COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3498-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REGINALD HUMPHREY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Reginald Humphrey appeals from the trial court order, following a bench trial, denying his petition for conditional release under § 971.17(4), STATS. He argues that the trial court erred in denying his petition because the evidence did not clearly and convincingly establish any "medical

substantiation or justification" for continuing his confinement at the Winnebago Mental Health Institute. We affirm.

I. BACKGROUND

We need not repeat the factual background and standards of review. They are contained in this court's decision affirming the denial of one of Humphrey's previous petitions for conditional release. *See* ***State v. Humphrey***, No. 95-2943-CR, unpublished slip op. (Wis. Ct. App. Oct. 1, 1996).[1] We include that decision as an appendix to this one because Humphrey's arguments are based, in part, on his undisputed assertion that, in the period between that case and this one, he has addressed the concerns the trial court expressed in the previous case.

In our previous decision, we concluded that "[t]he trial court's findings support its legal conclusion that Humphrey remains dangerous." ***Id.*** at 7. Specifically, we explained:

> The trial court found that three years of institutional treatment was an insufficient time to support a conclusion [that] 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

[1] Between the petition leading to the previous appeal and the petition leading to the instant appeal, Humphrey also petitioned for conditional release one other time. The trial court denied that petition and Humphrey appealed, but subsequently withdrew that appeal. Throughout this decision, therefore, when we refer to Humphrey's "previous" appeal, we are referring to the appeal Humphrey completed, leading to our October 1, 1996 decision.

> 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.

Id. at 6-7.

Humphrey argues that the evidence established that between the May 4, 1995 hearing on the petition leading to his previous appeal and the September 8-9, 1997 hearing on his petition leading to this appeal, he successfully addressed all the concerns expressed by the trial court when it denied his petition in 1995. He points out that, at the 1997 hearing on his petition, the undisputed evidence established, among many favorable factors, that he was not regarded as a security risk, that he had earned and responsibly exercised unescorted off-grounds privileges, and that his treatment team had concluded that he "ha[d] achieved maximum benefit from his stay at [Winnebago Mental Health Institute]."

Humphrey is correct. All the expert witnesses recommended conditional release and even the prosecutor, referring to the opinion of Dr. Kenneth Smail, stated, "And I basically have been convinced, as Dr. Smail says, that he's been a model inmate at Winnebago." The prosecutor acknowledged:

> The … reasons that I am opposing his conditional release have nothing to do with the way that he has conducted himself up there. I just wanted that to be clear, that the State is not critical in any way of any of these things. And I still haven't found any significant violation that in my judgment should be grounds for a refusal of the conditional release.

In closing argument, the prosecutor again noted that Humphrey had "done everything that is possible for him to do to put himself in the very best possible

light for release." Arguing against conditional release, however, the prosecutor explained:

> I don't think there's any hoop he could have jumped through, any treatment program he could have more vigorously pursued than what[] he's done to put himself in this position for conditional release.
>
> On the other hand, that's not the bottom line. If this were a medical decision, if this were a therapeutic decision, then by consensus it would be a done deal and he'd get out. But the bottom line … is not a question about whether he's maxed out his treatment potential[;] ultimately it's not a question about whether he's done everything he can do to get once and for all over this horrible drug problem that has plagued him for all of his adult life. The bottom line … is his dangerousness to the community.

Thus, the State opposed conditional release, pointing to Humphrey's history as "a career criminal [with twelve convictions preceding the crimes for which he was committed] with a lifelong drug problem and schizophrenia … who has never been drug-free while not in the custody or at least under the supervision of the Department of Corrections." Therefore, the State concluded, the "six plus years" of a drug-free life while in custody since his arrest in the instant case simply did not constitute a period that was "long enough" to allow for conditional release.

The 1997 trial court decision denying Humphrey's petition acknowledged Humphrey's "progress" in "his employment, his education, his training … [h]is social skills, his employment skills, his understanding of both his mental disorder, the conduct and impact of that conduct as to the victim and the community and his need to remain drug and alcohol free." Nevertheless, the trial court concluded:

> However, I will reach and do reach the conclusion that Mr. Humphrey does still remain dangerous in the

> setting in light of his very long history and use of drugs and alcohol, that the period of time that he has remained free of drugs and alcohol is not an adequate time to determine that he would not return to the use of drugs and alcohol in that, as noted, he did go a period of about four and a half years or five years and then fell back into the use of drugs and alcohol. That I don't believe that supervision outside the Winnebago [Mental Health Institute] at this time is sufficient to remove the danger to the community when looking at the long history. The very violent criminal conduct that he has engaged in the past periods, and the longstanding period of, history of drugs and alcohol, the periods that he has returned to the use of drugs and alcohol is sufficient to not remove the conclusion that he remains dangerous at this point.
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> ….
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> …[T]he State has introduced clear and convincing evidence that the danger of the defendant returning to the use of drugs and alcohol has not subsided to a point that he is not dangerous to the community at this point without the strict supervision that is being displayed or implemented at Winnebago.

Accordingly, the trial court denied Humphrey's petition for conditional release.

II. ANALYSIS

Humphrey's mental illness, career criminality, chronic drug use, and complete compliance with the Winnebago treatment programs were all undisputed. Additionally, the evidence at the 1997 hearing established that, in the prosecutor's words, "[i]f this were a medical decision, if this were a therapeutic decision, then by consensus it would be a done deal and he'd get out" because Humphrey had "maxed out" of the treatment programs at Winnebago. Therefore, Humphrey argues, the trial court erred in denying conditional release because, according to the supreme court in ***State v. Randall***, 192 Wis.2d 800, 532 N.W.2d 94 (1995), "there must be a medical justification to continue holding a sane but

dangerous insanity acquittee in a mental health facility." ***Id.*** at 807, 532 N.W.2d at 96.[2]

Although Humphrey asserts that "[t]here is absolutely nothing in this record to support any conclusion that [he] is or remains dangerous," he really does not directly argue that he is no longer dangerous. Indeed, Humphrey seems to imply that the very concept of "conditional release" presumes that one still may be dangerous and, therefore, if released, must be released only conditionally in order to assure the continuing treatment and supervision to mollify and eventually eliminate the dangerousness.[3] Instead, he contends that, regardless of his possible

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[2] Humphrey further maintains that additional passages in ***State v. Randall***, 192 Wis.2d 800, 532 N.W.2d 94 (1995), support his argument:

> To be constitutionally permissible, the continued confinement of a sane but dangerous insanity acquitee in a mental health facility, must have some therapeutic value.

Id. at 817, 532 N.W.2d at 100.

> [T]he appropriateness of continuing the confinement of an insanity acquittee depends upon whether or not the State has a medical justification for the commitment. The only legitimate goal for confinement based on dangerousness is to reduce, to an acceptable level, the risk of danger which the individual poses. To the extent that this goal is realized by providing treatment to the acquittee, confinement at a state mental health facility following an insanity acquittal is medically justified and, as such, constitutionally permissible.

Id. at 838, 532 N.W.2d at 109.

[3] Humphrey explains:

> The next step for him is to be integrated into the community through appropriate monitoring, supervision, placement in a halfway-house and whatever else the authorities deem appropriate. There is absolutely nothing Humphrey can do at [Winnebago] that he has not done. There is [sic] no more courses he can take, there is no more treatment he can receive, there is no more unrestricted access to the community that he can have (other than what he currently enjoys), there are no more work opportunities available to him. Humphrey has and

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dangerousness, the evidence did not support the trial court's denial of his petition because "there is absolutely no medical substantiation or justification" for continuing his confinement at Winnebago.

In response, the State does not address Humphrey's specific arguments under ***Randall***. Instead, the State relies on the trial court's comments in its decision denying the petition, which, the State maintains, "cut[] to the heart of the matter." The trial court stated:

> His prior mental history is a longstanding one of schizophrenia. The not taking his medication as prescribed, the use of drugs and alcohol. [sic] It is a history where, but for periods of time of either incarceration, institutionalization or supervision, the defendant has returned to the use of drugs and alcohol which dramatically affect his mental condition as well.

Thus, the State argues:

> Humphrey's present sobriety and stabilization of mood have been forced upon him by incarceration and institutionalization. When jails and hospitals close their doors behind him, Humphrey has a sad and dangerous tendency to drink, to use street drugs, and to ignore his prescribed medications. The consequences are disastrous. *See, e.g.,* ([Transcript including] Dr. Smail's testimony regarding Humphrey's need for abstinence, need for psychotropic medication, and "high risk for decompensation" that would occur if Humphrey failed to behave accordingly). They make Humphrey far too dangerous for conditional release.

We agree with the State. Although the undisputed evidence on Humphrey's behalf demonstrated his progress, we have little difficulty concluding that the trial court's findings were not clearly erroneous – i.e., that Humphrey's horrific crimes leading to his commitment, together with his career criminality,

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> continues to have met all of the goals and expectations of the Institution.

chronic drug use, mental illness, and relatively limited drug-free period while institutionalized (in comparison to the only slightly shorter previous drug-free period preceding his resumption of drug use and crime) establish his dangerousness. Further, we conclude that those factual findings, as a matter of law, do support the trial court's conclusion that Humphrey remains dangerous.

We also believe that Humphrey's reading of ***Randall*** is incomplete. In ***Randall***, the supreme court declared:

> [I]t is not a denial of due process for an insanity acquittee who has committed a criminal act to be confined in a state mental health facility for so long as he or she is considered dangerous, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offense charged.

Randall, 192 Wis.2d at 806-07, 532 N.W.2d at 96. The supreme court further explained that "the legislature has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues, even after a clinical finding of sanity." ***Id.*** at 807, 532 N.W.2d at 96. Most significantly, in light of Randall's arguments on appeal, the supreme court clarified:

> The inference of continuing dangerousness provides the basis for the acquittee's initial commitment to a mental health facility following the insanity acquittal. Under Wisconsin's statutory scheme, the acquittee, once committed, is subject to treatment programs specifically designed to treat both mental and behavioral disorders. *Treatment designed to reduce those behavioral disorders which render the individual dangerous may continue even after clinical signs of mental illness are no longer apparent. Such treatment is necessary to realize the ultimate goal of safely returning the acquittee into the community. Because this state's mental health facilities provide such comprehensive treatment we cannot conclude that it is punitive to continue an acquittee's confinement based on dangerousness alone.*

Id. at 807-08, 532 N.W.2d at 96-97 (emphasis added).[4] Moreover, the court broadly defined "medical justification" as any treatment "geared to reducing clinical symptoms of mental illness or behavioral disabilities which render the acquittee dangerous." ***Id.*** at 837, 532 N.W.2d at 108. Accordingly, the supreme court concluded:

> [T]he legislature has determined that the treatment programs made available to insanity acquittees in Wisconsin … are not limited to the medical or pharmacological needs of the patient. This state's statutory scheme provides a structured environment which seeks to treat both the acquittee's mental and behavioral disorders.
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> To the extent that insanity acquittees continue to receive treatment during their confinement at Mendota or Winnebago – whether that treatment is geared to reducing clinical symptoms of mental illness or behavioral disabilities which render the acquittee dangerous – we find there is sufficient medical justification to continue the confinement and treatment.

Id. at 837, 532 N.W.2d at 108.[5]

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[4] In ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995), the supreme court, applying ***Randall*** to its analysis of the constitutionality of the sexual predator statute, noted that:

> [T]he treatment programs in Wisconsin's secure mental health facilities are designed to treat both mental and behavioral disorders[,] and the goal of safely returning an acquittee to the community can be well-served by continuing treatment aimed at reduction of danger arising from behavioral disorders even after an acquittee was deemed to no longer suffer from a condition that could be defined under the traditional rubric of mental illness.

Id. at 316, 541 N.W.2d at 128.

[5] We also note that in ***Kansas v. Hendricks***, 521 U.S. 346, 117 S. Ct. 2072 (1997), the Supreme Court, addressing the constitutionality of a state sexual predator statute, stated:

> [W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others…. [I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable

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In the instant case, the testimony established that Humphrey was a model patient at Winnebago and that, based on this status, he had been given the maximum amount of freedom available to a patient. Testimony also revealed, however, that Humphrey is still mentally ill, suffering from schizophrenia, and

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> treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. *Cf.* ***Greenwood v. United States***, 350 U.S. 366, 375, 76 S. Ct. 410, 415, 100 L. Ed. 412 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of petitioner"); ***O'Connor v. Donaldson***, 422 U.S. 563, 584, 95 S. Ct. 2486, 2498, 45 L. Ed.2d 396 (1975) (Burger, C.J., concurring) ("[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low").

Id. at ___, 117 S. Ct. at 2084.

Moreover, this court's recent decision in ***State v. Randall***, No. 97-0519-CR, slip op. (Wis. Ct. App. Sept. 17, 1998, ordered published Oct. 28, 1998) (***Randall II***) sheds additional light on Humphrey's claim. In ***Randall II***, this court considered Randall's subsequent appeal of the denial of his petition for conditional release. Challenging the trial court's denial of his proposal that the jury be asked whether any medical justification existed for his continued confinement at the Winnebago Mental Health Institute, Randall argued that the trial court erred in concluding "that the State did not have to prove a therapeutic justification." ***Id.*** at 9. Specifically, he contended "that he was denied substantive due process because the State was not required to make an individualized showing that his confinement at [Winnebago] served some particular medical justification." ***Id.*** at 10. Analyzing ***Randall I***, this court rejected Randall's argument, concluding:

> Therefore, because a Wisconsin insanity acquittee's continued confinement is based both on an initial determination of the cause of his or her criminal conduct, as well as a finding of continued dangerousness, and because Wisconsin's mental health institutions provide an environment designed to reduce dangerousness, *no individualized showing that confinement is necessary to address a particular medical treatment need is required.*

Id. at 11 (emphasis added).

that his treatment plan at Winnebago continues to reinforce the importance of his staying on medication and abstaining from using drugs and alcohol. Consequently, we cannot conclude, as Humphrey argues, that no medical justification, as defined in ***Randall***, existed for his continued confinement. Accordingly, we affirm the trial court's order denying his petition for conditional release.

By the Court.—Order affirmed.

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

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

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