

Appeal No. 2010AP3120

Cir. Ct. No. 1985CF79

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF STATE OF WISCONSIN V. BRYAN J.
STANLEY:**

LA CROSSE TRIBUNE,

PETITIONER-APPELLANT,

v.

**CIRCUIT COURT FOR LA CROSSE COUNTY, HONORABLE
RAMONA A. GONZALEZ, PRESIDING, LA CROSSE COUNTY
CLERK OF CIRCUIT COURT, AND BRYAN J. STANLEY,**

RESPONDENTS-RESPONDENTS.

FILED

OCT 20, 2011

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

This appeal stems from the La Crosse Tribune's attempts to obtain records related to Bryan Stanley's conditional release from commitment to institutional care. In 1985, Stanley was charged with three counts of first-degree intentional homicide following a shooting in a church in Onalaska, Wisconsin. Stanley was found not guilty by reason of mental disease or defect and committed to institutional care under WIS. STAT. § 971.17 (1985-86). Following more than twenty years of institutional commitment, Stanley was found appropriate for

conditional release.¹ The circuit court sealed Stanley's conditional release plan as a confidential treatment record under WIS. STAT. § 51.30(1)(b) and (4) (2009-10).² The La Crosse Tribune disputes the court's authority to seal the records and contends that it has been denied access to Stanley's conditional release plan in violation of Wisconsin's Open Records Law.

The appeal raises two significant issues at the intersection of Wisconsin's Open Records Law and Mental Health Act, one procedural and one substantive. The procedural issue involves the proper mechanism to pursue an open records request for documents that have been placed under seal by the circuit court. The procedural issue also involves whether an open records requester can recover costs, fees, and damages when it is alleged that a circuit court judge has not timely responded to requests for documents the court has placed under seal. The substantive issue is whether a conditional release plan for treatment and services under WIS. STAT. § 971.17(4)(e) is a confidential treatment record under WIS. STAT. § 51.30(1)(b) and (4) and thus exempt from disclosure under Wisconsin's Open Records Law.

The outcome of the disputes in this case will affect defendants subject to institutional care following a finding of not guilty by reason of mental disease or defect, members of the media and the public seeking documents under the Open Records Law, and circuit courts faced with these issues. In addition, a

¹ In *State v. Stanley*, No. 2008AP197-CR, unpublished slip op. ¶¶1, 23 (WI App Nov. 13, 2008), we reversed the circuit court's order denying Stanley's petition for conditional release and remanded with directions to provide notice to the Department of Health and Family Services to prepare a conditional release plan. See WIS. STAT. § 971.17(4)(e).

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

resolution of the procedural issue involves defining the authority and role of the court of appeals. Because of the statewide significance of the issues in this case, we certify this appeal to the Wisconsin Supreme Court for its review and determination.

Background

In April 2009, the La Crosse Tribune submitted a letter to the circuit court judge presiding over Stanley's case, the Honorable Ramona Gonzalez, requesting Stanley's conditional release plan. The La Crosse Tribune also requested the court record from the La Crosse County Clerk of Circuit Court. The clerk of the circuit court denied the La Crosse Tribune access to the parts of the record under seal by order of the circuit court, and also stated that the documents under seal may contain confidential treatment records, which would require a court order for release.³ The La Crosse Tribune then submitted further correspondence to Judge Gonzalez regarding its request for Stanley's conditional release plan.⁴

³ The clerk stated that, under WIS. STAT. § 19.35(1)(a), records may be reviewed "except as provided by law." She stated that portions of the record were sealed by court order. She also stated that Stanley's treatment records are confidential under WIS. STAT. § 51.30, and that access to those records without written consent is limited under § 51.30(4)(b), requiring a court order in this case.

⁴ The La Crosse Tribune filed a petition for a supervisory writ in this court, requesting that we order Judge Gonzalez to release Stanley's conditional release plan. We issued an order questioning whether we had jurisdiction over the petition because the La Crosse Tribune had not filed an action in the circuit court to challenge the circuit court order sealing the conditional release plan. *See* WIS. STAT. § 752.02 (court of appeals has supervisory authority over all actions and proceedings in circuit court). Judge Gonzalez then offered to hold a hearing on the La Crosse Tribune's arguments on whether the conditional release plan should be unsealed. We dismissed

(continued)

