

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2010

David R. Schanker
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. 2009AP1754-CR

Cir. Ct. No. 1998CF36

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH C. VANDEBERG,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Fond du Lac County:
RICHARD J. NUSS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Keith C. Vandenberg appeals from the orders denying his motions for conditional release and postconviction relief. Vandenberg argues that the record does not support the circuit court's finding that he continues to be a danger to himself or others, and that the circuit court erroneously exercised

its discretion when it considered the statutory factors and denied his motion for conditional release. Because we conclude that the circuit court properly exercised its discretion under WIS. STAT. § 971.17(4) (2007-08), we affirm.¹

¶2 In 1998, Vandenberg shot and killed his wife with a shotgun. He was subsequently found not guilty by reason of mental disease or defect, and committed to institutionalized care for life. In January 2009, he filed a petition for conditional release under WIS. STAT. § 971.17(4). The circuit court held a hearing. The court found that Vandenberg has a major mental illness, and he will have that illness for his lifetime. The court also acknowledged that Vandenberg has been successful in returning to competency to a large extent because of the structure of the setting in which he lives and the medication he is receiving there. The court also determined that there needed to be a better plan in place for where Vandenberg would live and how he would support himself once he was released.

¶3 The court considered these factors against the risk of bodily harm he could present to others. The court found that the only reason Vandenberg was not a great risk to himself and others was because his medication is managed and he is in a structured setting. The court concluded: “You take him away from either one of those, and you pose the tremendous risk of decompensation. And decompensation ... could result in some serious consequences.” The court denied the motion for conditional release. The court also denied Vandenberg’s subsequent motion for postconviction relief.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Vandeberg first argues that the record does not support the circuit court's finding that he continues to be a danger to himself and others. The statute provides:

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.

WIS. STAT. § 971.17(4)(d). “The ultimate determination of dangerousness requires a careful balancing of society's interest in protection from harmful conduct against the acquittee's interest in personal liberty and autonomy.” *State v. Randall*, 192 Wis. 2d 800, 839, 532 N.W.2d 94 (1995). The statutory factors guide the circuit courts in balancing these interests. *Id.*

¶5 The State has the burden of proving by clear and convincing evidence that Vandeberg would pose a significant risk of harm if conditionally released. *See id.* at 823. We review the evidence supporting a determination of dangerousness in the light most favorably to the finding, and we will affirm if there is any credible evidence or inference on which the finding could be based. *See State v. Randall*, 222 Wis. 2d 53, 60, 586 N.W.2d 318 (Ct. App. 1998).

¶6 Vandeberg addresses each of the statutory factors and argues that the circuit court's finding was not supported by the evidence at the hearing. He concedes that the nature and circumstances of the crime are grave. He also states that his mental competency has been restored by medications, and he has taken his

medications for ten years. He argues that there is no basis in the record to find that his mental health is not stable, and argues that the court showed a lack of understanding of the conditional release process by considering that it had not yet been determined where Vandenberg would live and work upon his release. Vandenberg concludes that the State did not prove that he would pose a significant risk of bodily harm if he were conditionally released.

¶7 The evidence at the hearing established that Vandenberg had done well and complied with his medications in a structured setting. The court also considered a letter from Vandenberg's son that described his father's failure to take medications in the past, and his ability to convince others that he did not need the medications. The record supports the circuit court's finding that there were many uncertainties about what would happen to Vandenberg if released. The court was not required to infer that, since Vandenberg had improved in a structured setting, he would behave that way if he was conditionally released. Reviewing the evidence in the light most favorable to the finding, we conclude that there was sufficient evidence to support the circuit court's conclusions that Vandenberg still posed a significant risk of danger.

¶8 Vandenberg's second argument is that the circuit court did not properly exercise its discretion when it balanced the statutory factors because the court did not apply a proper legal standard. We will sustain a discretionary act of the circuit court if that court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W. 2d 175 (1982). Specifically, Vandenberg argues that the court did not consider that conditional release is a two-step process, and that a release plan is formulated only after conditional release is granted by the court. Consequently, he

asserts that the court erred when it found that the release plan for him was too speculative.

¶9 Again, we conclude that the circuit court considered the appropriate factors and explained its reasons for the conclusion it reached. The court was clearly aware that conditional release is a two-step process, but nonetheless found that the release plan for Vandenberg was too speculative. The circuit court was simply not comfortable with the answers provided as to where Vandenberg would live and how he would support himself. Given the court's concern that Vandenberg had regained competency because he was in a structured setting where his medications were managed, it was not unreasonable for the court to be concerned about the details of the plans for his conditional release. We conclude that the circuit court did not erroneously exercise its discretion, and affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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

