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.

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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

<u>Wisconsin Statutes</u>

ARGUMENT

I. The circuit court heavily relying on an improper factor means its finding regarding M.M.K.'s competency was clearly erroneous, and this Court cannot independently decide if the remaining evidence was sufficient.

The circuit court erroneously relying on the filing of a motion for involuntary medication is sufficient to find that the court's competency determination was clearly erroneous, given how heavily it factored into the court's analysis. (App. Br. at 17-20). Were the order still in effect, the remedy would have been to remand. Here, reversal is appropriate because the order is no longer in effect.

Rather than address M.M.K.'s argument regarding the court improperly relying on the filing of a motion for involuntary medication, the State distracts by focusing on other information it claims the court relied upon. (Resp. Br at 5-6). Essentially, the State argues that the evidence was sufficient, despite the court's reliance on an improper factor.

The clearly erroneous standard is used to review competency determinations because they are "functionally factual inquiries" and circuit courts are in a better position to observe witnesses and weigh their credibility. *State v. Byrge*, 2000 WI 101, ¶¶33, 44, 237 Wis. 2d 197, 614 N.W.2d 477. The Supreme Court "has stated many times, the circuit court must make a record of its reasoning to ensure the soundness of its own decision making and to facilitate judicial review." *Klinger v. Oneida Cnty.*, 149 Wis. 2d 838, 847, 440 N.W.2d 348 (1989).

This Court is not a factfinding court. *Wurtz v. Flieschman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980); *Matter of Dejmal's Estate*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). "When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings." *Wurtz*, 97 Wis. 2d at 108.

Here, the circuit court made findings on the record and specifically identified what it was relying on to make its decision. The transcript demonstrates that the court spent roughly equal time talking both about Dr. Calas' testimony and the filing of the motion for involuntary medication. (R.76:24-27; App.101-04). The State's request for this Court to independently analyze the remaining evidence would be tantamount to this Court acting as factfinder and weighing the evidence itself.[1]

While there are not facts in dispute, *Wurtz* is instructive in that the solution to the circuit court's error is to have the circuit court determine M.M.K.'s competency without considering the filing of the motion for involuntary medication order. *Wurtz*, 97 Wis. 2d at 108. However, because the commitment is no longer in place, there is nothing to be accomplished by such a redetermination and reversal is appropriate.

[1] This sort of analysis by this Court would be appropriate if the standard were one of mixed question of fact and law, but that sort of excise and application is not possible here.

II. The State failed three of the *Sell* factors, meaning involuntary medication is unlawful.

In order to protect the defendant's "'significant' constitutionally protected 'liberty interest' in avoiding" involuntary medication, the court in *Sell* created four factors that must be met before the government may forcibly medicate a defendant to attempt to return them to competency. *United States v. Sell*, 539 U.S. 166, 178-80 (2003) (quoting *Washington v. Harpe*r, 494 U.S. 210, 221 (1990)). Failing just one of these *Sell* factors bars the State from involuntarily medicating M.M.K. *State v. Fitzgerald*, 2019 WI 69, ¶32, 387 Wis. 2d 384, 929 N.W.2d 165. The State here failed three of the four *Sell* factors. This Court must reverse and vacate the involuntary medication order. *Id*. at ¶¶32, 35.

A. The State lacks an important interest in prosecuting M.M.K.

These are not serious offenses and, therefore, there is no important interest in prosecuting M.M.K. While the State has articulated its interest in prosecuting these criminal violations, *Sell* makes clear that states can only forcibly medicate a defendant if there is an "important governmental interest" in prosecuting "serious offenses." *Sell*, 539 U.S. at 180.

These offenses are not serious under any applicable legal standard. As detailed in M.M.K.'s brief in chief, the charge in these cases has not been labeled "serious" by the Legislature. (App. Br. at 23). Additionally, the maximum penalty for each offense, nine months in jail, cannot be considered among the serious penalties in Wisconsin's statutory scheme. *See*

§ 939.50-51, *see also*, *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007). Finally, by failing to respond, the State concedes that the significant amount of sentence credit owed to M.M.K. further lessens any governmental interest. *State v. Alexander*, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 ("[a]rguments not refuted are deemed admitted"). Thus, any government interest the State may have in prosecuting M.M.K. is significantly diminished by the 127 days of credit M.M.K. is owed. (67:2).

In addition to being non-violent, misdemeanor offenses, the alleged conduct was not even serious on the scale of restraining order violations. The State describes the Facebook posts and emails as "harassing and salacious," (Resp. Br. at 7), because it cannot characterize them as even remotely threatening.[2] There is also no evidence M.M.K. ever tried to contact the alleged victim in-person. While the State may have some interest in prosecuting these offenses, these are

[2] The allegations in the complaint for each appeal:

- 2024AP000591 –M.M.K. posted she needed "to get home to her husband and kids [because her] husband has been struggling mentally," (R.2:2; App.55),
- 2024AP000592 – M.M.K. posted that the alleged victim "is mentally unstable" and updated another post to say "her minor child is being withheld by her mentally ill father," (R.2:2-3; App.47-48),
- 2024AP000593 – M.M.K. again posted that the alleged victim was mentally ill and withholding their child, (R.2:1; App.50),
- 2024AP000594 – M.M.K. e-mailed the alleged victim and in one of them accused him of being "abusive and states he needs to get out of her house." (R.2:1; App.52).

far from the "serious offenses" that *Sell* contemplated would permit involuntary medication. *Sell*, 539 U.S. at 180.

B. The State has not shown involuntary medication will significantly further an important state interest.

The State also fails *Sell*'s second factor because it has not shown that its treatment plan is "individualized . . . to the particular defendant." *State v. Green*, 2021 WI App 18, ¶38, 396 Wis. 2d 658, 957 N.W.2d 583. For the reasons stated in M.M.K.'s brief in chief, the individualized treatment plan is unconstitutionally generic and does not provide what *Sell* requires. (App. Br. at 26-29); *Green*, 396 Wis. 2d at ¶38.

The State has not met its burden under *Sell*'s second factor. First, the State concedes that their individual treatment plan failed to identify "the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court." *Green*, 396 Wis. 2d at ¶38; *Alexander*, 287 Wis. 2d 645, ¶15. These timeframes are required to satisfy *Sell*'s second factor and are distinct from the timelines required under § 971.14(5)(b). *See Green*, 396 Wis. 2d at ¶38. Because the State concedes they failed this requirement, they cannot meet *Sell*'s second factor and involuntary medication is unlawful.

The State's reference to Dr. Cohen's testimony also does not cure the glaring deficiencies in the provided treatment plan. While Dr. Cohen mentioned

that aripiprazole[3] was most appropriate, Dr. Cohen did not explain why the fifteen other listed medications were also necessary to address M.M.K.'s individual treatment needs. (*See* App. Br. at 26-28). The closest Dr. Cohen came was generally describing how some of the medications "have similar abilities to treat symptoms." (R.82:9; App.17). Some of the medications requested—*e.g.* Fluphenazine Decanoate and Invega Sustenna, (R.44:7; App.76)—were not specifically discussed at all. To pass constitutional muster, the plan must instead articulate why *all* the particular medications are appropriate to addressing M.M.K.'s unique treatment needs. *See Green*, 396 Wis. 2d at ¶¶34, 38.

C. The State's treatment plan is not medically appropriate.

Central aspects of the State's treatment plan are not medically appropriate. First and foremost, the State again fails to respond and therefore concedes that the treatment plan fails to provide the maximum dosages for many of the listed medications, as required by *Sell*. *Green*, 396 Wis. 2d at ¶38; *Alexander*, 287 Wis. 2d 645, ¶15. As detailed in M.M.K.'s brief, dose and dosage are distinct terms with unique meanings. (App. Br. at 33-34). Dr. Cohen's failure to list frequency of administration for the injectable antipsychotics listed in the addendum letter means the State cannot meet the fourth *Sell* factor. *Green*, 396 Wis. 2d at ¶38; (R.44:7; App.76).

[3] Dr. Cohen referred to both "aripiprazole" and "Abilify;" Abilify is the brand name for aripiprazole. This brief simply refers to "aripiprazole."

Despite this, the State asserts that Dr. Cohen's testimony about aripiprazole proves the treatment plan is medically appropriate. Again, Dr. Cohen's testimony does not cure the treatment plan's defects. Even if Dr. Cohen would start administering these drugs in the "lower doses," the State does not explain why it is medically appropriate to allow them to forcibly administer drugs in dosages well above those indicated by the FDA and shown to be effective. (App. Br. at 30-31). Instead, the State seemingly wants free reign to adjust dosages as they see fit "if a lower dose is not working." (Resp. Br. at 9). The Constitution, however, does not give the State this freedom; it is the responsibility of the court to determine if the treatment plan's ranges are medically appropriate in each given case. *Green*, 396 Wis. 2d at ¶44. Absent proof from the State that the entire dosage range for each medication is medically appropriate, the individualized treatment plan does not suffice under *Sell*.

The State correctly notes that "the specific kinds of drugs . . . matter" because they "may produce different side effects and enjoy different levels of success." (Resp. Br. at 9) (internal citations omitted). Despite this, the State does not show how each of the specific drugs listed in the individualized treatment plan would be "in the patient's best medical interest in light of his [or her] medical condition." *Sell*, 539 U.S. at 181. As a result, the State hasn't satisfied *Sell*'s fourth requirement and involuntary medication is unlawful. *Fitzgerald*, 387 Wis. 2d at ¶32.

CONCLUSION

For the reasons stated above, M.M.K. respectfully requests this Court to reverse the circuit court's commitment and involuntary medication orders.

Dated this 26th day of July, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,751 words.

Dated this 26th day of July, 2024.

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