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DISTRICT III

May 31, 2023

To:

Hon. Melissia R. Mogen
Circuit Court Judge
Electronic Notice

Jacqueline Baasch
Clerk of Circuit Court
Burnett County Courthouse
Electronic Notice

Winn S. Collins
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Dennis Schertz
Electronic Notice

Charles Henry Beenken 691530
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:

2022AP2130-CRNM State of Wisconsin v. Charles Henry Beenken
(L. C. No. 2018CF264)

Before Stark, P.J., Hruz and Gill, 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).

Charles Beenken appeals from an order denying his petition for conditional release under WIS. STAT. § 971.17(4) (2021-22).[1] His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32. Beenken was advised of his right to respond to the no-merit report, but he has not filed a response. Having considered the report and independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that the

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

order may be summarily affirmed because there are no arguably meritorious issues for appeal. *See* WIS. STAT. RULE 809.21.

On October 29, 2019, Beenken was found not guilty by reason of mental disease or defect (NGI) of child abuse—intentionally causing great bodily harm, and was committed for twenty years to the Department of Health Services. In March 2022, Beenken petitioned for conditional release. The circuit court held an evidentiary hearing on Beenken's petition during which the State's expert, Beenken's expert, and Beenken testified. The court also took judicial notice of a letter from department staff at Beenken's institution. Ultimately, the court denied the petition, finding that the State had met its burden of showing by clear and convincing evidence that Beenken poses a danger to himself and others. This no-merit appeal follows.

The no-merit report first addresses whether the evidence was sufficient to support the circuit court's order denying Beenken's petition for conditional release. Pursuant to WIS. STAT. § 971.17(4)(d), the court "shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released." A circuit court determines dangerousness by considering the statutory factors in § 971.17(4)(d)[2] and "balancing of society's interest in protection from harmful conduct against the acquittee's interest in personal liberty and

[2] WISCONSIN STAT. § 971.17(4)(d) provides, in relevant part, that the court may consider:

> the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

autonomy." *See* ***State v. Randall***, 2011 WI App 102, ¶15, 336 Wis. 2d 399, 802 N.W.2d 194 (citation omitted).

In reaching its decision, the circuit court cited the proper legal standard. *See* WIS. STAT. § 971.17(4)(d). The court then considered the brutal nature of the crime—"Mr. Beenken violently beat and almost drowned his five-year-old son, and when his sister attempted to intervene and help the child, Mr. Beenken beat and strangled her." *See* ***id.*** When considering Beenken's current mental condition, the court found the State's expert to be more credible than Beenken's expert, stating that Beenken's expert's demeanor during the testimony was akin to "intentional advocacy … rather than a dispassionate presentation of reasoned conclusions" and his expert "did not display the same qualified confidence or credibility" as the State's expert. The court emphasized that, among other things, the State's expert expressed concern over the link between Beenken's significant marijuana use and the psychotic episode, the fact that marijuana intoxication may have contributed to the psychotic instability displayed during the offense, and the fact that Beenken had not yet had any substance abuse programming. The court reasoned that although it was "encouraged by the change and the positive growth that has transpired over the last eight months with the increased therapy and the medication,"

> based upon this testimony, and based upon all of the records that have been presented, that there remains clear and convincing evidence considering all factors, and looking at, in particular, at the nature of the circumstances of the index offense. Again, the fact that the level of intentional harm that existed is real.
>
> In looking at Mr. Beenken's mental history and his present mental condition, and the lack of AODA services, it doesn't appear that he is yet there.
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> ….
>
> [T]he Court hasn't heard what sort of tools or techniques or coping mechanisms that Mr. Beenken would utilize to minimize his risk or

> his danger if he is released to the community. And to the extent that he does develop these techniques, and … these processes, that is something that the Court would need to hear about, and would need to be able to understand how he's going to deal with his chronic pain, especially being abstinent or remaining abstinent from alcohol and marijuana.

When reviewing the sufficiency of the evidence, "we give deference to the [circuit] court's determination of credibility and evaluation of the evidence and draw on its reasoning and adopt the trial court's reasonable inferences." ***Randall***, 336 Wis. 2d 399, ¶14. Nothing in the record or the no-merit report evidences that there would be any arguable merit to challenging the weight or credit the circuit court afforded the witnesses' testimony or the court's finding that Beenken remains a danger to himself or others. Accordingly, we agree with counsel's conclusion that there would be no arguable merit to challenging the court's discretionary decision to deny Beenken's petition for conditional release.

The no-merit report also addresses whether Beenken's trial counsel provided ineffective assistance of counsel based on the fact that trial counsel was unable to convince the circuit court to grant Beenken's petition for conditional release. However, given the factual findings and credibility determinations made by the court in rendering its decision, we also agree with appellate counsel that any ineffective assistance of counsel challenge would lack arguable merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (requiring a defendant to demonstrate both deficient performance and prejudice to prove ineffective assistance).

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Dennis Schertz of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Charles Beenken 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