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DISTRICT I

July 19, 2022

To:

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Circuit Court Judge
Electronic Notice

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Donald Samuel James
Sand Ridge Secure Treatment Center
P.O. Box 800
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1527-NM

In re the commitment of Donald Samuel James: State of Wisconsin
v. Donald Samuel James (L.C. # 2010CI2)

Before Donald, P.J., Dugan and White, 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).

Donald Samuel James appeals an order committing him as a sexually violent person under WIS. STAT. ch. 980 (2019-20).¹ James's appointed appellate counsel, Attorney Dennis Schertz, filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738, 744 (1967). James responded to the no-merit report. After considering the no-merit report and the response, and after conducting an independent review of the record as

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

mandated by *Anders*, we conclude that there are no arguably meritorious appellate issues. Therefore, we affirm. *See* WIS. STAT. RULE 809.21.

This case has a lengthy and unusual procedural history. The State petitioned to commit James as a sexually violent person on July 23, 2010. *See* WIS. STAT. § 980.02(1)(a). On August 6, 2010, the circuit court concluded that there was probable cause to believe that James was a sexually violent person and sent him to Sand Ridge Treatment Center pending a commitment trial. Over the next two years, two appointed attorneys withdrew from representing James at his request. James then moved to discharge his third appointed attorney and proceed *pro se*. The circuit court denied the motion after a hearing on the grounds that James was not competent to represent himself. However, three weeks later, the circuit court discharged James's third appointed attorney because James filed an ethics complaint against the attorney.

The circuit court then appointed a fourth attorney, Attorney Patrick Flanagan, to represent James. James vociferously refused to allow Attorney Flanagan to represent him, but agreed to allow Flanagan to serve as his stand-by counsel. The circuit court engaged in a lengthy colloquy with James to ensure that he was knowingly, intelligently, and voluntarily waiving his right to counsel, after which it allowed James to proceed *pro se* with Attorney Flanagan as stand-by counsel.

Over the next three-and-one-half years, James filed numerous motions, the State responded to the motions, and hearings were held at which all of James's motions were denied. James refused to talk to his stand-by counsel even though James was unable, without assistance, to retain an expert and prepare for trial. In late 2015, the State moved to vacate the order allowing James to represent himself, arguing that despite seven jury trial dates, the case had not

yet gone to trial because James kept filing repetitive motions. After a hearing on May 4, 2016, at which the circuit court heard arguments from both James and the State, the circuit court allowed James to continue to represent himself. James's trial was eventually held in June 2018. He was committed under ch. 980.

The no-merit report addresses whether there was sufficient evidence to support the commitment order. At trial, Dr. Anthony Jurek testified that James had a mental disorder and was more likely than not to commit an act of sexual violence in the future as a result of that disorder. Dr. Jurek explained to the jury the process by which he evaluated James and reached this conclusion. Dr. Melissa Westendorf also testified that she evaluated James; that she diagnosed him with antisocial personality disorder, as well as a provisional diagnosis of paraphilia; that this diagnosis predisposed him to sexual violence; and that, based on her evaluation of James, it was her opinion that he met the criteria for commitment under WIS. STAT. ch. 980. Our review of the trial testimony shows that there was adequate evidence to support the jury's determination that James is a sexually violent person. *See* WIS. STAT. § 980.01(7) (a sexually violent person is someone who has been convicted of a sexually violent offense and is dangerous because he or she has "a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence"). Therefore, the circuit court properly determined that James should be committed for control, care and treatment until he is no longer a sexually violent person. *See* WIS. STAT. § 980.06.

The no-merit report also addresses whether James was competent to represent himself. "The determination of self-representation competency requires an assessment of whether a person is able to provide himself or herself with 'meaningful' self-representation." *Dane Cnty. DHS v. Susan P.S.*, 2006 WI App 100, ¶18, 293 Wis. 2d 279, 715 N.W.2d 692. "In making this

assessment, courts must distinguish technical legal knowledge—something that is not required— from the practical ability to make arguments, present evidence, and ask effective questions.” *Id.* We agree with the no-merit report that the record demonstrates that James was able to provide himself with meaningful representation. James’s motions and his self-representation at trial show that he understood the concepts and procedures in WIS. STAT. ch. 980 cases, that he was able to ask pertinent questions of witnesses, and that he was able to advocate for himself. There would be no arguable merit to this issue.

The no-merit report and James’s response address whether there would be arguable merit to a claim that the circuit court erroneously denied his motion to dismiss the entire jury panel after one of the jurors became upset during *voir dire* and had to be excused. James argued that the entire jury panel should be dismissed because the juror’s emotional state may cause the other jurors to treat him unfairly. The circuit court denied James’s motion, noting that it had immediately ordered that the upset juror be excused and escorted to jury services. The circuit court concluded that it was not necessary to dismiss the entire panel because it was able to see the jury panel when the incident occurred, it did not see any jurors react to the juror who became upset, and the juror in question was quickly removed from the court room. Because the circuit court’s decision denying James’s motion to dismiss the entire jury panel was an appropriate exercise of discretion, we conclude that there would be no arguable merit to this claim.

The no-merit report and James’s response also address whether James could argue that he did not receive a fair trial because the circuit court denied James’s motion seeking to prohibit the State from presenting evidence at trial about whether he has participated in treatment during the eight years that passed between his probable cause hearing, at which time he was sent to Sand Ridge Treatment Center, and his trial. The circuit court ruled that evidence about James failing

to participate in treatment in the eight years since he had gone to Sand Ridge was relevant to the question of whether James was likely to reoffend in the future, one of the elements the State had to prove at trial. This evidentiary ruling was a proper exercise of discretion. Therefore, there would be no arguable merit to this claim.

Our independent review of the record does not disclose any other arguably meritorious issues for appeal. Therefore, we affirm the commitment order and relieve Attorney Schertz of further representation of James in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of James in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals