DIVISION ONE
FILED: 04/17/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	No. 1 CA-MH 11-0082
	)	
	)	DEPARTMENT A
	)	
IN RE MH 2011-001989	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. MH-2011-001989

The Honorable Veronica W. Brame, Commissioner

REMANDED WITH INSTRUCTIONS

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

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia D. Beck, Deputy Legal Defender
Attorneys for Appellant

T I M M E R, Judge

¶1 A.I. appeals the superior court's order of treatment, arguing the court denied him due process by failing to properly serve a detention order and notice of hearing pursuant to

Arizona Revised Statutes ("A.R.S.") section 36-536 (West 2012).[1] For the reasons that follow, we remand with instructions.

BACKGROUND

¶2 On July 26, 2011, a medical doctor filed a petition for court-ordered treatment of A.I., alleging he was a danger to himself, a danger to others, and persistently or acutely disabled. The superior court scheduled an evidentiary hearing for August 2 and issued a detention order and notice of hearing for A.I. The only notice in our record includes a blank "Return of Order" section.

¶3 A.I. appeared at the hearing and testified on his own behalf. Neither A.I. nor his counsel complained A.I. was not provided adequate notice of the hearing. The court found A.I. was persistently or acutely disabled, in need of psychiatric treatment, and unwilling to accept voluntary treatment. The court ordered A.I. to undergo combined inpatient and outpatient treatment.

¶4 This appeal followed. The sole issue raised is whether the State properly served A.I. with notice of the hearing held to impose court-ordered treatment. Although A.I. did not argue lack of service or defective service to the superior court, we may address it in the first instance. *In re*

[1] Absent material revision after the date of the events at issue, we cite a statute's current Westlaw version.

MH 2006-000023, 214 Ariz. 246, 249, ¶ 11, 150 P.3d 1267, 1270 (App. 2007) (holding that service issue may be raised first with the appellate court given the liberty interests at stake in mental health cases).

DISCUSSION

¶5 When seeking to impose court-ordered treatment on a person, the State must serve that person with the petition for court-ordered treatment, the affidavits in support of the petition, and the notice of the hearing at least seventy-two hours before a hearing on the petition. A.R.S. § 36-536(A). Notice cannot be waived, and the person serving the notice must file a proof of service with the court. A.R.S. § 36-536(B), (D). Additionally, due process requires notice and an opportunity to be heard, which compliance with § 36-536 furthers by guaranteeing the patient and his counsel sufficient time to prepare for the hearing. *In re MH 2006-000023*, 214 Ariz. at 248-49, ¶ 10, 150 P.3d at 1269-70. Consequently, if the State failed to comply with § 36-536, we must vacate the treatment order. *Id.* at 249, ¶¶ 11-12, 150 P.3d at 1270. The determinative issue before us then is whether the record reflects proper service of the notice.

¶6 A.I. argues in his opening brief that the State never served notice of the hearing, as evidenced by the blank "Return of Order" section set forth in the only copy of the notice

contained in the record. After receipt of the opening brief, and on motion by the State, we reinstated jurisdiction with the superior court to allow that court to amend the record to reflect proper service, if appropriate. *See* Arizona Rule of Civil Appellate Procedure 11(e) (providing that if matters are omitted from the record, the appellate court may direct correction of the omission). We directed the court to "rule on and amend the record in furtherance of this appeal" and then transmit written findings and/or an amended record to this court no later than January 23, 2012, when appellate jurisdiction would automatically reinstate.

¶7 In response to this court's order, the superior court held a hearing on January 10, 2012, and entered the following order, which is part of our record:

> **IT IS ORDERED** amending the Court record to include the filed and complete copy of the Detention Notice that was served upon the Patient in this matter. Per the [Court of Appeals'] Order dated December 22, 2011, these documents will be presented to the Court of Appeals.

Despite this order, the superior court failed to forward the completed notice to this court, and it is not part of our record. Repeated calls to the clerk of the superior court have not yielded the completed notice.

¶8 After appellate jurisdiction reinstated, the State filed its answering brief and attached a copy of a completed

notice, which reflects timely service on A.I. The State contends the attachment proves A.I. had been properly served, making this appeal moot. In his reply brief, A.I. notes the lack of a completed notice in the record and reiterates his request that we vacate the treatment order.

¶9 Despite our previous reinstatement of jurisdiction with the superior court and that court's January 10, 2012 order, our record contains no evidence A.I. was properly served notice of the August 2 hearing. Although the superior court's order acknowledges the existence of a completed notice, because the return of service is not in the record, we cannot review the sufficiency of service. And even if we could rely solely on the court's order as proof of service, because the order does not reflect when A.I. was served, we cannot know if he was timely served pursuant to § 36-536(A). The State cannot supplement the record through attachments to its brief, so we do not consider the effect of the provided completed notice. *LaWall v. Pima County Merit Sys. Comm'n,* 212 Ariz. 489, 491-92, ¶ 5 n.3, 134 P.3d 394, 396-97 n.3 (App. 2006).

¶10 Without proof of adequate service, we cannot determine the validity of the treatment order. We therefore remand this matter to the superior court with instructions as follows:

(1) The court should hold an evidentiary hearing to reconstruct the record to determine whether the State served A.I. with notice as required by A.R.S. § 36-536(A).[2]

(2) If the court determines the State served A.I. in compliance with § 36-536(A), the court should enter an order to that effect and amend the record to include a completed notice showing proper service. The court need not take additional steps.

(3) If the court determines the State failed to serve A.I. in compliance with § 36-536(A), the court must enter an order vacating the treatment order entered August 2, 2011.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge

[2] In his reply brief, A.I. argues that if the State's copy of the completed notice is determined to be genuine, it is still defective because proof of service was not filed with a sworn affidavit or served by the sheriff as required by Arizona Rule of Civil Procedure ("Rule") 4(g). A.I. is mistaken because Rule 4(g) applies only to service of a civil summons and pleading. A notice of hearing is not a "pleading," Rule 7(a), and A.R.S. § 36-536 does not require service by the sheriff or an affidavit of service.