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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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

) 1 CA-MH 09-0082
)
) DEPARTMENT A
)
IN RE THE MATTER OF SANDRA H.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, ARCAP)
)
)
)
)

Appeal from the Superior Court in Mohave County

Cause No. MH-2009-0030

The Honorable Lee F. Jantzen, Judge

AFFIRMED

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

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

W I N T H R O P, Judge

¶1 Appellant seeks reversal of the superior court's order for involuntary mental health treatment. She argues: (1) that her attorney's inability to personally interview one of her

evaluating physicians pursuant to Arizona Revised Statutes ("A.R.S.") section 36-537(B) (Supp. 2009), unconstitutionally impacted her due process rights; (2) that the superior court was unable to consider all available and appropriate placement alternatives; and (3) that one of the evaluating doctors failed to explain why Appellant was incapable of understanding the alternatives to treatment and placement. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Following petitions for court ordered evaluation and court ordered treatment, the superior court held a hearing pursuant to A.R.S. § 36-539 (Supp. 2009). See also A.R.S. §§ 36-523 (2009) (petition for evaluation), 36-533 (2009) (petition for treatment). Dr. E.L. Harman and Dr. N. Zegarra, Appellant's evaluating physicians, testified, as did two members of the treating hospital's staff and Appellant.

¶3 Prior to the hearing, Appellant's appointed counsel attempted to perform his statutory duty to interview the evaluating doctors. See A.R.S. § 36-537(B)(4). Unable to interview one of the doctors beforehand, Appellant's counsel moved for dismissal of the action on due process grounds. The court denied the motion.

¶4 The court then found Appellant, who suffers from a bipolar disorder,¹ to be persistently and acutely disabled and unwilling to accept voluntary treatment, and ordered Appellant to serve 365 days of combined inpatient and outpatient mental health treatment, with the period of inpatient treatment not to exceed 180 days. Because Appellant was from Pinal County and desired to return home, the court also ordered that she “be allowed to transfer her treatment from Mohave to Pinal County for outpatient treatment, if accepted by Pinal County and if in compliance with Pinal County guidelines.”

¶5 Appellant filed a timely notice of appeal from the treatment order, and we have jurisdiction pursuant to A.R.S. §§ 12-2101(K) (2003) and 36-546.01 (2009).

ANALYSIS

¶6 We will not disturb an order for treatment unless it is “clearly erroneous or unsupported by any credible evidence.” When reviewing the record, “we view the evidence in the light most favorable to sustaining the order.” *In re MH 2008-000438*, 220 Ariz. 277, 278, ¶ 6, 205 P.3d 1124, 1125 (App. 2009) (citations omitted).

¹ Appellant was diagnosed with a bipolar disorder in 1984. She successfully treated her condition with lithium until, after about twenty years, the drug became toxic to her system. Her condition deteriorated and she spent most of 2009 in and out of treatment facilities. This action was triggered by Appellant’s aggressive behavior toward her son, who was caring for her, and her inability to take care of her activities of daily living.

1. *Duty to Interview Evaluating Physician*

¶7 At the hearing, Appellant argued that her due process rights were violated because her attorney was unable to interview one of the evaluating physicians pursuant to A.R.S. § 36-537(B)(4). On appeal, she argues the statute requiring the interview is unconstitutionally vague.

¶8 When a case can be decided fairly on other grounds, we will not address constitutional issues, particularly those raised for the first time on appeal. *In re Appeal in Pima County Mental Health Serv. Action No. MH-1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993) (citations omitted). Instead, we review statutory claims *de novo*, with the goal of fulfilling the legislature's intent. *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003); *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008). We first look to the language of the statute itself, and if the language is clear, we "apply it without resorting to other methods of statutory interpretation[.]" *Bilke*, 206 Ariz. at 464, 80 P.3d at 271 (citation omitted).

¶9 Although the statute's language is clear, we think it worth noting that the Arizona legislature, through its statutory scheme, has recognized "the importance of providing an impaired individual with mental health services. Providing individuals with needed mental health care on a timely basis is an important

public policy. . . . [and] the State [has] a strong interest in providing mental health services on the expedited basis set forth in the statutes." *In re MH 2004-001987*, 211 Ariz. 255, 260, ¶¶ 22-23, 120 P.3d 210, 215 (App. 2005). Because of the truncated statutory timetable, those persons involved in the process may have to adapt and be flexible in order to comply with its requirements. *See, e.g., id.* at 261, ¶ 26, 120 P.3d at 216 (finding telephonic testimony in proceedings for involuntary mental health treatment necessary to further public policy). One of those requirements is the attorney interview with the evaluating physician. *See* A.R.S. § 36-537(B)(4).

¶10 Section 36-537 sets forth the powers and duties of counsel in advance of a hearing on a petition for court ordered treatment. Subsection (B) states, in pertinent part:

The patient's attorney, for all hearings, whether for evaluation or treatment, shall fulfill the following minimal duties: . . . At least twenty-four hours before the hearing, interview the physicians who will testify at the hearing, *if available*, and investigate the possibility of alternatives to court-ordered treatment.

(Emphasis added.) The words "if available" clearly make counsel's interview with the evaluating physician contingent upon the physician's availability. In this case, Appellant's trial counsel visited Dr. Zegarra's office at Mohave Mental Health while she was seeing patients. After waiting fifty minutes, he left without interviewing the doctor. The record

contains no indication that he attempted a follow up visit with Dr. Zegarra, either in person or telephonically, or that he sought additional time to make pre-hearing contact with her. The court found that under a strict interpretation of the statute, trial counsel performed his statutory duty when he attempted to interview Dr. Zegarra, who was at that time unavailable. We agree. Further, Appellant had the opportunity to review Dr. Zegarra's written evaluation and recommendation before the hearing and to fully confront Dr. Zegarra when she testified, in person, at Appellant's hearing.

¶11 Ultimately, the duty to interview evaluating physicians belongs to the attorney. The language of A.R.S. § 36-537(B)(4) is clear, flexible, and consistent with public policy supporting expedited treatment of mental health cases. On this record, trial counsel's inability to complete an in-person pre-hearing interview with one of the evaluating physicians was not an impingement on Appellant's due process rights.

2. *Consideration of Placement Alternatives*

¶12 Next, Appellant argues the court lacked evidence as to treatment and placement alternatives sufficient to order the least restrictive treatment regimen. See A.R.S. § 36-540(B) (Supp. 2009). Appellant does not explicitly argue that the court failed to implement the least restrictive treatment, only

that it lacked sufficient evidence to make that determination. See A.R.S. § 36-539(B) (Supp. 2009) ("Witnesses shall testify as to placement alternatives appropriate and available for the care and treatment of the patient."). We disagree.

¶13 Here, the court found by clear and convincing evidence that Appellant was, as a result of a mental disorder, persistently or acutely disabled and unwilling or unable to accept voluntary treatment.² Under A.R.S. § 36-540(A), placement options for proposed patients found to be so are outpatient treatment, inpatient treatment, or a combination of both.

¶14 As described *supra*, Dr. Harman recommended a combination of inpatient and outpatient treatment in both his hearing testimony and treatment recommendation. Further, in consideration of the fact that Appellant's home is located in Pinal County and this action took place in Mohave County, Dr. Harman testified that after twenty-five days, transferring Appellant to Pinal County for local treatment would be a possible treatment option.³

² Appellant does not challenge the sufficiency of the evidence supporting this finding.

³ Although the hearing transcript reflects a recommendation that "the first 45 days of treatment be at Mohave Mental Health in Kingman, Arizona[,] " counsel for Mohave County avers that this is a typographical error. Apparently, Dr. Harman's actual testimony recommended the first twenty-five days of treatment be at Mohave Mental Health.

¶15 Dr. Zegarra's testimony comported with Dr. Harman's; she also testified: "[T]he patient is to be stable and remain in the hospital until her thought processing is stable . . . and then probably . . . she can be [managed] in the outpatient basis." Further, the court specifically acknowledged considering the least restrictive alternatives when it elected to order a transfer from Mohave to Pinal County so that Appellant could be closer to her home.

¶16 Appellant's argument suggests that the evaluating physicians must testify as to the efficacy of each of the potential treatment options: inpatient, outpatient, and combined. We find, however, that Appellant's untreated behavior, Dr. Harman and Dr. Zegarra's testimony concerning their treatment recommendations, combined with the court's consideration of Appellant's desire to be close to home, was sufficient to adequately inform the superior court's treatment order.

3. *Explanation of Treatment and Alternatives*

¶17 Finally, Appellant argues Dr. Zegarra's testimony failed to establish that Appellant was incapable of understanding treatment and placement recommendations, and any alternatives to same, thus triggering the court's authority to direct involuntary treatment, in violation of A.R.S. § 36-539(B) (requiring testimony as to the nature and extent of the

persistent and acute disability). Under the statutory framework, doctors must attempt to explain to the proposed patient the advantages and disadvantages of accepting treatment, as well as the alternatives to such treatment and the advantages and disadvantages of those alternatives. *In re Commitment of An Alleged Mentally Disordered Person MH 91-00558*, 175 Ariz. 221, 225, 854 P.2d 1207, 1211 (App. 1993). "Unless the doctors have explained these matters to the mentally-ill person, the applicant cannot establish that such person's capacity to make an informed decision is impaired." *Id.* We reject Appellant's argument.

¶18 The hearing transcript indicates that Dr. Zegarra did, in fact, testify (1) to having explained the advantages and disadvantages of treatment, (2) to having explained the alternatives to treatment and placement, as well as the advantages and disadvantages of those, and (3) to Appellant's inability to understand the advantages, disadvantages, and alternatives to treatment and placement. Although her testimony was brief, Dr. Zegarra indicated Appellant was unwilling to subject herself to voluntary treatment because Appellant "considered that [there] was - nothing wrong with her and she was even questioning why she was in the hospital."

¶19 Because Dr. Zegarra did, in fact, testify to Appellant's ability to understand the treatments and alternatives available, we find Appellant's argument unavailing.

CONCLUSION

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

_____/s/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Presiding Judge

_____/s/_____
MARGARET H. DOWNIE, Judge