

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT X
Case No. XXXXAPXXX-NM

In re the protective placement of John S.:

BAY COUNTY,

Petitioner-Respondent,

v.

JOHN S.,

Respondent-Appellant.

Appeal from the Order Extending the Respondent-
Appellant's Protective Placement Entered in the Bay County
Circuit Court, the Honorable Grover Cleveland, Presiding

NO MERIT BRIEF OF RESPONDENT-APPELLANT
PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

INTRODUCTION

On July 30, 2009, Bay County Circuit Judge Grover Cleveland ordered John S.'s protective placement in an unlocked, non-institutional community facility, pursuant to Wis. Stat. § 55.08(1) and § 55.12. (35). On May 17, 2010, the Bay County Department of Human Services filed its annual review of John's protective placement, (53), and petitioned the court for review of the placement. (52). John, through his guardian ad litem, contested his continued placement and requested the appointment of adversary counsel. (57). The State Public Defender appointed defense counsel. (56). At defense counsel's request, (58), the court appointed a psychologist to conduct an independent examination. (59).

On September 30, 2010, the court reviewed the continued need for protective placement, pursuant to Wis. Stat. § 55.18(3)(d). (98). At the conclusion of that hearing, the court ordered John's protective placement to be continued. (98:53-57). The court entered a written order conforming to its ruling from the bench on October 6, 2010. (73).

The State Public Defender appointed the undersigned attorney to represent John in postcommitment proceedings. This attorney has reviewed the transcripts and court records pertaining to this case and has conferred with John by telephone. This attorney believes that an appeal from the order continuing John's placement would be frivolous and without arguable merit, and therefore seeks this court's permission to withdraw as John's appellate attorney. This report is filed pursuant to Rule § 809.32 and *Anders v. California*, 386 U.S. 738 (1967).

DISCUSSION OF POTENTIAL ISSUES

The Sufficiency of the Evidence to Support the Order Continuing the Protective Placement.

Under Wis. Stat. § 55.18(3)(e), “If the court finds that the individual continues to meet the standards [for protective placement] under s. 55.08(1) and the protective placement of the individual is in the least restrictive environment that is consistent with the requirements of s. 55.12(3), (4), and (5), the court shall order the continuation of the protective placement in the facility in which the individual resides at the time of the hearing.”

Under Wis. Stat. § 55.08(1), the standards for protective placement are:

- (a) The individual has a primary need for residential care and custody.
- (b) The individual . . . is an adult who has been determined to be incompetent by a circuit court.
- (c) As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others. Serious harm may be evidenced by overt acts or acts of omission.
- (d) The individual has a disability that is permanent or likely to be permanent.

Three witnesses testified at the review hearing. Psychologist John Watson interviewed John on September 9 and September 23, 2010, and reviewed records from an evaluation he had done ten years earlier, as well as records

maintained by John's guardian. (98:8). Watson opined that John was incompetent and not able to live on his own. (98:10). He noted that John had "periods of intrusive thoughts" and that he did not consistently take his prescribed medication. *Id.* On cross-examination, Watson explained that in conversation, John tended to be unfocused and rambling, and that he could not concentrate long enough to complete one subject. (98:12). John, currently age 23, was diagnosed with Attention Deficit Disorder at the age of 12. (98:13). Watson believed that John's "intrusive thoughts" evinced a "major mental illness," and he agreed with a psychiatrist's previous diagnosis that John suffered from a "non-specific psychosis." (98:14). John scored in the 12th percentile in intelligence. (98:15). The doctor did not believe that John could live independently in the community, even if services were provided to him, and that his current placement (a supervised group home) was the least restrictive placement consistent with John's needs. (98:17-18).

Dr. Watson filed two reports with the court, both of which were admitted into evidence without objection at the hearing. (98:11; 71; 72). In one report, the doctor noted disturbances in John's "thought processes," "memory," "concentration and comprehension," and "judgment." (71:2). Watson observed that John "describes delusional ideas," and that his functional capacity was impaired by "developmental disability" and "serious and persistent mental illness." *Id.* Watson opined that John was unable to meet the essential requirements for his physical health or safety due to his mental illness and his inconsistent use of medication. (71:3). The doctor believed that John's impairment was likely to be "long-term." (71:4). The doctor concluded the second report with the opinion that John "appears to struggle with major mental illness, anxiety, severe learning problems and passive dependent and schizotypal personality characteristics." (72:5).

Faye Dunaway, the social worker who periodically monitored John's condition on behalf of Bay County, concurred with Dr. Watson's observation that John was not able to "stay on task" during conversations. (98:20-21). Dunaway testified that John lacks insight regarding his daily needs, and does not understand "the reality of the responsibility" of living independently. (98:22). Dunaway noted that before John was "in the system" he was hospitalized twice for an alcohol overdose and incarcerated for methamphetamines. (98:26). She believed that he "needs structure," and that without it, his conduct begins to deteriorate and his ability and willingness to make good decisions declines. *Id.* Dunaway consequently felt that John's current placement was the least restrictive placement that was appropriate for him. (98:26-27).

The final witness was April O'Neill, a social service coordinator with Community Health Partnership. O'Neill sees John once per month, and talks to the staff at the group home where John resides. (98:34-35). Both Dunaway and O'Neill testified that John had been working regularly at the Career Development Center in Bay City, but that he had recently begun missing work because he was sleeping all day. (98:21-22, 35). O'Neill noticed that in the past six months, John was not as happy as he had been previously, that he was "more off-task," and that he could not stay focused on one topic, causing her to suspect that he was not taking his prescribed medication. (98:36-37).

John's guardian ad litem told the court that while she hoped John could eventually live more independently, and while she believed that John would benefit from some changes to his work program, she also believed that the guardianship and protective placement needed to continue. (98:47-50). John's attorney conceded, "It's kind of hard to

argue with Dr. Watson's professional conclusion that John lacks the capacity to meet his essential needs." (98: 50). The attorney recommended that the court continue the protective placement "as is." *Id.*

After hearing the evidence and counsel's arguments, the court continued John's placement at the group home where he was residing for one year. (98:53-57, 61). In its written order, the court specifically found that each of the statutory criteria for continuing the placement had been met, and that the current placement is the "least restrictive, most integrated, appropriate placement based upon the ward's needs." (73).

Under Wis. Stat. § 805.17(2), "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This court accordingly upholds a trial court's findings unless they are against the "great weight and clear preponderance" of the evidence. *Noll v. Dimicelli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

There is no arguable basis for asserting that the trial court's findings were against the great weight and clear preponderance of the evidence, and therefore, there is no arguable basis for challenging the sufficiency of the evidence to support the order continuing John's protective placement.

CONCLUSION

Counsel is unaware of any other potential issues that could be raised in this appeal. Because the issue identified in this report lacks arguable merit, this attorney asks permission to withdraw as John's appellate counsel.

Dated this 20th day of July, 2011.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

**CERTIFICATION IN COMPLIANCE
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 20th day of July, 2011.

Signed:

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 20th day of July, 2011.

Signed:

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Respondent-Appellant