

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP197-CR

Cir. Ct. No. 1985CF79

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYAN J. STANLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 BRIDGE, J. Bryan J. Stanley appeals from an order following a bench trial denying his petition for conditional release under WIS. STAT.

§ 971.17(4) (2005-06)¹ from Mendota Mental Health Institute. Stanley was committed to institutional care after he was found not guilty of three counts of first-degree murder by reason of mental disease or defect. Stanley contends that the circuit court erred in denying his petition because the evidence did not clearly and convincingly establish that he would pose a significant danger to himself or others if conditionally released. We conclude that the evidence in the record and the reasonable inferences drawn therefrom do not support the circuit court's determination of Stanley's dangerousness. We therefore reverse and remand the matter.

BACKGROUND

¶2 The following facts are taken from testimony and reports introduced at Stanley's hearing and are undisputed. In 1985, Stanley was found not guilty by reason of mental disease or defect of three counts of first-degree intentional homicide stemming from the murder of a priest and two parishioners at an Onalaska church. He was committed to Mendota on October 30, 1985, and has remained there for the past twenty-three years. Stanley filed petitions over the years seeking conditional release, the most recent of which was denied in 1999.

¶3 The hearing on his most recent petition, conducted pursuant to WIS. STAT. § 971.17(4),² was held on October 4, 2007. At the hearing, Stanley called

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² As it relates to the present case, WIS. STAT. § 971.17(4)(a) provides that a person who is committed for institutional care may petition the committing court to modify its order by authorizing conditional release, and that such petitions may not be filed more frequently than six months after the most recent release petition was denied.

four witnesses and offered one exhibit into evidence. The State called no witnesses and offered no exhibits.³

¶4 Stanley's mental illness dates back to approximately 1981. Stanley experienced active symptoms of psychosis from schizophrenia which resulted in four psychiatric hospitalizations from 1981 to 1983. Beginning with his first hospitalization, Stanley was prescribed the antipsychotic drug Navane. Between 1981 and 1985, Stanley stopped taking Navane on three occasions. On the last occasion, he experienced a psychotic state that resulted in the commission of his index offense in 1985.

¶5 Prior to his trial and following his admission to Mendota in 1985, Stanley was prescribed Prolixin. This medication caused side effects of undue daytime sedation, tremors, pain in his feet and lower legs, and akathisia.⁴ In 1993, Stanley refused to take Prolixin for one day. His medication was then changed from Prolixin to Clozaril, and he has remained on Clozaril since 1993. The side effects were relieved with the change in medication, and Stanley improved significantly, both mentally and in terms of his ability to function on a daily basis.

³ Over Stanley's objection, the State offered unsworn comments by two of the victims' family members, as well as by the priest who gave the homily at the victims' funeral masses. Pursuant to WIS. STAT. § 971.17(4)(d), the object of the court's inquiry at a conditional release hearing is to determine whether the person poses a significant risk of bodily harm to him or herself or to others if conditionally released. Stanley argues that the statements by lay witnesses were irrelevant to the court's inquiry regarding whether he is presently dangerous. We agree. Moreover, unlike the criminal sentencing statute, WIS. STAT. § 972.14(3)(a), which expressly allows a victim to make a statement to the court, the conditional release statute contains no equivalent provision.

⁴ Akathisia is a condition characterized by restlessness and the intolerance of inactivity. *See* TABER'S CYCLOPEDIA MEDICAL DICTIONARY 64 (20th ed. 2005).

¶6 Stanley has lived on minimum security since 1993. In January 2006, he was transferred to the Forensic Transition Unit, an unlocked, minimum security unit which is set up in the style of a group home. Stanley has been permitted to leave the Mendota grounds unescorted to take computer courses at Madison Area Technical College. He also works part time in a clerical position he has held since January 2001. This position requires him to independently travel to and from Mendota by city bus. For purposes of verification, he participates in a phone check-in system and is subject to periodic unannounced staff visits. In addition, Stanley has been granted the ability to travel independently to a local library branch to study a correspondence course. In 2005, Stanley began going on overnight visits to family members' homes. His participation in all of these activities has been successful and without incident.

¶7 Dr. Castillo, the psychiatrist who treated Stanley at Mendota from 2001 to 2007, reported that Stanley is compliant with his medication and understands that he will decompensate if he ceases taking it. He testified that for the duration of the time he treated Stanley, Stanley never expressed any desire to stop taking Clozaril. Dr. Castillo testified that the dosage of Clozaril which Stanley is currently on has been steady, that it has made a dramatic difference for him, and that he has tolerated the medication very well.

¶8 Dr. Castillo noted that Clozaril has the potential to cause a drop in the body's white blood cell count, but that this has not happened with Stanley and is not likely to happen in the future. As a result of the possibility of causing a reduction in his white blood cell count, Clozaril cannot be administered to Stanley unless he submits to a monthly blood draw. Dr. Castillo testified that, in his experience, individuals who decompensate generally do so between one and six months after they stop taking their medication. Further, Dr. Castillo testified that

if Stanley stopped taking Clozaril, “we would know or whoever is monitoring would know about it.”

¶9 Dr. Castillo stated that if Stanley continues to take his medication; continues to participate in treatment; continues to have contact with his family, his psychiatrist and his case manager; and continues to be actively involved in structured activities such as employment, his “chances of ... continuing success in the community are good.” Dr. Castillo supported Stanley’s conditional release.

¶10 Dr. Smail, who was appointed by the court to examine Stanley, also supported Stanley’s conditional release. Dr. Smail testified that Stanley’s schizophrenia is in remission, and stated that “in my judgment he is ready for a next step which is a community placement.” He proffered a list of conditions for Stanley’s release that he asserted would monitor Stanley’s adjustment if he were to re-enter the community.

¶11 Tori Sebranek, a forensic case manager, testified about the components of Stanley’s aftercare plan⁵ if his petition for conditional release was granted. She testified that the conditions would include secure housing; supervision by staff twenty-four hours a day; an ankle bracelet to monitor Stanley’s whereabouts; an assignment to a community psychiatrist who would determine the frequency of contact; monitoring of Stanley’s adherence to the

⁵ Aftercare refers to the requirement in WIS. STAT. § 971.17(4)(e), which provides that if the court finds that a person is appropriate for conditional release, the court shall notify the Department of Health and Family Services of its determination. DHFS then has sixty days to present to the court for its approval “a plan that identifies the treatment and services, if any, that the person will receive in the community.” Section 971.17(4)(e). The plan “shall address the person’s need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment.” *Id.*

prescribed medication regimen; and, at least initially, weekly meetings with his case manager and probation agent. She testified that there is a protocol in place to protect the community, and if Stanley decompensated to a point where he posed a significant risk to the public, he would be taken into custody.

¶12 For reasons discussed more fully below, the circuit court denied Stanley's petition. Stanley appeals.

ANALYSIS

¶13 Pursuant to WIS. STAT. § 971.17(4)(d), a circuit court "shall grant the petition [for conditional release] unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself ... or to others or of serious property damage if conditionally released."⁶ The State has the burden to prove by clear and convincing evidence that Stanley would pose a significant risk of harm if conditionally released. *See State v. Randall*, 192 Wis. 2d 800, 823, 532 N.W.2d 94 (1995).

¶14 The circuit court's findings of fact will not be overturned unless clearly erroneous. *See State v. Jefferson*, 163 Wis. 2d 332, 338, 471 N.W.2d 274 (Ct. App. 1991). The circuit court's application of those facts to the law, that is, whether Stanley presently poses a significant risk of harm to himself or others, is a question of law which we review independently. *Id.* We review the evidence supporting a finding of dangerousness in the light most favorable to the finding,

⁶ WISCONSIN STAT. § 971.17(4)(d) is not directly applicable in this case because Stanley committed the crimes of which he was acquitted prior to 1991, the year in which the current version of this provision went into effect. However, the State agrees that the relevant aspects of the current statute are applicable by virtue of preexisting case law.

and will affirm the finding if there is any credible evidence or inference on which the finding could be based. *State v. Randall*, 222 Wis. 2d 53, 60, 586 N.W.2d 318 (Ct. App. 1998).

¶15 In making a determination of dangerousness, the court may consider the following non-exclusive factors:

the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are [available] for treatment beyond medication.

WISCONSIN STAT. § 971.17(4)(d).

¶16 The circuit court found that at the time the underlying crimes were committed, Stanley suffered from a severe mental illness, and that three people lost their lives as a result of his being in a psychotic state. The court also found that Stanley continues to suffer from the same mental illness, which is being managed by medication. It found that Stanley has had his mental illness managed for a significant period of time in the structured setting of Mendota, but that over the past twenty-two years of his treatment at Mendota, “there have been instances of him refusing his medications or getting off his medications.” The court referenced Stanley’s risk of dangerous behavior when not on medications,⁷ and

⁷ Stanley objects on appeal to the fact that the circuit court began its ruling by referring to certain unspecified documents, not offered by either party but obviously contained in the record of Stanley’s prior petitions for conditional release, in which several psychiatrists previously testified about the risk associated with Stanley’s conditional release. This objection was not raised before the circuit court and, therefore, will not be considered now. See *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). However, we agree that the file material referenced by the court is not relevant to the present proceeding absent some indication as to how it bears on Stanley’s current petition for conditional release.

concluded that, “Where I may be willing to take the risk had his crime not been what it is, based upon his current treatment plan, I am not willing to take that risk based upon what this crime was all about.”

