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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV/III

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To:

Hon. Amy Smith
Circuit Court Judge
Br. 4, Rm. 8107
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Russell D. Bohach
The Gettelman Mansion
2929 W. Highland Blvd.
Milwaukee, WI 53208

Ismael R. Ozanne
District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Rebecca R. Weise
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kevin R. Lindauer 304178
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:

2012AP689-CRNM State v. Kevin R. Lindauer (L. C. #2007CI5)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Kevin Lindauer has filed a no-merit report concluding there is no arguable basis for challenging an order dismissing Lindauer's petition for discharge from his WIS. STAT.

ch. 980¹ commitment. Lindauer was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by WIS. STAT. RULE 809.32, this court concludes there is no arguable merit to any issue that could be raised on appeal.

Lindauer was convicted of third-degree sexual assault for enticing a cognitively disabled adult male into his room at a group home and placing his mouth on the victim's penis without the victim's consent. Lindauer had previously been convicted of fourth-degree sexual assault, two counts of lewd and lascivious behavior and one count of disorderly conduct—the disorderly conduct conviction arising from reports that Lindauer had approached two different men in a bathroom asking to “jack them off.” When police responded, Lindauer was discovered masturbating in a bathroom stall. Within ninety days of his mandatory release date for the third-degree sexual assault conviction, the State petitioned for Lindauer's commitment under WIS. STAT. ch. 980. In October 2009, Lindauer was committed as a sexually violent person under ch. 980.

In June 2011, Lindauer filed a petition for discharge pursuant to WIS. STAT. § 980.09. The State moved to dismiss the petition, claiming that the supporting medical report depended on facts and professional knowledge of research that was previously considered by experts testifying at the commitment trial. The circuit court dismissed the petition without a discharge hearing.

There is no arguable basis for challenging the order dismissing Lindauer's petition for discharge. Before granting a discharge hearing, the circuit court must go through a two-step

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

process “aimed at weeding out meritless and unsupported petitions, while still protecting a petitioner’s access to a discharge hearing.” *State v. Arends*, 2010 WI 46, ¶22, 325 Wis. 2d 1, 784 N.W.2d 513. While the circuit court must consider all of the evidence in the record when determining whether a discharge hearing is warranted, the petitioner must also produce some new evidence, not previously considered by a trier of fact, which demonstrates that he or she does not meet the criteria for commitment under WIS. STAT. ch. 980. *In re Commitment of Schulpius*, 2012 WI App 134, ¶4, 345 Wis. 2d 351, 825 N.W.2d 311.

Here, Lindauer’s discharge petition, relying upon a report by licensed psychologist Diane Lytton, outlined four main grounds for discharge: (1) Lindauer does not meet the criteria of a sexually violent person based on his mental condition—personality change due to a traumatic brain injury, mixed type—and is a candidate for long-term protective placement, but not as a sexually violent person; (2) actuarial instruments are unreliable in this case because the instrument samples do not include a significant number of offenders with a severe brain injury; (3) Lindauer is not “more likely than not” to commit a future act of sexual violence when assessed under the Wollert and Waggoner study, which employs the broadest definition of a sex offender; and (4) the “hands-off” sexual behavior Lindauer has exhibited since his original commitment bolsters Lytton’s opinion that Lindauer’s mental condition may cause him to act out in a sexual way, but “does not and will not predispose him to engage in acts of sexual violence.”

The circuit court reviewed Lytton’s report and testimony from Lindauer’s original commitment with the report submitted in support of the underlying discharge petition. The court found that Lindauer’s first three arguments for discharge did not present new evidence because they were litigated in the original commitment trial. With respect to the “hands-off” sexual behavior Lindauer had exhibited since his original commitment, the court noted that while this

behavior occurred post-commitment, Lindauer had exhibited similar behavior that was considered and incorporated into Lytton's opinion at the original commitment trial. The court, therefore, properly concluded that the continuation of "hands-off" sexual behavior did not constitute new evidence that a reasonable trier of fact could use to conclude Lindauer is not a sexually violent person. Because Lindauer failed to set forth new evidence demonstrating that he does not meet the criteria for commitment as a sexually violent person, there is no arguable merit to challenge the dismissal of Lindauer's discharge petition.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Russell D. Bohach is relieved of further representing Lindauer in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals