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DISTRICT II

March 6, 2024

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1-CR

State of Wisconsin v. Andrew J. Bohn (L.C. #2007CF788)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Andrew J. Bohn appeals an order denying his petition for conditional release. Bohn argues the evidence at the hearing on the petition was insufficient to establish by clear and convincing evidence that he would pose a significant risk of bodily harm to others if conditionally released. *See* WIS. STAT. § 971.17(4)(d) (2021-22).¹ He also challenges the standard of review. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2007, the State charged Bohn with attempted first-degree intentional homicide. The complaint alleged that, while serving a commitment for another offense, Bohn stabbed a fellow patient in the neck with scissors and almost killed her. As part of a plea deal, Bohn pled no contest, but not guilty by reason of mental disease or defect, to the lesser charge of mayhem. The court ordered Bohn committed to institutional care for the maximum period of twenty-five years.

In October 2008, Bohn petitioned for conditional release and the circuit court granted the petition. Bohn subsequently attacked a man with a crowbar by repeatedly hitting him in the head with the weapon. Bohn stipulated to the revocation of his conditional release, and the circuit court revoked his release in November 2010.

In 2019, Bohn again petitioned for conditional release. Dr. Kevin Miller examined Bohn and, at a hearing on Bohn's petition, testified that Bohn would only present a "moderate risk" of harm to others if he were placed on conditional release. Miller explained that Bohn's psychosis was resolved. Given Bohn's serious criminal history and Bohn's limited time in a minimum-security unit, the circuit court rejected Miller's conclusion that Bohn's risk was moderate and concluded that Bohn presented a significant risk of bodily harm to the public. It denied Bohn's petition.

After the court denied conditional release, Bohn went through a period where he became hostile and sexually inappropriate. In August 2020, Bohn physically attacked another patient. Before that attack, Bohn was manic, made hypersexualized comments, and played with his feces. Bohn had also warned staff that he had paranoid, violent, and homicidal thoughts. However,

staff were unable to stop Bohn from attacking the other patient. By November 2020, Bohn's behavior had stabilized based on medication changes.

In June 2022, Bohn petitioned for conditional release. This is the petition underlying the present appeal. Miller examined Bohn and again concluded Bohn only presented a moderate risk of harm to others if he were placed on conditional release. In Miller's report, he detailed Bohn's extensive, prior criminal history. He noted the offense underlying Bohn's current commitment, where he stabbed a fellow patient in the neck and almost killed her. Miller noted Bohn's first commitment occurred in 2003, after he assaulted an elderly woman walking in her neighborhood based on his delusional belief that she was abusing children. In 2006, Bohn tried to choke his mother. Miller's report mentioned the incident where Bohn hit a man in the head repeatedly with a crowbar.

Miller explained that, when not committed in the past, Bohn used a lot of different illegal, psychoactive drugs. Bohn advised Miller that when he became psychotic due to substances, he had significant delusions about being harmed or that others were being harmed and he needed to protect them.

Miller noted that since his 2019 report, Bohn's diagnosis changed from an unspecified mood disorder to bipolar disorder type I. Miller acknowledged that after his 2019 report, in May 2020, Bohn's mental health began to deteriorate and in August 2020, Bohn attacked another patient. Bohn had been stabilized since November 2020. Miller nevertheless stated that his conclusions regarding Bohn remained the same since 2019 and that Bohn presented a moderate risk of bodily harm to others.

Miller also noted that any conditional release would raise two problems. First, Bohn would need to be placed in a facility where he could not use illicit substances and such a facility may not have proper staffing or protocols to minimize exposure to illicit drugs. Second, Miller believed that Bohn would need to be placed in a facility with a high staff-to-patient ratio to ensure that any declines in mental status are noticed and addressed quickly.

The court held a hearing on the petition and Miller testified. Miller testified consistent with his report, that Bohn met the statutory requirements for conditional release. He noted that Bohn had a violent history, but that at the time of the hearing, Bohn's risk was moderate. Miller emphasized that both mania and substance use can trigger Bohn to act out violently. If the court granted Bohn's conditional release petition, Miller believed that Bohn needed to be in a living arrangement with twenty-four hour supervision and monitoring of Bohn's sleep and possible substance use.

