IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

AMY ELIZABETH COTNER,
Petitioner,

v.

HON. DANELLE B. LIWSKI, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2017-0044
Filed August 16, 2017

Special Action Proceeding
Pima County Cause No. CR20164468001

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Joel Feinman, Pima County Public Defender
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Counsel for Petitioner

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Real Party in Interest

OPINION

Presiding Judge Staring authored the opinion of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Presiding Judge:

¶1 In this special action, petitioner Amy Cotner challenges the respondent judge's order requiring the forced administration of antipsychotic medication pursuant to A.R.S. §§ 13-4511(1) and 13-4512(E), and Rule 11.5(b)(3), Ariz. R. Crim. P., after finding Cotner incompetent in the underlying criminal proceeding and committing her to an in-custody restore-to-competency (RTC) program. Cotner contends the respondent abused her discretion by misinterpreting and incorrectly applying the standard for issuing involuntary medication orders, as established in *Sell v. United States*, 539 U.S. 166 (2003). For the reasons that follow, we accept jurisdiction of this special action and grant Cotner relief.

Factual and Procedural Background

¶2 At the outset, we note that both below and before this court, real party in interest State of Arizona has expressly taken no position in this matter. We therefore base our recitation of the facts and procedural history on Cotner's special-action petition and the record she has provided this court.

¶3 In January 2016, Tucson police officers responded to a report of a disturbance on a public bus. When they arrived, it appeared Cotner was experiencing an acute episode of mental illness. Although Cotner stated she recognized one of the officers and agreed to talk to him, another officer attempted to restrain her and place her in handcuffs. She struggled with the officers, kicking them and inflicting minor cuts on one officer's hands. The Pima County

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

Attorney's Office initially refused to file felony charges against Cotner, and the officers filed misdemeanor charges in Tucson City Court. The city prosecutor later dismissed those charges and Cotner was charged by indictment with three counts of aggravated assault of a peace officer, one class four and two class five felonies, in violation of A.R.S. § 13-1204(A)(8)(a).

¶4 In December 2016, Cotner's counsel filed a motion for mental competency examination, pursuant to Rule 11, Ariz. R. Crim. P., stating Cotner had sustained a serious head injury in a February 2016 automobile accident that "may have affected her cognitive functioning." Counsel also stated that she and Cotner's behavioral health caseworker believed Cotner's condition was deteriorating while she was in the Pima County Jail, and they questioned whether the medications she had been taking were working properly. In January 2017, the respondent appointed psychiatrist Stephen Streitfeld, M.D., and psychologist Sergio Martinez, Ph.D., to examine Cotner and provide opinions about whether she was competent to stand trial.

¶5 Streitfeld concluded Cotner was not competent to stand trial but was restorable. Martinez opined Cotner was competent, but only if medicated. After a February 28 hearing, the respondent found Cotner was not competent and ordered her to participate in Pima County's out-of-custody RTC program. On June 3, Cotner was arrested on a new charge and, two days later, the respondent ordered her to participate in the in-custody RTC program. The respondent found Cotner was "incompetent to refuse treatment and should be subject to involuntary treatment pursuant to A.R.S. §§ 13-4511 and 13-4512(E)."[2] Cotner filed an objection the following day, arguing that ordering her to take antipsychotic medication without making

[2]Section 13-4511(1) requires the trial court to determine if a criminal defendant found incompetent to stand trial "is incompetent to refuse treatment, including medication, and should be subject to involuntary treatment." *See also* § 13-4512(E) (incorporating requirement).

the findings required by *Sell* violated her due process rights under the Arizona and United States Constitutions.

¶6 After a June 9 hearing, at which the state took no position and deferred to the trial court, the respondent nevertheless entered *Sell* findings, denied Cotner's request for an evidentiary hearing, and ordered her to take medication. The respondent also denied Cotner's request for a stay of the order while she sought special-action relief in this court. We subsequently granted Cotner's request for a stay pending our consideration of this special action.

Special-Action Jurisdiction

¶7 We have broad discretion in determining whether to accept special-action jurisdiction. *See State v. Campoy*, 220 Ariz. 539, ¶ 2, 207 P.3d 792, 795 (App. 2009). Here, the challenged order is interlocutory and Cotner has no equally plain, speedy and adequate remedy by appeal. *See* Ariz. R. P. Spec. Act. 1(a); *see also Potter v. Vanderpool*, 225 Ariz. 495, ¶ 7, 240 P.3d 1257, 1260 (App. 2010). Also, whether the respondent misapplied *Sell* is a question of law, which lends itself to review by special action. *See State v. Bernini*, 222 Ariz. 607, ¶ 8, 218 P.3d 1064, 1068 (App. 2009) ("questions of law . . . appropriately reviewed by special action"). Further, the issue of whether to compel the medication of criminal defendants with antipsychotics in the context of Rule 11 proceedings is likely to recur, and we are not aware of any published opinions in Arizona regarding the application of *Sell*. *See Lear v. Fields*, 226 Ariz. 226, ¶ 6, 245 P.3d 911, 914 (App. 2011). Given these circumstances, and the significant liberty interest implicated by the government compelling a person to take antipsychotics, we accept jurisdiction of this special action.

Discussion

¶8 As the Supreme Court acknowledged in *Sell*, "an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" 539 U.S. at 178, *quoting Washington v. Harper*, 494 U.S. 210, 221 (1990) (forced medication of prisoner who was danger to self and others). Drawing from its decisions in *Harper* and *Riggins v. Nevada*, 504 U.S. 127 (1992) (forced medication to restore competency during

trial), the Court emphasized that the circumstances in which the intrusion is justified "may be rare." *Sell*, 539 U.S. at 180; *see also United States v. Onuoha*, 820 F.3d 1049, 1060 (9th Cir. 2016) ("Involuntary medication orders are disfavored in light of the significant liberty interest at stake."); *United States v. White*, 620 F.3d 401, 413 (4th Cir. 2010) (requiring circumstances "sufficiently exceptional to warrant the extraordinary measure of forcible medication").

¶9 After *Sell*, the determination that circumstances permit the forced medication of a defendant with antipsychotics to restore competency requires finding all of the following: (1) "that *important* governmental interests are at stake" in prosecuting the defendant on the offense charged; (2) "that involuntary medication will *significantly further* those concomitant state interests," meaning it is substantially likely the defendant will be restored to competency and it is substantially unlikely the side effects will impair significantly the ability to assist in the defense; (3) "that involuntary medication is *necessary* to further those interests," that is, less intrusive treatments that are likely to achieve substantially the same results do not exist; and, (4) "that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition." *Sell*, 539 U.S. at 180-81. "Because of the importance of the liberty interests implicated" by an involuntary medication order, the government must satisfy each part of the *Sell* test by clear and convincing evidence. *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 692 (9th Cir. 2010). [3]

¶10 Examining the first *Sell* requirement, the respondent stated during the hearing on Cotner's objection to forced medication, "I believe there is an important government interest [in] . . . proceed[ing] as timely as possible with criminal cases, to hold people accountable for criminal actions if they did complete them, if they are responsible for them, and to prosecute the cases." She subsequently

[3] In her petition, Cotner asserts the respondent erred by not "plac[ing] the burden [of proof] on the State." On the record before us, including the respondent's insufficient *Sell* findings, we do not address this assertion, nor whether Cotner adequately developed an argument on the point.

added that the fact this case involves victims, who "have a Constitutional Right to have a speedy trial in Arizona, . . . also compels a government interest in this case," and is "a valid reason for requiring medications." We review the respondent's finding on this *Sell* requirement de novo. *Onuoha*, 820 F.3d at 1054.

¶11 In *Onuoha*, the Ninth Circuit prescribed a "two-step inquiry" for evaluating the first *Sell* requirement. *Id.* The initial portion of this test requires courts to determine whether the charged offense "is sufficiently 'serious' to establish an important governmental interest." *Id.* If that is established, the court must then determine whether there are "'special circumstances'" that lessen the government's interest. *Id.* Significantly, the evaluation does not employ a totality-of-the-circumstances test. *Id.* Rather, *Sell* requires that an important governmental interest exist before a court can order antipsychotic medication. *Id.*; *see also Sell*, 539 U.S. at 180. "If the government cannot demonstrate at the outset that the interest in prosecution meets a significant threshold, the inquiry ends there." *Onuoha*, 820 F.3d at 1054.

¶12 *Sell* thus requires an individualized, fact-based examination of each case and each defendant. 539 U.S. at 180; *see also Onuoha*, 820 F.3d at 1054-55 (evaluating government interest under *Sell* requires examination of defendant's individual circumstances, including prior criminal history, potential length of prison term, and conduct involved). Additionally, "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes." *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005). More is required than the state's general interest in seeing that serious offenses are prosecuted expeditiously. That interest exists in virtually every case involving serious charges, and finding it sufficient by itself would effectively render perfunctory the *Sell* requirement of an important governmental interest.

¶13 From the record before us, it does not appear the respondent first determined the seriousness of the offenses based on the nature of the charges and the specific conduct involved. *See Onuoha*, 820 F.3d at 1054. Nor does the record establish the requisite seriousness as a matter of law. Cotner has been charged

with three counts of aggravated assault of a peace officer, one class four and two class five felonies. A class four, first-time felony offense, the most serious of the three charges, carries with it a sentencing range of one to 3.75 years' imprisonment, with the possibility of probation. *See* A.R.S. §§ 13-603(B), 13-702(D). Additionally, Cotner asserts in her petition that she struggled with the officers, kicking them, when they tried to subdue her while she was having an acute episode of mental illness. She inflicted minor cuts on one of the officer's hands, and there is no suggestion in the record that any weapons were involved.

¶14 Moreover, as noted, Cotner asserts and the state does not dispute that it initially declined to file felony charges, doing so only after the city prosecutor dismissed the misdemeanor charges in Tucson City Court. And, in her January 10, 2017 order requiring Cotner to be examined pursuant to Rule 11, the respondent found she "is not a threat to public safety as defined in A.R.S. § 13-4501(5)," in part because she is not charged with a crime "involving . . . the infliction of physical injury on another person."

¶15 Further, even if an offense possesses the requisite seriousness, "[s]pecial circumstances may lessen the importance of [the governmental] interest," including the potential for civil commitment proceedings, the time needed to restore the defendant to competency, the effect of the potential delay on the state's interest in timely resolution, the amount of time the defendant has already been in custody, and the constitutional requirements of a fair trial. *Sell*, 539 U.S. at 180. Even assuming the charges against Cotner are sufficiently serious to satisfy *Sell*, on the record before us it does not appear the respondent considered the factors relevant to the second part of the two-step inquiry.

¶16 In sum, the respondent's finding that there exists an important governmental interest appears to have been based only on the state's general interest in prosecuting criminal cases expeditiously and protecting the rights of victims. We agree with Cotner the respondent erred and thereby abused her discretion in considering the first *Sell* finding.

¶17 We also agree with Cotner's claims as to the last three *Sell* findings: that forced medication will significantly further the state's interests, is necessary to further those interests (less intrusive means do not exist), and is medically appropriate. We review these findings for clear error. *See Onuoha*, 820 F.3d at 1057; *see also United States v. Watson*, 793 F.3d 416, 423 (4th Cir. 2015).

¶18 The respondent found medication would further the state's interests because Streitfeld, the Rule 11 psychiatrist, had found Cotner incompetent and "had some indications in his reports that medications could be of an assistance." The respondent added that Martinez, the Rule 11 psychologist, had opined Cotner was competent but needed to take medication to remain so. The respondent based her finding on the third *Sell* requirement—that involuntary medication was necessary—on her concern that although Cotner was taking medication voluntarily at that time, she might not continue to do so. That concern arose from a report by a psychiatrist treating Cotner while she was in an out-of-custody RTC program, stating she had not attended all of her sessions. As to the fourth *Sell* requirement, the respondent found involuntary medication appropriate because drugs had been prescribed by a physician and Cotner was willing to take them. The respondent added that a doctor, not the court, should determine medical appropriateness.

¶19 In making these last three *Sell* findings, courts must consider the specific drugs involved, possible side effects, and their efficacy. *Sell*, 539 U.S. at 181-82; *see also Watson*, 793 F.3d at 424-25. This inquiry demands an evaluation of the medication's anticipated effects on that particular person, a standard that is "more than a formality." *Watson*, 793 F.3d at 425. The court must find the medication "is substantially likely to render the defendant competent to stand trial." *Sell*, 539 U.S. at 181; *see also Watson*, 793 F.3d at 424. It must also find "that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Sell*, 539 U.S. at 181. That a certain treatment plan may be generally effective for the defendant's condition is insufficient. *Watson*, 793 F.3d at 424-25; *see also Ruiz-Gaxiola*, 623 F.3d at 700 (government's burden not sustained

when "experts rely on generalities and fail to apply their views to [the defendant's] condition with specificity"). The plan must take into account such individualized factors as the person's condition, age, delusions, and likelihood that the proposed treatment plan will be successful for that person. *Watson*, 793 F.3d at 424.

¶20 The third *Sell* finding is that forced medication is necessary and "any alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Sell*, 539 U.S. at 181. The fourth requires the court to determine that the "administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition." *Id.* As the Court recognized, "[t]he specific kinds of drugs at issue may matter here as elsewhere." *Id.* "Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id.*; *see also Ruiz-Gaxiola*, 623 F.3d at 691 (noting risk of serious or fatal side effects from use of antipsychotics).

¶21 We find *United States v. Chavez*, 734 F.3d 1247 (10th Cir. 2013), instructive. There, a psychologist testified at an evidentiary hearing held pursuant to *Sell*. *Id.* at 1249, 1251. He conceded there was no individualized treatment plan at that point, but stated Haldol is generally used to treat a person, like the defendant, diagnosed as paranoid schizophrenic, and would "'*probably* be the first line of treatment.'" *Id.* at 1251. He also discussed antipsychotic medications generally, their potential side effects, and possible side effects of Haldol. *Id.* He admitted the defendant's medication might change, depending on his reactions to it, but said he would not be making those decisions in any event, because he is a psychologist, not a psychiatrist. *Id.*

¶22 The Tenth Circuit concluded there was insufficient information to support the findings that involuntary medication would "'significantly further'" the government's interests and was "medically appropriate" because the government had failed to present an individualized treatment plan that specified the medication the defendant was to be given, the doses, and the potential side effects. *Id.* at 1250, 1252.

¶23 The *Chavez* court also concluded that the record in that case did not permit the kind of inquiry *Sell* demands. *Id.* at 1252. "While *Sell* does not explicitly identify what level of specificity is required in a court's order for involuntary medication," the court observed, "the need for a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires." *Id.* The court added that this was particularly true in Chavez's case because "there is no evidence in the record that a psychiatrist, who will be prescribing the drugs, has evaluated [the defendant] for purposes of determining whether it is appropriate to involuntarily medicate him." *Id.* at 1252-53. The court concluded, "[A]n order to involuntarily medicate a non-dangerous defendant solely in order to render [her] competent to stand trial must specify which medications might be administered and their maximum dosages." *Id.* at 1253. And, with respect to the final *Sell* requirement, the court stated, "without knowing which drugs the government might administer and at what range of doses, a court cannot properly conclude that such a vague treatment plan is '*medically appropriate, i.e.*, in the patient's best medical interest.'" *Id.*, *quoting Sell*, 539 U.S. at 181.

¶24 Here, it was never clear what medications Cotner was taking and no psychiatrist presented an individualized treatment plan that specified the antipsychotic medication Cotner should be forced to take. Streitfeld reported that Cotner had told him she was taking Lamictal (mood stabilizer), Seroquel (anti-psychotic/mood stabilizer), Vistaril (anxiolytic antihistamine), and Zoloft (anti-depressant). Martinez, however, reported Cotner's prescribed medications included Depakote for bipolar disorder and Fluoxetine (Prozac) for depression. The respondent acknowledged she did not know the specific medications Cotner was taking or whether the medications she was receiving in jail were the same as those she had been taking while out of custody.

¶25 Additionally, although Streitfeld opined Cotner was restorable to competency in an in-custody RTC program, he did not propose a specific treatment plan and did not specify what medication she should take, the dosage, the possible side effects, its anticipated efficacy, or how it might affect her ability to assist counsel. He reported Cotner had told him she was willing to continue to take

her medications, but preferred to obtain them from her own provider because she believed the medications she received at the jail were of a lesser quality and she felt her condition was deteriorating. Significantly, Streitfeld, who is a psychiatrist, never stated it was necessary to force Cotner to take medication. And, although Martinez opined Cotner required medication to be competent, he did not express an opinion as to which medications were indicated for Cotner, and, given that he is not a physician, it is doubtful he would have been qualified to do so. *See Chavez*, 734 F.3d at 1252-53.

¶26 Finally, the fact a physician prescribes medication does not, standing alone, make it medically necessary and medically appropriate for purposes of *Sell*. Those are determinations for the court to make after conducting the "rigorous analysis" *Sells* demands, *Onuoha*, 820 F.3d at 1059, and after the opportunity to present evidence. As the court acknowledged in *Onuoha*, "courts must rely on the testimony of medical experts in evaluating the constitutionality of involuntary medication. But a physician's word is not absolute, not even the word of a reputable and experienced doctor." *Id.*; *see also Watson*, 793 F.3d at 424-27; *United States v. Grigsby*, 712 F.3d 964, 975-76 (6th Cir. 2013). In this instance, the respondent denied Cotner's request for an evidentiary hearing "with a doctor to testify," depriving her of the opportunity to refute the respondent's assumptions and conclusions.[4]

Conclusion

¶27 Involuntary antipsychotic medication "represents a substantial interference with [a] person's liberty," *Riggins*, 504 U.S. at 134, *quoting Harper*, 494 U.S. at 229, threatening the person's "mental, as well as physical, integrity," *White*, 620 F.3d at 422 (Keenan, J., concurring). The proper application of *Sell* ensures this kind of intrusion may occur under only the most compelling circumstances, which "may be rare." 539 U.S. at 180. Here, the respondent erred as

[4]Although we decline to establish a bright-line rule requiring an evidentiary hearing in all cases, we anticipate the adequate evaluation of whether to issue an involuntary medication order will often require the trial court to conduct one.

a matter of law and thus abused her discretion by entering findings that do not comply with *Sell*. *See* Ariz. R. P. Spec. Act. 3(c); *see also State v. Peoples*, 240 Ariz. 244, ¶ 7, 378 P.3d 421, 424 (2016) (legal error constitutes abuse of discretion). We therefore grant relief, vacating the respondent's involuntary medication order, and direct the respondent to reevaluate Cotner's objection in compliance with *Sell* and this opinion.