STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2025AP437-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.A.W.,

Defendant-Appellant.

On Appeal from an Order of Commitment for Treatment (Incompetency) Entered in the Milwaukee County Circuit Court, the Honorable Mark A. Sanders Presiding.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 6

POSITION ON ORAL ARGUMENT AND PUBLICATION 6

STATEMENT OF THE CASE AND FACTS 6

ARGUMENT 12

I. The State failed to prove the *Sell* factors by clear and convincing evidence. 12

A. *Sell*'s substantive requirements and standard of review. 12

B. The government does not have an important interest in prosecuting Thomas. 15

C. The proposed treatment plan does not satisfy the second or fourth *Sell* factors. 19

CONCLUSION 21

CERTIFICATION AS TO FORM/LENGTH 22

CERTIFICATION AS TO APPENDIX 22

CASES CITED

Langlade Cnty. v. D.J.W.,
2020 WI 41,
391 Wis. 2d 231, 942 N.W.2d 277 15

Lewis v. United States,
518 U.S. 322 (1996)..... 15

Riggins v. Nevada,
504 U.S. 127 (1992)..... 14

Sell v. United States,
539 U.S. 166 (2003).....passim

State v. Fitzgerald,
2019 WI 69,
387 Wis. 2d 384, 929 N.W.2d 165 14

State v. Green,
2021 WI App 18,
396 Wis. 2d 658, 957 N.W.2d 583,
aff'd on other grounds,
2022 WI 30
401 Wis. 2d 542, 973 N.W.2d 7709, 14, 19

State v. J.D.B.,
2024 WI App 61,
414 Wis. 2d 108,
13 N.W.3d 525.....passim

State v. Woods,
117 Wis. 2d 701, 345 N.W.2d 457
(1984) 15

United States v. Breedlove,
756 F.3d 1036 (7th Cir. 2024)..... 15

United States v. Chavez,
734 F.3d 1247 (10th Cir. 2013)..... 15

United States v. James,
938 F.3d 719 (5th Cir. 2019)..... 14

United States v. White,
620 F.3d 401 (4th Cir. 2010)..... 17

Washington v. Harper,
494 U.S. 210 (1990)..... 14

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution
U.S. CONST. amend V 14

Wisconsin Statutes
302.11(1g) 16

48.415(9m)(b) 16

48.685(1)(c) 16

50.065(1)(e)1 16

50.065(1)(e)2 16

809.109(7) 11

939.62(2m)(a)2m 16

941.29(1g) 16

949.165(1)(a)..... 16

969.01 ..... 7, 10, 18

969.08 ..... 16, 17

969.08(10)(b)..... 16

973.0135(1)(b)..... 16

ISSUES PRESENTED

1. Did the State provide sufficient evidence to support an order for involuntary medication to restore Thomas[1] to competency under *Sell v. United States*, 539 U.S. 166 (2003)?

The circuit court found that the State met all four *Sell* factors.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Thomas does not request oral argument. Publication may be warranted to further clarify the law on issues of constitutional importance and to provide guidance to the bench and bar.

STATEMENT OF THE CASE AND FACTS

On July 3, 2024, the State charged Thomas with one count of misdemeanor retail theft and one count of resisting an officer causing a soft tissue injury. (2:1). According to the complaint, police attempted to detain Thomas based on a retail theft complaint at Walgreens. (2:1). Thomas allegedly resisted detention, and police officers "took him to the ground," at which point he "kicked at" one of the officers and "grabbed at" the officer's taser. (2:1-2).

[1] A pseudonym for the defendant-appellant, T.A.W.

The officer sustained abrasions to his hands and knees during this struggle, but police were able to detain Thomas. (2:2).

Thomas' competency was called into question on July 5, 2024, and he was remanded into custody without a bail hearing in violation of Wis. Stat. § 969.01. (28:15; App. 68). A psychologist subsequently examined Thomas and opined that he lacked substantial mental capacity to understand the proceedings or assist in his defense such that he was incompetent to stand trial. (16:5-6). Nonetheless, the psychologist opined that Thomas was likely to attain competency within statutory time limits if provided with psychotropic medications. (16:6).

Thomas remained in custody in continued violation of Wis. Stat. § 969.01, and on August 13, 2024, the circuit court committed him to the Department of Health Services for treatment to restore competency. (28:13; App. 66).[2] From that point forwards, Thomas remained in county jail for an additional four months before finally transferring to the Sand Ridge Secure Treatment Center for competency restoration treatment on December 18, 2024. (28:13; App. 66).

On January 6, 2025, DHS filed a motion requesting an involuntary medication order. (19:1). The motion requested a hearing "to determine

[2] While the circuit court committed Thomas on August 13, 2024, it did not enter a written order to that effect until August 24, 2024. (12:1-2).

whether [Thomas] is competent to refuse medication and requires involuntary medication in order to gain competency[.]" (19:1). Along with the motion, DHS filed a treatment plan prepared by Andrew Kordus, a medical doctor. (19:2-4).

At the involuntary medication hearing, the State called Dr. Kordus as its sole witness. Dr. Kordus testified that he had met with Thomas on two occasions over the past several weeks, and that he believed Thomas was not competent to refuse medications. (30:5-6; App. 9-10). Dr. Kordus further testified that Thomas' diagnosis was "unspecified schizophrenia spectrum or other psychotic disorder." (30:6; App. 10). He said Thomas was experiencing thought disorganization, internal stimuli, and delusions. (30:6; App. 10). Dr. Kordus also stated that medication treatment would be the only way to treat these symptoms, and that medication would likely restore Thomas' competency to stand trial. (30:7, 14; App. 11, 18).

Dr. Kordus further testified that his treatment plan for Thomas included three medications: Risperdal, Haldol, and Olanzapine. (30:8-11; App. 12-15). He stated that Thomas had responded favorably to Risperdal and Haldol in the past, that Thomas was currently prescribed two milligrams of Risperdal at bedtime, and that Haldol and Olanzapine could be administered if Thomas did not respond favorably to Risperdal. (30:8-12; App. 12-16). According to Dr. Kordus, the initial dose for Haldol is usually 5 milligrams, whereas Olanzapine is "administered

initially [at] 10 milligrams at bedtime." (30:10-11; App. 14-15). Dr. Kordus testified that in addition to the oral versions of these medications, each medication could be administered via injections. (30:11; App. 15).

Dr. Kordus testified that eight milligrams of Risperdal, 40 milligrams of Haldol, and 30 milligrams of Olanzapine would be the maximum individual doses for each medication. (30:8-11; App. 12-15). However, he did not specify any limitation on the number of maximum individual dosages that could be administered on a per day, per week, or per month basis. (30:8-11; App. 12-15). Similarly, the treatment plan identified dose ranges for each medication without specifying any limitation on the number of maximum individual dosages that could be administered on a daily, weekly, or monthly basis. (19:4).

At the conclusion of testimony, the circuit court addressed the *Sell* factors and found that each factor was satisfied so as to justify involuntarily medication.[3] As to the first factor, the court analyzed

[3] "In short summation, a court must find that: (1) there are important government interests at stake, including bringing a defendant to trial for a serious crime; (2) involuntary medication will significantly further those state interests; (3) involuntary medication is substantially likely to render the defendant competent to stand trial; and (4) administration of the drugs is in the patient's best medical interest in light of his medical condition." *State v. Green*, 2022

whether an important government interest existed to prosecute Thomas by reference to this Court's recent decision in *State v. J.D.B.*, 2024 WI App 61, 414 Wis. 2d 108, 13 N.W.3d 525. The court first noted that the defendant in *J.D.B.* was charged with a crime that is statutorily defined as a "serious crime," and that Thomas was not charged with any crime that is statutorily defined as serious. (30:34, 38; App. 38, 42). Next, the court stated that the allegations in *J.D.B.* were more aggravated than in the instant case because J.D.B. punched and threatened to murder a police officer. (30:35; App. 39).

The court stated that Thomas' case and *J.D.B.* were similar in that special circumstances existed in both cases to lessen the government's interest in prosecution. Specifically, the court noted that both Thomas and J.D.B. were held in custody without a bail hearing in violation of Wis. Stat. § 969.01, and that both faced lengthy delays in county jail before being transferred to an institution for competency restoration treatment. (28:12-15; App. 65-68). The court also noted that the delay in Thomas' case was longer than in *J.D.B.* (28:13; App. 66).

Notwithstanding the above, the circuit court concluded that the State had an important interest in prosecuting Thomas primarily based on two allegations in the criminal complaint. (28:15; App. 68). First, the court stated that the police officer in

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WI 30, ¶29, 401 Wis. 2d 542, 973 N.W.2d 770 (citing *Sell*, 539 U.S. at 180-81).

Thomas' case allegedly suffered what the court characterized as "a minor injury." (30:43; App. 47). Second, the court stated that Thomas had allegedly attempted to grab the officer's taser at one point. (28:10-11; App. 63-64). Thus, while the court believed that the first *Sell* factor presented a "very close" case, it ultimately decided that the State had established the first factor. (28:16; App. 69).

The circuit court further concluded that the State had established the second, third, and fourth *Sell* factors. In support of this finding, the court relied on Dr. Kordus' testimony that forced medication was likely to restore Thomas' competency to stand trial, that there were no alternatives to medication, and that the proposed treatment plan was medically appropriate for Thomas. (28:16-19; App. 69-72).

The circuit court subsequently entered an order authorizing the involuntary administration of medication, and Thomas filed a notice of motion to continue the automatic temporary stay of the order pursuant to Wis. Stat. § 809.109(7). (24:1; 25:1; App. 3). Thomas then filed a memorandum in support of the motion, and this Court entered an order continuing the stay pending further order of the Court. (32:6).

ARGUMENT

I. The State failed to prove the *Sell* factors by clear and convincing evidence.

A. *Sell*'s substantive requirements and standard of review.

If the government seeks an involuntary medication order during criminal competency proceedings, the goal of that order is limited to "rendering the defendant *competent to stand trial*." *Sell*, 539 U.S. at 181 (2003) (emphasis in original). Unlike the civil commitment system, the criminal legal system is not the appropriate mechanism for providing broad mental health treatment. Involuntary treatment for individuals deemed incompetent in the criminal system is instead focused on rendering a person—who is presumed innocent—competent so they can be prosecuted. For that reason, *Sell* requires the State to prove four factors by clear and convincing evidence before an accused person can be forcibly medicated.

To meet its burden under *Sell*, the State must first prove that "*important* governmental interests are at stake." *Sell*, 539 U.S. at 180 (emphasis in original). This requires proof that medication aims to bring "to trial an individual accused of a serious crime." *Id.* To find the first factor satisfied, a court "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id.*

Second, the State must prove that "involuntary medication will *significantly further* the government's interest in prosecuting the offense." *Id.* at 181 (emphasis in original). To meet its burden on the second factor, the State must prove "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "substantially 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.*

Third, the State must prove "that involuntary medication is *necessary* to further those interests." *Id.* (emphasis in original). This factor requires proof that "any alternative, less intrusive treatments are unlikely to achieve substantially the same result." *Id.* In evaluating this factor, a court "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.*

Fourth, the State must prove "that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his medical condition." *Id.* (emphasis in original). Because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success," courts should consider "the specific kinds of drugs at issue." *Id.*

In evaluating these factors, the task of the court is to answer the following: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Id.* at 183 (citing *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992)).

While the Constitution may permit forcible medication in some cases, "[t]hose instances may be rare." *Id.* at 180. If the State does not meet the high burden established by *Sell*, involuntary medication is unconstitutional. *State v. Fitzgerald*, 2019 WI 69, ¶32, 387 Wis. 2d 384, 929 N.W.2d 165.

Recently, the Wisconsin Supreme Court reaffirmed that "a defendant's liberty interest in refusing involuntary medication at the pretrial stage of criminal proceedings" can be overcome only when "each one of the factors set out in *Sell*" is satisfied. *State v. Green*, 2022 WI 30, ¶2. The State bears the burden to prove each one of the four *Sell* factors by clear and convincing evidence. *Green*, 2021 WI App 18, ¶16, 396 Wis. 2d 658, 957 N.W.2d 583, *aff'd on other grounds*, 2022 WI 30; *United States v. James*, 938 F.3d 719, 722 (5th Cir. 2019) (collecting cases to show that ten of the federal circuit courts that have considered the question agree on this burden and standard of proof).

Given the serious deprivation of liberty at stake, "a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires." *United States v. Chavez*, 734 F.3d 1247, 1252 (10th Cir. 2013). If the State fails to prove any one of the four *Sell* factors, the involuntary medication order violates the Due Process Clause and is unconstitutional. *Sell*, 539 U.S. at 179.

Because this appeal implicates Thomas' due process rights, the issues present a question of constitutional fact which requires this Court to apply facts to the applicable constitutional standard in *Sell*. *See State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984); *see also Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶¶23-24, 391 Wis. 2d 231, 942 N.W.2d 277.

Under that standard, this Court will uphold the circuit court's factual findings unless they are clearly erroneous or against the great weight and clear preponderance of the evidence. *Id.*, ¶24. Whether those facts meet the legal standard, however, is a question of law reviewed de novo. *Woods*, 117 Wis. 2d at 716; *D.J.W.*, 2020 WI 41, ¶25.

B. The government does not have an important interest in prosecuting Thomas.

Sell did not define "serious crime," but federal courts often defer to the judgment of the legislature. *United States v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2024); *see Lewis v. United States*, 518 U.S. 322, 326 (1996) ("The judiciary should not substitute its

judgment as to seriousness for that of a legislature, which is far better equipped to perform the task."). In Wisconsin, the legislature has already defined the phrases "serious crime" and "serious felony" in multiple contexts.[4] The statute defining "serious crime" for the purposes of revoking bond, Wis. Stat. 969.08, is the best fit because it is the most expansive and because holding an individual without bond best mirrors the competing interests in administering involuntary medication, i.e. a defendant's liberty interest weighed against the State's public safety and prosecutorial interests. As a result, this Court has relied on Wis. Stat. § 969.08 when determining whether a crime is serious for the purposes of the first *Sell* factor. *J.D.B.*, 2024 WI App 61, ¶36.

Here, the State has only a minimal interest in prosecuting Thomas because neither of his charges are considered "serious" under Wis. Stat. § 969.08 nor any other statute. Additionally, neither of Thomas' charges are violent offenses. *See* Wis. Stat. § 941.29(1g). And as this Court recognized when granting a continued stay of the involuntary medication order, both of Thomas' alleged crimes fall on the lower end of the punishment spectrum, reflecting the legislature's determination that these offenses are less serious than those in higher

[4] "Serious crime" is defined in Wis. Stat. §§ 48.685(1)(c); 50.065(1)(e)1. & 2; and 969.08(10)(b). Wis. Stat. § 949.165(1)(a) incorporates the definition from § 969.08(10)(b). "Serious felony" is defined in Wis. Stat. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; and 973.0135(1)(b).

categories. (32:6). *See also United States v. White*, 620 F.3d 401, 410-11 (4th Cir. 2010) ("Without establishing a hard and fast rule … a crime is serious for involuntary medication purposes where the defendant face[s] a ten-year maximum sentence for the charges against him.").

Thomas' case is distinct from *J.B.D.* because the defendant in that case was charged with a violent felony that is statutorily defined as a "serious crime" under Wis. Stat. § 969.08. *J.D.B.*, 2024 WI App 61, ¶36.[5] In addition to these categorical differences, the specific allegations in *J.D.B.* were more aggravated because the defendant allegedly made "threats about getting a gun and killing everyone in [his] residence." *J.D.B.*, 2024 WI App 61, ¶6. He also punched a police officer in the face and threatened to murder him. *Id.* By contrast, Thomas did not make any threats, his alleged conduct was not intended to harm the officer, and it allegedly only resulted in "a minor injury." (30:42-43; App. 46-47). While the circuit court relied heavily on the allegation that Thomas had attempted to grab the officer's taser at one point, the State never introduced evidence from anyone with firsthand knowledge of the incident, and instead chose to rely on a conclusory one-sentence statement in the complaint. (28:10-11; 30:36-37; App. 40-41, 63-64). At a minimum, the lack of evidence presented to support this allegation, the minimal level of detail

[5] This Court concluded that J.D.B. was charged with a serious crime, but held that special circumstances undermined the State's interest in prosecution. *Id.*, ¶¶35, 53.

provided in the complaint, and the absence of any charge filed in connection with the allegation reduces the State's interest in prosecution.

Moreover, "it is not enough that the State generally has an important interest in bringing to trial *anyone* charged with a serious crime" because special circumstances can undermine the State's interest in prosecution of a serious crime. *J.D.B.*, 2024 WI App 61, ¶37 (emphasis in original). Here, even assuming for the sake of argument that Thomas had been charged with a serious crime, three special circumstances undermine the State's interest in prosecution. First, Thomas was held in custody without a bail hearing for well over a month in violation of Wis. Stat. § 969.01. (28:15; App. 68). As this Court recognized in *J.D.B.*, "[t]his statutory violation is significant, and it lessens the importance of the State's interest in prosecution." 2024 WI App 61, ¶46. Second, Thomas was ordered committed on August 13, 2024, and was supposed to be transported "forthwith" to the appropriate facility for treatment, but he remained in the county jail until December 18, 2024, when he was transferred to Sand Ridge for treatment. (28:13; 12:3; App. 66). As in *J.D.B.*, this delay is a "significant period of time that is incongruous with constitutional demands." 2024 WI App 61, ¶52. Third, Thomas has at this point already been in custody for over nine months and counting such that there is no risk that he will be free without punishment. This consideration lessens the importance of the State's interest in prosecution because it "'diminishes the risks that ordinarily

attach to freeing without punishment one who has committed a serious crime.'" *Id.*, ¶38 (quoting *Sell*, 539 U.S. at 180).

Based on the above, the non-violent offenses that Thomas is charged with do not meet the legislature's definition of serious crimes, and special circumstances reduce the government's interest in prosecuting Thomas. For these reasons, the first *Sell* factor was not satisfied.

C. The proposed treatment plan does not satisfy the second or fourth *Sell* factors.

To meet its burden under *Sell*, the State must present "an individualized treatment plan applied to the particular defendant." *Green*, 2021 WI App 18, ¶38, *aff'd on other grounds*, 2022 WI 30. "Whether a treatment plan is sufficiently individualized relates to the second *Sell* factor—whether the drugs are "substantially likely" to render Thomas competent. *See id.*, ¶33. However, an individualized treatment plan is also needed under the fourth factor because that plan must also be medically appropriate in light of the individual's medical condition. *Id.*, ¶42. Thus, while the two inquiries are separate, there is overlap in analyzing whether a plan is sufficiently individualized to satisfy both the second and fourth *Sell* factors.

Here, the State's proposed treatment plan identifies several medications with ranges signifying how much of each drug may be administered on a per dose basis, but the plan does not identify the number

of maximum dosages that may be administered on a daily, weekly, or monthly basis. (19:4). Likewise, at the involuntary medication hearing, Dr. Kordus identified daily minimum doses for the proposed medications without specifying any limitation on the number of maximum dosages that may be administered on a per day, per week, or per month basis. (30:8-11; App. 12-15). This oversight is critical because "[w]ithout this information, it is impossible for a circuit court to know how much of any proposed drug will ultimately be administered to the defendant." *J.D.B.*, 2024 WI App 61, ¶57. As such, the State's proposed treatment plan is not sufficiently individualized to Thomas and therefore does not satisfy the second and fourth *Sell* factors. *See id.*, ¶56.

CONCLUSION

For the reasons stated above, Thomas asks this Court to reverse and remand with instructions for the circuit court to vacate the involuntary medication order.

Dated this 8th day of April, 2025.

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 3,207 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 8th day of April, 2025.

Signed:
Electronically signed by
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