FILED BY CLERK
JUL 31 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. MH-20100545	2 CA-MH 2012-0002 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure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 Barbara S. Burstein
Tucson
Attorneys for Appellee

Ann L. Bowerman
Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant appeals from the trial court's order that he undergo involuntary mental health treatment pursuant to A.R.S. § 36-540. He argues the court erred by allowing him to waive his right to counsel, by having him removed from the courtroom during his hearing, and by not permitting him to testify following his removal. Appellant

also argues that the involuntary-treatment order "must be vacated" because his clinical record was not available at the hearing as required by statute. We affirm.

¶2 In January 2012, the trial court conducted a hearing pursuant to a petition for court-ordered treatment to determine whether, as a result of mental disorder, appellant was persistently and acutely disabled and required court-ordered treatment because he was unwilling to accept treatment voluntarily. *See* A.R.S. §§ 36-533, 36-539, 36-540. On the first day of that hearing, appellant's appointed counsel informed the court that appellant wished to waive his right to counsel and represent himself.

¶3 During a lengthy colloquy with the trial court, appellant stated he had "been down this road once before" concerning "Title 36 court-ordered treatment." Appellant further explained he did not want counsel to represent him because he believed the petition would be granted "no matter who's representing [me] . . . or I represent myself." He stated that, "if anyone's going to go ahead and state their case, I wanted that to be myself." When the court asked him how his background and experience prepared him to represent himself, appellant replied that he was prepared and knew what he wanted to communicate about why he neither needed nor wanted court-ordered treatment and repeated that he "had been down this road before." The court warned appellant that he would be held to the same standards as an attorney regarding the law, court rules and procedures, and proper decorum and behavior. The court granted appellant's request, finding he knowingly, intelligently, and voluntarily had waived his right to counsel. The court, however, asked that appellant's appointed counsel remain in the courtroom "in the

event that the Court decides [appellant] is not able to maintain proper decorum or . . . [if appellant] may decide at some point that he needs assistance."

¶4 Throughout the first day of the hearing, appellant repeatedly interrupted the trial court and witnesses despite several warnings by the court that he must maintain proper courtroom decorum. After appellant interrupted a witness for the second time, the court told appellant: "[T]his is your last warning about your decorum. You're to sit still and not turn around and make faces or speak to the folks in the back of the courtroom or comment on the testimony or the questions." The court ultimately continued the hearing to give appellant time to prepare his cross-examination of witnesses.

¶5 On the second day of the hearing, the trial court confirmed that appellant still wanted to represent himself. Appellant then stated he had not received a transcript of the first day of the hearing until the afternoon of the previous day. As his appointed counsel attempted to explain that appellant had, in fact, received the transcript three days earlier, appellant interrupted him to repeat his claim that he had not received the transcript. The court ruled that the hearing would proceed, but appellant nonetheless continued to interrupt the court and repeat his claim regarding the transcript. After appellant repeatedly ignored the court's admonishments about his behavior, the court excluded him from the courtroom and requested that his appointed counsel "represent [him] for the rest of this proceeding."

¶6 After the state rested, appellant's counsel asked that the court permit appellant to testify. The court declined to permit appellant to return to the courtroom to testify, noting appellant had been "given ample opportunity [to be able to testify] and was

not able to comply with the requirements." After both parties rested, the court found there was clear and convincing evidence that, as a result of a mental disorder, appellant was persistently and acutely disabled and was in need of court-ordered treatment because he would not participate in treatment voluntarily. This appeal followed.

¶7 Appellant contends the trial court erred in permitting him to waive his right to counsel because the court did not properly "ascertain [his] knowing, intelligent and voluntary waiver." A person facing an involuntary commitment hearing has a right to counsel, A.R.S. § 36-528(D); an individual may, however, knowingly, voluntarily, and intelligently waive that right. *In re Jesse M.*, 217 Ariz. 74, ¶¶ 15-17, 170 P.3d 683, 686-87 (App. 2007). Appellant claims the court did not comply with the requirements of *Jesse M.* in determining whether his waiver was valid. We stated there that, when a trial court:

> is faced with a patient who wants to waive his right to counsel at an involuntary commitment hearing, the court should: (a) advise the patient of his right to counsel; (b) advise the patient of the consequences of waiving counsel, namely, that the patient and not the lawyer will be responsible for presenting his case, cross-examining the petitioner's witnesses, calling witnesses, and presenting evidence as well as closing argument; (c) seek to discover why the patient wants to represent himself, which may involve a dialogue with counsel or others; (d) learn whether the patient has any education, skill or training that may be important to deciding whether he has the competence to make the decision; (e) determine whether the patient has some rudimentary understanding of the proceedings and procedures to show he understands the right he is waiving; and (f) consider whether there are any other facts relevant to resolving the issue. Once that on-the-record discussion has been completed, the trial court should make specific factual findings supporting the grant or denial of the waiver.

Id. ¶ 30.

¶8 Appellant argues that, because the trial court here did not "fully question" him regarding several of the above factors, it failed to comply with *Jesse M.* and could not find he knowingly, voluntarily, and intelligently had waived his right to counsel. In addressing appellant's argument, we emphasize that the question before the court was not whether appellant was competent to represent himself, but whether he was competent to waive his right to counsel. *See id.* ¶¶ 22, 30.

¶9 Appellant first claims that, although he had informed the trial court he was familiar with the proceedings and procedures, "a review of the record indicates [he] actually stipulated to court-ordered treatment" in his previous proceeding and therefore "avoid[ed] a full adversarial hearing." Although appellant is correct that he had waived his right to an adversarial hearing in his previous proceeding, he cites no authority, and we find none, suggesting that the trial court was therefore required to reject his assertion that he was "familiar with . . . the format and proceedings . . . as far as . . . what's transpiring."

¶10 And, although appellant correctly points out that the trial court did not expressly inform appellant he would be responsible for cross-examining witnesses, presenting evidence, and calling and examining his own witnesses, the record shows the court properly informed appellant he would be solely responsible for the presentation of his case and would receive no assistance from the court or counsel in doing so. Indeed, when appellant later informed the court he was not prepared to cross-examine witnesses,

the court gave him the opportunity to withdraw his waiver of counsel, but appellant declined. In light of appellant's avowal he understood the procedures for his hearing, we find no abuse of discretion in the court's implicit determination that appellant understood what his responsibilities would be should he waive his right to counsel.

¶11 For similar reasons, we reject appellant's claim that the trial court erred in permitting him to waive his right to counsel because it did not specifically discuss whether appellant had "any education, skill or training" relevant to his decision to waive his right to counsel. *Id.* ¶ 30. Again, given appellant's statements to the court that he understood the procedure and proceedings, and given that his responses to the court's questions were reasonably articulate, the court could infer appellant was competent to decide whether to waive his right.

¶12 Finally, to the extent appellant suggests we should reverse the trial court's decision because it did not make express factual findings on each item listed in *Jesse M.*, we reject that argument. Although we stated there that a court "should make specific factual findings supporting the grant or denial of the waiver," we ultimately affirmed the trial court's decision to deny the patient's request despite the absence of such findings. *Id.* ¶¶ 30, 35 (concluding "totality of the record supports the denial of [the] request to waive his counsel"). After an extensive and thorough colloquy with appellant, the court here expressly found he knowingly, intelligently, and voluntarily had waived his right to counsel. Nothing more was required.

¶13 Appellant additionally argues the trial court erred in having him removed from the hearing. Section 36-539(B), A.R.S., provides that a patient "shall be present at

all hearings." But, as appellant acknowledges, in *In re MH 2007-000629*, 219 Ariz. 289, ¶¶ 10-12, 15-16, 197 P.3d 750, 752-53, 754 (App. 2008), this court determined that a disruptive patient could be removed from a hearing absent a specific warning that disruptive behavior could constitute grounds for removal. He contends, however, that because he did not use "profanity nor disrespect[] the court," "had several procedural questions he was trying to clarify," and his behavior was not as disruptive as that addressed in *In re MH 2007-00629*, the court erred in removing him from the hearing.[1]

¶14 We first reject appellant's suggestion that the patient's behavior in *MH 2007-00629* established some minimum threshold that must be reached before a trial court properly may remove a patient from the courtroom. Instead, we stated in that case that a trial court has "the discretion . . . to determine whether its attempts to warn the patient were adequate under the circumstances when determining whether to proceed with a hearing after removing a disruptive patient." *Id.* ¶ 15. And, although the patient's behavior in *MH 2007-00629* was more extreme than appellant's, it was a single disruptive incident, *see id.* ¶ 4, while appellant's conduct continued throughout both days of hearings despite repeated admonitions by the trial court.

¶15 As described above, the trial court repeatedly warned appellant that his behavior was inappropriate, but appellant persisted in interrupting the court and

[1]We agree with the state that *Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir. 1983), does not support appellant's claim that removal "'must be limited to cases urgently demanding that action.'" That case, relying on criminal law, addressed potential prejudice to a patient during a jury trial, specifically the fact the patient was restrained throughout without any apparent justification. *Id.*

witnesses. Although some of his interruptions appeared to be attempts to make a procedural point or seek clarification of the court's rulings, that does not justify his disruptive behavior. In any event, several of his other interruptions had no such basis. Moreover, the record reflects that appellant's disruptive behavior was not limited to interruptions; the court informed him that he must "sit still and not turn around and make faces or speak to the folks in the back of the courtroom."

¶16 On the second day of the hearing, the appellant claimed he had not received a transcript of the first day's proceedings until the preceding day, and continuously interrupted the court and his appointed counsel as the court attempted to resolve the issue. The court expressly warned appellant that he had "the right to represent [him]self . . . only if [he could] follow proper courtroom decorum." Appellant nonetheless persisted in interrupting the court and repeating his claim that he had received the transcripts only the previous day, ignoring the court's determination that the hearing would proceed. Thus, the record amply supports the court's discretionary determination that further warnings would serve no purpose and that removing appellant was necessary. *See id.* ¶ 15.

¶17 Appellant further claims the trial court erred in not permitting him to return to the courtroom in order to testify. Appellant is correct that § 36-539(B) gives him the right to cross-examine witnesses and present evidence, and that right obviously would include the right to testify. These rights must be scrupulously honored by the court. But, given that the right to be present can be waived by disruptive conduct, *In re MH 2007-000629*, 219 Ariz. 289, ¶¶ 10-12, 15-16, 197 P.3d at 752-53, 754, clearly the right to testify similarly can be waived. Here the court re-assessed whether appellant would be

able to comport himself properly in testifying on his own behalf and determined, based on prior conduct, that he could not. Having already determined the court did not err in removing appellant from the proceedings due to his behavior, those same reasons justified the court's decision that appellant would not be permitted to testify.

¶18 Although in this close case we find no abuse of the trial court's discretion, the better practice may be to err on the side of protecting the person's right not only to be present during the proceedings but also to testify on his own behalf. A court may reasonably provide more latitude in dealing with a person allegedly suffering from a crippling mental disorder than to a party not similarly burdened in another type of proceeding. Nor can we overlook the inherent tension in finding a person "is a danger to self or to others, is persistently or acutely disabled or is gravely disabled," by a mental disorder, § 36-533(A)(1), soon after having found that same person knowingly and voluntarily had waived his or her statutory rights, *see Jesse M.*, 217 Ariz. 74, ¶ 18, 170 P.3d at 687.

¶19 Notwithstanding those observations, we recognize that a trial court has both the authority and obligation to ensure that no party disrupts the proceedings such that it is not possible to conduct them effectively. *See In re MH 2006-000749*, 214 Ariz. 318, n.6, 152 P.3d 1201, 1207, n.6 (App. 2007). But here, despite the appellant's earlier disruptions, his rights to be present and testify would have been better protected if the court had permitted him to return and testify.[2] Had the appellant, after being permitted

[2]We also note, in a related vein, that after appellant had been removed from the proceeding, and his advisory counsel was directed to represent him, counsel's

by the court to return, continued to ignore the court's admonitions and disrupt the proceedings, excluding him then would have been more clearly a proper exercise of the court's power to control its courtroom and the proceedings.

¶20 We are mindful that these hearings are difficult under the best of circumstances, and the trial court is in the best position to make these determinations in the exercise of its considerable discretion. And, in light of the appellant's repeated disruptions and continuing inappropriate conduct despite being given several warnings by the court, we have no basis to conclude the court ultimately exceeded its discretion here.

¶21 Last, appellant argues his clinical record was not available at the hearing in violation of § 36-539(B), which states that "[t]he clinical record of the patient for the current admission shall be available and may be presented in full or in part as evidence at the request of the court, the county attorney or the patient's attorney." Thus, he reasons, because the statutory requirements thus were not complied with, the trial court's order must be vacated. *See In re MH 2006-000490*, 214 Ariz. 485, ¶ 10, 154 P.3d 387, 390 (App. 2007) ("'Because involuntary treatment proceedings may result in a serious deprivation of appellant's liberty interests, statutory requirements must be strictly met.'"), *quoting In re Maricopa Cnty. Super. Ct. No. MH 2001-001139*, 203 Ariz. 351, ¶ 8, 54

---

performance could be described as lackadaisical. Until suggested by the county attorney, he failed to request that appellant be permitted to return to the proceedings and to testify, raised no legal issues, and offered no closing argument on appellant's behalf. But, although a patient in a mental health proceeding has the right to effective representation, *see In re Pima Cnty. Mental Health Serv. Action No. MH-2116-1*, 157 Ariz. 314, 315, 757 P.2d 118, 119 (App. 1988), appellant does not raise this potential issue, and we do not address it.

P.3d 380, 382 (App. 2002). Appellant has waived this argument because he did not raise it below and, accordingly, we do not address it further. *See In re Pima Cnty. Mental Health Serv. Action No. MH-1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993).

¶22 For the reasons stated, the trial court's order is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge