STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2016AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. SCOTT,

Defendant-Appellant.

On Appeal from an Order Authorizing Involuntary Medical Treatment, Entered by the Milwaukee County Circuit Court, the Honorable Jeffrey A. Kremers Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

Whether the circuit court's order forcing Scott to be involuntarily treated to competency so that he may participate in postconviction/appellate proceedings violates ***State v. Debra A.E***., 188 Wis. 2d 111, 523 N.W.2d 727 (1994) and his right to substantive due process as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, §1 of the Wisconsin Constitution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents a clear violation of the procedures that the Wisconsin Supreme Court established in ***Debra A.E***., which does not authorize that a prisoner be involuntarily treated to competency so that he may participate in postconviction/appellate proceedings. If the court of appeals simply applies ***Debra A.E***., then oral argument would be of marginal value and publication is unnecessary because the law on the question presented is settled. Wis. Stat. §809.22(2) and §809.23(1)(b).

However, if the State urges the court of appeals to authorize circuit courts to subject prisoners to involuntary treatment during postconviction/appellate proceedings, then the court of appeals should hold oral argument and publish its decision because it will break new ground. There is no Wisconsin statute or case that sets forth the factors a postconviction circuit court should weigh when deciding whether to follow ***Debra A.E***. or force a prisoner to undergo psychiatric treatment against his will. Viewed this way,

Scott's case presents a substantial, constitutional issue of first impression for Wisconsin.

STATEMENT OF FACTS

In 2009, a jury found Andre L. Scott guilty of battery, disorderly conduct, and kidnapping. (R.7). The circuit court sentenced him to 13 years and 3 months of initial confinement and 10 years of extended supervision. (R.18). Scott filed a timely notice of intent to pursue postconviction relief, but his attorney abandoned him. In 2015, the court of appeals re-instated Scott's postconviction/appellate deadlines, and the State Public Defender appointed a new attorney to represent him. (R.24-25).

The new attorney had concerns about Scott's ability to assist with postconviction proceedings and to make the decisions that are within his sphere of control. He thus requested a competency evaluation. (R.58). The circuit court held a hearing and ordered the Wisconsin Forensic Unit to conduct the evaluation. (R.92).

On July 18, 2016, Dr. Robert Rawski evaluated Scott and noted that he has a history of depression and schizophrenia. (App.130). Dr. Rawski's report indicates that Scott was incarcerated at Stanley Correctional Institution in 2009 and then transferred to the Wisconsin Resource Center in January 2012. In November 2012, he was sent to Oshkosh Correctional Institution. Three years later he was returned to the Wisconsin Resource Center where he remains today. (App.131). The doctors and staff who evaluated Scott at Stanley Correctional, Wisconsin Resource Center, and Oshkosh Correctional did not find him to be dangerous and thus did not medicate him against his will. (App.131-132).

Dr. Rawski diagnosed Scott with schizoaffective disorder. He notes that Scott has been untreated since about 2007. "Attempts at providing involuntary treatment in prison have failed largely because of his lack of acute dangerousness." (App.133). According to Dr. Rawski, Scott "appears to have no insight into his acute psychotic symptoms or need for treatment." (App.133).

Dr. Rawski quizzed Scott about his case and his litigation goals and recorded Scott's answers. Dr. Rawski's report describes Scott's thoughts as "floridly disorganized" but notes that he accurately reported how he pled, how his case proceeded, the jury verdict, and his sentence. (App.133). Scott indicated dissatisfaction with the outcome of his trial, a desire to appeal, and the hope for a conviction of a less serious crime that would have a maximum sentence of 18 months. (App.133-135). He correctly reported that a new trial carried the risk of a longer sentence and seemed to not want that result. According to Dr. Rawski, Scott expressed these thoughts during 45 minutes of rapid, disorganized remarks that were hard to follow. (App.133-135)

Dr. Rawski concluded in part that:

> Mr. Scott demonstrated a lack of substantial capacity to coherently explain his understanding of the legal proceedings, and was substantially incapable of assisting in his defense. (App.135).
>
> He is routinely described by DOC staff to be chronically psychotic but insufficiently dangerous to medicate involuntarily. From a competency standpoint, he demonstrated gross thought disorganization with some delusional remarks regarding the legal proceedings that never allowed me to clearly understand what he was trying to request or what he expected to receive through the appeals process. (App.135).

> Even though he has not been treated for the last nine years, it is more likely than not that Mr. Scott's competency to proceed can be restored with institution of appropriate psychotropic treatment. Competency restoration will require the institution of appropriate antipsychotic and mood-stabilizing medications in an effort to improve thought organization and decrease mental speed, so as to allow for a more rational appreciation and capacity for explaining himself. (App.135).
>
> I believe that Scott is currently substantially incapable of understanding and applying the advantages, disadvantages and alternatives to psychotropic treatment[1] to his particular condition so as to make an informed choice as to whether to accept or refuse such medication for the purposes of competency restoration. (App.135-136).

On August 17, 2016, the circuit court held a hearing where Scott said that he considered himself "competent to proceed." (App. 103). Dr. Rawski testified and confirmed that Scott has schizophrenia or schizoaffective disorder, his symptoms are treatable, but he has declined medication because he lacks insight into his illness and the need for treatment. (App.109-111). The Department of Corrections had tried to obtain an involuntary medication order but failed because Scott is not dangerous. (App.110). Dr. Rawski testified that he met with Scott for about 70 minutes. Half the time he could not understand what Scott was talking about. However, he did not regard Scott as dangerous or threatening. (App.111-112).

[1] Dr. Rawski's report does ***not*** indicate that he ever discussed psychotropic medications or the advantages, disadvantages and alternatives to them with Scott. (App.129-136).

The circuit court held that Scott was not competent to proceed and not competent to refuse medication and treatment. (App.122-123). Postconviction counsel asked the court to follow ***Debra A.E.***, which authorizes an appeal to proceed in this situation. The court declined and instead ordered involuntary treatment because the alternative seemed "cruel" and "inhumane":

> . . . What if the situation is he—sort of hypothetical. You can't regain competency without treatment.[2] And he won't accept voluntary treatment. Are we going to keep someone locked up in a confined setting who we know is not competent? Doesn't that seem kind of cruel? (App.116).

Defense counsel explained that Scott did not want an involuntary medication order and likely would not have pursued an appeal if one were required. (App.116). The court replied:

> But now he's started an appeal . . . And once he's started the clock on the appellate process, doesn't the Court have a right to say, "Wait a minute, we need to protect the integrity of the process," as well as what—what I thought my question was going to—the humanity of saying we shouldn't be locking people up who are not competent to understand what's going on. That's the whole point of the competency statutes in the first place. (App.117).

When postconviction counsel noted that Scott had never been found to be dangerous to himself or anyone else, the court replied:

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[2] There is no evidence in the record that Scott cannot regain competency ***without*** treatment. Dr. Rawski merely opined that, more likely than not, Scott can be restored to competency ***with*** appropriate psychotropic treatment. (App.135).

> I understand that. I guess I have a larger concern, and it—this is gonna have to be decided by a higher court. I am just not willing to sanction a process that says we keep somebody confined who is not competent to proceed, who is not competent to understand what is going on, but could be restored to competency with appropriate medical intervention; which, though I know from my own judicial experience of hearing testimony, there are people who don't like the side effects of psychotropic medications for legitimate reasons and actual reasons. But I'm just not willing to sanction, from the court's perspective, a process that says we leave Mr. Scott in this state of not being competent to understand what's going on, not being competent and able, therefore, to really participate in and assist in his postconviction proceedings, appellate proceedings. I'm just not willing to sanction that. If an appellate court wants to tell me or tell us that nope, sorry you can't do that, then they can do that. But I'm not willing to do that. (App.122).

Following the hearing, the circuit court ordered that:

> [T]he Department of Health Services is authorized to administer medication or treatment to the defendant for an indeterminate period not to exceed 12 months at an institution of its choice. The institute shall periodically re-examine the defendant and furnish written reports to the court 3 months, 6 months, and 9 months after commitment and 30 days prior to expiration of this order. (App.127).

The circuit court stayed its involuntary medication order for 30 days so that Scott could seek appellate relief. (App.128). Scott filed a petition for leave to appeal, but this court denied it. On January 31, 2017, this case was reassigned to the undersigned counsel.

ARGUMENT

I. The Circuit Court's Involuntary Medication Order Violates ***Debra A.E***. and Scott's Right to Substantive Due Process.

A. The standard of review is *de novo*.

This case requires the court of appeals to apply ***Debra A.E.*** to undisputed facts and decide whether Scott's right to substantive due process has been violated. Either way, it poses a question of law, which an appellate court reviews *de novo*. ***State v. Daniel***, 2015 WI 44, ¶20, 362 Wis. 2d 74, 862 N.W.2d 867 (application of ***Debra A.E***.); ***State v. Wield***, 2003 WI App 179, ¶20, 266 Wis. 2d 872, 668 N.W.2d 823 (due process violation).

B. The circuit court's involuntary medication order flouts ***Debra A.E.***

Debra A.E. established the process for managing postconviction proceedings involving a possibly incompetent defendant. After sentencing, if either the State's counsel or defense counsel has a good faith doubt about the defendant's competency to seek postconviction relief, he should advise the circuit court and move for a competency evaluation. If the court agrees that there is reason to doubt a defendant's competency, it shall determine the method for evaluating it. ***Debra A.E***., 188 Wis. 2d at 131.

At the postconviction competency hearing, the State must prove by a preponderance of the evidence that the defendant is competent to proceed. ***Daniel***, ¶53. ***Debra A.E.*** drew a distinction between a defendant's competence to stand trial and a defendant's competence to seek postconviction relief. "[A] defendant is incompetent to stand trial if he or

she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***Daniel***, ¶50 (quoting ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477). A defendant is incompetent to seek postconviction relief "when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." ***Id***. ¶50 (quoting ***Debra A.E***., 188 Wis. 2d at 126). Thus, the postconviction court cannot rely upon a pretrial competency determination when deciding whether a defendant is competent to pursue postconviction relief. ***Daniel***, ¶50.

If the postconviction court finds the defendant incompetent to proceed, then the circuit court should allow defense counsel to initiate or continue postconviction proceedings regarding any issues that rest on the circuit court record, do not necessitate the defendant's assistance or decision-making, and involve no risk to the defendant. ***Debra A.E***., 188 Wis. 2d at 133-134. This ensures that "an incompetent defendant will not suffer from the delay of meritorious claims." ***Id.***

In addition, defense counsel may seek deadline extensions and "request the appointment of a guardian to make decisions the law requires the defendant to make." ***Id***. at 135. This permits the guardian "to instruct defense counsel whether to initiate postconviction relief, and if so, what objectives to seek." ***Id***.

Finally, after a defendant regains competency, the circuit court should allow him to raise any issues that could not have been raised earlier because of incompetency. ***Id.*** In other words, ***State v. Escalona-Naranjo***, 185 Wis. 2d 169, 517 N.W.2d 157 (1994) "will not bar an incompetent

defendant from invoking sec. 974.06 after being restored to competency." ***Id***.

Debra A.E. specifically noted that "ordinarily this process need not include a court order for treatment to restore competency." ***Id.*** at 130. It also stated:

> The process we prescribe, supported by significant consensus of the parties, satisfied the interests of alleged incompetent defendants and the public in expediting postconviction relief and reaching a final determination on the merits.

Id. at 136.

In Scott's case, the circuit court violated ***Debra A.E.*** in at least three ways.

First, the court held that Scott was "not competent to proceed" based on Dr. Rawski's report and testimony. (App.114). Dr. Rawski opined that Scott was not competent "to participate in appeals proceedings" because he "demonstrated a lack of substantial capacity to coherently explain his understanding of the legal proceedings, and was substantially incapable of assisting in his defense." (App.135). But that was the wrong standard.

The correct standard for deciding competency to pursue postconviction relief is whether Scott "is unable to assist counsel or to make decisions committed by law to the defendant to a reasonable degree of rational understanding." ***Daniel***, ¶50 (quoting ***Debra A.E***., 188 Wis. 2d at 126). It is a distinction with meaning because the test for competency "depends upon the mental capacity that the task at issue requires." ***Debra A.E.*** at 125. Postconviction, a defendant's tasks include: (1) deciding whether to seek postconviction relief, (2) assisting counsel in developing a factual foundation

for appellate review, (3) deciding whether to appeal, and (4) deciding what objectives to pursue. However, counsel is entitled to decide which issues to raise in order to meet the client's objectives, and counsel may not pursue issues that have no merit. ***Id*** at 125-126; ***Flores v. State***, 183 Wis. 2d 587, 607, 516 N.W.2d 362 (1994); ***Jones v. Barnes***, 463 U.S. 745, 751 (1983); SCR 20:1.2(a).

