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August 13, 2013

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

2012AP370-NM State of Wisconsin v. Miles Davis Childs (L. C. #2006CI14)

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

Counsel for Miles Davis Childs has filed a no-merit report and supplemental no-merit report concluding there is no arguable basis for appealing a judgment committing Childs as a sexually violent person under WIS. STAT. ch. 980.[1] Childs was informed of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

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

that could be raised on appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

In January 1998, Childs was convicted of attempted third-degree sexual assault and aggravated battery of an elderly person. Within ninety days of his mandatory release date, the State petitioned for Childs' commitment under WIS. STAT. ch. 980. Childs waived his jury trial right. After a trial, the court found Childs was a sexually violent person and committed him under ch. 980.

According to the no-merit report, Childs questions whether he was properly referred by an agency with jurisdiction and whether the assistant district attorney had authority to file the petition. The no-merit report acknowledges that pursuant to WIS. STAT. § 980.02(1), a request from an agency with jurisdiction and a subsequent decision by the Department of Justice not to file are prerequisites to a district attorney's authority to file a ch. 980 petition. ***State v. Byers***, 2003 WI 86, 263 Wis. 2d 113, ¶43, 665 N.W.2d 729. The no-merit report indicates that nothing in the record explicitly established these prerequisites were met, yet claimed "it is a reasonable inference that the Department of Corrections referred Childs' case to [the Department of Justice] which in turn declined to file a petition and referred it to the Milwaukee County District Attorney office."

Based on the record, we could not say there was no arguable merit to a claim that the prerequisites were not met and ordered additional proceedings with respect to this possible issue. Counsel filed a supplemental no-merit report, with attached documentation establishing that the Department of Corrections referred Childs to the Department of Justice for commitment under WIS. STAT. ch. 980, and the Department determined it would not file a petition. Because these

prerequisites were met, any claim that the assistant district attorney lacked authority to file the petition lacks arguable merit.

There is likewise no arguable merit to a claim that Childs' jury waiver was invalid. 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 Childs advised the circuit court that he wished to withdraw his request for a jury trial. After the circuit court reiterated Childs' right to a jury trial, Childs confirmed that he wanted a trial to the court. Any challenge to the validity of Childs' jury waiver would lack arguable merit.

The no-merit report also addresses the sufficiency of the evidence to support Childs' commitment. The State was required to prove beyond a reasonable doubt that Childs: (1) had been convicted of a sexually violent offense; (2) suffers from a mental disorder; and (3) is more likely than not, because of that mental disorder, to engage in at least one future act of sexual violence. *See* WIS. STAT. § 980.01(7); *see also* WIS JI—CRIMINAL 2502.

Appellate review of the sufficiency of the evidence to support a WIS. STAT. ch. 980 commitment order is the same as that applicable to support a judgment of conviction. *See* ***State v. Curiel***, 227 Wis. 2d 389, 418-19, 597 N.W.2d 697 (1999). An appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to

the State and the commitment, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found that the respondent was a sexually violent person beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the respondent was a sexually violent person, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found the respondent was a sexually violent person based on the evidence before it. ***Id.***

At trial, a probation agent testified regarding Childs' lengthy criminal record, including a 1980 conviction for second-degree sexual assault in which Childs forced penis to vagina intercourse on a woman in a public bathroom because "voices" compelled it. In 1997, Childs was convicted of attempted third-degree sexual assault and aggravated battery of a sixty-seven-year-old woman. In that case, Childs grabbed the woman at a bookstore, placed his hands over her mouth and threw her on the floor. Childs got on top of the victim and was grabbing her, but the victim successfully fought him off and Childs left the store. Police reports indicated that Childs admitted attempting to restrain the woman so he could put his penis in her vagina, and voices told him to have sex with the woman and, later, to leave the store.

Christopher Tyre, a licensed psychologist, opined that Childs suffers from two mental disorders—schizophrenia and antisocial personality disorder. Tyre further opined that Childs' particular manifestations of these disorders are "congenital or acquired conditions affecting his emotional or volitional capacity" and predispose him to future acts of sexual violence. Tyre testified that Childs scored a seven on the Static-99-R, corresponding with a forty percent risk of recidivating within five years and a fifty percent risk of recidivating within ten years.

Lori Pierquet, a licensed psychologist, diagnosed Childs as suffering from polysubstance dependence, schizophrenia and antisocial personality disorder, and opined that the latter two disorders predisposed Childs to future acts of sexual violence. Pierquet noted Childs' chronic inability to follow rules, as well as his history of auditory command hallucinations and "fixed delusions that continue despite medications." Pierquet also noted that although sex offender treatment had been offered to Childs on more than one occasion, he declined treatment, indicating he did not feel he needed it.

According to Pierquet, Childs scored an eight on the Static-99-R, corresponding with a forty-five percent risk of recidivating within five years and a fifty-five percent risk of recidivating within ten years. Pierquet further testified that Childs scored a twelve on the MnSOST-R, corresponding with a 54% risk of re-arrest for a sexual offense within six years. Finally, applying the RRASOR test, Childs scored a four on a scale from zero to six. Pierquet testified that Childs' score is "viewed as a higher risk for sexual reoffending." Based on Childs' diagnoses and risk assessment, both Tyre and Pierquet opined to a reasonable degree of psychological certainty that Childs is dangerous because his mental disorders make it more likely than not that he will engage in acts of sexual violence.

Charles Lodl, another psychologist, testified that Childs suffered from paranoid schizophrenia, but that his mental disorder did not predispose him to commit acts of sexual violence. Although Lodl disagreed with the other two psychologists, the court was free to accept the opinions of Tyre and Pierquet in finding that Childs was a sexually violent person. Any challenge to the verdict therefore lacks arguable merit.

Finally, any challenge to the constitutionality of WIS. STAT. ch. 980, as amended in 2003-04, lacks arguable merit. One challenging the constitutionality of a statute bears the burden of demonstrating the statute's infirmity beyond a reasonable doubt. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). Even where the statutory scheme impinges upon a fundamental liberty, as commitment admittedly does, it will not be invalidated on substantive due process grounds as long as it is narrowly tailored to a compelling government interest. ***Id.*** at 302. Moreover, a statute will not be declared unconstitutionally vague unless it fails to give notice about what conduct the statute proscribes or fails to provide those who enforce the law with objective standards with which to do so. ***Curiel***, 227 Wis. 2d at 415.

Here, the no-merit report addresses whether there is arguable merit to challenge the constitutionality of WIS. STAT. ch. 980 on grounds including a change in the threshold for dangerousness and the absence of a temporal context limited to imminent danger. This court has held that the legislature "may modify the threshold for dangerousness so long as the applicable criteria remain relevant to ch. 980's underlying purposes of both protecting society and providing needed treatment to persons whose mental disorder makes them dangerous." ***State v. Tabor***, 2005 WI App 107, ¶5, 282 Wis. 2d 768, 699 N.W.2d 663. The "more likely than not" standard is sufficient to satisfy the substantive due process requirements because there exists a sufficient link between the person's mental disorder and level of dangerousness to distinguish the person, and the State has a compelling interest in preventing acts of sexual violence through commitment and treatment. *See* ***State v. Nelson***, 2007 WI App 2, ¶¶4, 18, 298 Wis. 2d 453, 727 N.W.2d 364. With respect to any temporal context challenge, this court has held that "the underlying propensity for uncontrollable violence is not confined to the immediate future but rather presents an ongoing threat to the public." ***State v. Olson***, 2006 WI App 32, ¶6, 290 Wis. 2d 202, 712

N.W.2d 61. Therefore, "the fact that the legislature did not myopically limit its view of dangerousness to the immediate future does not render the statute unconstitutionally infirm." ***Id.*** Any challenge to the constitutionality of ch. 980 on these grounds therefore lacks arguable merit.

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

Therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals