STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. XXXAPXXX-NM

In re the Commitment of John Smith:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOHN SMITH,

Respondent-Appellant.

On No Merit Notice of Appeal From a Judgment and
Commitment Order for Sexually Violent Person
in the Circuit Court for Bay County,
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 Defendant-Appellant

ISSUES PRESENTED

1. Was the evidence at trial sufficient to find beyond a reasonable doubt that Mr. Smith was a sexually violent person?

2. Did the circuit court err when it did not allow Mr. Smith to have a competency examination?

STATEMENT OF THE CASE

On October 12, 2010, a chapter 980 petition was filed in Bay County, case number XX-CI-XXX, alleging that Mr. Smith was a "sexually violent person" within the meaning of Wis. Stat. § 980.01(7). (1).

The petition alleged that Mr. Smith was convicted of second degree sexual assault/unconscious victim, in violation of Wis. Stat. § 940.225(2)(d) in Bay County case number XX-CF-XXX and child enticement/sexual contact in violation of Wis. Stat. § 948.07 in Lake County case number XX-CF-XXX. It further alleged that these offenses were sexually violent offenses under Wis. Stat. § 980.01(6)(a). (1:1).

The petition also alleged that Mr. Smith suffered from Paraphilia, Not Otherwise Specified (NOS) and Cognitive NOS, which predisposes him to engage in sexually violent acts, as defined by chapter 980. This allegation was based upon a report by Dr. Nancy Drew, a licensed psychologist working for the Wisconsin Department of Corrections. (1:2). Finally, the petition alleged that Mr. Smith was more likely than not to engage in acts of sexual violence based upon his record and actuarial risk instruments. (1:5-6).

On October 19, 2011, the court found Mr. Smith was a sexually violent person. Facts specific to the trial will be discussed in the argument section of this brief.

ARGUMENT

I. The Evidence at Trial Was Sufficient to Prove beyond a Reasonable Doubt That Mr. Smith Was a Sexually Violent Person and No Procedural Errors Invalidated the Verdict.

On appeal, this court will not reverse a chapter 980 commitment order "unless the evidence, viewed most favorably to the state and the commitment, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the defendant to be a sexually violent person beyond a reasonable doubt." ***State v. Treadway***, 2002 WI App 195, ¶33, 257 Wis. 2d 467, 651 N.W.2d 334 (internal quotation marks and brackets omitted).

"It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). When a record of historical facts supports more than one inference, "an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.***, at 506-07. Testimony is "incredible as a matter of law" only when it is "in conflict with nature or with fully established or conceded facts." ***State v. Haskins***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980).

In this case, the court was aware of the instructions regarding the elements it had to find, beyond a reasonable doubt. These three elements for the commitment of a sexually violent person are:

1. That Mr. Smith has been convicted of a sexually violent offense;

2. That Mr. Smith currently has a mental disorder. Mental disorder means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards.

Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty controlling behavior. You are not bound by medical opinions, labels, or definitions.

3. That Mr. Smith is dangerous to others because his mental disorder which makes it more likely than not that he will engage in future acts of sexual violence. Acts of sexual violence means acts which would constitute sexually violent offense. Second degree sexual assault/use of force is a sexually violent offense.

At trial, the first element was not contested. (63:8). The judgment of conviction for Bay County case number XX-CF-XXX, where Mr. Smith was convicted of one count of second degree sexual assault of a child, was accepted as an exhibit. (63:15; 39). The judgment of conviction for Lake County case number XX-CF-XXX, where Mr. Smith was convicted of

child enticement-sexual contact, was also accepted as an exhibit. (63:17; 40).

The second element is whether Mr. Smith had suffered from a mental disorder that predisposed him to engage in acts of sexual violence and caused him serious difficulty in controlling his behavior. Two experts testified at the trial. Both concluded that Mr. Smith had a mental disorder that predisposed him to engage in acts of sexual violence.

First, John Watson diagnosed Mr. Smith with pedophilia and cognitive disorder, not otherwise specified (NOS). (63:88). He also concluded Mr. Smith had a second disorder like dementia, affecting impulse control. (63:92). He concluded the mental disorders were within the definition of chapter 980. (63:95). He also testified that Mr. Smith was more likely than not to commit future acts of sexual violence. (63:96).

Second, Nancy Drew testified that Mr. Smith had two mental health disorders that were predisposing under chapter 980. (63:197). She concluded he has cognitive disorder, NOS and paraphilia, NOS. (63:200). She also diagnosed him with bipolar and personality disorder, NOS, which exacerbates his potential for acting out in a sexually violent manner. (63:201). She also testified based on her assessment of Mr. Smith using actuarial methods and clinical judgment that Mr. Smith was more likely than not to reoffend. (63:224).

Looking at the evidence most favorable to the state, the evidence is not so insufficient that it can be said as a matter of law that no reasonable fact-finder could have found, beyond a reasonable doubt, that Mr. Smith has a mental disorder that predisposes him to commit sexually violent acts, or that he is dangerous because he is more likely than not to engage in future acts of sexual violence.

In addition, no procedural errors invalidated the guilty verdict. The court rendered its decision, explaining its reasons. (63:22-33). Therefore, any argument that Mr. Smith's procedural or due process rights were violated at trial would be without merit.

II. Did the Trial Court Err When It Concluded Mr. Smith Was Not Entitled to a Competency Evaluation?

Mr. Smith's trial attorney requested a competency evaluation for him. The court held a hearing to determine whether a competency evaluation can be ordered for a chapter 980 case. Ultimately, the court concluded a competency evaluation is not appropriate in this context. (28).

The court concluded, based on the doctors' reports, that Mr. Smith was diagnosed with bi-polar disorder and cognitive disorder, NOS. It also concluded that three doctors had found "to varying degrees, that Smith has negligible or no ability to benefit from available treatment." (28:1).

Under ***State v. Luttrell***, 2008 WI App 93, 312 Wis. 2d 695, 754 N.W.2d 249, a person against whom a chapter 980 petition has been filed is not entitled to a competency evaluation. In ***Luttrell***, the court reasoned that a 980 commitment is different than a criminal prosecution, where competency is required, because it is a civil commitment for treatment rather than punishment. ***Id.***, ¶¶7-10. The court noted that competency is not a prerequisite for civil mental commitments or civil protective placement proceedings. ***Id.***, ¶10. Thus, the court concluded that Luttrell was not entitled to a competency hearing.

In this case, Mr. Smith also was unable to benefit from treatment due to his deficiencies. (28:1). Therefore, an argument could be made that he is simply being warehoused.

However, the United States Supreme Court has "never held the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." ***Kansas v. Hendricks***, 521 U.S. 346, 366 (1997). In ***Hendricks***, it stated that "it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed." ***Id.*** Thus, the Court already determined treatment is not a constitutional prerequisite for statutes committing individuals deemed sexually violent.

Thus, Mr. Smith is not entitled to a competency hearing under ***Luttrell*** even though he is not able to benefit from treatment because the United States Supreme Court concluded people can be committed in this context for public protection even if treatment is not possible.

CONCLUSION

For all the reasons set forth above, undersigned counsel respectfully requests, pursuant to Wis. Stat. Rule 809.32, that this court enter an order relieving her of further representation of the defendant in this matter.

Dated this 19th day of July, 2012.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-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 19th day of July, 2012.

Signed:

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[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-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 19th day of July, 2012.

Signed:

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[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant