OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 19, 2025

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You are hereby notified that the Court has entered the following opinion and order:

2024AP2237-CR State of Wisconsin v. B.A.G. (L.C. #2024CF67)
2024AP2238-CR State of Wisconsin v. B.A.G. (L.C. #2024CF423)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In these consolidated appeals, B.A.G. appeals from circuit court orders authorizing the Wisconsin Department of Health Services to involuntarily medicate B.A.G. for the purpose of restoring her to competency so that she may stand trial in two Waukesha County criminal cases. *See* WIS. STAT. § 971.14 (2023-24).[1] On appeal, B.A.G. argues the involuntary medication orders violate her right to due process because they fail to meet the factors required under ***Sell v.***

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

United States, 539 U.S. 166, 180-82 (2003). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

The involuntary medication orders at issue derive from two pending criminal cases. In Waukesha County Circuit Court case No. 2024CF67, the State charged B.A.G. with one count of terroristic threats, causing public panic or fear, and one count of misdemeanor bail jumping. Those charges arose from a January 2024 incident when B.A.G. allegedly yelled at the occupants of a city bus that she was going to shoot everybody. In March, B.A.G. was arrested for allegedly berating guests of a hotel, employees of a Shake Shack restaurant, and drivers in the nearby parking lot. In Waukesha County Circuit Court case No. 2024CF423, the State charged her with disorderly conduct, misdemeanor bail jumping, and felony bail jumping.

B.A.G.'s competency was questioned, and the circuit court ordered a competency examination. A psychologist examined B.A.G. and filed a report with the court. Based on B.A.G.'s records and clinical observations, the psychologist diagnosed B.A.G. with schizoaffective disorder, bipolar type. The psychologist noted that B.A.G. had discontinued her psychotropic medications, was currently acutely symptomatic, was experiencing delusional thinking, and was unable to "sustain any semblance of rational, reciprocal, productive conversation[.]" The report noted that B.A.G. had previously been restored to competency through psychiatric treatment and psychotropic medication.

On April 15, 2024, following a contested competency hearing, the circuit court determined B.A.G. was currently incompetent but was likely to regain competency within the

statutorily prescribed timeframe. It ordered B.A.G. committed for treatment pursuant to WIS. STAT. § 971.14(5).

On June 23, 2024, while awaiting placement at a mental health facility, B.A.G. suffered a "significant" seizure in the Waukesha County Jail and was hospitalized in the intensive care unit. Her condition was life threatening; however, she refused to take antiseizure medication. Because her refusal posed a danger to herself, she was involuntarily medicated under WIS. STAT. ch. 51. She was treated with antiseizure and antipsychotic medication. The medication was effective. B.A.G. had no further seizures, and medical providers observed "a reduction in [her] agitation and disorganization."

The hospital discharged B.A.G. on July 9, 2024, pursuant to a settlement agreement through Milwaukee County. As part of that settlement agreement, B.A.G. agreed to "maintain medication compliance."

Upon returning to the Waukesha County Jail, B.A.G. stopped taking her medications. By July 17, her psychosis had returned. During a meeting with the social worker, B.A.G. pointed at the social worker and stated: "Kill her. You can kill her. Kill this girl right here." On July 18, a psychologist evaluated B.A.G. and concluded she remained incompetent due to her "decompensated mental state and severe functional deficits."

On July 24, 2024, B.A.G. received a placement at Mendota Mental Health Institute ("Mendota"). B.A.G. continued to refuse to take her antiseizure and antipsychotic medication. After evaluating B.A.G. and reviewing her medical records, a Mendota staff psychiatrist requested an order for involuntary medication pursuant to WIS. STAT. § 971.14(5). The psychiatrist submitted an individualized treatment plan identifying the medications to be used,

the dosage range, and the frequency of doses. The psychiatrist also attached a letter further explaining her observations and recommendations.

Following an evidentiary hearing, the circuit court ordered involuntary medication on the basis that B.A.G. was dangerous to herself or others,[2] and, alternatively, on the basis that involuntary medication was needed to restore B.A.G.'s competency to stand trial. On the latter determination, the court determined the State had presented sufficient evidence satisfying the four ***Sell*** factors. B.A.G. appeals. Additional facts will be discussed below.

"[C]ircuit courts may order involuntary medication to restore trial competency under [WIS. STAT.] § 971.14 only when the order complies with the ***Sell*** standard." ***State v. Fitzgerald***, 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 N.W.2d 165. In ***Sell***, the Court "established a four-factor test to determine whether such medication [for competency purposes] is constitutionally appropriate." ***Fitzgerald***, 387 Wis. 2d 384, ¶13. Specifically, the State must prove by clear and convincing evidence: "(1) the State has an important interest in proceeding to trial; (2) involuntary medication will significantly further that State interest; (3) involuntary medication is necessary to further that State interest; and (4) involuntary medication is medically appropriate." ***State v. D.E.C.***, 2025 WI App 9, ¶32, ___ Wis. 2d ___, ___ N.W.3d ___. Here, B.A.G. argues the State failed to prove all the ***Sell*** factors by clear and convincing evidence.

[2] We do not consider the dangerousness ground on appeal. *See* ***State v. N.K.B.***, 2024 WI App 63, ¶¶45-46, 414 Wis. 2d 218, 14 N.W.3d 681, *review granted* (WI Feb. 12, 2025) (No. 2023AP722-CR) (concluding defendants committed under WIS. STAT. § 971.14 cannot be involuntarily medicated based on dangerousness "absent the commencement of proceedings under WIS. STAT. ch. 51 or some other statute that authorizes involuntary medication based on the individual's dangerousness.").

We start our analysis with the first ***Sell*** factor—whether the State has an important interest in proceeding to trial. *See* ***Sell***, 539 U.S. at 180. Pursuant to ***Sell***, the State's "interest in bringing to trial an individual accused of a serious crime is important." ***Id.*** ***Sell*** did not define what constitutes a "serious crime," but in making that determination, we have previously considered whether the crime is of the type specified in WIS. STAT. § 969.08(10)(b),[3] whether the crime involved violence, and the maximum penalty associated with the offense. ***State v. J.D.B.***, 2024 WI App 61, ¶36, 414 Wis. 2d 108, 13 N.W.3d 525, *review granted* (WI Feb. 12, 2025) (No. 2023AP715-CR). Further, to satisfy the first ***Sell*** factor, it is not enough that the State simply establishes a "serious crime." ***J.D.B.***, 414 Wis. 2d 108, ¶37. Special circumstances unique to each defendant may lessen the importance of the State's interest in prosecution. ***Id.***, ¶¶37-38. These circumstances include "the potential for future civil commitment, and the length of pretrial detention." ***Id.***, ¶38.

[3] WISCONSIN STAT. § 969.08 is titled "Grant, reduction, increase or revocation of conditions of release." That section generally describes when a circuit court may grant or reduce the amount of bail, may alter other conditions of release, revoke release, or grant new bail after it was revoked. *See* ***id.*** Section 969.08(10)(b) defines a "serious crime" in § 969.08 as:

> any crime specified in s. 943.23(1m), 1999 stats., s. 943.23(1r), 1999 stats., or s. 943.23(1g), 2021 stats., or s. 346.62(4), 940.01, 940.02, 940.03, 940.05, 940.06, 940.08, 940.09, 940.10, 940.19(5), 940.195(5), 940.198(2)(a) or (c), 940.20, 940.201, 940.203, 940.204, 940.21, 940.225(1) to (3), 940.23, 940.24, 940.25, 940.29, 940.295(3)(b)1g., 1m., 1r., 2. or 3., 940.302(2), 940.31, 941.20(2) or (3), 941.26, 941.30, 941.327, 943.01(2)(c), 943.011, 943.013, 943.02, 943.03, 943.04, 943.06, 943.10, 943.231(1), 943.30, 943.32, 943.81, 943.82, 943.825, 943.83, 943.85, 943.86, 943.87, 943.88, 943.89, 943.90, 946.01, 946.02, 946.43, 947.015, 948.02(1) or (2), 948.025, 948.03, 948.04, 948.05, 948.051, 948.06, 948.07, 948.085, or 948.30 or, if the victim is a financial institution, as defined in s. 943.80(2), a crime under s. 943.84(1) or (2).

On appeal, B.A.G. argues the State failed to satisfy the first ***Sell*** factor because she is not charged with a serious crime, there is a likelihood that she could be civilly committed, and she waited too long for placement at Mendota in the Waukesha County Jail. The State responds B.A.G.'s first two arguments are meritless, and the third is forfeited. We agree with the State.

B.A.G. argues that her crimes are not serious because they are not listed in the bail statute, did not involve actual violence, stemmed from her mental illness, and the most severe crime charged (felony bail jumping) has a maximum penalty of only six years imprisonment. We disagree with B.A.G. regarding the seriousness of her crimes. Within a span of three months, B.A.G. has twice lashed out at ordinary citizens—threatening to shoot people on a bus and verbally assaulting patrons of businesses. The circumstances of these two cases reveal why, as the ***Sell*** Court explained when discussing the State's interest in prosecution, the "[p]ower to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *See* ***Sell***, 539 U.S. at 180 (quotation omitted).

Further, the aggregate maximum penalty of all of her charged crimes exceeds ten years. *See* ***United States v. White***, 620 F.3d 401, 410 (4th Cir. 2010) ("Without establishing a hard and fast rule," the federal court held "a crime is serious for involuntary medication purposes where the defendant faced a ten-year maximum sentence for the charges against him."). B.A.G. argues that her charged crimes are not serious because they derive from her mental illness, lacked actual violence, and are not listed in the bail statute. We reject her arguments. The State is not obligated to wait until someone inflicts violence or commits a certain type of crime before prosecuting them. We conclude B.A.G. has been charged with serious crimes.

B.A.G. also argues the likelihood of her civil commitment lessens the State's interest in prosecuting her. Under the first ***Sell*** factor, the Court pointed out that "[t]he potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution." ***Sell***, 539 U.S. at 180. This is because a "defendant's failure to take drugs voluntarily … may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." ***Id.***

On appeal, B.A.G. argues that based on her mental health diagnosis, the circuit court's dangerousness findings, the fact that WIS. STAT. ch. 51 proceedings were initiated during her incarceration, the connection between her mental illness and alleged criminal behavior, and the duration of her ongoing mental health concerns, the potential for a civil commitment is distinct and non-speculative. She argues the State's interest in prosecuting her is lessened.

We disagree. The record reflects that WIS. STAT. ch. 51 proceedings were initiated against B.A.G. but she was discharged under a settlement agreement with Milwaukee County (her county of residence) in which she agreed to comply with psychotropic medication and continue to follow up with neurology and psychiatry on an outpatient basis. After entering into the settlement agreement, B.A.G. promptly stopped taking her medication. The State was under no obligation to give her another civil commitment instead of prosecuting her.

Further, although the ***Sell*** Court mentioned "civil commitment," it is clear from the context that the Court was concerned with the prospect of civil *confinement*. *See* ***Sell***, 539 U.S. at 180 ("The defendant's failure to take drugs voluntarily ... may mean lengthy *confinement* in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing

without punishment one who has committed a serious crime." (emphasis added)); *see also* ***id.*** ("The potential for future *confinement* affects, but does not totally undermine, the strength of the need for prosecution." (emphasis added)). That B.A.G. may be committed on *an outpatient basis* (similar to as in her WIS. STAT. ch. 51 settlement agreement), it does not mean that civil *confinement* is probable. *See* ***Sell***, 539 U.S. at 180.

Additionally, the record does not support a determination that any "confinement in an institution for the mentally ill" would be of such a length that it "would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *See* ***id.*** As stated above, the aggregate maximum penalty of all B.A.G.'s charged crimes exceeds ten years. Even if the record established civil confinement was probable (which it does not), nothing in the record suggests B.A.G. would be confined for such a length of time that the State's need to prosecute her for her alleged crimes is lessened. *See* ***Sell***, 539 U.S. at 180.

B.A.G. next argues her pretrial detention in the county jail diminished the State's interest in prosecution under the first ***Sell*** factor. She argues her imprisonment in the Waukesha County Jail between the entry of the commitment order (in April 2024) and her transport to Mendota for treatment (in July 2024) was unreasonable and inconsistent with constitutional demands. The State responds, in part, that this argument is forfeited because B.A.G. failed to make it in the circuit court. The State points out that B.A.G. limited her arguments on the first ***Sell*** factor to lack of a serious crime and the prospect of involuntarily medicating her through a civil committment.

We agree with the State. We conclude B.A.G.'s objection to the length of her pretrial detention is forfeited and it would not be appropriate to overlook forfeiture in this case. *See*

D.E.C., 2025 WI App 9, ¶67. "Application of the forfeiture rule is appropriate in many instances to ensure that parties and circuit courts have 'notice and a fair opportunity to address issues and arguments, enabling courts to avoid or correct any errors with minimal disruption of the judicial process.'" ***Id.*** (citation omitted). In any event, in this case, the record reflects that while B.A.G. waited for a spot at Mendota, she received treatment while in the jail. As examples, a social worker monitored her and attempted to meet with her, and jail staff kept B.A.G.'s medical providers informed about her mental state and her compliance with medication. We do not consider B.A.G.'s pretrial detention argument further. We conclude the record sufficiently supports that the State satisfied the first ***Sell*** factor.

B.A.G. next argues that the State failed to satisfy the second, third, and fourth ***Sell*** factors because the individualized treatment plan was deficient.

> ***Sell*** requires an individualized treatment plan that, "[a]t a minimum," identifies "(1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court."

State v. Green, 2021 WI App 18, ¶38, 396 Wis. 2d 658, 957 N.W.2d 583 (citation omitted). "However, it is not enough that the State merely present a treatment plan that identifies the medication, dosage, and duration of treatment." ***Id.*** "Instead, the court must consider the individualized treatment plan as applied to the particular defendant." ***Id.***

On appeal, B.A.G. concedes that her treatment plan "identified specific medications, the maximum daily or monthly dosage ranges for those medications, and the potential side effects of those medications." She also acknowledges the plan provided:

> The effects of treatment and progress towards competency restoration will be reported to the court as statutorily required at 3 months after commitment, 6 months after commitment, 9 months after commitment and within 30 days prior to the expiration of commitment. Progress reports will be provided earlier should treatment be successful prior to the statutorily required timeframe.

However, B.A.G. argues the treatment plan was deficient because: (1) the antipsychotic drug Haloperidol included in the treatment plan was not medically appropriate for her; (2) the proposed dosage ranges for the medications were not sufficiently individualized; and (3) the individualized treatment plan failed to meaningfully limit the duration of treatment.

The State again responds that B.A.G. forfeited these arguments by failing to raise them in the circuit court. The State explains B.A.G. raised only one argument before the court that did not concern the first ***Sell*** factor and B.A.G. has not renewed it on appeal.[4] The State emphasizes that aside from trial counsel's arguments, B.A.G.'s trial counsel conceded the State established the remaining ***Sell*** factors.

In reply, B.A.G. does not discuss trial counsel's concession. Instead, B.A.G. argues forfeiture does not apply because her arguments relate to sufficiency of the evidence and because

[4] In the circuit court, B.A.G. argued the State failed to satisfy the second ***Sell*** factor with respect to the antiseizure medications. She argued that the antiseizure medications would not "significant[ly] further the government's interest in prosecuting the offense[]" because her seizures did not pertain to her incompetency and the State could only medicate her with antipsychotic drugs.

The psychiatrist testified that all antipsychotic medication increases the risk for seizures, and, given B.A.G.'s medical seizure history, the psychiatrist could not safely prescribe antipsychotic medication for B.A.G. without also prescribing antiseizure mediation.

The court determined that based on the evidence presented, "you cannot treat the mental illness without treating the seizures that the two go hand in hand, and without being able to treat the seizures, you're really unable to treat the mental illness." It ordered B.A.G. involuntarily treated with the medication as indicated in the treatment plan, which included both antipsychotic and antiseizure medication.

she "explicitly objected to the motion [for involuntary medication] and 'any involuntary medication' before and after the evidence was entered."

We disagree with B.A.G. We conclude B.A.G. forfeited her appellate arguments relating to the second, third, and fourth ***Sell*** factors and it would not be appropriate to overlook forfeiture in this case. *See* ***D.E.C.***, 2025 WI App 9, ¶67. The record reflects that, except for her argument relating to the appropriateness of antiseizure medication, which she does not renew on appeal, B.A.G. conceded to the circuit court that the State established the remaining ***Sell*** factors. At the close of her arguments to the court, B.A.G. stated: "I do think that the other factors the State can meet[.]"

Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals