IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

IN RE: MH2018-006681

No. 1 CA-MH 18-0080
FILED 11-26-2019

Appeal from the Superior Court in Maricopa County
No. MH2018-006681
The Honorable Amy Michelle Kalman, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Anne C. Longo
Counsel for Appellee

Maricopa County Legal Defender's Office, Phoenix
By Anne H. Phillips
Counsel for Appellant

OPINION

Judge Lawrence F. Winthrop delivered the opinion of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Michael J. Brown joined.

W I N T H R O P, Judge:

¶1 Appellant appeals a superior court order for involuntary mental health treatment. Appellant argues the order should be vacated because the court violated his due process rights by failing to make a

finding on the record that he knowingly and voluntarily waived his right to be present at a hearing for an involuntary evaluation pursuant to Arizona Revised Statutes ("A.R.S.") section 36-529(D). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant has a history of mental health issues and has undergone court-ordered treatment at least five times. While undergoing outpatient treatment, he exhibited odd and concerning behaviors and made statements—including that he intended to stop taking his medication and engaging with clinical staff once his current court order expired—that prompted the staff to file an application for involuntary evaluation and a petition for a court-ordered evaluation pursuant to A.R.S. § 36-523. A signed detention order for notice and evaluation was sent to Appellant, and he was involuntarily hospitalized for evaluation the next day.

¶3 Appellant requested a hearing to determine whether he should continue to be involuntarily hospitalized pending the psychiatric evaluation pursuant to A.R.S. § 36-529(D), and the superior court promptly scheduled a hearing. Counsel was appointed for Appellant, and he received notice of the scheduled hearing. Appellant was not present at that hearing, and his attorney asked the court to waive his presence. Appellant's attorney cross-examined the witness called by the State and offered argument on Appellant's behalf. At no time during the hearing did Appellant's counsel explain why Appellant was not at the hearing.

¶4 At conclusion of the hearing, the court ordered that Appellant continue to be detained pending the psychiatric evaluation. After the evaluation was completed, and based on its results, the State petitioned for court-ordered treatment, and the court issued a detention order for treatment and notice to Appellant, pending another hearing on the petition for court-ordered treatment. The court subsequently held that hearing, found Appellant to be persistently or acutely disabled, and ordered him to undergo treatment.

¶5 Appellant filed a timely notice of appeal from the treatment order. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 36-546.01.

ANALYSIS

¶6 Appellant argues the court violated his due process rights by failing to make a finding on the record that he knowingly and voluntarily waived his right to be present at the involuntary evaluation hearing.

¶7 Appellant raises an issue in this appeal that was not argued before the superior court. Even so, Appellant asserts we should resolve it on the merits because the issue is about statutory interpretation affecting a constitutional right. This court generally does not consider arguments raised for the first time on appeal except under exceptional circumstances. *In re MH 2008-002659*, 224 Ariz. 25, 27, ¶ 9 (App. 2010).

¶8 This case does not constitute an exceptional circumstance. Nothing indicates Appellant was prejudiced by the court accepting counsel's waiver of his presence at the hearing. The hearing was only conducted because of Appellant's request, and regardless whether the court found the seventy-two-hour detention during the evaluation necessary, Appellant was still required to go through the statutory involuntary evaluation process.[1]

¶9 Moreover, even assuming *arguendo* that Appellant's claim on appeal was not waived, he still has not made a cognizable argument for relief. Appellant argues he had no notice of the hearing, but a review of the record confirms that, through counsel, Appellant was given notice of the time and place of the hearing. Appellant does not dispute that an attorney was properly appointed to represent his interests at the evaluation hearing. General due process principles require a person be given notice and an opportunity to be heard, and in other contexts, representation by counsel satisfies that requirement. *See Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, 446, ¶ 30 (2018) (holding that due process principles are satisfied when an absent parent's counsel has an opportunity to fully participate in a termination adjudication hearing on the parent's behalf (citing *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 283, ¶¶ 14-16 (App. 2010))). Appellant does not assert that he wanted to testify at the hearing or that his counsel

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[1] The court found reasonable cause to believe Appellant was, as a result of a mental disorder, persistently or acutely disabled. *See* A.R.S. § 36-529(A) (requiring the court to determine whether "there is reasonable cause to believe that the proposed patient is, as a result of a mental disorder, a danger to self or others or has a persistent or acute disability or a grave disability").

inadequately represented his interests at the hearing, and we find no prejudice in our review.

¶10 Further, Appellant relies on cases interpreting § 36-539, which governs hearings for court-ordered treatment detention.[2] However, Appellant was present for that hearing. He was not present at the hearing for the *involuntary evaluation detention*, which is governed by § 36-529(D). Appellant asserts we should read into § 36-529(D) the same requirements as found in § 36-539. But the seventy-two-hour hospitalization for the involuntary evaluation under § 36-529 does not amount to the same deprivation of liberty as the court-ordered treatment. The court must only find "reasonable cause" that an involuntary evaluation is necessary. A.R.S. § 36-529(A). In contrast, under § 36-539, the court must find clear and convincing evidence that court-ordered treatment is necessary, and the deprivation of liberty for such court-ordered treatment is generally many months and can last up to a year. *See* A.R.S. § 36-540(A), (F). Additionally, the hearing under § 36-529(D) is optional and is only conducted when the patient requests a hearing. In contrast, the hearing on the court-ordered treatment is mandatory, and a court may not detain a patient without conducting it. *See* A.R.S. §§ 36-539, -540(A). Therefore, we are not persuaded by Appellant's argument to read a requirement into § 36-529(D) that the legislature clearly chose to omit.

CONCLUSION

¶11 For the foregoing reasons, we affirm the superior court's order for Appellant's involuntary mental health treatment.

AMY M. WOOD • Clerk of the Court
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[2] In reference to the court-ordered treatment hearing, § 36-539(C) states, "If the patient, for medical or psychiatric reasons, is unable to be present at the hearing and cannot appear by other reasonably feasible means, the court shall require clear and convincing evidence that the patient is unable to be present at the hearing and on such a finding may proceed with the hearing in the patient's absence."