

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2943-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REGINALD J. HUMPHREY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Reginald J. Humphrey appeals from an order denying his request for conditional release from the Winnebago Mental Health Institute. See § 971.17(4), STATS.¹ We affirm.

¹ Section 971.17(4), STATS., provides:

(..continued)

PETITION FOR CONDITIONAL RELEASE. (a) Any 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order was entered, the most recent release petition was denied or the most recent order for conditional release was revoked. The director of the facility at which the person is placed may file a petition under this paragraph on the person's behalf at any time.

- (b) If the person files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney and, subject to sub. (7) (b), refer the matter to the state public defender for determination of indigency and appointment of counsel under s. 977.05 (4) (j). If the person petitions through counsel, his or her attorney shall serve the district attorney.
- (c) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records, as provided under s. 146.82 (2) (c). If any such examiner believes that the person is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release.
- (d) The court, without a jury, shall hear the petition within 30 days after the report of the court-appointed examiner is filed with the court, unless the petitioner waives this time limit. Expenses of proceedings under this subsection shall be paid as provided under s. 51.20 (18). The court shall 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 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.

In 1992, Humphrey was found not guilty by reason of mental disease of attempted first-degree intentional homicide and first-degree recklessly endangering safety, and committed to a state mental health facility after pouring gasoline on a University of Wisconsin-Milwaukee student and attempting to light her on fire. *See* §§ 939.32, 940.01, 941.30(1) and 971.165(1), STATS. In 1995, Humphrey filed this, his third petition for conditional release from his commitment at Winnebago. At the request of the trial court, Humphrey was examined by Dr. Frederick Fosdal, a psychiatrist, and Dr. Kenneth Smail, a psychologist. Both mental health professionals had examined Humphrey during his previous unsuccessful attempts to gain conditional release. On the earlier occasions, Drs. Fosdal and Smail recommended against release. This time, however, Drs. Fosdal and Smail supported Humphrey's conditional release. The trial court denied Humphrey's petition, determining that he continues to pose a significant risk to the community.

Our review is governed by *State v. Jefferson*, 163 Wis.2d 332, 338, 471 N.W.2d 274, 277 (Ct. App. 1991). The trial court's findings of fact will not be (.continued)

- (e) If the court finds that the person is appropriate for conditional release, the court shall notify the department of health and social services. The department of health and social services and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. 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. The department of health and social services may contract with a county department, under s. 51.42 (3) (aw) 1. d., with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 60 days after the court finding that the person is appropriate for conditional release, unless the county department, department of health and social services and person to be released request additional time to develop the plan. If the county department of the person's county of residence declines to prepare a plan, the department of health and social services may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the individual will be living in that county.

overturned unless clearly erroneous. *Id.* “The trial court's application of those facts to the law,” that is, whether Humphrey is dangerous to himself or others, “is a question of law which appellate courts review independently from the trial courts.” *Id.* In order to keep Humphrey at Winnebago, the State had to prove by clear and convincing evidence that Humphrey remains dangerous. *State v. Randall*, 192 Wis.2d 800, 840-841, 532 N.W.2d 94, 110 (1995).

Humphrey argues that the trial court erred in concluding that he still is a significant risk to the community, and points to the opinions contained in reports prepared by Drs. Fosdal and Smail that were considered by the trial court, as well as Dr. Smail's testimony in court. Both reports indicate that Humphrey had a longstanding history of mental illness and drug abuse. The reports opine that after approximately three years of treatment, Humphrey did not have any remaining psychiatric symptoms and that although Humphrey has a history of not taking his medication, he has been responsible for taking his own medication since January 1995. The reports further opine that Humphrey has progressed satisfactorily through the various programs at Winnebago and has handled his grounds and off-grounds privileges satisfactorily. Drs. Fosdal and Smail concluded that Humphrey should be conditionally released. Dr. Smail also offered testimony, which reaffirmed the opinions contained in his report.

Contrary to Humphrey's argument, the opinions of Drs. Fosdal and Smail are not dispositive. The determination of whether the evidence satisfies the conditions for release is made by the courts, not the treating mental health professionals. *See* § 971.17(4)(d), STATS. The Supreme Court of the United States has noted the uncertainty of psychiatric science:

We have recognized repeatedly the “uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment...”

Jones v. United States, 463 U.S. 354, 365 n.13 (1983) (citation omitted); see *Steele v. State*, 97 Wis.2d 72, 97, 294 N.W.2d 2, 13 (1980) (“while some courts may have blind faith in all phases of psychiatry, this court does not”).

Our courts, therefore, are guided by the reasonable legislative judgments concerning the propriety of releases. *Jones*, 463 U.S. at 364-365. The Wisconsin legislature has provided six non-exclusive factors the trial court should consider in determining whether a person should be conditionally released:

- (1) The nature and circumstances of the crime;
- (2) The person's mental history and present mental condition;
- (3) Where the person will live;
- (4) How the person will support himself or herself;
- (5) What arrangements are available to ensure that the person has access to and will take necessary medication; and
- (6) What arrangements are possible for treatment beyond medication.

See § 971.17(4)(d), STATS.

The opinions of Drs. Fosdal and Smail must be measured in the context of the statutory factors. The trial court found that three years of institutional treatment was an insufficient time to support a conclusion Humphrey's non-violent behavior will continue, given his longstanding history of mental illness and drug abuse. The trial court also found Humphrey's recent ability to monitor his own medication is too recent and is not indicative as to whether his treatment regime will continue to be proper because there has been no substantial period of time in his life when he was taking his prescribed medication other than when he was incarcerated or, as here, institutionalized. The trial court also found that the record was devoid of any indication that Humphrey appreciated the potential consequences to others of not taking his medicine, and that he has no awareness that his addictions were in any way related to mental disease. The trial court further found that Humphrey seems to show little appreciation for the physical and emotional pain that the victim suffered and the extremely dangerous and life-threatening nature of his

conduct. Finally, the trial court found that Humphrey did not appear to be able to actively participate in group therapy and that he would have to be able to do so before he could be integrated successfully into any type of group setting such as a half-way home.

The trial court's findings support its legal conclusion that Humphrey remains dangerous. *Randall*, 192 Wis.2d at 840-841, 532 N.W.2d at 110, held that an insanity acquittee, such as Humphrey, may be confined in a state mental health facility for as long as he or she is considered dangerous. *Randall* also held that the trial courts must balance “society's interest in protection from harmful conduct against the acquittee's interest in personal liberty and autonomy.” *Id.*, 192 Wis.2d at 839, 532 N.W.2d at 109.

The trial court undertook the balancing required by *Randall*. The nature and circumstances of the crime, Humphrey's longstanding mental history, the lack of evidence regarding Humphrey's appreciation of dangerousness of his conduct, and the relatively small amount of time that has passed since the offense support the trial court's conclusion that Humphrey is still dangerous. On our independent review, we agree.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.