DIVISION ONE
FILED: 02/02/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH2011-001173	)	1 CA-MH 11-0063
	)	
	)	DEPARTMENT B
	)	
	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 28, Arizona
	)	Rules of Civil
	)	Appellate Procedure)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. MH2011-001173

The Honorable Veronica Brame, Judge *Pro Tem*

AFFIRMED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
and Geraldine L. Roll, Deputy County Attorney
Attorneys for Appellee

Martin Lieberman, Maricopa County Legal Defender — Phoenix
By Colin F. Stearns, Deputy Legal Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant appeals from an order entered pursuant to Arizona Revised Statutes ("A.R.S.") section 36-540(A)(2) (Supp. 2011) requiring he undergo court-ordered mental-health

treatment. Appellant contends the trial court erred in finding that an evaluating physician's affidavit complied with A.R.S. § 36-533(B) (Supp. 2011) and that his counsel was ineffective. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellant——a young male in his twenties——was admitted to a hospital for a high fever and irrational behavior that mainly included incessant talking about his job. The hospital gave Appellant medication, "re-hydrated him," and released him the same evening. Appellant became dehydrated again and paramedics brought him to Banner Good Samaritan hospital ("Hospital"). Appellant voluntarily remained in Hospital for a few days. At some point, Appellant asked to leave, but Hospital staff refused his request.

¶3 A few days after Appellant's admission to Hospital, Dr. Antonio Carr, a psychiatrist and deputy medical director, petitioned for a court-ordered mental-health evaluation, believing Appellant was a danger to himself. Dr. Carr claimed that Appellant was psychotic, lacked insight and capacity, placed himself in risky situations, was violent and combative, and had refused voluntary treatment.

¶4 Accompanying Dr. Carr's petition was an application for involuntary evaluation by Moira Kehayes, a behavioral health social worker at Hospital. Kehayes claimed Appellant exhibited

bizarre and dangerous behavior, including "trying to jump out of his father's car, walking for long distances without shoes, attempting to elope from the emergency department[,] and refusing to take oral medication." Appellant reportedly told her he jumped from the car "to see the higher power" and admitted auditory hallucinations related to a "higher power." She also stated that Appellant "required both chemical and physical restraint due to his highly agitated behaviors and threatening statements toward staff." Kehayes further noted that:

> [Appellant] has been depressed and anxious intermittently for the last 8 months and was treated with Xanax by his PCP. In the last several days, he's been increasingly paranoid, speech is rapid, pressured, he was observed pacing, agitated, crying, thought content is positive for bizarre and non-sensical statements, paranoia, auditory hallucinations and heightened religiosity. His affect is exaggerated and mood is elevated. His thought process is tangential with flight of ideas.

Kehayes believed Appellant was a danger to himself and persistently or acutely disabled. She noted that Appellant refused voluntary treatment, allegedly saying he is "not crazy." The trial court ordered Appellant undergo a mental-health evaluation.

¶5 Three days later, Dr. Andrew Parker, also a deputy medical director, petitioned for court-ordered treatment of

Appellant. In his affidavit, Dr. Parker affirmed he had reviewed available documentation and had examined Appellant. Dr. Parker diagnosed Appellant with a probable psychotic disorder, not otherwise specified, and a mood disorder, also not otherwise specified. In Dr. Parker's opinion, Appellant exhibited impaired emotional process, thought, memory, and cognition, including lack of insight into his illness and poor judgment. Appellant reportedly believed he had been admitted to Hospital because of sun overexposure, and he denied having "danger to self-ideation," previous hospitalizations, and hallucinations. Dr. Parker opined that Appellant was a danger to himself due to a severe mental disorder, was persistently or acutely disabled, and was unable and unwilling to receive treatment. Dr. Parker also concluded that combined inpatient and outpatient treatment was the only appropriate treatment option.

