

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/08/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH2010-002436) 1 CA-MH 11-0004
)
) DEPARTMENT B
)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules
) of Civil Appellate
) Procedure)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. MH2010-002436

The Honorable Diana L. Clarke, Judge *Pro Tempore*

AFFIRMED

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

Martin Lieberman, Maricopa County Legal Defender Phoenix
By Colin F. Stearns
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant appeals from an order entered pursuant
to Arizona Revised Statutes ("A.R.S.") section 36-540(A)

(Supp. 2011)¹ requiring that Appellant undergo an inpatient treatment program in a mental health facility. Appellant contends that the trial court erred in finding Dr. Andrew Parker's affidavit statutorily sufficient under A.R.S. § 36-533(B) (2009). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Police officers J.S. and K.S. applied for a court-ordered evaluation of Appellant, believing that he was a danger to self and others. In their applications for involuntary evaluation, the officers noted that Appellant threatened two individuals with a gun and fought with them. Dr. Misty Tu, a deputy medical director at Urgent Psychiatric Care, petitioned for a court-ordered evaluation of Appellant.

¶3 The trial court granted the petition and issued a detention order for involuntary evaluation of Appellant at Desert Vista Hospital. Dr. Andrew Parker evaluated Appellant and petitioned for court-ordered treatment ("COT"), alleging that Appellant was gravely disabled, a danger to others, and persistently or acutely disabled. The petition was accompanied by affidavits from Dr. Parker

¹ We cite to the current versions of any statutes unless the statutes have been amended after the proceedings below.

and Dr. Teejay Tripp that detailed their reasons for requesting COT.

¶4 Dr. Parker's affidavit indicated that he approached Appellant for evaluation. After Dr. Parker introduced himself, Appellant responded, "I'm ok . . . [sic] I'll call Kay up . . . [sic] My brother did it." Based on this response, Dr. Parker concluded that Appellant was "incompetent to consent to participate in [an] interview." Subsequently, Dr. Parker based his affidavit upon observations of Appellant and his chart documentation since Appellant's admission at Desert Vista Hospital.

¶5 Dr. Parker's probable diagnosis of Appellant was psychotic disorder, not otherwise specified, and dementia, not otherwise specified. Dr. Parker also indicated that Appellant's emotional process, thought process, cognition, and memory were impaired. Dr. Parker opined that Appellant was incompetent to consent to a physical examination. However, based on a chart review of an earlier physical examination conducted upon admission at Desert Vista Hospital, Dr. Parker concluded that Appellant did not have any medical problems that would contribute to his present psychiatric condition. Dr. Parker opined that Appellant had a severe mental disorder and, as a result, was

substantially likely to suffer severe and abnormal harm if left untreated.

¶6 Dr. Tripp examined Appellant on the same day that Dr. Parker conducted his evaluation. He indicated in his affidavit that Appellant's probable diagnosis was dementia, not otherwise specified, and that as a result Appellant was a danger to others, gravely disabled, and persistently or acutely disabled. According to his affidavit, Dr. Tripp explained to Appellant the purpose of the interview and its confidential nature. Appellant appeared to understand and proceeded with the interview. Regarding Appellant's mental status, Dr. Tripp opined that Appellant was not depressed, but appeared anxious; his thought process was concrete; he was alert and oriented; and his memory was poor. Dr. Tripp conducted a physical examination of Appellant and indicated that there did not appear to be a medical problem causing Appellant's psychiatric condition.

¶7 Dr. Tripp concluded that Appellant was unable to recognize reality because of his severe memory impairment, and that as a result of a severe medical disorder, Appellant was substantially likely to suffer severe and abnormal harm if left untreated.

¶8 At the hearing on the petition for treatment the parties stipulated to the admission of Drs. Parker and

Tripp's affidavits in lieu of their testimony. Appellant's counsel then challenged the sufficiency of Dr. Parker's affidavit, arguing that Dr. Parker failed to conduct a proper personal and physical examination of Appellant. The court rejected that argument, finding that Appellant was a danger to others, gravely disabled, and persistently or acutely disabled, and thus COT in an inpatient treatment program was appropriate. Appellant was ordered to undergo an inpatient treatment program for no more than 365 days.

