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July 23, 2018

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

2018AP327-NM In re the commitment of Darrell Aferon Morrow:
State of Wisconsin v. Darrell Aferon Morrow
(L.C. # 1996CF961629)

Before Kessler, P.J., Brennan and Stark, 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).

Darrell Aferon Morrow appeals from a July 21, 2017 order denying his WIS. STAT. ch. 980 (2015-16)[1] petition for discharge without setting the petition for trial. Appellate counsel,

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

Dennis Schertz, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Morrow was advised of his right to file a response, and he has responded. Upon this court's independent review of the record, as required by ***Anders***, and counsel's report, we conclude that no issue of arguable merit for appeal exists. We therefore summarily affirm the order.

In 1990, Morrow was charged with and convicted of one count of first-degree sexual assault and four other offenses. On February 14, 1996, the Department of Corrections asked the Department of Justice to petition for Morrow's commitment as a sexually violent person. On November 13, 1996, Morrow was found to be sexually violent and, by order dated January 7, 1997, he was committed to the custody of the Department of Health and Social Services.

Morrow's annual psychological re-examination and treatment progress reports were filed with the circuit court on March 31, 2017. On April 4, 2017, Morrow signed a *pro se* petition for discharge, which was forwarded to the circuit court by staff at Sand Ridge Secure Treatment Facility. Morrow's petition alleged, "I no longer have a mental disorder or my mental disorder has changed because … I am stable on my medication." Morrow also alleged that he is "no longer 'more likely than not' to commit an act of sexual violence because … I should have never been sent to prison after being listed as disabled in Milwaukee County, and plus I am innocent of the index finger 980 commitment[.]"

Attached to the discharge petition were several pages handwritten by Morrow in which he claims, among other things, that the sex with his victim was consensual, the victim committed perjury at the criminal trial, the district attorney had hated him for years, and he has been

mentally ill since 1974. In a two-page supplement, Morrow discusses potential cash settlement amounts for his commitment.

The circuit court held a brief hearing on the petition, attempting to ascertain what had changed since the last attempt at discharge. It instructed Morrow to "tell me what's new and why you should be released." After stopping Morrow from revisiting the criminal case and original commitment proceedings, the circuit court determined that "nothing has changed" and that Morrow had "failed to establish the existence of facts from which the court or jury may conclude that he does not meet the criteria for commitment." The circuit court denied the discharge petition without setting it for a trial and ordered Morrow's commitment to continue. Morrow appeals.

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. Talley***, 2017 WI 21, ¶27, 373 Wis. 2d 610, 891 N.W.2d 390. The circuit court first conducts a paper review of the petition, which shall be denied unless it "alleges 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."[2] *See* WIS. STAT. § 980.09(1); *see also* ***State v. Arends***, 2010 WI 46, ¶4, 325 Wis. 2d 1, 784 N.W.2d 513.

In reviewing the petition for its sufficiency, the circuit court may hold a hearing to determine whether the petition is indeed sufficient. *See* WIS. STAT. § 980.09(2). This second step involves an "expanded review" of the petition, in which 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 the State's response, arguments of counsel, and any supporting documentation provided. *See* ***id.***; *see also* ***Talley***, 373 Wis. 2d 610, ¶27. The pleading standard is the same at this second stage as in the first: whether the petition alleges facts "from which a court or jury would likely conclude the person no longer meets the criteria for commitment." *See* WIS. STAT. § 980.09(2); *see also* ***Talley***, 373 Wis. 2d 610, ¶27, and ***State v. Richard***, 2014 WI App 28, ¶13, 353 Wis. 2d 219, 844 N.W.2d 370.

"[C]ircuit courts are to carefully examine, but not weigh, those portions of the record they deem helpful to their consideration of the petition, which may include facts both favorable as well as unfavorable to the petitioner." ***State v. Hager***, 2018 WI 40, ¶4, 381 Wis. 2d 74, 911

[2] WISCONSIN STAT. § 980.09 was revised in 2013. *See* 2013 Wis. Act 84, §§ 21-25. Among the revisions was a change in the pleading standard necessary to warrant a trial on the release petition, from whether the petition alleged facts from which a fact-finder "may conclude" a person no longer meets the criteria for commitment to whether the fact-finder "would likely conclude" a person no longer meets the criteria for commitment. *Cf.* WIS. STAT. § 980.09(1)-(2) (2011-12) *with* WIS. STAT. § 980.09(1)-(2) (2015-16).

The supreme court recently determined that this change is procedural and may apply retroactively. *See* ***State v. Hager***, 2018 WI 40, ¶62, 381 Wis. 2d 74, 911 N.W.2d 17. While the circuit court referenced the older "may conclude" standard in its order denying discharge, the circuit court did note the "would likely conclude" standard during the hearing. However, the result is the same under either standard: if Morrow cannot satisfy the lower "may conclude" burden, he surely does not satisfy the greater "would likely conclude" requirement.

N.W.2d 17. If the court determines facts exist from which the fact-finder would likely conclude the petitioner no longer meets the criteria for commitment, the court shall set the matter for trial. *See* WIS. STAT. § 980.09(2).

The criteria for commitment under WIS. STAT. ch. 980 require the State to show three things: that the person has been convicted of a sexually violent offense; that the person has a mental disorder; and that the person is dangerous to others because he or she has a mental disorder which makes it more likely than not that he or she will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502; WIS. STAT. § 980.01(7).

We agree with the circuit court that Morrow's petition is insufficient to warrant trial to a fact-finder. The circuit court properly rejected Morrow's attempt to relitigate his underlying criminal conviction. It then referenced Morrow's March 2017 psychological re-examination report, noting that Morrow has the same mental health diagnoses, actuarial scores and re-offense risk, and psychopathy score as he did previously. The circuit court also noted the examining psychologist's statement that Morrow "made absolutely no significant progress" in treatment[3] and the psychologist's conclusion that Morrow remains a sexually violent person. The circuit court also observed that the re-examination report indicates that Morrow remains delusional.[4]

[3] According to the re-examination report, Morrow had "decided not to attempt to move on to" the third phase of his treatment because he likely would have to move off the unit where he resides and change jobs. However, the treatment progress report notes that the third phase is where Morrow would learn to manage his re-offense risk factors and prepare for transition into the community.

[4] Although these facts were not expressly referenced by the circuit court, we observe that the treatment report notes that Morrow had not made adequate progress in understanding or identifying the thoughts and behaviors that are linked to his sexual offending or in demonstrating sufficiently sustained changes in management of those thoughts and behaviors. The report further details several instances of Morrow "violating the boundaries of female staff members by making sexual comments."

Nothing in Morrow's petition counters these facts or provides any basis on which the circuit court could conclude that a fact-finder would likely find Morrow had sufficiently changed such that he no longer meets the criteria for commitment.

Accordingly, there is no arguable merit to a claim that the circuit court erred in denying Morrow's petition for discharge without setting it for trial.

Our independent review of the record reveals no other potential issues of arguable merit.[5]

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Morrow in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals

[5] Morrow's response to the no-merit report does not identify any arguably meritorious issues for appeal. As with his documents submitted to the circuit court and documents submitted to this court in prior appeals, Morrow continues to protest his criminal conviction, which is not before this court. He also reiterates a claim for "500-30-million five hundred thousand dollars" for his continued commitment, which is also not before this court.