DIVISION ONE
FILED: 05-20-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH 2008-001606,	)	1 CA-MH 09-0065
	)	DEPARTMENT D
	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2008-001606

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

Magellan Health Services of Arizona, Inc. by Steven B. Wiggs Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender by Edith M. Lucero, Deputy Public Defender Attorneys for Appellant	Phoenix

W E I S B E R G, Judge

¶1 J.J. ("Appellant") asks this court to overturn the order that he continue to undergo combined in-patient and out-patient mental health treatment based on a determination that he

is persistently or acutely disabled ("PAD"). He argues for the first time on appeal that the statute allowing a continuation of treatment violates the due process clause and is unconstitutionally vague. For reasons that follow, we affirm the court's treatment order.

BACKGROUND

¶2 On July 16, 2008, Dr. Gorky Herrera filed a petition for court-ordered evaluation of Appellant alleging that he was a danger to self and to others, had expressed a plan to shoot himself, and had not been taking his medications.

¶3 On July 21, Dr. Thomas Cyriac filed a petition for court-ordered treatment ("COT") on the ground that Appellant was a danger to self and PAD. The physician's affidavit noted diagnoses of mood disorder and psychosis. In the interview, Appellant stated that he had been discharged from the Navy in 2006, and had lived with his parents until recently when he began staying in hotels or his car. He said that he had twice been hospitalized while in the Navy and for two months on one occasion. At the urgent care center, Appellant had admitted to being depressed and to suicidal thoughts, auditory hallucinations, and paranoid delusions, but in the interview he denied suicidal ideation and did not display overt paranoia or respond to internal stimuli. He said that after leaving his parents' house, he had gone into the desert. When found, he was

wearing only his underwear and shoes. Dr. Cyriac concluded that if he "does not receive adequate treatment in a timely manner, especially given his lack of insight into his condition, he remains at a high risk of harm to himself." The addendum noted that his "significant mood and psychotic symptoms impair his capacity to make an informed decision regarding treatment" as well as his ability to consider the benefits and need for psychotropic treatment.

¶4 Dr. Travis Stiegler[1] completed an affidavit indicating a diagnosis of psychotic disorder and noting that Appellant was a danger to self and PAD. Appellant had told the physician that while in the desert, he had taken off his clothes in order to keep the insects from biting him. He revealed paranoid ideation and perceptual disturbances but denied suicidal or violent ideation. His attention and concentration were poor; his ability for abstract thought and his judgment were "grossly impaired"; and he lacked insight into his illness. The addendum noted that Appellant was unable to express an understanding of the alternatives to treatment but that the advantages and disadvantages, as well as the alternatives, had been explained.

[1]Dr. D.V. Raikhelicar completed an affidavit stating that he was the supervising physician for Dr. Stiegler and would be available to meet with attorneys for all parties and to appear in court.

¶5 Appellant was served with a detention order on July 17. A hearing took place on July 28, 2008, at which counsel for both sides stipulated to submit the case on the record. Appellant's counsel agreed to waive live testimony from the two acquaintance witnesses. Appellant took the stand and was advised of his right to a hearing and the possible consequences of waiving that right. The court found a knowing, intelligent, and voluntary waiver; it also found by clear and convincing evidence that Appellant was suffering from a mental disorder, was a danger to self, and was PAD. The court ordered combined in-patient and out-patient treatment for 365 days with the former not to exceed 180 days.[2] The court set review hearings for September 11, 2008 and May 29, 2009.

¶6 In a final report dated May 26, 2009, Appellant's prescribing physician, Dr. Kevin Crisham, stated that although Appellant had been fully compliant with his medication, he had "repeatedly" informed the team nurse and case manager that "once he is off COT, he will not take his medications, will not subject himself to shots . . . and *will not follow any doctor orders to take his medications as prescribed*." (Emphasis added.) Thus, his clinical team recommended that COT "be extended until such time that [he] is cognizant of the symptoms & signs of his

[2]Appellant was discharged on July 30, 2008 and again resided with his parents.

illness, understands the importance of taking his medications as prescribed, and follows nurse & doctor orders & treatment."

¶7 Steven Wiggs, counsel for Magellan Health Services, filed a petition for continued COT on June 12, 2009. The court appointed counsel for Appellant, who requested a hearing.

¶8 At the hearing, the parties stipulated to admit the affidavit of Dr. Crisham. One of Magellan's case managers, M.C., testified that she frequently saw and spoke to Appellant and that she had helped to create his individual service plan. She testified that in the last few months, his appearance had improved, that he had engaged in a little conversation, and that his case manager was "very dedicated" and had a good relationship with Appellant. In addition to that relationship, medication and keeping Appellant "engaged and active" had been helpful. But she added that Appellant had said that he did not want to take medication and thought he did not need it.

¶9 S.S., another case manager, testified that two weeks before the hearing, he had covered for Appellant's case manager for about five minutes and that Appellant "appeared regular, normal, and answered all" of his questions. He stated that Appellant had said when released from COT, he would come to see the doctors but did not want to take any medication.

¶10 At the conclusion of the testimony, Appellant's counsel moved for a directed verdict. She argued that Appellant

was willing to go to appointments, that "[h]is only concern is the medication," that S.S. had not observed any behavior that suggested a need for COT, and that "[w]e have no indication that he wouldn't follow through with the recommendation of his case manager." In response, Wiggs stated that the court should consider Dr. Crisham's opinion that Appellant had not yet recognized that he had a mental illness and that medications were helpful to him. Wiggs asserted that the primary issue was whether Appellant would voluntarily continue treatment when his prior compliance with medication was "problematic."

¶11 The court stated that based on all of the evidence, Appellant remained PAD as a result of a mental disorder and was in need of combined in-patient and out-patient treatment. The court ordered that he undergo treatment for a period not to exceed 365 days and in-patient treatment not exceed 180 days.

¶12 Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 36-546.01 (2009).

DISCUSSION

¶13 On appeal from an order of treatment, we will uphold the superior court's factual findings unless they are "clearly erroneous or unsupported by any credible evidence." *In re MH 2006-000490*, 214 Ariz. 485, 487 ¶ 7, 154 P.3d 387, 389 (App. 2007). We review questions of law, such as statutory

interpretation or constitutionality, de novo. B*ertleson v. Sacks Tierney, P.A.*, 204 Ariz. 124, 126, ¶ 6, 60 P.3d 703, 705 (App. 2002).

¶14 Appellant first argues that the statute requiring an annual review of a patient who is undergoing COT, A.R.S. § 36-543, is unconstitutional because it offers less substantive and procedural due process than the statutes governing an initial order for COT. Appellant's counsel does not suggest that this issue is a recurring one, and having failed to raise the issue in the superior court, he deprived that court of the opportunity to consider and rule on this challenge. "[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (citation omitted).

¶15 We also might disregard the constitutional challenge made here because we find no evidence in the record that appellate counsel served notice of this claim as required by A.R.S. § 12-1841(A) (Supp. 2009). The statute provides: "In any proceeding in which a state statute . . . is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in

the action are served and shall be entitled to be heard." *See DeVries v. State*, 219 Ariz. 314, 319, ¶ 14, 198 P.3d 580, 585-86 (App. 2008) ("a party raising a constitutional challenge in an appeal must comply with . . . A.R.S. § 12-1841").

¶16 Nevertheless, we do not lightly reject a claim that a person subject to COT was denied due process. We have long recognized that "civil commitment constitutes a significant deprivation of liberty, [and] the State must accord the proposed patient due process protection." *Maricopa County Cause No. MH 90-00566*, 173 Ariz. 177, 182, 840 P.2d 1042, 1047 (App. 1992). The Supreme Court accordingly has held that a proposed mental health patient is entitled to "be present with counsel, have an opportunity to be heard, [and] be confronted with witnesses against him." *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

¶17 Here, pursuant to A.R.S. § 36-543(G) (2009), Appellant had appointed counsel, he was present at the hearing on renewal of the treatment order with counsel, and he had an opportunity to confront the witnesses. In addition, his counsel expressly stipulated to admission of Dr. Crisham's "affidavit."[3] We also note that by statute, Appellant's counsel was charged with "the duties imposed by § 36-537 and review [of] the medical

[3]Appellant argues that Dr. Crisham's notarized report is not equivalent to an affidavit, which is required for an initial order for COT. Counsel cites no authority suggesting that a notarized report is inherently suspect or less credible than an affidavit.

director's report and the patient's medical records." Furthermore, § 36-538(G) afforded Appellant "the right to have an analysis of [his] mental condition by an independent evaluator pursuant to § 36-538." If, after speaking to Dr. Crisham and Appellant and examining the medical records, trial counsel thought further assessment would be helpful, she could have requested an independent evaluation. No evidence shows that counsel did so. Yet on appeal, Appellant argues that two physicians must examine a proposed patient before renewal takes place, just as two physicians must examine a proposed patient for initiation of COT. Appellant had an opportunity for a second evaluation and failed to utilize it. There was no due process violation.

¶18 Appellant next objects to the failure of a treatment plan to accompany the petition for continued treatment. He does not allege that no plan existed and does not explain why, when a patient has been undergoing treatment for nearly a year, the court may not presume that such a plan exists and that the petitioning party wishes to continue to implement the plan. Appellant's counsel was free to question Dr. Crisham about the treatment plan before the hearing or to call him to testify at the hearing but did not do so. Based on this record, Appellant has not shown a denial of due process.

¶19 Appellant also asserts that the County Attorney's Office should have appeared at the renewal hearing because COT is an exercise of state power and neither Wiggs nor Magellan Health Services had "authority to independently confine a person." Of course, although Wiggs and Dr. Crisham may have requested Appellant's confinement, it was the superior court, after a hearing and consideration of all of the evidence, that ordered continuing treatment and authorized Magellan, as a delegatee, to continue to provide such treatment. We, therefore, reject this argument.

¶20 Appellant next argues that the renewal statute is impermissibly vague because it fails to limit the number of times a party may seek renewal or to define who may seek renewal. Regarding the former, Appellant cites no authority suggesting that due process requires the legislature to limit the number of times a patient may need continuing treatment.

¶21 Regarding the latter contention, numerous provisions of A.R.S. § 36-543 refer to and impose duties upon "the medical director of the mental health treatment agency." For example, if a patient is to be released from inpatient treatment and has a guardian who must be notified, the director must give the required notice. A.R.S. § 36-543(A),(B). Also, the medical director is not civilly liable for acts of a released person if the statutory requirements have been met. A.R.S. § 36-543(C).

The medical director "shall appoint one or more examiners" to conduct patient examinations and shall forward the results "to the court, including the medical director's recommendation based on the review which may be release of the patient without delay, release with delay or no release." A.R.S. § 36-543(E),(G). We, therefore, conclude that the medical director may seek renewal of treatment, and thus the statute is not unconstitutionally vague on this ground.

¶22 Appellant next argues that insufficient evidence showed the need for renewal of treatment or supported the court's finding that he was PAD. As previously mentioned, Appellant suggests without support that a physician's "Report" is somehow entitled to less evidentiary weight and should be regarded as less authoritative than a form entitled Affidavit." Even if we were to agree arguendo, we know of no reason why the superior court must totally disregard the Report.

¶23 Appellant complains that counsel for Magellan did not argue to the court that he had presented "clear and convincing evidence." Nonetheless, the court heard the testimony, considered all of the evidence, and in its minute entry stated that it had received clear and convincing evidence. This finding satisfies the statute, regardless of counsel's choice of words.

¶24 Appellant cites the testimony of S.S. that in the five minutes spent with Appellant he did not observe any unusual behavior as evidence that undercut the court's findings. However, the significance of S.S.'s testimony was its verification that Appellant had said he would not take medication when released from COT. Appellant's intention, which he had revealed to several staff members, led Dr. Crisham to be very concerned that the progress made over the course of nearly a year would dissipate soon after Appellant was released from treatment. Moreover, Appellant offered no evidence that he would continue treatment if it entailed medication or that medication was not necessary for him to remain stabilized; instead, all of the evidence indicated the contrary.

¶25 Finally, Appellant contends that the court failed to make the necessary findings to support its order. However, pursuant to § 36-543(H), Magellan's medical director had to prove by clear and convincing evidence that Appellant was a danger to self or to others, was PAD, and that he was "in need of treatment . . . [and was] either unwilling or unable to accept treatment voluntarily." Although the court did not orally announce each finding, its minute entry stated that it had found "by clear and convincing evidence that the patient [was] suffering from a mental disorder and, as a result, [was] still [PAD], [was] in need of treatment, and [was] either

unwilling or unable to accept voluntary treatment." There was no error.

CONCLUSION

¶26 For the foregoing reasons, we affirm the order authorizing renewal of court-ordered mental health treatment.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge