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**DISTRICT I**

July 5, 2018

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

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2017AP1070-NM          State of Wisconsin v. Kenneth William Jaworski (L.C. # 2006CI2)

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

**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).**

Kenneth William Jaworski appeals from an order denying his petition for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980 (2015-16).<sup>1</sup> His appellate counsel, Jeffrey W. Jensen, has filed a no-merit report seeking to withdraw as appellate counsel

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

pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Jaworski filed a response. The no-merit report addresses whether Jaworski was entitled to a trial on his petition. Upon reviewing the record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues and summarily affirm the order denying discharge.<sup>2</sup> See WIS. STAT. RULE 809.21(1).

Jaworski was civilly committed in 2014 as a sexually violent person. He petitioned for discharge under WIS. STAT. § 980.09 in 2016. Jaworski’s petition for discharge was based upon an evaluation performed by licensed psychologist Diane Lytton, Ph.D., to the effect that Jaworski was not “more likely than not” to commit a sexually violent act if released. The report made use of updated data for the actuarial risk assessment tools.

The circuit court reviewed the petition and denied it without holding a trial, concluding that it was “an easy call.” The circuit court held that the petition was facially sufficient under WIS. STAT. § 980.09(1), but after considering other matters in the record, denied the petition at a hearing pursuant to § 980.09(2). The circuit court also denied Jaworski’s motion for reconsideration.

An individual committed under WIS. STAT. ch. 980 may petition for discharge at any time. See WIS. STAT. § 980.09(1). A petition for discharge triggers a two-step review process. See *State v. Richard*, 2014 WI App 28, ¶11, 353 Wis. 2d 219, 844 N.W.2d 370. The circuit court first conducts a paper review of the petition, which shall be denied unless it “alleges facts

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<sup>2</sup> Jaworski previously appealed the judgment committing him as a sexually violent person and the order denying his postcommitment motion. See *State v. Jaworski*, No. 2016AP5, unpublished slip op. (WI App Apr. 18, 2017). This court affirmed, and the Wisconsin Supreme Court denied Jaworski’s petition for review.

from which the court or jury would likely conclude the person's condition has changed ... so that the person no longer meets the criteria for commitment as a sexually violent person.” *See* sec. 980.09(1).

If the petition is facially sufficient, the circuit court may hold a hearing to determine whether the petition is indeed sufficient. *See* WIS. STAT. § 980.09(2). In this second stage of review, the circuit court “may consider the record, including evidence introduced at the initial commitment trial,” current or past reports, relevant facts in the petition and in the State's response, arguments of counsel, and any supporting documentation provided. *See id.* The standard is the same at this second stage: whether there are facts from which the court or jury would likely conclude the person's condition has changed so that the person no longer meets the criteria for commitment as a sexually violent person. *See Richard*, 353 Wis. 2d 219, ¶13.

The criteria for commitment as a sexually violent person are that the person: (1) has been convicted of a sexually violent offense; (2) has a mental disorder; and (3) is dangerous to others because he has a mental disorder that 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); WIS JI—CRIMINAL 2502. If there are facts from which the court or jury would likely conclude the person no longer satisfies these criteria, the circuit court shall set the matter for a trial; otherwise, it shall deny the discharge petition. *See* WIS. STAT. § 980.09(2).

When it denied Jaworski's petition, the circuit court discussed the expert opinions at Jaworski's trial in 2014 and noted that Jaworski's Static-99R score had stayed the same, even in

Dr. Lytton's recent evaluation.<sup>3</sup> The circuit court distinguished the circumstances presented from those at issue in *Richard*. Additionally, the circuit court expressed concern that there was no evidence Jaworski had engaged in treatment during the time he was committed.

In his response, Jaworski argues that participation in treatment is not a relevant consideration. Jaworski is wrong. It is appropriate for the circuit court to consider a lack of treatment progress during its review. *See* WIS. STAT. § 980.09(2) (providing that the circuit court may consider "any current or past reports filed under [WIS. STAT. §] 980.07," i.e., treatment progress reports).

We agree with the circuit court's assessment. *See State v. Hager*, 2018 WI 40, ¶19, 381 Wis.2d 74, 911 N.W.2d 17 ("We review the circuit court's determination of whether the statutory criteria for a discharge trial have been met *de novo*." (italics added)). Accordingly, there is no arguable merit to a challenge to the circuit court's denial of Jaworski's discharge petition without a trial.

Upon our independent review of the record, we have found no other arguable basis for reversing the order denying discharge. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Therefore,

IT IS ORDERED that the order denying the petition for discharge is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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<sup>3</sup> Dr. Lytton, however, used newer data bases to assess Jaworski's associated risk of reoffending.

IT IS FURTHER ORDERED that Attorney Jensen is relieved of further representation of Kenneth William Jaworski in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*