¶17 Stanley challenges the court’s finding that there have been “instances” of Stanley refusing or going off his medications since his commitment to Mendota. We agree that the court’s finding is not supported by the record. The record demonstrates, and the State does not dispute, that Stanley refused to take Prolixin for one day in 1993. Since his medication was changed to Clozaril in 1993, Stanley has not again refused to take his medication. Thus, since his commitment to Mendota, there has been only one instance when Stanley has declined to take his medication, rather than the multiple instances the court found. Further, the one instance occurred approximately fifteen years ago and involved a medication he no longer takes.

¶18 The State argues that the court’s reference to “instances” was harmless because the record nevertheless supports the finding that Stanley has stopped taking his medication several times during his lifetime, including while at Mendota. Although this is true, the record establishes that Stanley’s responses to the various medications he has been prescribed have differed significantly. When Stanley discontinued his medication before his crimes, he was taking Navane. Following his institutionalization at Mendota, Stanley was initially prescribed Prolixin, which caused deleterious side effects and Stanley refused to take this medication for one day. Since then, and for the past fifteen years, Stanley has been on Clozaril and he has neither refused to take his medication nor displayed an interest in doing so.

¶19 The court's erroneous reference to multiple instances when Stanley refused his medication since his commitment to Mendota is important because it, coupled with the heinous nature of Stanley's crimes, provided the sole factual bases for the court's denial of the petition. We agree that the nature of the crime is one factor that may be considered under WIS. STAT. § 971.17(4)(d). However, "[a]lthough past conduct may be a significant indicator of future behavior, evidence of dangerousness should not rely solely on the acquittee's past conduct." *Randall*, 192 Wis. 2d at 838. The only other factor considered under § 971.17(4)(d), whether Stanley would take necessary medication, was based on an inference drawn from an erroneous statement of fact. Apart from this erroneous statement, there is no evidence in the record to support the court's apparent inference that Stanley would not voluntarily continue to take his medication upon his conditional release.

¶20 The uncontroverted testimony by both physicians at the hearing was that Stanley's situation has stabilized since he has begun taking Clozaril; he does not experience the harsh side effects with this medication that he experienced with his prior medication; the dosage remains constant; Stanley understands the necessity that he continue to take the medication and the consequences if he does not; conditions attached to his release would include close monitoring; if decompensation were to occur, it would occur over a period of time conducive to detection by monitoring staff; and if Stanley were to begin to show signs of decompensation, monitoring staff would be in a position to recognize the symptoms early and respond appropriately.

¶21 We are mindful that the circuit court is the ultimate arbiter of the credibility of the witnesses and the weight to be given their testimony. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651

N.W.2d 345. We are also mindful that the circuit court was not required to accept the experts' conclusions, even if they were uncontroverted. *See State v. Brown*, 2005 WI 29, ¶88, 279 Wis. 2d 102, 693 N.W.2d 715. In this instance, however, the circuit court did not explicitly reject the experts' conclusions. Instead, it apparently discounted the experts' assessment of the likelihood of Stanley going off his medication in the future based on the court's erroneous belief that Stanley had gone off his medication a number of times while at Mendota.

¶22 In sum, the uncontroverted evidence presented at Stanley's conditional release hearing establishes that for the fifteen years Stanley has been on Clozaril, his use of the medication has been continuous and voluntary. He has been slowly integrated into the community with success. The only physicians to testify at the hearing both supported Stanley's conditional placement. To the extent the circuit court apparently discounted this testimony, the only articulated reason for doing so was based on an apparent inference drawn from an erroneous fact not supported by evidence in the record.

¶23 The standard under WIS. STAT. § 971.17(4) provides that, in order to deny conditional release, the evidence must demonstrate the acquittee's dangerousness by clear and convincing evidence. We conclude that the evidence in the present case did not meet that threshold. Accordingly, we reverse and remand the matter with directions to provide notice to DHFS under § 971.17(4), which will in turn require DHFS to present to the circuit court for its approval a plan that sets out the conditions that will attach to Stanley's release.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

