STATE OF WISCONSIN

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

DISTRICT X

Case No.XXXXAPXXX-NM

In re the commitment of John Smith:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JOHN SMITH,

Respondent-Appellant.

On Appeal Pursuant to Rule 809.32 to Review the Order Denying Discharge Entered in the Bay County Circuit Court, the Honorable Grover Cleveland Presiding

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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

STATEMENT OF THE ISSUE

> Was the evidence presented at the bench trial sufficient to sustain the trial court's decision denying the petition for discharge and finding that the State had proved by clear and convincing evidence that Mr. Smith meets the criteria for commitment as a sexually violent person?

The trial court found that the state had met its burden of proving that Mr. Smith was a sexually violent person.

STATEMENT OF THE CASE

Mr. John Smith was previously committed as a sexually violent person under Chapter 980 following a jury trial conducted back in April, 1997. (25; 47). This appeal arises out of a petition for discharge pursuant to Wis. Stat. § 980.09. The trial court concluded that the petition for discharge raised a sufficient issue of fact to warrant a discharge trial. (188). A bench trial was subsequently conducted on May 12, 2011, before the Honorable Grover Cleveland. (204). The following day, May 13, 2011, Judge Cleveland issued an oral ruling denying the petition for discharge. (203:2-17). This case is before the Court of Appeals, District X, pursuant to a no-merit notice of appeal from the written order denying discharge entered on May 31, 2011. (176; 210).

At the bench trial, the government offered testimony from Dr. John Watson, a psychologist who conducted an annual Chapter 980 examination of Mr. Smith for the Department of Health Services. Dr. Watson identified the

reports he prepared dated May 20, 2010, and April 3, 2011. (182; 193; 204:6, 8-9).

In Dr. Watson's opinion, Mr. Smith suffers from two qualifying mental disorders under Chapter 980. Dr. Watson also diagnosed a third mental disorder, voyeurism, that does not constitute a qualifying mental disorder under Chapter 980. With regard to the qualifying disorders, Dr. Watson concluded that Mr. Smith suffers from pedophilia, involving both sexes though limited to incest. (204:21-22, 53-55). He noted that recidivism for incest offenders is generally lower. (204:56). The second qualifying mental disorder Dr. Watson identified was personality disorder not otherwise specified with anti-social features. (204:21-23).

According to Dr. Watson, pedophilia does not remit. (204:25). Dr. Watson believed Mr. Smith's personality disorder limits his empathy, and thus, does not inhibit him regarding his pedophilia. (204:23-24). Dr. Watson noted that while personality disorders tend to remit in the fourth decade of life, Mr. Smith's situation is aggravated by an elevated level of psychopathy. (204:17, 26).

In Dr. Watson's opinion Mr. Smith posed a high risk to reoffend. (204:46). Dr. Watson employed three actuarial risk assessment instruments to assess Mr. Smith's risk to reoffend, the RRASOR, the Static-99 and the Static-99R. (204:27, 30). On the RRASOR, Dr. Watson gave Mr. Smith a score of 3, which is moderately high. Persons with this score reoffended at a rate of 25% after five years, 37% after ten years, and 48% after 17 years. (204:33-34). Dr. Watson explained that these percentages tend to underestimate risk in that they are based on convictions rather than offenses actually committed, and because the actuarial instruments are limited to finite time periods rather than assessing lifetime

risk. (204:32). He also believed the actuarial instruments underestimate risk because there are many undetected offenses. (204:69-70).

On the Static-99, Dr. Watson gave Mr. Smith a score of 6, which he characterized as the highest risk group. Persons with this score reoffended at a rate of 45% after ten years and 52% after fifteen years. (204:36-37). On the new Static-99R, Mr. Smith received a score of five, reflecting a one point reduction based on his increased age. Dr. Watson reported that persons with this score reoffended at a rate of 36%, though he believed this was an underestimate of risk. (204:41-42).

Along with the actuarial scores, Dr. Watson testified that Mr. Watson was in the highest risk group to reoffend because he exhibited the "unfortunate" combination of sexual deviance and psychopathy. (204:43,46). In one study, persons with this combination of traits reoffended at a rate of 60% over eight years. (204:43). Dr. Watson noted Mr. Smith's scores on the PCL-R, the "gold standard" for assessing psychopathy, were consistently high. (204:44). According to Dr. Watson, it is questionable whether conventional treatment works with persons with high psychopathy. (204:45).

In assessing risk, Dr. Watson also considered other factors such as sexual deviance, attitudes supportive of sexual offending, denial of offenses, general level of social and emotional functioning and treatment progress. (204:47-49). Dr. Watson did not believe that Mr. Smith had reduced his risk to reoffend, noting that until recently Mr. Smith had refused to participate in treatment, and thus,\ had not made significant progress in treatment. (204:17-19, 47-49). In Dr.

Watson's opinion, it was more likely than not that Mr. Smith would reoffend. (204:50).

In response to Dr. Watson's testimony, counsel for Mr. Smith called two expert witnesses, forensic psychologist Nancy Drew and Dr. Faye Dunaway. Mr. Smith did not testify. (204:131).

Ms. Drew diagnosed Mr. Smith with personality disorder not otherwise specified with antisocial features, but noted that she was unable to assess whether a diagnosis of pedophilia applied to Mr. Smith at the present time. Ms. Drew explained that notwithstanding his offense history, Mr. Smith denies having any such fantasies and denies that the prior allegations, involving incest, ever happened. (204:75-77, 79, 96, 96). She noted a ppg exam might be helpful to make such an assessment. (204:77).

Ms. Drew indicated that simply having a diagnosis of a mental disorder does not mean a person will act out. (204:77-78). She further noted that treatment is not the only way to reduce risk for incest offenders, noting that getting caught and getting older often reduce the risk of reoffense. (204:78). There was no indication that Mr. Smith was preoccupied with sex offending. Ms. Drew acknowledged that he had not made significant progress in treatment. (204:79, 97)

In Ms. Drew's opinion it was more likely than not that Mr. Smith would commit a sexually violent offense in the future. (204:80). In reaching this conclusion Drew used the Static-99R, the newest actuarial instrument. (204:80-83). She disagreed with Dr. Watson's placement of Mr. Smith in a "high risk" group when applying this instrument. (204:81-83,89). Ms. Drew does not use the RRASOR or the old Static-99 in conducting risk assessments, because the

RRASOR has not been updated and the Static-99 is based on old data. (204:83-84).

Ms. Drew did not believe Mr. Smith's PCL-R score of 28 increased his risk to reoffend, noting the PCL-R is not an actuarial instrument. She characterized the data suggesting a combination of deviancy and psychopathy increases risk as controversial. (204:84-85,94). She noted that while Mr. Smith's psychopathy could lead to problems, it would not necessarily lead to a sex crime. (204:97). Drew questioned the contention that actuarial instruments underestimate risk. (204:85-86). She also noted that Mr. Smith's denial of his prior offenses is not related to recidivism, though it may inhibit his ability to progress in treatment programs. (204:87-88). Ms. Drew disagreed with Dr. Watson's consideration of additional risk factors besides the actuarial instruments, characterizing this subjective approach as "double dipping." (204:89-91).

Dr. Faye Dunaway, like Ms. Drew, found it difficult to establish with certainty a diagnosis of pedophilia. She noted that many people who have had contact with children are not pedophiles. (204:104). There was no indication Mr. Smith currently has intense fantasies and he has exhibited no signs of pedophilia while confined. Dr. Dunaway noted the majority of such offenders only offend once and that the risk of reoffense goes down with age. (204:105-108). Dr. Dunaway concluded she could not find a qualifying mental disorder with the requisite degree of certainty. (204:126). Even if a diagnosis of pedophilia applied to Mr. Smith, Dr. Dunaway did not believe Mr. Smith posed the requisite risk to reoffend. (204:108).

Dr. Dunaway noted that while there is some evidence to support a diagnosis of personality disorder not otherwise

specified with regard to Mr. Smith, there were difficulties with this diagnosis. She noted that such a diagnosis does not necessarily involve a sexual component. (204:108-109).

Dr. Dunaway was unable to find it was more likely than not that Smith would reoffend. (204:127). In assessing his risk to reoffend, Dr. Dunaway applied the Static-99R and a new instrument, the MATS-1. (204:110). In applying the Static-99R, Dr. Dunaway assessed risk utilizing data based on the entire sample group rather than just the high risk study group. (204:112-113, 115-117). According to Dr. Dunaway, Mr. Smith's risk to reoffend under the Static-99R was 10-14% over five years. (204:113). In light of Mr. Smith's age, she did not believe it made any sense to apply the risk data for a ten year period because Mr. Smith would be over 60 years of age at that point. (204:114). With regard to the new MATS instrument, Dr. Dunaway noted the risk to reoffend over eight years was 6%. (204:114-115). She noted the base rate of reoffense for incest offenders was lower than for other sex offenders. (204:117).

Dr. Dunaway did not believe it was more likely than not that Mr. Smith would reoffend. (204:118-119). She did not believe his PCL-R score increased his risk. (204:120-121). She also noted shortcomings with the studies that assess the combination of psychopathy and deviancy, particularly in the absence of ppg testing. (204:122-123). She considered the current use of studies addressing psychopathy and deviance and assumptions regarding the underestimation of risk to be unscientific ways of assessing risk. (204:122-124, 125-126).

In his oral ruling denying the petition for discharge, Judge Cleveland concluded that the state had proven by clear and convincing evidence that Mr. Smith was a sexually violent person. In particular, the court found that Mr. Smith

had been convicted of a qualifying conviction, had a qualifying mental disorder, and was dangerous to others in that he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. (203:4-6). In explaining this ruling, Judge Cleveland emphasized that he considered the testimony of Dr. Watson more persuasive. (203:9, 11, 16).

ARGUMENT

Was the Evidence Presented at the Discharge Trial Sufficient to Sustain the Trial Court's Ruling Denying the Petition for Discharge?

In a discharge trial under Wis. Stat. § 980.09(3), the State bears the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person. It might be argued that the evidence presented at the discharge trial conducted on May 12, 2011, was insufficient to support Judge Cleveland's decision denying the discharge petition. Under the governing standard of review, any argument challenging the sufficiency of the evidence would be without arguable merit.

This case presents a classic example of a trial coming down to the assessment of the credibility of the witnesses by the finder of fact. The trial judge was presented with conflicting testimony from three experts, Dr. Watson, Dr. Dunaway and Ms. Drew. There were basically no legal disputes throughout the trial. Judge Cleveland ultimately found the testimony of Dr. Watson to be more persuasive than the testimony of the other two experts. (203: 9, 11, 16).

As in a criminal case, in determining whether the evidence presented at a Chapter 980 proceeding is sufficient

to sustain the verdict, a reviewing court views the evidence in the light most favorable to the decision of the finder of fact. ***State v. Kienitz***, 227 Wis. 2d 423, 434, 597 N.W.2d 712 (1999); ***State v. Burgess***, 2002 WI 264, ¶23, 258 Wis. 2d 548, 565, 654 N.W.2d 81; ***State v. Marberry***, 231 Wis. 2d 581, 593, ¶21, 605 N.W.2d 612 (Ct. App. 1999). The question on review is not whether the appellate court agrees the respondent is a sexually violent person, but whether the evidence 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 respondent is a sexually violent person by clear and convincing evidence. ***Kienitz***, 227 Wis. 2d at 434; ***Burgess***, 258 Wis. 2d 548, ¶23; ***Marberry***, 231 Wis. 2d 581, ¶21. As the Court recognized in ***Burgess***, the finder of fact is the "sole judge of credibility; it weighs the evidence and resolves any conflicts." 258 Wis. 2d 548, ¶23.

Viewed in the light most favorable to the trial court's ruling, the evidence was clearly sufficient to sustain Judge Cleveland's finding that Mr. Smith is a sexually violent person. In assessing the expert testimony, Judge Cleveland expressly found the testimony of Dr. Watson to be more persuasive and to have more convincing power. This credibility assessment is not inherently incredible, and therefore, must be respected.

Unlike an original commitment trial, in a discharge trial under Wis. Stat. § 980.09(3), the State must simply prove the respondent meets the criteria for commitment as a sexually violent person by clear and convincing evidence. In his oral decision denying discharge, the trial court found that all of the elements required for commitment were established by clear and convincing evidence. (203:4-6). Consistent with the requirements of Wis. Stat. § 980.01(7), the court found that Mr. Smith had been convicted of a qualifying conviction,

had a qualifying mental disorder, and was dangerous to others in that he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. (203:4-6). Viewed in the light most favorable to the court's ruling, the judgments of conviction for first degree sexual assault entered back in 1991 along with the testimony of Dr. Watson, which the court found most persuasive, provided sufficient evidence to establish the elements for continued commitment by clear and convincing evidence. (197:Exhibit #1; 204: 3, 21-25, 46, 50).

CONCLUSION

For the reasons set forth above, undersigned counsel respectfully requests, pursuant to Rule 809.32, that this court enter an order relieving him of further representation of the Respondent-Appellant in this matter.

Dated this 24th day of February, 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 24th day of February, 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 24th day of February, 2012.

Signed:

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[NAME OF ATTORNEY]
[State Bar No.]

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Attorney for Defendant-Appellant