71651-4

71651-4

No. 71651-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN WILLIAM BRATTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Every individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of psychotropic medications. When a criminal defendant has been found incompetent to stand trial due to mental illness, the trial court may order that he be forcibly medicated to restore competency only if the court correctly applies the four factors set forth by the United States Supreme Court in Sell v. United States, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

In this case, Benjamin Bratton was found incompetent to stand trial and the trial court ordered that he be committed to Western State Hospital and forcibly medicated if necessary to restore his competency. The court's order was a violation of constitutional due process because the court misapplied the Sell factors. First, the court erroneously found that the State had a sufficiently important interest in forcibly medicating Mr. Bratton based solely on the crime charged without considering the facts of the individual case. Second, the court erred in finding that no less intrusive alternative was available, where Mr. Bratton agreed to take medication and be treated in the community.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding, "Having been charged with a serious offense, the State has an important governmental interest to prosecute the defendant for this incident." CP 62-63.

2. The court erred in finding, "The administration of involuntary medications will significantly further the State's concomitant interests and are likely to render the defendant competent." CP 63.

3. The court erred in finding, "There is no alternative, less intrusive treatment that could achieve the same results as would the administration of involuntary medications." CP 63.

4. The court's failure to consider the individual circumstances of the case in concluding that the State had an important interest in forcibly medicating Mr. Bratton was a violation of constitutional due process.

5. The court's order allowing Mr. Bratton to be committed to Western State Hospital and forcibly medicated was a violation of constitutional due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Most courts to consider the issue have concluded that the first of the Sell factors is a question of law reviewed de novo. Some courts hold that the second Sell factor is a mixed question of law and fact. Most courts agree the third and fourth factors are questions of fact reviewed for sufficient evidence. Should Washington courts adopt these standardss?

2. Regarding the first Sell factor, the State must show that important governmental interests are at stake. The State's interest in bringing to trial an individual accused of a "serious" crime is important. But the court must also consider the facts of the individual case in evaluating the State's interest. Did the court err in failing to consider the facts of Mr. Bratton's case in concluding that the State's interest was sufficiently important?

3. Before a court may order an incompetent defendant to be involuntarily committed and forcibly medicated, the court must find that no less intrusive alternatives are likely to achieve substantially the same results. Did the court err in finding that no less intrusive alternatives were available where Mr. Bratton agreed to be medicated in the community?

D. STATEMENT OF THE CASE

William Bratton is a 58-year-old man who at the time of his arrest had been living alone in an apartment in Lake City for about two and a half years. CP 8, 29. He had worked at Boeing as a design engineer and retired in 2008. CP 29. He was permanently disabled due to hearing loss. CP 29.

According to the certification for determination of probable cause, federal agents discovered that Mr. Bratton's name and email address were used to purchase access to a known child-pornography website in 2007. CP 23. Five years later, in November 2012, agents contacted Mr. Bratton at his apartment. Id. When confronted with the allegations that he had purchased child pornography, Mr. Bratton freely admitted he had purchased access to Internet sites containing images of nude children. Id. He said he thought it was legal to possess images of nude children as long as the images did not depict sexual activity. Id. He said he been downloading such images onto hard drives and recordable compact discs since around 2000. CP 23-24.

Mr. Bratton consented to allow an agent to seize and search his home computer, discs and hard drives he kept in a safe deposit box. CP

24. Analysis of the computer, hard drives and discs revealed a large number of images of suspected child pornography. Id.

Mr. Bratton later explained during a mental health evaluation that he believed someone had hacked into his computer and installed software on his hard drive that would affect every copy of the Windows operating system. CP 31. He thought someone had taken control of his computer and he did not know how the child pornography had been installed. Id. He said he saved the images because he thought he would need them as proof. Id. He suspected espionage. Id. He said he had sought help for the suspected espionage from both Boeing and the FBI. Id. When federal agents came to his home to investigate, he thought they were there to resolve the situation he had reported. Id. That is why he freely agreed to allow them to seize and search his computer. Id.

Mr. Bratton was charged with two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.070(1), 9.68A.011(4)(a)-(e). CP 1-2.

At defense counsel's request, the trial court ordered that Mr. Bratton be evaluated to determine whether he was competent to stand trial and assist in his defense. 11/21/13RP 3-5.

Mr. Bratton had been evaluated on one prior occasion, in December 2012, to determine his competency to stand trial. CP 30. At that time, he had been charged in Seattle municipal court with reckless endangerment and malicious mischief after he threw a pickle jar through a window in response to auditory hallucinations. CP 30; 3/10/14RP 35. As a result of that evaluation, Mr. Bratton was diagnosed with late-onset paranoid schizophrenia, marked by paranoid delusions and auditory hallucinations that had not begun until after he was 40. CP 30. The 2012 evaluator concluded he was not competent to stand trial because he had delusional ideas related to his case. CP 30. The evaluator recommended that his competency be restored through treatment but the court declined to order it. CP 30. The court found he was not competent to stand trial and dismissed the charges without prejudice. CP 47.

For the present case, Mr. Bratton was evaluated again by a psychologist at Western State Hospital (Western) in early 2014. CP 28-33. He was not currently involved in mental health treatment and was taking no psychotropic medications. CP 30-31. He reported that he had only one prior mental health hospitalization in June 2009, when he had been diagnosed with major depression. CP 30.

The evaluator reported that Mr. Bratton was cooperative, alert, and oriented to person, place, time and situation. CP 30. His attention, concentration and speech were normal, and his thought processes were organized and goal-directed and his memory intact. CP 30. His intelligence and cognitive abilities were average or above. CP 30. But the content of his thoughts was distorted by paranoid and persecutory delusional beliefs. CP 30. He had no insight into his disorder and denied any psychotic symptoms. CP 30. The evaluator diagnosed Mr. Bratton with psychotic disorder, not-otherwise-specified, rule out delusional disorder or paranoid schizophrenia. CP 32.

The evaluator concluded that, due to his mental illness, Mr. Bratton was not competent to understand the nature of the proceedings or assist in his defense. CP 32-33. He understood the charge and showed a sound understanding of court procedures and legal strategies. CP 32. But his paranoid, delusional beliefs impaired his ability to discuss his legal situation or the alleged offense rationally. CP 32. The evaluator recommended that Mr. Bratton be admitted to Western and administered psychotropic medications against his will if necessary in order to restore his competency. CP 33.

Mr. Bratton had no history of assaultive or aggressive behavior toward others and denied thoughts of hurting anyone. CP 33. Therefore, he need not be evaluated to determine whether he was a danger to others. CP 33.

In response to the evaluator's report, the State filed a motion requesting an order allowing Western to forcibly medicate Mr. Bratton against his will if necessary. CP 15-18. Mr. Bratton objected to commitment at Western and forced medication. CP 34-57.

A hearing was held on March 20, 2014. A psychiatrist from Western, Sukhinder Aulakh, testified. 3/10/14RP 7. Dr. Aulakh testified that antipsychotic medications could help decrease Mr. Bratton's delusional thinking and his possible hallucinations and enable him to assist in his defense. 3/10/14RP 14, 16. The immediate side effects of such medications can include active muscles and muscle tremors and stiffness, headaches and constipation. 3/10/14RP 14-15, 20. Longer-term side effects can include weight gain, diabetes or heart disease. 3/10/14RP 15. Fewer than 15 percent of people who take such medications have side effects. 3/10/14RP 15. Side effects can be treated by adjusting the dosage or administering other kinds of medication. 3/10/14RP 15. A small percentage of people who take

antipsychotic drugs develop lasting side effects of involuntary muscle movements. 3/10/14RP 21.

Dr. Aulakh was 80 percent confident that Mr. Bratton's competency could be restored through medication. 3/10/14RP 17. The 20 percent chance of failure was due to Mr. Bratton's long history of paranoid delusions. 3/10/14RP 18. It would take at least 45 days for him to become competent. 3/10/14RP 27.

Dr. Aulakh said that Western did not have an outpatient competency restoration program. 3/10/14RP 16-17. He acknowledged that clinics exist in the community where individuals can receive antipsychotic medication. 3/10/14RP 34. But he thought Mr. Bratton should be hospitalized in order to restore his competency because he had no insight into his mental illness. 3/10/14RP 23.

Dr. Aulakh agreed Mr. Bratton was not a danger to himself or the public and would not otherwise be subject to civil commitment. 3/10/14RP 34. He had lived on his own in an apartment for years and could function in the community; he was able to support himself through his pension and disability income. 3/10/14RP 31-32, 34.

In closing argument, the deputy prosecutor acknowledged that the State's primary interest in restoring Mr. Bratton to competency was

not so that he could be prosecuted for the two pending felony charges. 3/10/14RP 37. Instead, the State's primary interest was to restore him to competency so that he could be prosecuted for the two misdemeanor charges that were dismissed in 2013. 3/10/14RP 37. The prosecutor said,

> We have an important governmental interest in having the defendant be found competent so that we can get him – in a large sense get him convicted of these crimes, but really the State just wants him convicted of the misdemeanor crimes so that he can go to Mental Health Court and he will have wraparound services so that he'll have medication that can help him with housing, that can help him with treatment needs, because I do think it's clear that Mr. Bratton is a person who came to the criminal justice system late in life.

3/10/14RP 37. The prosecutor elaborated, "it's not my goal as a prosecutor to incarcerate someone who has mental health problems but to get them treated." 3/10/14RP 37. The prosecutor's concern was that, if not treated, Mr. Bratton's "delusional thinking" was "going to land him back into the criminal justice system." 3/10/14RP 38.

Defense counsel argued strenuously against involuntary commitment and forced medication. Counsel argued the criminal charges were not sufficiently "serious" to justify forced medication. 3/10/14RP 42-45. Moreover, involuntary commitment with forced medication was not the least restrictive alternative because Mr. Bratton

was willing to take psychotropic medication on an outpatient basis and receive treatment from his local community mental health clinic in Lake City. 3/10/14RP 43. Finally, Mr. Bratton would be significantly harmed if committed to Western because he would likely lose his apartment, which "has made all the difference in his well-being." 3/10/14RP 47. Before landing his apartment, he had been homeless and seriously depressed. 3/10/14RP 47.

The court granted the State's motion to commit Mr. Bratton involuntarily and forcibly medicate him if necessary. 3/10/14RP 51-53; CP 58-63; Appendix A and B. The court then entered an order granting Mr. Bratton's motion to stay these two orders pending this appeal. CP 64.

E. ARGUMENT

The trial court's orders authorizing involuntary commitment and forced psychotropic medication unreasonably interfere with Mr. Bratton's liberty and violate his constitutional due process rights

1. Because every individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of psychotropic medication, the State must prove by clear, cogent and convincing evidence four independent "Sell" factors before a court may authorize forced medication

The United States Supreme Court has repeatedly recognized that forcibly medicating an individual against his will "represents a substantial interference with that person's liberty." Washington v. Harper, 494 U.S. 210, 229, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). Every individual has a "significant" constitutionally protected liberty interest in "avoiding the unwanted administration of antipsychotic drugs." Id. at 221-22; U.S. Const. amend. XIV; Const. art. 1, § 3.

The involuntary administration of such drugs represents an interference with a person's right to privacy, right to produce ideas, and ultimately the right to a fair trial. Riggins v. Nevada, 504 U.S. 127, 134-35, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). An individual has a constitutionally protected liberty "interest in avoiding involuntary

administration of antipsychotic drugs"—an interest that only an "essential" or "overriding" state interest might overcome. Id.

The Due Process Clause permits the government to administer psychotropic medication to a mentally-ill defendant facing serious criminal charges in order to render him competent to stand trial 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 an important governmental interest. Sell v. United States, 539 U.S. 166, 179, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). The governmental interest at issue is "the interest in rendering the defendant *competent to stand trial*." Id. at 181.

The Constitution requires that, before a court may authorize forced medication, the State must prove the four factors set forth by the Court in Sell. Id. at 180-81; State v. Hernandez-Ramirez, 129 Wn. App. 504, 510, 119 P.3d 880 (2005).

First, "a court must find that *important* governmental interests are at stake." Sell, 539 U.S. at 180. The State's interest in bringing to trial an individual accused of a serious crime is important, whether the crime is one against the person or one against property. Id. But courts

must also "consider the facts of the individual case in evaluating the Government's interest in prosecution." Id. Special circumstances may lessen the importance of that interest. Id. For instance, the defendant's failure to take drugs voluntarily may mean lengthy civil commitment in an institution for the mentally ill that would diminish the risks that ordinarily attach to freeing without punishment a person who has committed a serious crime. Id. For similar reasons, the State's interest in prosecution is lessened if the defendant has already been confined for a significant amount of time, for which he would receive credit toward any sentence ultimately imposed. Id. In addition, the State has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one. Id.

Second, "the court must conclude that involuntary medication will *significantly further* those concomitant state interests." Id. at 181. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that would interfere significantly with his ability to assist his attorney, thereby rendering the trial unfair. Id.

Third, "the court must conclude that involuntary medication is *necessary* to further those interests." Id. This is a two-part inquiry.

"The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." Id. In addition, the court must also "consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed up by the contempt power, before considering more intrusive methods." Id.

Fourth, "the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." Id. Different kinds of drugs may produce different side effects and enjoy different levels of success. Id.

The Sell factors do not represent a balancing test, but a set of independent requirements, each of which must be found to be true before the forcible administration of psychotropic drugs is constitutionally permissible. State v. Lopes, 355 Or. 72, 91, 322 P.3d 512 (2014). "[T]o comport with due process an order compelling involuntary administration of antipsychotic medication requires 'thorough consideration and justification' and 'especially careful scrutiny,' and must be based on 'a medically-informed record.'" Id. (quoting United States v. Ruiz-Gaxiola, 623 F.3d 684, 691 (9th Cir. 2010)). Ultimately, Sell orders are disfavored due to "[t]he importance

of the defendant's liberty interest, the powerful and permanent effects of anti-psychotic medications, and the strong possibility that a defendant's trial will be adversely affected by the drug's side-effects." United States v. Rivera-Guerrero, 426 F.3d 1130, 1137-38 (9th Cir. 2005). Thus, forcible antipsychotic medication should be ordered in only rare circumstances. Id.

The Sell Court did not specify the nature of the State's burden to prove these four factors. In Hernandez-Ramirez, this Court said the State bears the burden to prove each factor by clear, cogent and convincing evidence. Hernandez-Ramirez, 129 Wn. App. at 510-11. The federal circuit courts agree that the State bears the burden of proof by clear and convincing evidence. See United States v. Diaz, 630 F.3d 1314, 1331-32 (11th Cir. 2011); United State v. Fazio, 599 F.3d 835, 840 n.2 (8th Cir. 2010); United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); United States v. Grape, 549 F.3d 591, 598-99, 604 (3d Cir. 2008); United States v. Green, 532 F.3d 538, 545 (6th Cir. 2008); United States v. Valenzuela-Puentes, 479 F.3d 1220, 1224 (10th Cir. 2007); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004).

2. Washington courts should hold that the first Sell factor is a legal question reviewed de novo, the second factor is a mixed question of law and fact, and the other two factors are matters of fact reviewed for sufficient evidence

The significant liberty interests at stake in a Sell proceeding "call for equally significant procedural safeguards" that extend to the standard of review on appeal. Ruiz-Gaxiola, 623 F.3d at 693. The first factor of the Sell inquiry—whether the State's interests are sufficiently "serious"—is a question of law that should be given no deference by the reviewing court. Lopes, 355 Or. at 92. That is because "the importance of an asserted governmental interest is an issue that [the reviewing court] is well-equipped to review and evaluate for itself in the first instance." United States v. Hernandez-Vasquez, 513 F.3d 908, 915-16 (9th Cir. 2008). Thus, federal and state courts uniformly agree that the first Sell factor is a question of law reviewed de novo on appeal. United States v. Breedlove, __ F.3d __, 2014 WL 2925284 (7th Cir. 2014); United States v. Dillon, 738 F.3d 284, 291 (D.C. Cir. 2013); Diaz, 630 F.3d at 1331; Ruiz-Gaxiola, 623 F.3d at 693; United States v. White, 620 F.3d 401, 410 (4th Cir. 2010); Fazio, 599 F.3d at 839; Green, 532 F.3d at 546, 552; United States v. Palmer, 507 F.3d 300, 303 (5th Cir. 2007); United States v. Bradley, 417 F.3d 1107,

1113 (10th Cir. 2005); Gomes, 387 F.3d at 1113-14; State v. Cantrell, 143 N.M. 606, 612, 179 P.3d 1214 (N.M. 2008); Lopes, 355 Or. at 92; State v. Barzee, 177 P.3d 48, 56 (Utah 2007).

The second factor—whether involuntary medication will significantly further the State's interests—is a mixed question of law and fact. The Court should review the factual findings underlying that factor for sufficiency of the evidence and whether those facts meet the legal standard de novo. Cantrell, 143 N.M. at 613; Barzee, 177 P.3d at 57.

The third and fourth factors—whether less intrusive means are available and whether administration of the drugs is medically appropriate—are questions of fact to be reviewed for sufficient evidence. Ruiz-Gaxiola, 623 F.3d at 693; Cantrell, 143 N.M. at 613.

The ultimate question—whether the facts in total support the court's legal conclusion that an order authorizing involuntary medication was warranted—is reviewed de novo. State v. Miller, __ Wn. App. __, 324 P.3d 791 (2014).

3. The court erred in concluding the State's interest was sufficiently "serious" because the court did not consider the individual circumstances of the case

The first Sell factor requires the court to determine whether "*important* governmental interests are at stake." Sell, 539 U.S. at 180. The court must consider not only the seriousness of the crime charged but also "the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." Id.

Here, the court found the State's interests were sufficiently serious merely because Mr. Bratton was charged with first degree possession of depictions of a minor engaged in sexually explicit conduct. CP 62. The court found that the crime was "a per se serious offense under RCW 10.77.092."[1] CP 62. Without considering any

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[1] In RCW 10.77.092, the Legislature enumerated certain crimes that are serious offenses per se for the purposes of a Sell hearing. The statute provides:

> (1) For purposes of determining whether a court may authorize involuntary medication for the purpose of competency restoration pursuant to RCW 10.77.084 and for maintaining the level of restoration in the jail following the restoration period, a pending charge involving any one or more of the following crimes is a serious offense per se in the context of competency restoration:
>
> (a) Any violent offense, sex offense, serious traffic offense, and most serious offense, as those terms are defined in RCW 9.94A.030;

other circumstances or facts unique to this case, the court summarily concluded "[h]aving been charged with a serious offense, the State has an important governmental interest to prosecute the defendant for this incident." CP 62-63. By failing to consider whether the circumstances of the case mitigated the State's interest in prosecuting Mr. Bratton for these charges, the court erred and violated his constitutional due process rights.

In Sell, the Court explained that the State may have less of an interest in prosecuting a defendant for a serious charge if he is subject to a lengthy civil confinement due to his refusal to take medication, or if he has already been confined for a significant amount of time. Sell, 539 U.S. at 180. These considerations are important because the length of time a person is confined can undermine the government's interest in

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(b) Any offense, except nonfelony counterfeiting offenses, included in crimes against persons in RCW 9.94A.411;

(c) Any offense contained in chapter 9.41 RCW (firearms and dangerous weapons);

(d) Any offense listed as domestic violence in RCW 10.99.020;

(e) Any offense listed as a harassment offense in chapter 9A.46 RCW;

(f) Any violation of chapter 69.50 RCW that is a class B felony; or

(g) Any city or county ordinance or statute that is equivalent to an offense referenced in this subsection. . . .

prosecuting him in order to protect the public, deter criminal behavior, and obtain just punishment. White, 620 F.3d at 413.

But these are not the only considerations the court should consider. The inquiry of whether the crime is sufficiently "serious" is fact-specific and "flexible." Id. at 412.

Factors the court should consider include the nature and particular facts of the alleged crime. Id. at 413. "Not every serious crime is equally serious." Id. at 419. The Ninth Circuit explained,

> the Sell test does not create any categorical rule precluding courts from determining that a defendant's 'non-property, non-violent' crime is a serious offense. But neither does it preclude courts from considering the nature of the crime as one of many factors that may be relevant in a particular case.

Ruiz-Gaxiola, 623 F.3d at 695 n.7 (citation omitted).

Thus, courts routinely consider the facts of the individual case in evaluating the government's interest in prosecution. See id. at 695 (noting that crime was "neither against persons nor property"); White, 620 F.3d at 419-20 (finding significant that White's alleged activities were nonviolent); Hernandez-Vasquez, 513 F.3d at 919 (examining factors such as prior offenses, predatory nature of offenses, and closeness in time of prior offenses to conclude that reentry of deported alien was sufficiently "serious"); Valenzuela-Puentes, 479 F.3d at 1226

(considering "nature or effect of the underlying conduct"); United States v. Dumeny, 295 F.Supp.2d 131, 132 (D. Maine 2004) (concluding facts underlying charge of possession of firearms by person previously committed to mental health institute were not sufficiently serious because defendant was charged "with possession only"); Lopes, 355 Or. at 93 (considering alleged facts of crime which, if proved, established that defendant "subjected a child to a substantial risk of harm").

Besides the facts of the crime, the court should also consider other special circumstances, such as whether the defendant is likely to reoffend. In White, for instance, the court found significant that White was committed to a mental hospital that "preclude[d] her from certain activities, such as her ability to obtain and own firearms." White, 620 F.3d at 413.

Here, the court erred in failing to consider the individual facts of the case and whether they mitigated the State's interest in prosecuting Mr. Bratton for possession of child pornography. Several facts of the alleged crime mitigate the State's interest. First, the offense was nonviolent. There was no suggestion in the record that Mr. Bratton ever committed a hands-on offense against a child or anyone. Also, he

had no criminal record, no history of violence, and denied thoughts of hurting anyone. CP 33. Although the creation and dissemination of child pornography harms children who are depicted in the images, the harm caused by each individual who only possesses an image is indirect and "minor." See Paroline v. United States, __ U.S. __, 134 S. Ct. 1710, 1725, 188 L. Ed. 2d 714 (2014).

The court should also have considered that Mr. Bratton was unlikely to reoffend. He said he thought at the time that it was legal to possess the images. CP 23. Once he was informed that the conduct was illegal, he was unlikely to repeat it. 3/10/14RP 48.

Finally, the State explicitly stated it *had little interest* in prosecuting and imprisoning Mr. Bratton for possession of child pornography given his mental illness. 3/10/14RP 37. Instead, the State's interest was in rendering him competent so that it could prosecute him in Mental Health Court for the *misdemeanor charges* that were dismissed in 2013. Id. Under these circumstances, the court erred in concluding that the State had a sufficiently serious interest in prosecuting Mr. Bratton for possession of child pornography to justify forcibly medicating him. Failure to consider Mr. Bratton's "special circumstances" was a violation of due process. Sell, 539 U.S. at 180.

4 The State did not prove by clear, cogent and convincing evidence that involuntary commitment and forcible medication was the least restrictive alternative available

To prove the third Sell factor, the State must show that (1) "alternative, less intrusive treatments are unlikely to achieve substantially the same results," and (2) "less intrusive means of administering the drugs," such as "a court order to the defendant backed by the contempt power," is unlikely to succeed. Sell, 539 U.S. at 181. The State did not prove this factor by clear, cogent and convincing evidence because there is no evidence that Mr. Bratton refused to take the medication. To the contrary, the evidence shows he was willing to take antipsychotic medication to restore his competency by receiving treatment at his local mental health clinic.

Generally, in cases where courts held that the State proved the third Sell factor by clear and convincing evidence, the record showed that the defendant repeatedly refused to take medication that had been prescribed to him. In Hernandez-Ramirez, for instance, the defendant "consistently claimed that he is mentally sound and has refused to take the medications prescribed to him." Hernandez-Ramirez, 129 Wn. App. at 512. Similarly, in Diaz, the court found, "Diaz has, repeatedly and for a time period of over a year, refused to take medication." Diaz,

630 F.3d at 1335; see also Gomes, 387 F.3d at 162-63 (affirming district court's conclusion that less intrusive alternatives were unlikely to render defendant competent where "Gomes has repeatedly refused all chemical treatment and has indicated that he will not cooperate under any circumstances").

Here, unlike in those cases, the record contains no evidence that Mr. Bratton refused to take antipsychotic medication. To the contrary, his attorney stated he was willing to take psychotropic medication on an outpatient basis at his local community mental health clinic in Lake City. 3/10/14RP 43. This was a preferable option because if Mr. Bratton were involuntarily committed to Western until his competency was restored, he would likely lose his apartment which had been an important component of his stability and well-being. Id.

The statute provides authority for courts to order treatment on an outpatient basis to restore the competency of a defendant in cases such as this. RCW 10.77.086 provides:

> (1)(a) If the defendant is charged with a felony and determined to be incompetent, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, or has been determined unlikely to regain competency pursuant to RCW 10.77.084(1)(b), but in any event for a period of no longer than ninety days, the court:

> (i) Shall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment; or
>
> (ii) *May alternatively order the defendant to undergo evaluation and treatment* at some other facility as determined by the department, or *under the guidance and control of a professional person.*

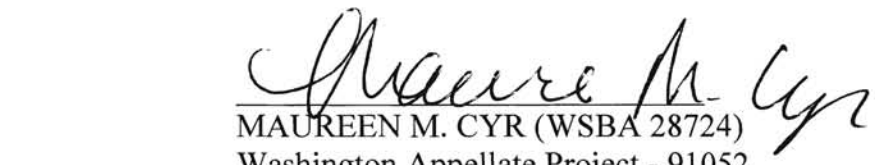
(emphases added).

Sell commands that courts consider this less intrusive option before ordering a defendant to be involuntarily committed and forcibly medicated. Sell, 539 U.S. at 181. Here, the court should have tried ordering Mr. Bratton to be treated in the community "under the guidance and control of a professional person," RCW 10.77.086(1)(a)(ii), before requiring that he be involuntarily committed and forcibly medicated. Because the record contains no evidence that Mr. Bratton refused to take medication, and because a less intrusive option of treatment in the community was available, the court's order requiring involuntary commitment and forcible medication violated constitutional due process.

F. CONCLUSION

The court's order requiring Mr. Bratton to be involuntarily committed and forcibly medicated if necessary violated Mr. Bratton's constitutional due process rights. The order should be reversed.

Respectfully submitted this 7th day of July, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. WILLIAM B. BRATTON, Defendant.	No. 13-1-13952-5 KNT ORDER ALLOWING WESTERN STATE HOSPITAL TO FORCE MEDICATION AGAINST THE DEFENDANT'S WILL IF NECESSARY

A hearing was held on March 10, 2014, before the Honorable Judge Berns. After considering the Western State Hospital reports dated February 5, 2014, and December 18, 2012, hearing testimony from Dr. Aulakh, and hearing argument from counsel, the court enters the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. The defendant is currently charged with two counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree. Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in the First Degree is a per se serious offense under RCW 10.77.092. Having been charged with a serious offense,

ORIGINAL

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North, Suite 2A
Kent, Washington 98032
(206) 296-9000, FAX (206) 205-7475

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the State has an important governmental interest to prosecute the defendant for this incident.

2. The administration of involuntary medications will significantly further the State's concomitant interests and are likely to render the defendant competent. The medications are unlikely to have side effect that interfere with the defendant's ability to assist counsel. Medication will help the defendant assist in his defense.

3. There is no alternative, less intrusive treatment that could achieve the same results as would the administration of involuntary medications.

4. The administration of involuntary medications is medically appropriate and in the defendant's best medical interest in light of his condition.

II. CONCLUSIONS OF LAW

This court finds that the correct standard to use when determining if forced medications are justified in restoring a pre-trial defendant to competency has been established in Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). The court finds that the Sell factors have been satisfied and orders that psychotropic medications may be administered to the defendant as deemed clinically appropriate by the staff at Western State Hospital, against the defendant's will if necessary. In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 10 day of March, 2014.

JUDGE ELIZABETH BERNS

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North, Suite 2A
Kent, Washington 98032
(206) 296-9000, FAX (206) 205-7475

APPENDIX B

FILED
KING COUNTY, WASHINGTON

MAR 10 2014

SUPERIOR COURT CLERK
BY Kim Dunnett
DEPUTY

3PP
COPY TO COUNTY JAIL MAR 11 2014

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

William B. Bratton,

Defendant.

No. 13-1-13952-5Knt

ORDER FINDING DEFENDANT INCOMPETENT AND COMMITTING FOR FIRST RESTORATION PERIOD

THIS MATTER having come on before the undersigned judge of this court, the court examined the report of Western State Hospital, dated February 5, 2014, and considered the records herein, and heard the statements of counsel, and now finds that the defendant is incompetent to stand trial.

IT IS HEREBY ORDERED:

1. That the defendant is committed to Western State Hospital for a restoration period of

[ ] ninety days

[√] forty-five days (for all cases in which the highest charge is a Class C felony or a Class B felony that is not classified as a violent offense under RCW 9.94A.030)

from date of admission, or until such earlier time as the defendant becomes competent to stand trial.

ORIGINAL

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Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

2. Pursuant to CrR 3.3, the time for trial in the above-entitled matter is tolled until such time as the defendant is found competent to stand trial.

3. If the defendant does not object, psychotropic medication may be administered to the defendant as deemed clinically appropriate by the staff of Western State Hospital.

[✓] Clinically appropriate psychotropic medications may also be administered against the defendant's will if necessary.

4. The King County Department of Adult and Juvenile Detention shall transport the defendant to Western State Hospital and shall return him/her to the King County Jail at such time as he/she becomes competent and is discharged or the restoration period has elapsed. Any facility providing inpatient services related to competency shall discharge the defendant as soon as the facility determines that the defendant is competent to stand trial. Discharge shall not be postponed during the writing and distribution of the evaluation report.

5. If the defendant is returned to the King County Jail for any reason prior to the end of the restoration period, Western State Hospital shall notify the chief criminal judge and counsel for both parties within 24 hours of the defendant's return. If the defendant is returned to the King County Jail, the Jail must continue the medication regimen prescribed by the facility, when clinically appropriate, unless the defendant refuses to cooperate with medication and there is no forced medication order in effect.

6. When the defendant regains competency, or at the end of the restoration period, a medical report shall be provided to the chief criminal judge of the court in which the criminal proceeding is pending, counsel for both parties, and the King County Jail Psychiatric Unit professional staff, setting forth the findings of the staff, detailing the defendant's present mental condition, and indicating whether the defendant is competent to enter a plea to the charges and to

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

stand trial and whether psychotropic medications will be required to assist the defendant to maintain competency.

7. If the report finds that the defendant remains incompetent, the report shall provide an opinion as to whether the defendant should be evaluated by a County Designated Mental Health Professional under RCW 71.05.

8. If the defendant is incompetent solely due to a developmental disability or the evaluator concludes that the defendant is not likely to regain competency, the report must include an assessment of the defendant's future dangerousness which is evidence-based regarding predictive validity.

9. At the end of the restoration period, if the defendant remains incompetent:

[ ] the defendant shall be returned to the custody of the King County Jail to be held pending further proceedings against the defendant.

[✓] all parties agree [ ] to waive the presence of the defendant or [✓] to the defendant's telephonic participation at a subsequent presentation of an agreed order if the recommendation of the evaluator is for continuation of the stay of criminal proceedings for restoration efforts, and the hearing is held prior to the expiration of the authorized commitment period.

The court grants the defendant one week to report to WSH.

This matter is next scheduled for court on the 30th day of April 2014 (This date must be prior to the expiration of the first 45 or 90 day restoration period). @ 8:30 AM in GA

DONE IN OPEN COURT this 10th day of March, 2014

JUDGE

JUDGE ELIZABETH BERNS

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

Presented by:

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
Cecchia Y. Gregson
Deputy Prosecuting Attorney, WSBA # 31439

Copy received, notice of presentation waived
and approved for entry by:

By: _____
Attorney for Defendant, WSBA # Lois Tricky 10952

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. BENJAMIN BRATTON, Appellant.	)	NO. 71651-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] BENJAMIN BRATTON 12508 LAKE CITY WAY NE #410 SEATTLE, WA 98125	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JULY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710