DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE JON MORRIS W.	)	No. 1 CA-MH 11-0071
	)	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	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)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. MH 2011-001276

The Honorable Steven K. Holding, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Aubrey Joy Corcoran, Assistant Attorney General
And Joel Rudd, Assistant Attorney General
Attorneys for Arizona State Hospital

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Jon Morris W.

S W A N N, Judge

¶1 In 2005, Appellant was found guilty except insane of first degree murder. Pursuant to A.R.S. §§ 13-502 and 13-3994, he was admitted to the Arizona State Hospital ("the Hospital") and placed under the jurisdiction of the Psychiatric Security Review Board ("the Board").

¶2 On May 12, 2011, the Hospital filed a petition for a court-ordered treatment of Appellant pursuant to A.R.S. § 36-533. The petition was supported by the affidavits of two doctors, Drs. Ghafoor and Breslow. The affidavits stated that Appellant was diagnosed with a delusional disorder; that the disorder rendered him a danger to others and left him persistently or acutely disabled; and that Appellant would not accept treatment for the disorder voluntarily. It requested the court to order inpatient treatment in accord with A.R.S. § 36-540(A)(2).

¶3 On May 13, 2011, the Maricopa County Public Defender moved to withdraw as Appellant's counsel. On May 16, the court granted that motion and appointed successor counsel for Appellant. At a May 18 hearing on the Hospital's petition, Appellant moved to represent himself. The superior court granted Appellant's motion and appointed advisory counsel to assist him. It continued the hearing on the Hospital's petition for court-ordered treatment to June 15, 2011.

¶4 On June 13, Appellant filed two documents: a "Motion for Appointment of Investigator" and a "Motion to Compele [sic] Discovery/Subpoena[,] Request for Continuance[,] Request for Stay of Court Ordered Treatment[, and a] Motion to Schedule Pre-Trial Conference." In his motions, Appellant asserted that he needed assistance locating witnesses to be deposed and that he

needed additional time to subpoena and depose witnesses, retain expert testimony, and prepare to present his defense.

¶5 At the June 15, 2011 evidentiary hearing, the court began by addressing the requests presented in Appellant's motions. Appellant acknowledged that back at the May 18 hearing, he had been aware that the evidentiary hearing was set for June 15. Appellant's advisory counsel informed the court that Appellant requested the continuance and subpoenas so that he could depose two witnesses whom the petition alleged he had attacked. The court denied Appellant's motions as untimely. It added that under the Victims' Bill of Rights, Appellant would have likely been prevented from deposing the witnesses. The hearing proceeded, and the trial court heard testimony from Dr. Tariq Ghafoor, a psychiatrist at the Hospital; Dr. Michael Breslow, another psychiatrist at the Hospital; three registered nurses; Appellant's mother; and Appellant himself.

¶6 After taking the matter under advisement, the court found by clear and convincing evidence that Appellant was suffering from a mental disorder rendering him persistently or acutely disabled; that he was a danger to others; that he was in need of treatment; and that he was either unwilling or unable to accept voluntary treatment. On June 22, 2011, the court ordered Appellant to undergo up to 180 days of inpatient treatment at

the Hospital. Appellant timely appealed, and this court has jurisdiction under A.R.S. § 12-2101(A)(10).

¶7 Appellant argues that the treatment order should be vacated for three reasons. First, he argues that because the Hospital failed to strictly comply with the applicable statutes, the proceedings were improper and the order was rendered void. Second, Appellant contends that the finding that he was a danger to others was not based on substantial evidence. And third, Appellant argues that he was denied due process because he was prevented from interviewing witnesses.

STANDARD OF REVIEW

¶8 We review the application and interpretation of statutes as well as constitutional claims de novo. *In re MH 2010-002637*, 228 Ariz. 74, 78, ¶ 13, 263 P.3d 82, 86 (App. 2011). We view the facts in the light most favorable to upholding the court's ruling. *In re MH 2009-002120*, 225 Ariz. 284, 290, ¶ 17, 237 P.3d 637, 643 (App. 2010). We will not reverse an order for involuntary treatment unless it was unsupported by any credible evidence. *Id.*

DISCUSSION

I. THE TREATMENT ORDER IS NOT VOID BECAUSE OF ANY DEVIATIONS FROM PRE-PETITION PROCEDURES OR FROM REQUIREMENTS FOUND IN A.R.S. § 36-533.

¶9 Appellant argues that the treatment order is void because in filing the petition under A.R.S. § 36-533, which is

contained in Article 5[1] of the chapter on Mental Health Services, the Hospital "did not follow any of the statutory pre-petition procedures." What Appellant means by "statutory pre-petition procedures" are the procedures for a court-ordered evaluation, as they are articulated in Article 4[2] of the same chapter, and which Appellant describes at length in his opening brief.

¶10 This court faced a similar fact pattern and argument in *In re MH 2010-002348*, 228 Ariz. 441, 268 P.3d 392 (App. 2011). In that case, the patient had been adjudicated guilty except insane and committed to the Hospital for 10.5 years. *Id.* at 443, ¶ 2, 268 P.3d at 394. The Hospital alleged that the patient suffered a mental disorder that rendered him persistently or acutely disabled, and it petitioned the trial court to order treatment pursuant to A.R.S. § 36-540(A)(2). *Id.* The trial court granted that petition and ordered treatment, *id.* at 444, ¶ 4, 268 P.3d at 395, and the patient argued on appeal that the order was void because the Hospital failed to file a petition for evaluation first, thereby violating his right to due process. *See id.* at 446, ¶ 13, 268 P.3d at 397. We rejected that argument. We held that "strict compliance with procedures prior to the petition for treatment was not required"

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[1] Article 5, Court-Ordered Treatment, A.R.S. §§ 36-532 to -544.

[2] Article 4, Court-Ordered Evaluation, A.R.S. §§ 36-520 to -531.

because the patient had been adjudicated guilty except insane. *See id.* at 446, ¶ 15, 268 P.3d at 397. The guilty except insane adjudication satisfied "[t]he due process considerations the pre-petition procedures were designed to protect." *Id.* at 447, ¶ 19, 268 P.3d at 398. In light of that, we held: "[C]ommitment to a mental health facility as a result of a GEI adjudication obviates the need for a petition for evaluation prior to filing a petition for court-ordered treatment."[3] *Id.*

¶11 The rule and the rationale of *In Re MH 2010-002348* apply here. Appellant was committed to the Hospital after an adjudication of guilty except insane. Therefore, his arguments that the Hospital somehow "failed" to follow pre-petition procedures are without merit.

¶12 Furthermore, we find meritless Appellant's contention that "the evaluating physicians did not conduct or review a complete physical examination of Appellant as required in A.R.S. § 36-533(B)." On April 25, 2011, an amended version of A.R.S. § 36-533(B) went into effect,[4] stating:

> The petition shall be accompanied by the affidavits of the two physicians who

[3] In the course of arriving at this rule, we found, after supplemental briefing on the issue, that there exist no "statutes or administrative regulations that specifically govern the treatment of those committed to the Hospital as [guilty except insane]." *Id.* at 446, ¶ 18, 268 P.3d at 397.

[4] Because the Hospital filed its petition on May 12, 2011, this case falls under the amended version of the statute.

> participated in the evaluation and by the affidavit of the applicant for the evaluation, if any. The affidavits of the physicians shall describe in detail the behavior which indicates that the person, as a result of mental disorder, is a danger to self or to others, is persistently or acutely disabled or is gravely disabled and shall be based upon the physician's observations of the patient and the physician's study of information about the patient. A summary of the facts which support the allegations of the petition shall be included. The affidavit shall also 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.

A.R.S. § 36-533(B) (emphases added) (footnotes omitted).

¶13 Here, the affidavits of the two physicians, Drs. Ghafoor and Breslow, were entered into evidence by stipulation. Each affidavit notes Appellant's "past medical history" as well as his "vital signs." In each affidavit, identical numbers are respectively recorded for Appellant's blood pressure, pulse, respiratory rate, and temperature. In the "past medical history" section of Dr. Ghafoor's affidavit, he lists "[c]hronic pain, hyperlipidemia, and GERD [i.e., gastroesophageal reflux disease]," while in the same section Dr.

Breslow lists "chronic back pain, Dyslipidemia, Fibromyalgia, obesity and GERD." The evidence shows that even if the two doctors did not themselves perform physical examinations immediately before the Hospital filed its petition, they each made an independent "review" of previous examination results. Under the amended language of § 36-533(B), the doctors' review is sufficient. The statute does not require the results from a complete physical examination in every instance; it demands that the affidavits include such results only if they are "relevant to the evaluation." A.R.S. § 36-533(B).

II. THE TRIAL COURT'S FINDING THAT APPELLANT WAS A DANGER TO OTHERS WAS SUPPORTED BY SUFFICIENT EVIDENCE.

¶14 Appellant claims that there was insufficient evidence to support the trial court's finding that he was a danger to others. We disagree. Under A.R.S. § 36-501(5), a person is a "[d]anger to others" if that person has a mental disorder and his judgment is "so impaired that the person is unable to understand the person's need for treatment and as a result of the person's mental disorder the person's continued behavior can reasonably be expected, on the basis of competent medical opinion, to result in serious physical harm."

¶15 Here, the Hospital's witnesses testified that Appellant did not understand his need for treatment. Second, evidence showed that Appellant had recently assaulted Hospital

staff.[5] Finally, both Dr. Ghafoor and Dr. Breslow testified that Appellant could be reasonably expected to cause serious physical harm to others because of Appellant's diagnosed mental disorder. We therefore conclude that the trial court did not err in finding by clear and convincing evidence that Appellant was a danger to others, pursuant to A.R.S. § 36-540(A).

III. APPELLANT WAS NOT DEPRIVED OF DUE PROCESS.

¶16 Appellant argues that he was deprived of due process when he was denied the opportunity to interview or depose the Hospital's witnesses before the hearing. But the record shows that the trial court denied Appellant's motion because it was untimely and would require an additional continuance. The trial court's decision to deny a continuance to permit discovery is within that court's discretion, and we will not reverse that decision absent an abuse of the trial court's discretion. *Alberta Secs. Comm'n v. Ryckman*, 200 Ariz. 540, 543, ¶ 11, 30 P.3d 121, 124 (App. 2001).

¶17 Here, we find that the court's denial of Appellant's request for a continuance to interview witnesses was not an abuse of discretion that infringed Appellant's right to due process. Our supreme court has stated that "in determining

[5] Only three months before the Hospital filed its petition, Appellant assaulted a female nurse and a male security officer. The security officer was physically injured as a result of the assault, and the nurse testified that she was concerned for her own safety when she was around Appellant.

whether civil mental health commitment proceedings afford basic Fourteenth Amendment due process, we must balance the liberty interests of the patient against the various interests of the state, and consider whether the procedures used or proposed alternatives will likely lead to more reliable outcomes." *In re MH 2008-000867*, 225 Ariz. 178, 181, ¶ 10, 236 P.3d 405, 408 (2010) (*in banc*). And this court has recognized that "[p]roviding individuals with needed mental health care on a timely basis is an important public policy." *In re MH 2004-001987*, 211 Ariz. 255, 260, ¶ 22, 120 P.3d 210, 215 (App. 2005). The trial court noted that Appellant had "ample notice" of the hearing, that his motions were untimely, and that further delay would be unwarranted, and accordingly declined to continue the hearing. The state had a strong interest in making sure that Appellant, as a patient committed to the Hospital after being adjudicated guilty except insane for first degree murder, received treatment for his own protection as well as the protection of the Hospital staff. Appellant fails to establish that the court's decision to proceed without further delay led to a less reliable outcome. We therefore conclude that Appellant's right to due process was not violated.

CONCLUSION

¶18 The June 22, 2011 court-ordered treatment of Appellant is affirmed.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge