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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. MH-20000209	2 CA-MH 2012-0001 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Honorable Julia Connors, Court Commissioner

AFFIRMED

Barbara LaWall, Pima County Attorney
By Paula J. Perrera
Tucson
Attorneys for Appellee

Mental Health Defender's Office
By Ann L. Bowerman
Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 In this appeal from the superior court's order compelling mental health treatment, Appellant argues her due process rights were violated because evidence of previous, similar petitions seeking compulsory treatment was disclosed to evaluators and introduced in court. She also maintains the court erred in finding, by clear and convincing evidence, that she was "either unwilling or unable to accept voluntary treatment," as required before compulsory treatment may be ordered.[1] A.R.S. § 36-540(A). For the following reasons, we affirm.

Background

¶2 In reviewing a superior court's order for involuntary treatment, we view the facts in the light most favorable to sustaining the court's findings and judgment. *In re MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). So viewed, evidence presented at a contested hearing on the state's petition for court-ordered treatment established the following.

¶3 On December 2, 2011, Appellant telephoned 9-1-1 and reported she had just left her psychiatrist's office and believed he and his office staff were plotting to kill her. On December 4, 2011, Tucson Police Department officers responded to multiple 9-1-1 calls from Appellant, who told them she did not feel safe in her home and did not feel safe going to a hospital. Later that same day, she appeared at the emergency department of a local hospital and, after her condition had deteriorated and she had refused voluntary admission to a behavioral health facility, hospital staff sought and received an order directing her emergency admission for evaluation.

[1]Appellant does not meaningfully challenge the superior court's finding that, "as a result of a mental disorder, [she is] persistently and acutely disabled and in need of mental health treatment." *See* A.R.S. § 36-540(A).

¶4 After her admission, Appellant was evaluated by psychiatrists Saul Perea and Anderson Douglass. Perea diagnosed her as suffering from "Paranoid Schizophrenia versus Schizoaffective Disorder"; Douglass's diagnosis was "Schizoaffective disorder, bipolar type, currently manic and psychotic." She refused the voluntary administration of medication and told Douglass she believed psychiatric medications were poison and psychiatrists were plotting against her. Perea described her as suffering from "severe and bizarre" paranoia. The psychiatrists agreed that she suffered from a severe mental disorder, required medication for treatment, and was unlikely to follow through with treatment voluntarily. When asked whether "any history of her psychiatric illness . . . would suggest" medication was an effective treatment for her, Douglass responded, "In her chart it indicates she's been on court-ordered treatment pretty much for the last 12 months and recently got off of that treatment. She had been on medications and in the chart it indicated that she did well enough to function outside of the hospital" while on medication.

¶5 In an under-advisement ruling, the superior court found by clear and convincing evidence that Appellant was persistently and acutely disabled as a result of a mental disorder, was in need of mental health treatment, and was "not willing to accept the treatment being currently recommended because it includes the prescribing of psychiatric medications to treat her illness." The court ordered her to receive outpatient mental health treatment for a period of one year and authorized her re-hospitalization "in a level one behavioral health facility, should the need arise, for a time period not to exceed 180 days."

Due Process

¶6 Court-ordered, involuntary treatment for mental illness constitutes "'a serious deprivation of liberty'" and must comport with due process. *In re Pima Cnty. Mental Health No. MH 3079-4-11*, 228 Ariz. 341, ¶ 5, 266 P.3d 367, 368 (App. 2011), *quoting In re MH 2006-000749*, 214 Ariz. 318, ¶ 14, 152 P.3d 1201, 1204 (App. 2007). Among other due process protections, a person subject to a petition for court-ordered treatment must receive "a full and fair adversarial proceeding." *Id.*

¶7 Appellant first argues her due process rights were violated by the manner in which the Pima County Superior Court assigns cause numbers to petitions for involuntary evaluation or treatment. According to Appellant, the cause number identifies the first year in which a proposed patient was subject to a petition, as well as the number of such petitions previously filed. She argues, "When everyone in the process is made aware of the fact that a patient has been petitioned for court ordered treatment at least 8 previous times, it unduly prejudices their opinion of her." She seems to suggest evidence of prior court-ordered treatment should have been precluded pursuant to Rule 404(b), Ariz. R. Evid., which provides, generally, that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In a related argument, she asserts she was "denied . . . the right to a fair and impartial trial" as a result of the prosecutor's "repeated references to previous court orders for treatment."

¶8 Appellant acknowledges that she failed to raise any of these issues at the hearing below. Relying on *In re MH 2007-001275*, 219 Ariz. 216, ¶ 11, 196 P.3d 819, 822 (App. 2008), she argues, "Constitutional arguments may be raised at any time," and

urges that we exercise our discretion to consider her claims, rather than regard them as waived. We decline to do so.

¶9 Absent "extraordinary circumstances," this court will not consider arguments raised for the first time on appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994); *see also Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000) ("[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal."). This is a rule of procedure, not of jurisdiction, "established for the purpose of orderly administration and the attainment of justice." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987). But, contrary to Appellant's argument, "the mere invocation of a liberty interest or due process challenge is not necessarily a sufficient reason to forego application of the waiver rule." *In re MH 2008-002659*, 224 Ariz. 25, ¶ 10, 226 P.3d 394, 396 (App. 2010). For example, in *In re Pima County Mental Health No. MH-1140-6-93*, we declined to consider due process claims raised for the first time on appeal of an involuntary treatment, noting that none of the claims "appear[ed] compelling" and "several . . . facially lack[ed] merit." 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993).

¶10 The same considerations inform our decision to regard Appellant's claims as waived in this case. As the state points out, consideration of a patient's past psychiatric history is not only relevant, but statutorily required. Pursuant to A.R.S. § 36-533(B), a petition for involuntary commitment "shall be accompanied by the affidavits of the two physicians who participated in the evaluation," with each affidavit "based upon the physician's observations of the patient and the physician's study of information about the patient." Those physicians "shall be qualified psychiatrists, if possible, or at least

experienced in psychiatric matters, and . . . shall examine and report their findings independently." A.R.S. § 36-501(12)(a). By definition, an "examination" must include an "exploration of the person's past psychiatric history and of the circumstances leading up to the person's presentation . . . [and] a psychiatric exploration of the person's present mental condition." § 36-501(14); *see also In re Maricopa Cnty. Mental Health No. MH 94-00592*, 182 Ariz. 440, 444, 897 P.2d 742, 746 (App. 1995) (potential patient's current behavior "is neither the sole nor the essential indication of the statutory criteria"; "treatment history and past behavior" also relevant). We are unpersuaded by Appellant's suggestion that past petitions for court-ordered treatment may not be considered as part of a potential patient's past psychiatric history.

¶11 We also agree with the state that Appellant has failed to make a showing that she was prejudiced by any reference to previous petitions for involuntary treatment. Instead, she speculates that a physician's awareness of previous petitions "leads the doctor to assume that the patient has been non-compliant with treatment" and asserts, without any evidence of bias on the part of the superior court,[2] that "the repeated references to previous court orders for treatment . . . clearly denied [her] the right to a fair and impartial trial." Absent any colorable showing of prejudice affecting Appellant's right to a fair hearing, we are not inclined to depart from our usual rule of waiver. *Cf. Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 25, 118 P.3d 37, 42-43 (App. 2005) (fundamental error review in civil case; showing of prejudice required).

[2]At the close of the hearing, Appellant's counsel agreed the superior court could take judicial notice of previous court records, and the court responded, "Each presentation of evidence is unique and although I can and will take judicial notice of the file I will also note that the folks I have heard from might be different people than the other judges have heard from . . . ."

Willingness to Engage in Treatment

¶12 Appellant also argues the superior court erred in finding that she was "unwilling or unable to accept voluntary treatment," as required by § 36-540(A), citing her own testimony and that of her husband that she had been seeing a psychiatrist who did not prescribe medication for her, that she had suffered side effects from psychiatric medications, and that she had researched ways of dealing with her illness that provided alternatives to medication. She argues her "unwillingness to take medications . . . does not make her unwilling to accept voluntary treatment, and she had, in fact, been in treatment voluntarily with her own psychiatrist."

¶13 When considering a challenge to the sufficiency of the evidence, we will affirm an involuntary treatment order if the superior court's findings are supported by substantial evidence and are not clearly erroneous. *In re MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d at 1163; *see also In re Maricopa Cnty. Mental Health No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995). We do not reweigh the evidence. *In re Pima Cnty. Mental Health No. MH-2010-0047*, 228 Ariz. 94, ¶ 17, 263 P.3d 643, 647 (App. 2011). Here, the only medical evidence offered was presented through the affidavits and testimony of Doctors Perea and Douglass,[3] and both of them concluded Appellant required treatment with psychiatric medication, which she refused.

[3]Appellant testified she had been seeing a psychiatrist and a psychologist on a regular basis before her hospitalization, but neither provided evidence at her involuntary treatment hearing.

Substantial evidence thus supported the court's finding that Appellant was unwilling to comply voluntarily with the treatment she required.[4]

Disposition

¶14 The superior court's order granting the petition for court-ordered treatment is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[4]Because there was no competent medical evidence from which the superior court could have concluded that Appellant's alternative efforts, without medication, constituted a recommended treatment or would have been adequate to address her mental disorder, we do not consider her argument that those efforts evinced her willingness to "accept voluntary treatment" under the "unambiguous language" of § 36-540(A).