Dr. Rawski reported, among other things, that Scott wanted an appeal but not a new trial because it could result in a longer sentence. (App.134). But Dr. Rawski did not base his evaluation on ***Debra A.E.***'s postconviction competency standard. The court simply adopted Dr. Rawski's conclusion, so it made the same mistake. (App.122-123).

Second, the circuit court ordered Scott to be forcibly medicated until he was competent to participate in postconviction proceedings. "I'm just not willing to sanction, from the court's perspective, a process that says we leave Mr. Scott in this state of not being competent to understand what's going on, not being competent and able, therefore, to really participate in and assist in his postconviction proceedings, appellate proceedings." (App.122). The Wisconsin Supreme Court approved that very process as appropriately balancing the interests of the incompetent defendant and the public. ***Debra A.E***., 188 Wis. 2d at 130.[3] The circuit court had no prerogative to ignore binding precedent and order Scott to be involuntarily treated until he is competent to participate in postconviction proceedings.

Third, ***Debra A.E.*** noted that "ordinarily" the postconviction process need not include an order for

[3] The American Bar Association has also sanctioned this process. *See* ABA Criminal Justice Mental Health Standard 7-8.8(b)(2016).

treatment to restore competency. ***Debra A.E***., 188 Wis. 2d at 130. The circuit court failed to identify any extraordinary feature that would make Scott's case qualify for an exception to ***Debra A.E***. If anything, Scott's case is a typical scenario. He is an inmate with a mental illness, but he is not dangerous. Dr. Rawski's report and testimony on this point are undisputed.

The circuit court should have followed standard procedure—*i.e*. ***Debra A.E***. It should have applied the postconviction test for incompetency. If it found Scott incompetent under that test, then it should have allowed postconviction proceedings to continue on all issues that rest on the trial record and that do not require Scott's input. If any decisions do require Scott's input, then counsel could ask the postconviction court to appoint a temporary guardian. If Scott regains competency after his direct appeal is over, then he should be permitted to raise issues that he was unable to raise earlier due to his incompetence.

The court of appeals should reverse the circuit court's order staying postconviction proceedings and forcing Scott to be involuntarily treated to competency. It should remand the case and order the circuit court to comply with ***Debra A.E.***

C. The circuit court violated Scott's right to substantive due process.

The Fourteenth Amendment of the United States Constitution and Article I, §1 of the Wisconsin Constitution guarantee a person the right to substantive due process—that is, protection against state action that is arbitrary, wrong or oppressive. ***State v. Wood***, 2010 WI 17, ¶17, 323 Wis. 2d 321, 780 N.W.2d 63. When faced with a claim that the State has violated a person's right to substantive due process, a court must identify the protected constitutional interest and

the conditions under which competing State interests might outweigh it. ***Id***., ¶18 (citing ***Washington v. Harper***, 494 U.S. 210, 220 (1990)).

A prisoner has a significant, constitutionally-protected liberty interest in refusing psychotropic medication. ***Vitek v. Jones***, 445 U.S. 480, 493-494 (1980); ***Harper***, 494 U.S. at 218. Consequently, the State may not order the administration of psychotropic drugs to a mentally ill prisoner absent an "essential" or "overriding" state interest. *See* ***Sell v. United States***, 539 U.S. 166, 179 (2003); ***Riggins v. Nebraska***, 504 U.S. 127, 135 (1992); ***Winnebago County v. Christopher S***., 2016 WI 1, ¶67, 366 Wis. 2d 1, 878 N.W.2d 109 (Abrahamson, J., dissenting); ***Wood***, ¶25. Otherwise, the State violates the prisoner's right to substantive due process.

The State has an "essential" or "overriding" interest in ordering involuntary medication where, for example, a prisoner is dangerous to himself or others and where it seeks to render a non-dangerous detainee competent to stand trial. ***Harper***, 494 U.S. at 225-226; ***Sell***, 539 U.S. at 180-181. Apart from ***Debra A.E***., which states that "ordinarily" the postconviction process does not require treatment to restore competency, no Wisconsin or United States Supreme Court case holds that the State has an "essential" or "overriding" interest in medicating a prisoner to competency so that he is competent to pursue postconviction/appellate relief. ***Debra A.E.*** 188 Wis. 2d at 130.

Sell lists the factors a court must apply when deciding whether to treat a detainee to competency solely to stand trial. It notes that the cases where this will be allowed are "rare."

Sell, 539 U.S. at 180. The court must find, by clear and convincing evidence[4], that:

- ***"[I]mportant*** governmental interest are at stake." ***Id***. (Emphasis in original). The State's interest in bringing a person accused of a serious crime to trial is important because it seeks to protect the basic human need for security, timely prosecution and fair trial rights. ***Id***.

- "[I]nvoluntary medication will "***significantly further***" the State's interest in rendering the person competent to stand trial and the administration of drugs is substantially unlikely to have side effects that will interfere significantly with his ability to assist counsel. ***Id***. at 181. (Emphasis in original).

- "Involuntary medication is ***necessary***" to further those interests. That is, alternative, less intrusive treatments are unlikely to reach substantially the same results. ***Id***. (Emphasis in original)

- "[T]he administration of drugs is "***medically appropriate***, *i.e.* in the patient's best medical interest in light of his medical condition." ***Id***. (Emphasis supplied).

The State did not prove, and the circuit court did not weigh, the ***Sell*** factors before ordering Scott to be involuntarily treated to competency. First, neither the State nor the circuit court identified a ***state interest*** in forcing psychotropic medications upon Scott in the postconviction setting. The only interest the court mentioned was the

[4] ***Sell*** did not address the State's burden of proof, but multiple federal circuit courts hold that the State must prove ***Sell***'s factors by clear and convincing evidence. ***United States v. Ruiz-Gaxiola***, 623 F.3d 684, 692 (9th Cir. 2010)(*see* cases cited therein).

"inhumanity" of not treating Scott, a person who the DOC says does not qualify for involuntary commitment and medication.[5] According to ***Debra A.E***., allowing counsel to seek postconviction/appellate relief to the extent feasible, while reserving the defendant's right to raise additional issues if and when he regains competency, strikes the appropriate balance between the State's interests and the defendant's interests. ***Debra A.E***. 188 Wis. 2d at 134-35.[6]

Second, the State failed to identify, and the circuit court failed to find, any State interest that could be "significantly furthered" by involuntarily medicating Scott to competency. Nor did anyone (the State, Dr. Rawski or the circuit court) identify which psychotropic drugs Scott should be treated with or what their side effects might be.

Third, Dr. Rawski did not opine, and the circuit court did not find, that alternative, less intrusive means would be substantially unlikely to restore Scott to competency. Dr. Rawski never identified any form of treatment for Scott's condition other than psychotropic treatment in the generic sense.

Fourth, the circuit court found that leaving Scott untreated was "inhumane." It did not find that forcing treatment was in Scott's best medical interests in light of his medical condition.

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[5] Presumably the DOC was referring to the Chapter 51 standards, but the record is silent on this issue. (App.109, 131-132).

[6] In a different context, the United States Supreme Court has held that a death row prisoner does not have a statutory right to be competent to assist his attorney with federal habeas proceedings. ***Ryan v. Gonzalez***, __U.S.__, 133 S.Ct. 696, 706 (2013).

In short, the circuit court did not weigh the ***Sell*** factors—or any State interest—before ordering Scott to be treated involuntarily with psychotropic drugs until he is competent to participate in postconviction proceedings. If the court of appeals does not reverse the circuit court's involuntary medication order based on its failure to follow ***Debra A.E.***, then it should reverse the order because it violates Scott's right to substantive due process under ***Sell***, the Fourteenth Amendment of the United States Constitution, and Article I, §1 of the Wisconsin Constitution.

CONCLUSION

For the reasons stated above, the court of appeals should reverse the circuit court's involuntary medication order and remand this case for further proceedings.

Dated this 1st day of March, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,520 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of March, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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A P P E N D I X

I N D E X
T O
A P P E N D I X

Page