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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH2011-002104) No. 1 CA-MH 11-0093
)
) DEPARTMENT E
)
) MEMORANDUM DECISION
)
) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. MH2011-002104

The Honorable Veronica Brame, Judge *Pro Tempore*

AFFIRMED

William G. Montgomery, Maricopa County Attorney Phoenix
By Anne C. Longo, Deputy County Attorney
Bruce B. White, Deputy County Attorney
Attorneys for Appellee

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By Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Patient appeals the superior court's order committing her to involuntary treatment for a period of one year, with inpatient treatment not to exceed 180 days. For the following reasons, we affirm the superior court's order.

FACTS AND PROCEDURAL HISTORY

¶2 A psychiatrist filed a Petition for Court-Ordered Evaluation, stating there was reasonable cause to believe Patient had a mental disorder that caused her to be a danger to herself and persistently or acutely disabled. An Application for Involuntary Evaluation was attached to the petition, as was an Application for Emergency Admission for Evaluation. The petition was granted, and after evaluations by Dr. Esad Boskailo and Dr. Michael Sweeney, Dr. Boskailo filed a Petition for Court-Ordered Treatment, alleging that Patient was a danger to herself and persistently or acutely disabled, and requesting that the court order her to undergo combined inpatient and outpatient treatment. Affidavits by Dr. Boskailo and Dr. Sweeney were attached to the petition.

¶3 In his affidavit, Dr. Boskailo diagnosed Patient as suffering from "(Probable Diagnosis) Schizophrenia, Undifferentiated Type." During his evaluation, he noted that she presented with multiple types of delusions, "mostly parasitosis," and that her records indicated she believed her body and home were infested with bugs. He described her as

"verbal, tangential with significant flight of ideation." He explained that Patient refused to take any psychotic medication because she believes she is allergic to everything. When he asked Patient about other symptoms, she stated that she was "ADHD, Autistic and PTSD" and that she needed Valium and pain pills. In concluding that Patient is dangerous or disabled, Dr. Boskailo noted that before Patient was hospitalized in the instant case, she had been receiving psychiatric care and had been hospitalized three previous times for similar problems. Patient presented with "several delusional systems, hallucinations, and her thinking process is very disorganized and she has no ability to recognize reality." Accordingly, Dr. Boskailo concluded that Patient needed further inpatient psychiatric care and treatment.

¶4 In the second attached affidavit, Dr. Sweeney diagnosed Patient as suffering from "(Probable Diagnosis) Psychotic Disorder, Not Otherwise Specified)," which rendered her persistently or acutely disabled. He stated records showed Patient arrived at the hospital complaining that her body had been infested with insects, and she was found to have low potassium. During treatment, she appeared to be "actively psychotic." Dr. Sweeney tried on two separate days to speak with Patient, but on both days she was "quite irritable and uncooperative" and said she was unable to answer questions

because of migraine headaches. However, Dr. Sweeney's affidavit stated "she did speak repeatedly in order to insult me and tell me that she was not going to cooperate with the evaluation." He described her mood as "irritable and labile," and noted that "[t]he content of her thinking was remarkable for her global paranoia and hostility." She claimed she was suffering from several "vague, but dramatic physical ailments," but Dr. Sweeney opined that these complaints were likely delusional. Though Patient refused to engage in the evaluation process, his interactions with Patient led him to conclude that she was paranoid and disabled due to her psychiatric condition.

¶15 Dr. Boskailo and Dr. Sweeney both testified at the hearing on the petition. Dr. Boskailo reiterated his diagnoses of psychotic disorder and schizophrenia, describing the symptoms that led him to these diagnoses. He also testified that every day Patient remained untreated for her psychiatric problems, she suffered harm. Petitioner then moved to admit Dr. Boskailo's affidavit that accompanied the petition. The superior court admitted the affidavit over Patient's objection.

¶16 Dr. Sweeney then testified and described his two attempts to examine Patient. On both occasions Patient said she was having a migraine; she "was very angry, hostile . . . and irrationally angry" toward him. When he tried to get her to participate in the evaluation process, she insulted him and said

she was not going to talk to him. Dr. Sweeney testified Patient seemed "disorganized" and he could not get her to focus on any topic. He stated that even if he had had another three days to evaluate Patient, she did not want to engage and he doubted he would have been able to "win her over."

¶7 Petitioner then moved for the admission of Dr. Sweeney's affidavit:

Petitioner: Okay. Did you have an opportunity - did you prepare an affidavit and file -

Dr. Sweeney: Yes, I did.

Petitioner: And you filed it with this court, is that right?

Dr. Sweeney: Yes, ma'am.

Petitioner: And did you have an opportunity to review that affidavit?

Dr. Sweeney: Yes, I did.

Petitioner: Was it a true and accurate copy of the one that you filed with the court?

Dr. Sweeney: Yes, I believe so.

Petitioner: And Dr. Sweeney, is there anything in that affidavit that you would change, if you need to?

Dr. Sweeney: No. No, I don't think so. I think it pretty well captures what my impressions were and my - what my professional opinion was of the patient's condition.

Patient's counsel objected, stating "I'd object because [Dr. Sweeney's] on the stand testifying, so we don't need for it to come in." The court admitted Dr. Sweeney's affidavit, and Patient proceeded to cross-examine Dr. Sweeney.

¶18 The hearing continued with testimony from the additional requisite witnesses and from Patient herself. After considering all the evidence, the superior court found by clear and convincing evidence that Patient was persistently or acutely disabled, in need of psychiatric treatment and unwilling or unable to accept treatment voluntarily. The court ordered Patient to undergo a combination of inpatient and outpatient treatment for a period of time not to exceed a total of 365 days, with inpatient treatment not to exceed 180 days.

¶19 Patient timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(10) and 36-546.01 (West 2012).¹

DISCUSSION

¶10 Under A.R.S. § 36-533(B) (West 2012), a petition for court-ordered treatment shall be accompanied by affidavits from the two doctors who evaluated the patient, which must:

[D]escribe in detail the behavior which indicates that the person, as a result of

¹ Absent material revision after the relevant date, we cite a statute's current version.

mental disorder, is a danger to self or to others, is persistently or acutely disabled or is gravely disabled and shall be based upon the physician's observations of the patient and the physician's study of information about the patient. A summary of the facts which support the allegations of the petition shall be included.

¶11 At a hearing on a petition for involuntary treatment, A.R.S. § 36-539(B) (West 2012) requires that "[t]he evidence presented by the petitioner or the patient shall include . . . testimony of the two physicians who participated in the evaluation of the patient, which may be satisfied by stipulating to the admission of the evaluating physicians' affidavits" that were attached to the petition. "The physicians shall testify as to their personal observations of the patient" and "their opinions concerning whether the patient is, as a result of mental disorder, a danger to self or to others, is persistently or acutely disabled or is gravely disabled and as to whether the patient requires treatment." *Id.* Their testimony also "shall state specifically the nature and extent of the danger to self or to others, the persistent or acute disability or the grave disability." *Id.* The requirements of A.R.S. § 36-539(B) are "in addition to all rules of evidence and the Arizona rules of civil procedure" that are not inconsistent with that subsection. A.R.S. § 36-539(D).

¶12 Patient argues her treatment order should be vacated because evidence in support of the petition did not meet the requirements of the plain language of A.R.S. § 36-539(B). She argues Petitioner did not elicit the requisite testimony from Dr. Sweeney, instead relying on his affidavit to provide his opinions.² Patient argues that under the statute, a doctor's affidavit may be admitted in evidence - either to supplement testimony or in lieu of testimony - only if both parties stipulate. She contends that Dr. Sweeney's affidavit was inadmissible hearsay and did not satisfy the statutory requirement of "testimony of [one of] the two physicians who performed examinations."

¶13 Addressing first the evidentiary issue, hearsay "is a statement, oral or written, made at a time when there was no opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written." *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 258-59, 603 P.2d 513, 529-30 (App. 1979) (quotation omitted); see also Ariz. R. Evid. 801-802.

¶14 Dr. Sweeney's affidavit constituted hearsay to the extent it recounted out-of-court statements (Dr. Sweeney's observations and opinions) that Petitioner sought to introduce

² Patient does not argue that Dr. Boskailo's hearing testimony was insufficient.

for the truth of their content; that is, to show Dr. Sweeney's medical opinion that Patient was acutely and persistently disabled. Although a hearsay statement may be admitted if it falls within an exception to the rule barring hearsay, Petitioner does not argue that any hearsay exception applies to the affidavit.

¶15 "Evidentiary error, however, is reversible only if the objecting party was prejudiced." *State v. May*, 210 Ariz. 452, 458, ¶ 22, 112 P.3d 39, 45 (App. 2005). Patient does not explain how she was prejudiced by the erroneous admission of the affidavit, and we discern no such prejudice from the record. On direct examination, Dr. Sweeney reaffirmed the professional opinions set forth in his affidavit. He recounted his preparation of the affidavit and reaffirmed the statements he made there. As a result, there could not have been any confusion about his opinion of Patient's condition or the bases for that opinion.

¶16 Additionally, as noted, Dr. Sweeney did in fact testify in person at the hearing and therefore was subject to cross-examination. Contrary to Patient's argument on appeal, the court's decision to proceed in this fashion did not shift the burden to her to elicit testimony from Dr. Sweeney, but offered her the requisite opportunity to question him about the

opinions and observations recorded in his report and which he reaffirmed in his direct testimony.

¶17 We also decline to accept Patient's argument that we must reverse the treatment order because the evidence of Dr. Sweeney's opinion "did not strictly comply" with § 36-539(B). As noted, the statute provides that the two physicians who have evaluated the patient "shall testify" about their "personal observations of the patient," "their opinions concerning whether the patient is, as a result of mental disorder, a danger to self or to others [or] is persistently or acutely disabled" and "whether the patient requires treatment." The statute further provides that "[s]uch testimony shall state specifically the nature and extent of the danger to self or to others, [or] the persistent or acute disability."

¶18 Patient argues that although § 36-539(B) allows a physician's testimony to be satisfied by an affidavit if the patient consents, the statutory requirement was not satisfied because Dr. Sweeney's affidavit was not offered with her consent. We conclude Dr. Sweeney's testimony reaffirming the substance of his affidavit satisfied the statute's requirements. Patient does not dispute that the affidavit contains the required elements concerning the physician's evaluation of the patient, professional opinion and the bases for that opinion. It would elevate form over substance to adopt Patient's argument

that the statute would be satisfied if Dr. Sweeney had read his affidavit aloud while testifying but was not satisfied by his testifying that the affidavit "capture[d]" his "impressions and . . . [his] professional opinion . . . of the patient's condition."

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court's treatment order.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PHILIP HALL, Judge