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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Nos. 2024AP000591-CR, 2024AP000592-CR,
2024AP000593-CR, 2024AP000594-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

M.M.K.,
Defendant-Appellant.

On Appeal from Order of Commitment for Treatment
(Incompetency) and Order to Provide Emergency Medical
Care and Treatment Entered in the Portage County Circuit
Court, the Honorable Louis J. Molepske Jr. and Honorable
Michael D. Zell presiding.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State does not request publication. This matter is a misdemeanor and publication is prohibited by Wis. Stat. 809.23(4)(b). If the Court determines that this matter will be decided by a three judge panel or the Court converts the matter to a three-judge panel on its own motion, the State would ask for an extension to file a response as the State need to notify the Department of Justice as this district attorney's office does not handle three judge criminal appeals. See Wis. Stat 978.05(5).

SUPPLEMENTAL STATEMENT OF FACTS AND THE CASE

Over the course of several months in 2023, M.M.K. accrued four open cases in Portage County, which alleged a combined five counts of violating an injunction, contrary to Wis. Stat. 813.125(4)&(7).¹ R. 1.1. Each case alleges various conduct by M.M.K which violated an injunction that her husband had against her in which she was to refrain from contacting her husband or posting on social media about her husband or children. R. 1.1 - 2. M.M.K's conduct included social media posts about her husband's mental health and an allegation that her husband is abusive. R.1. 1 - 2.

Dr. Craig Schoenecker evaluated M.M.K. regarding her competency to stand trial on December 22, 2023. M.M.K. made comments to Dr. Schoenecker stating she was a victim of "chemical captivity", she was human trafficked, she was stalked and poisoned. R. 22. 3. Further, M.M.K. told Dr. Schoenecker that there were people who wanted to label M.M.K as mentally ill to stop her from exposing corruption. R. 22. 3. Dr. Schoenecker was able to determine, to a reasonable degree of medical certainty, that M.M.K. met the DSM-5 TR criteria for the diagnosis of Rule out Delusional Disorder. R. 22. 3. Dr. Schoenecker was unable to offer an opinion to a reasonable degree of medical certainty regarding M.M.K's capacity to rationally understand court proceedings and assist

¹ Much like Petitioner's brief, the State refers to the record numbers in 2024AP000591. In 2024AP000591, 2024AP000592, 2024AP000593, and 2024AP000594, the complaints are all document 2.

in her defense. R. 22. 4. Dr. Schoenecker's concerns centered around M.M.K's delusional belief system. R. 22. 5. As a result, Dr. Schoenecker requested that M.M.K receive an inpatient evaluation, which the court granted. R. 22. 5.

Dr. Danielle Calas determined that M.M.K. was not competent and also recommended an order for involuntary medication and treatment. R. 42. 7, 9. A contested competency hearing was held on March 12, 2024. Dr. Calas testified at this hearing and provided testimony regarding her evaluation of M.M.K. Dr. Calas testified that M.M.K seemed to understand the legal proceedings but M.M.K's mental illness is so severe that she cannot assist in her own defense. R. 76. 9-11. Dr. Calas diagnosed M.M.K. with unspecified schizophrenia and other psychotic disorder. R. 76. 18.

At the March 12, 2024 competency hearing, the circuit court determined that M.M.K. was not competent but was likely to regain competency. R. 76. 27. The circuit court stated that M.M.K understands proceedings but that she cannot assist in her own defense. R. 76. 25-27. The circuit court based this determination on the potential that in the middle of trial, M.M.K. would be unable to communicate with her attorney due to her undiagnosed schizophrenia. R. 76. 25-27. The circuit court also relied on Dr. Calas' finding that M.M.K was not competent but likely to be restored to competency within the statutory time frame. R. 76. 27.

On March 26, 2024, a motion hearing on the involuntary medication motion was held and Dr. Candance Cohen was called to testify. Dr. Cohen testified regarding the efforts to provide treatment to M.M.K. voluntarily, which M.M.K. refused. R. 82. 6. Dr. Cohen testified that she believed that M.M.K. met the criteria for involuntary medication, she was not capable of applying an understanding of the advantages and disadvantages of the medical treatment to her mental illness, and that the involuntary administration of medication and treatment is necessary for M.M.K. to regain competency. R. 82. 7 – 9.

Dr. Cohen had formed an individualized treatment plan for M.M.K. Dr. Cohen stated that Abilify or Aripiprazole are the

most appropriate for M.M.K. and listed a variety of other medications that would have similar abilities to treat symptoms but Dr. Cohen believed that Abilify or Aripiprazole were the most appropriate. R. 82. 9. Dr. Cohen also had a plan to address side effects which included Benadryl and anxiety medication, if they were needed. R. 82. 9.

The circuit court considered the Sell factors along with Wisconsin Statute 971.14 in granting the involuntary medication motion. The circuit court determined that the involuntary administration of medication and treatment is necessary for M.M.K. to regain competency and is substantially likely to render the defendant competent to stand trial. R. 82. 34.

The circuit court discussed the individualized medication plan the doctor testified to. The court stated that the doctor plans to start with a low dose of Ability and consider other medications if Abilify is not effective in restoring competency. R. 82. 32.

The seriousness of the charges was also addressed by the circuit court. The judge determined that M.M.K.'s behavior was serious as M.M.K. violated a restraining order and "results in the ongoing harassment, intimidation, and illegal violation of this person's sanctity and their right to be left alone." R. 82. 33. The harassment of the victim by M.M.K. was serious to the court.

Following the court's decision, M.M.K. filed a motion to stay the involuntary medication order pending appeal, and the circuit court later stayed the order allowing for DHS to involuntarily medicate M.M.K. on March 28, 2024. R.77. 1. Later, this Court issued a stay of the medication order pending further order from the Court.

On April 18, 2024, M.M.K.'s motion for a continuation of the stay of the involuntary administration of medication order was granted by this Court.

On May 1, 2024, Dr. Shawn Johnson filed a competency report stating that M.M.K. is not competent and is unlikely to be restored to competency within the statutory period. R. 89. 9. The circuit court held a competency hearing on May 10, 2024,

at that hearing the circuit court determined M.M.K to be not competent and unlikely to regain competency. The State motioned the circuit court to discharge M.M.K. from commitment and dismiss the matters against M.M.K. without prejudice. The circuit court granted this motion and an order regarding competency, dismissal, and release from bond was signed along with a judgment of dismissal/acquittal. R. 97. 1.

ARGUMENT

- I. The circuit court relied on the testimony and report of Dr. Calas to make its determination that M.M.K. was not competent and therefore the court's decision was not clearly erroneous.

The circuit court relied on the testimony and report of Dr. Calas to make its determination that M.M.K. was not competent, as a result there are facts in evidence which the circuit court relied on to support its decision, therefore, the court's decision is not clearly erroneous.

Wisconsin law states that “no person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of the an offense so long as the incapacity endures.” Wis. Stat. 971.13(1). The due process test provided in Wis. Stat. 971.13(1) is a codification of the United States Supreme Court decision in *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788 (1960). See *State v. Garfoot*, 207 Wis. 214, ¶16, 558 N.W.2d 626 (1997).

“Competency to stand trial constitutes a judicial inquiry, not a medical determination.” *State v. Byrge*, 2000 WI 101, ¶31, 237 Wis.2d 197, 614 N.W.2d 477, (2000). Appellate courts are to use the clearly erroneous standard when reviewing the circuit court's competency determination. *Id.* at ¶45. “The review of a circuit court's competency to stand trial determination is limited to whether that finding is totally unsupported by facts in the record and, therefore, is clearly erroneous.” *State v. Smith*, 2016 WI 23, ¶29, 367 Wis.2d 483, 878 N.W.2d 135(2016), citing *Byrge*, 2000 WI 101, ¶33, 237 Wis. 2d 197,

614 N.W.2d 477; *Garfoot*, 207 Wis.2d at 224-25, 558 N.W.2d 626.

The circuit court relied on the testimony and report of Dr. Calas to determine that M.M.K. was competent. The circuit court stated M.M.K. is a smart person and understands proceedings in the criminal justice system. R. 76. 25-27. However, the court believed that M.M.K. could not assist in her own defense due to her mental illness, that being undiagnosed schizophrenia. R. 76. 25-27. Dr. Calas stated that her mental illness was impacting her ability to have an accurate perception of events which renders her unable to assist in her own defense. R. 76. 9. The report Dr. Calas filed and the circuit court received states that M.M.K.'s underlying psychosis precluded her ability to have a rational conversation regarding her cases. The circuit court relied on this report as well.

The circuit court did mention the request for a voluntary medication order in making its ruling. However, the court relied on other facts in the record such as the testimony and reports by Dr. Calas and are therefore not clearly erroneous.

II. The State presented sufficient evidence to support an involuntary medication order under *Sell*.

The United States Supreme Court has held that the constitution allows the government to involuntarily administer individuals who are mentally ill and facing serious criminal charges to make that person competent to stand trial. *Sell v. United States*, 539 U.S. 166, 179, 123 S.Ct. 2174 (2003). The Court then established a four-factor test to determine whether a court may order involuntary medication to restore a defendant to competency. The four factors the State must show by clear and convincing evidence are: (1) an important government interest is at stake; (2) involuntary medication will significantly further that interest; (3) involuntary medication is necessary to further that interest; and (4) administration of drugs is medically inappropriate. *Id.* at 180-81. The State must provide an individualized treatment plan to meet the second, third, and fourth factors under *Sell*. *State v. Green*, 2021 WI App 18, ¶¶ 37-38, 396 Wis. 2d 658, 957 N.W.2d 583.

The State is required to prove the factual components of each of the four factors by clear and convincing evidence. *Id.* at 16. The standard for reviewing Sell orders was not specified by the Sell Court. *United States v. Grape*, 549 F.3d 591, 598 (3d Cir. 2008). Wisconsin courts also have not specified the standard of review of the circuit court's determination of the Sell factors. *Green*, 396 Wis. 2d 658 ¶18. Numerous federal courts have held that the first Sell factor is reviewed de novo and remaining factors are reviewed under the clearly erroneous standard. See *United States v. Mikulich*, 732 F.3d 692, 696 (6th Cir. 2013); *Grape*, 549 F.3d 591, 598 (3rd Cir. 2008); *United States v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007); *United States v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005); *United States v. Diaz*, 630 F.3d 1314, 1331 (11th Cir. 2011); *United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014); *United States v. Fazio*, 599 F.3d 835, 839-40 (8th Cir. 2010).

A. The State presented sufficient evidence to satisfy the Sell factors.

i. The State has an important interest in prosecuting M.M.K.

“Bringing to trial an individual accused of a serious crime” is an important interest. *Sell* at 180, 123 S.Ct. 2174. The court “must consider the facts of the individual case in evaluating the Government’s interest in prosecution.” *Id.*

This case concerns M.M.K. making harassing and salacious posts on a social media site about her husband and child in violation of a restraining order. M.M.K.’s harassing actions resulted in five class A misdemeanor counts over four filed cases. R. 1.1. The five class A misdemeanors each carry a maximum sentence of nine months in jail. If each sentence were to be run consecutive to another, M.M.K. could receive a sentence of forty five months in custody.

The circuit court found that the State had an important interest in prosecuting M.M.K. and that this was a serious offense. The circuit court determined that M.M.K.’s behavior “results in the ongoing harassment, intimidation, and illegal violation of this person’s sanctity and their right to be left alone.” R. 82. 33. The State has an interest in making sure that people who violate

restraining orders are held accountable and that individuals who are supposed to be protected by a restraining order actually are protected. It is important for the State to prosecute these offenses and if someone is not competent, bring that person to competency, to prosecute these offenses in order to effectively put meaning to a restraining order.

ii. Involuntary medication will significantly further the government's interest.

The court must find that the involuntary medication will significantly further the government's interest in prosecuting the offense. *Id.* at 181, 123 S.Ct. 2174. The court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.*

The treatment plan offered by the State was not generic. M.M.K.'s treatment plan, testified to by Dr. Cohen, indicated that M.M.K. would start out with Abilify or Aripiprazole as these were the most appropriate medications for M.M.K. Dr. Cohen testified as to why Abilify or Aripiprazole were the most appropriate medications and also included a plan for side effects, which included Benadryl to treat the side effects. R. 82. 9. The individualized treatment plan consisted of a range of dosage for the medication and Dr. Cohen indicated that M.M.K. would start on the low end of the range and if needed would be given a higher dosage.

The circuit court determined that the involuntary medication will significantly further the government's interest because the involuntary administration of medication and treatment is necessary for the defendant to regain competency and is substantially likely to render M.M.K. competent. R. 82. 32-33. The circuit court based this decision on the testimony and report of Dr. Cohen.

iii. The individual treatment plan is medically appropriate.

The medical appropriateness of the administration drugs means what is in the patient's best medical interest in light of the medical condition. *Id.* "The specific kinds of drugs at issue may matter here as elsewhere" as "Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id.*

The individual treatment plan and the testimony of Dr. Cohen indicate that M.M.K. would first start out with low doses of Abilify or Aripiprazole, if the levels of dosage is not effective, a higher dose would be given to M.M.K. This is medically appropriate as doctors should be able to adjust dosage to be more effective if a lower dose is not working. It does not make sense to continue to give an individual a dosage which is not effective and the doctor knows is not effective.

The circuit court determined based on the testimony and report of Dr. Cohen that the plan was rational, coherent and appropriate. Therefore, under the clearly erroneous standard, there is evidence to support the court's decision.

III. The State is not contesting the mootness question.

CONCLUSION

The circuit court's competency order and involuntary medication order were properly ordered. The State asks the Court affirm the circuit court's orders.

Dated this 11th day of July, 2024.

Respectfully submitted,

Electronically signed by Jedidiah J. Dodge

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2585 words and 10 pages.

Dated this 11th day of July, 2024.

Electronically signed by Jedidiah J. Dodge

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