

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2496
STATE OF WISCONSIN**

Cir. Ct. No. 94CF942752

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF WALTER ALLISON, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

WALTER ALLISON, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Walter Allison, Jr., appeals from the trial court's order denying his petition requesting supervised release from his WIS. STAT. ch. 980 commitment. Allison argues that, because the only witness called to testify stated that Allison could be managed and supervised in the community if certain

conditions were in place, the State failed to meet its burden of proof. Because the record contains ample evidence supporting the trial court's determination that Allison continues to be a sexually violent person who is substantially probable to engage in acts of sexual violence if he does not remain in institutional care, we affirm.

I. BACKGROUND.

¶2 After a long-standing history of criminal charges, including sexual offenses against both adults and minors of both sexes, a WIS. STAT. ch. 980 commitment proceeding was commenced seeking to have Allison committed. On February 27, 1995, Allison was found to be a sexually violent person and he was committed and ordered into secure custody. Allison has unsuccessfully petitioned for supervised release pursuant to WIS. STAT. § 980.08(3) (2001-02)¹ on several occasions. Now in his early sixties, Allison filed his most recent petition on April 17, 2003.

¶3 Following receipt of the petition, the trial court ordered Dr. James Harasymiw, a doctor employed by the Department of Health and Family Services, to reevaluate Allison and report his findings concerning Allison's readiness for supervised release. The doctor provided the court with a report of his findings. Dr. Harasymiw essentially concluded there was little change in Allison's condition since his last evaluation several months earlier, and that he continued to suffer from mental disorders that predisposed him to commit sexually violent acts. Despite these findings, the doctor opined that because of his age and health,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Allison “seems to be more manageable in the community than previously believed if at least certain conditions are imposed for his supervision.”

¶4 Following a hearing, at which only Dr. Harasymiw testified, the trial court found that the State proved, by clear and convincing evidence, both that Allison “continues to have mental disorders that predispose him to engage in acts of sexual violence” and that “Allison will engage in acts of sexual violence if he does not remain in institutional care.” As a result, Allison’s petition was denied.

II. ANALYSIS.

¶5 Allison points out that WIS. STAT. § 980.08(4) places the burden of proof on the State in a hearing seeking supervised release. He argues that the State failed to present “affirmative evidence in support of its position,” and thus, he submits the State failed to prove by clear and convincing evidence that he should not be granted supervised release. We disagree.

¶6 Allison correctly states that in a hearing on a petition for supervised release, the State is obligated to prove that the petitioner is still a sexually violent person and that it is substantially probable that he will reoffend. WISCONSIN STAT. § 980.08(4) provides, in relevant part: “The court shall grant the petition unless the state proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care.”

¶7 However, whether to grant a petition for supervised release is a discretionary decision of the trial court. *State v. Brown*, 2004 WI App 33, ¶16, 269 Wis. 2d 750, 676 N.W.2d 555, review granted, 2004 WI 114, ___ Wis. 2d

___, 684 N.W.2d 136 (Wis. May 12, 2004) (No. 03-1419). We will uphold the trial court's decision if it was based on a logical interpretation of the facts and a correct application of the proper legal standards. *State v. Seibert*, 220 Wis. 2d 308, 314, 582 N.W.2d 745 (Ct. App. 1998).

¶8 In determining whether to grant a petition for release, the trial court is given direction by WIS. STAT. § 980.08(4):

In making a decision under this subsection, the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition [alleging that a person is a sexually violent person] under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself and what arrangements are available to ensure that the person has access to and will participate in necessary treatment, including pharmacological treatment....

Here, the State, following the dictates of the statute, supplied the trial court with a great deal of background information regarding the petitioner, as well as the report and testimony of Dr. Harasymiw.

¶9 In reaching its decision denying Allison's request, the trial court considered Dr. Harasymiw's assessment of Allison's mental condition. Dr. Harasymiw's report stated:

Mr. Allison is diagnosed with Paraphilia NOS and Personality Disorder NOS with Antisocial features. These are mental disorders, acquired or congenital, that affect[] his emotional or volitional capacity, and predispose[] him to commit sexually violent acts as defined by Chapter 980. At this time, based on static indicators, Mr. Allison continues to show substantial probability that he will commit another sexually violent offense. However, based on dynamic issues such as Mr. Allison's age and health[,] the risk may be more manageable in a less secure facility tha[n] previously supposed. There has been no change in these factors since the February 19, 2003 re-evaluation.

