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DISTRICT II

April 12, 2017

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

2016AP1209-NM In re the commitment of Donald Anderson, Jr.: State of Wisconsin v. Donald Anderson, Jr. (L.C. # 2015CI1)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Donald Anderson, Jr., appeals from an order committing him as a sexually violent person under WIS. STAT. ch. 980 (2015-16).[1] Anderson's appellate counsel filed a no-merit report pursuant to WIS. STAT. § 980.038(4) and WIS. STAT. RULE 809.32. Anderson received a copy of the report, was advised of his right to file a response, and has elected not to do so. After

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the order. WIS. STAT. RULE 809.21.

The no-merit report addresses whether there was sufficient evidence to commit Anderson as a sexually violent person under WIS. STAT. ch. 980. To commit Anderson, the State had to prove beyond a reasonable doubt that Anderson: (1) had been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is 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. *See* WIS. STAT. §§ 980.01(7) and 980.05(3)(a).

The standard of review for sufficiency of the evidence to support a commitment under WIS. STAT. ch. 980 is the same as the standard of review for a criminal conviction. ***State v. Curiel***, 227 Wis. 2d 389, 417, 597 N.W.2d 697 (1999). This court will not reverse a commitment order "unless the evidence, viewed most favorably to the state and the commitment, 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 the [respondent] to be a sexually violent person beyond a reasonable doubt." ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612 (Ct. App. 1999) (brackets in original; citation omitted). Our review of the trial transcripts persuades us that the State produced ample evidence on each element. Accordingly, we agree with counsel that any challenge to the sufficiency of the evidence for Anderson's commitment would lack arguable merit.

In addition to the sufficiency of the evidence, we considered other potential issues that arise in cases tried to a jury, *e.g.*, jury selection, objections during trial, confirmation that the waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner. Objections

during trial were properly ruled on. When Anderson elected not to testify, the circuit court conducted a proper colloquy to ensure that his waiver was valid. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made to the jury during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.[2] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Len Kachinsky of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Len Kachinsky is relieved of further representation of Anderson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[2] Two mental health experts testified during Anderson's trial. The parties did not request and the circuit court did not apply the WIS. STAT. § 907.02(1) ***Daubert*** evidentiary standard to the experts' testimony. ***State v. Alger***, 2015 WI 3, ¶4, 360 Wis. 2d 193, 858 N.W.2d 346. The ***Daubert*** standard applied to this case because the WIS. STAT. ch. 980 petition was filed on March 6, 2015, after the February 1, 2011 trigger date for application of the ***Daubert*** standard. ***Alger***, 360 Wis. 2d 193, ¶4.

The admission of expert testimony is discretionary with the circuit court. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687, *review denied*, 2015 WI 24, ___ Wis. 2d ___, 862 N.W.2d 602. If the record sustains the circuit court's decision, we will affirm it. ***Prosser v. Cook***, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994). Each expert's testimony clearly met the ***Daubert*** standard because the testimony was "based upon sufficient facts or data" and was the product of "reliable principles and methods" reliably applied by the expert to the facts of the case. WIS. STAT. § 907.02(1). No issue with arguable merit arises from the circuit court's failure to apply the ***Daubert*** standard.