

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2012

Diane M. Fremgen
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. 2011AP2920-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2004CF124

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GRAHAM L. STOWE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Graham Stowe appeals an order denying his petition for conditional release from his WIS. STAT. § 971.17¹ commitment. Stowe

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

argues the circuit court erroneously placed the burden of proof on Stowe when it denied conditional release based solely on Stowe's failure to present a release plan. We reject Stowe's arguments and affirm the order.

BACKGROUND

¶2 In August 2005, Stowe was committed to institutional care after he was found not guilty by reason of mental disease or defect of bail jumping, four counts of false imprisonment, first-degree reckless endangerment and felony intimidation of a victim. Stowe was conditionally released in June 2007, but was revoked in July 2009 based on numerous rule violations. Stowe's subsequent petition for conditional release was denied and Stowe appealed. In that appeal, we described Stowe's underlying crimes and failure on conditional release, noting:

In 2004, Stowe broke into the home of Amanda [B.], his former girlfriend, with plans to kidnap her and then kill himself in front of her. While in the home, Stowe tied up Amanda's brother and father, then doused the father with gasoline and beat him. The captives were able to escape only after Stowe overdosed on medications and passed out. Stowe was found not guilty by reason of mental disease or defect of charges stemming from the incident and was committed to the Department of Health and Family Services for thirty-nine years and six months.

Stowe was conditionally released in June 2007, but was revoked in July 2009 after a host of rule violations. The primary violations occurred on June 14, 2009, when Stowe entered the Stadium View Bar where Amanda worked, remained for forty-five minutes, drank two beers, and questioned employees about Amanda. Stowe's conditions of release forbade him from having unsupervised contact with Amanda, entering any establishment whose sole purpose was to serve alcohol, and consuming alcohol. Stowe also had an angry confrontation with Amanda regarding overnight arrangements for their child, spray painted an obscene phrase near a different ex-girlfriend's workplace, and was warned by police after calling the same woman more than thirty times in one night.

State v. Stowe, No. 2010AP2458-CR, unpublished slip op. (WI App June 7, 2011).

¶3 In the interim, Stowe filed and later withdrew another petition for conditional release. In March 2011, Stowe filed the underlying petition for conditional release. The petition was denied after a hearing and this appeal follows.

DISCUSSION

¶4 The circuit court must grant a petition for conditional release 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.” WIS. STAT. § 971.17(4)(d). Among the factors the court may consider are, without limitation, 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. *Id.*

¶5 We view the evidence in the light most favorable to the circuit court’s determination. *See State v. Randall*, 222 Wis. 2d 53, 60, 586 N.W.2d 318 (Ct. App. 1998). We will affirm that determination if there is any credible evidence, or reasonable inferences from that evidence, upon which the court could have based its decision. *Id.*

¶6 Here, Stowe argues the circuit court impermissibly placed the burden of proof on him when it denied conditional release based solely on Stowe’s failure to present a release plan. We are not persuaded. Stowe’s petition was not

denied based on the absence of a plan but, rather, because Stowe remained too great a risk for conditional release.

¶7 At the conditional release hearing, Dr. James Armentrout testified about Stowe's mental condition and ongoing risk, specifically noting that Stowe had two relevant mental health conditions. Stowe's primary diagnosis, according to Armentrout, is a pattern of personality disorder that has been diagnosed repeatedly and "is a major causal factor in the difficulties that he has had." Armentrout also opined that Stowe exhibited a pattern of alcohol abuse that was presently "in forced remission," but contributed to Stowe's past failure on conditional release.

¶8 Armentrout further acknowledged there was no evidence of significant improvement with Stowe's "attitudes, his interpersonal relationships, his cooperation with rules, [or] his understanding of the difficulties he has had in the past." Armentrout added:

If I were to consider whether there has been significant change in him since the time of his revocation, I believe in July of 2009, it would be my opinion there has been very little change in the gentleman's personality pattern, in the level of his social skills, in his understanding of the difficulties he has interacting with other people.

¶9 Although Armentrout recognized that Stowe was mostly compliant with hospital and ward rules, and maintained a level of emotional and behavioral stability, he distinguished compliance from progress. Armentrout opined that Stowe was simply doing what he needed to be released, noting: "I would be very hesitant to attribute sincerity to this gentleman. I would always be looking for an ulterior, selfish motive, but that's because of what I understand to be his personality pattern."

¶10 Armentrout suggested Stowe “could be considered for a conditional release,” but qualified his conclusion by explaining that “as a psychologist, [he] might be placing slightly more emphasis on the issue of concurrent mental or emotional distress and disorder and the availability or need for continued mental health treatment.” Armentrout further acknowledged “the statute goes beyond that by bringing up the question of the risk of substantial harm if [Stowe] were to be released”—a “prediction” Armentrout said he would “reserve for the court.”

¶11 When asked by defense counsel whether there was anything Stowe could have done to make Armentrout recommend conditional release, Armentrout replied: “He could show better understanding, better ability to discuss those issues, he could take responsibility, he could state a determination to behave better and have some idea what’s involved in behaving better.” The court then asked Armentrout about his “causes of concern,” and Armentrout replied:

I consider Mr. Stowe to be, as part of the narcissistic elements of his personality disorder, I think he tends to be grandiose, I think he has an inflated sense of his own importance, I think he feels entitled to special treatment. I think he is insistent on having attention and special treatment and admiration and is very quick to react against those who either disagree with him or frustrate him or otherwise don’t agree with his opinion of himself.

Within the hospital, the staff [is] constrained in how they respond to some of his difficult behavior, but ... if he were in the community, he would find people much less receptive and much less tolerant to some of the behavior he has shown in the hospital.

And I think he simply does not respect the rights, the feelings, or the property of other people. I think he wants to do what he wants to do. I think he feels entitled to do that, and he could easily have difficulty getting along with people who would be less tolerant or who would be less constrained in how they respond to him. He might well have conflicts with people, as he seems to have had some conflicts in the past.

¶12 The court also asked Armentrout if he would view Stowe as an “appropriate candidate” for continued commitment if there was treatment in the institution that would help him come to terms with some of the issues identified. Armentrout answered affirmatively, but also opined that the resources available at Stowe’s present institution were not designed for him. Based on his opinion that Stowe could not be effectively treated at his current location, Armentrout expressed concern about the expenditure of resources for his placement there.

¶13 The court then asked Armentrout to confirm his opinion that there had been very little change in Stowe’s “personality issues” since the time of his revocation. Armentrout replied there had been “relatively little” change, stating:

I think he is very much the person he was then, although perhaps in the last year and a half, he has begun to recognize the value of freedom, relative freedom, if he can acquire it, but I think the factors that led him to repeatedly violate a number of conditions of his release. He did not do it once and he did not violate only one. He persistently and repeatedly simply ignored the conditions he had agreed to and I see that as a potential risk in the future. When I spoke with him, he said he would cooperate with ... any conditions of his release, but of course, he said the same thing in 2007, so we have to simply be cautious.

¶14 The circuit court denied Stowe’s petition, explaining: “There’s nothing in the record that is credible, from the court’s perspective, to support a conclusion that his conduct is so altered that he does not still pose a significant risk, a substantial risk, actually, of harm to others.” Although Stowe called two mental health professionals that supported his conditional release, the court found those experts to be biased and nonobjective. The court also discounted Armentrout’s suggestion that Stowe should be considered for conditional release because “he’s costing a lot of money ... and we’re not sure that he’s getting a lot of benefit from where he’s at.” The court explained that the appropriateness of

Stowe's treatment in institutional care was not a factor in granting conditional release. Rather, the court was required to analyze whether "the risk here has been minimized to the degree that there is not clear and convincing evidence that [Stowe] would pose a significant risk of bodily harm."

¶15 The court's decision emphasized two facts—Stowe's recent failure on conditional release and his failure to change since revocation. Although the court noted it saw "some improvements" in Stowe's behavior, it also noted that "the underlying character features, the very character features which pose such a great risk of harm, remain." The court expressed its concern that Stowe had not changed "in any fundamental way in terms of the self-centeredness" and "in terms of the basic type of manipulation of those around him that got him into trouble not only in the first place ... but also when he was given an opportunity to go out."

¶16 The court recounted that Stowe had "multiple occasions of violations," noting that "those were times in which he was allegedly balanced, not depressed, not confused, and deliberately kept testing, testing, deliberately would go out and break the rules, and each time, got worse." The court added:

And it is a dilemma, and I will concede the point that it seems somewhat unfair to Mr. Stowe to place him in a situation in which there's some concern from that institution that there's nothing else that they can do for him, and yet, he clearly is in need of treatment. He's clearly in need of treatment to respond to the personality features that cause him to pose such a tremendous risk to those around him within the community and which became rapidly evident when he was out the last time. So without any change, there's little reason to expect that there's going to be a different consequence.

¶17 The court concluded by discussing the lack of information about what Stowe would do on conditional release. The court stated its understanding that a plan would be developed after conditional release was granted, but

expressed its concern that a plan could be created, noting: “[T]he risks are far too great to rely on the possibility that we’re going to agree that maybe there’s a plan that’s out there.” When defense counsel asked whether the court’s only worry was how Stowe would reintegrate into the community, the court replied:

[M]y worry, as you suggest, is safety, and what happens with him defines the level of safety for the community. So yes, that’s my only worry, is that is he going to be, as the statute says, safe, or does he pose a risk of harm to himself or to others or to property, and that’s the concern.

The court added that the restrictive nature of Stowe’s placement would have to be equivalent to his present placement with “treatment available, and the possibility that, as where he’s at now, he can have some progressive privileges in which he can demonstrate that safety in the community without placing people at the risk that was so clearly demonstrated last time that he did this.”

¶18 Based on this record, we reject Stowe’s claim that his petition for conditional release was denied based solely on the absence of a conditional release plan. As noted above, the petition was denied because Stowe remained too great a risk for conditional release. Viewing the court’s comments in context, it did not treat the development of a plan as a separate requirement from the dangerousness inquiry. Further, it is unclear what else the court could have considered. Stowe had not changed since his earlier revocation. Therefore, information about his present release plan was the only thing that could differ from the past and assure the court that Stowe would not present the same risk if conditionally released.

¶19 To the extent Stowe claims that the court’s reliance on the absence of a plan was inconsistent with WIS. STAT. § 971.17(4)(d), that statute includes in its non-exhaustive list of factors for consideration “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.” *Id.*

¶20 Ultimately, Stowe misconstrues the idea of the burden of proof—just because the State has the burden does not mean Stowe is absolved of all responsibility to present evidence in his defense. The State concedes it had the burden of proving that Stowe remained too dangerous to be conditionally released, and it could do so with evidence related to the listed statutory criteria or other evidence. In turn, however, Stowe could attempt to overcome the State’s presentation with evidence of his own. Here, evidence of a conditional release plan addressing Stowe’s treatment needs may have assuaged the court’s concerns. Because the circuit court reached a rational conclusion based on credible evidence, and did not improperly shift the burden of proof to Stowe, we affirm.

By the Court.—Order affirmed.

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

