DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH2010-001739	)	1 CA-MH 10-0061
	)	DEPARTMENT C
	)	**MEMORANDUM DECISION**
	)	(Not for Publication - Rule 28, Arizona Rules of Civil Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH2010-001739

The Honorable Steven K. Holding, Commissioner

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy County Public Defender
Attorneys for Appellant

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

O R O Z C O, Judge

¶1 Victor S. (Appellant) appeals from the trial court's order of commitment for involuntary mental health treatment. For the reasons stated below, we affirm the order of commitment.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant was charged with trespass, disorderly conduct, and resisting arrest occurring in October 2009. During Rule 11 Competency Evaluations, Doctors Toma and Balaji determined Appellant was incompetent to stand trial. During these evaluations, Appellant made statements that referenced his extensive history with mental health treatment. The evaluators determined Appellant suffered from schizoaffective disorder, bipolar type, as well as paranoid and grandiose delusions. In July 2010, with Appellant in the State's custody, the State filed a Petition for Evaluation pursuant to Arizona Revised Statutes (A.R.S) section 36-523 (2009), a Petition for Notice pursuant to A.R.S. § 36-541.01.D (2009), and an Application for Involuntary Evaluation. *See* A.R.S. §§ 31-226.H (2002) and 36-520.A (2009). Subsequently, Dr. Parker (Parker) filed a Petition for Court-Ordered Treatment according to A.R.S. § 36-533 (2009).

¶3 Before filing the petition, Parker approached Appellant for an initial admission interview. Appellant cooperated with Parker for the initial interview. Later, Parker was asked to "generate an Affidavit opinion for [Appellant's] court ordered evaluation process." At the second interview, Parker gave Appellant the option to allow the information from the first interview to be used for the affidavit or to answer the questions again for purposes of completing the affidavit. Appellant told

Parker that he had already answered the questions and would prefer not to answer them again. Parker decided to base his opinion on observations and would not include any direct statements made by Appellant because of his decision to not participate or allow information to be shared for the affidavit. Parker was able to determine that Appellant suffered from an impaired emotional process, delusional themes within his thought process, poor insight and judgment, and a distorted recollection of events.

¶4 The petition also included Dr. Badeaux's (Badeaux) affidavit that found Appellant suffered from a mental disorder that is the result of being persistently or acutely disabled. Badeaux determined that Appellant had significant delusional thinking, believed he received messages from terrorists through others, showed signs of mild distractibility, and that his long and short term memory appeared to be generally intact. Badeaux concluded that Appellant suffered from acutely disabling psychiatric symptoms and that even though he did not appear to be an acute risk to harm himself or others at this time, the severity of his symptoms made involuntary inpatient treatment the most appropriate alternative.

¶5 Based on these affidavits and petition, the court issued a detention order for treatment and notice pursuant to A.R.S. § 36-535 (Supp. 2010). At the hearing on the petition,

the parties stipulated to both Parker and Badeaux's affidavits in lieu of their testimony. An employee with Correctional Health Services testified that Appellant said he was going to starve himself while in treatment and requested a pen and paper to write his Will. The court also heard testimony from an employee of the Maricopa County Restoration of Competency Program indicating that Appellant had "fairly strong paranoia." Appellant asked the court to dismiss the petition, without calling any witnesses, arguing that there was insufficient evidence and that Parker's affidavit was "very, very vague and conclusory." The court denied Appellant's request to dismiss the petition and found by clear and convincing evidence that Appellant was persistently or acutely disabled. The court ordered Appellant into involuntarily treated for a period not to exceed a total of 365 days and the inpatient program not to exceed 180 days.

¶6 Appellant filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-120.21.A.1 (2003).

DISCUSSION

¶7 Appellant argues on appeal that Parker failed to follow the statutory requirements that require him to conduct an examination of Appellant and that insufficient evidence supported

the court's finding.[1] A review of whether the evidence presented at an involuntary treatment hearing meets the statutory requirements involves a question of law; therefore we review the issue de novo. *In re MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995).

¶8 Under A.R.S. § 36-533.B, the petition for treatment must be accompanied by the affidavits of two physicians who conducted the examinations, which shall describe in detail the behavior which indicates that the person, as a result of a mental disorder, is persistently or acutely disabled. An examination is defined as "an exploration of the person's past psychiatric history and of the circumstances leading up to the person's presentation, a psychiatric exploration of the person's present mental condition and a complete physical examination." A.R.S. § 36-501.14 (Supp. 2010). The purpose of the two physicians' independent examination is "to prevent professional mental health

[1] Appellee argues Appellant waived the issue of the sufficiency of Parker's affidavit on appeal because Appellant did not raise the issue to the trial court. *See In re MH 2007-001264*, 218 Ariz. 538, 540, ¶ 16, 189 P.3d 1111, 1113 (App. 2008); *see also In re MH 2008-002393*, 223 Ariz. 240, 244, ¶ 17, 221 P.3d 1054, 1058 (App. 2009) (a party cannot raise an issue for the first time on appeal). At trial, Appellant stated Parker's affidavit was "very, very vague and conclusory." Appellee argues this issue is not the same as whether Parker's affidavit meets the statutory requirements. While we would encourage Appellant's counsel to be clearer when stating objections, we do not believe Appellant has waived this issue on appeal.

evaluators, whether consciously or otherwise, from simply ratifying or rubber stamping one another's findings." *In re MH 2008-000438*, 220 Ariz. 277, 280, ¶ 16, 205 P.3d 1124, 1127 (App. 2009) (internal quotation marks and citations omitted). There are few cases in the field of medicine where the physical examination is more important than in psychiatric evaluations. *Id.* The physicians must physically examine the person using "both the art of examination with the science of psychiatry in rendering a diagnosis and opinion." *Id.* at ¶ 17; *see In re MH 2009-002120*, 225 Ariz. 284, 287, ¶ 5, 237 P.3d 637, 640 (App. 2010) ("A complete physical examination is not the typical annual physical but a component of a psychiatric examination, which includes observing the patient's demeanor and physical presentation, and can aid in diagnosis." (internal quotation marks omitted)).

¶9 These statutes do not require that the patient cooperate with the examination. *See* A.R.S. §§ 36-512, -513 (2009). We have held that mental health offices are not required to engage or confront a mentally ill patient or force a patient to be physically restrained to fulfill the statutory requirements. *In re MH-1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993) (each time the psychiatrist tried to evaluate the patient, the patient would walk away and the court held, "[b]ased upon the testimony and other evidence in the

record, we cannot say that the trial court's finding of acute disability was not supported by substantial evidence"); *see MH 2009-002120*, 225 Ariz. at 289, ¶ 15, 237 P.3d at 642 ("particularly [] where . . . the record reflects a long history of mental illness, and testimony of four witnesses establishes current behavior supporting the diagnosis of an acute and persistent disorder" (internal quotation marks omitted)).

¶10 Parker's initial interview was not for the purpose of creating an affidavit; instead, the second interview was for that purpose. During the second interview, Appellant stated that he did not wish to answer Parker's questions because he had already addressed them. Parker could not force Appellant to answer his questions. *See MH 2009-002120*, 225 Ariz. at 289, ¶ 15, 237 P.3d at 642. However, Parker was not required to have Appellant answer his questions in order to conduct an examination. *Id.* at 289, ¶ 13, 237 P.3d 642 (This Court has never meant to "imply that a patient can *prevent the examinations* and then claim the petitioner failed to meet its burden." (internal quotation marks omitted)). In Parker's affidavit he describes Appellant's affect, judgment, thoughts of paranoia, his mood, and that he explained the advantages of and alternatives to treatment of Appellant. In this case, even though Appellant refused to cooperate, Parker fulfilled the requirements of the statute.

Therefore, we find Parker's affidavit was sufficient to satisfy the statutory requirements for an examination.

¶11 The State argues that this appeal is moot because Appellant has moved. Appellant argues that he is receiving treatment in Tucson, however, we are unable to determine whether the treatment Appellant is receiving is pursuant to the court ordered treatment plan. We therefore leave to the trial court to determine whether the court order for treatment should be dismissed or modified.[2]

CONCLUSION

¶12 For the aforementioned reasons, we affirm the trial court's order for court ordered treatment.

_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

_____
DONN KESSLER, Judge

_____
MICHAEL J. BROWN, Judge

[2] Appellant requests that we strike Appellee's answering brief and sanction Appellee for alleging that the appeal is moot. In our discretion, we deny this request.