

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1172-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF BEN F. OLDAKOWSKI:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

BEN F. OLDAKOWSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Counsel for Ben Oldakowski has filed a no merit report pursuant to RULE 809.23, STATS. Oldakowski has not responded to the report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to

any issue that could be raised on appeal. We therefore affirm the trial court's judgment and order.

In 1971, Oldakowski committed a series of sexual assaults. In March 1972, he was convicted of first-degree sexual assault, contrary to § 944.01, STATS., 1969. He was committed under § 975.06, STATS., 1969, and placed at the Mendota Mental Health Institute. He was paroled in 1979, and revoked a short time later after he committed another sexual assault. He was again released on parole in September 1985, and revoked nine months later after committing the offense of indecent exposure. In February 1991, he was again paroled. Within three months he was convicted of lewd and lascivious behavior, and again revoked and placed at the Mendota Mental Health Institute.

Based on the above-recited history, and in anticipation of Oldakowski's release, the State filed a ch. 980, STATS., petition against Oldakowski in July 1994. The petition alleged that Oldakowski suffered from mental disorders that predisposed him to engage in acts of sexual violence. The petition further alleged that in addition to Oldakowski's criminal offenses, he had recently engaged in inappropriate sexual contact while at the Mendota Mental Health Institute, which included offering money to women to expose themselves to him and making obscene phone calls.

After the trial court found probable cause to proceed on the petition, the matter was delayed by Oldakowski's challenge to the constitutionality of ch. 980, STATS. After the supreme court determined that ch. 980 was constitutional, Oldakowski waived his right to a jury trial, and a bench trial occurred in August 1996. After hearing the evidence, the trial court determined that Oldakowski met the statutory criteria for commitment as a sexual predator. After a further

dispositional hearing, the court ordered Oldakowski committed to a secure mental health facility until further order of the court.

To obtain commitment of a sexually violent person, the State must prove the following: that the person has been convicted of a sexually violent offense; that the person is within ninety days of discharge or release from a sentence imposed for a sexually violent offense; that the person has a mental disorder; and that the person is dangerous to others, because that mental disorder creates a substantial probability that he or she will engage in acts of sexual violence. *See* § 980.02(2), STATS. The State's burden at trial is to prove those criteria beyond a reasonable doubt. *See* § 980.05(3), STATS. If the subject of the petition waives the right to a jury, there may be a bench trial. *See* § 980.05(2), STATS. Upon finding that the subject of the petition is a sexually violent person, the court shall commit the person to the custody of the Department of Health and Family Services, and shall specify in the order for commitment whether the person shall be kept in a secure mental health facility, some other facility, or under supervised release. *See* § 980.06, STATS.

The trial court heard sufficient evidence to find, beyond reasonable doubt, that Oldakowski was a sexually violent person. The State produced detailed reports and oral testimony from two psychologist experts, concerning their examination of Oldakowski and the resulting opinions. Both unequivocally found, to a degree of professional certainty, that Oldakowski suffered from mental disorders that made it substantially probable that he would engage in sexually violent acts if he were not committed. Oldakowski presented no rebuttal witnesses. Although counsel vigorously cross-examined both psychologists on all aspects of their reports and testimony, the trial court chose to believe them and to accord their opinions great weight. Any further review of this issue would be

frivolous because the trial court's determinations as to weight and credibility are not subject to review. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979).

Review of the trial court's decision committing Oldakowski to a secured mental health facility also would be frivolous. The only evidence presented at the disposition hearing was the State's dispositional report and testimony from its author, one of the psychologists testifying at the commitment hearing. In the witness's opinion, Oldakowski's history of sexual misbehavior, and his inadequate responses to treatment over twenty-five years, left no alternative but commitment to a secured facility. The criteria for a supervised release or placement in a nonsecured facility were examined, with the conclusion that Oldakowski satisfied none of them. Again, the court found the report and testimony persuasive and accorded it great weight, despite counsel's best efforts on cross-examination. The court's determinations on credibility and weight are not subject to review. *See id.*

Oldakowski received effective assistance from trial counsel. At each stage of the proceeding, trial counsel vigorously defended Oldakowski's interests, including the exhaustion of all appellate review on his constitutional challenges. Once those issues were resolved against Oldakowski, counsel timely raised his other available defenses. Additionally, the record shows no errors of strategy or performance by trial counsel that contributed to the outcome. As appellate counsel correctly notes, the end result became virtually inevitable, given the evidence against Oldakowski, once he lost his constitutional challenges.

Our review of the record discloses no other potential issues for appeal. We affirm the judgment of conviction and relieve Oldakowski's counsel of any further representation of him in this matter.

By the Court.—Judgment and order affirmed.

