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DISTRICT I

April 25, 2017

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

2016AP313-NM

State of Wisconsin v. Frank A. Normington
(L.C. # 1997CV000407B)

Before Brennan, P.J., Brash and Dugan, JJ.

Frank Normington appeals an order that dismissed his petition for discharge from a commitment as a sexually violent person under Chapter 980 of the Wisconsin Statutes, following a trial to the court. Attorney Dustin Haskell has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);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 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the

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

sufficiency of the evidence to support the circuit court's determination, and the lack of any prejudicial procedural or evidentiary errors at the discharge hearing. Normington 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 at any time. In order to obtain a hearing on a discharge petition, the petitioner must allege 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(1) and (3); 980.01(1) WIS JI—CRIMINAL 2506. Once a petitioner makes a sufficient showing to obtain a hearing, the State bears the burden of proving by clear and convincing evidence that the petitioner still meets the criteria. WIS. STAT. § 980.09(3).

Here, the State introduced several judgments of conviction demonstrating that Normington had committed several sexually violent offenses in the past, and all three of the expert witnesses who testified at the discharge hearing agreed that Normington suffers from at least two mental disorders—namely pedophilia and antisocial personality disorder—that predispose him to commit acts of sexual violence. Thus, the only contested issue at the discharge hearing was whether Normington was more likely than not to commit future acts of sexual violence.

One of the State's experts, Dr. Christopher Tyre, testified that it was more likely than not that Normington would reoffend based largely upon clinical evaluation of a number of risk factors, while the other two experts, Dr. Carolyn Hensel-Fixmer and Dr. Sharon Kelley expressed the opposite opinion, based largely upon actuarial instruments. The circuit court found Tyre's opinion to be the most persuasive, relying heavily on Normington's failure to participate in treatment. We agree with counsel that taking Normington's treatment record into consideration does not run afoul of the constitutional protection that criminal defendants enjoy against self-incrimination. The holding in *State v. Zanelli*, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997) that precluded testimony about a defendant declining to be interviewed was based upon a statutory provision that has been repealed, and replaced with a provision that expressly authorizes such testimony. *See* Wis. Stat. § 980.038(2). The circuit court was entitled to rely on Tyre's opinion, and we will not disturb credibility determinations on appeal. Nor could Normington raise a *Daubert* challenge to the reliability of Tyre's testimony, because Normington's initial Chapter 980 commitment predated the adoption of WIS. STAT. § 907.02. In short, Tyre's testimony was sufficient to support the court's decision that Normington still met the criteria for commitment of a sexually violent person.

As to other potential issues addressed by counsel, the record shows that Normington knowingly and voluntarily waived his right to a jury trial in favor of a trial to the court, and that the circuit court reasonably exercised its discretion in excluding from evidence some internal statistics kept by the Sand Ridge Secure Treatment Center as to recidivism rates of persons over the age of sixty who had been released from the institution's custody. Assuming for the sake of argument that the circuit court erred in admitting hearsay testimony by Tyre about what the creator of the RRASOR had to say about the continued use of that actuarial tool, the error was

harmless because the circuit court did not rely on the RRASOR or any other actuarial tool for its conclusion that Normington still met the criteria of a sexually violent person. Similarly, assuming that the circuit court erred in allowing Tyre to testify that he recommended commitment only about twenty percent of the time when conducting initial Chapter 980 evaluations, the testimony was not prejudicial because Normington was not being evaluated for initial commitment.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying Normington's petition for 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 Normington in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that the record shall be remanded to the circuit court forthwith, so that the circuit court can proceed upon a subsequent petition that Normington has filed. This renders Normington's pending motion for a stay moot, and we will take no separate action upon it.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals