

**NO. 12-11-00188-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

<i>THE STATE OF TEXAS</i>	§	<i>APPEAL FROM THE</i>
<i>FOR THE BEST INTEREST</i>	§	<i>COUNTY COURT AT LAW</i>
<i>AND PROTECTION OF K.M.E.</i>	§	<i>CHEROKEE COUNTY, TEXAS</i>

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***MEMORANDUM OPINION***

K.M.E. appeals from an order authorizing the administration of psychoactive medication-forensic. In two issues, K.M.E. argues that the trial court erred in granting the order based upon the United States Supreme Court's opinion in *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), and that the order violated her right to equal protection under the Texas Constitution and the Fourteenth Amendment to the United States Constitution. We affirm.

**BACKGROUND**

On June 8, 2011, an application for an order to administer psychoactive medication-forensic was filed by Dr. Satyajeet Lahiri. In the application, Lahiri stated that K.M.E. was subject to an order dated June 6 for court ordered inpatient mental health services under Chapter 46B of the Texas Code of Criminal Procedure because she had been found incompetent to stand trial. Lahiri stated that K.M.E. had been diagnosed with schizophrenia, paranoid. Lahiri wanted the trial court to compel K.M.E. to take eight psychoactive medications. Lahiri stated further that K.M.E., verbally or by other indication, refused to take the medications voluntarily, and that he believed K.M.E. lacked the capacity to make a decision regarding administration of psychoactive medications because she was acutely psychotic with persecutory delusions and impaired reality testing.

Lahiri determined that the proposed medications were the proper course of treatment for K.M.E. and that if she were treated with the medications, her prognosis would be fair, with restoration of competency. However, Lahiri believed that if K.M.E. was not administered the medications, the consequences would be poor with no clinical improvement. Lahiri considered other medical alternatives to psychoactive medication, but determined that those alternatives would not be as effective. He also considered less intrusive treatments likely to secure K.M.E.'s agreement to take the psychoactive medications. Finally, Lahiri believed that the benefits of the psychoactive medications outweighed the risks in relation to present medical treatment and K.M.E.'s best interest.

On June 14, the trial court held a hearing on the application. Lahiri testified he completed the application for an order to administer psychoactive medication-forensic and swore that all the statements in the application were true and correct. His testimony included the facts stated in the application. Lahiri also stated that he understood K.M.E. was charged with the third degree felony offense of retaliation. On cross examination, Lahiri testified that K.M.E. told him she had religious and constitutional objections to taking medications. He did not know K.M.E.'s religious faith and she did not elaborate on her constitutional objections.

K.M.E. testified that she understood the purpose of the hearing. She believed that taking psychotropic medications for a psychological condition invalidated her as a witness in her pending parallel lawsuit. K.M.E. testified that she "was assaulted until [she] had a stroke, and it caused memory impairment." She testified that she had never been diagnosed with any kind of mental disorder or been forced to take medications. She stated that this was "quite preposterous, a hate crime." K.M.E. claimed that "they" want to invalidate her and her point of view and keep her separate from her family. She stated that she refused to take the medications for religious reasons because she is a Christian polytheist. Further, K.M.E. testified that she also refused to take the medications on constitutional grounds, stating that the "rights of an individual in this country are to protect them from the tyranny of a group."

On cross examination, K.M.E. stated that she did not have a history of mental illness nor had she ever been diagnosed with a mental disorder. She explained that she was hospitalized twice for psychiatric treatment because she was diagnosed with paranoia. According to K.M.E., she was "simply validated," and that it was the "function of a head injury."

After the hearing concluded, the trial court granted the application. On June 14, 2011, after considering all the evidence, including the application and the expert testimony, the trial court found that the allegations in the application were true and correct and supported by clear and convincing evidence. The trial court found that K.M.E. lacked the capacity to make a decision regarding administration of medications and that treatment with the proposed medication was in K.M.E.'s best interest. The trial court authorized the Texas Department of State Health Services to administer K.M.E. psychoactive medications. This appeal followed.

### **INVOLUNTARY ADMINISTRATION OF PSYCHOACTIVE MEDICATIONS**

In her first issue, K.M.E. argues that the trial court erred in granting the order authorizing administration of psychoactive medication-forensic. More specifically, K.M.E. contends that the evidence is legally and factually insufficient because the trial court's findings were inadequate. The State disagrees.

#### **Applicable Law**

Chapter 46B of the Texas Code of Criminal Procedure contains the provisions and procedures relating to a defendant charged with a felony or misdemeanor punishable by confinement who is, or may be, incompetent to stand trial. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.001-46B.171 (West 2006 & Supp. 2010). Article 46B.086 prescribes the procedures for a court in which criminal proceedings are pending to authorize psychoactive medications for a defendant who has been committed to a facility pursuant to Article 46B. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.086 (West Supp. 2010); *see also R.M. v. State*, No. 03-08-00317-CV, 2008 WL 4368544, at \*3 (Tex. App.–Austin Sept. 26, 2008, no pet.) (mem. op.). However, Article 46B.086 applies only to a defendant:

- (1) who is determined under this chapter to be incompetent to stand trial;
- (2) who . . .
  - (B) is committed to an inpatient mental health facility or a residential care facility for the purpose of competency restoration;
- (3) for whom a correctional facility that employs or contracts with a licensed psychiatrist, an inpatient mental health facility, a residential care facility, or an outpatient treatment program provider has prepared a continuity of care plan that requires the defendant to take psychoactive medications; and

(4) who, after a hearing held under Section 574.106, Health and Safety Code, if applicable, has been found not to meet the criteria prescribed by Sections 574.106(a) and (a-1), Health and Safety Code, for court-ordered administration of psychoactive medications.

TEX. CODE CRIM. PROC. ANN. art. 46B.086(a) (West Supp. 2010).

Article 46B.086 does not apply when a defendant meets the criteria under Section 574.106 of the health and safety code for court ordered administration of psychoactive medications. *See id.*; **R.M.**, 2008 WL 4368544, at \*4. Section 574.106 authorizes a trial court to issue an order for the administration of one or more classes of psychoactive medications to a patient who is under a court order to receive inpatient mental health services. TEX. HEALTH & SAFETY CODE ANN. § 574.106(a) (West 2010). The court may issue the order if it finds, by clear and convincing evidence, that (1) the patient lacks the capacity to make a decision regarding the administration of the proposed medication and (2) treatment with the proposed medication is in the best interest of the patient. *Id.* § 574.106(a-1)(1). Further, the court may issue the order if (1) the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, and (2) if the court finds, by clear and convincing evidence, (a) that treatment with the proposed medication is in the best interest of the patient and (b) the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect. *Id.* § 574.106(a-1)(2).

An individual has a constitutionally protected liberty interest in avoiding the involuntary administration of antipsychotic drugs. *Sell*, 539 U.S. at 178, 123 S. Ct. at 2183; *United States v. Leveck-Amirmokri*, No. EP-04-CR-0961-DB, 2005 WL 1009791, at \*3 (W.D. Tex. Mar. 10, 2005). The United States Constitution permits the government to involuntarily 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 [sic] to further important governmental trial-related interests.” *Sell*, 539 U.S. at 179, 123 S. Ct. at 2184. In applying the above standard, a court must (1) find that important governmental interests are at stake, (2) conclude that involuntary medication will significantly further those concomitant state interests, (3) conclude that involuntary medication is necessary to further those state interests, and (4) conclude that administration of the drugs is medically appropriate. *Id.*, 539 U.S. at 180-81, 123

S. Ct. at 2184-85. A court need not consider whether to allow forced medication for purposes of rendering the defendant competent to stand trial if forced medication is warranted for a different purpose, such as the defendant's dangerousness or where refusal to take drugs puts the defendant's health at risk. *Id.*, 539 U.S. at 181-82, 123 S. Ct. at 2185.

### **Danger to self or others**

Here, K.M.E. does not dispute that she is subject to Section 574.106, but argues that the language of Section 574.106(a-1)(2) required a finding that she presented a danger to herself or others in the inpatient mental health facility. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1)(2). Sections 574.106(a-1)(1) and 574.106(a-1)(2) provide alternative bases for court ordered administration of psychoactive medications. The trial court found, as required by Section 574.106(a-1)(1), that K.M.E. lacked the capacity to make a decision regarding administration of medications and that treatment with the proposed medication was in K.M.E.'s best interest. Because the trial court made the findings required by Section 574.106, there was no need to determine whether she presented a danger to herself or others as required by Section 574.106(a-1) (2). K.M.E.'s argument to the contrary is without merit.

### **Sell v. United States**

K.M.E. also contends that the trial court erred in granting the order based upon *Sell*. Initially, we again note that there is no evidence that K.M.E. was dangerous to herself or others. The trial court found that K.M.E. lacked the capacity to make a decision regarding administration of medications, not that she was a danger to herself or others. Further, the trial court also found that treatment with the proposed medication was in K.M.E.'s best interest, but there was no testimony or finding that her health was at risk if she did not take the proposed medications. Therefore, we conduct the four part analysis required by *Sell* to determine whether the involuntary administration of psychoactive drugs to K.M.E. to render her competent to stand trial was constitutionally permissible. *See id.*, 539 U.S. at 179, 123 S. Ct. at 2184.

#### *1. Whether important governmental interests are at stake*

The government's interest in bringing to trial an individual accused of a serious crime is important, whether the offense is a serious crime against persons or property. *See id.*, 539 U.S. at 180, 123 S. Ct. at 2184. Thus, the relevant question becomes what constitutes a "serious crime." *See United States v. Barajas-Torres*, No. CRIM.EP-03-CR-2011KC, 2004 WL 1598914, at \*2 (W.D. Tex. July 1, 2004). When addressing other constitutional issues, the United States

Supreme Court and the Texas Supreme Court have defined a “serious offense” as one for which a defendant may be sentenced to imprisonment for more than six months. *See Baldwin v. New York*, 399 U.S. 66, 69, 90 S. Ct. 1886, 1888, 26 L. Ed. 2d 437 (1970) (determining whether defendant had a right to a jury trial); *Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976) (determining whether relator had a right to a jury trial in a contempt hearing). Here, K.M.E. was charged with the offense of retaliation, a third degree felony. *See* TEX. PENAL CODE ANN. § 36.06(a), (c) (West 2011). The punishment range for a third degree felony is imprisonment for not less than two years and not more than ten years. *See* TEX. PENAL CODE ANN. § 12.34(a) (West 2011). Because K.M.E.’s potential punishment is more than six months of imprisonment, K.M.E. is charged with a “serious crime.” *See Baldwin*, 399 U.S. at 69, 90 S. Ct. at 1888; *Ex parte Werblud*, 536 S.W.2d at 547. Thus, we conclude that important governmental interests are at stake in involuntarily administering antipsychotic drugs to K.M.E. in order to render her competent to stand trial. *See Sell*, 539 U.S. at 179, 123 S. Ct. at 2184.

2. *Whether involuntary medication will significantly further those interests*

Involuntary medication will significantly further important governmental interests if administration of the drugs is substantially likely to render K.M.E. competent to stand trial and the drugs are substantially unlikely to produce side effects that will interfere significantly with K.M.E.’s ability to assist counsel in conducting a trial defense. *See Sell*, 539 U.S. at 181, 123 S. Ct. at 2184-85. Lahiri testified at the hearing that he believed K.M.E. needed psychoactive medications in order to improve, and that K.M.E. would regain her competency faster if medications were used. He testified that medications were “necessary” in order for K.M.E. to improve enough to be released. This evidence shows that administration of these medications was substantially likely to render K.M.E. competent to stand trial. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2184.

Lahiri testified that none of the requested medications would interfere with K.M.E.’s ability to communicate with her counsel. He believed that when K.M.E. is competent, she will be able to communicate better and that these medications will help her do so. Even though K.M.E. stated that she had an adverse reaction to a medication, she did not explain the reaction or whether it would adversely affect her ability to communicate with her counsel. Thus, the evidence shows that administration of these medications was substantially unlikely to have side effects that would interfere with K.M.E.’s ability to assist counsel in her defense. *See id.*, 539

U.S. at 181, 123 S. Ct. at 2185. Therefore, we conclude that involuntarily administering antipsychotic drugs to K.M.E. would significantly further important governmental interests. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2184.

3. *Whether involuntary medication is necessary to further those interests*

To conclude that involuntary medication is necessary to further those interests, we must determine that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2185. We must also consider whether there are less intrusive means for administering the drugs. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2185. Lahiri stated that he did not know of any less intrusive method that would lead to K.M.E.'s recovery that "would be practical." He also testified that he was unable to have a rational and informed discussion with K.M.E. about her mental illness or use of medications. He stated that K.M.E. was unable to weigh the risks and benefits of taking medications, was in complete denial of her illness, and from the start had refused to take medications. K.M.E. objected to taking medications for a condition that she did not have, and refused to acknowledge that she suffered from a "genetic disorder," because she knew "the cause [was] environmental." The evidence shows that any alternative, less intrusive treatments would be unlikely to achieve substantially the same results. Accordingly, we conclude that involuntarily administering antipsychotic drugs to K.M.E. is necessary to further those concomitant state interests. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2185.

4. *Whether administration of the drugs is medically appropriate*

To conclude that administration of the drugs is medically appropriate, we must determine that medication is in K.M.E.'s best medical interest in light of her medical condition. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2185. Lahiri testified that K.M.E. suffered from paranoid schizophrenia, and was acutely psychotic with persecutory delusions and impaired reality testing. He stated that the classifications of medications he requested to treat K.M.E.'s mental illness were in the proper course of treatment and in K.M.E.'s best interest. He stated that if these medications were used, the benefit to K.M.E. would outweigh the risks. The requested medications included an antidepressant, three antipsychotics, an anxiolytic/sedative/hypnotic, two mood stabilizers, and one miscellaneous drug. Again, Lahiri testified that medications were "necessary" in order for K.M.E. to improve enough to be released. Further, K.M.E. testified that she had an adverse reaction to a medication, but could not recall the type of medication. Nor did

she explain the adverse reaction other than stating that she felt it “shut down a brain receptor.” The evidence shows that these medications were in K.M.E.’s best interest, in the proper course of treatment, to abate symptoms of her mental illness, and her best chance of restoring her to competency. Thus, we conclude that involuntary administering antipsychotic drugs to K.M.E. is medically appropriate. *See id.*, 539 U.S. at 181, 123 S. Ct. at 2185.

### **Holding**

Based on the foregoing discussion, we conclude that the trial court was not required to find that K.M.E. was a danger to herself or others in the inpatient mental health facility. We conclude further that the State has satisfied the four elements of the *Sell* analysis. Therefore, involuntary administration of antipsychotic drugs to K.M.E. is constitutionally permissible. Accordingly, we overrule K.M.E.’s first issue.

### **CONSTITUTIONAL CLAIM**

In her second issue, K.M.E. contends that the trial court’s order violated her right to equal protection under the Texas Constitution and the Fourteenth Amendment to the United States Constitution. More specifically, she argues that a pretrial detainee enjoys the protection of *Sell* only if she has the capacity to make a medical decision, and that there is no basis to justify this unequal treatment and it is irrational. However, K.M.E. did not complain to the trial court that her state and federal constitutional rights to equal protection were being violated. A constitutional claim must have been asserted in the trial court to be raised on appeal. *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993). Therefore, K.M.E. has not preserved this complaint for review. Accordingly, we overrule K.M.E.’s second issue.

### **DISPOSITION**

The judgment of the trial court is *affirmed*.

**BRIAN HOYLE**

Justice

Opinion delivered November 23, 2011.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)