STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. SCOTT,

Defendant-Appellant.

On Appeal from an Order Authorizing Involuntary Medical Treatment, Entered by the Milwaukee County Circuit Court, the Honorable Jeffrey A. Kremers Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant

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INTRODUCTION

Scott contends that the circuit court's involuntary medication order violated ***State v. Debra A.E.***, 188 Wis. 2d 111, 523 N.W.2d 727 (1994) and his right to substantive due process. The State counters that because Wisconsin lacks a statute governing postconviction competency proceedings, circuit courts may simply invoke Wis. Stat. §971.14(4)(b)'s involuntary medication provision. The State's response only begs the question of whether §971.14(4)(b) is unconstitutional on its face because it allows a circuit court to enter an involuntary "treatment to competency" order without addressing the four factors required by ***Sell v. United States***, 539 U.S. 166 (2003). A facial challenge to the constitutionality of a statute is a matter of subject matter jurisdiction and cannot be waived. ***Winnebago County v. Christopher S.***, 2016 WI 1, ¶4 n.6, 366 Wis. 2d 1, 878 N.W.2d 109. Unless the court of appeals holds that §971.14(4)(b) does not apply to Scott's situation, there is no escaping the substantive due process argument.

STATEMENT OF FACTS

Certain aspects of this case's procedural history require emphasis. First, at the outset of the August 17, 2016 competency hearing, the State acknowledged that it bore the burden of proof. (App. 104). It then proceeded to examine Dr. Rawski but asked just a few questions—the main one being the reason for his conclusion that Scott was incapable of understanding and applying the advantages and disadvantages of psychotropic treatment to his condition. (App.108-109). The State did not ask whether, and the circuit court did not find that, Scott was unable to assist counsel or to make

decisions committed by law to the person with a reasonable degree of rational understanding. Those decisions include whether to proceed with or forgo postconviction relief, whether to file an appeal, and what objectives to pursue. That is the ***Debra A.E.*** standard for determining whether a defendant is competent to participate in postconviction proceedings

Second, the State and the circuit court expressed concern about leaving an inmate incompetent during postconviction proceedings. However, the State made no effort to elicit evidence that an involuntary "treatment to competency" order would satisfy the second, third and fourth ***Sell*** factors. The State did not establish:

- what drug(s) Dr. Rawski proposed to treat Scott with;
- whether that medication would "significantly further" an State interest and not substantially interfere with Scott's ability to assist his lawyer;
- whether the proposed medication was "necessary" to further the State's interest or whether less intrusive means could be used to accomplish it; and
- whether the proposed medication was in Scott's best medical interest in light of his medical condition.

The circuit court did not address these factors either. The State concedes this point. (Response Br. 17).

Third, it is undisputed that Scott is not dangerous and has never qualified for an involuntary medication order. (App.110, 131-132, 133). In fact, Dr. Rawski described Scott as "very pleasant, very nice"—not dangerous, intimidating or threatening. (App.112).

Fourth, defense counsel told the circuit court that Scott was so opposed to involuntary medication that "he would not have pursued an appeal if he knew that it could result in a forced medication order." (App.116). The circuit court replied that once Scott invoked his right to appeal it could subject him to involuntary treatment in part to "protect the integrity of the process." (App.116).

Fifth, the circuit court held that Scott was not competent to participate in postconviction proceedings or refuse treatment. It therefore suspended postconviction proceedings, ordered Scott to be medicated and treated for an indeterminate period not to exceed 12 months, and ordered Scott to be re-examined periodically thereafter. (App.122-127-128).

Finally, the CCAP docket for this case, Milwaukee County Case No. 2009CF136, indicates that on May 8, 2017, the circuit court found Scott competent and reinstated postconviction proceedings. According to an October 14, 2016 court of appeals order, Scott has until 30 days after this appeal is resolved to file his postconviction motion or notice of appeal.[1]

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[1] *See* Exs. A and B attached to Scott's Motion to Supplement the Record accompanying his Petition to Bypass.

ARGUMENT

I. The Circuit Court's Involuntary Treatment Order Violates ***Debra A.E.*** and Scott's Right to Substantive Due Process.

A. The circuit court violated ***Debra A.E.***

Attorney Breffeilh's duty was to raise the issue of competency, not carry the State's burden of proof. That's why Breffeilh did not take a position on whether Scott was competent. (App.104). In fact, taking a position could have created a conflict between Breffeilh's duty to his client and his duties as an officer of the court. ***State v. Daniel***, 2015 WI 44, ¶¶41-44, 362 Wis. 2d 74, 862 N.W.2d 867. This appeal likewise does not challenge the circuit court's August 17, 2016 incompetency finding. It does, however, argue that the circuit court violated ***Debra A.E.***

For starters, the circuit court applied the wrong legal test for determining whether Scott was incompetent to participate in postconviction proceedings. On appeal, Scott and the State agree on what that test is. The defendant is incompetent "when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." ***Debra A.E.*** 188 Wis. 2d at 126-127. Those decisions include whether to proceed with or forgo postconviction relief, whether to file an appeal, and what objectives to pursue. (Response Br. 7). At the circuit level, neither Dr. Rawski, the district attorney, nor the circuit court acknowledged or applied this postconviction competency test. Instead, Dr. Rawski applied the test for competency to stand trial. (App.135). The district attorney and the circuit court focused on Scott's ability to understand the advantages and disadvantages of treatment per §971.14(4)(b). (App.109, 122).

Furthermore, ***Debra A.E.*** holds that even if the circuit court finds the defendant incompetent, the postconviction process should continue with respect to "any issues that do not necessitate the defendant's assistance or decision making, and involve no risk to the defendant." ***Id.*** at 133-134. Here, the circuit court suspended postconviction proceedings altogether. Then on May 8, 2017, it found Scott competent and reinstated the proceedings. The circuit court's suspension of postconviction proceedings violated ***Debra A.E.***

Lastly, ***Debra A.E.*** holds that the postconviction process ordinarily does not require involuntary treatment to restore competency because "[m]eaningful postconviction relief can be provided even though a defendant is incompetent." ***Id.*** at 130. Neither the State (which bore the burden of proof) nor the circuit court identified anything extraordinary about Scott's appeal—any essential or overriding state interest that would justify an "involuntary treatment to competency" order. Indeed, the circuit court appears to believe that it may order treatment to competency in the ***ordinary*** case. It declared that once Scott invoked his right to appeal, it had the right to protect the appellate process by forcibly medicating him. (App.116-117). That is a clear violation of ***Debra A.E.***

B. The circuit court's order violated Scott's right to substantive due process.

The Wisconsin Supreme Court did not decide ***Debra A.E.*** in a vacuum. Long before that case, the United States Supreme Court established that a prisoner has a protected liberty interest in being free from involuntary psychiatric treatment in a mental hospital. ***Vitek v. Jones***, 445 U.S. 480, 494-495 (1980). A prisoner also has "a significant liberty interest in avoiding the unwanted administration of

antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." ***Washington v. Harper***, 494 U.S. 210, 221-222 (1990). *See also* ***State v. Wood***, 2010 WI 17, ¶17, 323 Wis. 2d 321, 780 N.W.2d 63 (inmate has the same right under Article 1, §1 of the Wisconsin Constitution). While these drugs have therapeutic benefits, they can also have serious or fatal side effects. ***Harper*** at 229-230. Consequently, the Government may not treat an inmate with antipsychotic drugs against his will unless there is an "essential" or "overriding" state interest to do so. Otherwise, the Government violates the inmate's right to substantive due process. ***Riggins v. Nevada***, 504 U.S. 127, 135 (1992).

The Government has an "essential" or "overriding" state interest to subject an inmate to involuntary treatment where he is dangerous to himself or others, and the medication is in his medical interest. ***Riggins*** at 135. In some circumstances, rendering a defendant competent to stand trial may also qualify as an "essential" or "overriding" state interest. The United States Supreme Court explained:

> These two cases, ***Harper*** and ***Riggins***, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, ***but only if*** the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important trial-related interests.
>
> This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. ***But those instances may be rare.***

Sell at 179-180. (Emphasis supplied).

Now consider the statute at issue. The Wisconsin legislature enacted the current version of §971.14(4)(b) through 1989 Wis. Act 31, §2848t, before the United States Supreme Court decided ***Harper***, ***Riggins***, ***Debra A.E.***, and ***Sell***. The statute provides in part:

> If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3) (dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

Wis. Stat. §971.14(4)(b).

Section 971.14(3)(dm)[2] in turn provides:

> (3) Report. The examiner shall submit to the court a written report which shall include all of the following:
>
> . . .
>
> (dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication

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[2] This provision was created by 1989 Wis. Act. 31 §2848h before ***Harper, Riggins***, and ***Sell***, and later amended.

> or treatment have been explained to the defendant, one of the following is true:

Section 971.14(4)(b) does not track ***Sell***'s requirements. It assumes that once a defendant is found incompetent to stand trial (or, as the State claims, to participate in postconviction proceedings), he can be involuntarily treated to competency if he is incapable of expressing or applying the advantages, disadvantages and alternatives to treatment in choosing to accept or refuse treatment.

In contrast, ***Sell*** requires the court to find that an important governmental interest is at stake after considering the individual circumstances of the defendant's case, including the seriousness of his offense and the specific drugs the government proposes to administer. Ordering treatment to competency to stand trial will be permitted in "rare instances", not most instances. [3] The court must determine whether those drugs will "significantly further" the state interest at stake, will interfere with the defendant's ability to assist his lawyer, are medically necessary to further the state's interests, and are in the defendant's best interests in light of his medical condition. ***Sell*** at 180-182. ***Sell*** in fact vacated a lower court order requiring the defendant to be treated to competency for trial because (a) he was not dangerous and (b) the lower court did not consider all of the factors above.

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[3]Contrary to the State's argument on page 17 of its Response Brief, competency to participate in postconviction proceedings is not an "essential" or "overriding" state interest. ***Debra A.E.*** at 130 clearly holds that "meaningful postconviction relief can be provided even though a defendant is incompetent. Nor does the "inhumanity" of leaving a mentally ill inmate untreated justify a §971.14(4)(b) involuntary medication order. That is what Chapter 51 is designed for.

Section 971.14(4)(b) permits a circuit court to order a defendant to be treated to competency without considering the ***Sell*** factors. It is therefore unconstitutional on its face, and the circuit court's use of §971.14(4)(b) here violated Scott's right to substantive due process.

C. Scott did not forfeit or waive the argument that the circuit court violated his right to substantive due process.

Scott did not forfeit his substantive due process argument. ***Debra A.E.*** holds that the Government cannot "ordinarily" force an inmate to be treated to competency at the postconviction stage. That means the State had to show, and the circuit court had to find, something extraordinary to justify the involuntary treatment order in Scott's case. ***Harper***, ***Riggins***, and ***Sell*** establish what qualifies as grounds extraordinary enough to override Scott's fundamental right to avoid being forced to take antipsychotic drugs. The State did not make the required showing, and the circuit court did not make the required finding. Scott's right to "substantive due process" is not a new and separate issue. It is an additional reason why the circuit court had no authority to force him to be treated to competency against his will—an issue Scott clearly preserved in the circuit court. (App.115, 118-119, 120-212). *See* ***State v. Weber***, 164 Wis. 2d 788, 790, 476 N.W.2d 867 (1991) (waiver rule applies to issues not arguments).

That is really beside the point in light of the State's position in this appeal. The State contends:

> There is no controlling law on the standards and procedures applicable to involuntary medication of an incompetent person to render him competent to participate in postconviction and direct appeal

> proceedings. However, the circuit court can utilize the involuntary medication procedures set out in §971.14(4)(b). (Response Br. 1; *See also* Response Br. at 2, 7, 9, 14).

If §971.14(4)(b) violates substantive due process on its face, then the circuit court cannot use it to order a defendant to be treated to competency for trial or postconviction purposes. As noted at the outset of this brief, a facial challenge to the constitutionality of a statute cannot be waived. ***Christopher S.***, 2016 WI 1, ¶4 n.6. And contrary to the State's request, the court of appeals cannot remand this case so that the circuit court can apply the ***Sell*** factors. The damage is done, and it is irreparable.

CONCLUSION

For the reasons stated above, the court of appeals should reverse the circuit court's involuntary medication order.

Dated this 31st day of May, 2017.

Respectfully submitted,

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,410 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

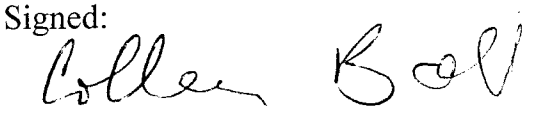
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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 this 31st day of May, 2017.

Signed:



COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov
Attorney for Defendant-Appellant