[Cite as *State v. Stutler*, 2015-Ohio-5518.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JEREMY STUTLER Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2015CA00099 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CR01169
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio By: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	STEVEN A. REISCH Stark County Public Defender's Office 201 Cleveland Ave. S.W., Suite 104 Canton, Ohio 44702

Hoffman, J.

{¶1} Defendant-appellant Jeremy Stutler appeals the May 8, 2015 Judgment Entry entered by the Stark County Court of Common Pleas denying his request for Level IV privileges pursuant to R.C. 2945.401. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE[1]

{¶2} Appellant was charged with murder in 2011, and found not guilty by reason of insanity in the Stark County Court of Common Pleas. The trial court committed Appellant to Twin Valley Behavioral Healthcare, a maximum security mental health facility. In January of 2014, Appellant was transferred to Northcoast Behavioral Healthcare.

{¶3} On February 2, 2015, Dr. Joy Stancowski, M.D., the Chief Clinical Officer of Northcoast Behavioral Healthcare authored a letter requesting Appellant be granted Level IV medical privileges for community trips with staff/case manager supervision.

{¶4} The State requested a second opinion from Dr. Arcangela Wood, a psychologist and the Director of Psycho-Diagnostic Clinic of Akron. Dr. Wood opined it would be reasonable for Appellant to be granted Level IV privileges; however, she listed a number of conditions at the end of the letter necessary for the granting of said privileges. Both parties stipulated to the reports at the May 4, 2015 hearing.

{¶5} Following the hearing on May 4, 2015, the trial court denied the request for a change to Level IV privileges via Judgment Entry of May 8, 2015.

{¶6} Appellant appeals, assigning as error:

[1] A full rendition of the underlying facts is unnecessary for our resolution of the appeal.

{¶7} THE TRIAL COURT ERRED IN DENYING APPELLANT'S INCREASE IN PRIVILEGES AS REQUESTED BY THE PSYCIATRIC HOSPITAL.

{¶8} R.C. 2945.401 provides, in pertinent part,

> (A) A defendant found incompetent to stand trial and committed pursuant to section 2945.39 of the Revised Code or a person found not guilty by reason of insanity and committed pursuant to section 2945.40 of the Revised Code shall remain subject to the jurisdiction of the trial court pursuant to that commitment, and to the provisions of this section, until the final termination of the commitment as described in division (J)(1) of this section. ***
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> ***
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> (D)(1) Except as otherwise provided in division (D)(2) of this section, when a defendant or person has been committed under section 2945.39 or 2945.40 of the Revised Code, at any time after evaluating the risks to public safety and the welfare of the defendant or person, the designee of the department of mental health and addiction services or the managing officer of the institution or director of the facility or program to which the defendant or person is committed may recommend a termination of the defendant's or person's commitment or a change in the conditions of the defendant's or person's commitment.
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> ***

(G) In a hearing held pursuant to division (C) or (D)(1) of this section, the prosecutor has the burden of proof as follows:

(1) For a recommendation of termination of commitment, to show by clear and convincing evidence that the defendant or person remains a mentally ill person subject to court order or a mentally retarded person subject to institutionalization by court order;

(2) For a recommendation for a change in the conditions of the commitment to a less restrictive status, to show by clear and convincing evidence that the proposed change represents a threat to public safety or a threat to the safety of any person.

(H) In a hearing held pursuant to division (C) or (D)(1) or (2) of this section, the prosecutor shall represent the state or the public interest.

(I) At the conclusion of a hearing conducted under division (D)(1) of this section regarding a recommendation from the designee of the department of mental health and addiction services, managing officer of the institution, or director of a facility or program, the trial court may approve, disapprove, or modify the recommendation and shall enter an order accordingly.

{¶9} Accordingly, R.C. 2945.401(G)(2) provides the state must show by clear and convincing evidence the proposed change represents a threat to public safety or a threat to the safety of the any person.

{¶10} This Court addressed the issue raised herein in *State v. Aduddell*, 5th Dist. No. 2010CA00137, 2011-Ohio-582, wherein the trial court denied the defendant's transfer

to the locked facility of Heartland Behavioral Healthcare from Twin Valley Behavioral Healthcare. Defendant argued therein the state asserted no evidence demonstrating the transfer put the public at risk.

{¶11} This Court held Ohio Supreme Court has defined "clear and convincing evidence" as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re: Estate of Haynes* (1986), 25 Ohio St.3d 101, 103–104, 495 N.E.2d 23.

{¶12} In *State v. Hubbard,* 11th Dist. 2013T0082, 2014 Ohio 4130, the Eleventh District held,

> Pursuant to R.C. 2945.401(I), "the trial court has discretion to approve, disapprove, or modify any recommendation made concerning a patient's course of treatment." *State v. Hilton,* 10th Dist. Franklin No. 02AP–518, 2003–Ohio–87, ¶ 18. Absent an abuse of that discretion, this court will not disturb the lower court's decision regarding a level movement recommendation. *Id.*
>
> Hubbard argues that the trial court's finding that the change in his status represented a threat to public safety or the safety of any person was not supported by the evidence. Hubbard maintains that his evasiveness about his paranoia, occasional refusal to sign his treatment plan, and

questioning of his diagnosis and treatment do not amount to proof that he is a threat to anyone's safety.

We disagree. It is well-established that any reemergence of Hubbard's mental illness could be potentially violent and lethal. Heartland Behavioral Health's proposed granting Hubbard Level IV privileges was based on its conclusion that such privileges are "the least restrictive alternative available that is consistent with public safety and the welfare of the person." R.C. 2945.40(F). The reasons for supporting this recommendation were undermined at the hearing. Dr. Noffsinger felt that Hubbard's psychosis was in "relative remission" and that he did not experience psychotic symptoms. Yet there was considerable evidence presented at the hearing that Hubbard concealed his actual mental condition and that his compliance was not an indication of progress but, rather, a desire for greater freedom. To his regular doctors, Hubbard frankly admitted that he did not believe that he had a mental illness, that he needed medication, or that his crime was the result of mental illness. But when Dr. Noffsinger evaluated Hubbard in preparation for testifying at the hearing, Hubbard acknowledged his illness and need for treatment. Hubbard only consented to receiving injectable medication when the court made it clear that he would have to consent in order for the court to consider granting him greater privileges. Hubbard has been preoccupied with saying the "wrong things" when speaking with his doctors. Hubbard's evasiveness—his "offering very little"—has hindered doctors from stating more affirmatively

that he does not have symptoms. Instead, it was reported that Hubbard did "not appear to have any delusions or hallucinations on the surface."

Dr. Noffsinger's recommendation cited Hubbard's "sufficient insight into his illness" and "remorse[ ] about the offense." Yet, Hubbard's statements to his treating doctors reflect neither insight nor remorse, but rather a concern to say the right things to obtain greater privileges.

Thus, the State effectively demonstrated that Level IV privileges were not, in fact, the least restrictive setting consistent with public safety. *State v. Evans,* 5th Dist. Richland No. 12CA76, 2013–Ohio–2730, ¶ 51 ("[w]hile there is evidence that appellee is responding well to treatment and his bipolar condition is in remission, we find appellant met its burden and established, by clear and convincing evidence, the proposed transfer represents a threat to public safety or the safety of any person," as "[t]oo many questions remain about the efficacy of appellee's diagnosis and treatment").

Assuming, arguendo, that the evidence before the trial court did not rise to the level of clear and convincing evidence, the trial court, as demonstrated by R.C. 2945.401(I), retains discretion to approve, disapprove, or modify a level movement recommendation. Here, the trial court's judgment was based on justifiable concerns regarding Hubbard's threat to public safety if allowed less restrictive conditions. In particular, the court noted "the episodic nature of [Hubbard's] paranoid schizophrenia" and "the fact that the staff who will be there observing [Hubbard] on the Level IV

> movement is not staff that the Court considers to be security oriented enough to protect citizens if the episodes came back in such a nature to be as violent as the first episode." We find no abuse of the court's discretion in its decision to deny the request to move Hubbard to Level IV in light of these concerns

{¶13} We agree with the reasoning set forth in *Hubbard,* supra, and find a trial court retains discretion to deny a request for increased privileges even if the evidence in opposition to the requested modification presented by the state does not rise to the level of clear and convincing evidence.

{¶14} At the hearing herein, the State argued the nature of the underlying crime, the brutality and severity of the facts and circumstances evidenced a risk to the community. The State cited the conditions attached to Dr. Wood's letter, including the supervision of an adequate amount of staff to decrease the likelihood of escape.

{¶15} At the hearing, the trial court stated on the record,

> THE COURT: Yeah. Well, unfortunately, this Court disagrees with the psychologist. It's probably something the Court of Appeals will decide, and I'll do an entry to my decision but I will speak a little bit on the record because I know the families, both families have been inquiring.
>
> First of all, since I've been on this bench, this is probably the most gruesome crime - - let's start with that premise. This has probably been the most gruesome crime that I've seen or had in my courtroom.
>
> When I read the evaluations by the psychologist, prior to this incarceration he was unstable while living in the community. He was not

compliant with his psychiatric treatment and was acutely psychotic. His mental illness constitutes a disorder of thought, mood and perception; that when not under control grossly impairs his judgment and behavior and the capacity to recognize and reality. It also impairs his ability to meet the ordinary demands of life.

His mental illness has caused him not to conform with the laws of Ohio. He murdered his girlfriend in a despicable manner, gruesome manner due to his delusional beliefs. When I read the report, it does indicate that he has complied with some of the counseling and things of that nature so that is something that I have taken into consideration. However, let me just grab my - -

* * *

When I read Dr. Arcangela, she can't guarantee how this gentleman is going - - or how this Defendant is going to handle himself out there in the public, and the Judge's role is a little bit different than the psychologist. And I can't say I've always agreed with what every psychologist said, but to have this person out there, and I don't know what kind of supervision there is going to be, but to me at this point I think that there's just been, there's too much risk to the public.

Tr. at 8-11.

{¶16} We note, in her report, Dr. Wood stated Appellant's risk of future violence was "moderate." (emphasis added). She further recommends a number of conditions, including increased staff, as a condition of the increase in privileges.

{¶17} Upon review, we find the trial court did not abuse its discretion in denying the request for Level IV privileges.

{¶18} The May 8, 2015 Judgment Entry entered by the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur