

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070903
	:	TRIAL NO. B-0706324
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
SEAN MERTZ,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Raising three assignments of error, defendant-appellant Sean Mertz, having been found incompetent to stand trial, appeals from the trial court's November 2007 entry authorizing the involuntary administration of medication by Summit Behavioral Healthcare.<sup>2</sup> Mertz had refused medication prescribed by a psychiatrist. The trial court's entry ordering Mertz to be forcibly medicated with psychotropic drugs in an effort to restore him to competency, is a final and appealable order.<sup>3</sup>

Mertz had been indicted on multiple counts of rape and aggravated robbery. Mertz's counsel filed a suggestion of incompetency. The trial court ordered a psychiatric

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> Mertz's notice of appeal declares that appeal is being sought from the trial court's December 12, 2007 entry denying a stay of the November order. As the state was not prejudiced by this error we consider the appeal on the merits. See App.R. 3(D); see, also, *Roberts v. Skaggs*, 176 Ohio App.3d 251, 2008-Ohio-1954, 891 N.E.2d 827, at ¶8.

<sup>3</sup> See *State v. Muncie*, 91 Ohio St.3d 440, 2001-Ohio-93, 746 N.E.2d 1092, paragraph two of the syllabus.

examination of Mertz and found him to be incompetent. Mertz was committed to the Summit Behavioral facility for evaluation and treatment with the goal of rendering him competent for trial. When Mertz refused to take the prescribed medication, the facility petitioned the trial court for an order compelling the treatment.

Mertz's first assignment of error, in which he contends that the trial court failed to make the findings required under *Sell v. United States*<sup>4</sup> before granting the petition for involuntary medication, is overruled.

R.C. 2945.38(B)(1)(c) provides that if a defendant is found incompetent to stand trial, and if the clinical facility to which the defendant is committed for treatment or evaluation determines that medication is necessary to restore the defendant's competency to stand trial but the defendant refuses the medication or cannot give consent, the facility may petition the trial court for authorization for the involuntary administration of medication. After holding a hearing on the petition, the trial court may authorize the facility to involuntarily administer medication if it makes the following findings: (1) that an important governmental interest is at stake, (2) that involuntary medication will significantly further those governmental interests, (3) that involuntary medication is necessary to further those interests and that alternative treatments are unlikely to achieve substantially the same results, and (4) that the administration of drugs is medically appropriate.<sup>5</sup>

Here, the trial court conducted a thorough hearing pursuant to R.C. 2945.38(B)(1)(c). The psychiatrist treating Mertz at Summit Behavioral testified that the medications to be administered would likely reduce his delusional and manic symptoms and restore him to competency. Without this treatment, Mertz's illness would worsen.

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<sup>4</sup> (2003), 539 U.S. 166, 123 S.Ct. 2174; see, also, *State v. Upshaw*, 166 Ohio App.3d 95, 2006-Ohio-1819, 849 N.E.2d 91, at ¶31-32.

<sup>5</sup> *Sell v. United States*, 539 U.S. at 180-181, 123 S.Ct. 2174.

The psychiatrist also described the minor side effects of the intended course of treatment, noted that there was no less invasive means to treat Mertz, and declared that the treatment was medically appropriate. Based upon this testimony and the facts of record, including allegations that Mertz had committed serious crimes, the trial court found each of the *Sell* factors to be present and granted the petition.

Since the trial court complied with R.C. 2945.38 and followed the *Sell* analysis, and the record contains competent, credible evidence to support the trial court's findings, we will not disturb its granting of the petition.<sup>6</sup>

In his second and third assignments of error, Mertz argues that he was denied procedural due process by the trial court's refusal to provide an independent psychiatric or psychological examination before ruling on the petition and to grant a second continuance of the hearing on this issue. Mertz contends that, pursuant to *Steele v. Hamilton Cty. Community Mental Health Bd.*,<sup>7</sup> the trial court was required to appoint an independent psychiatrist or psychologist to examine him before ordering involuntary medication.

But in *Steele* the court was determining the rights of an incompetent patient in a civil commitment proceeding controlled by R.C. Chapter 5122. We adopt the reasoning of the Second District Court of Appeals in *State v. Barker*,<sup>8</sup> where the court held that a mentally ill criminal defendant who refuses to take medication to restore him to the standard of competent to stand trial does not have a right to an independent psychiatric or psychological examination.

Here the trial court held a lengthy hearing on whether to order involuntary medication of Mertz. At the hearing Mertz's counsel vigorously and effectively cross

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<sup>6</sup> See *Myers v. Garson*, 66 Ohio St.3d 610, 1993-Ohio-9, 614 N.E.2d 742; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus; see, also, *Stand Energy Corp. v. Cinergy Serv.* (2001), 144 Ohio App.3d 410, 417, 760 N.E.2d 453.

<sup>7</sup> 90 Ohio St.3d 176, 189-190, 2000-Ohio-47, 736 N.E.2d 10.

<sup>8</sup> 2nd Dist. No. 20417, 2005-Ohio-298.

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examined the treating psychiatrist. And at the conclusion of the hearing, the trial court made the findings required under *Sell* and R.C. 2945.38. The court did not abuse its discretion in failing to permit a second continuance,<sup>9</sup> and did not deprive Mertz of his right to procedural due process. The second and third assignments of error are overruled.

Therefore, the judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 24, 2008  
per order of the Court \_\_\_\_\_.

Presiding Judge

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<sup>9</sup> See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶147, citing *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078, syllabus.