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DISTRICT II

September 20, 2017

To:

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Circuit Court Judge
Racine County Courthouse
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Hon. Bruce E. Schroeder
Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2016AP717 In re the commitment of Hung N. Tran: State of Wisconsin v. Hung N. Tran (L.C. # 2004CI3)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Hung N. Tran appeals from orders denying his WIS. STAT. ch. 980 (2015-16)[1] discharge

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

petition and his postcommitment motion for a new trial.[2] Tran argues he is entitled to a new trial on his discharge petition in light of newly discovered evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 We affirm.

In 1992, Tran was convicted of first-degree sexual assault of a child and sentenced to prison. Before his release, Tran was committed as a sexually violent person under WIS. STAT. ch. 980. In 2011, he filed a petition for discharge. The State opposed the petition and the matter was tried to a jury in September 2012.[3]

Three experts testified about whether Tran remained a sexually violent person. Dr. Anthony Jurek opined that Tran was more likely than not to reoffend in a sexually violent way. Tran presented two expert witnesses, Hollida Wakefield and Dr. Diane Lytton, both of whom disagreed with Jurek and opined that Tran no longer met the commitment criteria. All three experts used actuarial scoring instruments in reaching their conclusions.

The experts disagreed about the actuarial significance of a 1991 sexual assault allegedly committed by Tran in Virginia against a young boy. An agent with the Wisconsin Department of Corrections testified that Tran admitted to assaulting a little boy in 1991 while visiting family in

[2] The Honorable Bruce E. Schroeder entered the order denying Tran's discharge petition. The Honorable Eugene A. Gasiorkiewicz entered the order denying Tran's postcommitment motion.

[3] Tran previously filed a petition for discharge and a postcommitment motion, both of which were denied by the circuit court. Tran appealed the orders. We consolidated the appeals and affirmed both circuit court orders. ***State v. Tran***, Nos. 2008AP340/2528 and 2010AP329, unpublished slip op. (WI App Mar. 30, 2011).

Virginia, and that the incident resulted in a "warrant of felony arrest" which was signed by a magistrate and read:

> You are hereby commenced in the name of the Commonwealth of Virginia forthwith to arrest and bring the accused before this Court to answer the charge that the accused, within this city or county, on or about May 16th of 1991, did unlawfully and feloniously, in violation of 18.2-67.3, Code of Virginia, sexually abused one [J.B.], date of birth [in 1987], with intent to sexually molest him by fondling his penis.

The experts agreed that under generally accepted actuarial scoring principles, a "prior offense" would include an "arrest charge or conviction that was legally dealt with prior to the index offense." However, they disagreed about whether the Virginia incident satisfied that criteria. While Jurek used the 1991 Virginia incident in scoring the actuarial instruments, Wakefield and Lytton did not. The jury found that Tran still qualified as a sexually violent person and the circuit court denied Tran's discharge petition.

Tran filed a postcommitment motion alleging that on May 7, 2015, he obtained further information regarding the Virginia incident that outlined the "exact parameters of Mr. Tran's interaction with the [Virginia] Law Enforcement Community," and constituted newly discovered evidence. At a hearing, Tran called Sergeant Wayne Sorrell, a liaison between the local Virginia police department and the Commonwealth's Attorney's Office. Sorrell testified that a state agency issued a felony arrest warrant for Tran on July 30, 1991, that the warrant was eventually forwarded to Wisconsin with a detainer requesting Tran's extradition, and that the Virginia case was put on hold pending extradition. Sorrell confirmed that "the only way a warrant would have been issued" was if there was a presentation of probable cause to the magistrate judge who

signed the warrant. He also testified that he was unable to locate a formal criminal complaint or any type of indictment and that Tran never appeared before a magistrate in Virginia.

The circuit court denied the motion, determining that the evidence was in existence since 1991, and that Tran had not presented any evidence "of a good reason or excusable neglect on the part of trial counsel for not obtaining the very documentation now confronting this court." Observing that both parties knew about the Virginia incident at the time of Tran's discharge trial, the court further determined that "the additional information did not add anything of significance that would have altered the actuarial opinions rendered at the time of trial. No evidence is before this Court to the contrary from any of the experts who testified" at the discharge trial.

On appeal, Tran maintains that the information presented at his postcommitment hearing supports his position that he was never "charged" with a crime in Virginia in 1991. Tran argues that had he been able to present the May 7, 2015 evidence at his discharge trial, "it would have created a significant doubt as to whether Mr. Tran was ever charged as that term is utilized when scoring the actuarial instrument." Moreover, he posits that if the Virginia incident did not qualify as a "charge," his actuarial scores would have been lower, and thus, the risk percentages for reoffense would have been lower.

The decision to grant or deny a motion for a new trial based on newly discovered evidence is within the circuit court's discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. A defendant seeking a new trial based on newly discovered must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial, (2) the defendant was not negligent in seeking the evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative to the evidence that was

introduced at trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. If all four factors are met, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Avery***, 345 Wis. 2d 407, ¶25 (citation omitted).

We conclude that the circuit court properly exercised its discretion in denying Tran's motion. The 1991 Virginia sexual assault was known to and discussed by the parties at Tran's discharge trial. The proffered additional information was available at the time of trial and was not "newly discovered." *See* ***id.***, ¶15, n.13 (testimony that was available at the time of trial did not qualify as newly discovered evidence). As the circuit court properly determined, Tran made no showing that his failure to obtain additional information at an earlier time was not attributable to neglect.

Additionally, the circuit court properly determined that the "new" information was immaterial. Evidence about the 1991 Virginia arrest warrant was presented at trial. All three experts knew about the Virginia incident and offered testimony as to why it did or did not qualify as a "charge" for purposes of actuarial scoring. Tran does not explain how the fact that no complaint or indictment ever issued or that Tran was never brought before a Virginia magistrate would have altered the expert testimony or the jury's assessment of the evidence.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals