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DISTRICT II

June 12, 2013

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

2012AP1683-NM

In re the commitment of James Broeders: State of Wisconsin v.
James Broeders (L.C. #2007CI1)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

James Broeders appeals from an order denying his WIS. STAT. § 980.09 (2011-12)¹ petition for discharge from his WIS. STAT. ch. 980 commitment as a sexually violent person. 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). Broeders received a copy of the report, was

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Broeders was originally committed as a sexually violent person following a jury trial in July 2007. In 2009, Broeders petitioned for discharge and the trial court denied the petition without a hearing. On appeal, pursuant to the State's motion for summary reversal, we reversed and remanded to the trial court for a discharge hearing. Trial counsel was appointed and in March 2012, a unanimous jury concluded that Broeders remained a sexually violent person. This no-merit appeal is taken from the trial court's order denying the discharge petition entered upon the jury's verdict, and the report addresses (1) whether there was sufficient evidence to support the jury's verdict and (2) whether trial counsel was ineffective.

First, we agree with appellate counsel's conclusion that there was sufficient evidence to support the jury's verdict that Broeders remained a sexually violent person. At a discharge hearing, the State must prove by clear and convincing evidence that the petitioner still meets the criteria for commitment as a sexually violent person. WIS. STAT. § 980.09(3). A sexually violent person is one who has been convicted of a sexually violent offense and "who is dangerous 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 fact finder'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 reverse only if the evidence, viewed most favorably to the State, was so lacking in probative value that no reasonable trier of fact could

have found Broeders to be a sexually violent person. *State v. Kienitz*, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999).

Counsel's no-merit report sets forth the evidence supporting the jury's verdict and our independent review confirms that, despite disagreement between the expert witnesses on Broeders' dangerousness, and even considering the testimony that Broeders made some progress in treatment, there was sufficient evidence for a reasonable juror to conclude that Broeders remains a sexually violent person. The parties stipulated that Broeders had a prior qualifying conviction. James Harasymiw testified that Broeders suffers from antisocial personality disorder and that, in Broeders's case, this mental disorder predisposes him to engage in acts of sexual violence. Harasymiw offered his expert opinion that based on the relevant tests and records, Broeders is "more likely than not" to reoffend. While Broeders' expert Hollida Wakefield disagreed with Harasymiw's conclusion, there was sufficient evidence for a reasonable juror to conclude that Broeders is dangerous due to a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. *See* WIS JI—CRIMINAL 2502; WIS. STAT. § 980.01(7). The jury permissibly weighed the testimony of the experts and found Harasymiw more credible. *See State v. Brown*, 2005 WI 29, ¶¶39-40, 279 Wis. 2d 102, 693 N.W.2d 715 (witness credibility and the weight of evidence are left to the fact finder).

Second, we agree with appellate counsel's conclusion that there is no evidence in the record to support a meritorious claim that trial counsel was ineffective. Though we normally decline to address claims of ineffective assistance of counsel if the issue was not raised in a postconviction motion, we may take a broader approach when reviewing a no-merit appeal. *See 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 may identify issues of arguable merit even if not preserved in the trial

court). The no-merit report discusses the parties' joint request that due to Wakefield's medical issues, she should be permitted to testify by telephone.² The trial court explained some of the benefits and disadvantages of telephonic testimony to Broeders and ascertained Broeders' agreement that Wakefield should testify by telephone. The jury was told that Wakefield could not appear in person due to a medical issue. The transcripts demonstrate that her testimony was clear and intelligible. Trial counsel's request that Wakefield be permitted to testify telephonically was a strategic decision accomplished with Broeders' consent. A reasoned strategic decision will not support a claim of ineffective assistance of counsel. *See State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

Finally, we note that the trial court performed a colloquy with Broeders and ensured that he understood he had a right to testify at the hearing. After the jury returned its verdict, the court polled the jurors individually and each confirmed that they answered "yes" to the question of whether Broeders is still a sexually violent person. Our review of the record discloses no other potential issues for appeal.³ Accordingly, this court accepts the no-merit report, affirms the order, and discharges appellate counsel of the obligation to represent Broeders further in this appeal.

Upon the foregoing reasons,

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

² In a civil case, telephonic testimony is specifically authorized under WIS. STAT. § 807.13(2).

³ Specifically, we have reviewed the jury selection, the handling of evidentiary objections at trial, the completeness and accuracy of the jury instructions, and closing arguments.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved from further representing James Broeders in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals