DIVISION ONE
FILED: 1/3/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	1 CA-MH 12-0041
	)	
	)	DEPARTMENT A
	)	
IN RE MH2012-000774	)	**MEMORANDUM DECISION**
	)	
	)	Not for Publication –
	)	(Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
	)	
	)	
	)	
	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. MH2012-000774

The Honorable Lori Horn Bustamante, Commissioner

AFFIRMED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
Bruce P. White, Deputy County Attorney
Attorneys for Appellee

Bruce Peterson, Legal Advocate — Phoenix
By Colin F. Stearns, Deputy Legal Advocate
Attorneys for Appellant

G E M M I L L, Judge

¶1 Appellant appeals the superior court's order for

treatment entered after the court found that Appellant was, as a result of a mental disorder, persistently or acutely disabled. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 8, 2012, a petition for court-ordered evaluation was filed by Diane Papke, M.D., alleging there was reasonable cause to believe Appellant had a mental disorder that rendered him a danger to others, persistently or acutely disabled, and in need of treatment. The petition stated that Appellant was unwilling to undergo voluntary evaluation and did not recognize his need for treatment. The superior court issued an order on March 9, 2012, detaining Appellant for evaluation.

¶3 On March 26, 2012, Yaniv Simon, M.D., filed a Petition for Court-Ordered Treatment (hereinafter referred to as "the Petition") contending that Appellant was a danger to others and was persistently or acutely disabled. The Petition was based on two affidavits submitted by Dr. Simon and Andrew Parker, D.O., which were attached to the Petition. The affidavits stated that Appellant had a severe mental disorder, the disorder substantially impaired Appellant's capacity to make an informed decision regarding treatment, the disorder rendered Appellant incapable of understanding and expressing an understanding of the advantages and disadvantages of treatment and of the alternatives to treatment, and the treatment's and alternatives'

advantages and disadvantages were explained to Appellant. The Petition requested the superior court to order combined inpatient and outpatient treatment in accord with Arizona Revised Statutes ("A.R.S.") section 36-540(A)(2) (Supp. 2012).[1]

¶4 On April 3, 2012, the superior court held a hearing regarding the Petition. Although the parties stipulated to Dr. Parker's affidavit in lieu of his in-court testimony, Appellant did not stipulate to Dr. Simon's affidavit and argued that it was "insufficient." At the hearing, the court heard testimony from Dr. Simon and two witnesses in contact with Appellant, Eric Hayden and Sahar Mohammed. During the hearing, the court granted Appellant's motion to dismiss the allegation of danger to others.

¶5 After considering the arguments, the testimony, and the court file, including the doctors' affidavits, the superior court found by clear and convincing evidence that Appellant was, as a result of his mental disorder, persistently or acutely disabled, in need of treatment, and either unwilling or unable to accept voluntary treatment. The court-ordered Appellant to undergo combined inpatient/outpatient treatment for a period of time not to exceed 365 days with the period of inpatient

[1] Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

treatment not to exceed 180 days.

¶6 Appellant timely appeals, and we have jurisdiction under A.R.S. §§ 36-546.01 (2009) and 12-2101(A)(1) (Supp. 2012).

ANALYSIS

¶7 Appellant argues the superior court erred because insufficient evidence supported the finding that he was persistently or acutely disabled. Specifically, Appellant contends the insufficiency resulted from Dr. Simon's failure to testify in court that Appellant was unable to make an informed decision regarding treatment. Additionally, Appellant argues Dr. Simon's affidavit was not admitted during the hearing and thus may not be considered as evidence in support of the superior court's finding.

¶8 A court may order involuntary treatment only if it finds by clear and convincing evidence that treatment is necessary. A.R.S. § 36–540(A); *In re MH 2007–001236*, 220 Ariz. 160, 165, ¶ 15, 204 P.3d 418, 423 (App. 2008). We will affirm a court's order for involuntary mental health treatment if it is supported by substantial evidence. *In re MH 2008–001188*, 221 Ariz. 177, 179, ¶ 14, 211 P.3d 1161, 1163 (App. 2009) (citation omitted). To the extent Appellant raises issues involving statutory interpretation and application, our review is de novo. *In re MH 2006–000749*, 214 Ariz. 318, 321, ¶ 13, 152 P.3d 1201, 1204 (App. 2007). Court-ordered involuntary treatment

constitutes a "significant deprivation of liberty that requires due process protection." *In re MH 2007–001264*, 218 Ariz. 538, 539, ¶ 6, 189 P.3d 1111, 1112 (App. 2008); *see also MH 2006–000749*, 214 Ariz. at 321, ¶ 14, 152 P.3d at 1204 (citations and quotations omitted). Therefore, a patient subject to a petition for involuntary treatment is entitled to a full and fair adversarial proceeding, and courts should strictly adhere to the requirements of the civil commitment statutes. *MH 2006–000749*, 214 Ariz. at 321, ¶¶ 14–16, 152 P.3d at 1204 (citations and quotations omitted).

¶9 Section 36-501(32) (Supp. 2012) defines "Persistently or acutely disabled" as:

> [A] severe mental disorder that meets all the following criteria:
>
> (a) If not treated has a substantial probability of causing the person to suffer or continue to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality.
>
> (b) *Substantially impairs the person's capacity to make an informed decision regarding treatment*, and this impairment causes the person to be incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment and understanding and expressing an understanding of the alternatives to the particular treatment offered after the advantages, disadvantages and alternatives are explained to that person.

> (c) Has a reasonable prospect of being treatable by outpatient, inpatient or combined inpatient and outpatient treatment.

(Emphasis added.)

¶10 Appellant argues the Maricopa County Attorney's Office (hereinafter "MCAO") failed to meet its statutory burden at the hearing to show Appellant was acutely or persistently disabled. Appellant points out that an individual is not persistently or acutely disabled if he can make an informed decision regarding treatment. *See In re MH 91-00558*, 175 Ariz. 221, 225, 854 P.2d 1207, 1211 (App. 1993). Further, an order for treatment requires "the opinions of the two examining physicians, both of whom performed evaluations." *M.H. 2007-001236*, 220 Ariz. at 170-71, ¶ 32, 204 P.3d at 428-29 (stating a sole physician's testimony as to an individual's ability to make an informed decision is insufficient); A.R.S. § 36-539(B) (Supp. 2012) ("and testimony of the two physicians who participated in the evaluation of the patient"). The stipulated affidavit of Dr. Parker expresses the required findings and opinions, but Appellant specifically argues the evidence at trial fails to include a second physician opinion that Appellant is unable to make an informed decision.

¶11 Dr. Simon's affidavit, included as part of the Petition, clearly expressed the required opinion. Within Dr. Simon's affidavit, the following question is answered

affirmatively regarding the Appellant, "Does the severe mental disorder substantially impair the person's capacity to make an informed decision regarding treatment?" Dr. Simon's affidavit further supports that assertion by stating, "The patient does not recognize his recent symptoms as suggesting an exacerbation of his underlying mental illness. Therefore, he does not understand why more intensive treatment is recommended." If admitted into evidence at the hearing, these statements sufficiently support the court's ruling.

¶12 Under A.R.S. § 36-533(B) (Supp. 2012), a petition for court-ordered treatment must be accompanied by the affidavits of two physicians. Appellant argues that although Dr. Simon's affidavit was attached to the Petition filed with the clerk of the superior court (along with Dr. Parker's affidavit), the parties did not stipulate its admission in evidence, nor did MCAO specifically offer it into evidence during the court hearing. Therefore, Appellant contends the only admissible testimony from Dr. Simon was his actual testimony in court, which is asserted to be insufficient.

¶13 Contrary to Appellant's argument, however, the record on appeal reveals that Dr. Simon's affidavit was admitted into evidence during the hearing and was considered in the superior court's finding. The minute entry from the superior court's hearing records the following: "LET THE RECORD REFLECT that Dr.

Simon's affidavit which was previously filed with the Court is admitted for the Court's review." We note that the transcript of the hearing is silent on whether Dr. Simon's affidavit was admitted into evidence. We give "greater weight to the minute entry than to a conflicting, silent transcript." *State v. Gelden*, 126 Ariz. 232, 232, 613 P.2d 1288, 1288 (App. 1980) (citing *State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969)). Furthermore, the superior court acted within its discretion in admitting and considering the affidavit. *See In re MH 2006–000490*, 214 Ariz. 485, 488, ¶ 9, 154 P.3d 387, 390 (App. 2007) (recognizing the court may admit or take judicial notice of physician affidavits appended to a petition).

¶14 Based on the two doctors' affidavits and the testimony of Dr. Simon and the two lay witnesses, we conclude that sufficient evidence supports the superior court's finding that Appellant was unable to make an informed decision regarding treatment.

CONCLUSION

¶15 For the foregoing reasons, we conclude that sufficient evidence supports the court-ordered treatment, and we

therefore affirm.

___/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
MARGARET H. DOWNIE, Judge

___/s/_____
DIANE M. JOHNSEN, Judge