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DISTRICT II

April 5, 2023

To:

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

2021AP76-NM

State of Wisconsin v. John Fabian (L.C. #2006CI1)

Before Gundrum, P.J., Neubauer and Grogan, 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).

John Fabian appeals from an order denying his petition for discharge from his commitment as a sexually violent person under WIS. STAT. ch. 980 (2021-22).¹ Fabian also appeals from an order denying his petition for supervised release. Fabian's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Fabian was advised of his right to file a response to the

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

no-merit report, but he has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the circuit court's orders because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Fabian was committed as a sexually violent person in 2006. In November 2015, Fabian filed a petition for discharge from his commitment and filed a separate petition for supervised release. The circuit court held a bench trial on Fabian's petitions in September 2019.

At the beginning of trial, the parties stipulated that Fabian had been convicted of a sexually violent offense. The State then presented the testimony and reports of two psychologists: Dr. Laura DeMarzo and Dr. Bradley Allen.

DeMarzo testified that she is a treatment evaluator for the Department of Health Services and that she had prepared Fabian's most recent treatment progress report. DeMarzo explained that Fabian was in phase two of a three-phase treatment program at Sand Ridge Secure Treatment Center. DeMarzo acknowledged that Fabian had made progress in treatment since he was initially committed. She testified, however, that Fabian had not made significant progress in treatment. In support of her conclusion in that regard, DeMarzo explained that while Fabian was able to articulate risk factors related to his sexual offending, he was not able to "see how those [risk factors] manifest in his current functioning." DeMarzo also testified that Fabian had not demonstrated "sufficiently sustained change" in his "thoughts, attitudes, emotions and behaviors and sufficient management of the sexual arousal[,] such that it was "reasonable to assume that with continued treatment ... changes could be maintained." Ultimately, DeMarzo opined that

Fabian was “moving in the right direction” with respect to supervised release and that it was “within a possibility that he could get there,” but he was not there yet.

Allen testified that he had prepared Fabian’s annual re-examination report pursuant to WIS. STAT. § 980.07 in November 2018 and had prepared an update to that report in August 2019. According to Allen, Fabian suffers from three mental disorders: pedophilic disorder, sexually attracted to both sexes, nonexclusive type; antisocial personality disorder; and an intellectual disability. Allen testified that Fabian’s pedophilic disorder and antisocial personality disorder predispose him to engage in acts of sexual violence. Based on Fabian’s score of six on the Static-99R—extrapolated to account for lifetime risk and undetected offenses—Allen testified that Fabian’s lifetime risk of committing a future act of sexual violence was approximately sixty percent. In other words, Allen opined that Fabian’s risk “exceeds the legal threshold of ‘more likely than not’ that he will commit another sexually violent offense should he be discharged.” Allen also opined that Fabian did not meet the criteria for supervised release because he had not made significant progress in treatment.

Doctor Scott Woodley, a psychologist who had been appointed by the circuit court to evaluate Fabian, also testified at Fabian’s trial, and his report was introduced into evidence. Woodley opined that Fabian met the criteria for both discharge from his WIS. STAT. ch. 980 commitment and supervised release. Like Allen, Woodley diagnosed Fabian with pedophilic disorder, sexually attracted to both sexes, nonexclusive type; antisocial personality disorder; and an intellectual disability. Also like Allen, Woodley opined that the pedophilic disorder and antisocial personality disorder predisposed Fabian to commit acts of sexual violence. Unlike Allen, however, Woodley concluded that Fabian’s risk of committing a future act of sexual violence was “below the legal threshold of ‘more likely than not[.]’” Specifically, Woodley

testified that Fabian's risk of reoffense was "in the low to mid-40 percent range." Woodley further opined that Fabian was making significant progress in treatment and also met the remaining statutory criteria for supervised release.

After the parties submitted written closing arguments, the circuit court denied Fabian's petitions for discharge and supervised release. With respect to discharge, the court found that the State had proved by clear and convincing evidence that Fabian continued to meet the criteria for commitment as a sexually violent person. More specifically, the court found that the State had met its burden to prove that Fabian: (1) had been convicted of a sexually violent offense; (2) suffered from a mental disorder that predisposed him to commit acts of sexual violence; and (3) was more likely than not to engage in one or more acts of sexual violence. As related to Fabian's risk of reoffense, the court specifically found that Allen's testimony on that issue was more credible than Woodley's testimony. The court further found, based on the testimony of Allen and DeMarzo, that Fabian did not meet the criteria for supervised release because he had not made significant progress in treatment.

The no-merit report addresses two potential issues: (1) whether the evidence was sufficient to support the circuit court's determination that Fabian continued to meet the criteria for commitment as a sexually violent person; and (2) whether the evidence was sufficient to support the court's determination that Fabian did not meet the criteria for supervised release. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit, and we will not discuss them further.

Having independently reviewed the record, we also conclude that there would be no arguable merit to a claim that the circuit court erroneously exercised its discretion when ruling

on any objections at Fabian’s trial, nor would there be arguable merit to a claim that Fabian received ineffective assistance of trial counsel. In addition, to the extent that the court failed to comply with any statutory time limits, we observe that the failure to comply with the time limits specified in WIS. STAT. ch. 980 “is not grounds for an appeal or grounds to vacate any order, judgment, or commitment issued or entered under [ch. 980].” *See* WIS. STAT. § 980.038(5). Any claim for relief based on the failure to comply with statutory time limits would therefore lack arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Fabian further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of John Fabian in this appeal. *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