

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2002

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. 02-0295-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99 CF 2901

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROOSEVELT BENNETT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roosevelt Bennett was charged with attempting to possess a firearm as a felon, bail jumping, and providing false information on a

firearms-dealer notification form.¹ He appeals from an order committing him to institutional care following the trial court's determination that he was not responsible for his crimes. *See* WIS. STAT. § 971.15. Bennett also appeals from an order denying his postconviction motion to vacate the commitment order. Bennett claims that the trial court erroneously exercised its discretion when it: (1) denied his request for a supplementary mental examination; and (2) denied his postconviction motion without considering a subsequent report by a psychologist who opined that Bennett could be placed on conditional release. We affirm.

I.

¶2 On March 11, 1999, the day he was released on bail for prior charges of carrying a concealed weapon, disorderly conduct, and bail jumping, Roosevelt Bennett went to Badger Guns & Ammo because he believed that he was on a mission to save the African-American community by preventing the sale of handguns. The trial court found that while Bennett was in the store he was “loud and boisterous” with a man and a woman looking at a handgun, and that Bennett went through a military maneuver with a rifle. Bennett also asked to see three Cobray M-11 .9mm. pistols, two pistol grip shotgun cruisers, a full-size shoulder shotgun, and a Ruger .357 magnum handgun. He told the salesperson that he had \$1000 to pay for the guns. When the salesperson told Bennett that he could not take a copy of the firearms-dealer notification form with him, Bennett became agitated and left the store. Bennett returned about three hours later. He purchased a Cobray M-11 .9mm. pistol and filled out the required paperwork. The

¹ *See* WIS. STAT. §§ 941.29(1)(a), (1)(c) & (2m); 939.32; 946.49(1)(b); and 175.35(2e) & (3) (1999–2000). All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

Wisconsin Handgun Hotline rejected the sale of the gun because Bennett was a convicted felon.

¶3 On March 5, 2001, Bennett pled not guilty by reason of mental disease to the charges of attempting to possess a firearm as a felon, bail jumping, and providing false information on a firearms-dealer notification form. He waived his right to a jury trial and, as noted, the trial court found him not responsible. The trial court then conducted a dispositional hearing. Two psychiatrists, John Pankiewicz, M.D., and George Palermo, M.D., testified.

¶4 Dr. Pankiewicz testified that he examined Bennett on August 11, 1999. Dr. Pankiewicz opined that Bennett was suffering from bi-polar affective disorder, manic state, when he attempted to buy the handgun.² Dr. Pankiewicz's written report recommended that Bennett be placed in institutional care. At the hearing, Dr. Pankiewicz opined that Bennett had a history of non-compliance with taking medication and could be a threat to himself or others if he stopped taking his medication.

¶5 Dr. Palermo testified that he examined Bennett in August of 1999. Dr. Palermo's written report diagnosed Bennett as having bi-polar disorder and antisocial personality disorder with narcissistic traits. Dr. Palermo testified that Bennett had a history of not taking his medication and would need medication for

² Dr. Pankiewicz's report described bi-polar affective disorder as:

a severe mental illness in which individuals can suffer from deep depressions or periods of euphoria and/or irritability. In the manic phase, individuals can also sustain psychotic symptoms such as delusions or hallucinations. These delusions often cause them severe impairment in impulse control and personal judgment.

the rest of his life. Dr. Palermo's report opined that Bennett "may become dangerous to himself and/or others" during his manic-depressive episodes.³

¶6 Following the trial court's determination that Bennett was not responsible for the crimes, his attorney requested another evaluation of Bennett because "it's been, I believe, now about 18 months since Mr. Bennett has had any report to determine the current state of his mental illness and the level of dangerousness that he would impose to himself or the community." The trial court denied the request and ordered Bennett committed to institutional care because it determined that Bennett, if conditionally released, "would pose a significant risk of bodily harm to himself and to others." The trial court noted that Bennett committed the crimes the day he was released on bail, while allegedly taking medication that had been given to him while he was in custody:

[A]lthough the defendant had been in custody for almost two months on this matter[,] the date he's out of custody he's still getting involved in this conduct and the mental illness is taking over him ... I think that that is significant because, as Dr. Palermo indicated, being medicated doesn't mean that the illness is under control.

¶7 The trial court also found significant Bennett's history of mental illness and his history of non-compliance with taking medication: "The defendant has a long-term illness. He also has a long-term history of non-compliance with medication." Finally, the trial court emphasized Bennett's need for long-term treatment:

This, again, is the third set of charges that this Court has looked at for Mr. Bennett, around basically a relatively short period of time that he was getting involved in these

³ Both Dr. Pankiewicz and Dr. Palermo testified that the opinions in their reports were not changed by anything they heard at the hearing.

matters. But, again, after each of those he had an opportunity to be medicated, to be compliant with medication, to be under treatment and not get involved in something more. That's not what happened. That history alone I think is significant in showing that the defendant is going to need some long-term treatment and is not going to be necessarily in a position where he would be very safe coming out into the community.

¶8 Bennett filed a postconviction motion to vacate the commitment order, alleging that the trial court erred because it did not have enough information on his present mental health to determine whether he would have been dangerous to himself or others. Bennett asked the trial court to reconsider its decision in light of a report from psychologist Robert Gordon, Ph.D., and either order conditional release or reduce the term of institutional care. Dr. Gordon examined Bennett on December 3, 2001. Dr. Gordon's report recommended that "consideration be given to having [Bennett] placed in a less restrictive setting" because Bennett's "conduct has been good and he has been cooperative and exhibited no behavioral problems during the past two years."

¶9 The trial court denied Bennett's motion. It concluded that Dr. Gordon's report "would not have made any difference" because it based its decision to institutionalize Bennett on Bennett's failure to take his medication when Bennett was "on his own" and, also, that when Bennett was medicated "his illness was ... not necessarily ... under control."

II.

¶10 A commitment order must specify either institutional care or conditional release. WIS. STAT. § 971.17(3)(a). A court must order institutional care if it finds by clear and convincing evidence that conditional release of the person would pose a "significant risk of bodily harm to himself or herself or to

others or of serious property damage.” *Id.* Among the factors the court may consider in making this determination are:

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 possible for treatment beyond medication.

Id. “If the court lacks sufficient information to make the determination ... immediately after trial, it may adjourn the hearing and order the department of health and family services to conduct ... a supplementary mental examination ... to assist the court in framing the commitment order.” WIS. STAT. § 971.17(2)(a).

¶11 A trial court’s decision to order institutional care or conditional release is discretionary. *State v. Cook*, 66 Wis. 2d 25, 27–28, 224 N.W.2d 194, 196 (1974). The trial court’s findings of fact are reviewed in the light most favorable to its decision and will be sustained if there is any credible evidence to support them. *See State v. Gladney*, 120 Wis. 2d 486, 490, 355 N.W.2d 547, 549 (Ct. App. 1984).

¶12 Bennett alleges that the trial court erroneously exercised its discretion when it denied his request for a mental health examination because it did not have information about his present mental health. *See* WIS. STAT. § 971.17(3)(a) (present mental condition is a factor the trial court may consider when determining whether a person should be placed in institutional care or on conditional release). Bennett thus claims that the trial court erred because, without information about his present mental health, it could not determine whether he should be placed in institutional care or on conditional release. We disagree.

¶13 Under WIS. STAT. § 971.17, a trial court is not required to order a supplementary mental examination of the defendant before conducting the commitment hearing. Section 971.17(2)(a) provides: “*If* the court lacks sufficient information to make the determination ... it *may* adjourn the hearing and order the department of health and family services to conduct ... a supplementary mental examination.” (Emphasis added.) The trial court determined that it had sufficient information to determine whether Bennett posed a significant risk of bodily harm to himself or others. The record supports this determination.

¶14 The trial court considered the reports and testimony of Dr. Pankiewicz and Dr. Palermo. Dr. Pankiewicz testified that Bennett had a history of not taking his medication. Dr. Pankiewicz’s report opined that during manic phases, Bennett “loses substantial control of his impulses and judgment and tends to come down with grandiose delusional ideation.” Dr. Pankiewicz concluded that Bennett’s hospitalization, rather than conditional release was appropriate. Dr. Pankiewicz’s report noted that Bennett would be a “substantial threat to himself and others” if released and that Bennett would “need to transition through a hospital environment with a careful program set up to maintain him in the community if he is to reach the point of conditional release.”

¶15 Dr. Palermo’s report discussed Bennett’s history of mental illness, which began in the 1970’s. Dr. Palermo’s report further stated that when Bennett was experiencing a manic-depressive episode, Bennett “may become dangerous to himself and/or others as a consequence of his delusional, paranoid ideas and the training and knowledge in the use of guns that he acquired during his military service.” Dr. Palermo testified that Bennett had not taken his medication regularly, and that Bennett would need to take medication for the rest of his life. Dr. Palermo’s report recommended that Bennett “should be transferred to a State

psychiatric institute ... for treatment of his basic bipolar illness with frequent relapses until he reaches a plateau and until, after several months of compliance with his medication, he will pose no threat to society, to others or to himself.”

¶16 The trial court also had information about the nature and circumstances of Bennett’s past crimes. In 1998, Bennett was charged with battering a public transit driver. The trial court found Bennett not guilty by reason of mental disease or defect and ordered sixteen months of institutional care. In 1999, Bennett was charged with carrying a concealed weapon, disorderly conduct, and bail jumping. A jury found Bennett not guilty by reason of mental disease or defect and the trial court again ordered Bennett committed to institutional care.

¶17 There is credible evidence to support the trial court’s finding that Bennett posed a risk of significant bodily harm to himself and others. The reports and testimony show that Bennett had a history of serious mental illness and non-compliance with taking medication. The psychiatrists agreed that, without medication, Bennett could become dangerous to himself and others. Moreover, there was evidence that, even with medication, Bennett’s illness was not necessarily fully treated. The trial court twice committed Bennett to institutional care for prior offenses, and both times, upon being released, Bennett committed subsequent offenses. Accordingly, the trial court properly considered appropriate factors when it ordered Bennett committed to institutional care.

¶18 Bennett also alleges that the trial court erroneously exercised its discretion when it denied his postconviction motion to vacate the commitment order because Dr. Gordon’s report established that he was no longer dangerous. He claims that because his postconviction motion “procedurally resembles the denial of ... a petition [for conditional release]” his claim on appeal “might be

analyzed as though there had been a denial of Bennett’s petition for release, although Bennett has not petitioned, or it might be treated as a review of [the trial court’s] commitment order entered had [it] ordered an examination of Mr. Bennett’s current mental health condition.” Again, we disagree.

¶19 Under WIS. STAT. § 971.17(4)(a), “[a]ny person who is committed for institutional care may petition the committing court to modify its order by authorizing conditional release *if at least 6 months have elapsed since the initial commitment order was entered*, the most recent release petition was denied or the most recent order for conditional release was revoked.” (Emphasis added.) Thus, a petition for conditional release under § 971.17(4)(a) is not the same as an initial commitment order entered under § 971.17(3)—a petition for release is filed at least six months after the initial commitment order was entered. Accordingly, we decline to treat Bennett’s postconviction motion as a petition for conditional release. As noted above, the trial court reasonably determined that Bennett was a danger to himself and others. Thus, it properly denied Bennett’s postconviction motion.⁴ If Bennett wishes to petition the court for conditional release, he may still do so under § 971.17(4).

By the Court.—Orders affirmed.

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

⁴ Bennett alleges that “[t]here may not have been anything inappropriate about the factors [the trial court] considered; instead, the court did not give enough, if any, consideration to [the Department of Health and Family Services’s] successful treatment of Mr. Bennett, as Dr. Gordon has documented.” How Bennett was or was not responding to treatment after the trial court committed him to the Department’s custody does not affect whether the trial court’s decision to commit him was within the trial court’s discretion.