¶9 Appellant timely filed this appeal². This Court has jurisdiction pursuant to A.R.S. § 36-546.01 (2009) and A.R.S. § 12-2101(K) (2003).

STANDARD OF REVIEW

¶10 We review the application and interpretation of statutes *de novo* because they are questions of law. *In re MH 2006-000749*, 214 Ariz. 318, 321, ¶ 13, 152 P.3d 1201, 1204 (App. 2007). "Factual findings made by the [trial] court will not be set aside unless clearly erroneous or unsupported by substantial evidence." *In re MH 2007-001236*, 220 Ariz. 160, 165, ¶ 15, 204 P.3d 418, 423 (App. 2008). However, the statutory requirements for civil

² Appellant moved this Court to accelerate its decision. The motion is denied.

commitment must be strictly construed because of the serious deprivation of liberty that may result. *Id.*

DISCUSSION

¶11 Appellant contends that the trial court erred in finding Dr. Parker's affidavit statutorily sufficient. Specifically, Appellant argues that the order for treatment must be vacated because Dr. Parker failed to conduct: (1) a personal examination of Appellant during the evaluation period; and (2) a complete physical exam of Appellant. We address each issue in turn.

I. Adequacy of Dr. Parker's Personal Examination of Appellant

¶12 Section 36-501(14) (Supp. 2011) defines an "examination" 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." The evaluating physician must personally perform the examination. *In re MH 2008-000438*, 220 Ariz. 227, 280, ¶ 14, 205 P.3d 1124, 1127 (App. 2009) (holding that the evaluating physician must personally examine the patient); compare A.R.S. § 36-501(12) (stating that the evaluation must be carried out by a group of persons, including at least two licensed physicians experienced in

psychiatric matters), with § 36-533(B) (stating that the petition for involuntary treatment shall be accompanied by the affidavits of the two physicians who conducted the examinations).³

¶13 The record shows that Dr. Parker personally met with Appellant and attempted to interview him. Based on Appellant's initial responses, Dr. Parker determined that he was unable to consent to an interview, and therefore diagnosed Appellant based on his own observations and on Appellant's chart history. There is no indication that Dr. Parker did not personally make these observations. Instead, the record indicates that Dr. Parker approached, interacted with, and observed Appellant, thereby obtaining information about Appellant's appearance, demeanor, manner of speech, and responses. These observations formed the basis of Dr. Parker's professional opinion that Appellant suffered from a severe mental disorder.

¶14 Given this record, we understand Appellant's argument to be that Dr. Parker did not orally interview Appellant during the examination. However, nothing in A.R.S. § 36-501 requires that a physician conduct an

³ In 2011, A.R.S. § 36-533(B) was amended to require physicians only to "participate" in the evaluation, rather than conduct the examination. 2011 Ariz. Sess. Laws Ch. 219 § 2 (1st Reg. Sess.). This change was not made retroactive and does not affect our decision.

interview as part of the personal examination. Although a physician is required to explain to the patient the conditions and treatment options, and to assess whether the patient is willing or capable of voluntarily accepting treatment, Appellant has not raised the issue of failure to explain treatment options on appeal.

¶15 Even if Dr. Parker was required to interview Appellant before reaching a diagnosis, Dr. Parker's failure to do so is excusable. When evaluating patients, some degree of resistance to treatment can be expected. See *In re MH 94-00592*, 182 Ariz. 440, 446, 897 P.2d 742, 748 (App. 1995). Failure to strictly comply with statutory requirements is excusable if such efforts would be futile or if it is impractical to do so. *Id.* Patient actions that may render further action unnecessary include walking away, verbal or physical abuse, and nonresponsiveness. *Id.* However, inconveniences like a sarcastic or sleeping patient are insufficient. *Id.*; see also *MH 2008-000438*, 220 Ariz. at 280-81, ¶ 18, 205 P.3d at 1127-28 (holding that a failure to conduct an examination was not excusable when the patient was sleeping and there was no evidence the patient was confrontational, needed physical restraint, or willfully refused the exam); *In re MH-201000029*, 225 Ariz. 500, 501, 506, ¶¶ 2, 21, 240 P.3d 1262, 1263, 1268 (App.

2010) (holding that a remote physical exam of patient by Telemed video was insufficient where there was nothing to suggest appellant's behavior or condition made a bodily exam of patient impractical).

¶16 Dr. Parker did not conduct an interview with Appellant because he determined that Appellant was incompetent to consent to the process. Although the trial court did not expressly find that Dr. Parker's conclusion that an interview was impractical was based on the patient's conduct, we assume the trial court knew that an "examination" was required unless the conduct of the patient made a full examination futile. *State v. Moody*, 208 Ariz. 424, 443, ¶ 49, 94 P.3d 1119, 1138 (2004) ("We presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling."). Accordingly, the court's treatment order based in part on Dr. Parker's affidavit was not erroneous.⁴

⁴ Nor do we agree with Appellant that the implied finding that an interview was futile is belied by the fact that Dr. Tripp was able to interview and fully examine Appellant. It is up to the trial court to weigh the facts to determine if an examination was futile. The fact that Appellant was able and willing to consent to be interviewed and examined by Dr. Tripp does not mean that he was able and willing to be interviewed and examined by Dr. Parker. It is possible that Appellant's condition and ability to consent changed. There is no requirement that Dr. Parker consult with Dr. Tripp to see if Appellant consented to being examined by Dr. Tripp so that Dr. Parker could try

II. Adequacy of Dr. Parker's Physical Examination of Appellant

¶17 At the time of the examination and the hearing in this case, A.R.S. § 36-501(14) provided that an evaluation include a "complete physical examination."⁵ Appellant argues that because Dr. Parker did not conduct a complete physical examination of Appellant, indeed, he only reviewed the medical records, that the examination was insufficient. Thus, Appellant contends that the treatment order must be vacated because A.R.S. § 36-533(B) requires that the petition for COT be accompanied by affidavits of the two physicians who conducted the examinations that describe in detail the facts justifying the petition.

¶18 We disagree with Appellant that the lack of a physical examination in this case was insufficient. As noted above, Dr. Parker attempted to do an examination of Appellant, but concluded, based on Appellant's conduct,

again. Indeed, the statute requires independent examinations by the two physicians. A.R.S. § 36-501(12)(a).

⁵ In 2011, the legislature amended A.R.S. § 36-533(B) to state that an affidavit must "include the results of the complete physical examination of the patient *if this is relevant to the evaluation.*" 2011 Ariz. Sess. Laws Ch. 219, § 2 (1st Reg. Sess.) (emphasis added). Furthermore, the amended section indicates that an "examination may include *firsthand observation* or remote observation by interactive audiovisual media." *Id.* (emphasis added). These changes were not made retroactive and do not affect our decision.

that Appellant was not competent to consent to such an examination. The conduct described by Dr. Parker supports the implied finding by the trial court that any such full physical examination was futile. *Supra* ¶¶ 4, 15. These facts distinguish this case from both *MH 2008-000438* and *In re MH-201000029*. In the former case, the court found that the physician's failure to conduct an examination because the patient was sleeping violated the statute, distinguishing other cases where the patient's refusal or inability to cooperate made such an exam futile. 220 Ariz. at 280-81, ¶ 18, 205 P.3d at 1127-28. In the latter case, the court found that a remote Telemed video examination was insufficient when there was no evidence that the patient's behavior or condition made an examination impractical. 225 Ariz. at 501, 506, ¶¶ 2, 21, 240 P.3d at 1263, 1268. Dr. Parker's description of Appellant's behavior here, when Dr. Parker attempted to conduct an examination, supports that Appellant was either a confrontational patient or made the examination impractical.

CONCLUSION

¶19 For the reasons stated above, we affirm the treatment order.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge