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February 13, 2013

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

2012AP298-NM

In re the commitment of Chester L. Flowers: State of Wisconsin v.
Chester L. Flowers (L.C. #2005CI1)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Chester Flowers appeals from a circuit court order denying his WIS. STAT. § 980.09 (2009-10)¹ petition for discharge from his WIS. STAT. ch. 980 commitment after a hearing. Flowers' appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, WIS. STAT. § 980.095, *State ex rel. Seibert v. Macht*, 2001 WI 67, ¶20, 244 Wis. 2d 378, 627 N.W.2d 881, and *Anders v. California*, 386 U.S. 738 (1967). Flowers received a copy of the report and

¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders*, we summarily affirm the order as there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses whether (1) the circuit court erroneously denied Flowers' request to adjourn the hearing to secure in-person testimony from the examiner he retained in lieu of testimony by telephone, (2) whether there was sufficient evidence that Flowers remains a sexually violent person, and (3) whether trial counsel was ineffective. We agree with appellate counsel that these issues lack arguable merit for appeal.

We agree with appellate counsel that the circuit court properly exercised its discretion when it required Flowers' examiner to appear by telephone rather than adjourning the hearing until she could appear in person. See *Bagnowski v. Preway, Inc.*, 138 Wis. 2d 241, 249, 405 N.W.2d 746 (Ct. App. 1987). As grounds for the decision, the court noted the delay if the hearing had to be rescheduled. The court found that it could assess the examiner's opinions without having her testify in person. Any challenge to the circuit court's discretionary decision would lack arguable merit for appeal.

We also agree with appellate counsel that there was sufficient evidence that Flowers did not meet the standard for discharge from his WIS. STAT. ch. 980 commitment. A ch. 980 committed person may be discharged "from commitment once the statutorily-defined dangerousness 'abates.'" *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶14, 262 Wis. 2d 720, 665 N.W.2d 155. "A committed person may petition the committing court for discharge at any time." WIS. STAT. § 980.09. At the discharge hearing, the State "has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually

violent person.” Sec. 980.09(3). A sexually violent person is a person who has been convicted of a sexually violent offense and “who is dangerous to others because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.” WIS. STAT. § 980.01(7).

In reviewing the sufficiency of the evidence in a WIS. STAT. ch. 980 proceeding, we defer to the circuit court’s assessment of the credibility of witnesses and its evaluation of the evidence. *State v. Rachel*, 2010 WI App 60, ¶20, 324 Wis. 2d 465, 782 N.W.2d 443. We will affirm the circuit court’s decision only if the evidence, viewed most favorably to the State and the commitment, was so lacking in probative value that no reasonable trier of fact could have found Flowers to be a sexually violent person. *See State v. Kienitz*, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999).

In denying Flowers’ discharge petition, the circuit court placed greater weight on the credentials and testimony of Dr. Lakshmi Subramanian. Dr. Subramanian diagnosed paraphilia and anti-social personality disorder. He opined that Flowers remained sexually violent. The court placed less weight on the credentials and testimony of Flowers’ examiner, Hollida Wakefield. Wakefield opined that Flowers was less likely to engage in acts of sexual violence if discharged from his commitment. The court found that Flowers had not made progress in sex offender treatment and that he was more likely than not to commit sexually violent acts if discharged. The court was free to consider whether Flowers’ lack of progress in treatment contributed to the risk of re-offense. *Cf. State v. Pocan*, 2003 WI App 233, ¶12, 267 Wis. 2d 953, 671 N.W.2d 680 (progress in treatment one way to show petitioner is no longer sexually violent). The record supports the circuit court’s decision.

We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Flowers' ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing. *State v. Allen*, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal"). We agree with appellate counsel that the record does not support an ineffective assistance of counsel claim.

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, affirm the order denying Flowers' petition for discharge, and relieve Attorney Len Kachinsky of further representation of Flowers 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 Len Kachinsky is relieved of further representation of Chester Flowers in this matter.

Diane M. Fremgen
Clerk of Court of Appeals