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September 1, 2016

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

2015AP534-NM State of Wisconsin v. Carl Cornelius Gilbert, Jr. (L.C. # 2006CI12)

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

Carl Gilbert appeals an order that denied his petition for discharge from a commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes. Attorney Jeffrey W. Jensen 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) and ***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 whether Gilbert was entitled to a trial on his petition, and whether the circuit court erred in continuing with a non-evidentiary hearing on the

petition after Gilbert voluntarily left the hearing. Gilbert was sent a copy of the report and filed a response alleging ineffective assistance of counsel, to which counsel filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues and affirm the order denying discharge.

A person committed under Chapter 980 is entitled to periodic reexamination under WIS. STAT. § 980.07, and may petition the court for discharge. However, the court shall deny a discharge petition without a hearing 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 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. WIS. STAT. § 980.09(3); WIS JI—CRIMINAL 2506. In making its determination as to whether an evidentiary hearing 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. Section 980.09(2).

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

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

or research that was considered by an expert testifying in a prior proceeding that determined the person to be sexually violent." ***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 that is based upon a new expert opinion if the expert simply disagrees with the diagnoses or conclusions that lead to the original commitment, but must grant a hearing if the petition alleges any change in either the person himself, or in the professional knowledge or research used to evaluate a person's mental disorder or predict dangerousness, from which a fact finder could determine that the person does not meet the current criteria for commitment. ***State v. Ermers***, 2011 WI App 113, ¶31, 336 Wis. 2d 451, 802 N.W.2d 540.

Gilbert petitioned for discharge after court-appointed psychologist William Merrick, Ph.D., submitted an annual evaluation report. Merrick diagnosed Gilbert with Schizoaffective Disorder, Bipolar Type; Anxiety Disorder, Not Otherwise Specified; Intermittent Explosive Disorder, by History; Polysubstance Dependence, In Sustained Remission in a Controlled Environment; and Antisocial Personality Disorder—the last of which Merrick opined predisposed Gilbert to commit sexually violent acts.

With regard to static risk factors, Merrick employed the RRASOR and the Static-99 actuarial instruments to evaluate the risk that Gilbert would commit future acts of sexual violence. The results placed Merrick in the high risk range. With regard to dynamic risk factors, Merrick observed that Gilbert had not yet completed an appropriate sex offender treatment program, and found no evidence that Gilbert had been able to modify cognitive distortions that he held at the time of his offenses, or that he had made any significant progress in the area of anger management. Merrick did note that medications seemed to be helping Gilbert with regard

to impulse control. Taken together, Merrick concluded that Gilbert still met the statutory criteria for commitment.

The State filed an ***Arends*** motion seeking to deny Merrick's petition without a trial. *See* ***State v. Arends***, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513. At a hearing on that motion Gilbert's then attorney indicated that there were insufficient facts with which to dispute the motion. Gilbert, who was participating in the hearing by videoconference, indicated that he wanted to discharge counsel. When the court refused to allow him to do so, Gilbert walked out of the videoconference room. The court indicated that the hearing would continue because Gilbert had forfeited his right to further participate in light of his "refus[al] to follow Court orders to remain quiet and wait his turn and he just kept interrupting" and had left of his own accord.

We agree with counsel's assessment that the circuit court properly continued with the hearing after Gilbert left, and that, based upon Merrick's uncontested report, the circuit court properly determined that no trial was warranted on Gilbert's discharge petition.

Gilbert argues that counsel provided ineffective assistance by failing to seek an independent evaluation for him, and by refusing to file a ***Daubert***[2] motion or other pretrial motions. However, counsel explains in the supplement that counsel *did* consult with an expert who had recently done an evaluation of Gilbert in conjunction with another discharge petition, and that the expert could not provide an opinion that would support discharge. Additionally,

[2] ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993). *See also* WIS. STAT. § 907.02.

counsel notes that Gilbert was committed before the ***Daubert*** standard was adopted in Wisconsin, and so could not use it as a basis to subsequently challenge his commitment. Again, we agree with counsel's assessment.

Gilbert further alleges that the circuit court demonstrated bias against him by denying his own pro se request for a second evaluator. Gilbert has not, however, pointed to any statutory provision that would require court appointment of a second evaluator for a discharge petition. Nor has Gilbert set forth any facts that would suggest that the circuit court's rulings were motivated by personal animus toward Gilbert, rather than the court's view of the law.

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 124. 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 discharge is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of any further representation of Carl Gilbert in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals