NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CRIMINAL PART
ACCUSATION NO. 20-09-0475

STATE OF NEW JERSEY,

Plaintiff,

v.

J.D.,

Defendant.

APPROVED FOR PUBLICATION

January 10, 2024

COMMITTEE ON OPINIONS

Decided: March 15, 2023

Vanessa I. Craveiro, Assistant Prosecutor, for plaintiff (Robert J. Carroll, Morris County Prosecutor, attorney).

Maureen Miller, Assistant Deputy Public Defender, for defendant (Joseph E. Krakora, Public Defender, attorney).

FRANZBLAU, J.S.C.

In this matter, the State seeks for this court to appoint a Guardian / Guardian Ad Litem for the purpose of securing private educational services for defendant and engaging defendant in involuntary education to assist him in attaining competency to stand trial.

Facts and Procedural History

On July 20, 2020, a complaint warrant was issued against J.D. (D.O.B. 07/30/00) charging him with the following offenses: (i) four counts of sexual assault on a minor in violation of N.J.S.A. 2C:14-2(b), each a crime in the second degree; (ii) one count of child endangerment in violation of N.J.S.A. 2C:24-4(a)(1), a crime of the second degree; and (iii) one count of child endangerment in violation of N.J.S.A. 2C:24-4(a)(1), a crime of the third degree.

On or about September 25, 2020, defendant waived his right to indictment and entered into a plea agreement pursuant to which he agreed to plead guilty to two counts of criminal sexual contact in violation of N.J.S.A. 2C:14-3(b), each a crime of the fourth degree. That plea agreement contemplated imposition of the following sentence: "5 years probation conditioned upon 364 days MCCF [Morris County Correctional Facility] SUSPENDED[,] Megan's Law, Psycho-Sexual Evaluation required as a condition of probation and follow any treatment recommendations."

In connection with defendant's guilty plea and prior to sentencing, a psycho-sexual evaluation and risk assessment were completed by Kenneth McNiel, Ph.D. Within a February 8, 2021 report, Dr. McNiel opined that defendant was not competent to stand trial and could not be restored to

competency as a result of, among other things, defendant's impaired cognitive functioning, intellectual disability and impairment. In pertinent part, Dr. McNiel opined that:

> Educational records indicate intellectual functioning in the Extremely Low range, (2nd percentile), with severe deficits in basic academic skills. Overall clinical impression is of a well-intentioned but extremely limited individual generally functioning at the eight – ten year old level, who compensates and can sometimes hide his limitations with [a] genuine, friendly personality and cooperative social style. He nonetheless remains highly dependent on others for functional support and could easily be misled or exploited.
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> . . . .
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> [T]he results of this evaluation indicate a chronic history of intellectual impairment and disability that includes severe deficits in language skills, verbal comprehension and abstract reasoning skills which limit [J.D.]'s ability to rationally understand legal proceedings or to assist in his own defense. It is my opinion within a reasonable degree of professional certainty that [J.D.] did not fully understand the Miranda warnings as administered to him and that he is not competent to stand trial due to chronic intellectual impairment that is unlikely to improve in the foreseeable future.
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> [McNiel Report, pp. 10-11].

As a result of Dr. McNiel's conclusions, on or about April 21, 2021, the court ordered that a formal competency evaluation be performed by the Ann Klein Forensic Center (AKFC).

Within a May 18, 2021 report, Raymond Terranova, Ph.D., concluded that defendant was not competent to stand trial due to his low level of intellectual functioning, which, in part, could be connected to defendant's limited education. He further stated that, "it is this examiner's opinion that the defendant's level of intellectual functioning is the only present barrier to his competency. It is this examiner's opinion that repeated exposure to the competency standard, as noted above, could restore [J.D.]'s competency." Terranova Report, p. 15 (emphasis added). Dr. Terranova concluded that J.D. needed education regarding his plea options, legal strategy and his Fifth Amendment rights. Dr. Terranova further opined, within a reasonable degree of psychological certainty, that J.D. "does not currently present with a level of risk to self or others in a manner that would warrant civil commitment." Id. at 14.

In August 2021, the court ordered that the criminal proceedings in this case be suspended for a three month period and for another competency evaluation to be performed by AKFC. That subsequent evaluation was completed by Jeffrey Palmer, Psy.D. Dr. Palmer's opinions are set forth within his March 4, 2022 report. Dr. Palmer agreed with Dr. Terranova's findings that defendant was not competent to stand trial and that defendant could become competent with education. In this regard, Dr. Palmer opined,

within a reasonable degree of psychological certainty, that, "[J.D.] was [sic] incompetent to proceed at this time and would remain so if no efforts at education were [sic] made."[1] Palmer Report, p. 12. Dr. Palmer further concluded that, "there was not sufficient evidence available to suggest that [J.D.] presented an imminent danger to himself, others, or property at this time and was appropriate for involuntary hospitalization." Ibid. Finally, Dr. Palmer concluded that defendant does not meet the criteria for being considered "dangerous" for the purpose of civil commitment. Ibid.

The State has not challenged the conclusions of Dr. McNiel, Dr. Terranova or Dr. Palmer that defendant is not currently competent to stand trial based upon his low level of intellectual functioning or that defendant does not pose a danger to himself or others.

This court issued a May 9, 2022 order requiring that Dr. Terranova and/or Dr. Palmer prepare an addendum to their respective reports to provide guidance on what type of education/treatment would be needed to potentially

[1] As reflected within Dr. Palmer's report, defendant only attended school through the sixth grade. Thereafter, defendant received special education services until dropping out of school in eighth grade at the age of sixteen. Defendant has an IQ of 69 and his Individualized Educational Plan reflects "mild cognitive impairment." Finally, defendant's past psychiatric evaluations reflect various disorders including Unspecified Anxiety Disorder and Oppositional Defiant Disorder.

bring defendant to competency.[2] On May 27, 2022, after consultation with Dr. Terranova, Dr. Palmer responded to the court's May 9, 2022 order. Dr. Palmer referenced his prior evaluation and that of Dr. Terranova and noted, "there was evidence that [J.D.] had the capacity to learn new material with education." However, Dr. Palmer advised, "the State does not have a community-based competency restoration program and I was unable to locate a State affiliated agency that provide[s] similar services." Dr. Palmer then suggested that defendant meet with Jonathan Wall, Psy.D., a private service provider.

Dr. Wall met with defendant on one occasion to consider an educational treatment plan for defendant to attain competency. However, defendant was unable to retain Dr. Wall's services due to inadequate financial resources. As a result, the State demanded that defendant sign up for benefits with the Division of Developmental Disabilities (DDD) asserting that any disability benefits received by defendant could fund his private educational treatment plan for the purpose of attaining competency to stand trial. Likewise, the State asserted that if defendant is unable to sign up for DDD benefits on his own,

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[2] While Dr. Terranova's and Dr. Palmer's reports speak in terms of providing education to defendant to enable him to regain, retain or be restored to competency, based upon the fact that defendant's incompetence stems from educational deficits, there is no suggestion that defendant has ever been competent in the past such that he could regain or be restored to that previous state of being.

defendant should be required to enroll in the Criminal Justice Advocacy Program (CJAP), which organization could assist him in signing up for DDD benefits. Whether intentional or as a result of defendant's intellectual impairment, he has been unable to complete the application for DDD benefits, which was reported to be in excess of twenty pages, and he has been unable or unwilling to engage CJAP to assist him in procuring DDD benefits.

With the consent of the parties, by order dated July 19, 2022, this court ordered that the New Jersey Department of Health (DOH) "pay for any and all future sessions of treatment and education between defendant and Dr. Jonathan Wall, Psy.D., as needed to assist defendant in gaining competency." However, following DOH's intervention and a request for reconsideration, this court vacated the July 19, 2022 order after concluding that DOH has no statutory obligation to provide educational and competency restoration services on an outpatient basis.[3] Concomitantly, this court extrapolated that DOH also would have no obligation to pay for educational and competency restoration services on an outpatient basis since DOH has no underlying obligation to provide

[3] DOH only has an obligation to provide competency evaluations for criminal defendants and to provide related treatment to defendants who have been civilly-committed. See N.J.S.A. 2C:4-5; N.J.S.A. 2C:4-6(b). There are no statutory provisions that contemplate or require DOH to provide or pay for a criminal defendant's treatment in the community.

those same services on an outpatient basis.

Based upon the opinion of Dr. Terranova, which was subsequently adopted by Dr. Palmer, that J.D. "could" be restored to competency through education, and defendant's unwillingness and/or inability to procure DDD benefits to fund private educational services to potentially attain competency, on December 20, 2022, the State submitted a motion for this court to appoint a Guardian Ad Litem for defendant to assist him in signing up for DDD benefits and provide him with any other assistance needed to secure private educational services in order to attain competency.[4] The Office of the Public Defender, which represents defendant, filed opposition on December 29, 2022, asserting that there is no legal basis for a Guardian Ad Litem to be appointed.[5] The

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[4] While the State's motion seeks appointment of a Guardian Ad Litem, this court believes that the State actually may have intended to seek appointment of a Guardian, because defendant already has been deemed incapacitated by virtue of the experts' opinions that defendant is not competent to stand trial. Likewise, defendant's interest in the criminal proceeding is being represented by the Morris County Public Defender. Conversely, a general Guardian has the power to "exercise all the rights and powers of the incapacitated person" over their person, property or both, which would include procuring DDD benefits or securing educational services on defendant's behalf. See N.J.S.A. 3B:12-24.1(a). See also S.T. v. 1515 Broad Street, LLC, 455 N.J. Super. 538 (App. Div. 2018) (discussing generally the differences between appointment of Guardians and Guardians Ad Litem).

[5] Defendant also filed a motion seeking to withdraw J.D.'s guilty plea and to dismiss the indictment against J.D. pursuant to N.J.S.A. 2C:4-6(c). Those issues will be addressed in a separate statement of reasons because the motion

court held oral argument on February 23, 2023.

This court now denies the State's motion to appoint a Guardian / Guardian Ad Litem for the purpose of securing private educational services for defendant and engaging defendant in involuntary education to assist him in attaining competency to stand trial.

Analysis

The State argues that criminal courts have the authority to issue unique remedies and a duty to protect individuals with mental infirmities. More specially, in this case, the State argues that this court must exercise it parens patriae authority to appoint a Guardian / Guardian Ad Litem to assist defendant in attaining competency to stand trial.

Referencing the parens patriae authority, the State draws on "the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability," such as minority, mental illness or incompetency. In re Grady, 85 N.J. 235, 259 (1981). Likewise, a court's parens patriae authority may be exercised in order to protect the interest of society. State v. Tuddles, 38 N.J. 565, 572 (1962).

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was filed without a transcript of the plea proceeding and the court awaits an updated competency evaluation ordered on October 20, 2022.

Fatal to the State's argument is the absence of any legal authority that would authorize this court to appoint a Guardian / Guardian Ad Litem for the purpose of forcing an adult criminal defendant to submit to involuntary education for the purpose of attaining competency to stand trial. The State cites no statute and no Criminal Part Rule that would authorize the requested action. Likewise, the State has failed to explain adequately how appointing a Guardian / Guardian Ad Litem for the potential purpose of bringing defendant to competency in order to face punitive action would serve to protect his interest. Grady, 85 N.J. at 259.

Concomitantly, the State also has failed to convince this court that the public interest would be served by appointing a Guardian / Guardian Ad Litem for the purpose of subjecting defendant to involuntary education so that he can attain competency to stand trial. To that point, both Dr. Terranova and Dr. Palmer have concluded that defendant does not pose a danger to himself or to others. Compare State v. Krol, 68 N.J. 236, 261 (1975) (noting that crafting a remedy that infringes on a defendant's liberty or autonomy in order to protect the public is appropriate when the defendant "is mentally ill and is dangerous to himself or others"). On that basis, this court cannot reasonably conclude that the public interest would be served by prosecuting defendant. In addition, even if DDD benefits are procured for the purpose of paying for private

educational services for defendant, there is no suggestion as to how a Guardian / Guardian Ad Litem would be compensated.

Although this court acknowledges that the Civil Part IV Rules contain provisions for the appointment of Guardians Ad Litem and Guardians, see R. 4:26-2 and R. 4:86, Part IV rules "govern the practice and procedure of civil actions in the Superior Court, Law and Chancery Division, the surrogate's courts and the Tax Court except as otherwise provided in Part VI and Part VIII." R. 4:1 (emphasis added). The aforementioned Civil Part IV Rules governing Guardians and Guardians Ad Litem are not applicable to criminal actions in the Superior Court, Law Division. Rather, Criminal Part III Rules "govern the practice and procedure in all indicatable and non-indictable" proceedings in the criminal part of the Superior Court, Law Division. R. 3:1-1. Therefore, this court cannot conclude that it is legally permissible to appoint a Guardian / Guardian Ad Litem for the defendant under the guise of Civil Part IV Rules. See Johnson v. State, 18 N.J. 422, 430 (1955) (recognizing that the power to appoint a guardian "has become familiar in its exercise by the Court of Chancery and its successor courts, . . . and is usually limited to civil matters").

This court rejects the State's reliance on State v. Freeman, 203 N.J. Super. 351 (Law Div. 1985), as legal authority for the appointment of a

Guardian / Guardian Ad Litem for defendant. In Freeman, the defendant was accused of murdering his wife. Following the defendant's refusal to allow the State to interview his minor children, the criminal court appointed a Guardian Ad Litem to protect the children's interests. Critically, the children were not criminal defendants. Accordingly, the Freeman court's decision to appoint a Guardian Ad Litem for the children in connection with a criminal action did not implicate the defendant's Fifth Amendment Due Process Rights.

Arguably, in this case, allowing the appointment of a Guardian / Guardian Ad Litem for the purpose of securing private educational services for defendant and engaging defendant in involuntary education to assist him in attaining competency may undermine defendant's due process right to remain free from trial. See Drope v. Missouri, 420 U.S. 162, 171 (1975) (recognizing that a defendant has a due process right not to be tried or convicted while incompetent to stand trial); N.J.S.A. 2C:4-4(a) (recognizing that "no person who lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures").

Further, this court recognizes that a trial court should not intrude into a defense attorney's relationship with his client. State v. Marut, 361 N.J. Super. 431, 433 (App. Div. 2003). During oral argument, defendant's attorney

specifically objected to the appointment of a Guardian / Guardian Ad Litem, declaring that said appointment for the purpose of engaging defendant in involuntary education so that he can attain competency to stand trial is not in defendant's legal interest. This court now concludes that appointment of a Guardian / Guardian Ad Litem for the purpose of securing involuntary educational services for defendant to potentially attain competency would intrude on defendant's relationship with his attorney and the attorney's legal advice and strategy.

This court further rejects the State's reliance on Sell v. U.S., 539 U.S. 166 (2003), as authority for the appointment of a Guardian / Guardian Ad Litem to arrange for and secure defendant's participation in involuntary education for the purpose of attaining competency. In Sell, the United States Supreme Court concluded that it was constitutional for a criminal defendant to be involuntarily medicated for the purpose of being restored to competency in order to stand trial. This court cannot reasonably equate involuntary medication of a defendant for the purpose of restoring competency with the involuntary education of a defendant to attain competency. The former suggests the curing of a transient illness that permits a previously competent defendant to be restored to competency and, as related to this case, the latter implies bringing this defendant to competency—a state that he previously may

never have experienced.

Nevertheless, assuming arguendo that one can equate the constitutionality of involuntary education with involuntary medication, this court rejects that Sell permits the appointment of a Guardian / Guardian Ad Litem for the purpose of providing defendant with involuntary education to attain competency.[6]

In Sell, the United States Supreme Court established a four-prong test to determine whether the involuntary administration of medication to a defendant for the purpose of restoring competency is permissible. Id. at 180. "First, a court must find that important governmental interest at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important." Ibid. (emphasis in original). "Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." Ibid. In R.G., the Appellate Division specifically recognized

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[6] In State v. R.G., the Appellate Division affirmed the trial court's order denying the State's request to involuntarily medicate defendant R.G. to restore him to competency to stand trial concluding that the State failed to satisfy the test under Sell. 460 N.J. Super. 416 (App. Div. 2019). As a result, the Appellate Division did not reach the issue of whether the New Jersey State Constitution would afford a defendant greater protection of individual liberty or privacy rights than provided by the United States Constitution. Id. at 432.

that "circuit courts have differed on how to apply the first factor under Sell: some rely on the maximum sentence for the charges to evaluate if the crime is serious; others consider the defendant's probable sentence." R.G., 460 N.J. Super. at 430-31. Second, a court must determine that "involuntary medication will significantly further those concomitant state interests." Sell, 539 U.S. at 181 (emphasis in original). The court must find that "administration of the drugs is substantially likely to render the defendant competent to stand trial." Ibid. (emphasis added). Third, the court must find that "involuntary medication is necessary to further those interests." Ibid. (emphasis in original). Fourth, the court must determine that "administration of the drugs is medically appropriate." Ibid. (emphasis in original).

This court now concludes that the State has failed to meet the first two prongs under Sell by clear and convincing evidence.[7] Accordingly, this court now rejects Sell as authority for allowing the appointment of a Guardian / Guardian Ad Litem and for the imposition of involuntary educational services for the purpose of bringing defendant to competency in order to stand trial.

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[7] "Sell does not expressly address the evidentiary standard needed to establish the four factors. Because the [Sell] Court said the factors would be satisfied rarely, we agree with United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004), that the Sell 'findings must be supported by clear and convincing evidence.'" R.G., 460 N.J. Super. at 429, n. 5.

As for the first prong, defendant initially was charged with: (i) four counts of second degree sexual assault on a minor in violation of N.J.S.A. 2C:14-2(b), each a crime in the second degree; (ii) one count of child endangerment in violation of N.J.S.A. 2C:24-4(a)(1), a crime of the second degree; and (iii) one count of child endangerment in violation of N.J.S.A. 2C:24-4(a)(1), a crime of the third degree. Certainly, the nature of the initial charges against defendant are serious, and, if defendant ultimately would have been convicted on those charges, implicate a presumption of material incarceration despite the fact that defendant had no prior criminal history.[8] N.J.S.A. 2C:44-1(d). See State v. Hodge, 95 N.J. 369, 374 (1984); State v. Whidby, 204 N.J. Super. 312, 313 (App. Div. 1985).

However, the special circumstances of this case confirm that the State entered into a plea agreement with defendant that required that he plead guilty to only two counts of criminal sexual contact in violation of N.J.S.A. 2C:14-3(b), both crimes of the fourth degree. Based upon the terms of the negotiated plea agreement and defendant's lack of criminal history, there would be a presumption against defendant's incarceration. N.J.S.A. 2C:44-1(e). While the plea agreement contemplates Megan's Law registration, the State's plea

[8] Defendant's Public Safety Assessment, dated July 21, 2020, reflects that J.D. had no other prior involvement with the criminal justice system.

offer calls for defendant to serve only a term of non-custodial probation conditioned on a 364-day jail sentence at the MCCF, which jail sentence was to be suspended.

In view of the fact that the competency evaluations have concluded that defendant is not a danger to himself or to others and that the State's plea offer calls for defendant to plead guilty to only two fourth degree crimes without any mandatory period of confinement, this court cannot conclude that the State has established by clear and convincing evidence that an important governmental interest is at stake in this case. R.G., 460 N.J. Super. at 431.

As for the second prong, defendant has been subjected to three evaluations since the initial criminal complaint was filed against defendant on July 20, 2020. Dr. McNiel's psycho-sexual evaluation concluded that defendant was not competent to stand trial and that he is "unlikely to improve in the foreseeable future." McNiel Report, p. 11. Dr. Terranova and Dr. Palmer also agreed that defendant is not competent to stand trial. In this regard, Dr. Palmer agreed with Dr. Terranova's finding that defendant's intellectual disability is his only barrier to becoming competent and that "repeated exposure" to the competency standard "could restore [J.D.]'s competency." Terranova Report, p. 15. (emphasis added).

The court notes that Dr. Terranova and Dr. Palmer never indicate within

their reports that it is probable, or even substantially likely, that repeated exposure to the competency standard would result in defendant's competency. Sell, 539 U.S. at 181. Rather, they agreed only that "repeated exposure to the competency standard could restore [J.D.]'s competency." Terranova Report, p. 15 (emphasis added).

Given that: (i) there is professional disagreement between Dr. McNiel, on the one hand, and Dr. Terranova and Dr. Palmer, on the other hand, as to whether defendant can attain competency; and (ii) Dr. Terranova and Dr. Palmer's opinions are tepid regarding any substantial likelihood of defendant attaining competency through repeated exposure to the competency standard, this court concludes that the State has failed to establish by clear and convincing evidence prong two of Sell.

This court also expresses significant concern that subjecting defendant to "repeated exposure" to involuntary education over an indefinite period of time, as called for by Dr. Terranova and agreed with by Dr. Palmer, would involve a significantly higher level of invasiveness to defendant's rights and exceed the constitutional parameters established by Sell, which addressed only "forced medication" over a finite period of time. Compare Winston v. Lee, 470 U.S. 753, 759 (1985) (acknowledging that "[a] compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security of such

magnitude that the intrusion may be unreasonable . . . .").

Based upon the foregoing, this court denies the State's motion to appoint a Guardian / Guardian Ad Litem to facilitate defendant's involuntary education for the purpose of defendant attaining competency.[9]

[9] To the extent this court did not address any additional arguments made by the State, it is because this court did not find those arguments or supporting case law compelling or persuasive.