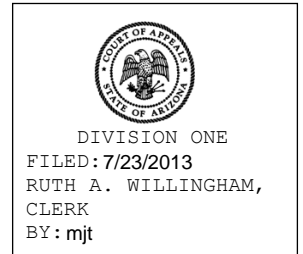


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



IN RE MH2012-003987) 1 CA-MH 13-0008
)
) DEPARTMENT C
)
) **MEMORANDUM DECISION**
)
) Not for Publication -
) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. MH2012-003987

The Honorable Sarah R. Simmons, Judge

REMANDED

Barbara Lawall, Pima County Attorney Tucson
By Jonathan Laurence Pinkney-Baird, Deputy County Attorney
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender Phoenix
By Anne H. Phillips
Attorneys for Appellant

G E M M I L L, Judge

¶1 Appellant appeals from the Pima County Superior Court's November 29, 2012, order for involuntary mental health treatment, asserting the court violated her due process right to

be present for her hearing by erroneously determining that she voluntarily absented herself from the proceedings. For the following reasons, we vacate the court's finding that she waived her right to be present and remand for a hearing on that issue.

BACKGROUND

¶12 On November 15, 2012, while Appellant was being held on criminal charges in the Pima County Jail, a psychologist working there filed a petition and application with the Pima County Superior Court requesting that the court order Appellant to undergo an involuntary evaluation. The petition alleged Appellant had been screaming and yelling, refusing meals and medication, was found naked in her cell, and had a "lack of behavioral control." The court ordered that Appellant be evaluated and the resulting screening report indicated Appellant showed "signs and symptoms consistent [with] bipolar disorder."

¶13 On November 20, 2012, another medical doctor filed a petition for court-ordered treatment requesting that Appellant be ordered to participate in combined inpatient and outpatient treatment, pursuant to Arizona Revised Statutes ("A.R.S.") section 36-540(A)(2) (Supp. 2012). Attached to the petition were affidavits and reports of two psychiatrists who evaluated Appellant, both concluding she was "persistently or acutely disabled." That same day, the court issued a notice stating a hearing on the petition would be held on November 27, 2012.

¶14 At the hearing, Appellant's counsel requested a continuance and told the court his client "claim[ed] to be ill and vomiting" and did not want to become sick in the courtroom. Counsel further stated that Appellant desired to be present for the hearing and to testify on her own behalf. The State objected and called Appellant's attending psychiatrist to testify regarding Appellant's condition that day. The doctor testified that he went to visit with Appellant the morning of the hearing after he had been notified she was complaining of being ill. He stated that she was "delusional" and had gone "off on a tangent" when he tried to speak with her about the hearing. He further testified that he spoke with the attending nurse who reported that Appellant was "complaining of vomiting blood, but none was seen." Further, the nurse told the doctor Appellant had been "observed walking around the unit and not in distress." The nurse was not present at the hearing for questioning. The doctor also testified that he checked Appellant's vital signs and he opined that Appellant was physically able to attend the hearing.

¶15 The court then found Appellant was "physically capable of being [present] and that she [had] voluntarily absent[ed] herself from the hearing" The court asked Appellant's attorney whether he had advised his client of the "consequences" of her failure to appear and he replied that he had. The court

then proceeded with the hearing without further discussion about Appellant's absence.

¶16 The court first heard additional testimony from Appellant's psychiatrist, who testified that he diagnosed Appellant with an unspecified psychotic disorder and stated that she "probably has schizoaffective disorder or bipolar disorder." He further testified Appellant is "very delusional." He reported that in observing Appellant he noted several concerning behaviors, including being non-responsive, laughing inappropriately, stating that she hears the voice of God, talking to herself, and stating she was afraid to take her medications for fear "they would implode inside her body." The doctor also testified Appellant seemed "paranoid and disorganized in her thinking." When asked whether he discussed with Appellant the allegations regarding her mental health treatment, the doctor responded that he had "tried to," but that Appellant would either not respond or would intentionally interrupt him. He further stated Appellant "may have understood some" of what he was explaining, but he could not be sure because she was "very disorganized [and] psychotic" The doctor further opined that Appellant's mental illness substantially impaired her ability to make informed decisions regarding her mental health treatment.

¶17 Another psychiatrist who had evaluated Appellant

testified that she diagnosed her with "Bipolar 1 disorder, generalized anxiety disorder and post traumatic stress disorder" The doctor also testified Appellant was incoherent and unresponsive when she attempted to evaluate her or discuss her treatment. The doctor further stated that Appellant's mental illness affects "her judgment and her ability to make an informed decision," as well as "her ability to interact with others and to perceive reality" A third doctor, the psychologist who drafted the petition for involuntary evaluation, testified that Appellant had been displaying dysfunctional behavior, such as being naked in her room for extended periods, refusing medication and food, and reacting in a nonresponsive manner to evaluators.

¶18 The court found Appellant was "persistently or acutely disabled" as a result of mental disorder. The court further found by clear and convincing evidence that Appellant was unable or unwilling to participate in voluntary treatment and ordered that Appellant receive "court ordered treatment with the ability to be re-hospitalized should the need arise" The court then approved the State's motion to transfer venue to Maricopa County for a hearing to determine a treatment plan. Appellant timely appealed and we have jurisdiction pursuant to A.R.S. §§ 36-546.01 (2009) and 12-2101(A)(10)(a) (Supp. 2012).

ANALYSIS

¶9 Appellant argues on appeal that she “was denied her due process right to attend and be heard at her hearing for court-ordered treatment” when the trial court erroneously determined that her absence from the hearing was voluntary. We agree the court’s finding that she voluntarily waived her right to be present at the involuntary treatment hearing must be vacated.

¶10 Court-ordered involuntary treatment is a “serious deprivation of liberty,” and therefore a person who faces the proposition of such an order is entitled to a full and fair hearing. *In re MH 2006-000749*, 214 Ariz. 318, 321, ¶ 14, 152 P.3d 1201, 1204 (App. 2007) (internal quotations and citations omitted). This includes the right to be present at the hearing if the patient so chooses. *Id.* at 321-22, ¶¶ 15, 17, 152 P.3d 1204-05; A.R.S. § 36-539(B) (Supp. 2012) (“The 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.”). Further, “although a patient has the power to waive attendance at an involuntary treatment hearing, the patient’s waiver is ineffective unless the superior court expressly finds that it is given knowingly and intelligently.” *In re MH 2006-000749* at 319, ¶ 1, 152 P.3d at 1202.

¶11 "Whether a right has been waived is a question of fact for the trial court." *Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987). "Because a waiver of rights requires the intent to waive be clearly shown, doubtful cases will be decided against waiver." *In re MH 2006-000749* at 324, ¶ 28, 152 P.3d at 1207 (internal quotations and citations omitted). We will uphold the trial court's finding of a voluntary waiver absent an abuse of discretion. *State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984).

¶12 Our review of the record reveals that the trial court did not have a sufficient basis for its finding that Appellant voluntarily waived her presence at the hearing. Further, the court did not make any express findings as to whether Appellant's purported waiver was knowing and intelligent. See *In re MH 2006-000749* at 319, ¶ 1, 152 P.3d at 1202.

¶13 First, regardless of whether Appellant was "physically capable" of attending the hearing, there is no indication in the record that she intended to waive her right to be present, apart from the bare fact that she was not present at the hearing. Appellant's counsel expressed that his client desired to be present and to testify on her own behalf. The mere fact that Appellant may have been physically able to attend but did not do so is insufficient to support a finding that she knowingly and intelligently waived her right to be present at the proceedings.

As this court has explained,

Given that the purpose of an involuntary treatment proceeding is to assess allegations that a person suffers from a serious mental disorder that so significantly affects her that she is unwilling or incapable of accepting treatment, the superior court may not presume that a patient who is absent from her involuntary treatment hearing has knowingly and intelligently waived her right to be present.

Id. at 323, ¶ 24, 152 P.3d at 1206.

¶14 Moreover, the court's brief colloquy with Appellant's trial counsel regarding whether he had informed Appellant of the "consequences" of not attending is also insufficient to establish a knowing and intelligent waiver. This is especially true because there was no indication of which "consequences" were explained or whether Appellant, who was described by her doctor as being "delusional" that very morning, understood those consequences.

¶15 Further, because of the nature of mental health cases, "the superior court must scrutinize carefully any contention that a mentally impaired person has waived a right such as that at issue here." *Id.* at ¶ 25. This court has acknowledged that "some mentally ill persons have the capacity to knowingly and intelligently waive a fundamental right" but "not every mentally ill person may do so" *Id.* at ¶ 23. It is particularly difficult to find a knowing and intelligent waiver "in an

involuntary treatment hearing such as this, which was ordered at the request of physicians who averred that the patient was so persistently or acutely disabled as a result of a mental disorder that she should be compelled to receive treatment." *Id.* Here, the petition and the testimony presented at the hearing described Appellant as "very delusional" and "paranoid and disorganized in her thinking." Further, both psychiatrists agreed that Appellant's mental illness impacts her ability to make informed decisions. Special care must be taken when evaluating whether a person such as Appellant – described as delusional and having difficulty perceiving reality – can be found to have made a voluntary, knowing, and intelligent waiver. This is especially true when, as here, Appellant's counsel advised the court that she wanted to be present and testify, a continuance was requested, and there was no evidence that Appellant expressed any desire to waive her right other than the fact of her absence.

¶16 We conclude, on this record, that the trial court erred in finding that Appellant voluntarily waived her presence at her involuntary treatment hearing.

CONCLUSION

¶17 For the foregoing reasons we vacate the trial court's finding that Appellant voluntarily waived her right to be present at the involuntary treatment hearing. "[W]e remand this

matter to allow the superior court to conduct a prompt hearing to determine whether Appellant knowingly and intelligently waived her right to be present at the involuntary treatment hearing. If the court determines that Appellant's absence was not the result of a voluntary waiver, it shall vacate the involuntary treatment order entered after the prior hearing." *Id.* at 325-26, ¶ 34, 152 P.3d at 1208-09.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Judge

/s/

PATRICIA A. OROZCO, Judge