

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

David R. Schanker
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. 2008AP2909-CR

Cir. Ct. No. 2006CF65

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLINT SCOTT MOSAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Clint Mosay appeals a judgment of conviction for first-degree reckless homicide in violation of WIS. STAT. § 940.02(1)

(2003-2004).¹ He claims the circuit court erred when it concluded he failed to substantiate his WIS. STAT. § 971.15 defense because his psychosis was caused by voluntary substance abuse. We conclude the circuit court properly rejected Mosay's § 971.15 defense and affirm his conviction.

BACKGROUND

¶2 The parties have stipulated to the relevant facts. Mosay was released from prison on May 1, 2005, after serving a sentence for a prior conviction. On July 3, 2005, he was taken into custody after contacting Burnett County law enforcement complaining of government surveillance by agents using night vision goggles. Mosay exhibited bizarre behavior while in custody and tested positive for THC and methamphetamine. He was released the afternoon of July 15, 2005.

¶3 Upon his release, Mosay visited several relatives' homes. According to one relative, Mosay believed he was being watched by sewer workers and claimed airplanes took pictures of him as they flew overhead. Mosay did not sleep the night of his release and left the next morning to attend a tribal Pow-Wow with several relatives. Following Mosay's return in the evening of July 16, Mosay's mother, Renee, observed bizarre and paranoid behavior. At approximately 1 a.m. on July 17, Renee and her friend Ranell Johnson were leaving to purchase crack cocaine when Mosay entered Ranell's van. Although Renee and Ranell initially objected, they relented and permitted Mosay to accompany them after he repeatedly told his mother, "I can't stay here."

¹ All other references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Mosay became agitated during the trip and expressed concern that someone else was in the vehicle. He became loud and repeatedly insisted the women stop the van. As Mosay moved an object in his hand toward the women in the front seat, Renee pleaded with him to calm down. Mosay responded, “I don’t know what is going on.” He yelled at Ranell to stop the van and began punching her from the back seat. Ranell eventually stopped and Renee directed Mosay to look at her, asked him what he wanted, and stated she was his mother. Mosay responded, “I don’t know who you are,” and stabbed Renee in the neck. Mosay exited the van, moved to the driver’s side of the vehicle, and repeatedly stabbed Ranell as Renee tried to pull her to the passenger side of the van and away from Mosay. After the women managed to get out of the vehicle, Mosay took the keys and fled. Ranell was alive at the time police discovered her, but died at the scene. Renee was admitted to the hospital and recovered from the stab wound.

¶5 Mosay was arrested at approximately 11 a.m. on July 17. Police detectives interviewed him later that day and Mosay responded to their questions with cryptic and bizarre statements before requesting an attorney, at which time the police ceased their questioning.² Mosay later described his experiences on the days preceding the killing in mental health interviews with four examiners whose reports are attached to the stipulation. Mosay stated he frequently saw police, military, and “guys in suits” on July 16. During the Pow-Wow that day, Mosay heard someone announce over the intercom “the money man’s here, the money man’s here,” and he saw several hundred people stop and look at him. Mosay

² Mosay believed the entire tribal community in which he lived was trying to set him up, and he claimed people in the community were acting like robots controlled by unseen forces.

stated he feared his friends and relatives on July 16 because he thought they were conspiring to kill him.

¶6 Mosay also described his frequent narcotic use to mental health examiners. Mosay claimed he voluntarily consumed methamphetamine every day between his release from prison on May 1, 2005 and his reincarceration on July 3, 2005, a period of sixty-four consecutive days. He slept little during this time. Mosay's drug use in the two days preceding the homicide is less clear. In interviews with mental health professionals, Mosay variously denied using methamphetamine, stated he had used a small amount within an hour of being released from jail, and stated he used a small amount but not shortly after his release. Although no one personally observed Mosay using drugs or heard him admit to using drugs, everyone who had contact with Mosay on July 15 and 16 believed he was under the influence of methamphetamine. A drug test administered at 1:15 p.m. on July 18, approximately thirty-one hours after the homicide, showed no trace of methamphetamine or amphetamine, but did report a positive result for cannabinoid. All four mental health examiners agreed Mosay was under a methamphetamine-produced psychosis at the time of the stabbing, and each agreed Mosay's resulting mental state would not have been present absent the voluntary use of methamphetamine.

¶7 Mosay was charged with, and pled no contest to, one count of first-degree reckless homicide. Mosay maintained, however, that he was not mentally responsible for the crime pursuant to WIS. STAT. § 971.15. He waived his right to a jury trial on the responsibility portion of the trial and the parties submitted a factual stipulation to the circuit court for determination of whether Mosay was mentally responsible for Ranell's death. The circuit court determined Mosay suffered from a mental illness at the time of the homicide, but found Mosay failed

to substantiate his § 971.15 defense because “his condition was temporary and was the product of his voluntary ingestion of drugs.”

DISCUSSION

¶8 On appeal, Mosay claims the circuit court erred when it determined Mosay’s voluntary ingestion of drugs barred his WIS. STAT. § 971.15 defense. As an initial matter, we must clarify the standard of review. “Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.” WIS. STAT. § 971.15(3). Ordinarily, “[t]he question of whether a defendant has met the burden of proving mental disease or defect is one of fact for the jury rather than one of law for the court.” *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985). However, in *Leach* the court held that, under certain circumstances, a trial court may withdraw the issue of mental disease or defect from the jury’s consideration. *Id.* at 660-61. In this case, Mosay waived his right to a jury trial on the issue of his mental responsibility under § 971.15. The circuit court was responsible for determining whether Mosay created a fact issue by submitting credible evidence having probative value *and* whether Mosay satisfied the burden of proof established by § 971.15(3). We therefore review the circuit court’s decision de novo.

¶9 WISCONSIN STAT. § 971.15(1) provides a person is not criminally responsible “if ... as a result of mental disease or defect the person lacked substantial capacity [at the time of the criminal act] either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.” In *Gibson v. State*, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972), our supreme court stated “the question of insanity is a policy question, *i.e.*,

whether the defendant is to be excused from criminal responsibility because of the effect on his volitional ability caused by certain mental defects or diseases.” In determining whether the insanity defense was available to a defendant in a murder trial who felt dizzy, lightheaded and uncontrollable after taking several pills and drinking alcohol, the *Gibson* court held a voluntarily-drugged condition does not constitute a mental defect or a disease under the insanity statute. *Id.* at 113, 116. In this case, all experts agree Mosay was under a methamphetamine-produced psychosis at the time of the homicide, and there is no doubt Mosay’s acts directly resulted from his voluntary consumption of methamphetamine.

¶10 Mosay attempts to escape this rule by arguing we should apply *State v. Maik*, 287 A.2d 715, 722 (N.J. 1972), *overruled on other grounds by State v. Krol*, 344 A.2d 289, 305 (N.J. 1975), in which the New Jersey Supreme Court agreed with the defendant’s argument that “when a psychosis emerges from a fixed illness, we should not inquire into the identity of the precipitating event or action.” In *Maik*, the defendant, a longtime schizophrenic and occasional drug user, was implicated in the stabbing death of a classmate, which he claimed he committed during a schizophrenic episode. *Id.* at 717. Experts were unable to determine whether the episode occurred as a result of voluntary drug use or a romantic failure during which Maik tried to “reform” a young woman. *Id.* at 719. The court concluded the insanity defense was available to a defendant with a preexisting mental condition, regardless of the source of the condition’s aggravation. *Id.* at 722.

¶11 Mosay’s reliance on *Maik* is misplaced for two reasons. First, Mosay acknowledges *Maik* requires evidence of an underlying mental condition unrelated to the consumption of narcotics. Mosay asserts he “had mental health issues unrelated to the use of drugs, and although he was never a resident of a

mental health institution there was testimony that his psychosis at the time of the crime was evident before the crime and persisted after he had ceased taking methamphetamine.” However, Mosay has failed to cite any record entries containing the pertinent testimony, and “we decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for ... evidence to support [the asserted facts].” *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).³

¶12 Mosay’s reliance on *Maik* is also problematic because our supreme court distinguished that case in *State v. Kolisnitschenko*, 84 Wis. 2d 492, 493, 267 N.W.2d 321 (1978). In *Kolisnitschenko*, the defendant was found guilty of murdering his neighbor in the first phase of his bifurcated trial. *Id.* Kolisnitschenko argued during the second phase he was not guilty by reason of mental disease or defect. *Id.* He testified that prior to the murder he consumed “a variety of drugs including eight to ten amphetamine tablets, beer, Champale, 10 mixed alcoholic drinks, and a third of an ounce of marijuana.” *Id.* at 494. The jury found him responsible after it was given an instruction based on *Gibson*. *Id.* at 495. On appeal, Kolisnitschenko argued the instruction was erroneously given because testimony at the hearing established he suffered from a nontemporary prepsychotic condition known as “stormy personality” prior to the night of the murder. *Id.* at 497. Thus, Kolisnitschenko’s theory was that the drugs and alcohol he consumed merely aggravated a preexisting mental disorder.

³ The only record entry Mosay cites is his brief before the circuit court, which contains the conclusory statement that “there is evidence in the experts’ reports and motion hearing testimony that Mr. Mosay had mental health issues unrelated to the use of drugs or alcohol prior to the crime, though he had been given no specific diagnosis.” Argument is not evidence.

¶13 The court rejected Kolisnitschenko’s argument, concluding his drug and alcohol ingestion was the “significant precipitating factor” for his mental state at the time of the crime. *Id.* at 502. This inquiry includes a temporal element to which the defendant’s pre- and post-crime mental health is relevant. *Id.* at 501-02. The court noted “Kolisnitschenko was psychotic only during the period of intoxication. There was no evidence that Kolisnitschenko’s mental disease existed before consuming the intoxicants or persisted after the effects of the intoxicants had worn off.” *Id.* at 501. The court distinguished the facts from those of *Maik*: “[T]he evidence clearly demonstrates that [Kolisnitschenko’s] intoxication was a significant precipitating factor, thus distinguishing the situation from that in *Maik* where the testimony was that intoxication was one possible precipitating factor among various possibilities.” *Kolisnitschenko*, 84 Wis. 2d at 502.

¶14 The parties assert, and we agree, this case falls somewhere between the factual scenarios described in *Maik* and *Kolisnitschenko*. Although Mosay’s psychosis was undisputedly the result of his voluntary methamphetamine consumption, we cannot say he was under the “direct influence” of the drug at the time of the crime.⁴ See *Kolisnitschenko*, 84 Wis. 2d at 501. However, we do not view this fact as sufficient to bring this case within the realm of *Maik*. Although Mosay refers to trauma he suffered as a child (e.g., the deaths of his father and younger half-brother, his family’s history of drug and alcohol abuse, and his exposure to violence at home), there is no evidence any factor other than Mosay’s

⁴ We note signs and symptoms of intoxication can persist for hours or days beyond the time when the substance is detectable in bodily fluids. AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 201 (4th ed., rev. 2000). This may be due to low concentrations of the substance in certain areas of the brain or to a “hit and run” effect where the substance alters a physiological process that takes longer to recover from than the elimination of the substance. *Id.*

voluntary intoxication was the “significant precipitating factor” for Mosay’s mental state at the time of the homicide. Moreover, nothing in the record or briefs suggest any of these factors qualify as a “mental disease or defect” under WIS. STAT. § 971.15. The undisputed evidence establishes the lone precipitating factor for Mosay’s mental state during the homicide was his voluntary consumption of narcotics. See *Kolisnitschenko*, 84 Wis. 2d at 502. Thus, the insanity defense is not available to Mosay.

¶15 It is true the court in *Kolisnitschenko* left open the possibility that voluntary drug use could result in insanity of sufficient permanence to be considered a “mental disease or defect” under WIS. STAT. § 971.15. See *Kolisnitschenko*, 84 Wis. 2d at 501 n.7; see also WIS JI—CRIMINAL 605 (chronic use of drugs or alcohol may produce a condition that can constitute a mental disease or defect if the condition has become permanent). We need not reach the issue in this case. Although Mosay argues his psychosis was sufficiently permanent because one medical expert testified during Mosay’s competency hearing that he was still suffering from its effects as of February 2007, the totality of evidence supports the circuit court’s conclusion. The remaining medical examiners observed no signs of psychosis during Mosay’s interviews. Further, Mosay indicated in interviews his mind was “getting clearer” and one report states, “By November 2006, he said he was feeling much better and back to normal and was sleeping good and had his appetite back and did not have [any] residual [m]eth complaints.” Thus, we need not resolve, on these facts, whether permanent mental illness brought about by voluntary intoxication constitutes a mental disease or defect within the meaning of § 917.15.

By the Court.—Judgment affirmed.

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

