IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MARTIN WOLF, *Petitioner*,

v.

THE HONORABLE CHRISTOPHER L. KOTTKE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI, *Respondent Judge*,

STATE OF ARIZONA, *Real Party in Interest*.

No. 1 CA-SA 19-0200
FILED 2-27-2020

Petition for Special Action from the Superior Court in Yavapai County
Nos. V1300CR201980059
V1300CR201980060
The Honorable Christopher L. Kottke, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED

COUNSEL

Yavapai County Public Defender's Office, Camp Verde
By Ruth Szanto
Counsel for Petitioner

Yavapai County Attorney's Office, Prescott
By Larissa Parker
Counsel for Real Party in Interest

OPINION

Chief Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge Randall M. Howe and Judge David D. Weinzweig joined.

S W A N N, Chief Judge:

¶1 The petitioner in this special action is a criminal defendant who must be restored to competency before standing trial. The superior court determined that the charged offenses are sufficiently serious to justify forcible medication to restore competency. We accepted jurisdiction and granted relief. As a matter of law, the offenses at issue here are not "serious" within the meaning of *Sell v. United States*, 539 U.S. 166 (2003). The state's interest in prosecution therefore cannot override the petitioner's constitutional right to avoid the unwanted administration of medication.

FACTS AND PROCEDURAL HISTORY

¶2 Petitioner Martin Wolf is charged with four counts of aggravated harassment against his ex-wife and her husband based on his communications to them in violation of an order of protection or injunction against harassment. The superior court found Wolf mentally incompetent but restorable under Ariz. R. Crim. P. 11, and ordered him into the Restoration to Competency Program. Soon thereafter, the state moved for an order that Wolf be forcibly medicated for the purpose of restoring him to competency.

¶3 At a hearing on the motion, the state conceded that the charged offenses "aren't crimes of the century in terms of sentencing" and that Wolf's criminal history is limited to an unconfirmed decades-old conviction for disorderly conduct. The state argued, however, that the offenses are sufficiently serious to warrant forcible medication because some of them are domestic-violence offenses and they arose from a long-term, escalating pattern of conduct. Wolf responded that he already had been in custody for almost eight months for the low-level offenses, and that the offenses were premised on long-distance communications that did not threaten violence.

¶4 The court ordered that Wolf be involuntarily medicated, concluding, as relevant here, that his conduct was "[p]rotracted, and

potentially dangerous[,] . . . could result in consecutive sentences of one year, presumptively[, and, as d]omestic violence offenses[, created an] important government interest in reducing likelihood of repeat conduct and victimization in this matter where victims are known to Mr. Wolf."

¶5 Wolf petitioned for special-action relief. We accepted jurisdiction and granted relief in an order that specified a written decision would follow. This is that decision.[1]

JURISDICTION

¶6 We accepted special-action jurisdiction because Wolf's petition presented a question of law, his liberty was significantly restrained, and he had no equally plain, speedy and adequate remedy by appeal. *See Cotner v. Liwski*, 243 Ariz. 188, 192, ¶ 7 (App. 2017).

DISCUSSION

¶7 "[A]n individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Sell*, 539 U.S. at 178 (citation and internal quotation marks omitted). But in rare instances, the individual's interest may be overridden by the state's interest in restoring the individual to competency to stand trial. *Id.* at 178–80. In *Sell*, the Supreme Court prescribed a four-part test for determining whether a defendant may be forcibly medicated for the purpose of restoring his or her competency. *Id.* at 180–81. At issue here is the *Sell* test's requirement that "*important* Government interests [be] at stake." *Id.* at 180. The existence of important government interests is a legal question that we review de novo, reviewing any relevant factual findings for clear error. *See United States v. Fazio*, 599 F.3d 835, 839 (8th Cir. 2010); *United States v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005).

¶8 Important government interests are at stake when the government seeks to bring to trial a defendant charged with a "serious crime." *Sell*, 539 U.S. at 180. In such cases, "the Government seeks to protect through application of the criminal law the basic human need for security." *Id.* Though *Sell* did not define what constitutes a "serious crime,"

[1] After we granted relief, Wolf was declared competent and entered a plea. We nonetheless issue this opinion because it explains the reasoning for our order and addresses an issue of statewide importance that is capable of repetition yet evading review.

it instructed that the court must consider the facts and circumstances of the case. *Id.*

¶9 In Arizona, the analysis takes part in two steps: the court first must determine whether the crime is sufficiently serious to create an important government interest, and then, if an important government interest exists, must determine whether special circumstances lessen the interest. *Cotner*, 243 Ariz. at 193, ¶ 11 (adopting framework established by *United States v. Onuoha*, 820 F.3d 1049, 1054 (9th Cir. 2016)). "[I]t is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes." *Cotner*, 243 Ariz. at 193, ¶ 12 (quoting *Evans*, 404 F.3d at 237). But the court also must consider the substance of the defendant's conduct and the nature of the crime charged. *Onuoha*, 820 F.3d at 1055 (holding that first-time-offender's telephone calls to airport officials urging evacuation on eve of terrorism-attack anniversary constituted serious criminal conduct despite relatively low sentencing range because calls greatly threatened security, considerably disrupted airport activities, diverted law enforcement resources, and created need for deterrence). Circumstances such as substantial presentence incarceration and the potential for civil commitment may diminish the weight of the government's interest in prosecution. *Sell*, 539 U.S. at 180.

¶10 Wolf is charged with four non-dangerous class six felonies, several of which are domestic violence offenses. *See* A.R.S. §§ 13-105(13), -2921(A)(1), -2921.01(A)(1), (C). Our legislature has made clear that non-dangerous class six felonies are the least serious of all felonies—they carry the lowest sentencing ranges in the felony classification scheme, *see, e.g.*, A.R.S. § 13-702(D), and may even be re-classified as misdemeanors depending on the nature and circumstances of the crime and the history and character of the defendant, A.R.S. § 13-604(A). On the record before us, we must conclude that Wolf's criminal history is insufficient to enhance the sentencing range, *see* A.R.S. §§ 13-105(22), -703(A), and that he may be sentenced to no more than consecutive presumptive one-year prison terms for each count, *see* A.R.S. §§ 13-702, -711(A). In this case, any immediate additional penalty caused by the domestic-violence designation is minor in comparison to the sentence for the basic offense. *See, e.g.*, A.R.S. § 13-3601.01(A) (mandating completion of domestic violence offender treatment program for misdemeanor domestic violence conviction); *State v. Willis*, 218 Ariz. 8, 12–13, ¶¶ 16–17 (App. 2008) (holding that "the requirement that [a defendant] attend domestic violence courses pursuant to A.R.S. § 13-3601.01(A) is not serious enough to trigger the requirement of a jury trial" and "the mere possibility of a future sentencing enhancement [under § 13-

3601.02 based on a domestic-violence conviction] is not sufficient to make the offense serious for the purpose of giving the defendant a constitutional right to a jury trial"). Indeed, the legislature has defined the term "serious offense" in A.R.S. § 13-706(F)(1), and that definition does not include the charges at issue here.

¶11 The superior court properly considered that Wolf allegedly engaged in a prolonged, escalating pattern of harassment against a former spouse and her partner in disregard of a court order. But even considering those allegations, we must conclude as a matter of law that Wolf is not charged with "serious crimes." We agree without hesitation that the state has a real and meaningful interest in protecting the victims and securing a conviction. But

> [i]nvoluntary antipsychotic medication "represents a substantial interference with [a] person's liberty," threatening the person's "mental, as well as physical, integrity," [and t]he proper application of [the] *Sell* [test] ensures this kind of intrusion [for the purpose of restoring competency] may occur under only the most compelling circumstances, which "may be rare."

Cotner, 243 Ariz. at 196, ¶ 27 (citations omitted). This is not such an extraordinary case. To hold otherwise would be to nullify *Sell*. Wolf may well be a candidate for civil commitment and if committed may be involuntarily medicated. But he may not be medicated against his will in the context of this criminal prosecution.

CONCLUSION

¶12 The superior court erred by ordering that Wolf be forcibly medicated to restore him to competency. As a matter of law, the state's interest in prosecution is insufficient to overcome Wolf's constitutional right to refuse medication. It is for that reason that we accepted jurisdiction and granted relief.

AMY M. WOOD • Clerk of the Court
FILED: AA