

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No.: KEN-16-141

Ismail Mohamed Awad
APPELLANT/DEFENDANT

v.

STATE OF MAINE
APPELLEE

ON APPEAL FROM THE
KENNEBEC COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT ISMAIL MOHAMED AWAD

Scott F. Hess, Esq., BBO # 4508
The Law Office of Scott F. Hess, LLC
72 Winthrop Street
Augusta, ME 04330
Tel: (207) 430-8079

RECEIVED

JUL 05 2016

Clerk's Office
Maine Supreme Judicial Court

Table of Contents.....i

Table of Authorities.....ii

Issues Presented for Review.....1

Reply.....1

I. The trial court is required to consider *Harper* grounds as a prerequisite for authorizing forcible medication under *Sell*, and such grounds were not pursued by the State.....1

II. The trial court is required to enter an order that specifies the maximum dosages and the specific medications that may be administered.....5

Conclusion.....10

Certificate of Service.....11

Table of Authorities

Supreme Court Cases

<i>Sell v. United States</i> , 539 U.S. 166 (2003).....	1, 4, 5, 7, 10
<i>Washington v. Harper</i> , 494 U.S. 210 (1990).....	3

Other Federal Cases

<i>United States v. Bush</i> , 585 U.S. 806 (4th Cir. 2009)	6, 7, 8
<i>United States v. Chaves</i> , 734 F.3d 1247 (10th Cir. 2013).....	9
<i>United States v. Diaz</i> , 630 F.3d 1314 (11th Cir. 2011).....	8
<i>United States v. Evans</i> , 404 F.3d 227 (4th Cir. 2005)	6
<i>United States v. Grape</i> , 549 F.3d 591, 594 (3rd Cir. 2008).....	8
<i>United States v. Hernandez-Vasquez</i> , 513 F.3d 908 (2007)	8
<i>United States v. Palmer</i> , 507 F.3d 300, 301 (5th Cir. 2007).....	8

Maine State Statutes

15 M.R.S. § 106 (2015)	5, 10
------------------------------	-------

Statement of issues in reply to Appellee's brief

- I. Is the trial court required to consider Harper grounds as a prerequisite for authorizing forcible medication under Sell and were such grounds considered?
- II. Is the trial court required to enter an order that specifies the maximum dosages and the specific medications that may be administered?

Reply

- I. The trial court is required to consider *Harper* grounds as a prerequisite for authorizing forcible medication under *Sell*, and such grounds were not pursued by the State.

In response to Mr. Awad's argument that the Court had not complied with *Sell's* directive to consider "*Harper*-type" grounds prior to issuing an order involuntarily medicating a defendant, the State argues, *inter alia*, that DHHS did pursue alternative grounds in the form of a guardianship, and that pursuing alternative grounds to medicate Mr. Awad would "defeat" the purpose of his admission to Riverview. *Red Brief* at 40, 41.

In *Sell*, the Supreme Court of the United States stated that:

If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial

competence purposes. At the least, they will facilitate direct medical and legal focus upon such questions as: why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who **(1) is not dangerous and (2) is competent to make up his own mind about treatment?** Can bringing such an individual to trial alone justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial? **We consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, 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.**

Sell v. United States, 539 U.S. at 188. (emphasis added.)

As a preliminary matter, the State asserts that “[t]he trial court was informed during the hearing that Riverview applied for appointment of a guardian prior to the *Sell* hearing; however, as Ms. Davidson testified, that application was denied.” *Red Brief* at 39. The record, in fact, reflects that at no time was there any application for a guardianship. That interpretation of the record is factually inaccurate. Ms. Davidson testified that DHHS made a conscious decision not to pursue a guardianship because “...[DHHS] felt the cell (sic) hearing was less intrusive than a guardianship and, therefore, that should be pursued **first.**” (Tr. at 125.) (emphasis added). There is no evidence that DHHS

ever formally pursued a guardianship, much rather that they were denied a guardianship by a court. This decision making runs contrary to the directive issued by the United States Supreme Court.

Second, the State essentially argues that, despite there possibly being *Harper* type grounds to medicate Mr. Awad, “pursuing forced medication for *Harper* reasons would defeat the purpose of his court order admission to Riverview in addition to the significant state interests the State (sic) in rendering Mr. Awad competent to proceed to trial.” *Red Brief* at 41.

The purpose of Mr. Awad’s admission to Riverview is to make him competent to stand trial. It is illogical to argue that exploring other, more legally appropriate grounds, to medicate Mr. Awad somehow would defeat the purpose of his admission or lessen the State’s interest. In addition, whether the State agrees with this directive or not, it is a mandate by the Supreme Court.

In addition, the record provides ample indications that Mr. Awad may otherwise qualify for a guardian or that other grounds exist to forcibly medicate him. First, there are numerous references to Mr. Awad engaging in assaultive behaviors. Since the Riverview assault where Mr.

Awad was charged, there were at least three to four other assaults and he has engaged in acts of throwing objects at people. (Tr. I at 119.) Second, Mr. Awad appears to be incompetent in general, which would be a factor a probate court could consider in guardianship proceedings. He has been observed urinating in cups in his room (Tr. I at 148), defecating on his pillow (Tr. I at 45), and generally is not able to effectively communicate in a meaningful way for any period of time according to the forensic evaluations. Yet, DHHS appears to want to pursue forcible medication pursuant to a *Sell* decision, rather than on more appropriate grounds.

Court authorization under *Sell* should only be sought when there are no other grounds available to do so in those rare instances where a defendant is not dangerous and otherwise competent to make medication decisions. *Sell*, 539 U.S. at 188. These alternate grounds must first be pursued by the State, because forcibly medicating a non-violent defendant only to render them competent to stand trial is an extreme invasion of a person's liberty interests.

What is particularly disturbing in this case is that DHHS and the State sought court authorization to forcibly medicate Mr. Awad through

a *Sell* hearing as their first judicial resort, not the last resort. This approach is contrary to the letter and spirit of the *Sell* decision, and should be rejected. Clear judicial affirmation of the holding in *Sell* will not only result in Mr. Awad's constitutional rights being respected, but will also encourage early judicial intervention in cases where there may be appropriate grounds to medicate a patient, rather than waiting for a *Sell* hearing to be commenced. Accordingly, the trial court was required to first explore alternative legal grounds that may exist to allow Mr. Awad to be medicated.

II. The trial court is required to enter an order that specifies the maximum dosages and the specific medications that may be administered.

Contrary to the State's argument, specially outlining maximum dosages and medications that may be administered to a defendant is an implicit requirement of *Sell*. The State argues that detailed requirement as to the type of medication and their maximum dosages is not required by *Sell*. Moreover, the State implies that 15 M.R.S.A. § 106 would be the controlling legal authority on this point.

In its brief the State argues that "Appellate courts have considered the issue on matters arising from *Sell* authority have concluded that

'[e]xact precision in stating a dosage range is not necessary, so long as the government provides a reasonable range to allow medical providers the ability to adapt treatment to fit the 'often vagarious bodily and physical responses to medical treatment.'" *Bush*, 585 F. 3d at 817, quoting *United State v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005)." *Red Brief* at 36.

The relevant portion of the *Bush* opinion states that:

In *Evans*, we stated, "[F]or the district court even to assess whether involuntary medication is constitutionally permissible under Sell's second and fourth factors, the government must set forth the particular medication, including the dose range, it proposes to administer to [the defendant] to restore his competency." *Evans*, 404 F.3d at 241. As we explained, "To approve of a treatment plan without knowing the proposed medication and dose range would give prison medical staff carte blanche to experiment with what might even be dangerous drugs or dangerously high dosages of otherwise safe drugs and would not give defense counsel and experts a meaningful ability to challenge the propriety of the proposed treatment." *Id.* We recognized, however, that exact precision in stating a dosage range is not necessary, so long as the government provides a reasonable range to allow medical providers the ability to adapt treatment to fit the "often vagarious bodily and psυχical responses to medical treatment." *Id.*

In this case, the government's treatment plan does not provide this information. It indicates only that whatever medication is chosen will be administered by injection every two weeks. Although the government report did indicate that only three medications were in consideration-Haldol Decanoate, Prolixin Decanoate or Enanthate, and Risperdal Consta-and that Risperdal Consta "would be preferable," it indicated that the final determination would be made

by the medical staff at FMC Carswell. The district court's order also did not guide or limit the medical staff's discretion.

Relegating these decisions, at least at a general level, to the medical staff contravenes our instructions in *Evans*, for without identification of the medication and dose range to be administered, the court and the defendant have little basis on which to assess the risks associated with treatment and to determine whether they are justified by the government's important interests.

United States v. Bush, 585 F.3d 806, 817 (4th Cir. 2009). Thus, the *Bush* case does not support the State's assertion as that court recognized that specific medications and a range of doses must be specified.

Here, the Court's order does not specify dosages or a range of dosages, nor does it identify any particular anti-psychotic medications that may be administered, or even the classes of medication. (A. at 47.) The weight of opinions of other jurisdictions have concluded that a reasonable degree of specificity is required to pass constitutional scrutiny. This is due in part, because at some point medicating with a larger dose of an otherwise safe drug, may lead to side effects that are dangerous and otherwise do not comport with *Sell*.

In determining the degree of specificity required in the order, this Court should also consider the qualifications of Ms. Davidson and Dr. Peter Donnelly. Despite the State's multiple citations to Dr. Donnelly's

testimony in their brief about the effects of medication on competency, Dr. Donnelly himself testified that he is not qualified to testify about whether medication would likely to render Mr. Awad competent, because that is outside of his area of expertise. (Tr. at 53.) Likewise, Ms. Davidson offered all sorts of opinions on whether medication would restore Mr. Awad's competency, despite not being qualified to even determine competency in the first place. (Tr. at 104.) Essentially, the State here has attempting to sew together one qualified expert opinion out of two unqualified expert opinions. It is on that testimony the trial court issued an order allowing Mr. Awad to be forcibly medicated.

In a significant number of the cases cited by the parties, the evidence presented to the Court came from a psychiatrist or qualified psychologist. A non-exhaustive list includes *United States v. Bush*, 585 F.3d 806, 811 (report received from psychiatrist); *United States v. Diaz*, 630 F.3d 1314, 1321 (11th Cir. 2011) (Gov't called Chief of Psychiatry); *United States v. Hernandez-Vasquez*, 513 F.3d 908, 916-17 (9th Cir. 2007) (court assumes that medications will be administered by a physician); *United States v. Grape*, 549 F.3d 591, 594 (3rd Cir. 2008) (Gov't called

Chief of Psychiatry); *United States v. Palmer*, 507 F.3d 300, 301 (5th Cir. 2007) (reports authored by psychiatrist considered by court).

What is particularly noteworthy is that in *United States v. Chavez*, 734 F.3d 1247, 1258 (10th Cir. 2013), the court considered the expertise of the witnesses in its analysis of the degree of specificity required in the order, stating:

While Sell does not explicitly identify what level of specificity is required in a court's order for involuntary medication, and we have not yet addressed this issue, the need for a high level of detail is plainly contemplated by the comprehensive findings Sell requires. This is particularly so where, as here, **there is no evidence in the record that a psychiatrist, who will be prescribing the drugs, has evaluated Mr. Chavez for purposes of determining whether it is appropriate to involuntarily medicate him.** (emphasis added).

In this case, the trial court did not receive testimony in support of the State's motion from a psychiatrist or psychologist qualified to opine on the specific of medications that might be administered to Mr. Awad. The court received testimony from a nurse practitioner, who is not qualified to testify about competency. Thus, assuming that it was not error to rely on such testimony in the first place as argued in the Appellant's blue brief, it was all the more important for the trial court to specify what medications, and at what dosages, were authorized based on the evidence.

Lastly, the adoption of 15 M.R.S.A. § 106 is not a substitute for the precedent set by *Sell*. The vast majority of courts have held that *Sell* necessarily requires a number of findings, such as the findings argued above. The State seems to argue that the adoption of 15 M.R.S.A. § 106 somehow negates the requirements set forth by that decision. As *Sell* is derived from the Supreme Court's interpretation of the 14th amendment, that decisions, not § 106, would control where there may be inconsistencies.

Conclusion

For the reasons stated above and in the Blue Brief, the Appellant respectfully requests that this Honorable Court vacate the trial court's order with instructions to proceed to a hearing to determine if Mr. Awad can be restored to competency without being forcibly medicated.

Respectfully Submitted,



Scott F. Hess, Esq., Bar No. 4508
Law Office of Scott F. Hess, LLC
Attorney for Appellant
72 Winthrop Street
Augusta, Maine 04330

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on July 5, 2016, I caused to be served upon all parties, two conformed copies of the Brief of the Appellant by delivering said copies to:

Kate Marshall, Esq.
Kennebec County District Attorney's Office
95 State Street
Augusta, ME 04330

Dated: July 5, 2016



Scott F. Hess, Esq., Bar No. 4508