

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LYONS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State concedes the trial court's order authorizing involuntary medication should be reversed.

In its response, the State concedes that reversal of the trial court's order is required because the order does not satisfy the requirements of *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). Resp. Br. at 25. It agrees with Mr. Lyons that the order must be vacated because the trial court failed to limit the hospital's discretion in administering the medication. Resp. Br. at 24; *see also* Op. Br. at 23-25.

In addition, the State argues the trial court's findings were not sufficiently specific to permit meaningful review as to whether the medications were "substantially likely" to render Mr. Lyons competent to stand trial. Resp. Br. at 24; *In re Detention of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986). In doing so, it acknowledges it is unclear how the trial court determined that forced medication was "substantially likely" to render Mr. Lyons competent to stand trial, given the State's evidence indicating there was only a forty percent chance Mr. Lyons would respond to treatment. Resp. Br. at 22 (citing cases that indicate that a seventy percent chance is sufficient but "simply more than a 50 percent chance of success" is not).

The State does not assert there was sufficient evidence at trial to prove two of the four *Sell* factors: (1) that the medication was substantially likely to render Mr. Lyons competent to stand trial or (2) that forcibly medicating Mr. Lyons was medically appropriate. *Sell* 539 U.S. at 180-81; Resp. Br. at 18-25. Instead, it argues that reversal of the order is required due to inadequate findings and remand is unnecessary, given that the case is moot. Resp. Br. at 24.

As explained in Mr. Lyons' opening brief, the State did not meet its burden to prove three of the four *Sell* factors, and reversal is required. Op. Br. at 19.

2. Mr. Lyons' due process rights were violated when the trial court denied him the opportunity to present his defense and develop a complete and reliable record.

Sell orders are disfavored, and the court must take seriously its obligation to ensure the record has been developed accurately and completely before issuing such an order. *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005). The trial court failed in upholding this obligation to Mr. Lyons when it denied his request for more time to present expert testimony in his defense. RP 113.

The State argues the trial court acted properly first, because defense counsel was not able to articulate what evidence her expert

would provide, and second, because Mr. Lyons did not file a motion to reconsider despite the court's instruction that he could do so. Resp. Br. at 18. The State's first claim misrepresents the record, and its second claim is irrelevant to the issue at hand.

- a. Defense counsel provided all of the relevant information to the court when requesting additional time to present an expert witness in Mr. Lyons' defense.

The State concedes, as it must, that “[a]n involuntary medication order should only be issued after both sides have had a fair opportunity to present their case and develop a complete and reliable record.”

Resp. Br. at 11. Despite this concession, the State argues it did not violate Mr. Lyons' right to Due Process to deny him the opportunity to present expert testimony because defense counsel was “unable to outline in relevant detail the additional testimony that the expert would present.” Resp. Br. at 12; *see also* Resp. Br. at 4, 18. This claim is incorrect.

Prior to the hearing, defense counsel immediately informed the court she was unprepared to proceed because she had received nothing more from the State other than a form letter. RP 5. No petition was filed and the State refused to provide her with the relevant discovery, forcing her to obtain the medical records from Western State Hospital

by subpoena. RP 8-10. She explained to the court that because of these obstacles, she had been unable to consult with an expert prior to the hearing. RP 8.

The court ordered the hearing to proceed despite defense counsel's representations, telling both parties that it would reevaluate the situation after the State's presentation of evidence. RP 13. At the conclusion of the State's evidence, just one day later, Mr. Lyons renewed his request for additional time to obtain an expert witness. RP 102. At that time, defense counsel explained that she had already consulted with a potential expert and that she expected he would evaluate Mr. Lyons and offer an opinion as to whether Mr. Lyons should be forcibly medicated. RP 104. In other words, she anticipated this expert would refute the State's testimony.

Contrary to the State's suggestion, the court did not reject Mr. Lyons' request because defense counsel lacked the ability to provide an outline of the expert's expected testimony. Instead, the court rejected Mr. Lyons' request because it determined that regardless of what the defense expert testified, it would adopt the State expert's opinion. RP 109-10.

The State endorses the trial court's view that this conclusion was valid because the court was only being asked to decide a "matter of law" rather than a "factual question." RP 16. As explained in Mr. Lyons' opening brief, this argument fails to appreciate the State's burden at a *Sell* hearing and the significant constitutional interest at stake for the individual. *Sell*, 539 U.S. at 180; *Rivera-Guerrero*, 426 F.3d at 1137. The State does not meet its burden simply by providing an expert's conclusory testimony in support of its position, and the defense was entitled to its own expert to proffer a relevant opinion. *In re Detention of Schouler*, 106 Wn.2d 512, 723 P.2d 1103 (1986). Due process is violated where the court refuses to hear from a defense expert simply because it has preemptively decided it wishes to adopt the opinion provided by the State's expert. *See* RP 109-10.

The State attempts to distinguish this case from *Schouler*, but in doing so it relies on facts very similar to those presented here. 106 Wn.2d at 550; Resp. Br. at 14. Like in *Schouler*, Mr. Lyons' defense counsel had minimal time to prepare for the hearing and no opportunity to select a defense expert to testify. 106 Wn.2d at 512. While defense counsel was eventually able to obtain the medical records, the State refused to provide discovery and she only received them in response to

her own subpoena shortly before trial. Similarly, the State's suggestion that defense counsel had the opportunity to speak with the State's expert is disingenuous, as the State did not dispute below that it had only offered defense counsel this opportunity immediately preceding the hearing. RP 4; Resp. Br. at 15. Finally, the State's suggestion that defense counsel could have anticipated the State would eventually seek a *Sell* order in Mr. Lyons' case has no bearing on whether defense counsel had the opportunity to prepare once that order was actually sought. *See* Resp. Br. at 14.

In addition, the State claims, without citation to authority, that the opportunity to cross-examination the State's expert is a sufficient substitute for a defense expert. Resp. Br. at 16. This argument is contrary to *Schuloer* and *Rivera-Guerrero* and should be rejected. *Schuloer*, 106 Wn.2d at 513; *Rivera-Guerrero*, 426 F.3d at 1143.

- b. Mr. Lyons was not obligated to file a motion to reconsider in the trial court and properly sought review in this Court, which this Court granted.

Six days after the hearing, the parties reconvened for the court's ruling. RP 115. After the court issued its oral ruling ordering Mr. Lyons be medicated against his will, defense counsel offered that, had her earlier motion been granted, she would have presented expert

testimony from Dr. Brent O'Neill, a psychologist who works at Harborview Medical Center and Special Commitment Center. RP 127. In response, the court invited Mr. Lyons to file a motion for reconsideration. RP 127. Mr. Lyons elected instead to seek discretionary review in this Court, which the Commissioner granted. Ruling Denying State's Mot. to Dismiss. Mot. for Dis. Rev. and Granting Rev. at 17.

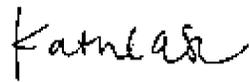
The State claims that the trial court did not err because it told Mr. Lyons to file a motion to reconsider and Mr. Lyons elected not to do so. Resp. Br. at 18. However, Mr. Lyons was free to seek discretionary review in this Court, and the fact that he chose to appeal to this Court rather than file a motion to reconsider in the trial court has no bearing on whether the trial court violated Mr. Lyons's right to Due Process. RAP 2.3. This Court should reverse.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse the trial court's order authorizing involuntary medication.

DATED this 16th day of September, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen".

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

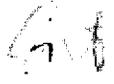
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Respondent,)	
)	NO. 47231-7-II
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)	
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)	
Appellant.)	

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