The circuit court, Judge Gonzalez presiding, scheduled a hearing in Stanley's criminal case on the La Crosse Tribune's open records request for the conditional release plan. The La Crosse Tribune moved to intervene. The circuit court initially granted intervention. On reconsideration, the circuit court denied the La Crosse Tribune's motion to intervene and ordered the matter to move forward as a proceeding on the La Crosse Tribune's open records request.⁵

The La Crosse Tribune, the Wisconsin Newspaper Association, and Stanley submitted briefs on whether the conditional release plan should be unsealed. After a hearing, the circuit court found that Stanley's conditional release plan is a confidential treatment record under WIS. STAT. § 51.30(1)(b) and (4) and entered an order denying the La Crosse Tribune's request for the records.⁶ The La Crosse Tribune appeals, seeking release of Stanley's conditional release plan, as well as costs, fees, and damages for violations of the Open Records Law.

the writ petition because Judge Gonzalez's offer to hold a hearing on whether to unseal the conditional release plan provided the La Crosse Tribune with an alternative adequate remedy at law. We noted that a decision by the circuit court on whether to unseal the conditional release plan would be reviewable by this court. We also noted that, after the circuit court resolved the issue of whether to unseal the conditional release plan, the records request would return to the clerk of the circuit court and the clerk's decision would be subject to circuit court review under WIS. STAT. § 59.20(3)(b) or WIS. STAT. § 19.37(1).

⁵ The proceedings continued under the original criminal case caption and case number.

⁶ The La Crosse Tribune filed a second petition for a supervisory writ in this court, seeking an order for Judge Gonzalez to release Stanley's conditional release plan and costs, fees, and damages under the Open Records Law. *See* WIS. STAT. § 19.37(2). We denied the petition, stating that the La Crosse Tribune had not established that an appeal from the circuit court's order would be an inadequate remedy. *See* WIS. STAT. § 808.03(1) (appeal may be taken from final order rendered in a special proceeding).

Discussion

The La Crosse Tribune asserts that Judge Gonzalez erred in denying it access to Stanley's conditional release plan because: (1) a conditional release plan under WIS. STAT. § 971.17(4)(e) is not a confidential treatment record under WIS. STAT. § 51.30(1)(b); and (2) Stanley waived any confidentiality of the treatment plan under WIS. STAT. § 905.04(4)(c) by petitioning the court for conditional release. It also contends that Judge Gonzalez violated Wisconsin's Open Records Laws by failing to timely respond to its open records requests, entitling it to costs, fees, and damages under WIS. STAT. § 19.37(2). Stanley responds that: (1) the conditional release plan fits squarely within the definition of confidential "treatment records" in § 51.30(1)(b); (2) the evidentiary waiver provision of § 905.04(4)(c) is inapplicable because Stanley had already been found appropriate for conditional release when the conditional release plan was prepared; and (3) the clerk of the circuit court's response was sufficient to comply with the Open Records Law. The State, on behalf of the circuit court and Judge Gonzalez, has submitted a respondent's brief contending that this court lacks authority to order the circuit court and Judge Gonzalez to pay costs, fees, and damages under the Open Records Law in this case.

The first issue we certify to the supreme court is the application of the Open Records Law when documents have been placed under seal by the circuit court. It is unclear what mechanism an open records requester is to follow to seek documents under seal by order of the circuit court. A corollary issue is whether the Open Records Law allows costs and fees against a circuit court judge alleged to have refused to release documents the judge has placed under seal.

The La Crosse Tribune asserts that the proper avenue of relief for an open records requester seeking documents under seal is a request for release of the records to the circuit court judge, and if that is unsuccessful, then a petition for a writ of mandamus in this court. It asserts that once documents have been placed under seal by the circuit court, a request to the clerk of the circuit court will be fruitless. It points out that the clerk cannot review the documents and must deny an open records request based on the court order sealing the documents.⁷ It also points out that we have held that one circuit court does not have supervisory authority over another circuit court; thus, it appears that a party may not seek mandamus in the circuit court to compel a circuit court judge to release sealed documents. *See Eau Claire Leader-Telegram v. Barrett*, 146 Wis. 2d 647, 650-51, 431 N.W.2d 741 (Ct. App. 1988).

The La Crosse Tribune also asserts that it is entitled to costs, fees, and damages against Judge Gonzalez for failing to timely respond to its open records requests under WIS. STAT. § 19.37(2). Wisconsin's Open Records Law requires that "[e]ach authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons

⁷ At oral argument, the parties disputed whether an open records requester must first submit a records request to the clerk of the circuit court when the documents have been placed under seal by the circuit court. *See* WIS. STAT. § 19.37 (delineating enforcement and penalties when "authority" withholds records); WIS. STAT. § 59.40(2)(a) (clerk of the circuit court is custodian of court records); WIS. STAT. § 19.32(1) ("authority" under Open Records Law includes elected official or court of law having custody of a record). Here, however, the La Crosse Tribune submitted a request for the records to the clerk of the circuit court. Thus, whether or not the La Crosse Tribune was required to first submit an open records request to the clerk of the circuit court, it did so. The parties agree that the clerk of the circuit court was required to deny the open records request based on the circuit court order sealing the records, and that the only authority that could decide to release the records was the circuit court.

therefor.” *See* WIS. STAT. § 19.35(4)(a). An “authority” under the Open Records Law includes an elected official or a court of law having custody of a record. *See* WIS. STAT. § 19.32(1). The La Crosse Tribune asserts that if it is not allowed damages against Judge Gonzalez for violating the open records law, judges will be exempt from compliance. It asserts that the court of appeals, as a “court” under § 19.37(2)(a), has authority to award open records damages against Judge Gonzalez.⁸

In response, Stanley characterizes this appeal as one from the circuit court’s decision on review of the clerk’s denial of the La Crosse Tribune’s open records request. Stanley asserts that the clerk of the circuit court provided a legally sufficient response to the La Crosse Tribune’s open records request explaining that the records were exempt from disclosure, and thus there was no open records violation. He asserts that the clerk of the circuit court was the “authority” under the Open Records Law because the clerk had legal custody of the records. *See* WIS. STAT. §§ 19.32(1), 19.33 & 59.40(2)(a). Stanley argues that the La Crosse Tribune’s request to the clerk for the conditional release plan was its open records request, as distinguished from its request to the circuit court to unseal the records. He contends that the circuit court correctly determined that the clerk properly denied the open records request.

The State, in its respondent’s brief, characterizes this appeal as one from the circuit court’s order on the La Crosse Tribune’s request to unseal the records. It asserts that this action is not an open records action, and thus does not

⁸ The La Crosse Tribune asserts that the fact that this action is proceeding on appeal rather than through mandamus must not be held against it because it has repeatedly attempted to pursue a mandamus action in this court.

give rise to costs, fees, and damages under the Open Records Law. Under the State's analysis, there is no established mechanism for an open records requester to obtain costs and fees against a circuit court judge who refuses to release records it has placed under seal.

At oral argument, the State posited that one option for an open records requester to obtain costs and fees under the Open Records Law when the "authority" withholding documents is a circuit court judge would be an original mandamus action in the Supreme Court. However, in the State's view the procedure best suited to this scenario is the following: (1) the requester submits an open records request to the clerk of the circuit court; (2) if the clerk refuses to grant the request because the records are sealed by court order, the requester moves the circuit court to unseal the records; (3) if the parties to the action do not object, the circuit court may unseal the records; and (4) if a party does object, the circuit court should conduct a hearing on the issue of unsealing the records before issuing a decision. Apparently, review would then be by appeal to the court of appeals, as here.

The La Crosse Tribune responds that there are many drawbacks to pursuing access to records under seal by order of the circuit court on appeal within the underlying case, rather than through a mandamus action in this court, including the following: (1) there may be confusion as to which party is obligated to respond; (2) the open records requester will be denied redress under the Open Records Law if the denying authority is not required to participate in the appeal; and (3) it prevents circuit court judges from being subject to the mandamus procedure for open records requests outlined in WIS. STAT. § 19.37.

It appears unclear how an open records requester is to proceed when seeking documents under seal by order of the circuit court. It is also unclear, under the statutes and current case law, whether the court of appeals has authority to award costs and fees against a circuit court judge for violation of the Open Records Law, either under WIS. STAT. § 19.37(2)(a) or under our supervisory authority over the circuit courts. Once a circuit court places documents under seal, only the circuit court can order those documents released. If the circuit court judge refuses to unseal the documents, our holding in *Eau Claire Leader-Telegram* appears to prevent an open records requester from utilizing the usual procedure following denial of an open records request, mandamus in the circuit court. *See* § 19.37. It appears that one option is for the requester to obtain a hearing on its request to unseal the documents in the circuit court in the underlying action, as the La Crosse Tribune did in this case. An aggrieved requester may then obtain review in this court on appeal. The question is whether this is an adequate avenue of relief, or whether the Open Records Law allows the requester to seek a writ of mandamus in this court to order the circuit court judge to release the records, and to pursue costs, fees, and damages under § 19.37(2). Because the application of the Open Records Law to requests to clerks of court and circuit court judges to release documents under seal will impact clerks, courts, litigants, and the public, we certify this issue to the supreme court.

The next issue we certify is whether a conditional release plan under WIS. STAT. § 971.17(4)(e) is a confidential treatment record under WIS. STAT. § 51.30(1)(b) and (4). Under the Mental Health Act, “treatment records” are confidential and privileged to the subject individual. § 51.30(4)(a). Section 51.30(1)(b) defines “treatment records” as “records that are created in the course of providing services to individuals for mental illness ... and that are maintained

by the department” Additionally, § 51.30(7) specifically provides that § 51.30 applies to treatment records of persons committed under ch. 971. Section 971.17(4)(e), in turn, provides that, if a person committed under ch. 971 is found appropriate for conditional release, the department must prepare a conditional release plan identifying the treatment and services the person will receive in the community. Thus, whether a member of the public may obtain conditional release plans of individuals ordered conditionally released from ch. 971 commitment turns on whether a conditional release plan under ch. 971 is a confidential treatment record under the Mental Health Act.

The La Crosse Tribune asserts that a conditional release plan is not created in the course of providing services, and thus is not a treatment record. Rather, it asserts, the conditional release plan is created by order of the court and subject to court approval, and concerns services that will be provided in the future. *See* WIS. STAT. § 971.17(4)(e)1. It asserts, therefore, that the conditional release plan is “maintained” by the circuit court, not the department. It categorizes the conditional release plan as a judicial document, outside the scope of “treatment records” as defined under WIS. STAT. § 51.30(1)(b).

The La Crosse Tribune also argues that, even if the conditional release plan is a treatment record, it is subject to the evidentiary exception under WIS. STAT. §§ 51.30(4)(a) and 905.04. It asserts that Stanley waived any confidentiality of the conditional release plan by putting his mental health at issue when he petitioned for conditional release. *See Billy Jo W. v. Metro*, 182 Wis. 2d 616, 642-43, 514 N.W.2d 707 (1994); § 905.04(4)(c) (“There is no privilege ... as to communications ... within the scope of discovery examination of an issue of the ... mental ... condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient’s claim or defense”). It

contends that the conditional release plan is the document that concludes the conditional release proceedings and thus comes within the scope of the waiver.

Stanley responds that a conditional release plan under WIS. STAT. ch. 971 is plainly a confidential treatment record under the Mental Health Act. He asserts that, although his conditional release plan was submitted to the court for approval, it was prepared by the department to provide him services for mental illness, falling squarely within the definition of treatment records under WIS. STAT. § 51.30(1)(b). *See Watton v. Hegerty*, 2008 WI 74, ¶¶22-25, 311 Wis. 2d 52, 751 N.W.2d 369 (holding that treatment records did not lose confidentiality when they were filed with the police department because they contained the same confidential information as records maintained by the department). He also asserts that the evidentiary rule waiving the privilege applies only to actual court proceedings, and that the proceedings for his conditional release concluded when it was determined he was appropriate for conditional release. *See* WIS. STAT. §§ 905.04(4)(c) and 971.17(4)(a) to (e).

It appears unclear whether a conditional release plan under WIS. STAT. ch. 971 is a confidential treatment record under the Mental Health Act. Moreover, it appears unclear whether, even if the conditional release plan is a confidential treatment record, the conditional release plan is subject to the evidentiary exclusion under WIS. STAT. § 905.04 after a court determines that an individual is appropriate for conditional release. A determination of this issue will have a significant impact on individuals subject to commitment under ch. 971, as well as medical professionals, courts, litigants, and the public. It is therefore best addressed to the supreme court.

In sum, the issues in this case require a balancing of the public's interests of ensuring the openness and transparency of government and maintaining the confidentiality of mental health records. *See Watton*, 311 Wis. 2d 52, ¶¶9, 25 (recognizing that the policy of the Open Records Law is “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them,” and that there is a “strong legislative interest in keeping private the details of an individual’s mental and emotional condition” (citations omitted)). This case presents issues of first impression that will have a statewide impact on many, including courts, litigants, and the public. Accordingly, we certify this appeal to the supreme court for its review and determination.