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NO. 70821-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY G. HERBERT,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Anthony Herbert accepted responsibility for his criminal conduct and has been confined for over two years. Despite his confinement, the State is pursuing any means to ensure a criminal sentence is entered against him—including forcing psychotropic drugs upon him. The State may only overcome his strong liberty, privacy and due process interest in being free from unwanted medication in rare circumstances. Yet, without sufficient showing of an important State interest, medical necessity or limited discretion, the trial court granted the State’s motion to medicate Mr. Herbert against his will. The order should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Herbert’s rights to liberty, privacy, due process, and to produce thoughts when it ordered the State could forcibly medicate him with antipsychotic drugs to restore competency.
2. The trial court erred in finding important the State’s interest in medicating Mr. Herbert for sentencing.
3. The trial court erred in finding forced medication necessary.

4. The trial court erred in failing to consider less-invasive alternatives to the forced administration of psychotropic drugs.

5. The trial court erred in failing to limit the duration of the forced administration of psychotropic drugs.

6. The trial court erred in failing to limit dosages of the antipsychotic medication.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Forcing a person awaiting sentencing to submit to involuntarily administered antipsychotic medications is a massive intrusion upon the person's liberty and privacy, and potentially impairs the accused's right to fair proceedings due to side effects of the medication. The State may not forcibly administer antipsychotic medications unless it proves by clear and convincing evidence that such medication is medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary to further important governmental trial-related interests. Should the forced medication order be reversed where the State's interest was diminished, the absence of less-intrusive alternatives or medical necessity was not proved, and the court failed to set limits on the treating physicians' discretion?

D. STATEMENT OF THE CASE

Held in custody, Mr. Herbert was charged with one count of felony violation of a court order in November 2011. CP 1-2. He was found competent to stand trial and competent to plead guilty in early 2012. CP 13-14. Later that year, he pled guilty to a second amended information charging witness tampering and several misdemeanor counts (violation of a court order, third degree malicious mischief, assault in the fourth degree, interfering with domestic violence reporting, and failure to register as a sex offender). CP ___ (sub # 90-92).¹ The statutory maximum for the felony count is 60 months, but the State recommended a lesser sentence of 50 months. CP ___ (Presentence Statement (sub 94)). Mr. Herbert intends to seek a drug offender sentencing alternative sentence (DOSAS), which would require only half the sentence be served in prison with the remainder occurring under community custody. Vol. VII RP 47; *see* RCW 9.94A.660; RCW 9.94A.662.

A pre-sentencing competency evaluation was ordered, and Mr. Herbert was found incompetent. CP 22-37. He was committed to

¹ A supplemental designation of clerk's papers has been filed asking the trial court to transfer to this Court all documents referred to herein by subfolder number.

Western State Hospital for restoration. CP 34-37. While committed, Mr. Herbert took zyprexa but complained of side effects and that the medications “don’t do any good;” he asked to consult with his doctor about alternatives and the side effects. Exhibits 1, 4-6, 8, 12, 15. He eventually stopped taking zyprexa but told nurses he was willing to consider medication if he could talk with someone about the side effects and alternatives, such as seroquel and lithium. Exhibits 7, 8, 13, 14, 17; *see* Exhibit 12; *see also* Exhibit 16 (jail health services advises Herbert to “continue not to take any psychiatric medications” as he appears able to function without them). Three months later he was again found incompetent and returned for restoration. CP 39-42.

After Mr. Herbert had been in custody almost two years, the State moved for an order to have Mr. Herbert forcibly medicated. CP 45-58. At the hearing, the State presented the testimony of Dr. Nipin Karnik in support of forcibly administering antipsychotic drugs to Mr. Herbert. Vol. VII RP 7. He testified Mr. Herbert presented with a mood and thought disorder, the particular diagnosis of which was not “critical” because he was basing treatment off the symptoms alone. Vol. VII RP 10-11. Dr. Karnik stated zyprexa is a broad spectrum antipsychotic medication that treats thought disorder and stabilizes

mood. Vol. VII RP 11-12. If well managed, Dr. Karnik opined zyprexa would improve Mr. Herbert's competency and not interfere with it. Vol. VII RP 27. He also recommended haldol. Vol. VII RP 27-28. According to Dr. Karnik, these medications would "improve or – or address the symptoms that are currently interfering with Mr. Herbert's competency" and are medically appropriate due to FDA approval. Vol. VII RP 29. With regard to less intrusive treatment options, Dr. Karnik simply testified he "didn't believe" any less intrusive treatment would be likely to restore Mr. Herbert's competency. Vol. VII RP 30. On cross-examination, Dr. Karnik conceded he had not looked beyond Mr. Herbert's jail and Western State Hospital records, he had not consulted with Mr. Herbert about the medications, and that zyprexa can interfere with other medication Mr. Herbert was taking. Vol. VII RP 31, 33-35; *see* Vol. VII RP 10 (Karnik only recently received jail records, which did not form basis for diagnosis and recommendations).

The trial court ordered Mr. Herbert forcibly medicated with zyprexa or haldol. CP 43. The order includes no time or dosage limitation, but does require blood testing and monitoring to ensure (an unspecified) proper dosage. CP 43.

E. ARGUMENT

The trial court violated Mr. Herbert’s constitutional right to bodily integrity and the right to fair proceedings by ordering him forcibly medicated without sufficient showing the State met its substantial burden.

1. Ordering the involuntary administration of antipsychotic medications is a massive curtailment of liberty.

All persons accused of a crime possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.” *Washington v. Harper*, 494 U.S. 210, 221-22, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990); U.S. Const. amend. XIV; Const. art. I, §§ 3, 7. Involuntary medications interfere with an individual’s rights to privacy, to liberty, to produce ideas and to a fair trial free of undesired side effects caused by antipsychotic medications. *Riggins v. Nevada*, 504 U.S. 127, 137, 112 S. Ct. 810, 118 L. Ed. 2d 479 (1992); *State v. Adams*, 77 Wn. App. 50, 55-56, 888 P.2d 1207, *review denied*, 126 Wn.2d 1016 (1995); U.S. Const. amends. I, V, VI, XIV; Const. art. I, §§ 3, 5, 7, 22.

As the Supreme Court observed, the side effects of forced medications may impact “not just [an accused’s] outward appearance, but also the content of his testimony on direct or cross examination, his

ability to follow the proceedings, or the substance of his communication with counsel.” *Riggins*, 504 U.S. at 137. Consequently, the record must show “that administration of antipsychotic medication was necessary to accomplish an essential state policy.” *Id.* at 138.

The involuntary administration of drugs “solely for trial competence” purposes may occur only in “rare” instances. *Sell v. United States*, 539 U.S. 166, 180, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). Such orders are disfavored. *United States v. Rivera-Guerro*, 426 F.3d 1130, 1137 (9th Cir. 2005). In *Sell*, the court ruled that the rare instance when forced medication is permitted for purposes of trial competence arises only after the State has proven: (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) “that administration of the drugs is medically appropriate.” 539 U.S. at 180-83 (emphases in original).

Where the State seeks to forcibly medicate a person in order to stand trial, “[t]he State bears the burden of proving each element justifying involuntary medication by clear, cogent, and convincing

evidence.” *State v. Hernandez-Ramirez*, 129 Wn. App. 504, 512, 119 P.3d 880 (2005). “[I]n light of the importance of judicial balancing, and the implication of deep-rooted constitutional rights, a court that is asked to approve involuntary medication must be provided with a complete and reliable medically-informed record, based in part on independent medical evaluations, before it can reach a constitutionally balanced *Sell* determination.” *Rivera-Guerro*, 426 F.3d at 1137.

2. The State’s interest is minimal where Mr. Herbert had already pled guilty and served half of his likely sentence.

The State must prove by clear, cogent, and convincing evidence that involuntary medication will significantly further its important interests and is necessary to further those interests. *Sell*, 539 U.S. at 180-83. The State’s interest in bringing to trial an individual accused of a serious crime is generally considered important. *Id.* at 180. But the court must consider the specific circumstances of the individual case in evaluating the importance of the State’s interest. *Id.* For example, the State’s interest may be lessened where civil commitment is available. *Sell*, 539 U.S. at 180. Likewise, the State’s interest diminishes where the accused has already been held for a significant amount of time. *Id.*

The State's interest here was certainly diminished. Mr. Herbert had pled guilty to the underlying offenses. *E.g.*, CP __ (sub # 91-92). The State had no interest in bringing him to trial. The State's interest in sentencing Mr. Herbert, post-conviction, is all that is at stake. Moreover, Mr. Herbert faces a maximum 60-month sentence, and the State proposed a 50-month term of incarceration. CP __ (Presentence Statement (sub 94)). Mr. Herbert had already spent almost two years in custody. Vol. VII RP 47.² If the defense-proposed drug-offender sentencing alternative (DOSA) is accepted, Mr. Herbert would have completed his period of incarceration. *See* Vol. VII RP 47. This also lessens the State's interest in sentencing. *See Sell*, 539 U.S. at 180, 186. Further, during the time in which Mr. Herbert is confined, the likelihood of future crimes is greatly reduced. *See id.* The trial court erred in ordering Mr. Herbert forcibly medicated where the State's interest is not significant. In fact, the court did not even consider these mitigating circumstances in finding the State's interest important. *See* CP 43; Vol. VII RP 56-57.

² Mr. Herbert would receive credit toward his sentence for time served confined at Western State Hospital. *See Sell*, 539 U.S. at 186.

3. The State did not prove that forcible medication was necessary over other less-intrusive means of restoring competency.

Before resorting to the involuntary administration of drugs, “[t]he court must conclude that any less intrusive treatments are unlikely to achieve substantially the same results.” *Sell*, 539 U.S. at 181. Forcible medication must be necessary to be appropriate. In *Sell*, the Court explained that even if the government requests an order on *Sell* grounds, a judge should “ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.” *Id.* at 182.³ The requirement is not onerous, but it is straight forward: “prior to undertaking the *Sell* inquiry, a [trial] court should make a specific determination on the record that no other basis for forcibly administering medication is reasonably available.” *United States v. Hernandez-Vasquez*, 513 F.3d 908, 914 (9th Cir. 2008). If the trial court “does not conduct a dangerousness inquiry under *Harper*, it should state for the record why it is not doing so.” *Id.*

³ The procedures set forth in *Harper* evaluate whether involuntary medication is justified based on a mental illness rendering the defendant gravely disabled or dangerous to himself or others. 494 U.S. at 210. The evidence here shows Mr. Herbert discussed harming himself and may have threatened staff. *E.g.*, Vol. VII RP 11, 12-13; Exhibits 2, 5.

These prerequisites are critical because the medical opinions required for a *Sell* inquiry are subjective, multi-faceted and complex. *Hernandez-Vasquez*, 513 F.3d at 915 (citing *Sell*, 539 U.S. at 182). The inquiry should not be made unless absolutely necessary. “A defendant’s liberty interest in avoiding unnecessary involuntary medication is too important to allow for situations in which the Court is asked to undertake the more error-prone analysis for what may be arbitrary or tactical reasons.” *Id.* Nevertheless, the State presented no such evidence and the court made no such inquiry here. *See id.* at 914-915 (excusing court’s neglect in failing to examine alternatives only because parties agreed to proceed directly to *Sell* inquiry).

Also, “the 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.” *Sell*, 539 U.S. at 181; *see Hernandez-Ramirez*, 129 Wn. App. at 511. Even if the State properly showed that medication was necessary, it failed to sustain its burden that such medication had to be forcibly injected into Mr. Herbert’s body. Instead, the defense showed that Mr. Herbert took zyprexa previously without incident. Exhibit 2 (“He was cooperative with staff. He ate his dinner and snack and took his evening

medications without any problem.”); Exhibit 4 (showing same); Exhibit 3 (showing same for later date); Exhibit 12 (showing compliance with generic of zyprexa for most of July 19-31, 2013); *see* Exhibit 1 at 5 (prescribing zyprexa); Vol. VII RP 42-43. Moreover, Mr. Herbert wanted to participate in medication decisions. Exhibits 6-8, 13, 15-16. He stopped taking zyprexa over concern for the side effects, wanting to consult with his doctor about alternatives. *E.g.*, Exhibits 13-15; *see* Exhibit 17. But Dr. Karnik testified he had not even consulted with Mr. Herbert about the side effects of the medications for which he advocated, particularly zyprexa. Vol. VII RP 31, 33-34. The State failed to show why a forcible medication order was necessary over other, less-restrictive orders, including consulting with Mr. Herbert to determine a best course forward or even threatening the imposition of contempt. *See Sell*, 539 U.S. at 181 (suggesting such an order as less intrusive than forcibly administering medication); *Hernandez-Ramirez*, 129 Wn. App. at 512 (court correctly concluded that less intrusive means would not be effective where defendant denied disorder and consistently refused any medications).

4. The order exceeds the bounds of decency by lacking critical limitations.

Additionally, “to pass muster under *Sell*,” the court must specifically authorize certain medications for a limited period of time. *Hernandez-Vasquez*, 513 F.3d at 911, 916. First, the court must specify the maximum dosages that may be administered. *Id.*; see *United States v. Chavez*, 734 F.3d 1247, 1252-53 (10th Cir. 2013) (vacating order where it fails to specify maximum dosages and discussing case law from other circuits requiring similar specificity). Such specificity is required because the court may not “simply delegate unrestricted authority to physicians” in the context of competency restoration. *Hernandez-Vasquez*, 513 F.3d at 917; see also RCW 71.05.217(7) (prohibits involuntary administration of antipsychotic drugs unless ordered after judicial hearing and “specific findings of fact” entered on mandatory criteria). Dr. Karnik recognized that under the requested order he could, and at times does, exceed the “FDA approved doses.” Vol. VII RP 24. While the court ordered blood test monitoring “to ensure proper dosage,” it set no limitation or indicator as to what would constitute a proper dosage. See CP 43.

Second, the trial court must set “the duration of time that involuntary treatment of the defendant may continue before the treating

physicians are required to report back to the court on the defendant's mental condition and progress.” *Hernandez-Vasquez*, 513 F.3d at 911, 917. Here again, the court failed to comply with the procedures required to secure Mr. Herbert’s constitutional rights. The court’s forcible medication order sets no limit on the timeframe during which such medications can be administered. CP 43. There is no requirement that the State or treating physicians report back to the court. CP 43.

These deficiencies in the court’s order, and in the State’s proof, constitute a further intrusion on Mr. Herbert’s rights to autonomy, to bodily integrity, to produce thoughts and, ultimately, to fair sentencing. Like the Circuit Court in *Hernandez-Vasquez*, this Court should reverse the *Sell* order because it too broadly delegates authority to intrude on Mr. Herbert’s critical constitutional interests. *See Hernandez-Vasquez*, 513 F.3d at 917.

5. On any one or more of these grounds, the forcible medication order should be reversed.

Either standing alone or in conjunction, these errors render deficient the order subjecting Mr. Herbert to forcible medication. *See* CP 43. Our courts have made clear that a person’s autonomy shall only be intruded on through forced antipsychotic medications in rare circumstances. In light of the critical interests at stake, the State must

be held to its high burden of clear, cogent and convincing evidence and the trial court must comply with the strictures set forth in *Sell* and its progeny. This court should reverse the forcible medication order.

F. CONCLUSION

The State failed to meet its high burden to demonstrate Mr. Herbert's rights to autonomy and to fair proceedings should be invaded by a forcible medication order. The erroneously imposed order should be reversed.

DATED this 13th day of February, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70821-0-I
)	
ANTHONY HERBERT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF FEBRUARY, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JANUARY, 2014.

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