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DISTRICT IV

July 15, 2021

To:

Hon. Todd J. Hepler
Circuit Court Judge
Electronic Notice

Susan K. Raimer
Clerk of Circuit Court
Columbia County Courthouse
Electronic Notice

Brenda L. Yaskal
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Dennis Schertz
Electronic Notice

Winn Collins
Electronic Notice

Scott Maher
Sand Ridge Secure Treatment Center
P.O. Box 800
Mauston, WI 53948

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

2019AP1288-NM

In re the commitment of Scott Maher:
State of Wisconsin v. Scott Maher (L.C. # 2007CI2)

Before Fitzpatrick, P.J., Blanchard, and Graham, 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).

Attorney Dennis Schertz, appointed counsel for Scott Maher, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20).¹ We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Maher petitioned for discharge or supervised release from a commitment under WIS. STAT. ch. 980. The circuit court denied the petition without a trial, but we reversed that order on appeal. On remand, the circuit court held a jury trial and again denied the petition, but we reversed that order on appeal and ordered a new trial. After the new trial, Maher's petition was again denied. Maher's appointed attorney appealed and filed the no-merit report now before us.

We ordered counsel to address two related issues further in our order of February 3, 2021. Counsel has filed a supplemental no-merit report, to which Maher has responded. The issues we ordered counsel to address relate to whether Maher's trial counsel was ineffective by not taking action in response to testimony and argument from the State that related to opinions about Maher that were held by earlier experts in the case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish ineffective assistance of counsel defendant must show that counsel's performance was deficient and that such performance prejudiced his or her defense).

The first issue is whether counsel was ineffective by failing to object or otherwise address testimony, presented by the State, that the State's other evaluators in the three years before the trial, who were not testifying at trial, had diagnosed Maher with a qualifying mental disorder. In the supplemental no-merit report, counsel concludes that, even if this testimony was improper, it would be frivolous to argue that Maher was prejudiced. Counsel explains that the jury was otherwise properly informed during the trial that Maher was already under commitment, and therefore the jury would expect that at least one previous State expert believed he met the criteria for commitment. We agree with that analysis and conclusion.

The second issue was whether counsel was ineffective by failing to object to or otherwise respond to comments made by the State during opening statement and closing argument

suggesting that previous *defense* experts held opinions unfavorable to Maher. Those comments were potentially objectionable because no evidence was actually introduced at trial about the opinions of any prior defense experts.

As to this issue, we conclude that it would be frivolous to argue ineffective assistance because the opinions of the prior defense experts were not a fact of sufficient consequence to the defense strategy. The defense strategy was that Maher's diagnosis and likelihood of engaging in acts of sexual violence had changed since previous evaluations. In that context, the jury could believe his current expert's favorable opinion, even if the jury also believed that she was the first expert to conclude that Maher did not have a qualifying mental disorder. The fact that earlier defense experts may have had opinions contrary to the current expert does not substantially impair the credibility of the current expert's opinion, when the defense theory was that Maher had changed. Accordingly, any objection or argument that Maher's attorney might have made to show that the State's assertions about prior defense experts were unsupported by the record would have been of little help to Maher. Further, they stood a chance of distracting the jury or drawing unwanted attention to inferences that would not be helpful to Maher. Seen in this light, it would be frivolous to argue that counsel's performance was deficient or that he was prejudiced by the State's comments.

We also consider whether the evidence was sufficient to support the jury's verdict that Maher continued to be a sexually violent person. Without attempting to recite the evidence in detail here, we conclude that, in light of the opinions of the State's expert and Maher's history, it would be frivolous to argue that the evidence was insufficient.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Schertz is relieved of any further representation of Maher 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