

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 19, 2011

A. John Voelker
Acting 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. 2010AP2290-CR

Cir. Ct. No. 2009CF238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY R. SCHWAB,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Henry Schwab appeals an order committing him to a mental health facility for eighteen months based on a finding that he was not guilty by reason of mental disease or defect (NGI) for a sex offender registry violation. He argues that the trial court erroneously exercised its discretion

because there was insufficient evidence to show that conditional release would pose a significant risk of bodily harm to members of the community. We reject that argument and affirm the order.

BACKGROUND

¶2 Schwab was required to register as a sex offender because, as a juvenile, he committed a first-degree sexual assault of a child. He was placed in a juvenile facility where he received some treatment, but did not complete the sex offender treatment program. After his release, he rented a room from Nichole Merckes, a social worker, who provided significant assistance to Schwab including filling out his paperwork and managing his affairs.

¶3 The Department of Corrections requested that Schwab be prosecuted for failing to notify the registry of an address change and also providing false information. When asked why he failed to comply with the registration requirements, Schwab responded, “just for the hell of it.” The complaint charged Schwab with two registry violations as a repeater. Pursuant to a plea agreement, the State dismissed one count and Schwab did not contest the remaining count, but entered the NGI plea to failing to notify the registry. Based on a psychological review, the State conceded that Schwab’s low IQ rendered him incapable of complying with the registration law.

DISCUSSION

¶4 WISCONSIN STAT. § 971.17(3)¹ governs the circuit court's duties after an NGI adjudication:

The court shall 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 In determining whether commitment shall be for institutional care or conditional release, the court may consider, without limitation because of enumeration, 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.

¶5 Schwab contends these factors support conditional release and the circuit court improperly placed the burden of proof for these factors on Schwab. Schwab's arguments are based in large part on evidence that was not presented as opposed to any evaluation of the evidence before the court. The trial court did not misallocate the burden of proof. Rather, the State presented sufficient evidence to show that conditional release would not be appropriate, and Schwab failed to rebut that evidence.

¶6 We evaluate a commitment decision based on whether the evidence, viewed in the light most favorable to the State, was sufficient to meet the applicable legal standard. *State v. Wilinski*, 2008 WI App 170, ¶12, 314 Wis. 2d 643, 762 N.W.2d 399. The State's witnesses, a case worker and a corrections

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

supervisor of NGI patients, testified that Schwab is dangerous because he lacks empathy and the mental capacity to distinguish right from wrong and cannot recognize the harm that his actions cause his victims. Because his sex offender treatment is incomplete, he needs a specialized, structured setting to be able to successfully complete a treatment program. The witnesses further testified that the community lacks the resources to provide the treatment Schwab needs.

¶7 As the trial court noted, the nature and circumstances of Schwab's crime show the inadequacy of conditional release. Although the current conviction is based on his failure to register as a sex offender, this is more than just a "paper crime." The registry program is designed to reduce the risk of re-offense and Schwab's inability to comply with that program presents a danger to the community. His "mental history and mental condition" show the need for specialized treatment that is not available in the community. His living situation was recently altered because Merckes had a baby and the department will not allow him to continue to live at her residence. Because Merckes provided significant assistance to Schwab managing his affairs, moving from her residence will further exacerbate Schwab's difficulties. Finally, Schwab has a history of not taking his medication for Tourette's Syndrome and ADHD, further complicating any conditional release. Applying the relevant factors to Schwab, the trial court appropriately found sufficient evidence that conditional release would endanger the public.

By the Court.—Order affirmed.

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

