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June 20, 2013

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

2012AP1285-NM In re the commitment of: State of Wisconsin v. Anthony D. Christopher (L.C. #2009CI4)

Before Curley, P.J., Fine and Brennan, JJ.

Anthony D. Christopher appeals an order, entered following a bench trial, committing him to the Wisconsin Department of Health Services as a sexually violent person. Christopher's appellate counsel, Attorney Russell D. Bohach, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] At our request, appellate counsel also filed a supplemental no-merit report. Christopher has not filed a response.

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

Upon our review of the no-merit reports and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm the commitment order. *See* WIS. STAT. RULE 809.21(1).

Christopher entered a plea of no contest in September 2003 to one count of third-degree sexual assault. *See* WIS. STAT. § 940.225(3) (2003-04). Before Christopher's discharge from confinement in that matter, the State filed a petition on May 22, 2009, seeking to commit him under WIS. STAT. ch. 980. *See* WIS. STAT. § 980.02(1m). Christopher demanded a jury trial but later withdrew that request, and the matter proceeded to a bench trial on June 27, 2011. The circuit court found that Christopher was a sexually violent person and ordered him committed for control, care and treatment.

We first consider whether Christopher could mount an arguably meritorious claim that his jury waiver was invalid. We conclude that he could not pursue such a claim. The subject of a petition filed under WIS. STAT. ch. 980 may withdraw his or her request for a jury trial unless the subject's attorney or the petitioner does not consent to the withdrawal. *See* WIS. STAT. § 980.05(2). Further, § 980.05(2) "does not require the [circuit] court to engage in any particular procedure to make sure that, when the requesting party informs the court he or she wishes to withdraw the request [for a jury trial], it is truly the wish of the party." ***State v. Denman***, 2001 WI App 96, ¶12, 243 Wis. 2d 14, 626 N.W.2d 296. Here, no interested party objected when Christopher advised the circuit court that he wished to withdraw his request for a jury trial. The circuit court confirmed Christopher's wishes by questioning him on the record. Christopher told the circuit court that he did not want a jury trial, that he had not been threatened or promised anything to induce his request to give up a jury trial, and that he wanted a trial to the court. Nothing more was required to effect a jury waiver. *See* ***id.***, ¶13.

We next consider whether Christopher could raise an arguably meritorious challenge to the sufficiency of the evidence that he was a sexually violent person. Before the circuit court could find that Christopher was a sexually violent person, the State was required to prove beyond a reasonable doubt that Christopher: (1) was previously convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not to engage in at least one future act of sexual violence because of the mental disorder. *See* WIS. STAT. §§ 980.01(1m), 980.01(7), 980.05(3)(a); *see also* WIS JI—CRIMINAL 2502. When we review a challenge to the sufficiency of the evidence that a person is sexually violent, we will uphold the finding

> unless the evidence, viewed most favorably to the [S]tate and the commitment, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the defendant to be a sexually violent person beyond a reasonable doubt.

State v. Kienitz, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999) (citations and two sets of brackets omitted, one set of brackets added). We may not disturb the verdict "'[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find that the defendant is a sexually violent person.'" ***Id.*** at 434-35 (brackets and citation omitted). Further, "[t]he trier of fact determines issues of credibility, weighs the evidence and resolves conflicts in [the] testimony." ***Id.*** at 435.

We agree with appellate counsel that a challenge to the sufficiency of the evidence would lack arguable merit. Christopher stipulated that he was previously convicted of a sexually violent offense. *See* WIS. STAT. § 980.01(6)(a) ("sexually violent offense" includes third-degree sexual assault as defined in WIS. STAT. § 940.225(3)). The State then presented the testimony of two psychologists, Dr. Michael Woody and Dr. William Merrick.

The record reflects that Woody is employed by the Department of Corrections to evaluate sex offenders completing their prison sentences to determine if the offenders meet the criteria for civil commitment under WIS. STAT. ch. 980. He testified that he evaluated Christopher by interviewing him, reviewing numerous legal, institutional, and psychiatric records, and conducting a risk assessment. Woody told the circuit court that Christopher suffers from paraphilia not otherwise specified and anti-social personality disorder. Woody explained that paraphilia is a disorder that "involves recurrent, intense sexually arousing fantasies, urges or behaviors, involving non-human objects or the suffering and humiliation of one's self or one's partner or children, or other nonconsenting persons." He told the circuit court that "the hallmark criteria" for anti-social personality disorder is "violation of the rights of others."

Woody described Christopher's history of inappropriate sexual behavior, which began when Christopher was a teenager and had penis-to-anus contact with his four-year-old sister. Woody then discussed Christopher's sexually assaultive and criminal behavior as an adult, including an armed robbery during which Christopher put his hand inside the front of the pants worn by the female victim, and an incident in which a ten-year-old girl alleged that Christopher, while a houseguest in her parents' home, awakened her one night by rubbing her vagina. Woody went on to explain that Christopher was convicted of third-degree sexual assault as a result of an incident in which he followed and grabbed a woman on the street, rubbed her breasts and vagina through her clothing, and put his finger into her vagina.

Woody also noted that Christopher received 164 conduct reports during his years in prison, including twenty-four major conduct reports. Woody opined that Christopher's rule violations demonstrated "continued difficulty managing his behavior, even in a controlled environment."

Woody told the circuit court that he used a variety of actuarial tools and determined Christopher's psychopathy score to assist in assessing Christopher's risk of reoffending. Woody explained that individuals with psychopathy scores and behavioral histories similar to Christopher's "have a higher rate of committing new offenses," and Woody described a study that found a sixty percent recidivism rate among such individuals. Woody concluded that, to a reasonable degree of psychological certainty, Christopher had mental disorders that made him more likely than not to engage in future acts of sexual violence.

Merrick testified that he is a psychologist employed by the State of Wisconsin and that his duties include conducting evaluations, required by WIS. STAT. § 980.05(1), after a circuit court finds probable cause to believe that a person is sexually violent. Merrick explained that Christopher was uncooperative with his evaluation and would not consent to an interview. Merrick testified that he nonetheless could conduct an evaluation based on the available records and was able to form professional opinions about Christopher to a reasonable degree of psychological certainty.

According to Merrick, Christopher meets all of the criteria for anti-social personality disorder, including impulsivity, aggressiveness, irresponsibility, lack of remorse, and a willingness to violate the rights of others. As reflected in Merrick's report, these traits are "central to [Christopher's] history of offenses" and continue to predispose him to engage in acts of sexual violence. Merrick opined that Christopher presented a variety of risks to reoffend, including continued willingness to disregard institutional rules, ongoing difficulty controlling his behavior, and refusal to complete sex offender treatment. Merrick concluded to a reasonable degree of psychological certainty that Christopher suffered from a mental disorder that rendered him more likely than not to engage in future acts of sexual violence.

Although defense counsel attempted to discredit the conclusions of the State's experts, the circuit court as the finder of fact is the ultimate arbiter of the credibility of the witnesses and the weight of their testimony. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). The circuit court was free to accept the professional opinions of Woody and Merrick and find that Christopher was a sexually violent person. An appellate challenge to the circuit court's finding would lack arguable merit.

Christopher called no witnesses at trial, and we have therefore considered whether the record would support a claim that he received ineffective assistance of counsel. *See* ***State v. Lombard***, 2004 WI 95, ¶¶46-51, 273 Wis. 2d 538, 684 N.W.2d 103 (ineffective assistance of counsel claim available to a litigant contesting commitment as a sexually violent person). To prevail on a claim of ineffective assistance of counsel, Christopher must show that trial counsel's performance was deficient and the deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. Counsel's strategic decisions, however, are virtually unassailable. *See* ***State v. Westmoreland***, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919.

The record reflects that trial counsel appropriately obtained professional evaluations from two psychological experts, but counsel advised the circuit court that the defense elected not to call either of those experts to testify. Nothing in the record demonstrates that defense counsel's strategic decision was prejudicially deficient. Further, appellate counsel confirmed in his supplemental no-merit report that he examined the defense experts' reports and that valid strategic reasons supported trial counsel's decision to forego presenting the testimony of the defense experts as witnesses at trial. *See* WIS. STAT. RULE 809.32(1)(f) (supplemental no-merit

report may include information outside the record). We are satisfied that no basis exists in the record for challenging trial counsel's effectiveness.

Last, we have considered whether the twenty-five month delay between the date that the State filed the petition and the date of trial violated Christopher's right to a speedy trial. The Sixth Amendment to the United States Constitution and article I, § 7 of the Wisconsin Constitution guarantee the right to a speedy trial in criminal prosecutions, and Wisconsin courts assess whether a criminal defendant suffered a violation of the right to a speedy trial by conducting the four-factor balancing test set forth in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). *See* ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973) (adopting the ***Barker*** test). Proceedings under WIS. STAT. ch. 980, however, are civil, not criminal. *See* ***State v. Carpenter***, 197 Wis. 2d 252, 258-59, 541 N.W.2d 105 (1995). Wisconsin law has not definitively established either that a person facing commitment under WIS. STAT. ch. 980 has the right to a speedy trial or how to assess whether the person suffered a violation of such a right. Case law suggests, however, that a right exists to a speedy resolution of proceedings under ch. 980. *Cf.* ***State v. Beyer***, 2006 WI 2, ¶¶74, 77-78, 287 Wis. 2d 1, 707 N.W.2d 509 (Roggensack, J., concurring) (indicating that delay in hearing claims by persons seeking release from a ch. 980 commitment is analyzed using the ***Barker*** criteria). Assuming that Christopher had the right to a speedy trial, we conclude that he could not make an arguably meritorious claim that he suffered a violation of that right.

The four-factor ***Barker*** test requires a court to balance: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion or failure to assert the right to a speedy trial; and (4) the prejudice to the defendant arising from the delay. *See* ***id.***, 407 U.S. at 530; *see*

also ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). Our review is *de novo*. *See* ***Borhegyi***, 222 Wis. 2d at 508.

The first ***Barker*** factor is a "triggering mechanism." ***Borhegyi***, 222 Wis. 2d at 510. Only if the length of the delay is presumptively prejudicial must a circuit court consider the other ***Barker*** factors. ***Borhegyi***, 222 Wis. 2d at 510. Generally, a delay that approaches one year is presumptively prejudicial. ***Id.*** Here, the delay between May 22, 2009, when the State filed the petition, and the start of trial on June 27, 2011, spans 766 days. Although this period triggers consideration of the speedy trial right, the factors here do not satisfy ***Barker***.

We consider only delays attributable to the State when determining whether a defendant suffered a denial of the right to a speedy trial. *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). Here, Christopher, not the State, was responsible for the bulk of the delay.

The State filed the petition on May 22, 2009, and the probable cause hearing required by WIS. STAT. § 980.04(2), convened on June 3, 2009. This twelve-day period is part of the normal progress of the case that we do not ordinarily count as a "delay." *See* ***Scarbrough v. State***, 76 Wis. 2d 87, 100-101, 250 N.W.2d 354 (1977). Defense counsel was not prepared to proceed on June 3, 2009, so the circuit court continued the matter to July 21, 2009, a delay of forty-eight days. This period, while attributable to Christopher, is also discounted as primarily part of the orderly administration of justice. *See* ***id.***

Immediately after the circuit court found probable cause to proceed, Christopher moved for the appointment of a psychologist to conduct an evaluation on his behalf, pursuant to WIS. STAT. § 980.031. The circuit court granted the motion and, also at Christopher's request, set a status date to monitor the progress of Christopher's expert in completing the evaluation. The

case was thereafter adjourned off the record on several occasions, but electronic docket entries reflect that the court-appointed defense expert did not complete his work until April 7, 2010.

At a status hearing in May 2010, Christopher stated that his court-appointed psychologist would not submit a report, but Christopher indicated that he had involved a second doctor in the case. Christopher also agreed to a trial date of September 30, 2010. At an August 2010 hearing, the parties advised the court that Christopher continued to await a necessary report from his new expert but anticipated receiving the report before the September trial date. Thus, the period from the probable cause determination on July 21, 2009, through September 30, 2010, a delay of 436 days, is attributable to Christopher and his efforts to secure a favorable report from an expert witness in time for trial.

The circuit court advised the parties that it was unavailable on September 30, 2010, and adjourned the trial to October 28, 2010. This twenty-eight-day delay is charged to the State, which is responsible for delays caused by lack of judicial manpower. *See* ***Hadley v. State***, 66 Wis. 2d 350, 363, 225 N.W.2d 461 (1975). The prosecutor then moved for a continuance because a State's expert was unavailable on October 28, 2010, and the circuit court rescheduled the matter for February 3, 2011, a delay of ninety-eight days. Delay caused by matters intrinsic to the case, including witness unavailability, is not counted. *See* ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324.

Although the record fails to include the reason that the circuit court adjourned the trial date of February 3, 2011, appellate counsel explains in his supplemental no-merit report that he investigated and determined that Christopher's trial counsel was unable to reach the courthouse due to a blizzard the previous day. *See* WIS. STAT. RULE 809.32(1)(f). The matter was therefore

rescheduled for trial on June 27, 2011. The delay of 144 days between February 3, 2011, and June 27, 2011, is thus attributable to Christopher.

In sum, of the 766 days between the date that the petition was filed and the date that trial began, 158 days are discounted and twenty-eight days are deemed the responsibility of the State. Christopher is responsible for the remaining 580 days of delay. Because the State is responsible for only a nominal portion of the delay, Christopher could not pursue an arguably meritorious claim that he was denied a speedy trial. *See* ***Norwood***, 74 Wis. 2d at 357-58.

Nonetheless, for the sake of providing a complete review in this no-merit proceeding, we briefly consider the remaining ***Barker*** factors. The next such factor is whether Christopher demanded a speedy trial. He did not. Instead, at the conclusion of the probable cause hearing, he expressly waived his right to a trial within ninety days. *See* WIS. STAT. § 980.05(1). This factor weighs heavily against a conclusion that Christopher was denied a speedy trial. *See* ***Barker***, 407 U.S. at 532.

The final ***Barker*** factor is whether Christopher suffered any prejudice from the pretrial delay. The most significant consideration in assessing prejudice is the possibility of impairment to the defense. *See* ***State v. Leighton***, 2000 WI App 156, ¶¶22-23, 237 Wis. 2d 709, 616 N.W.2d 126. Here, the record makes plain that delay did not prejudice Christopher's defense. He used a substantial portion of the delay to consult experts, an effort that potentially benefited him. He never filed a witness list, and nothing suggests that the delay cost him the chance to present witnesses who died, disappeared, or forgot information necessary for his case. *See* ***id.***, ¶23. He was fully able to cross-examine the State's witnesses when the trial went forward. The record simply contains nothing to suggest that a speedier resolution would have altered the circuit

court's conclusion that Christopher is a sexually violent person. Further pursuit of this issue would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Russell J. Bohach is relieved of any further representation of Anthony D. Christopher on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals