STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT I

Case No. 2020AP819-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILSON P. ANDERSON,

Defendant-Appellant.

Appeal from Final Orders Regarding a
Commitment for Treatment (Incompetency)
Entered by the Milwaukee County Circuit Court,
Honorable David A. Feiss Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The State Asserts an Incorrect Standard of Review.

The State improperly frames the issue presented as a review of the circuit court's competency determination. Anderson does not challenge the appropriateness of the circuit court's competency determination on appeal. Rather, Anderson challenges the circuit court's determination that the State met the burden of proof required to satisfy the legal standard in *Sell v. U.S.,* 539 U.S. 166 (2003). The circuit court's findings of fact are entitled to deference unless clearly erroneous. *Phelps v. Physicians Ins. Co. of Wis.,* 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. Yet the question at the heart of the issue presented is a question of law, which an appellate court decides de novo. *Brandt v. Brandt,* 145 Wis.2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988); *Langlade County v. D.J.W.,* 2020 WI 4, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277.

While *Sell* does not articulate a specific standard of review, the State ignores federal case law using a standard that mirrors the standard used to address similar questions under Wisconsin law. In reviewing a trial court's involuntary medication order, federal circuit courts review findings of fact for clear error and legal conclusions de novo. *U.S. v. Debenedetto,* 757 F.3d 547, 552-53 (7th Cir. 2014); *U.S. v. Gutierrez,* 704 F.3d 442, 448 (5th Cir. 2013). This standard is appropriate here.

II. The State's Argument for Involuntary Medication Based on Dangerousness Was Not Presented in the Circuit Court.

The circuit court record lacks any argument or conclusion declaring that Anderson is a danger to himself or others under § 971.14(2)(f). Yet the State now argues that this Court should affirm the circuit court's involuntary medication order under on § 971.14(2)(f) based on Anderson's purported dangerousness. According to the State, "there is sufficient evidence in the record to support *the circuit court's factual findings* that (1) Mr. Anderson poses a danger to himself and others, and (2) the proposed medication treatment was in his medical interest." Resp. Br. 11. (emphasis added). Then the State claims that this Court need not address whether the circuit court's involuntary medication order complies with *Sell.* Resp. Br. 12.

The State's pitch fails on multiple levels. First, the argument proffers that the circuit court made "factual findings" that appear nowhere in the record. Next, the argument misstates dicta from *Sell* and formulates a faulty legal premise based on the concurring opinion in *State v. Fitzgerald,* 2019 WI 69, ¶¶38-39, 387 Wis. 2d 384, 929 N.W.2d 165. (Roggensack, C.J. concurring).

The State twice asserts that the circuit court made findings that support an involuntary medication order under *Washington v. Harper,* 494 U.S. 210 (1990). Resp. Br. 11. The State fails to cite to those findings in the record. Those findings do not exist in the record because, in the circuit court, the State never argued that Anderson was

dangerous. Because the State failed to present the argument in the circuit court and because the purported "factual findings" do not exist in the record, affirming based on the State's dangerousness argument would be improper. This would require the court of appeals to exceed its authority as an appellate court and make factual determinations beyond those made by the trial court. *Wurtz v. Fleischman,* 97 Wis. 2d 100, 108-109, 293 N.W.2d 155 (1980).

Yet the State now claims that this Court need not consider *Sell*. This theory depends on the State's misstatement of the concurring opinion in *Fitzgerald.* In *Fitzgerald,* Chief Justice Roggensack wrote separately "to point out that if a defendant is dangerous to himself or others, ordering treatment for that condition, which will likely return the defendant to competency, does not employ the *Sell* factors." *Fitzgerald,* ¶43 (Roggensack, C.J. concurring). The concurrence therefore suggested that "*if medication is ordered under paragraph (2)(f),* as the United State Supreme Court has explained, the *Sell* factors do not apply." *Id.* ¶42; *Sell,* 539 U.S. at 182. (emphasis added).

Both *Sell* and Chief Justice Roggensack's concurrence contemplate a trial court's order for involuntary medication based on dangerousness as a prerequisite for a court to ignore the *Sell* factors. Because the State did not argue, and the circuit court did not order, medication under § 971.14(2)(f) based on dangerousness, this Court must review the question presented based on the *Sell* factors.

III. The State Failed to Prove the Four *Sell* Factors.

Neither *Sell* nor *Fitzgerald* articulates the burden of proof necessary to authorize involuntary medication under these circumstances. The State does not articulate any particular burden in its response brief. The circuit court should have—and this court must—look elsewhere to determine the proper standard. When the State seeks to medicate an individual against their will, there is a clear consensus that the State must justify their request with clear and convincing evidence.

In *Addington v. Texas,* 441 U.S. 418 (1979), the Supreme Court held that a clear and convincing standard of proof is required by the 14th Amendment in involuntary commitment proceedings. 441 U.S. at 423-433. Likewise, clear and convincing evidence is necessary to prove that a defendant is incompetent and to support an involuntary medication order under § 971.14(4)(b). The petitioner in a mental health commitment also has the burden of proving all required facts by clear and convincing evidence under § 51.20.

Because Wisconsin courts have little experience applying *Sell,* this Court should also look to federal case law and adopt a clear and convincing standard. As just one example, the evidence required in the 7th Circuit to support an involuntary medication order based on the *Sell* factors must be clear and convincing. *United States v. Debenedetto,* 757 F.3d 547, 552 (7th Cir. 2014).

The need for clear and convincing evidence here is obvious. Anderson has a substantial liberty

interest in refusing involuntary medication. The 14th Amendment demands a heightened burden of proof to allow the State to overcome Anderson's will. There is nothing in this record to suggest that the circuit court ordered involuntary medication based on clear and convincing evidence. Nothing in the record suggests that the court held the State to any particular burden. This court should vacate the involuntary medication order because the State failed to prove the *Sell* factors by clear and convincing evidence.

A. The State's evidence fails the first *Sell* factor.

To find that the State has a sufficiently important government interest at stake in the prosecution under the first Sell factor, the circuit court must engage in a two-step inquiry. The court must first determine whether a defendant'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 circuit court skipped the second step. The court found that an important government interest exists solely based on the court's judgment about the seriousness of the allegation:

> I do believe that a battery committed against a random individual, or frankly any individual, but in particular a random individual, is a serious crime against a person and that there is an important governmental interest at stake,

> despite the fact that this is charged as a misdemeanor. So I'm going to find that the state has met its burden on that factor.

(R.18:29). Appellant's Br. 16.

The State attempts to rescue the court's failure by reemphasizing the seriousness of the allegation. Resp. Br. 14. The simplicity of the court's conclusion betrays the rest of the State's argument that a brief discussion of the maximum penalty and some amount of custody credit constitutes a sufficient consideration the circumstances unique to Anderson. *Id.* And, while the court determined that Anderson likely could be restored to competency, that conclusion did not appear to factor into the court's decision on the first *Sell* factor.

The clearest example of the circuit court's failure to consider the mitigating circumstances is the total absence of any discussion about the possibility that Anderson's refusal of medication could prompt "lengthy confinement in an institution for the mentally ill." *Sell,* 539 U.S. at 180. A long commitment under Chapter 51 was a possibility that the court should have addressed based on the testimony from Dr. Collins and based on the court's own conclusions about the severity of Anderson's illness. Resp. Br. 6. (R.18:31-32).

B. The State's evidence fails the second and fourth *Sell* factors.

The State's argument fails to refute Anderson's position that *Sell* requires a detailed treatment plan and that Dr. Collins was sufficiently qualified to offer sufficient testimony to support a *Sell* order. It was

impossible for the State to meet the treatment plan requirement because it relied on a witness who—by her own testimony—was not qualified to discuss these issues with any level of specificity. Even if Dr. Collins had the qualifications to testify about the specifics of a treatment plan, the State failed to elicit that testimony. *Sell* and a corpus of subsequent federal case law establish that the 14th Amendment demand this level of specificity. *See* Appellant's Br. 11-12, 17-18.

To replace the required testimony about a specific treatment plan, the State claims to have met its burden by pointing to the section of the circuit court transcript where Dr. Collins discusses, in generic terms, schizoaffective disorder and how it is treatable with medication. Dr. Collins testified that "individuals who suffer from it have a history of psychotic episodes and manic episodes or manic symptoms." (R.18:11). According to Dr. Collins, "in general terms, that illness and the symptoms of it require psychiatric treatment or in other words psychotropic medications." (*Id.*). Following that generic discussion, the prosecutor and Dr. Collins exchanged rote recitations of jargon-filled legal phrases and conclusions without providing any supporting detail related to Anderson. *See* Resp. Br. 16 (R.18:12-15).

Based on *Sell*, the State cannot meet its burden by simply presenting the conclusory statements of a psychologist. The State must show its work. The State must *prove* these factors with expert testimony that allows the court to "engage in a detailed, fact-intensive inquiry to weigh the competing interests" as required by *Sell*. *Debenedetto,* 757 F.3d at 555.

Only then can the court appropriately find that the State has proven the *Sell* factors with a court-approved treatment plan describing (1) the medication or range of medications the treating physicians may use; (2) the maximum dosages that may be administered; and (3) the duration of time that involuntary medication may continue before the treating physician must report to court. *U.S. v. Chavez,* 734 F.3d 1247, 1253 (10th Cir. 2013).

Dr. Collins simply concluded that "psychiatric treatment is unlikely, substantially unlikely, to have side effects which would interfere significantly with Mr. Anderson's capacity to aid in his defense, because those side effects are also treatable or addressable with medication." (R.18:13). No evidence supports this conclusion. Dr. Collins never suggested a single medication, never discussed any potential side effects, and never analyzed *how* medications would bring Anderson to competency or *how* the potential side effects could affect his ability to aid and assist. In fact, Dr. Collins testified that she is "unable to testify" about potential medications. When asked if she spoke with anyone qualified to answer questions about medications she responded, "Certainly not, no." (R.18:18).

In what amounts to an admission that it cannot meet the treatment plan requirement, the State instead suggests that this Court should hold that defendants in Wisconsin are not entitled to a treatment plan because § 971.14 is different from the federal competency statute. The State also argues that it would be "impractical" to apply the federal

treatment plan requirement "in light of timeframes, State resources, and waitlists for inpatient treatment programs." Resp. Br. 17.

Setting aside the fact that none of those "impracticalities" are part of the record here, the State's argument fails. The State first misstates differences between the state and federal statutes. But more importantly, defendants have the same 14th Amendment rights whether they are in Wisconsin state courts or in the federal system.

The State claims that there are "critical differences" between Wisconsin law and federal law. The State cites two in particular—that an examiner must make an immediate medication recommendation and that the court simultaneously decides the questions of competency and involuntary medication. The State contrasts this with federal courts which first determine competency then return for a subsequent *Sell* hearing. Resp. Br. 17. This claimed difference is false based on the plain language of §§ 971.14(3)(dm) and (5)(am).

Under § 971.14(3)(dm), an examiner need only include a recommendation for involuntary medication in the initial report "if sufficient information is available." Under § 971.14(5)(am), once a defendant is committed, the State can return to court to seek involuntary medication by filing a motion including a "statement *signed by a licensed physician* that asserts that the defendant needs medication or treatment and that the defendant is not competent to refuse medication or treatment." § 971.14(5)(am). This statutory procedure mirrors what happens in federal court.

More importantly, providing diminished 14th Amendment protections to Wisconsin defendants is not an appropriate remedy for limited timeframes, limited resources, and treatment waitlists in the competency restoration system. If the State is failing to provide sufficient resources to meet the constitutional requirements demanded by *Sell,* the State cannot use these failures as a basis to deprive Anderson and others of their liberty interest in remaining free from involuntary medication. The State must look internally to find solutions that comply with the Constitution.

C. The State's evidence fails the third *Sell* factor.

The State's response again fails to refute Anderson's argument that the circuit court glossed over less intrusive treatments and the State failed to prove that "alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Sell,* 539 U.S. at 181. The State points to the rote recitation of the legal standard by Dr. Collins as proof that the State met its burden under the third *Sell* factor. Again, the State failed to show its work.

Likewise, the circuit court failed to hold the State to its burden. Courts "must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods." *Id.* The State did not present a single alternative for the court to consider and the court did not make any of the required findings related to alternatives. *See* Appellant's Br. 21-22.

Sell sets a high bar for the government to clear before overcoming the individual's profound liberty interest in being free from the forced administration of psychotropic medication. *Sell* permits recognizes involuntary medication in some cases "[b]ut those instances may be rare." *Sell,* 539 U.S. at 180. To clear this high bar, the State must prove each *Sell* factor by clear and convincing evidence. Having proved none of the four, this Court should vacate the circuit court's involuntary medication order.

CONCLUSION

For the reasons set forth here and in his opening brief filed on June 30, 2020, Defendant Wilson P. Anderson respectfully requests that the court of appeals vacate the circuit court's April 9, 2020, Amended Order of Commitment for Treatment.

Dated and filed by U.S. Mail this 1st day of December, 2020.

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 2,523 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 1st day of December, 2020.

Signed:
Electronically Signed by
David J. Susens

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