STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. SCOTT,

Defendant-Appellant-Petitioner.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

This case does not present the question of "what to do when a convicted defendant becomes incompetent during postconviction proceedings." (Response Br. 2). It presents the question of what test a circuit court should apply when the State of Wisconsin requests the forced administration of psychotropic drugs to restore a defendant to competency for postconviction proceedings. That is what happened in this case. An assistant district attorney urged the circuit to follow ***State v. Debra A.E.***, 188 Wis. 2d 111, 523 N.W.2d 727 (1994) and look to Wis. Stat. §971.14 for guidance on ordering involuntary medication. (App.116, 123-124). The circuit court complied. On appeal, the State, represented by an assistant attorney general, asked the court of appeals to do exactly the same thing. (Court of Appeals Response Br. at 14).

The problem is that Wisconsin does not have a postconviction competency statute. That is why ***Debra A.E***. refers the bench and bar to §971.14(4). The current version of §971.14(4)(b) was enacted via 1989 Wis. Act. 31 §2848t, before the United States Supreme Court decided a trilogy of cases that explain what courts must consider before forcing psychotropic medication upon a defendant or inmate. *See* ***Sell v. United States***, 539 U.S. 166, 179-182 (2003), ***Riggins v. Nevada***, 504 U.S. 127, 135 (1992), ***Washington v. Harper***, 494 U.S. 210, 227 (1990). Unfortunately, §971.14(4)(b) has not been updated to comply with these substantive due process requirements, and no Wisconsin case applies them in the "treatment to competency" context. *Cf* ***State v. Wood***, 2010 WI 17, ¶25, 323 Wis. 2d 321, 780 N.W.2d 63 (applying ***Sell***, ***Riggins***, and ***Harper*** to §971.17(3)(c)); ***Winnebago County v. Christopher S***., 2016 WI 1, ¶¶69-91, 366 Wis. 2d

1, 878 N.W.2d 109 (Abrahamson J. dissenting and applying same to a Chapter 51 commitment and medication of prisoner).

The State asks the Court to pass on the constitutionality of §971.14(4)(b) and the proper legal test, assuring that the problem "is likely never to arise again." (Response Br. 3). That is no solace to Andre Scott, who the State now concedes suffered a substantive due process violation. (Response Br. 30-31). The assurance also is not accurate. Letting the problem fester leaves circuit courts, prosecuting attorneys, and defense lawyers in the dark and puts postconviction defendants at risk for the same due process violation—especially since ***Debra A.E***. directs the bench and the bar to §971.14(4). It also permits recurring substantive due process violations for trial defendants.

STATEMENT OF CASE AND FACTS

The facts relevant to this appeal are those presented to Milwaukee County Circuit Court Judge Jeffrey Kremers, who presided over the 2016-2017 competency proceedings in this case. He did not preside over Scott's trial, which occurred back in 2009. Nor did he ever mention the evidence presented at trial. (App.104-129, 139-146).

ARGUMENT

I. The State Misunderstands ***Debra A.E***., and the Decision Should Be Clarified or Modified in Light of ***Sell***.

Scott agrees with the State that ***Debra A.E.*** provides a helpful process by which circuit courts and counsel are to manage postconviction relief for allegedly incompetent

defendants, and that the process ordinarily need not include involuntary treatment to restore competency. Meaningful relief can be provided even while a defendant is incompetent. ***Debra A.E.,*** 188 Wis. 2d at 129-130. (Initial Br. 8-12; Response Br. 4, 6).

Nevertheless, this Court should clarify or modify the part of ***Debra A.E***. that holds: "In conducting any hearing the circuit court should be guided by sec. 971.14(4), Stats, (1991-192), to the extent feasible." ***Id.*** at 132. *See also* ***State v. Daniel***, 2015 WI 44, ¶28, 362 Wis. 2d 74, 862 N.W.2d 867 (repeating this instruction). Section 971.14(4)(b) does not comply with ***Sell***, ***Riggins***, or ***Harper***. Therefore, this Court should hold that the bench and the bar should ***not*** look to §971.14(4)(b) for guidance on involuntary treatment to competency at the postconviction stage because that statute is unconstitutional on its face.

Furthermore, while Scott agrees that ***Debra A.E.*** is good law (except for the above clarification), he does not agree with the State's understanding of it. ***Debra A.E.*** did not establish a classification of postconviction claims. Rather, ***Debra A.E.*** observes that at the postconviction stage the defendant and his lawyer face a series of tasks or decisions.

One decision is whether to proceed with or forgo relief. "[T]he defendant may not wish to appeal based on any number of personal, practical, or even idiosyncratic reasons." ***Id***. at 126 (quoting ***Flores v. State***, 183 Wis. 2d 587, 607, 516 N.W.2d 362 (1994)). Some of those reasons may have nothing to do with his potential claims. Another decision is what objectives to pursue. ***Id***. Possible objectives include plea withdrawal, a new trial, resentencing, sentence modification, or maybe negotiating stipulated relief without filing a postconviction motion. Some defendants might have to

decide whether to proceed pro se or hire a private lawyer. Other defendants might have to decide whether to release records relating to their mental health at the time of the alleged crime. Most of these decisions carry risks—for example, the possibility of additional charges, a higher sentence, or perhaps life in a mental institution.

Debra A.E. provides that if defense counsel or the State has a good faith doubt about the defendant's competency, counsel should move for a ruling on it. If the defendant is found incompetent, defense counsel should (1) proceed with issues that involve no risk to him, (2) request an extension of deadlines, if appropriate, and (3) request the appointment of a temporary guardian to make decisions that are the defendant's to make. If defense counsel cannot raise some issues due to the defendant's incompetency, the defendant may raise them later via Wis. Stat. §974.06. ***Id.*** at 130.

In sum, ***Debra A.E***. does not focus on or specify types of claims. It explains how to manage the postconviction process once the defendant's ability to assist counsel and to make certain decisions is placed at issue.[1] Its statement that courts should look to §971.14(4) for guidance in conducting competency hearings should be clarified or modified in light of ***Sell***.

II. The Substantive Due Process Test for Involuntary Medication Is Clear, and the Circuit Court Violated It.

The State fixates on classifying claims because it assumes that involuntary medication depends upon the type

[1] Contrary to the State's Response Brief at 20 n.6, this Court's decision should indicate that Dr. Rawski, and hence the circuit court, applied the wrong legal test for competency to proceed at the postconviction stage. Otherwise, this error will recur.

of claim a defendant asserts. Scott has not yet filed a postconviction motion or notice of appeal, so the State concludes that discerning the test for ordering involuntary medication to competency is "purely academic" and "too difficult" for this Court decide. (Response Br. 3, 14, 26-29). The State misses the big, constitutional picture.

Because all persons have a constitutional liberty interest in being free from the forced administration of psychotropic drugs, it is impossible for a court to ever order them without considering substantive due process requirements. ***Sell***, 539 U.S. at 178 (quoting ***Harper***, 494 U.S. 221. As this Court explained in ***Wood***, ¶25:

> To summarize, ***Harper***, ***Riggins***, and ***Sell*** compel the following conclusions. First, a person competent to make medical decisions has a "significant" liberty interest in avoiding forced medication of psychotropic drugs. *See* ***Harper***, 494 U.S. at 221, 1001 S.Ct. 1028. Second, in light of that interest, the state may not order the administration of psychotropic drugs to a mentally ill individual unless it demonstrates an overriding justification to administer the drugs and a determination of medical appropriateness. *See* ***Riggins***, 504 U.S. at 135, 112 S.Ct. 1810. The incursions that substantive due process permits largely depend on what the state's overriding interest entails.

Sell and ***Wood*** explain that one overriding State interest warranting involuntary psychotropic medication is ensuring the safety and security of a prison or institution. This interest requires a court finding that the inmate is dangerous to himself or others. Another overriding State interest could be rendering a nonviolent detainee competent to stand trial. This interest requires a court to find the four ***Sell*** factors. ***Wood***, ¶25; ***Sell***, at 181-182.

First, the court must find that important governmental interests are at stake. This entails consideration of the seriousness of the defendant's crime, the State's interest in prosecuting the crime, whether the defendant's failure to take medication will result in institutionalization, and the amount time that the defendant has already served. ***Sell***, 539 U.S. at 180.

Second, the court must find that involuntary medication will significantly further the State's interests. It must find that the proposed drugs are substantially likely to render the defendant competent to stand trial without side effects that might interfere significantly with the defendant's ability to assist counsel in conducting a trial defense. ***Id***. at 181.

Third, the court must find that involuntary psychotropic medication is necessary to further those State interests. In other words, it must consider whether alternative less intrusive treatments or means are unlikely to achieve the same results as forced medication. ***Id.***

Fourth, the court must find that the administration of drugs is medically appropriate, which requires consideration of the specific drugs proposed for the defendant and their side effects. ***Id.***

Now, turn to §971.14(4)(b), which incorporates §971.14(3)(dm). The statute permits a court to order involuntary medication or treatment if the defendant is (1) incompetent to proceed, and (2) incompetent to refuse medication or treatment. The circuit court ordered the forced administered psychotropic drugs based on those two statutory requirements: "So I am going to make the finding that Mr. Scott is not only not competent at the present time but also that he is not competent to refuse medication and treatment."

(App.125-126). The court said that it was not willing to sanction a process that left Scott incompetent during postconviction proceedings. (App.125).

The circuit court's order and the statute it relied upon clearly violate ***Sell***, ***Riggins***, ***Harper*** and, therefore, substantive due process. (Initial Br. at 12-19). The State does not respond to any of these arguments. It therefore concedes them. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp***., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)(failure to refute an argument may be deemed a concession of it). Indeed, the State concedes that the circuit court violated Scott's right to substantive due process, but for a different reason. (Response Br. 30-31).

Establishing the proper test for deciding when the State may forcibly administer psychotropic drugs to a defendant during postconviction proceedings is not "purely academic." In Scott's case, the circuit court threatened to do it again. (R.97:5). The State even concedes this point. (Response Br. 12 n.3). Likewise, the proper test is not difficult to discern. This Court proved up to the task in ***Wood***.

Therefore, when the State asks to forcibly treat a nondangerous defendant with psychotropic drugs during postconviction proceedings, the State should be required to show that: (1) it has an overriding interest in forcing medication on the defendant; (2) the proposed medication will significantly further that overriding interest without interfering with the defendant's ability to assist his lawyer and make the decisions that are his to make; (3) less intrusive treatments or measures are substantially unlikely to achieve the same result; and (4) the proposed drugs are medically appropriate for the defendant.

In short, this Court has only to tweak the ***Sell*** test for postconviction proceedings. The potentially knotty question for future cases is whether the State ***has*** an overriding interest in medicating a defendant to competency for postconviction proceedings. Judging from the Response Brief, the State will not soon rush to assert this interest. That does not mean this Court should refrain from instructing the bench and the bar on how to address the issue the next time the State raises it.

III. The Court Should Hold that an Order for Involuntary Medication or Treatment to Restore Competency Is Immediately Appealable.

The parties agree that involuntary medication or treatment orders should be immediately appealable. There appear to be two ways to accomplish this goal. One way is to treat the order as "interlocutory" so that defense counsel must file a petition for leave to appeal pursuant to Wis. Stat. §808.03(2) and §809.50 and then require the court of appeals to grant all such petitions as in ***Arneson v. Jeznewski***, 206 Wis. 2d 217, 220, 556 N.W.2d 721 (1996). The other way is to treat the order as "final" so that it is appealable as a matter of right under Wis. Stat. §808.03(1). *See* ***State v. Rabe***, 96 Wis. 2d 48, 57, 291 N.W.2d 809 (1980)(§808.03 applies to criminal cases). Wisconsin appears to recognize three types of "final" orders: (1) one that disposes of the entire matter as to one or more of the parties in an action; (2) one that disposes of a special proceeding; and (3) one that disposes of a proceeding within an existing action. *See* Wis. Stat. §808.03(1) and ***State v. Alger***, 2015 WI 3, ¶¶28-31, 360 Wis. 2d 193, 858 N.W.2d 346.

Sell classified an involuntary medication order as a "collateral order" appealable as a matter of right (not by permission) under 28 U.S.C. §1291 because it conclusively

determined the disputed question of whether the defendant had a right to avoid forced medication, resolved an important constitutional issue that was separate from his guilt or innocence, and was effectively unreviewable on appeal from a final judgment. ***Sell***, 539 U.S. at 166. ***Sell*** applies federal law, not Wisconsin law.

No published Wisconsin case addresses the mechanism for appealing an order for involuntary treatment or medication. In the postconviction setting, courts have permitted an appeal from the denial of a postconviction motion for a competency evaluation as a matter of right. *See* ***Debra A.E.*** They have also permitted an interlocutory appeal from an order finding a defendant competent to pursue postconviction relief. *See* ***State v. Daniel***, 2014 WI App 46, ¶5 n.3, 354 Wis. 2d 51, 847 N.W.2d 855.

When a circuit court orders involuntary medication or treatment, the stakes for the defendant are high, so the Court should adopt a streamlined mechanism for appeal. That would appear to be treating the order as "final" and allowing an appeal as a matter of right after the defendant files a notice in the circuit court. An interlocutory appeal, by contrast, would require the defendant to file in the court of appeals 5 copies of a properly-formatted petition that includes a statement of the issues, a statement of facts, and an argument section. *See* Wis. Stat. §809.50. The State does not oppose the "final order" approach. (Response Br. 31). Either way, the important point is that these orders should be immediately appealable, and the Court should make the mechanism clear.

IV. The Parties Agree that the Court of Appeals Erred in Denying Scott a Stay Pending Appeal.

Scott asks this Court to: (1) hold that the court of appeals erred in denying Scott a stay pending appeal; (2) hold

that the court of appeals, like the circuit courts, must explain its reasons for granting or denying relief pending appeal; (3) establish the appellant's recourse once the court of appeals denies relief pending appeal; and (4) direct lower courts (circuit and appellate) to automatically stay orders for involuntary medication or treatment to restore competency pending appeal. (Initial Br. 22-27).

The State agrees that the court of appeals erred in denying Scott's motion for stay and that stays "should be granted in most appeals of involuntary medication orders, though not necessarily all" because there could be an "'imminent need' to begin medication immediately" or the appeal could be meritless. (Response Br. 34, 36).

If the State has an "imminent need" for an involuntary medication order, then it should be seeking "permission for the forced administration of drugs on . . . ***Harper***-type grounds," not on "restoration to competency" grounds. ***Sell***, 539 U.S. at 183. If a circuit court may deny a stay of its involuntary medication order because it believes its order is correct, then forced medication will begin, and he will suffer the very harm he seeks to avoid before the transcript is prepared or the briefs are written. Thus, when the State seeks involuntary medication or treatment based on an overriding interest in restoring competency, the Court should require an automatic stay. That is the only way to safeguard the defendant's right to appeal the order.

The State does not respond to Scott's argument that the court of appeals should explain its reasons for granting or denying the stay or his argument that this Court should establish a procedure for challenging the court of appeals' denial of relief pending appeal. It therefore concedes these points. *See* ***Charolais Breeding,*** 90 Wis. 2d at 109.

CONCLUSION

For the reasons stated above, Andre L. Scott respectfully requests that the Wisconsin Supreme Court reverse the circuit court's order for involuntary medication or treatment to competency, reverse the court of appeals order denying relief pending appeal, and establish the procedures requested herein.

Dated this 5th day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,826 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 5th day of January, 2018.

Signed:

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