After testimony both defense counsel and the State argued that Bohn's petition for conditional release should be granted. The circuit court, however, disagreed.

The circuit court detailed Bohn's lengthy violent history. It noted that much of Bohn's violence happened in the institution and while on conditional release. The court emphasized that the offense underlying Bohn's current commitment was "very egregious, very assaultive, very dangerous" and noted it had occurred in the institution. The court reviewed Bohn's mental health history and prior substance abuse, and it expressed concern that Bohn's substance abuse was connected to his violence. The court also noted that since Bohn's last petition a few years ago he had to return to a maximum-security placement "where he did stay for a fairly significant period of time." Although Bohn was currently in a minimum-security placement, Bohn's last

incident of violence was still in the recent past. Emphasizing Bohn’s violent history and his recent regression within the institution, the court found by clear and convincing evidence that Bohn presented a significant risk of bodily harm to others. It denied his petition. Bohn appeals.

On appeal, Bohn challenges the proper standard of review of the circuit court’s dangerousness finding as well as the evidence supporting the circuit court’s finding that he remained dangerous. We review the circuit court’s conditional release determination under the “sufficiency of the evidence test” standard. *State v. Randall (Randall III)*, 2011 WI App 102, ¶13, 336 Wis. 2d 399, 802 N.W.2d 194. We will affirm the circuit court’s finding of continued dangerousness if credible evidence supports it. *Id.*, ¶17. We defer to the circuit court’s credibility determinations and its evaluation of the evidence, drawing on the circuit court’s reasoning. *Id.*, ¶14. If multiple reasonable inferences may be drawn from the record, this Court will adopt the inference that the circuit court adopted. *Id.* The circuit court may reject an expert’s opinion even if that opinion is uncontradicted. *Bray v. Gateway Ins. Co.*, 2010 WI App 22, ¶24, 323 Wis. 2d 421, 779 N.W.2d 695 (2009).

Bohn first argues that the sufficiency of the evidence standard is the wrong standard to apply to review the circuit court’s dangerousness finding. Although he acknowledges that the current standard of review is sufficiency of the evidence, *see Randall III*, 336 Wis. 2d 399, ¶13, Bohn seeks a mixed question of fact and law standard of review. However, as Bohn acknowledges, this court is bound by its decision in *Randall III* and must apply the sufficiency of the evidence standard. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore do not discuss this argument further. The proper standard of review is sufficiency of the evidence. *Randall III*, 336 Wis. 2d 399, ¶13.

Bohn next argues the evidence supporting the circuit court’s determination to deny his petition for conditional release was insufficient. WISCONSIN STAT. § 971.17(4)(d) provides that the circuit court must “grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released.” In making this determination, the circuit court may, but is not required to, consider several statutory factors, including:

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.

WIS. STAT. § 971.17(4)(d).

Bohn largely frames his sufficiency of the evidence argument as a burden of proof issue. He first argues that because the State, who has the burden of proof at a conditional release hearing, ultimately agreed at the conclusion of its presented evidence that the petition should be granted, we must determine the evidence supporting the circuit court’s decision to deny the petition was insufficient.² However, Bohn’s arguments regarding the State’s position in the circuit court are misplaced in his sufficiency-of-the-evidence challenge. As stated above, we

² Relatedly, Bohn argues that because the State supported the grant of the conditional release petition in the circuit court, the State is now forfeited from making any argument on appeal that the evidence was sufficient in this case. As Bohn correctly acknowledges, a respondent may advance arguments that would sustain the circuit court’s ruling, even if those arguments were not made in the circuit court proceedings. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*, WIS. STAT. § 940.225(7). We decline to apply forfeiture to the State’s arguments.

will affirm the circuit court’s finding of continued dangerousness if credible evidence supports it. See *Randall III*, 336 Wis. 2d 399, ¶17.

Bohn then argues the evidence supporting the circuit court’s decision to deny the petition was insufficient because the circuit court’s understanding of the burden of proof was “dubious.” Bohn emphasizes that pursuant to WIS. STAT. § 971.17(4)(d), conditional release is required unless the State proves by clear and convincing evidence that he would pose a significant risk of bodily harm to himself or others. At the hearing on the petition, the circuit court read § 971.17(4)(d) into the record and then correctly restated the statutory language, noting “[i]t is mandatory that the Court grant the petition unless it finds by a standard of clear and convincing evidence that the person would pose a significant ... risk of bodily harm to himself or herself or to others ... if conditionally released.” However, Bohn argues that during the circuit court’s reasoning, it made statements suggesting that conditional release was not the default.³ We

³ The court stated on one occasion:

The legislature has provided some factors that the Court can consider and may consider, although it indicates that that is not without limitation, so the Court can consider other factors that might be applicable in a particular situation to determine whether or not the burden is met and the standard is met for the conditional release.

The court stated on another occasion:

So I think those two pre-conditions [that cause Bohn’s violence] are very important factors in trying to evaluate or analyze whether or not the criteria is met for this conditional release of the defendant.

(continued)

disagree with Bohn’s characterization of the circuit court’s comments. The circuit court did not misapply the burden of proof. Rather, it found by clear and convincing evidence that Bohn posed a substantial risk of bodily harm to others based on the underlying criminal offense and his history at the institution, including the recent attack on another patient. *See* WIS. STAT. § 971.17(4).

In any event, this is again a sufficiency-of-the-evidence challenge. Our standard of review requires us to review the record and determine whether the circuit court’s finding of continued dangerousness is supported by credible evidence. *See Randall III*, 336 Wis. 2d 399, ¶17.

Bohn next argues the evidence was insufficient to support the circuit court’s denial of his petition because the circuit court did not properly weigh the evidence and the circuit court’s reasons for denying the petition were “unconvincing” and “unpersuasive.” He contends that we should find Miller’s opinions that Bohn did not pose a substantial risk of bodily harm to others to be “compelling” and to give these opinions “the decisive weight they deserve.” However, as stated above, when reviewing a sufficiency of the evidence challenge, we will defer to the circuit court’s credibility determinations and its evaluation of the evidence. *Id.*, ¶14.

Finally, the court stated:

So I think in looking at the factors that the legislature has provided for, the Court does feel that he does by a finding of clear and convincing evidence pose a significant risk of bodily harm to others here based on the underlying offense as well as his problems within the facility fairly recently, that there hasn’t been enough of a period of no problems or no incidents at the facility to warrant a finding that he would not be a significant risk to cause bodily harm to others[.]

Here, the record sufficiently supports the circuit court's denial of Bohn's petition. Bohn's criminal history is extensive and severe. He has violently attacked people in the community while on conditional release and in the institution while committed. Although some of Bohn's violent acts occurred years ago, he attacked a fellow patient in 2020 following the denial of his prior petition for conditional release. Before that attack, Bohn had been manic, made hypersexualized comments, and played with feces. Although Bohn's mental health has been stable since the 2020 incident and it appears that his new bipolar diagnosis suits his needs, Bohn's mental health history establishes that he is stable for a period of time and then has a mental health crisis that culminates with a violent attack on another.

The record also establishes that if placed on conditional release, Bohn would need supervision for twenty-four hours a day. Miller opined that Bohn would need to be placed in a facility where he could not abuse substances because Bohn's substance abuse is one thing that "seem[s] to drive the violence." Miller expressed concern that such a facility may not have proper staffing or protocols to minimize exposure to illicit drugs. Miller also believed that Bohn would need to be placed in a facility with a high staff-to-patient ratio to ensure that any declines in mental status are noticed and addressed quickly because his mania is another precondition to violence.

We conclude that based on Bohn's mental health history, his underlying criminal history, his institutional conduct, and his ongoing needs, combined with Miller's expert opinion that Bohn still posed a moderate risk of harming others, the evidence sufficiently supports the circuit court's determination that Bohn would pose a significant risk of bodily harm to others if he were granted conditional release. The court properly denied Bohn's petition for conditional release. See *Randall III*, 336 Wis. 2d 399, ¶17.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals