

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0081-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO V. HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Antonio V. Henderson was found not guilty of battery by an inmate by reason of mental disease or defect. He appeals from an order committing him to institutional care for three years and six months. Henderson claims that the trial court lacked jurisdiction to commit him because

the time limits in § 971.17(3)(e), STATS., applicable to the revocation of conditional release, were not followed. He also claims that the State failed to adduce sufficient evidence to support the revocation of his conditional release. We conclude that the proceedings in the trial court did not involve a revocation of conditional release but a sentence modification. Thus, the trial court had authority to commit Henderson based on the facts before it. We affirm the order.

¶2 In May 1997, Henderson was charged with battery by an inmate for assaulting a psychiatric care technician at the Wisconsin Resource Center. On the day of trial, the State stipulated to a finding that Henderson was not guilty of the offense by reason of mental disease or defect. At the time Henderson was serving a criminal sentence which would last longer than the maximum commitment under the battery conviction. A November 3, 1997 order committed Henderson to the Department of Health and Social Services (DHSS) (now known as the Department of Health and Family Services) for institutional care for three years and six months. The order included the notation that the commitment was “as outpatient to run concurrent.”

¶3 Henderson’s criminal sentence was modified and he was scheduled to be released on probation. In June 1998, the State moved the trial court to clarify the commitment order as to whether Henderson’s outpatient status was dependent on his incarceration under the prior criminal conviction. The trial court acknowledged that because Henderson was incarcerated under the prior criminal sentence, he had not been examined to determine whether the commitment should be inpatient or conditional release. The trial court ordered Henderson committed to the Mendota Mental Health Facility for an evaluation and determination of the appropriate treatment plan. The June 17, 1998 order committing Henderson to Mendota required the examination and report to be completed within fifteen days

“unless extended by cause by the Court.” An additional fifteen-day extension was subsequently granted.

¶4 On July 15, 1998, Henderson filed a notice of objection to revocation of his conditional release. He complained that no petition to revoke his conditional release pursuant to § 971.17, STATS., had been filed by the State. The trial court acknowledged that Henderson’s prior commitment to DHSS for institutional care did not result in any treatment because Henderson was then an inmate. On July 16, 1998, the trial court ordered that Henderson be conditionally released and that pursuant to § 971.17(3)(d), DHSS submit a report on Henderson’s treatment plan within twenty-one days. Henderson remained at Mendota.

¶5 On August 11, 1998, DHSS petitioned for revocation of Henderson’s conditional release based on conduct of July 21, 1998. Henderson moved to dismiss the petition on the ground that it was not filed within forty-eight hours of his detention related to the alleged violations. *See* § 971.17(3)(e), STATS. The trial court denied the motion to dismiss. It held that a conditional release plan was never put into place and that it had jurisdiction to proceed with an alternate disposition, such as placement with DHSS. At a hearing held on September 9, 1998, the court revoked Henderson’s conditional release and committed him to institutional care.

¶6 Section 971.17(3)(e), STATS., allows DHSS to take into custody any person conditionally released if the released person has violated any condition or rule. DHSS “shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release ... within 48 hours after the detention.” *Id.* Henderson argues that the forty-eight hour time limit was not

met for his detention at Mendota from June 17 to August 11, 1998. He suggests that this appeal requires the court to determine whether the forty-eight hour time limit is mandatory, in which case the failure to comply would deprive the trial court of jurisdiction to revoke his conditional release. The State responds that the time limit should be directory only.

¶7 The parties have assumed that § 971.17(3)(e), STATS., applies. We do not. Even though DHSS moved to revoke conditional release and the trial court eventually ordered conditional release revoked, we are not bound by the legal term of art used by the trial court. See *Daniel R.C. v. Waukesha County*, 181 Wis.2d 146, 156, 510 N.W.2d 746, 750 (Ct. App. 1993). Rather, “[w]e review the overall analysis used by the court.” *Id.* Here, the controlling fact is the trial court’s finding that the conditional release was never effectuated.

¶8 The record demonstrates that when the not guilty by reason of mental disease or defect finding was made, Henderson was not conditionally released. He was serving a criminal sentence which the parties anticipated would last longer than any commitment. Consequently, his custody was not actually transferred to DHSS. Henderson merely received a concurrent commitment.

¶9 When the criminal sentence was modified, the commitment matter came back to the trial court to clarify the sentence because the commitment order provided both for institutional care and outpatient status. Moreover, no conditional release plan was in place. The trial court had to start anew on determining Henderson’s commitment status. For the first thirty days, Henderson’s confinement at Mendota was for investigation and examination under § 971.17(2), STATS., to aid the trial court in its determination.

¶10 On July 17, 1998, the trial court entered an order which provided that Henderson “shall be conditionally released from detention.” But again, no conditional release plan was in place. Henderson’s continued confinement at Mendota was under § 971.17(3)(d), STATS., which gives DHSS twenty-one days to present a plan to the court once there has been a finding that the person is appropriate for conditional release. The next time the matter came before the court, the trial court learned that its intent to conditionally release Henderson was frustrated because Henderson refused to cooperate in the development of a conditional release plan. In light of that development, the trial court deemed it necessary to proceed with an alternate disposition.

¶11 Thus, Henderson was never actually conditionally released. There was no conditional release to be revoked. The § 971.13(3)(e), STATS., revocation procedure, and its time limits, does not apply to Henderson.

¶12 We conclude that the trial court had authority to clarify its original disposition and to proceed to a disposition other than conditional release. We need not consider Henderson’s claim that the State failed to meet its burden for the revocation of his conditional release. However, we have considered whether the record supports the disposition made by the trial court and conclude that it does.

By the Court.—Order affirmed.

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