¶6 An affidavit by Dr. Paul Berkowitz, a board-certified psychiatrist, was attached to the petition for court-ordered treatment. Dr. Berkowitz noted that Appellant believed nothing was wrong with him and that he should not have been subject to a court-ordered evaluation. He affirmed that Appellant denied having hallucinations and thoughts of harming himself. Dr. Berkowitz reviewed Appellant's physical examination notes and did not find any medical cause for Appellant's psychiatric

condition. His conclusions about the condition of Appellant's emotional process, thought, cognition, and memory were similar to Dr. Parker's conclusions. He also opined Appellant needed inpatient treatment because he was "in a psychotic decompensated state."

¶7 In lieu of testimony, Hospital submitted the affidavits of Doctors Parker and Berkowitz and a seventy-two-hour medication affidavit. Kehayes and Jose Hernandez, a certified nursing assistant, testified as witnesses for Hospital. Kehayes testified she observed Appellant for about twenty-five minutes and saw that he was restless and did not cease talking about various topics. Appellant reportedly admitted he exited his father's vehicle before it stopped moving. Kehayes testified that Appellant did not make overt suicidal statements and said he did not intend to harm himself when he exited his father's moving vehicle.

¶8 Hernandez testified he was Appellant's "one-to-one sitter" for two days, and Appellant needed a "sitter" because he was trying to leave Hospital. Appellant allegedly insisted that he "was dehydrated yesterday, but I'm okay today. I'm -- I'm ready to go home and I'm going to go home. I'm going to call my wife so she can come and pick me up. I'm going to call my dad so he can come and pick me up." Appellant also tried about twenty times to call his father asking to be picked up. Over the two

days Hernandez observed Appellant, Appellant incessantly talked and walked around his room with a Bible in his hands at all times, but Hernandez said he could hold a conversation with Appellant. During that time, to Hernandez's observation, Appellant did not try to hurt himself.

¶9 Appellant's father testified that Appellant drove his employer's vehicle, but when it ran out of gasoline, Appellant abandoned the vehicle and walked to work. Appellant's father picked up Appellant and drove him to his jobsite to get gasoline for the vehicle. Appellant objected to returning to the vehicle, stating "I have to go to work," then exited the vehicle as it came to a stop and was barely moving. Appellant's father testified that Appellant had work boots on and was not walking without shoes. He also testified Appellant never tried to kill himself and that Appellant was taking medications.

¶10 Appellant testified that the car he exited from was not moving and he had work boots on when he was walking to work. He also said he was not a danger to himself, he never threatened to kill himself, and was taking medications while at Hospital and would continue to do so even if not court-ordered.

¶11 On the Hospital's motion, the trial court dismissed the allegation of danger to self. The court found Hospital showed by clear and convincing evidence that Appellant was suffering from a mental disorder, was persistently or acutely

disabled, was in need of treatment, and was unwilling and unable to accept voluntary treatment. The court found no other available or appropriate alternative to court-ordered treatment; thus, it ordered Appellant undergo involuntary treatment for up to 365 days, with no more than 180 days of inpatient treatment.

¶12 Appellant timely appealed. This Court has jurisdiction pursuant to A.R.S. § 36-546.01 (2009) and A.R.S. § 12-2101(A)(1) (Supp. 2011).

DISCUSSION

¶13 Appellant contends that the order for treatment must be vacated because Dr. Parker failed to conduct a complete physical examination of Appellant or review or augment the results of Appellant's physical examination conducted pursuant to A.R.S. § 36-533(B). Appellee argues Appellant either waived these arguments by failing to raise them in the trial court or invited the error by stipulating to admission of the affidavits in lieu of testimony. Appellee alternatively argues that Dr. Parker's affidavit was statutorily sufficient. Appellant aditionally argues that the order for involuntary treatment must be vacated because he received ineffective assistance of counsel below.

¶14 "We review the application and interpretation of statutes as well as constitutional claims *de novo* because they are questions of law." *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 (Supp. 2011), -539 (Supp. 2011). The statutory requirements for civil commitment must be strictly construed because of the serious deprivation of liberty that may result. *In re MH2010-002637*, 228 Ariz. 74, 82, ¶ 31, 263 P.3d 82, 90 (App. 2011) (petition for review filed Oct. 26, 2011). "A lack of strict compliance renders the proceedings void." *Pinal Cnty. Mental Health No. MH-201000029*, 225 Ariz. 500, 501, ¶ 5, 240 P.3d 1262, 1263 (App. 2010) (citation and internal quotation marks omitted). "We view the facts in a light most favorable to upholding the court's ruling and will not reverse an order for involuntary treatment unless it is 'clearly erroneous and unsupported by any credible evidence.'" *In re MH2009-002120*, 225 Ariz. 284, 290, ¶ 17, 237 P.3d 637, 643 (App. 2010) (citation omitted).

¶15 We need not address the waiver, invited error, and ineffective assistance of counsel issues because we hold that Dr. Parker's affidavit complied with A.R.S. § 36-533(B). Section 35-533(B) provides, in pertinent part, that the affidavits supporting the petition for court-ordered treatment shall include

> *the results of the complete physical examination of the patient if this is relevant to the evaluation.* The complete physical examination may be performed by the evaluating physician, by or under the

> supervision of a physician who is licensed pursuant to title 32, chapter 13 or 17 or by a registered nurse practitioner who is licensed pursuant to title 32, chapter 15. The examination must be consistent with existing standards of care and *the evaluating physician must review or augment the results of the examination.* The examination may include firsthand observation or remote observation by interactive audiovisual media.

(Emphasis added) (footnotes omitted). The examination is defined as an "exploration of the person's past psychiatric history and of the circumstances leading up to the person's presentation, a psychiatric exploration of the person's present mental condition and a complete physical examination." A.R.S. § 36-501(14) (Supp. 2011). A "complete examination" is "not the typical annual physical but a component of a psychiatric examination, which includes observing the patient's demeanor and physical presentation, and can aid in diagnosis." *In re MH 2008-000438*, 220 Ariz. 277, 280 n.3, ¶ 14, 205 P.3d 1124, 1127 n.3 (App. 2009).

¶16 Thus, as provided by § 36-533(B), if the evaluating physician does not conduct the physical examination, he or she "must review or augment the results of the examination." The results of the physical examination must be included in the affidavits of the two physicians who conducted the court-ordered evaluation only if the results are relevant to the evaluation. *Id.*

¶17 Nothing in the statute requires the physician to state in the affidavit that he or she reviewed or augmented a prior examination done by another person or that the physician considered the examination not relevant to his or her conclusions. Accordingly, Dr. Parker's affidavit is statutorily sufficient.

¶18 Even if the statute required the physician to state in the affidavit that he or she conducted an examination or reviewed the results of an examination conducted by another, contrary to Appellant's argument, Dr. Parker's affidavit meets the requirements of § 36-533(B). Appellant contends that Dr. Parker's affidavit never expressly stated he had reviewed, conducted, or augmented any medical examination. Construing the evidence most favorably to affirm the trial court's decision, Dr. Parker stated he received information about the circumstances of Appellant's admission to Hospital and the observations of Hospital's staff after Appellant's admission. Although Dr. Parker did not specifically mention that he conducted or reviewed a physical examination, he did state he "examined [Appellant] and studied information" about Appellant. Although the affidavit is not the model of clarity, we construe it as meaning that Dr. Parker studied the results of prior physical examinations of Appellant found in the Hospital record. The fact that Dr. Berkowitz's affidavit stated more precisely

that he "reviewed the physical examination performed at the time of admission" does not make Dr. Parker's more general statement insufficient to meet the requirements of § 36-533(B).

¶19 While we conclude that Dr. Parker's affidavit could have been more explicit on his review of any prior physician examination, we affirm the trial court's order requiring involuntary treatment.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge