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December 7, 2018

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

2018AP681-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 an October 23, 2017 order denying his WIS. STAT. ch. 980 (2015-16)[1] petition for discharge without setting the petition for trial. Appellate counsel, Dennis Schertz, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738

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

(1967), and WIS. STAT. RULE 809.32. Morrow was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as required by ***Anders***, and counsel's report, we conclude that there is no issue of arguable merit for appeal. 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, the circuit court found Morrow 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.

An 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* form petition for discharge, *see* WIS. STAT. § 980.07(6)(b), which was forwarded by staff at Sand Ridge Secure Treatment Facility and filed in the circuit court on May 3, 2017. That petition was denied in an order dated July 21, 2017. Morrow appealed, and we later affirmed. *See* ***State v. Morrow***, No. 2018AP327-NM, unpublished slip op. and order (WI App July 23, 2018).

On September 14, 2017, the circuit court received Morrow's *pro se* "petition for discharge, or in the alternative transfer to Mendota Mental Health Institution." Unlike Morrow's two prior discharge petitions, which were forms forwarded by the Department of Health Services following Morrow's annual review, this petition had been drafted by Morrow and submitted by him directly to the circuit court. In this petition, Morrow asserted that because he was now sixty years old, his "actuarially-based risk is below the legal threshold for chapter 980 commitment."

He also asserted that he does not have any paraphilic disorder, is not sexually preoccupied, takes medication, has not been in physical altercations with patients or staff, and "always attends the treatment classes" at Sand Ridge. He further claimed that continuing to hold him at Sand Ridge violates "the Legislative Purpose and Legislative Policy" of WIS. STAT. § 51.001.

The circuit court held a brief hearing on the petition, reminding Morrow, "You've got to show me that you've met the criteria for discharge since that -- and it's different since the last time I denied it." Morrow explained coping skills he has learned and informed the circuit court that he is on medication.

The circuit court noted that Morrow's petition was based on an April 13, 2016 evaluation by Dr. William A. Merrick. The circuit court had considered this 2016 evaluation when it denied a discharge petition in 2016 and again when it denied the discharge petition filed on May 3, 2017. Thus, the court concluded that Morrow had "failed to establish the existence of facts from which a court or jury would likely conclude that he does not meet the criteria for commitment as a sexually violent person." It further held that it had no authority to transfer Morrow to Mendota. Thus, the circuit court denied the discharge petition without setting it for a trial. 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." *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 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. Morrow's petition relies on a prior report that was deemed insufficient to secure his release on two prior attempts. Thus, there is no indication that Morrow's condition has sufficiently changed since the circuit court's prior review. Moreover, WIS. STAT. § 980.01(7) requires only that a person have a mental disorder and that the disorder makes it more likely than not that the person will engage in one or more future acts of sexual violence; the mental disorder need not be a specific paraphilic disorder. Dr. Merrick's 2016 report, on which Morrow relies, diagnosed Morrow with four mental disorders, including schizoaffective disorder and "other specified personality disorder, with antisocial features." Though Morrow claims he is not "sexually preoccupied," the report indicates that each of the four disorders "predisposes Mr. Morrow to commit sexually violent acts as defined by Chapter 980."[2]

Morrow alleged that his "actuarially-based risk is below the legal threshold for chapter 980 commitment." There is no specified score for the actuarial instruments that constitutes a "legal threshold" for commitment; the tests are a tool in the overall process of risk assessment. Further, Dr. Merrick's report noted that Morrow's actuarial scores "suggest that his risk of sexual recidivism is in the Medium to High Risk range when compared to other offenders charged with

[2] We observe that the treatment report also 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."

a sexual offense." The discharge petition does not establish why or whether the mere progression of age negates that risk.

Finally, Morrow is not committed pursuant to WIS. STAT. ch. 51. Its provisions and policies are inapplicable in this case. The circuit court also correctly noted it has no authority to order Morrow's transfer to Mendota.

In short, nothing in Morrow's petition provides a basis for the circuit court to conclude that a fact-finder would likely find Morrow's condition had changed such that he no longer meets the criteria for commitment under WIS. STAT. ch. 980. 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.

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