[Cite as *Cleveland v. Tarver*, 2017-Ohio-1165.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105522

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ALICIA TARVER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2016 CRB 024299

BEFORE: Kilbane, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 30, 2017

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MARY EILEEN KILBANE, P.J.:

{¶1} In this accelerated appeal, defendant-appellant, Alicia Tarver ("Tarver"), appeals the trial court's order allowing her to be involuntarily medicated in order to render her competent to stand trial on a petty theft charge. Tarver assigns the following two errors for our review:

> I. Whether the trial court's forced medication order violated Ms. Tarver's state and federal constitutional right to due process.
>
> II. Whether the trial court's conclusion that it lacked jurisdiction to rule on Ms. Tarver's motion to stay its forced medication order because an appeal had been noted was erroneous.

{¶2} On December 29, 2016, officers from the University Circle Police Department arrested Tarver for stealing a pack of cigarettes from a gas station located on Euclid Avenue in Cleveland, Ohio. Tarver was placed in jail. A bond was set at 10 percent of $1,000 on December 31, 2016, but was not paid by Tarver.

{¶3} On January 9, 2017, the trial court ordered a psychiatric evaluation because Tarver would "not talk to the court and walked away." Based on the psychiatric evaluation, on February 2, 2017, the trial court found that Tarver was incompetent to stand trial and remanded her to jail until a hospital bed became available at Northcoast Behavioral Healthcare Center ("Northcoast") on February 14, 2017.

{¶4} The following day, on February 15, 2017, Northcoast requested permission from the trial court to forcibly medicate Tarver because Tarver lacked "substantial capacity to give or withhold informed consent to psychiatric medication." The doctor

noted that Tarver "has remained mute during my attempts to speak with her. Even when confronted with the possibility of involuntary treatment, she did not respond to questions."

{¶5} A hearing was held on February 23, 2017, regarding the request. Dr. Sherif Soliman, a forensic psychologist at Northcoast, testified that forcibly medicating Tarver outweighed any risks. According to the doctor, Tarver displayed symptoms of catatonia and psychosis. Tarver was aggressive towards staff the week prior to the hearing and was involuntarily medicated because of the emergency situation. The doctor stated that Tarver calmed down and suffered no side effects after being medicated. Although Tarver appeared more responsive in group therapy the day prior to the hearing, the doctor did not think that it was the result of the involuntary medication from the previous week.

{¶6} The doctor admitted that he was not aware of the offense with which Tarver was charged, stating it was not relevant to his determination regarding involuntary medication. He did state, however, that it was very common to have individuals charged with misdemeanors treated involuntarily. At the conclusion of the hearing, the trial court ordered that Tarver be forcibly medicated.[1] The trial court refused to stay the matter

[1]R.C. 2945.38(B)(1)(b) requires a municipal court to conduct a hearing within five days after the request for forcible medication is made. Here, the trial court did not conduct the hearing until eight days after the request. However, the time period set forth for holding a hearing has been found to be directory rather than mandatory. *State v. Barker*, 2d Dist. Montgomery No. 20417, 2005-Ohio-298; *State v. McClelland*, 10th Dist. Franklin No. 07AP-253, 2007-Ohio-2260.

pending appeal. The court of appeals granted Tarver's stay and set the matter for an accelerated hearing.

Due Process

{¶7} In her first assignment of error, Tarver argues that because she was charged with an offense that was not serious, there was no government interest that would support forcibly medicating her so that she was competent to stand trial.

{¶8} Pursuant to the Due Process Clause of the Fourteenth Amendment, "'an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" *Sell v. United States*, 539 U.S. 166, 179, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), quoting *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). The trial court may, however, pursuant to R.C. 2945.38, authorize a hospital to involuntarily medicate a mentally ill defendant in order to render the defendant competent to stand trial. Although the statute does not contain specific directives regarding considerations in determining whether the defendant should be involuntarily medicated, the state of Ohio has followed the standard set forth in *Sell*. *See State v. Upshaw*, 166 Ohio App.3d 95, 2006-Ohio-1819, 849 N.E.2d 91 (2d Dist.); *State v. McClelland*, 10th Dist. Franklin No. 06AP-1236, 2007-Ohio-841; *State v. Barker*, 2d Dist. Montgomery No. 20417, 2005-Ohio-298; *State v. Brewer*, 12th Dist. Clermont No. CA2008-04-040, 2008-Ohio-6193.

{¶9} In *Sell*, the Supreme Court found that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant

facing *serious criminal charges* in order to render that defendant competent to stand trial." (Emphasis added.) *Sell* at 179-180. The Court set forth a four-part analysis to be conducted to determine whether involuntarily medicating the defendant is justified: (1) the existence of an "important" governmental interest; (2) that involuntary medication will "significantly further" the government interest; (3) that involuntary medication is "necessary" to further those interests; and (4) that the administration of the drugs must be "medically appropriate" for the individual defendant. *Id.* at 180-181.

{¶10} Tarver contends that the court erred as to the first factor. That is, although the prosecution of a "serious charge" has been deemed by *Sell* to constitute an important governmental interest, Tarver was not charged with a serious offense. The *Sell* court does not define "serious charge," or set forth the considerations a court should take into account in making the determination. However, the United States Supreme Court in *Lewis v. United States*, 518 U.S. 322, 326, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996) held that whether a crime is "serious" is dependent on the statutory penalty for the crime. Pursuant to Crim.R. 2(C), a "'serious offense' means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months."

{¶11} Tarver's charge for petty theft constitutes a first-degree misdemeanor, which pursuant to R.C. 2929.24(A)(1) carries a maximum sentence of 180 days. Therefore, because the possible sentence does not exceed six months, Tarver's charge is not a serious crime. Thus, the prosecution of Tarver does not constitute an important governmental interest that would support forcibly medicating her to stand trial. Indeed,

even based on the facts, forcibly medicating a person so that she is competent to stand trial for stealing a pack of cigarettes is extreme.

{¶12} Accordingly, we sustain Tarver's first assignment of error and reverse the trial court's order that required Tarver to be involuntarily medicated. Tarver's second assigned error is moot and need not be addressed. App.R. 12(A)(1)(C).

{¶13} Judgment reversed and remanded.

It is ordered that appellant recover of appellee her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA ANN BLACKMON J., and
ANITA LASTER MAYS, J., CONCUR