RECEIVED
09-21-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2020AP000298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH G. GREEN,

Defendant-Appellant.

Appeal from Final Orders Regarding a Commitment for Treatment (Incompetency) Entered in the Dane County Circuit Court, the Honorable Valerie Bailey-Rihn, Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. The state failed to present sufficient evidence to satisfy *Sell*.

The state concedes that an individualized treatment plan is necessary to fulfill the requirements under *Sell*[1]. (Response 16). Thus, there can be no dispute that, as the state failed to present a treatment plan at the competency hearing, it failed to meet its burden under *Sell* and the circuit court erred in granting an involuntary medication order at that time.

The disagreement in this case arises over whether the circuit court properly exercised its discretion in allowing the state to present additional evidence at the subsequent motion to lift hearing, and whether that additional evidence was sufficient to satisfy *Sell*.

As set forth below, and in the initial brief, the circuit court erroneously exercised its discretion in allowing the state to reopen evidence and the additional evidence, therefore, should not be considered. Even taking that additional evidence into consideration, however, it remains apparent that the involuntary medication orders entered in this case must be vacated. The state failed to present evidence regarding a treatment plan *specific to Mr. Green* and, consequently, the circuit court could not make the necessary findings under *Sell*.

---

[1] *Sell v. United States*, 539 U.S. 166 (2003).

A. The circuit court erred in allowing the state to reopen evidence.

After an order for involuntary medication was entered and a notice of appeal filed, and after briefing on whether the automatic stay of that order should be lifted, the state was allowed to present additional evidence on the *Sell* factors to support that involuntary medication order. The circuit court erroneously exercised its discretion in allowing the state to do so as it misapplied the law and its decision was contrary to the principles of equity and justice.

The parties agree that the state had no "strict right" to reopen its case and present additional evidence; rather, whether to allow the state to do so was a discretionary decision for the circuit court. (Br. 16; Response 22). Despite this acknowledgement, the state argues that the court did not misunderstand the law or fail to exercise its discretion when it found that the state had "a right" and was "entitled" to present additional evidence. (43:7-8, 14).

The state argues that Mr. Green reads too much into the circuit court's words, but it gives no alternate explanation for them. (Response 25). When defense counsel challenged the state's ability to reopen evidence, rather than weighing the options and discussing the principles of equity and justice, the court simply found that the state had a "right to supplement" and "was entitled to put on evidence." (43:7-8, 14). It also stated that this court would

decide the issue. (43:14). The circuit court's words were clear – it believed that the state had a strict right to present evidence in support of the *Sell* factors. There was no exercise of discretion.

The circuit court's confusion is understandable, as the state never made a motion to reopen evidence – in writing or otherwise – despite the hearing being continued for it to file one. Rather, the state framed its actions as supplementing the record by introducing evidence of a specific treatment plan, which it then filed. The state never presented the court with any legal or equitable argument about why it should be allowed to reopen evidence months after the involuntary medication order was entered and after an appeal had been initiated.

Now, when Mr. Green challenges the court's decision, the state asserts that it could not present the additional evidence at the competency hearing because it was not then available. (Response 24-25). In making this argument, the state misrepresents the record in this case.

There is nothing in the record to support the state's assertions that Dr. Schoenecker learned relevant information about Mr. Green after the competency hearing. Sure, he completed a second examination and submitted another report, but he had not reviewed any additional information relevant to a treatment plan, such as medical or mental health records. (12; 24). Moreover, Dr. Schoenecker's second report didn't make a recommendation for a specific

treatment plan. (24). In fact, unlike the first report, it didn't contain a recommendation for an involuntary medication order at all. (24:4-5).

Further, review of the record reveals that Dr. Schoenecker never developed a treatment plan for Mr. Green. Rather, the state proposed a treatment plan involving Haldol, and Dr. Schoenecker provided testimony about that drug – knowledge he surely had at the time of the competency hearing. There was no new information. The state simply introduced evidence that it wished it had presented at the competency hearing.

As the circuit court erred in allowing the state to reopen evidence on the *Sell* factors, this court should disregard the additional evidence and vacate the involuntary medication orders.

B. The state's evidence was insufficient.

The state's evidence, both at the competency hearing and at the motion to lift hearing, fell short of satisfying the requirements of *Sell* for one specific reason – it failed to present a treatment plan which had been developed specifically for Mr. Green. While, after the competency hearing, the prosecutor filed a treatment plan containing a specific drug and specific dosages, he failed to present any evidence that that specific plan had been developed or recommended for Mr. Green.

Case law illustrates that the state was required to present, and the circuit court was required to find, that an individualized treatment plan, specific to Mr. Green, would significantly further the state's interests, was necessary, and was medically appropriate for Mr. Green. *State v. Fitzgerald*, 2019 WI 69, ¶¶14-18, 387 Wis. 2d 384, 929 N.W.2d 165; *U.S. v. Evans*, 404 F.3d 227, 240-242 (4th Cir. 2005). The circuit court erred in finding that the state's evidence satisfied these requirements.

1. Federal and state cases from other jurisdictions provide guidance.

Recognizing that its evidence in this case fails to satisfy the analysis of *Sell*'s requirements set forth in the federal and state cases cited in Mr. Green's brief, the state tries to distinguish that case law by discussing the differences between the competency procedures in the federal and Wisconsin systems. (Response 17-20). The state's position shows, at best, a misunderstanding of the cases and statutes.

First, the cases cited do not analyze statutory requirements. Rather, the court in each case set forth *Sell*'s constitutional requirements and determined whether the state's evidence was sufficient, and therefore, the involuntary medication order complied with those requirements – the very thing this court must do. *See Evans*, 404 F.3d 22; *Warren v. State*, 297 Ga. 810, 778 S.E.2d (2015); *Coiner v. Liwski*, 243 Ariz. 188, 403 P.3d 600 (Ct. App. 2017). The

constitution demands the same of the state and circuit court regardless of the jursidction they are in.

Second, there are no "critical differences" between federal and Wisconsin procedure, as the state declares. (Response 17).

The state incorrectly asserts that, in Wisconsin, the competency report "shall include," and the examiner "must make" a determination of medication within the first 15 to 30 days. (Response 18-19). When read in full, the relevant portion of § 971.14(3)(dm) states that the written competency report shall include, "*[i]f sufficient information is available to the examiner to reach an opinion*, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment." Wis. Stat. § 971.14(3)(dm)(emphasis added). Thus, it is not necessary for the competency examiner to reach an opinion regarding involuntary medication prior to the initial competency hearing. Rather, the legislature recognized that there may not be sufficient time for an examiner to reach an informed opinion regarding the involuntary administration of medication and provided that in such circumstances, an opinion on that subject was not necessary.

Similarly, the circuit court is not required to make a determination on involuntary medication at every competency hearing. Rather, § 971.14(4)(b) states that the court shall decide the defendant's

competency to refuse medication "if at issue" at such hearing.

In any case, by incorrectly asserting the above, the state wants this court to believe that Wisconsin law requires that a determination on involuntary medication be made in the quick time limits for the initial competency hearing or never at all. Contrary to that implication, and similar to the federal procedure, the statute provides an avenue for a medication order to be entered after the initial finding of incompetency. Specifically, § 971.14(5)(am) states that the department may file a motion for an involuntary medication order at any time that it determines that an incompetent defendant should be subject to such an order. This procedure is no different than that employed in *U.S. v. Grisby*, 712 F.3d 964, 965-67 (6th Cir. 2013), a case relied upon by the state.

Neither Wisconsin's statute, nor the federal statutes, set forth any time period in which a decision on involuntary medication must be made. *See* Wis. Stat. § 971.14; 18 U.S.C. §§ 4241, 4247. In either system, at any point during the commitment, the respective entities may request an involuntary medication order from the court. *See* Wis. Stat. § 971.14(5)(am); *Grisby*, 712 F.3d 964, 965-67.

Thus, there is no need for rushed decisions or orders based on generalized treatment plans. The state and circuit courts in Wisconsin are just as capable of complying with *Sell's* requirement of an

individualized treatment plan as the participants in the federal system are. The federal cases cited in Mr. Green's brief, while not binding, provide valuable guidance on constitutional requirements set forth in *Sell* and should be adopted by this court.

2. The second and fourth *Sell* factors.

Much of the state's argument in support of its position that *Sell's* requirements were satisfied in this case rests on its misrepresentation of Wisconsin's competency procedure and the record, which have been addressed above.

Despite the state's assertions, there was no expert testimony or evidence that any individualized treatment plan had been developed, or would be appropriate, for Mr. Green. To the contrary, the state's only witness testified that it would not be until after Mr. Green arrived at Mendota that such a treatment plan would be formed. (43:37-38).

Again, the treatment plan in the record was filed by the prosecutor and, aside from some attempts to get in hearsay, there was no admissible evidence presented regarding why the prosecutor was recommending the drugs and dosages proposed. (42:14, 18-19; 43:28). The state's only evidence, Dr. Schoenecker's testimony, consisted of general information about Haldol and its usage to treat individuals with Mr. Green's condition. (43:17-21). Dr. Schoenecker's testimony was not specific to Mr. Green and he did not recommend Haldol, or any other drug, for him.

Because there was no expert testimony or other evidence presented to support an individualized treatment plan and relate it to the *Sell* factors in light of Mr. Green's particular condition, medical history, etc., the state's evidence failed to satisfy the constitutional requirements set forth in *Sell*. *See Evans*, 404 F.3d at 240-242.

Additionally, the state's assertion that the order in this case complies with *Sell* because it directs the treatment provider to determine whether the ordered treatment plan is medically appropriate, is misguided. (Response 28, 30). The state itself acknowledges that it is the court, not the treatment provider, which must ensure that the involuntary medication order complies with *Sell*. *Id*. Under the fourth *Sell* factor, the court must find that the treatment plan is medically appropriate before entering the medication order. *Sell*, 539 U.S. at 181. The court's order in this case demonstrates that it was not presented with sufficient evidence to make the necessary finding under this factor. (59:2).

In sum, the state's evidence in this case was generic and, if determined to be sufficient, would allow the state to obtain an involuntary medication order in any case in which Haldol is requested for a schizophrenic defendant; it would not be "rare" as the Court determined it should be. *Sell*, 539 U.S. at 180. As the state's evidence and treatment plan were not specific to Mr. Green and his condition, it failed to satisfy the second and fourth *Sell* factors and the orders must be vacated.

3. The third *Sell* factor.

The third *Sell* factor requires a finding that there are no less intrusive means available before an involuntary medication order can be entered. *Sell*, 539 U.S. at 181.

Despite its acknowledgement that the circuit court adopted *Sell*'s suggestion for a less intrusive alternative, the state confusingly does not concede that the involuntary medication order was improper. (Response 29-30).

In support of its position, the state cites federal cases examining orders which state that the defendant should be given the opportunity to take the medication voluntarily before it is forcibly administered. (Response 30). A court order backed by contempt such as the one in this case, however, is much different than an oral request to take medication. If a defendant refuses such an order, a hearing must be held and, if found in contempt he could face consequences such as jail. *See* Wis. Stats. §§ 785.03, 785.04.

The court cannot adopt an alternative less intrusive means – such as a court order backed by contempt – and at the same time rule out less intrusive means, as it must before entering an involuntary medication order. The two cannot coincide.

By finding that a court order backed by contempt could be sufficient to obtain compliance in Mr. Green's case, the circuit court failed to find that no less intrusive means were available; the involuntary medication orders must be vacated.

II. The state's motion to lift the automatic stay was improperly filed in the circuit court.

As set forth in the initial brief, the language in *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, as well as the procedure set forth in Rule 809.12, lead to the conclusion that it is this court, not the circuit court, which is the proper venue for a motion to lift the automatic stay of an involuntary medication order. (Br. 30-34).

Upon appeal of an involuntary medication order, *Scott* requires the circuit court to stay the order pending appeal. *Scott*, 2018 WI ¶43. Stated another way, the circuit court must grant a stay when the defendant appeals an involuntary mediation order. The state, being the party which sought the involuntary medication order, is aggrieved by the stay and may, therefore, seek relief from it in the court of appeals. Wis. Stat. § 809.12. As set forth in *Scott*, the court of appeals must then "explain its discretionary decision to grant or deny the State's motion." *Scott*, 2018 WI ¶48.

III. The circuit court erred in granting the state's motion to toll.

The statutory language of the statute is unambiguous; once Mr. Green was found incompetent, the court was allowed to commit him for a period not to exceed 12 months. Wis. Stat. § 971.14(5). The circuit erred when, without any authority to do so, it granted the state's motion to toll that time limit. As a result, the order must be vacated.

The state's argument on this issue boils down to two points – there is no case law prohibiting the court from tolling this statutory time limit and tolling is necessary to achieve the purpose of the statute. Neither is persuasive.

First, the state fails to explain why the language of the statute, providing the circuit court with the authority to commit an individual for competency restoration but imposing a strict time limit on that commitment, and providing the path which must be taken if that time limit cannot be met, is not controlling. The state cites no authority supporting its implication that circuit courts have inherent authority to toll statutory time limits.

Second, the state reads language into the statute that is not there and misrepresents the record. Section 971.14(5)(a)1. states that a defendant may be committed to the custody of the department "for treatment" for up to 12 months. It does not say

"appropriate treatment," "treatment with medication," or "treatment only as determined by the court." Many defendants, including those who need medication, may be restored to competency without being involuntarily medicated – other forms of treatment, including counseling and education, exist. Moreover, Mr. Green did not prevent DHS from providing him with treatment – during the 98 days that the circuit court stayed the involuntary medication order, Mr. Green remained in the jail on a waiting list for Mendota. (43:65-67). His treatment was delayed no more than it otherwise would have been.

The state's parade of horribles is equally unconvincing. The state does not explain how a tolling order would prevent defendants, like Mr. Green, from being "warehoused" and taking up "precious treatment space." (Response 37). In fact, a tolling order only prolongs the length of time a defendant may remain in a facility. Moreover, the state's ability to move to lift the automatic stay pending appeal provides a means of preventing a defendant from using up the entire commitment period on a frivolous appeal. If the state presents sufficient evidence to satisfy *Sell*, it will have no problem having the automatic stay lifted.

Finally, the state's suggestion that it would lose all ability to try Mr. Green if the statutory procedure and time limits are complied with, is disingenuous. The purpose of the statute is to provide treatment in order to restore defendants to competency, but courts

have recognized that this cannot be indefinite, it must be done in a reasonable amount of time, which our legislature has determined to be 12 months. If it cannot be accomplished in 12 months, the competency commitment must end. To obtain a longer commitment, the state must meet the more demanding requirements of Chapters 51 or 55. The criminal case, however, is not dismissed. Rather, it remains open and the defendant may be tried at any time if he becomes competent in the future. Wis. Stat. § 971.14(6).

CONCLUSION

For the reasons stated above, and in the initial brief, Mr. Green respectfully requests that this court vacate the circuit court's orders.

Dated and filed by U.S. Mail this 18th day of September, 2020.

Respectfully submitted,

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender
State Bar No. 1085045

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1770
grotelueschenk@opd.wi.gov

Attorney for Defendant-Appellant

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 2,999 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 and filed by U.S. Mail this 18th day of September, 2020.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender