DIVISION ONE
FILED: 08/21/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE JEREMY S.	)	1 CA-MH 12-0025
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015MH201200010

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney — Kingman
By William J. Eckstrom, Jr.
Special Deputy County Attorney
Attorney for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorney for Appellant

T H U M M A, Judge

¶1 Jeremy S. appeals from the superior court's order involuntarily committing him to a mental health facility pursuant to Arizona Revised Statutes (A.R.S.) section 36-540

(Westlaw 2012).[1] Because the proceedings before the superior court complied with statutory requirements and because the superior court's order is supported by substantial evidence, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Jeremy is a 39-year old college graduate who has been married for fourteen years and is a father. Historically, Jeremy has been a high-functioning individual who properly cares for his family and performs well in the workplace, having been employed at the same job for eight years. In 2011, after Jeremy and his family were at risk of losing their home, Jeremy became very depressed and his job performance suffered. At that time, Jeremy sought treatment from his primary care physician, who prescribed the medication Paxil. According to Jeremy's mother, Jeremy first took Paxil as prescribed, but then "wean[ed] himself off of it, and that's when this [impairment] happened."

¶3 Prior to February 2012, Jeremy had received no psychiatric treatment of any kind. By the first part of 2012, Jeremy and his family were losing their home; he was under a lot of stress at work; his wife was ill and Jeremy and his father-in-law were at odds. In early February 2012, Jeremy was admitted to the Mohave Mental Health Clinic for a few days for mental

[1] Absent material revisions, we cite the current Westlaw version of applicable statutes.

health treatment. During that stay, Jeremy allegedly was assaultive toward staff and was taken to jail. The precise diagnosis and outcome of that visit is unclear from the record.

¶4 On February 28, 2012, Dr. N. Zegarra, Medical Director of Mohave Mental Health Clinic, filed a request for court-ordered evaluation of Jeremy pursuant to A.R.S. § 36-523. The request stated there was reasonable cause to believe Jeremy had a mental disorder and, as a result, was a danger to himself and others. The request stated Jeremy was refusing treatment, was demonstrating aggressive, assaultive and bizarre behavior and had been admitted to a facility "for psychiatric care due to his assaultive behavior."[2]

¶5 On February 29, 2012, the superior court granted the request for evaluation and ordered that Jeremy be evaluated at the Mohave Mental Health Clinic in Kingman. The court also appointed an attorney to represent Jeremy.

¶6 On March 5, 2012, after evaluating Jeremy, Dr. Sirpa Tavakoli, a psychiatrist and Deputy Medical Director/Director of

[2] The request attached a February 23, 2012 application for involuntary evaluation pursuant to A.R.S § 36-520, in which Jeremy's mother stated she had "tried repeatedly to get [Jeremy] help and failed;" that Jeremy was refusing treatment and making decisions that risked harm to Jeremy and his children; was "manic & has been for more th[a]n 30 days – not sleeping" and that Jeremy had "created 2 incidents, 3 really, yesterday in which the Police were involved. Things are escalating quickly." Jeremy's mother added that his judgment was "severely impaired" and she believed Jeremy was bipolar.

Inpatient Psychiatry of the Mohave Mental Health Clinic, filed a petition for court ordered treatment pursuant to A.R.S. § 36-533. The petition stated Dr. Tavakoli and Dr. Laurence Seltzer had evaluated Jeremy and, based on those evaluations, alleged Jeremy had a mental disorder, was a danger to others and was persistently or acutely disabled. The petition sought an order for inpatient and outpatient treatment of Jeremy pursuant to A.R.S. § 36-540(A)(2).

¶7 The petition attached a March 5, 2012 affidavit by Dr. Tavakoli and her Medication Module Psychiatric Evaluation. Based on her evaluation of Jeremy, Dr. Tavakoli found Jeremy was "suffering from a mental disorder diagnosed as Bipolar Disorder, Type 1, most recent manic severe" and, as a result, was a danger to others and persistently or acutely disabled. The petition also attached a March 1, 2012 affidavit, and a Medication Module Psychiatric Evaluation, by Dr. Seltzer, a psychiatrist at Mohave Mental Health Center. Based on his evaluation, Dr. Seltzer found Jeremy was "suffering from a mental disorder diagnosed as Bipolar 1, [m]ost rec[ent] manic sev[ere]" and, as a result, was persistently or acutely disabled. The petition also attached March 5, 2012 evaluations by therapists Patricia J. Marko and Jettie Blanton, stating Jeremy had no or poor insight into his mental illness and was refusing medications; that Jeremy was at

risk of self harm or inadvertent harm of others and recommended Jeremy be held for continued mental health treatment.

¶8 On March 8, 2012, the superior court held a hearing on the petition. Jeremy, his attorney and counsel for the State were present and participated in the hearing. Dr. Tavakoli testified that, based on her observation and evaluation, Jeremy was suffering from bipolar disorder, was in a manic state and was acutely disabled (meaning he had a mental illness needing treatment). Dr Tavakoli added that Jeremy had a family history of bipolar disorder. She further testified that Jeremy's behavior was erratic, his mood had been irritable, he had grandiose ideation and he exhibited assaultive behaviors.

¶9 Dr. Tavakoli testified she tried without success to explain to Jeremy the advantages and disadvantages of treatment and placement and that Jeremy had refused voluntary treatment. Dr. Tavakoli testified Jeremy had not recently been taking any medication; was not under the influence of any drugs and could not be treated on an outpatient basis.

¶10 Given Jeremy's assaultive behavior (including "threats to my staff about wanting to kill them actually as recently as a few days ago"), Dr. Tavakoli recommended inpatient placement at a facility other than the Mohave Mental Health Clinic. Dr. Tavakoli testified that without treatment, there was a substantial probability that Jeremy would continue to suffer

severe and abnormal mental, emotional or physical harm that would significantly impair his judgment, reasoning and behavior or capacity to recognize reality. Dr. Tavakoli testified that Jeremy's prognosis was good "if his insight improves [and] if he takes medication and follows the treatment plan." Dr. Tavakoli was cross-examined by Jeremy's counsel.

¶11 Dr. Seltzer testified about his evaluation of Jeremy and repeated his finding that Jeremy was in a manic state, was grandiose and needed immediate treatment for his mental illness. Dr. Seltzer testified Jeremy "was doing things that were a danger," was euphoric, "didn't see any danger in things" and refused voluntary treatment. Dr. Seltzer testified Jeremy needed immediate treatment and, with medication, believed that Jeremy would stabilize in a few weeks. Dr. Seltzer was cross-examined by Jeremy's counsel, including about his affidavit attached to the petition.

¶12 Medication nurse Bill Paulson testified that Jeremy had been prescribed Depakote, which he refused to take. Although Mr. Paulson testified Jeremy had received medications in the last 72 hours, he was not asked about the nature of those medications, other than to confirm that those medications did not in any way impact Jeremy's ability to participate in the hearing. Mr. Paulson testified that Jeremy's family members seemed very supportive and concerned about Jeremy.

¶13 Jeremy's wife of fourteen years testified about Jeremy's sudden change in behavior that she first observed on January 28, 2012. Jeremy's wife added that, over the past weeks, "[h]e started grandiose ideas" and "[h]is thinking became irrational." She added that his uncharacteristic behavior "has become worse" since January 28, 2012. Jeremy's mother also testified about Jeremy's recent behavioral changes.

¶14 Jeremy did not testify and offered no evidence at the hearing. Jeremy's counsel argued the State failed to show, by clear and convincing evidence, that Jeremy was a danger to others or that his impairment could reasonably be expected to result in serious physical harm. Jeremy's counsel also argued that "poor judgment" was not sufficient to show Jeremy was persistently or acutely disabled or that his impairment was severe.

¶15 After considering the evidence and argument, and noting "[t]his is as close a call as I have had in these particular [types of] cases," the superior court found Jeremy was persistently or acutely disabled. The court ordered that Jeremy be treated in a program of first inpatient and then outpatient treatment for not more than 365 days. When the possibility of treatment at Mohave Medical Health Clinic was discussed, Jeremy stated "I would like to go somewhere else actually." The court ordered that Jeremy first undergo in-

patient treatment in the Mohave Mental Health Clinic, an order later amended to include the possibility of treatment at Northern Arizona Regional Behavioral Health Authority in Flagstaff.

¶16 Jeremy timely appeals from this order. We have jurisdiction pursuant to A.R.S. §§ 36-546.01 and 12-2101(A)(1).

DISCUSSION

¶17 We will affirm a superior court's order for involuntary mental health treatment if it is supported by substantial evidence. *In re MH 2008–001188*, 221 Ariz. 177, 179, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). "[W]e view the evidence in the light most favorable to sustaining the order," and will not set aside the superior court's findings unless they are clearly erroneous. *Cimarron Foothills Cmty. Ass'n v. Kippen,* 206 Ariz. 455, 457, ¶ 2, 79 P.3d 1214, 1216 (App. 2003); *In re MH 2008–001188*, 221 Ariz. at 179, ¶ 14, 211 P.3d at 1163. To the extent Jeremy raises issues of statutory interpretation, our review is *de novo*. *See In re Commitment of Flemming*, 212 Ariz. 306, 307, ¶ 3, 131 P.3d 478, 479 (App. 2006).

I. The State Provided The Court With An Adequate Record of Jeremy's Relevant Medications.

¶18 Jeremy first argues the State failed to comply with A.R.S. § 36-539(A), which requires that the court be provided a record of all drugs Jeremy received during the three days

immediately before the hearing. To help ensure that a patient facing involuntary commitment is not so under the influence of medication "as to be hampered in preparing for or participating in the hearing," the court must be presented at the hearing "a record of all drugs, medication or other treatment that the person has received during the seventy-two hours immediately before the hearing." A.R.S. § 36-539(A). We find no error in the State's compliance with this requirement.

¶19 Jeremy's counsel made no objection on this ground before the superior court and the record reflects no concerns that Jeremy was hampered by any medication at the hearing. Because no such concern was brought to the attention of opposing counsel and the superior court at the hearing, the issue cannot now be raised on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). Moreover, at the hearing, Drs. Tavakoli and Seltzer testified Jeremy had not been taking any medications. Although Nurse Paulson testified Jeremy had taken medications, he added that any medications Jeremy had taken in the last seventy-two hours would not affect his ability to participate in the hearing. This testimony was not addressed during cross-examination and was not contradicted during the hearing. Moreover, the superior court had the opportunity to observe Jeremy at the hearing and expressed no concerns.

Accordingly, we reject Jeremy's claim that the State did not comply with A.R.S. § 36-539(A).

II. The State Presented Substantial Evidence to Support the Court's Involuntary Commitment Order.

¶20 Jeremy argues that the testimony provided by the two evaluating physicians was insufficient to show the nature and extent of a persistent or acute disability as required by A.R.S. § 36-539(B). Specifically, Jeremy contends that the affidavits provided by Drs. Tavakoli and Seltzer are inadequate and argues Dr. Seltzer did not testify that Jeremy was persistently or acutely disabled or about the nature and extent of Jeremy's disability.

¶21 Jeremy did not object to the affidavits before the superior court. Because any such concern was not brought to the attention of opposing counsel or the superior court, the issue cannot now be raised on appeal. *See Trantor*, 179 Ariz. at 300, 878 P.2d at 658. Moreover, the pre-hearing affidavits by Drs. Tavakoli and Seltzer set forth facts supporting the allegations in the petition based on their examination of, and study of information about, Jeremy. Although terse, these affidavits at least minimally comply with the statutory requirements. *See* A.R.S. § 36-533(B); *compare In re MH2011-000914*, 229 Ariz. 312, 275 P.3d 611 (App. 2012) (finding "affidavit did not comply with the statute" when it was based on interaction with a patient for

"a minute or two" with no follow up given claimed "time constraints").

¶22 The requirements of A.R.S. § 36–539(B) are jurisdictional and cannot be waived. *In re Burchett*, 23 Ariz. App. 11, 13, 530 P.2d 368, 370 (1975) (construing statutory predecessor). If a court fails to strictly comply with A.R.S. § 36–539(B), any treatment order is void. *See, e.g., id.; In re Maxwell*, 146 Ariz. 27, 30, 703 P.2d 574, 577 (App. 1985). Considering the substance of the evidence received at the hearing, including the doctors' affidavits attached to the petition,[3] the record shows the State made the required showing by clear and convincing evidence.

¶23 Jeremy criticizes Dr. Seltzer for basing his diagnosis on Jeremy using "poor judgment." Dr. Seltzer's opinions,

[3] Citing A.R.S. § 36-539(B), Jeremy argues the doctors' affidavits should not be considered because he did not stipulate to their admission. Because the doctors testified, the stipulation provision of A.R.S. § 36-539(B) has uncertain application. Moreover, Jeremy cross-examined Dr. Seltzer on his affidavit; Jeremy did not object to the affidavits and both affidavits were part of the superior court file for the court's consideration. *See In re MH 2006-000490*, 214 Ariz. 485, 488, ¶ 9, 154 P.3d 387, 390 (App. 2007) ("In lieu of in-court testimony, a court may admit or take judicial notice of the physicians' affidavits appended to the petition."). It would impermissibly elevate form over substance to find the court could not consider the affidavits attached to the petition in ruling on that petition. Accordingly, in determining whether the court properly found the State met its burden, we consider the affidavits of the two doctors attached to the petition as well as the evidence received at the hearing.

however, were based on far more than concerns about judgment. Dr. Seltzer also based his diagnosis on Jeremy's "manic state impairing his judgment;" "grandiose" and "euphoric" behavior; "paranoid ideations, hearing voices;" that Jeremy "didn't see any danger in things;" that Jeremy "was acting in a way that it was different from the way he usually acts" and that Jeremy "didn't have good insight and he was not himself."

¶24 Consistent with the requirements of A.R.S. § 36-539(B), Drs. Tavakoli and Seltzer each: (1) are physicians experienced in psychiatric matters; (2) evaluated Jeremy, studied information about him and provided their personal observations of Jeremy; (3) found Jeremy was suffering from a mental disorder diagnosed as bipolar disorder, described as severe and manic; (4) found, as a result of that mental disorder, Jeremy was persistently or acutely disabled; (5) discussed the nature and extent of that disability and (6) stated Jeremy needed inpatient treatment.[4] Consistent with the requirements of A.R.S. § 36-501(33), Drs. Tavakoli and Selzter each discussed the likelihood that, if not treated, Jeremy's disability would cause him to continue to suffer an abnormal mental state that would significantly impair his judgment. Drs.

[4] Dr. Tavakoli further found that, as a result of Jeremy's mental disorder, he was a danger to others. Because the superior court did not find the State proved that allegation by clear and convincing evidence, we need not address that aspect of the petition or that aspect of Dr. Tavakoli's diagnosis.

Tavakoli and Selzter also discussed how the disability impaired Jeremy's understanding of the advantages and disadvantages of accepting voluntary treatment and treatment alternatives and his ability to make a treatment decision and noted Jeremy's favorable prospects if treated. Moreover, both doctors were cross-examined by Jeremy's counsel.

¶25 Noting "[t]his is as close a call as I have had in these particular [types of] cases," the superior court granted the petition based on the record before it. Having considered that same record, the superior court did not abuse its discretion in considering the evidence and granting the petition.

III. The State Properly Provided Testimony Regarding Placement Alternatives.

¶26 Jeremy next argues the State failed to have witnesses "testify as to placement alternatives appropriate and available for the care and treatment of the patient." A.R.S. § 36-539(B). However, Dr. Tavakoli testified that Jeremy needed inpatient treatment and discussed various placement alternatives. After the court granted the petition, Dr. Tavakoli, the parties and the Court discussed placement alternatives. When Dr. Tavakoli stated Jeremy would be sent to another facility given his threats to Mohave Mental Health Clinic staff, Jeremy expressed

agreement and the Court encouraged the parties to resolve the issue. Again, we find no error.

IV. The Court Properly Ordered Initial Treatment at an Appropriate Facility.

¶27 Jeremy contends the superior court violated A.R.S. § 36-541 by ordering him to undergo initial treatment in a mental health treatment facility that was not geographically convenient. A.R.S. § 36-541(B) provides:

> [a] patient who is ordered by a court to undergo treatment based on a determination that he is persistently or acutely disabled shall be treated for at least twenty-five days solely in or by a local mental health treatment agency geographically convenient for the patient unless he is accepted by the superintendent of the state hospital for treatment at the state hospital.

As amended, the Order for Treatment directed in-patient treatment for Jeremy in:

> Mohave Mental Health Clinic [Kingman], or other appropriate facility, to wit: the Northern Arizona Regional Behavioral Health Authority [Flagstaff], as a local mental health treatment agency for the first 25 days, and thereafter, if the Medical Director deems that local treatment is not appropriate, at the Arizona State Hospital.

A subsequent order authorized transport to a Tucson area hospital "to carry out the balance of treatment upon request from the Mohave County Attorney's Office to do so." The record, however, contains no evidence to show that Jeremy was moved to

Tucson or Flagstaff for any treatment, let alone during initial treatment for the first 25 days. *See* A.R.S. § 36-541(B). Accordingly, on this record we find no error.

CONCLUSION

¶28 For the foregoing reasons, we affirm the superior court's grant of the State's petition for court ordered treatment pursuant to A.R.S. § 36-533.

/s/_____
SAMUEL A.THUMMA, Judge

CONCURRING:

/s/_____
JON W. THOMPSON, Presiding Judge

/s/_____
PETER B. SWANN, Judge