

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN RE: MH2017-005515, *Appellant*,

No. 1 CA-MH 17-0054
FILED 8-28-2018

Appeal from the Superior Court in Maricopa County
No. MH2017-005515
The Honorable Margaret LaBianca, Judge

AFFIRMED

COUNSEL

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

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

MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Paul J. McMurdie joined.

WEINZWEIG, Judge:

¶1 Patient appeals the superior court's order for involuntary mental health treatment. He argues the State deprived him of due process and that he received ineffective assistance of counsel. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Patient was arrested for aggravated assault and incarcerated at a Phoenix jail. He acted paranoid and delusional there, raising concern among jail staff. Patient had previously been diagnosed with a range of mental disorders, including paranoid schizophrenia, psychosis not otherwise specified, paranoid personality disorder and antisocial personality disorder. He accused the staff and fellow inmates of poisoning his food, water and the air. He refused to accept treatment or attend court because it was "dangerous" and "ma[de] him vulnerable to attack." He claimed the inmates and staff were talking about him and occasionally yelled "shut up" for no apparent reason. The staff tried to evaluate him for persistent or acute mental disability, but Patient refused, insisting it would be a "waste of time."

¶3 A psychologist with the jail filed an application for involuntary evaluation, the first of three procedural steps to obtain an involuntary mental health evaluation and court-ordered treatment. A.R.S. § 36-520(A).

¶4 Thereafter, the deputy medical director petitioned for an involuntary outpatient mental health evaluation of Patient, the second procedural step. A.R.S. §§ 36-521(D), -523. The deputy asserted reasonable cause to believe Patient had a persistent or acute mental disability and refused a voluntary evaluation. The superior court granted the petition and directed the State to transport Patient to Desert Vista Behavioral Health for a mental health evaluation and then return him to jail.

¶5 Patient was transported to Desert Vista Behavioral Health for a court-ordered evaluation on October 11, 2017. Following the evaluation, the mental health providers concluded that Patient "requires treatment at

this time” in the Jail Mental Health Unit and unless treated, he “will remain [a] danger to self [and] others” and be “persistently and/or acutely disabled.”

¶6 On October 16, 2017, the State petitioned the superior court for an order requiring treatment, the third procedural step. A.R.S. §§ 36-533(A), -540(A)(2). The State alleged that Patient was persistently or acutely disabled and requested a combined inpatient and outpatient treatment protocol. The petition included affidavits of the mental health providers who evaluated Patient.

¶7 The court scheduled an evidentiary hearing for October 23, 2017. The State moved to continue the hearing until October 30, however, because one of the evaluating psychiatrists, Dr. Shabnam Sood, was traveling internationally and unavailable to testify. Patient’s attorney asserted a general objection. The court granted the continuance, finding good cause.

¶8 The hearing was held on October 30. The court heard from five witnesses at the hearing, including Dr. Shabnam Sood, Dr. Bennett Press, Hugo Gonzalez, James Dykstra and Kelly Bucher.

¶9 The court granted the order for treatment. It found clear and convincing evidence that Patient was persistently or acutely disabled due to a mental disorder and ordered combined inpatient and outpatient treatment as requested in the petition.

¶10 Patient timely appealed. We have jurisdiction pursuant to A.R.S. § 36-546.01.

DISCUSSION

¶11 Patient asks this court to vacate the order of treatment. He argues the superior court violated his due process rights by granting a continuance to hold the evidentiary hearing on October 30 instead of October 23. He also argues he received ineffective assistance of counsel because his court-appointed lawyer did not object to the belated evidentiary hearing.

¶12 We normally give broad discretion to the superior court in deciding whether to grant a continuance, *In re MH2003-000240*, 206 Ariz. 367, 369-70, ¶ 10 (App. 2003), but the continuance at issue here is a statutory creation, A.R.S. § 36-535(B), and we review issues of statutory interpretation *de novo*, *In re MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8 (App. 2002). We also

review the due process issue *de novo* because it presents a question of law. *In re MH 2006-002044*, 217 Ariz. 31, 33, ¶ 7 (App. 2007).

1. The Statute.

¶13 The superior court must hold an evidentiary hearing on a petition for court-ordered treatment “within six business days after the petition is filed,” but a petitioner can obtain a maximum extension of three business days upon good cause shown. A.R.S. § 36-535(B). Thus, assuming the petitioner requests a continuance based on good cause, the statute requires a hearing to proceed within nine business days after the petition is filed. *See id.*

¶14 Here, the court held the hearing one business day after the time allowed by statute. Petitioner filed the petition for treatment on October 16 and sought a continuance because the examining psychiatrist was unavailable to testify, meaning the hearing should have occurred on or before Friday, October 27. It was held on Monday, October 30.

¶15 The statute was thus violated. Patient never raised the statutory issue in the superior court, however, and thus waived the argument.¹ *In re MH 2009-002120*, 225 Ariz. 284, 287, ¶ 7 (App. 2010) (arguments not raised below are waived on appeal).

2. Due Process.

¶16 Patient argues the court deprived him of due process by granting the continuance and asks us to vacate the treatment order. We disagree that Patient was deprived of due process, and decline to vacate the treatment order. “Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *In re MH 2006-000023*, 214 Ariz. 246, 248-49, ¶ 10 (App. 2007). To vacate the treatment order, Patient must show the continuance deprived him of a full and fair hearing. *In re MH 2008-002393*, 223 Ariz. 240, 244, ¶ 15 (App. 2009) (“[T]he ensuing treatment order should not be dismissed unless the patient demonstrates he did not receive a fair hearing because of his illegal detention.”).

¹ We note that the court retained jurisdiction to issue the treatment order. *See In re MH2010-002348*, 228 Ariz. 441, 445, ¶ 11 (App. 2011) (while courts require strict compliance with the statutory requirements for civil commitment, a failure to strictly comply does not automatically divest the court of jurisdiction).

¶17 Patient never argues the hearing was unfair, and the record confirms a full and fair hearing. *See In re Jesse M.*, 217 Ariz. 74, 76, ¶ 9 (App. 2007) (due process requires that plaintiff “be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own”) (quotation omitted). Patient received adequate notice of the hearing and attended the hearing. He was represented by counsel. His lawyer cross-examined all the adverse witnesses, objected to evidence, moved for a directed verdict and offered closing argument. The court also heard from Patient himself, who spoke on his own behalf at the end of the hearing.

¶18 We further note that the continuance did not curtail Patient’s freedom, or in any respect cause “a significant deprivation of liberty.” *See In re MH2010-002348*, 228 Ariz. 441, 444, ¶ 7 (App. 2011). Patient was incarcerated in a Phoenix jail for the brief delay and would have remained there if the continuance had been denied. *Id.* at 445, ¶ 11, n.2 (“[T]he liberty interests sought to be protected are not at issue in this matter to the same extent as in a traditional civil commitment matter. Patient was in custody prior to filing the petition, and Patient will remain in custody . . . regardless of the outcome of the petition for treatment.”). The requirements of due process were satisfied.

3. Ineffective Assistance of Counsel.

¶19 Patient also argues he received ineffective assistance of counsel. Patient never raised this argument in the superior court and we decline to first address it on appeal. *In re MH2009-002120*, 225 Ariz. at 287, ¶ 7.

CONCLUSION

¶20 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA