DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE KATHY W.	) No. 1 CA-MH 12-0060)) DEPARTMENT B)) **MEMORANDUM DECISION**) (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)))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. S-8015-MH-2012-00025

The Honorable Lee F. Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney Kingman
By Dolores H. Milkie, Civil Deputy County Attorney
Attorneys for Appellee

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

H O W E, Judge

¶1 Kathy W. appeals from the superior court's order involuntarily committing her to a mental health facility on the

grounds that she is persistently or acutely disabled and in need of treatment.

FACTS AND PROCEDURAL HISTORY

¶2 On July 17, 2012, Dr. T. petitioned for a court-ordered evaluation of Kathy pursuant to Arizona Revised Statutes ("A.R.S.") section 36-523.[1] The request stated that reasonable cause existed to believe that Kathy had a mental disorder and as a result, was persistently or acutely disabled. Kathy had refused treatment and had been admitted to the Mohave Mental Health Clinic because of delusional and disorganized thinking and bizarre behavior.

¶3 On July 20, 2012, a Notice of Hearing was distributed to the parties, stating that a hearing would be held in five days to determine whether Kathy should undergo involuntary treatment. The notice stated that Kathy has "a right to appear before the Court, to make reply to the allegations, to bring in witnesses, including an independent mental health evaluator . . . and to be represented by an attorney."

¶4 That same day, an Authorization for Video Conference Hearing was distributed to the parties that set the hearing as a video conference between the clinic and the superior court. The authorization also stated that "Any objection to this method of

[1] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

hearing on behalf of the proposed patient must be filed promptly with the Court and may be considered a request for extension of time for the hearing pursuant to A.R.S. § 36-535(B) to allow for argument on the objection and coordination of a courtroom hearing." No one objected.

¶5 The court commenced the hearing and confirmed that Kathy and her attorney could hear and view the proceedings from their location at the mental health facility. The court asked whether anyone objected to the hearing by video and no one objected. Dr. T. testified that based on her observations and evaluations, Kathy suffered from schizophrenia, most likely paranoid type. Dr. T. testified that in her opinion, Kathy was persistently or acutely disabled. When asked whether she believed that Kathy's mental disorder had a reasonable prospect of being treated, Dr. T. responded affirmatively and opined that proper treatment would include inpatient treatment and outpatient treatment after Kathy was stabilized. The doctor further testified that if Kathy was not treated, a substantial probability existed that she would suffer or continue to suffer severe and abnormal mental, emotional or physical thoughts that significantly impair her judgment, reason, behavior or capacity to recognize reality. Dr. T. testified that she attempted to explain to Kathy the advantages and disadvantages of treatment

and placement, but that she did not believe Kathy understood her explanation.

¶6 Dr. S. also testified about his observations and evaluations of Kathy. He stated that he believed Kathy suffered from schizoaffective disorder, bipolar disorder. He testified that he believed that the disorder caused Kathy to be acutely disabled, and believed that Kathy needed inpatient treatment and that "she is not able to really return home." He further testified about his conversations with Kathy that led him to his opinion. Dr. S. testified that he attempted to explain to Kathy the advantages and disadvantages of treatment, but also believed that she did not understand his explanations.

¶7 Kathy did not testify and offered no evidence at the hearing. After considering the evidence and closing arguments, the court found by clear and convincing evidence that Kathy was persistently or acutely disabled and ordered her to undergo a combined inpatient and outpatient treatment program not to exceed a total of 365 days.

¶8 Kathy timely appeals. We have jurisdiction pursuant to A.R.S. §§ 36-546.01 and 12-2101(A)(1).

DISCUSSION

¶9 Kathy argues that (1) conducting the commitment hearing by video conference where she appeared through a monitor denied her due process, (2) she was provided with ineffective

assistance of counsel, (3) the evidence presented at the commitment hearing was insufficient, and (4) the evidence presented at the commitment hearing did not meet the statutory requirements of A.R.S. § 36-539.

¶10 We will affirm a superior court's order for involuntary mental health treatment if substantial evidence supports it. *In re MH 2008-001188*, 221 Ariz. 177, 179, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). We view the evidence in the light most favorable to sustaining the superior court's order and do not set aside the order unless it is clearly erroneous. *Id.* We review de novo the application and interpretation of statutes. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008), *superseded by statute on other grounds by* A.R.S. §§ 36-537 and -539.

I. The Video Conference

¶11 Kathy argues that her presence at the hearing through video conference denied her due process. Kathy has forfeited this claim on appeal because she did not object below to having the hearing conducted by video conference. The court notified Kathy and her attorney of Kathy's right to be present at the conference and the procedure for objection to the video conference five days before the hearing, allowing ample time for Kathy or her counsel to object. Further, Kathy and her counsel had the opportunity to object to the video conference at the

beginning of the hearing, but did not do so. Under these circumstances, we are limited to reviewing her claim for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶12 No fundamental error occurred here, for two reasons. First, a patient is not required to attend the hearing. Section 36-539(B) provides that a "patient and the patient's attorney shall be present at all hearings, ... The patient may choose to not attend the hearing or the patient's attorney may waive the patient's presence." A.R.S. § 36-539(B). The statute gives the patient the option of not attending.

¶13 Second, holding a video conference is an acceptable method of conducting the hearing. We have previously held that "appearance by telephone is an appropriate alternative to personal appearance." *Ariz. Dep't Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997). We have also held that the telephonic testimony of an evaluating physician in a civil commitment hearing did not deprive the patient of procedural due process. *In re MH-2008-000867,* 225 Ariz. 178, 182, ¶ 13, 236 P.3d 405, 409 (2010). If a key witness's telephonic appearance does not violate due process, a witness's video appearance also does not violate due process. Therefore, we do not find error, much less, error "[that is] clear,

egregious and curable only via a new trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

II. Ineffective Assistance of Counsel

¶14 Next, Kathy argues that her trial counsel was ineffective for failing to affirmatively advise the court of Kathy's position regarding her right to personally appear at the hearing. But the trial court, not counsel, has a duty to inquire into alternative means of a patient's appearance before proceeding with a commitment hearing in a case in which the patient is unable to physically attend and cannot appear through other electronic means. *See In re MH2010-002637*, 228 Ariz. 74, 81, ¶¶ 25-26, 263 P.3d 82, 89 (App. 2011). We find that Kathy was present for the hearing through video conference, and as discussed previously, this was an appropriate alternative to personal appearance.

¶15 Because Kathy appeared, counsel had no duty to inform the court that she agreed with the method of appearance. Further, if Kathy objected to the video conference, she could have spoken up when the court asked if anyone objected to the video conference. Therefore, we find no ineffective assistance of counsel violation. Further, we find that the trial court did not err because it did not have a duty to inquire about Kathy's willingness to appear electronically, and even if it did, the

court fulfilled that duty by asking if anyone objected to the method of appearance.

III. Sufficiency of the Evidence

¶16 Kathy argues that the testimony of Dr. S. was insufficient because he did not testify that Kathy's disorder had a reasonable prospect of being treatable by outpatient, inpatient, or combined inpatient and outpatient treatment.

¶17 Section 36-539(B) requires that two physicians who have evaluated the patient shall testify to their personal examinations of the patient, their opinions concerning whether the patient is persistently or acutely disabled as a result of a mental disorder, and whether the patient requires treatment. A.R.S. § 36-539(B). The physicians must state specifically the nature and extent of the persistent or acute disability. *Id.*

¶18 At the hearing, Dr. S.'s testimony fulfilled § 36-539(B)'s requirements. Dr. S. found Kathy was suffering from a mental disorder diagnosed as schizoaffective disorder, bipolar disorder, and found that the she was acutely disabled as a result of that disorder. He discussed the nature and extent of that disability and stated his opinion regarding whether he believed she needed treatment. Therefore, Dr. S.'s testimony was consistent with the statutory requirements of § 36-539(B).

¶19 Kathy also argues that the court had insufficient evidence to find that she was acutely or persistently disabled,

specifically because Dr. S. did not state verbatim the requirements of A.R.S. § 36-501(32)(c) that her mental disorder has a reasonable prospect of being treatable by outpatient, inpatient or combined treatment. Under that statute, if a court finds by clear and convincing evidence that a person is acutely disabled, it may order that person to undergo involuntary treatment. *See In re Pima Cnty. Mental Health*, 169 Ariz. 141, 142, 817 P.2d 945, 946 (App. 1991).

¶20 Kathy argued that subsection (c) of the statute had not been sufficiently proven. However, both doctors testified that treatment would benefit Kathy. Dr. S. testified that Kathy needed treatment and believed that inpatient treatment was appropriate. Dr. T. believed that Kathy's mental disorder had a reasonable prospect of being treated and opined that proper treatment would include a combination of inpatient and outpatient treatment. We find that the evidence presented was sufficient.

IV. Evidence Regarding Placement Alternatives

¶21 Kathy also argues that the court did not comply with A.R.S. § 36-539 because witnesses did not testify about placement alternatives appropriate and available to her. We find that the testimony of both doctors concerning their treatment recommendations was sufficient to comply with § 36-539(B). Placement options for patients found to be persistently or

acutely disabled and unwilling or unable to accept voluntary treatment are outpatient treatment, inpatient treatment, or a combination of both. *See* A.R.S. § 36-540(A). Dr. T. recommended that Kathy enter inpatient treatment and that after she is stabilized and on psychotic medication, she could enter an outpatient program. Dr. S. recommended that Kathy should remain in inpatient treatment until she is stabilized.

CONCLUSION

¶22 For the foregoing reasons, we affirm.

/s/
RANDALL M. HOWE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge