



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

April 11, 2017

To:

Hon. Thomas J. Walsh
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Tristan Breedlove
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Steven D. Phillips
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

James C. Smith 552623
Sand Ridge Secure Treatment Center
P.O. Box 800
Mauston, WI 53948

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

2016AP2450-NM State of Wisconsin v. James C. Smith (L. C. No. 2002CI1)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for James Smith has filed a no-merit report concluding there is no arguable basis for challenging an order denying Smith's petition for supervised release from his WIS. STAT. ch. 980 (2015-16) commitment.¹ Smith was advised of his right to respond to the report and has not responded. Upon our independent review of the record, we conclude there is no arguable basis for challenging the order.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In addition to the four sex crimes that resulted in Smith's prison sentence and ultimate commitment to the Sand Ridge Secure Treatment Center (SRSTC), in 2005 and 2006 Smith committed two fourth-degree sexual assaults of female staff members at SRSTC. Between 2006 and 2011, Smith had a number of incidents in which he either exposed himself or openly masturbated in front of female staff. In 2013, he exposed himself to a nurse while receiving medical care and on another occasion was found with his hand on his exposed penis. Smith also had other rules violations at SRSTC in 2014 and 2015, including trading photos of scantily-clad women with other residents, stealing, and lying about these incidents.

This court undertakes an independent review of the record to determine whether sufficient evidence supports the circuit court's conclusion regarding supervised release. *State v. Brown*, 2005 WI 29, ¶5, 279 Wis. 2d 102, 693 N.W.2d 715. However, we defer to the circuit court's credibility determinations in evaluating the evidence. *Id.*, ¶44.

The committed person has the burden of proving by clear and convincing evidence that he or she meets the criteria for supervised release. WIS. STAT. § 980.08(4)(c). The court may consider factors including the person's mental history and current mental condition, where the person will live, how the person will support himself or herself and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. Sec. 980.08(4)(c). The circuit court may not authorize supervised release unless, based on all of the reports, file records, and evidence presented, the court finds that all of the following criteria are met: (1) the person is making significant progress in treatment and the person's progress can be sustained while on supervised release; (2) it is substantially probable that the person will not engage in an act of sexual violence while on supervised release; (3) treatment that meets the person's needs and a qualified provider of the treatment are reasonably available; (4) the person

can reasonably be expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department; and (5) a reasonable level of resources can provide for the level of residential treatment, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release. Sec. 980.08(4)(cg).

Applying these criteria, the circuit court found Smith failed to establish four of the five criteria by clear and convincing evidence. Smith's petition for supervised release was supported by psychologist Dr. Courtney Endres. The petition was opposed by Dr. James Tomony and Dr. Letitia Johnson, both of whom are evaluators and psychologists at SRSTC. The circuit court found more credible the testimony of Tomony and Johnson that Smith did not make significant progress in treatment as defined in WIS. STAT. § 980.01(8). Although Tomony and Johnson agreed that Smith meaningfully participated in treatment programs and demonstrated a willingness to address his identified treatment needs, they opined supervised release would not be appropriate for at least another year. Tomony was concerned about Smith's long history of impulsivity, the thefts and lying about them, and being angry at those who held him accountable. Johnson opined that Smith still exhibited cognitive distortions with respect to some of his offenses, and treatment providers needed more information about whether Smith still possessed deviant sexual interests.

Relying on actuarial tests, Johnson testified Smith's score on the VRS-SO (Violence Risk Scale—Sexual Offender version) was much higher than the average score for a high-risk or high-needs offender. The circuit court considered this testimony, along with Smith's failure to obtain a valid penile plethysmograph test, and determined it could not find it was substantially probable that Smith would not engage in an act of sexual violence while on supervised release.

The court ruled in Smith's favor on the third criterion, whether treatment meeting Smith's needs is reasonably available in the community. However, the court found Smith failed to establish the fourth criterion that he could be expected to comply with the rules of supervision and treatment. Tomony and Johnson stressed Smith's impulsivity and rules violations. Finally, the circuit court found Smith failed to establish that he could be safely supervised with a reasonable expenditure of resources. The court found that, while the State could provide enough resources to supervise Smith twenty-four hours per day, it was not satisfied that doing so would constitute a reasonable expenditure of resources.

The circuit court's findings were based on its assessment of the witnesses' credibility. The court showed familiarity with the facts, the tests and tools used to evaluate Smith's treatment progress, and explained in detail the criteria Smith failed to demonstrate. *See State v. Rachel*, 2010 WI App 60, ¶30, 324 Wis. 2d 465, 782 N.W.2d 443. Because the circuit court could reasonably accept the testimony of the State's witnesses, there is no arguable basis for challenging the sufficiency of the evidence.

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Steven Phillips is relieved of his obligation to further represent Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals