *See* ***id.***, ¶40.

There is no arguable merit to a challenge to the sufficiency of the evidence supporting the circuit court's denial of the discharge petition. It was undisputed that Sanders had been convicted of sexually violent offenses.[2] There was also sufficient evidence that Sanders had a mental disorder. All three of the psychologists who testified, whether for the State or for Sanders, diagnosed him with antisocial personality disorder.[3] Dr. Christopher Tyre, who testified for the State, explained that antisocial personality disorder is marked by a disregard for the rights of others.

Thus, the dispositive question was whether Sanders was dangerous to others because his mental disorder makes it more likely than not that he will engage in one or more future acts of sexual violence.

Tyre testified that the antisocial personality disorder predisposed Sanders to future acts of sexual violence because he would have serious difficulty controlling his behavior. Tyre explained his scoring on actuarial instruments, which estimated Sanders' risk of re-offense at anywhere between thirty-three percent after five years and fifty percent after fifteen years. Tyre explained that these tools rely on new convictions after a set period of time, while Chapter 980

[2] Specifically, Sanders was convicted of two counts of rape and five counts of sexual perversion in 1974, and one count of second-degree sexual assault of a child in 1993.

[3] The psychologists differed on whether Sanders should be diagnosed with paraphilia.

asks about re-offense during the offender's lifetime. Tyre also noted that Sanders scored high for psychopathy, which is an extreme form of antisocial personality disorder. Individuals with a high degree of psychopathy are typically superficial, manipulative, aggressive, and highly risk-taking. Tyre further noted that individuals do not usually "age out" of antisocial personality disorder and the only thing about Sanders that had changed during his commitment was his age, because he consistently declined any mental health treatment.

Dr. Lakshmi Subramanian testified for Sanders. She did not believe he met the criteria for commitment any longer. She noted that she reached this conclusion because of a change in clinical methodology for assessing risk that resulted in lower actuarial scores. She further noted that Sanders was maintaining good behaviors at Sand Ridge.

Fields testified as well. She had also concluded Sanders no longer met the criteria for commitment because of lower actuarial scores.

The circuit court concluded that the only thing Sanders had done during his commitment was not get into trouble. It determined there was clear and convincing evidence that he remained sexually violent based on his past offending. The circuit court rejected the implication he had aged out of likely re-offense—there had also been evidence that Sanders did not respond well on periods of parole or probation, where he was responsible for making choices without the structure of an institution. In the absence of any treatment, the circuit court had no basis for concluding he would not recidivate. Based on our review of the record, sufficient evidence supports the circuit court's determination that Sanders remained sexually violent. Thus, there is no arguable merit to a challenge to the circuit court's denial of the discharge petition.

Appellate counsel next discusses whether there is any arguable merit to the circuit court's denial of Sanders' petition for supervised release.[4] We agree that there is no merit to such a challenge. The first criterion for granting supervisory release is "significant progress in treatment," *see* WIS. STAT. § 980.08(4)(cg)1., which Sanders cannot satisfy because he has had no treatment.

Finally, counsel discusses whether there is any arguable merit to a claim the circuit court erred when it proceeded to render final judgment without Sanders present. We agree that there is not.

Defense counsel rested without calling Sanders to testify. The circuit court proceeded to make its findings and to memorialize its reasoning. At the end of the court's comments, the State asked it to make a record of Sanders' waiver of the right to testify. Sanders, however, indicated that he did want to testify, so the circuit court vacated its ruling and continued the matter to the next day.

The next morning, Sanders did not exactly testify, though he voiced many concerns to the circuit court. He explained that he had started a federal *habeas corpus* proceedings[5] which he believed preempted the state proceedings, and which he said trial counsel failed to share with the

[4] Trial counsel had withdrawn the supervised release petition on Sanders' behalf but then Sanders filed another petition. The circuit court opted to simply rule on the petition.

[5] *See* 28 U.S.C. § 2254 (2015). Sanders' federal proceedings related to his original commitment order, not his discharge petition. Indeed, the circuit court noted that if Sanders believed the federal action preempted state court activity, then Sanders would not have filed the *pro se* discharge and release petitions months after initiating federal proceedings.

court. He requested the circuit court appoint him counsel for the federal proceedings.[6] He also complained that he had asked trial counsel to file a ***Daubert*** motion on his behalf.[7] The circuit court began addressing Sanders' issues, but Sanders kept interrupting. Because Sanders was appearing by video conference,[8] the circuit court directed the videographer to mute Sanders' side. Shortly thereafter, the videographer informed the court that Sanders had left the room. Sanders returned and left again. The circuit court finished its comments on the federal case, then adjourned the matter to the afternoon.

When the case reconvened, Sanders' attorney advised the court that Sanders intended "not to further participate." The attorneys made their records on Sanders' nonappearance, with defense counsel explaining Sanders' belief that doing anything else would jeopardize his federal case. The circuit court found that Sanders had voluntarily absented himself from the proceedings and that, by not returning, he had decided to not testify. The circuit court then re-entered its decision. We have no difficulty agreeing that Sanders' voluntary and volitional absence is a waiver of his rights to be present and to testify. *See* WIS. STAT. § 971.04; *see also* ***State v. Divanovic***, 200 Wis. 2d 210, 219-21, 546 N.W.2d 501 (Ct. App. 1996).

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

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[6] The circuit court properly stated that it had no authority to appoint counsel for federal court activity. We note, however, that 28 U.S.C. § 2254(h) (2015) allows the federal court to appoint counsel in appropriate circumstances.

[7] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 597 (1993). A ***Daubert*** motion would not have been granted. Wisconsin's application of ***Daubert*** became effective on February 1, 2011. *See* 2011 Wis. Act 2, § 45(5). However, because Sanders' original commitment was before that, ***Daubert*** is inapplicable to his petition. *See* ***State v. Alger***, 2015 WI 3, ¶4, 360 Wis. 2d 193, 858 N.W.2d 346.

[8] Sanders asked to appear remotely because of medical treatment.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Hannah Schieber Jurss is relieved of further representation of Sanders in this matter. *See* WIS. STAT. RULE 809.32(3) (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals