DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	1 CA-MH 09-0038
	DEPARTMENT E
IN RE MH 2009-000828	**MEMORANDUM DECISION**
	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009000828

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

Andrew P. Thomas, Maricopa County Attorney — Phoenix
by Anne C. Longo, Deputy County Attorney
Roberto Pulver, Deputy County Attorney
Civil Division
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 M.B. ("Appellant") asks this court to overturn the order that he undergo combined inpatient and outpatient mental

health treatment based on the superior court's determination that Appellant was persistently or acutely disabled and a danger to others. Appellant argues that he was denied due process because he was not given notice of his right to a hearing on involuntary hospitalization for a mental health evaluation until after one physician had interviewed him. He also argues that the physicians' affidavits were not attached to the petition for court-ordered treatment and that no clear and convincing evidence established that Appellant was a danger to others. For reasons that follow, we affirm the court's treatment order.

BACKGROUND

¶2 On March 30, 2009, Appellant's case manager filed a petition for court-ordered evaluation and alleged that Appellant was a danger to others, persistently or acutely disabled, and unwilling to voluntarily undergo evaluation. The petition stated that Appellant was psychotic, suffered from auditory hallucinations and homicidal ideations, and had a long history of violence. The case manager also filed an application for involuntary evaluation, which noted that Appellant was not taking his medication, was talking either to himself or to Mariah Carey, and was pacing and not sleeping. The application reported that Appellant mentioned that "he [had] slashed [his mother's] throat due to the way [she was] treating him," that he had been released from jail a month ago for having stabbed his

mother, and “was very verbally aggressive toward [her and] is having issues with [his] brother.”

¶3 Appellant was detained for an evaluation, and afterwards, Dr. E.B. filed a petition for both inpatient and outpatient court-ordered treatment ("COT") on April 2, 2009. His accompanying affidavit stated that Appellant had been released from jail after serving three years for stabbing his mother and had “a long history of dangerousness to others” and had been receiving outpatient care as seriously mentally ill. While living with his mother, he had stopped taking his medications and had become “increasingly psychotic; hearing voices, seeing Hollywood stars and conversing with them, not sleeping, and being increasingly agitated.” When told that he could not live with his mother, “he became more angry, threatening to hurt his mother, and threatening the probation officer.”

¶4 During Dr. E.B.’s interview, Appellant was “pleasant and cooperative” but “presented with paranoid delusions”; he not only heard voices but responded to them during the interview. Appellant denied any need for medication. Dr. E.B. noted that Appellant had been diagnosed with schizophrenia ten years ago. He concluded that Appellant had “no insight into his condition, and his judgment was severely impaired.” In his addendum, Dr. E.B. noted that Appellant “has no capacity to recognize

reality," could not "make an informed decision regarding treatment," and despite explanation, could not understand the advantages or disadvantages of treatment or its alternatives.

¶5 Dr. S.A.'s affidavit stated that Appellant partially had cooperated during the interview. He also admitted that he had a mental illness and that the voices sometimes told him "to hurt others" but denied that he needed medication. He said that he had stabbed his mother because "she was not treating me right. I am a man and she needs to respect me. Appellant was paranoid, guarded, delusional, preoccupied, and responding to internal stimuli but denied "suicide, violent and homicidal ideations." Dr. S.A. noted at least six prior hospitalizations and that the most recent hospitalization was "due to his refusal of psychiatric services despite recent psychotic symptoms." Dr. S.A.'s addendum stated that Appellant's judgment and insight were impaired, that he was unable to make an informed decision regarding treatment, and that he appeared unable to understand the consequences of not taking his medications.

¶6 A detention order for an evaluation was served on Appellant April 1. A hearing on the petition for COT was set for April 10, 2009, and Appellant was served with notice of the hearing on April 3.

¶7 At the hearing on COT, the parties stipulated to admission of the physicians' affidavits in lieu of their

testimony. Appellant's case manager, L.M., testified that he had been in contact with Appellant about five times during the last year of his incarceration and about five times in the month after his release. L.M said that during a meeting to discuss his housing, Appellant was talking to himself, became agitated with his mother, and then mentioned that he had slashed her neck. Appellant additionally said that he had stopped taking his medications.

¶8 Appellant's mother testified that her son had been living with her until the petition had been filed and that he had been taking his medication "periodically". He was not sleeping well, was talking to himself and hallucinating, and she was concerned about the voices and delusions. She denied feeling threatened by him

¶9 Appellant testified that he had not been in any fights and was willing to see his doctors twice a month and to take his medications "as long as [he] was comfortable with them." He was taking his medications "here and there" and did not deny saying that he heard voices.

¶10 The court found by clear and convincing evidence that Appellant was a danger to others and was persistently or acutely disabled. It ordered a program of combined inpatient treatment for a maximum of 180 days and outpatient treatment for no more than one year. Appellant timely appealed. We have jurisdiction

pursuant to Arizona Revised Statutes ("A.R.S.") section 36-546.01 (2009).

DISCUSSION

¶11 Appellant first argues that he was not advised of his right to a hearing on whether he should be involuntarily hospitalized for an evaluation before the hospitalization took place and thus that we should reverse the later treatment order. Appellant correctly observes that our courts strictly construe the civil commitment statutes because of their impact on liberty interests. *In re MH 2006-000490*, 214 Ariz. 485, 488, ¶ 10, 154 P.3d 387, 390 (App. 2007). Appellant concedes that trial counsel did not object to the lack of timely notice but nevertheless asks that we consider this contention. He cites *In re MH 2006-000023*, 214 Ariz. 246, 249, ¶ 11, 150 P.3d 1267, 1270 (App. 2007), in which we considered on appeal whether one could waive the right to a mandatory 72-hour period preceding a hearing on involuntary treatment; given the significant liberty interest at stake, we found extraordinary circumstances justified our review.

¶12 Because appellate counsel raised this particular issue in another appeal recently decided by this court, we adopt the reasoning in that case that untimely notice of the right to a hearing does not require reversal of the COT. *See In re MH 2008-002659*, ___ Ariz. ___, ¶ 11, ___ P.3d ___ (App. 2010) (2010

WL 199250). There, as here, no objection was made below to the lack of timely notice. *Id*. at ¶ 11. We observed that different factors govern the superior court's decision to order a mental health evaluation as opposed to involuntary hospitalization for an evaluation. *Id.* at ¶ 14. We also reasoned that § 36-529(D) conferred a right to a hearing on court-ordered hospitalization for an evaluation but did not grant a hearing on the need for an evaluation. *Id*. at ¶ 13. Thus even if the appellant had received timely notice of a right to a hearing on hospitalization, and after such a hearing the court had declined to order hospitalization, that ruling would not undercut the determination that she should submit to an evaluation. *Id*. at ¶ 15. Furthermore, the appellant was not entitled to dismissal of the subsequent treatment order, *id*. at ¶ 16, because unlike the patient in *In re MH 2006-000023* who had received inadequate notice of the hearing on COT, the appellant had not been "prejudiced in her ability to defend against" the later-filed petition for COT. *Id*. at n.3, ¶ 15.

¶13 Appellant suggests that he was prejudiced because if the evaluation began before he received notice of his right to protest hospitalization, he "may have" spoken to the psychiatrists without being informed that the evaluations were not totally confidential. The physicians' affidavits state that they informed Appellant of the limited confidential nature of

the interviews, and Appellant has not alleged any other prejudice from the delayed notice. Significantly, he does not allege that he was denied a fair hearing on the petition for COT, and thus we find no denial of due process. *See In re MH 2006-002044*, 217 Ariz. 31, 33, ¶¶ 7-9, 170 P.3d 280, 282 (App. 2007) (applying criminal law principle that even if defendant has been wrongfully jailed after warrantless arrest, unless he was deprived of fair trial, no due process violation occurred that required reversal of conviction). Therefore, lack of timely notice of Appellant's right to a hearing on hospitalization for an evaluation does not compel reversal of the COT.

¶14 Appellant next raises two additional issues that were not argued below. First, he argues that A.R.S. § 36-529(D) (2009) is unconstitutionally vague because "there is no practical manner" of enforcing the right to a hearing on hospitalization for evaluation purposes and "no apparent remedy if the patient is detained and evaluated before the notice is served." [O.B. at 17, 19] Second, that both of the physicians' affidavits were not attached to the petition for court-ordered treatment and thus he was denied due process. [O.B. at 29] We normally will not review an issue first raised on appeal, even one framed in constitutional terms, and decline

to do so here. *State v. Lefevre*, 193 Ariz. 385, 389, 972 P.2d 1021, 1025 (App. 1998).

¶15 Finally, Appellant argues that Appellee failed to produce clear and convincing evidence that he was a danger to others.[1] He asserts that he denied that inner voices told him to hurt others. To the contrary, Dr. S.A.'s affidavit reported that Appellant said that the voices sometimes told him "to hurt others." Dr. E.B. reported that Appellant had threatened both his mother and his probation officer.

¶16 Moreover, by the time the caseworker heard Appellant refer to his prior assault on his mother, Appellant had completely ceased taking his medications. Both physicians avowed that Appellant denied any need for medication, and Appellant testified that he would take those medications with which he was "comfortable." The court could quite reasonably infer that Appellant would not comply with his medications because he was unhappy about some of the side effects, and thus that the undisputed existence of his paranoid delusions, auditory hallucinations, and agitation would continue. In addition, Appellant's mother testified that when he began rambling in the caseworker's office, she could not understand

[1]Section 36-501(5) (2009) states: "'Danger to others' means that the judgment of a person who has a mental disorder is so impaired that he is unable to understand his need for treatment and as a result of his mental disorder his continued behavior can reasonably be expected, on the basis of competent medical opinion, to result in serious physical harm."

what he was saying but was concerned when he was talking to her and to someone else at the same time. Her inability to decipher Appellant's speech suggests she might be unable to anticipate when his agitation would escalate to physical aggression and to take protective measures. The physicians' affidavits, the witness' testimony, Appellant's past conduct, and his refusal to take medication to control his symptoms all support the court's finding that he posed a danger to others.

CONCLUSION

¶17 We find no basis on which to reverse the order that Appellant undergo combined inpatient and outpatient mental health treatment and thus affirm the order.

/S/_____
SHELDON H. WEISBERG, Presiding Judge

CONCURRING:

/S/_____
PHILIP HALL, Presiding Judge

/S/_____
JOHN C. GEMMILL, Judge