COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP643 **Cir. Ct. No. 2001CI1**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE COMMITMENT OF ERIC JAMES HENDRICKSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC JAMES HENDRICKSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Eric Hendrickson, pro se, appeals an order denying his post-commitment motion. Hendrickson argues the trial court erred by refusing

to apply WIS. STAT. § 907.02(1),[1] which adopted the ***Daubert***[2] reliability standard for expert testimony, at the October 2012 trial on Hendrickson's petition for discharge from WIS. STAT. ch. 980 commitment.[3] Hendrickson also claims trial counsel was ineffective by failing to challenge expert testimony regarding Hendrickson's penile plethysmograph ("PPG") test results. We reject these arguments and affirm the order.

BACKGROUND

¶2 In 2002, Hendrickson was committed as a sexually violent person under WIS. STAT. ch. 980. The Legislature subsequently amended Wisconsin's expert witness statute to adopt the ***Daubert*** reliability standard. The statute applies to actions and special proceedings commenced on or after February 1, 2011. 2011 Wis. Act 2, § 45(5). In June 2011, Hendrickson petitioned for discharge and, in August 2012, trial counsel moved to exclude the State's expert witness testimony under the heightened evidentiary standards of the ***Daubert*** statute. The trial court denied the motion. A jury found that Hendrickson was still a sexually violent person, and he remained committed under ch. 980. Hendrickson moved for post-commitment relief, seeking a new discharge trial on grounds he was denied the effective assistance of trial counsel. Hendrickson's motion was denied without a hearing and this appeal follows.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

[3] The State properly notes that Hendrickson framed this argument both here and in the trial court, as an ineffective assistance of counsel claim. Counsel, however, filed a ***Daubert*** motion that was considered and rejected by the circuit court on its merits, thus preserving the argument. Therefore, we need not address this claim under the rubric of ineffective assistance.

DISCUSSION

¶3 Hendrickson contends the trial court erred by refusing to apply the ***Daubert*** evidentiary standard to the State's expert witnesses at his October 2012 discharge petition trial. Hendrickson argues that because his initial commitment order and any subsequent order denying discharge petitions were final orders for the purpose of appeal under WIS. STAT. § 808.03(1), his June 2011 discharge petition commenced a "new action" subject to the ***Daubert*** evidentiary standard. Our supreme court has rejected this argument, concluding that when an initial WIS. STAT. ch. 980 commitment predates applicability of the ***Daubert*** evidentiary standard, a subsequent discharge petition does not commence an action or special proceeding. ***State v. Alger***, 2015 WI 3, ¶26, 360 Wis. 2d 193, 858 N.W.2d 346. Rather, the discharge petition is "part of the underlying Chapter 980 commitment" that occurred before the ***Daubert*** standard's initial applicability. ***Id.*** Consistent with ***Alger***, we conclude the trial court properly refused to apply the ***Daubert*** evidentiary standard at Hendrickson's discharge petition trial.

¶4 Hendrickson also claims he was denied the effective assistance of trial counsel. To succeed on his ineffective assistance of counsel claim, Hendrickson must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶5 In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689.

¶6 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Hendrickson fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶7 In his post-commitment motion, Hendrickson argued counsel was ineffective by failing to challenge psychologist Sheila Fields' reliance on the PPG test results as a basis for her opinion that Hendrickson had paraphilia, not otherwise specified, nonconsent. Hendrickson contends that reliance on the PPG was improper because its reliability and validity are not well established; he was not given the second phase of the test, known as the suppression PPG; and Fields did not administer or interpret the test herself but, rather, relied on David Thornton's interpretation of "the uncompleted PPG results." Hendrickson thus also contends counsel was ineffective by failing to object to Fields' testimony

regarding what Thornton told her about the test results.[4] We conclude that Hendrickson has failed to establish either deficient performance or prejudice on the part of trial counsel.

¶8 Trial counsel objected to any evidence of PPG test results, arguing it was "scientifically unreliable and shouldn't be the basis for any expert testimony or conclusion." Counsel also objected to Fields' testimony that the PPG results formed the basis for diagnosing Hendrickson with paraphilia, not otherwise specified, nonconsent. Counsel reiterated his belief that the PPG was not a scientifically accepted test and further argued that even if the test is scientifically acceptable, Fields was using it improperly. The circuit court overruled counsel's objections. Because counsel objected to evidence and testimony of the PPG results, Hendrickson has failed to establish that counsel was deficient in this regard.

¶9 To the extent Hendrickson contends trial counsel was deficient by failing to raise a hearsay objection to Fields' testimony regarding what Thornton told her about the PPG test results, an exception to the hearsay rule exists for statements made for the purposes of medical diagnosis or treatment. *See* WIS. STAT. § 908.03(4). Therefore, even if counsel had objected on hearsay grounds, the testimony would have been admitted under the exception for medical diagnosis. "[C]ounsel's failure to bring a meritless motion does not constitute

[4] To the extent Hendrickson raises allegations of ineffective assistance of counsel that were not raised in his postconviction motion, we will not address them. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889 (2007) ("We generally do not review an issue raised for the first time on appeal.").

deficient performance." ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

¶10 Although we need not address prejudice where deficient performance is not established, we nevertheless conclude Hendrickson has also failed to establish prejudice. In his motion, Hendrickson merely states: "All-in-all … if Hendrickson's trial court counsel would have brought these well settled legal facts precedences[s] to the attention of the court, then 'there is reasonable probability that there is a probability sufficient that there would have been a different outcome.'" This conclusory allegation is not sufficient to show prejudice, as a defendant must explain why there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

¶11 To the extent Hendrickson intimates the trial court erred by denying his post-commitment motion without a hearing, Hendrickson was not automatically entitled to an evidentiary hearing on his ineffective assistance claim. If the factual allegations in the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the trial court may, in its discretion, deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Here, the record shows that Hendrickson was not entitled to relief; therefore, the trial court properly denied the motion without a hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.