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DISTRICT IV

March 7, 2016

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

2014AP2136-NM In re the commitment of Joseph Mitchell: State of Wisconsin v. Joseph Mitchell (L.C. #2010CI2)

Before Lundsten, Sherman and Blanchard, JJ.

Joseph Mitchell appeals the circuit court's order that denied his petition for discharge from a commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes. Attorney Dustin Haskell 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

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

(1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses whether Mitchell was entitled to a trial on his petition. Mitchell was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

A person committed under Chapter 980 is entitled to periodic reexamination under WIS. STAT. § 980.07, and may petition the court for discharge, WIS. STAT. § 980.09(1). However, the court shall deny a discharge petition without a trial unless the petition alleges facts from which the court or a jury could conclude that the petitioner's condition has changed since the initial commitment, such that he or she no longer meets the criteria for a sexually violent person—that is, that the subject: (1) committed a sexually violent offense; (2) currently has a mental disorder affecting the emotional or volitional capacity and predisposing the subject to engage in acts of sexual violence; and (3) is dangerous because the mental disorder makes it more likely than not that the subject will engage in future acts of sexual violence. *See* WIS. STAT. § 980.01(7); § 980.09(1); § 980.09(3); and WIS JI—CRIMINAL 2506.

In making its determination as to whether a trial is warranted, the court may consider the facts alleged in the petition and the State's response, any past or current evaluations in the record or other documents provided by the parties, and arguments by counsel. WIS. STAT. § 980.09(2). This limited paper review to test the sufficiency of the petition is aimed at weeding out meritless or unsupported claims. *See* ***State v. Arends***, 2010 WI 46, ¶¶26-30, 325 Wis. 2d 1, 784 N.W.2d 513.

An expert opinion that the petitioner is no longer sexually violent may provide sufficient grounds to warrant a trial if based upon "something more than facts, professional knowledge, or

research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent," such as information about the committed person that did not occur until after the prior adjudication or new professional knowledge about how to predict dangerousness. *See* ***State v. Combs***, 2006 WI App 137, ¶32, 295 Wis. 2d 457, 720 N.W.2d 684. Put another way, a circuit court can deny a discharge petition based upon a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that led to the original commitment, but must grant a trial if the petition alleges any change in either the petitioner, or in the professional knowledge or research used to evaluate a petitioner's mental disorder or dangerousness, from which a fact finder could determine that the petitioner does not meet the current criteria for commitment. *See* ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540.

Mitchell's petition for discharge was based upon an evaluation performed by licensed psychologist Diane Lytton, Ph.D. Lytton diagnosed Mitchell with Alcohol Use Disorder, In a Controlled Environment; Stimulant Use Disorder (cocaine), In a Controlled Environment; Intellectual Disability, Mild; and Antisocial Personality Disorder—none of which Lytton opined affected Mitchell's emotional or volitional capacities or predisposed Mitchell to commit sexually violent acts.

With regard to static risk factors, Lytton concluded that Mitchell's scores on the Static-99R and Static-2002R (which had been considered at trial) could place Mitchell's five-year recidivism risk at anywhere from 2% to 21%, and his ten-year recidivism risk at 26% to 29%. At the court's request, she also discussed the MnSOST-3, which had not been addressed at Mitchell's trial. After adding in her clinical assessment of dynamic risk factors, such as

Mitchell's post-commitment behavior, Lytton could not conclude that it was more likely than not that Mitchell would reoffend.

The court first noted that Lytton had not suggested that any treatment progress Mitchell may have made was sufficient in and of itself to change Mitchell's risk assessment because Mitchell had not completed his treatment programs. The court next determined that the MnSOST-3 did not present new professional knowledge about how to predict dangerousness because the instrument has not been validated with studies in this state, as recommended by its own authors. Finally, the court concluded that Lytton's opinions regarding the Static-99R and Static-2002R were not new because she had provided virtually the same opinions at trial. We agree with the circuit court's assessment.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying discharge. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 184. 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 denying the petition for discharge is summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Diane M. Fremgen
Clerk of Court of Appeals