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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2020AP160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. ENGEN,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal from Final Orders Regarding a
Commitment for Treatment (Incompetency)
Entered by the Dane County Circuit Court,
the Honorable Ellen Berz Presiding.

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I. Introduction

Engen raises four issues for this Court's review. The State concedes error on two issues. First, the State concedes that the circuit court erred in denying trial counsel access to Engen's treatment records. (Resp. Br. 9). Second, the State concedes that the involuntary medication order does not satisfy the second, third, and fourth factors of the test prescribed in *Sell v. U.S.,* 539 U.S. 166 (2003). (Resp. Br. 12-13). This Court should accept the State's concessions and vacate the involuntary medication and tolling orders.

This Court should also address each of the four issues presented and publish its opinion because each issue impacts every individual facing a government request for involuntary medication under § 971.14. The Wisconsin Supreme Court announced that Wisconsin courts must apply the *Sell* test to such requests. *State v. Fitzgerald,* 2019 WI 69, ¶¶14-18, 387 Wis. 2d 384, 929 N.W.2d 165. Yet there are no published opinions to guide circuit court judges, prosecutors, and defense lawyers on the scope of the State's burden under *Sell* and *Fitzgerald* and an individual's substantive and procedural rights in § 971.14 involuntary medication proceedings. That Engen and the State agree on several issues should give the court of appeals confidence in publishing a decision can be applied consistently throughout the State.

II. The Circuit Court Erroneously Held there Was Sufficient Evidence to Order Involuntary Medication Based on the Four *Sell* Factors

This court should vacate the involuntary medication order because the State proved none of the *Sell* factors. The State concedes that *Sell* requires an individualized treatment plan and "the State's evidence in this case was inadequate" but argues that "this court should not use this case to develop Wisconsin's *Sell* case law." (Resp. Br. 12-13). To the contrary, this Court should use this case to establish the minimum requirements of each *Sell* factor and bring Wisconsin law up to speed with the corpus of consistent federal case law. Developing Wisconsin law will provide guidance that can ensure more consistent application of *Sell* in the circuit courts.

A. The State failed to prove the first *Sell factor*.

The circuit court found that the first *Sell* factor had been met. The State argues that the circuit court was correct. The State's argument fails because (1) the State's evidence failed to establish that Engen's alleged probation violation qualified as a "serious" crime, and (2) the State and circuit court ignored the individual circumstances of Engen's case. *Sell,* 539 U.S. at 180.

Sell created a two-step inquiry to determine whether an important government interest is at stake. First, the court must determine whether Engen's crime is serious enough to establish an important government interest. If so, the court must

consider whether special circumstances mitigate that interest. *Sell*, 539 U.S. at 180; *Fitzgerald*, ¶26; *U.S. v. Onuoha*, 820 F.3d 1049, 1054 (9th Cir. 2016).

The State failed at the first step because the prosecutor presented no evidence about the alleged probation violation. According to the State, "its case would be stronger if the facts of the probation violation were in the record, but does not concede that the information is necessary." (Resp. Br. 12). To make up for this, the State attempts to shift this Court's focus to the nature of the underlying crime and Engen's behavior in court. (Resp. Br. 11-12).

The State has no valid interest in treating Engen to competency through forced medication based on his courtroom demeanor. Nor does the State have a valid interest in treating Engen to competency based on crimes for which the State's interest has already been achieved through convictions and completion of sentences. The State's sole interest rests in prosecuting an alleged probation violation. Because the State neglected to allege the conduct constituting a probation violation, it has failed to prove that there is an important government interest in prosecuting it. (Appellant's Br. 25); *U.S. v. Armstrong,* No. 12-CR-36, 2014 WL 1257020 (W.D. Ky. Mar. 25, 2014)(unpublished); *U.S. v. Jones,* No. 15-CR-184, 2016 WL 3962776 (D. Conn. Jul. 21, 2016)(unpublished).

Moreover, because the State focused solely on the seriousness of the underlying crime and Engen's courtroom behavior, the circuit court failed to "consider the facts of the individual case" and conduct an "individualized assessment of the circumstances

surrounding the case". *Sell,* 539 U.S. at 180; *Fitzgerald,* ¶26. The facts at trial and Engen's behavior in court—not the individualized circumstances of the probation revocation—motivated the court:

> I do find that all of the factors have been satisfied. I'm utilizing not only the evidence presented today, but also the fact that I sat through a trial of this case and am very familiar with the danger Mr. Engen posed to his victim. Then, of course, we have his conduct today which is rather self-evident.

(R.153:1-2).

As this Court pointed out in the March 2, 2020, order, "the State has not sufficiently addressed how the individual facts of this case support the first *Sell* factor." (R.278:5). Like the prosecutor and the circuit court, the State has again neglected to address Engen's argument on the second step of the first *Sell* factor in the response brief. While the State provides a generalized recitation of the sentencing structure under § 973.01—apparently to reveal the potential that the State could continue to supervise Engen despite him being "at or close to the end of his confinement time"—the State does not even acknowledge the existence of second step of the first *Sell* factor. (Resp. Br. 12). By failing to address the second step at every stage, including in its response brief, the State has conceded the issue. *Raz v. Brown,* 2003 WI 29, ¶25, 260 Wis. 2d 614, 660 N.W.2d 647.

B. *Sell* requires an individualized treatment plan that meets certain minimum standards in all cases.

The State concedes that the circuit court erred by ordering involuntary medication under *Sell* factors "because the State did not provide an individualized treatment plan." Resp. Br. 12-13. Engen and a substantial body of federal case law agree that an individualized treatment plan is a "universal requirement" under *Sell*. (Resp. Br. 10; Appellant's Br. 16-17). Because an individualized treatment plan is essential to the court's decisions about the second, third, and fourth *Sell* factors, the question about what a treatment plan should include will arise in every § 971.14 involuntary medication case. Thus, this Court should provide guidance to the circuit courts about a plan's minimum requirements.

The State argues that providing such guidance would amount to an "advisory opinion." (Resp. Br. 13-14). This argument is well wide of the mark because this Court's opinion can provide guidance to the circuit courts by applying the facts and holding here to treatment plan requirements that are firmly established under *Sell* and its progeny.

This Court can—but need not—look beyond *Sell* for guidance on what a treatment plan requires. A treatment plan, including the State's proposed medication, is essential for the court to decide: "Has the Government, *in light of the efficacy*, *the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic treatment,* shown a need for that treatment

sufficiently important to overcome the individual's protected interest in refusing it?" *Sell*, 539 U.S. at 183 (emphasis added).

Dr. Elliott testified that delusional symptoms are not always treatable by psychiatric medication. (R.171:14-15). Dr. Pankiewicz recommended medication but testified that he did not have a specific medication in mind and did not know if Engen would suffer any side effects. (R.172:13-14). Neither Dr. Elliott nor Dr. Pankiewicz reviewed Engen's medical history. (R.171:16; R.172:11-12). This Court's analysis of how that testimony fails to meet the minimum requirements of an individualized treatment plan under *Sell* is anything but advisory.

III. The Circuit Court Misapplied *Scott* and the Rules of Appellate Procedure and Denied Engen's Right to Due Process.

Given the important liberty interest at stake—as recognized *Sell, Scott,* and *Fitzgerald*—involuntary medication orders should be the rare exception, not the rule. *Scott* acknowledges this and assumes that an erroneous involuntary medication order harms a defendant. Thus, a stay pending appeal should be—and under *Scott* is—automatic and the State must prove to the court of appeals that "the defendant will not suffer irreparable harm if the stay is lifted." *Scott,* 2018 WI 74, ¶47, 382 Wis. 2d 476, 914 N.W.2d 141. The procedure employed by the circuit court and endorsed by the State here expressly undermines both the purpose and language of *Scott.*

The procedure prescribed by *Scott* serves the dual-purpose of preventing frivolous appeals and eliminating the need for a defendant to race to the court of appeals for rescue from irreparable harm. To meet those purposes, the language of *Scott* takes the discretion to grant or lift the stay away from the circuit court and places it with the court of appeals. When a circuit court exercises the discretion to grant or lift the "automatic" stay, it violates *Scott's* procedure, frustrates *Scott's* purpose, and creates unnecessary emergencies for the court of appeals.

In the circuit court, the State explained that a circuit court seems to lack authority to lift the automatic stay under *Scott*. (R.173:21). Now the State takes a contradictory position. According to the State, the Supreme Court did not mean it when it held that:

> Whether to grant **the State's motion** is a discretionary decision, and as we explained above, **the court of appeals must explain its discretionary decision to grant or deny the State's motion.**

Scott, ¶48.

In other words, the State asks this Court to ignore the Supreme Court's specification that the *State* must move to lift the stay and the *court of appeals* must exercise its discretion to grant or deny the motion. *Id.,* ¶48. By asking this Court to return discretion to circuit courts to lift the stay and forcing a defendant to race to file an emergency motion in the court of appeals, the State is effectively asking this Court to overrule *Scott.* The court of appeals has

no power to "overrule, modify, or withdraw language from a previous supreme court case." *Cook v. Cook,* 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

The State acknowledges the merit in Engen's argument that the circuit court violated procedural due process when it invited and granted an oral motion by the State to lift the stay. The State simultaneously dismisses Engen's argument that the motion must be in writing. (Resp. Br. 21). But the motion must be in writing to ensure notice and avoid the due process violation that occurred here. *See Vitek v. Jones,* 445 U.S. 480 (1980).

This Court must clarify that *Scott* means what it says: a stay pending appeal is automatic and the court of appeals, not the circuit court, decides whether the state has met its burden to lift the stay under a test modified from *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995). Until this Court acts, circuit courts will continue to do what the court did here—authorize the automatic stay and lift it in the same breath with no notice to defendants. *Scott* will be meaningless and defendants will face irreparable harm without this Court's emergency intervention.

IV. The Circuit Court Erroneously Granted the State's Motion to Toll.

Like the State's motion in the circuit court and the circuit court's reasoning, the State's response fails to provide legal justification for the tolling order.

The statutory provisions relevant to the State's motion to toll are §§ 971.14(5)(a)1, 3, and 6(a). The plain statutory language sets the maximum commitment period at 12 months and demands that "if the court determines that it is unlikely that the defendant will become competent within the remaining commitment period," the circuit court "*shall* discharge the defendant from commitment and release him or her."

The State considers several of Engen's arguments about the tolling order unworthy of response because—in the State's estimation—they are "non-legal, treatment-related, speculative, and ignore the reasons for the tolling motion and order." Resp. Br. 22. This Court need not, and should not, accept the State's dismissal of Engen's arguments. Rather, this Court should consider the State's failure to respond to them a concession of those issues. *Raz,* 2003 WI 29, ¶25.

For instance, the State never responded to Engen's argument that, despite the circuit court calling the appeal "a sham," he has a strong appeal. (Appellant's Br. 42). This is a legal argument that meets the reasons for the tolling order head on. In issuing the tolling order the circuit court found that:

> If the proper treatment is withheld **based on legal machinations used to delay** and use up the commitment period, it makes no sense for the time of commitment period to continue running.

(R.173:41-42)(emphasis added).

In other words, the circuit court used its view that Engen's appeal is "a sham" as the sole justification for tolling the commitment period while Engen defended his right to be free from involuntary medication on appeal. The circuit court cited no legal authority for contradicting the unambiguous statutory language in § 971.14 by expanding the period for treatment. The State articulates no basis in its response brief.

The statute does not give the circuit court the authority to toll the time to bring Engen to competency. The state concedes that the plain language of § 971.14(5) "unambiguously sets a maximum time period that a defendant will be in DHS custody for treatment." (Resp. Br. 23)(internal quotes omitted). But according to the State, the unambiguous statutory time limits "simply do not come into play under the plain language of the statute." (Resp. Br. 25). In other words, the State's primary argument is that the statute means something other than what it says.

To State does not provide a basis to explain its contradictory position. Instead, the State claims that the tolling order is necessary to "achieve" the "statutory purpose" of § 971.14. According to the State, the "purpose" of the statute is to afford the State an unlimited period of commitment to treat Engen against his will when he pursues a meritorious appeal. (Resp. Br. 22-23).

This purported "statutory purpose" does not exist anywhere in the statutory language. But the State twists the language of § 971.14(5)(a)1 to meet its needs by asserting—with no authority—that

"treatment" means "appropriate treatment" as "determine[d] by the court." (Resp. Br. 23). Then the State speculates that tolling is necessary because without medication, Engen will be "warehoused" and "languish" while taking up "precious treatment space that could be effectively used by another patient." (Resp. Br. 23-24). The State fails to acknowledge the existence of any treatment options besides medication.

The Supreme Court rejected a previous request by the State to add words into § 971.14 in *Fitzgerald.* The court held that "[w]e do not read words into a statue regardless of how persuasive the source may be; rather we interpret the words the legislature actually enacted into law." *Fitzgerald,* ¶30. The court then recited the "omitted-case cannon of statutory interpretation" to conclude that if a matter is not covered by a statute, the court treats that matter as not covered. *Id.* (quoting *Lopez-Quintero v. Dittmann,* 2019 WI 58, ¶18, 387 Wis. 2d 50, 928 N.W.2d 480) (internal citations omitted).

If the legislature intended to expand the time available for competency treatment with a tolling mechanism, it would have included a tolling mechanism in § 971.14. This Court should not have rewrite or glean meaning from unambiguous statutory language to accommodate the circuit court's invented tolling scheme or the State's invented statutory purpose. *Fitzgerald,* ¶40 (citing *Fond Du Lac County v. Town of Rosendale,* 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989)).

In summary, the circuit court violated Engen's substantive and procedural due process rights by ordering involuntary medication in violation of *Sell,* lifting the automatic stay without adequate notice, and tolling the treatment period based on a faulty estimation of the strength of his appeal. This Court should vacate the medication order, vacate the tolling order, and provide essential guidance on all the issues raised.

CONCLUSION

For the reasons stated above and in his initial brief, Eric P. Engen respectfully requests that the court of appeals vacate the circuit court's January 16, 2020, Amended Order of Commitment for Treatment (Incompetency) and the portions of the January 21, 2020, order that lifted the automatic stay and granted the State's motion to toll.

Dated and filed by U.S. Mail this 8th day of December, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,731 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated and filed by U.S. Mail this 8th day of December, 2020.

Signed:

DAVID J. SUSENS
Assistant State Public Defender