COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3150

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

IN RE THE COMMITMENT OF RANDY J. SMITH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

RANDY J. SMITH,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randy Smith appeals orders committing him as a sexually violent person under WIS. STAT. ch. 980 and denying his motion to withdraw the stipulation upon which the commitment was ordered. He argues that

he was entitled to an evidentiary hearing on the motion to withdraw the stipulation. Because we conclude that the record conclusively establishes that Smith is not entitled to relief, we affirm the order denying the motion to withdraw the stipulation and the underlying commitment order.

¶2 After lunch on the second day of a jury trial, Smith informed his counsel that he wanted to admit to the allegations in the petition. The stipulation stated that Smith had completed eleven grades in school and could read, write and understand the English language. It stated that Smith had no difficulty understanding his attorney, the judge or the prosecutor and had no questions about what had happened up to that point. In the stipulation, Smith admitted that the allegations in the petition were true, that he was a sexually violent person at that time and that he was in need of institutional care. It stated that Smith was aware that he would be committed to the Department of Health and Family Services until such time as he was no longer a sexually violent person and that he would be placed in a secure institutional setting. The stipulation itemized the constitutional and statutory rights Smith waived by entering the stipulation.

¶3 The court read the entire stipulation aloud and ascertained that it contained Smith's basic understanding of the agreement. The court inquired whether there was any reason to believe Smith was not competent to enter the stipulation and Smith answered "No, your Honor." Smith's attorney stated that he was satisfied that Smith knowingly, intelligently and freely signed the document and that he was mentally competent. The court accepted the stipulation and entered the commitment order.

¶4 Smith filed a series of post-adjudication motions and affidavits seeking to withdraw the stipulation. He contends that the court did not conduct an

adequate colloquy, that Smith did not understand his constitutional rights, the meaning of "sexually violent person," the circumstances under which he would be entitled to transfer to a less restrictive environment or his appeal rights. He states that he would have continued with the trial had he known all of the implications of entering the stipulation.

¶5 He also filed a supporting affidavit from Dr. Ralph Underwager, a psychologist, who stated that Smith was mentally retarded and would be unable to fully understand the stipulation or make a voluntary, knowing and intelligent evaluation because of the difficulty of the language used in the stipulation. Underwager contended that the "mentally retarded are vulnerable to answer yes to any question asked by an authority figure in order to avoid appearing ignorant and retarded."[1]

¶6 To be entitled to an evidentiary hearing, Smith must allege facts that, if true, would entitle him to relief. Mere self-serving conclusions do not suffice, and the affidavits must allege sufficient facts to allow the trial court to meaningfully assess Smith's claim, including the claim that he would not have entered into the agreement but for the alleged misunderstandings or errors. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). The circuit court may deny the motion without a hearing if the record conclusively demonstrates that Smith is not entitled to relief. *See* ***id.*** at 309-10.

[1] Underwager did not base his opinion on his personal examination of Smith. He administered tests to Smith and found him to be of low average intelligence and not mentally retarded. Based on a subsequent test conducted by others that Underwager found more credible than his own, he submitted an affidavit describing general characteristics of retarded individuals. He did not identify any particular concept or word that Smith would have been incapable of comprehending.

¶7 The trial court conducted an adequate colloquy to establish that Smith knowingly, voluntarily and intelligently entered the stipulation. Smith initiated the discussion of stipulating to the allegations in the petition. He told the trial court that he understood the allegations, the consequences of the stipulation and the rights he waived by entering the stipulation. The best way for the circuit court to determine whether Smith understood what he was doing was to ask him. *See* ***State v. Salentine***, 206 Wis. 2d 419, 426, 557 N.W.2d 439 (Ct. App. 1996). Merely having a low intelligence level does not render Smith unable to knowingly and intelligently enter the stipulation. ***Id.*** at 431.

¶8 Dr. Underwager's report is not sufficient to overcome Smith's admissions. It is not necessary for Smith to "fully understand" every item of the stipulation. *See* ***State v. Barney***, 213 Wis. 2d 344, 356-57, 570 N.W.2d 731 (Ct. App. 1979). To "fully understand" terms such as "reasonable doubt," "substantial probability" or "sexually violent person" would be a formidable task for highly intelligent individuals with legal training. Underwager's opinion that a retarded person would answer yes to any question is belied by Smith's conduct in this case. Smith repeatedly expressed disenchantment with his attorneys and filed *pro se* motions despite being represented by counsel. The generalization that some retarded persons go along with suggestions made by authority figures does not accurately describe Smith's character.

¶9 Underwager's report also failed to consider the fact that the stipulation was orally explained to Smith by his attorney and Smith told the circuit court he had no questions about the stipulation. The report also ignored the fact that Smith was represented by competent counsel who was well aware of Smith's intellectual limitations. Trial counsel assured the court that he had gone over the

stipulation with Smith and believed that Smith signed the stipulation knowingly, voluntarily and intelligently, and that he was mentally competent to do so.

¶10 Smith's and Underwager's affidavits also ignore Smith's extensive criminal history which included numerous pleas in prior criminal cases with no indication that Smith did not adequately understand concepts like proof beyond a reasonable doubt. In his previous contacts with law enforcement, he was found to have knowingly, understandingly and intelligently waived his ***Miranda*** [2] rights.

¶11 Most significantly, the trial court personally observed Smith and conversed with him at length about procedures, Smith's rights and his understanding of those rights. The court noted that Smith always appeared to be clear in his understanding based on his verbal responses, his body language and his attentiveness to the proceedings. He appeared to be intelligent enough to understand written documents, witnesses' testimony and the facts and circumstances of the case against him. At no time did he appear confused, distant or distracted. Under these circumstances, Smith's self-serving and conclusory affidavits and Underwager's generalizations about the characteristics and abilities of retarded persons do not raise sufficient evidentiary issues to entitle Smith to a hearing on his motion to withdraw the stipulation.

¶12 Finally, Smith contends that he did not understand the effect the stipulation would have on his right to appeal. The trial court informed Smith that his stipulation meant he would give up any future challenge to his commitment, but did not specifically mention the right to appeal some evidentiary rulings that preceded the stipulation. Smith does not aver that he was misled by the prosecutor

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966)

in this regard.[3] His own misunderstanding of collateral ramifications does not render the stipulation constitutionally invalid. *See* ***State v. Rodriguez***, 221 Wis. 2d 487, 495-99, 585 N.W.2d 701 (Ct. App. 1998).

By the Court.—Orders affirmed.

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

[3] The appeal rights and obligations listed in the stipulation incorrectly assumed this case came under WIS. STAT. § 809.30. The stipulation gave a shorter appeal time for commencing this appeal than is actually allowed. Smith was not prejudiced by this error.