STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2024AP001789-CR, 2024AP001799-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

D.E.C.,

Defendant-Appellant.

Appeal from Order for Involuntary Treatment (Incompetency) Entered in the Clark and Jackson County Circuit Courts, the Honorable Anna L. Becker, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

LUCAS SWANK
Assistant State Public Defender
State Bar No. 1103010

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
swankl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

Wisconsin Statutes

ARGUMENT

The State, in its unending effort to avoid unfavorable decisions on the merits, argues mootness and forfeiture where they are inapplicable. Specifically, the State ignores its own burden in the circuit court and claims forfeiture on appeal. Its arguments on the merits do not adhere to a clear standard of review, and often are unresponsive to D.E.C.'s arguments. The arguments it does make are unconvincing and it also requests a remedy not supported by any legal citation.

This Court should reverse and vacate the involuntary medication orders because they did not comply with *Sell v. United States*, 539 U.S. 166 (2003).

I. The State ignores the principles underlying mootness.

The State argues that this Court should find Jackson County case moot, ignoring that it is only creating additional work for all involved.

"In Wisconsin, dismissal of a case as moot is an act of judicial restraint rather than a jurisdictional requirement." *Sauk Cnty. v. S.A.M.*, 2022 WI 46, ¶19, 402 Wis. 2d 379, 975 N.W.2d 162. The reason to not address moot issues is primarily one of judicial economy. *State ex rel. La Crosse Tribune, v. Circuit Court for La Crosse County*, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983) ("It is generally thought to be in the

interest of judicial economy not to continue to litigate issues that will not affect real parties to an existing controversy.").

This Court already consolidated these cases "because they raise the same issues involving the same parties." Order dated Sept. 11, 2024. The State does not argue that the Court should not decide the Clark County matter on the merits, and it does not explain why everyone should spend time discussing mootness, when the economical thing to do would be to dispose of both matters on their merits.

II. D.E.C.'s arguments prevail under any standard of review.

The parties disagree regarding the proper standard of review for the second, third, and fourth *Sell* factors—typical in these cases. *See State v. J.D.B.,* 2024 WI App 61, ¶34 n.8, ___ Wis. 2d ___, ___ N.W.3d ___; *State v. Green*, 2021 WI App 18, ¶19, 396 Wis. 2d 658, 957 N.W.2d 583. While *D.E.C.* believes all four factors are questions of constitutional fact, App. Br. at 14, the Court need not decide the issue, as the circuit court's findings were also clearly erroneous on this record. *J.D.B.*, ___ Wis. 2d ___, ¶34.

The circuit court approved a treatment plan that was not supported by a record sufficient for the court to make necessary findings. As such, the court's findings were clearly erroneous.

The State similarly argues that it should prevail under any standard. Resp. Br. at 13. Despite this, the

State consistently cites the lower clear error standard. Resp. Br. at 5, 16, 21, 25, 28.

III. The circuit court failed to include any restrictions regarding administration of medications into its order.

The circuit court did not incorporate any restrictions from the testimony into its order, making the order unconstitutional. To support the appropriateness of the plan, the State highlights multiple portions of Dr. Kercher's testimony regarding how she would treat D.E.C. The State ignores that none of that testimony was incorporated into the treatment plan or the written order. As such, nothing binds DHS to it.

D.E.C. argued originally that the treatment plan was unconstitutionally generic because it did not describe with particularity how medications would be administered, apart from beginning with aripiprazole. App. Br. at 17.

The State responds that Dr. Kercher testified that if aripiprazole was ineffective, "she would begin a trial with one of these other antipsychotic medications." Resp. Br. at 17. The State also argues that the plan provided for both oral and injectable medications, and "[a]fter one [oral] antipsychotic proved effective, the treatment would switch to injectables." Resp. Br. at 18.

However, none of these restrictions was adopted by the circuit court. The order adopted the treatment

plan as written—not incorporating any of the restrictions the State cites. *See* (R.76:2; App.6) ("[T]he defendant shall submit to the administration of medication(s) or treatment as outlined in the treatment plan."). Instead, the plan approved by the court, allows for use of the oral medications "in combination or in succession" without restriction on how many may be used in combination at once. (R.69:3; App.10).

Moreover, the plan states injectable medication will be used "if the defendant is unable or unwilling to take the proposed oral medication." (R.69:3; App.10). That does not require, as the State concedes is appropriate, that D.E.C. first be stabilized on oral medication before switching to a long-acting injectable.[1] Under the plan, DHS can inject D.E.C. if he refuses oral medication, regardless of prior stabilization.

The State also argues that the circuit court found that the plan "did not direct providers 'to give [him] every one of these doses at the maximum dose.'" Resp. Br. at 21 (quoting R.84:38; App.49). The circuit court was correct, the plan did not **direct** this, but it did allow it.

[1] As D.E.C. noted in his opening brief, at least one injectable medication—Haldol Decanoate—should not be used unless a patient has previously been stabilized on antipsychotic medications. App. Br. at 23. According to Dr. Kercher, D.E.C. is antipsychotic naïve. (R.84:13; App.24).

Nothing in the plan required DHS to conduct "robust trials," (R.84:22; App.33), with one medication at a time. Nothing in the plan required DHS to "safely trial a medication with daily oral doses, and then transition to an injection every four weeks after a trial proved successful." Resp. Br. at 18. Nothing prevented DHS from using all twenty-one medications "in combination" at the maximum dose. (R.69:3; App.10).

By not converting any of these restrictions into a written order, the circuit court did no more than trust that the doctors at WRC would "determine in [their] own professional judgment whether the approved treatment plan is medically appropriate." *Green*, 396 Wis. 2d 658, ¶43. As this Court stated in *Green*:

> If courts could render an order for involuntary medication compliant with *Sell* merely by directing the treating providers to comply with the order only if the provider determines that the treatment plan approved by the court is medically appropriate, all medication orders would satisfy *Sell*.

Id., ¶44 (internal quotation omitted). The same principle applies when it comes to the administration of the medication in the plan.

Finally, the State concludes that the involuntary administration of aripiprazole should be approved separately from the rest of the treatment plan. Resp. Br. at 29. By doing this, the State concedes several things. First, that the record was not sufficient to

authorize administration of any other medications. Second, that the "flexibility" of the treatment plan is not as important as they claim, since they are willing to restrict DHS to a single medication. Third, is an acknowledgement that the State can come back and ask for changes or updates to the medication plan at any time. App. Br. at 20; Wis. Stat. § 971.14(5)(am).

Regarding the substance of the argument, the State claims—without authority—that this Court can independently decide that aripiprazole is appropriate to administer, and should instruct the circuit court to issue such an order. Resp. Br. at 29. This is only true if the standard of review is of a mixed question of law, and this Court can review *de novo* whether the treatment plan is appropriate. If instead, the question is a factual one and subject to clear error review, Resp. Br. at 13, this Court is not in a position to make that determination. *Rand v. Rand*, 2010 WI App 98, ¶23, 327 Wis. 2d 778, 787 N.W.2d 445.

Regardless of the proper standard of review, D.E.C. contends that this Court should not concern itself with trying to craft an appropriate treatment plan for the State. If a treatment plan is unconstitutional, the prudent approach and appropriate remedy is to reverse the order and allow the State to provide a complete and proper treatment plan with supporting documentation to the circuit court.

IV. Finding D.E.C. forfeited any arguments would create a constitutional crisis.

The State argues D.E.C. forfeited arguments related to the medical appropriateness of the involuntary medication order. If this Court so finds, it will create a constitutional crisis where the State can cut corners and defendants are involuntarily medicated because the defense bar is not equipped to provide the representation necessary to keep the State honest.

In his opening brief, D.E.C. argued that a number of the proposed medications were not medically appropriate—relying on the labels for the medications published by the FDA and the prescribing textbook Dr. Kercher testified to relying on. App. Br. at 21-26. Notably, the State does not argue that the sources relied upon by D.E.C. are unreliable[2] or that D.E.C.'s assessment of the medication plan based on those sources is faulty. The State only argues forfeiture. Resp. Br. at 26-28.

Similar to mootness, "the rule of forfeiture is one of judicial administration and does not limit the power of an appellate court, in the exercise of its discretion, to consider issues raised for the first time on appeal." *State v. Hershberger*, 2014 WI App 86, ¶22 n.6, 356 Wis. 2d 220, 853 N.W.2d 586 (citing *State v. Caban*, 210 Wis. 2d 597, 609, 563 N.W.2d 501).

[2] D.E.C. did not make this explicit in the opening brief, but this Court should take judicial notice of the medication labels, because they are capable of accurate and ready determination and their source (the FDA's ".gov" website) cannot reasonably be disputed. Wis. Stat. § 902.01(2)(b).

A. The State failed to provide sufficient information to meet its burden.

D.E.C.'s arguments do more than demonstrate that the treatment plan was not medically appropriate under *Sell*, they demonstrate the failure of the State to provide necessary information to support its medication plan in the circuit court.

The State must show by clear and convincing evidence that a treatment plan is medically appropriate. *Green*, 396 Wis. 2d 658, ¶16. "Because the circuit court determines whether the plan is sufficiently individualized and medically appropriate, the court must be provided a 'complete and reliable medically informed record' from which to make those findings." *J.D.B.*, ___ Wis. 2d ___, ¶61, (quoting *Green*, 396 Wis. 2d 658, ¶2).

Simply put, the reason D.E.C. has to cite to the FDA labels and prescribing textbook on appeal is because the State failed to provide adequate information for the circuit court to make an informed decision to begin with. The best example of this is when trial counsel attempted to cross-examine Dr. Kercher regarding the use of fluphenazine above 20mg/day. Trial counsel tried to elicit information about the safety of prescribing doses of fluphenazine up to 40mg, and Dr. Kercher was "not familiar with the specific literature about that." (R.84:30; App.41). Instead, Dr. Kercher intimated that she relied on what the Stahl's textbook recommended. (R.84:30; App.41).

Here, the circuit court stated that it was "clearly not qualified to say whether one medication or another medication should be applied." (R.84:37; App.48). In fact, the court is required to do just that. *Green*, 396 Wis. 2d 658, ¶43. Courts are able to do this after doctors equip them with sufficient information to fulfill this role. *See J.D.B.*, ___ Wis. 2d ___, ¶61. Requiring the State—via its doctors—to present the necessary information to evaluate the appropriateness of the treatment plan is not an undue burden.

B. Relying on cross-examination to correct deficient records is not the solution.

By arguing forfeiture, the State necessarily asserts that trial counsel should have been either ready with the textbook that Dr. Kercher relied upon—which was not mentioned at all in her treatment plan[3]—or had the medication labels for all medications ready to cross-examine and impeach Dr. Kercher with. This is unreasonable.

The State's argument necessitates every single criminal defense attorney in the state to be fluent in these medication issues—as competency may come up in any given case. Moreover, since hearings on these medication orders must be held within 10 days (20, with an extension), Wis. Stat. § 917.14(5)(am), the State expects attorneys to become knowledgeable

[3] For what it's worth, undersigned counsel had to request that the State Public Defender's Office purchase the $100 textbook to even be able to point out Dr. Kercher's non-adherence to it.

about dozens of medications[4] in a matter of weeks, so they can evaluate these treatment plans and cross-examine doctors regarding the aspects that are not medically appropriate on their face.

Such a requirement is untenable. While, the circuit court stated that it was "clearly not qualified to say whether one medication or another medication should be applied," (R.84:37; App.48), the State seems content to place the burden on defense attorneys to obtain that qualification in 10 days. Instead, this Court should reaffirm that doctors must provide sufficient explanations and/or supporting resources to both the parties and the court.

If the Court agrees that the defense bar all need to become experts in the use of medications that may be used to treat mental illnesses, it will create a constitutional crisis. The majority of criminal defense attorneys are not equipped to do this research—especially on the short notice provided by the statute. Realistically, there is not time to hire or consult with an outside expert. If this Court bars the issue from being presented on appeal as a sufficiency claim, then the issue will have to be raised as ineffective assistance of counsel.

If this issue will have to be raised as ineffective assistance of counsel, undersigned counsel can safely assert that there will not be a sufficient number of private bar attorneys to take conflict cases. Moreover,

[4] In this case all twenty-one listed in the treatment plan. (R.69:3-4; App.10-11).

if there were enough attorneys, it is unlikely the State Public Defender would be able to timely appoint counsel.[5] What the State is arguing for is a system where individuals will receive inadequate representation, because the doctors the State employs refuse to provide adequate information to support their treatment plans.

This amounts to impermissible burden-shifting. The State requests a treatment plan, fails to provide important information to the circuit court when presenting that plan, and then puts an overwhelming burden on defense counsel to demonstrate why the State's proposed plan is not appropriate. Requiring this, while the doctors employed by the State withhold—or are unaware of—critical information, is fundamentally unfair as it relieves the State of their burden by requiring defense counsel do extensive independent research to rebut a poorly supported treatment plan.[6]

While we rely an adversarial system, the doctors employed to work in the state mental health facilities should not be engaged in an adversarial process. Allowing doctors to withhold the basis for their proposed medications until the hearing is the sort of trial by ambush that Wisconsin has long abandoned.

[5] Wis. Stat. § 809.109(2)(d) requires appointment within 15 days of SPD receiving materials from the clerk.

[6] Especially so when doctors fail to acknowledge an entire page of proposed medication during their testimony. (R.69:4; App.11).

Haack v. Temple, 150 Wis. 2d 709, 716, 442 N.W.2d 522 (1989).

The simple solution is for this Court to address the merits of D.E.C.'s claims, rely on the FDA medication labels that the State does not question the validity of, and again signal to the State that is incumbent on their doctors to provide meaningful information about what medications they are proposing. This includes how much and how often, as well as why it is medically appropriate and appropriate to treat the individual defendant. *J.D.B.*, ___ Wis. 2d ___, ¶¶58-59, 61.

V. Addressing the parade of horribles.

The State argues that requiring doctors to provide the sort of explanation D.E.C. argues is plainly supported by the language in *Green* and *J.D.B.* would result in a number of unsavory outcomes. D.E.C. briefly addresses these.

D.E.C. does not argue that flexibility is what makes a treatment plan unconstitutional. Resp. Br. at 22. The opening brief explicitly agreed that flexibility is appropriate. App. Br. at 19 n.7. The State claims that requiring doctors to provide information about **why** they require flexibility and **how** they reached the medications and dosages they did will disincentivize honesty. Resp. Br. at 22. In fact, D.E.C. is primarily asking that doctor be more forthcoming as to their decision-making and the information they use to come to their recommendations.

The State claims D.E.C. "suggest[s] that courts may only order the involuntary medication of a single medication at a time at a specific dose." Resp. Br. at 23. This appears to be in response to D.E.C.'s suggestion that if doctors believe it appropriate to give dosages above what has shown to be effective in clinical studies they can come back to court and request permission. App. Br. at 21. First, D.E.C. never argued a plan can only be one medication at a specific dosage.

Second, D.E.C. sees no reason why a treatment plan for an antipsychotic-naïve individual would need to allow for high dosages that are not normally effective. Dr. Kercher's reason was that she has "seen many instances where individuals do need and respond to favorably" to the higher dosages, (R.84:26; App.37), feels like a request to let her decide what is appropriate.

Finally, the State claims D.E.C.'s argument regarding the use of injectable lorazepam is "plainly meritless." Resp. Br. at 28. Here, the State does not engage with the argument at all or that the proposed medication does not have any relation to treatment to competency. App. Br. at 24-25. D.E.C. will not reiterate the prior arguments, but this issue is a great example of how the lack of information as why injectable lorazepam was included in the plan demonstrates that the State did not provide the circuit court the information it needed to decide based on a medically informed record. *J.D.B.*, ___ Wis. 2d ___, ¶61.

CONCLUSION

Because the treatment plan was unconstitutional under *Sell*, D.E.C. respectfully requests this Court to vacate the involuntary medication orders.

Dated this 29th day of November, 2024.

Respectfully submitted,

Electronically signed by Lucas Swank

LUCAS SWANK
Assistant State Public Defender
State Bar No. 1103010

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
swankl@opd.wi.gov

Attorney for Defendant-Appellant

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 2,998 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of November, 2024.

Signed:
Electronically signed by Lucas Swank
LUCAS SWANK
Assistant State Public Defender