Thus, despite Dr. Harasymiw's acknowledgement of Allison's mental disorders that predispose him to commit sexually violent offenses, Dr. Harasymiw believed that Allison's age and health significantly reduced the risk and that he might be a candidate for supervised release. The report goes on to recommend:

Mr. Allison's response to treatment to date has not been sufficient to substantially reduce the likelihood of future sexually violent offenses. However, based on his age[,] his degree and type of risk, while still meeting the threshold of "substantial probability[,"] seems to be more manageable in the community than previously believed[,] if at least certain conditions are imposed for his supervision. Such conditions would include the type and location of residence, and along with other[] conditions[,] supervision by a trained agent. If such conditions are found available for Mr. Allison, the court may wish to consider granting Mr. Allison a Supervised Release placement under his current Chapter 980 commitment.

¶10 However, the trial court declined to follow the doctor's recommendation. In its decision and colloquy with Allison, the trial court, while noting that Allison was in poor health and now in his sixties, stated that Allison still suffered from mental disorders that predisposed him to commit sexually violent offenses and that it was substantially probable that he would reoffend.

THE COURT: I believe at this point that given what we know about your mental health and about your emotional makeup and your emotional condition –

THE DEFENDANT: Yes.

THE COURT: – that you still suffer from a mental condition which predisposes you to acts of violent offenses. I believe that regardless of your heart condition and your other health conditions you're still suffering from paraphilia.

THE DEFENDANT: Yes.

THE COURT: Furthermore, I do believe that it is still substantially probable that you would engage in acts of sexual violence if not involved in institutional care. I believe that that –

THE DEFENDANT: Yes.

THE COURT: – paraphilia, I think that it will give you impulses that will be very difficult for you to control. You'll have serious difficulties controlling those impulses. I think you are less able to act on those impulses now than you were as a younger man or that you would as a completely healthy sixty year old.

THE DEFENDANT: Yes.

THE COURT: But common sense tells me that even a person who's in a wheelchair and who has his arms available can give into impulses and can be violent towards people who care for him.

THE DEFENDANT: Yes.

THE COURT: Whether you are in a nursing home where you are in the company of other people who are living communally with you or whether you're in a home by yourself where you get a visit from a nurse every morning and every afternoon or a person who comes and helps you bathe or a person who brings you your groceries or the next door neighbors –

THE DEFENDANT: Yes.

THE COURT: – or the kids coming down the street who are screaming or the guy selling popcorn or the people who are coming to drop off Bibles or to share scripture with you, all of those will present you with opportunities for those impulses to be acted upon, and I don't believe that your health has been so diminished that I can say that you won't give in to those impulses.

These were conclusions a reasonable judge could make. Allison had a documented thirty-year history of sexual assaults. Additionally, the court knew that during his confinement, Allison has refused to attend any sexual offender treatment programs or to seek treatment for his alcohol problem. The trial court was also aware of the fact that Dr. Harasymiw believed that the mental disorders

contributing to Allison’s sexual violence remained unchanged. The only factors that appear to have influenced Dr. Harasymiw into changing the recommendation given the year before—that Allison should not be considered a candidate for supervised release—were his age and health.

¶11 As the trial court observed, while Allison’s age and health may have reduced the risk of him sexually reoffending, it did not eliminate it. We are satisfied that the trial court properly exercised its discretion in reaching its conclusions.

¶12 Moreover, a trial court is not required to accept the opinion of an expert witness who testifies at the hearing; instead, the court exercises discretion in accepting or rejecting the expert’s testimony as it deems appropriate. *State v. Kienitz*, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). The court determines the credibility of the expert and the weight of his or her opinion. *Id.* at 440. If the record supports more than one reasonable inference, we must accept the circuit court’s inference unless it is without support as a matter of law. *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994).

¶13 For the reasons stated, the trial court’s order is affirmed.

By the Court.—Order affirmed.

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

