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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. MH 7919-7-10	2 CA-MH 2010-0002 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Honorable Julia Connors, Court Commissioner

AFFIRMED

Barbara LaWall, Pima County Attorney
By Grant Winston — Tucson
Attorneys for Appellee

Ann L. Bowerman — Tucson
Attorney for Appellant

B R A M M E R, Presiding Judge.

¶1 In this appeal, appellant challenges the March 15, 2010 order in which the trial court found she is suffering from a mental disorder and, as a result, is persistently or acutely disabled and in need of mental health treatment and ordered her committed for that purpose. She contends the order for evaluation was based on an application for emergency admission that did not comply with A.R.S. § 36-524 and was not supported

by sufficient evidence. She also contends the court erred in finding she is persistently and/or acutely disabled because there was no evidence that she had been provided an explanation of the advantages, disadvantages or alternatives to treatment. We affirm for the reasons stated below.

¶2 The record establishes that in March 2010, appellant was taken to a hospital in Tucson and evaluated by Dr. Shahzad Ali, who completed an Application for Emergency Evaluation pursuant to § 36-524. He opined she was suffering from a mental disorder based on the fact that she "present[ed] with grandiose delusions, pressured speech, [and was] unable to cooperate during interview . . . ." He also stated that as a result of this mental disorder, she was a danger to herself or others, and he specified the nature of the danger as follows: she was "talk[ing] to herself," appeared to be "paranoid about the federal government, institutions," seemed unable to function or "take care of herself." Summarizing the observations upon which he based his conclusion that she was a danger to herself or others, he stated she appeared to be experiencing a "manic episode," could not "participate in an interview," was experiencing "grandiose delusions," and was "paranoid." He repeated that she was talking to herself, adding that he could not determine if appellant was responding to internal stimuli.

¶3 Pursuant to A.R.S. § 36-529(B),[1] the trial court granted the application, finding appellant gravely disabled, persistently or acutely disabled, and a danger to

[1]Section 36-529(B), which was the basis for the court's emergency order, provides that,

> [i]f, from review of the petition for evaluation, there is reasonable cause to believe that the proposed patient is, as a result of a mental disorder, a danger to self or others, is persistently or acutely disabled or is gravely disabled and that the person requires immediate or continued hospitalization prior to his hearing on court-ordered treatment, the court shall

herself and others, and that her hospitalization was required pending a hearing for court-ordered treatment. Appellant was admitted to the hospital and evaluated by two psychiatrists. A petition for court-ordered treatment subsequently was filed and, after a hearing, the court dismissed the allegations that appellant was a danger to herself or others but found she was persistently or acutely disabled as a result of a mental disorder and in need of mental health treatment.

¶4 Section 36-524(C) provides, inter alia, that an application for emergency psychiatric evaluation must be based on a statement

> by the applicant that he believes on the basis of personal observation that the person is, as a result of a mental disorder, a danger to self or others, and that during the time necessary to complete the prepetition screening procedures set forth in [A.R.S.] §§ 36-520 and 36-521 the person is likely without immediate hospitalization to suffer serious physical harm or serious illness or is likely to inflict serious physical harm upon another person.

In addition, the applicant is required to state "[t]he specific nature of the danger" and summarize the basis for the applicant's belief that the person is a danger to herself or another. § 36-524 (C)(2), (3).

¶5 Appellant's first argument on appeal is that there was insufficient evidence to support Ali's conclusion that she was a danger to herself or others simply because she was manic, delusional, and paranoid. She argues that the application was not sufficiently specific, that the court should have denied the petition for court-ordered evaluation, and that the final order of commitment for treatment therefore is flawed.

> order the proposed patient taken into custody and evaluated at an evaluation agency.

¶6 First, as the state points out, appellant did not challenge the order for emergency evaluation below, raising it for the first time on appeal. She could have challenged the detention for emergency evaluation pursuant to § 36-529(D); *see also In re MH 2008-002659*, 224 Ariz. 25, ¶ 13, 226 P.3d 394, 397 (App. 2010). And, she could have raised the issue at the beginning of the hearing on the petition for court-ordered treatment. *See In re MH 2008-002659*, 224 Ariz. 25, ¶¶ 8-9, 12, 226 P.3d at 396 (finding appellant waived challenge to emergency detention procedure by raising it for first time on appeal but addressing issue in any event; suggesting it could have been raised at trial on petition for court-ordered treatment). Appellant concedes she did not challenge the validity of the application for emergency admission "in the original trial," but urges us to consider the arguments nevertheless.

¶7 Arguments raised for the first time on appeal generally are regarded as waived. *See id.* ¶ 9. But, in the exercise of our discretion we nevertheless may consider a waived argument, *see id.*, particularly in involuntary treatment cases, given the liberty interests at issue, *In re MH 2006-000023*, 214 Ariz. 246, ¶ 11, 150 P.3d 1267, 1270 (App. 2007).

¶8 Reversal of the final order of commitment for court-ordered treatment is not warranted here on this ground. Although the application could have been more specific with regard to appellant's danger to herself or others, nevertheless, given the burden of proof, we find the statute's requirements satisfied.

¶9 We also reject appellant's challenge to the sufficiency of the evidence to support the final order of commitment. The evidence supporting an order for involuntary treatment must be clear and convincing. A.R.S. § 36-540(A); s*ee also In re MH 2007-001236*, 220 Ariz. 160, ¶ 15, 204 P.3d 418, 423 (App. 2008). On appeal, we review an

order for involuntary treatment to determine if substantial evidence supports it. *See MH 2007-01236*, 220 Ariz. 160, ¶ 15, 204 P.3d at 423. We will not disturb the trial court's ruling unless the factual findings upon which it is based are clearly erroneous or unsupported by substantial evidence. *See id.*

¶10 Appellant contends the evidence did not satisfy A.R.S. § 36-501(33), which defines persistently or acutely disabled to be "a severe mental disorder that meets" certain criteria, one of which is the following:

> Substantially impairs the person's capacity to make an informed decision regarding treatment, and this impairment causes the person to be incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment and understanding and expressing an understanding of the alternatives to the particular treatment offered after the advantages, disadvantages and alternatives are explained to that person.

§ 36-503(33)(b). As appellant points out, this requirement has been construed to mean that doctors must explain to the prospective patient the advantages and disadvantages of accepting treatment and the alternatives to treatment and their advantages and disadvantages. *In re Pima County Mental Health No. MH-1140-6-93*, 176 Ariz. 565, 566-67, 863 P.2d 284, 285-86 (App. 1993). But, as the court stated in *Pima County Mental Health No. MH-1140-6-93*, 176 Ariz. at 568, 863 P.2d at 287, although the statute requires that these matters be explained to the patient, "we do not believe that mental health officials must engage in a confrontation with a mentally ill patient or have the patient physically restrained in order to fulfill the letter of the requirement." If the evidence is clear and convincing that it would have been impracticable for the doctor to explain treatment and treatment alternatives to a patient, the requirement of the statute

"can be excused." *In re Maricopa County Mental Health Case No. MH 94-00592*, 182 Ariz. 440, 446, 897 P.2d 742, 748 (App. 1995).

¶11 The record contained ample evidence to support the trial court's finding that appellant suffers from a mental disorder and is persistently and acutely disabled. And both psychiatrists discussed treatment with appellant, although one stopped discussing it when appellant refused to listen.

¶12 Dr. Nelson Rosario testified appellant suffers from bipolar disorder, manic with psychosis, and explained her symptoms, proposed treatment, and prognosis with and without treatment. He concluded this condition significantly impaired her judgment, reasoning, and ability to recognize reality. He testified he discussed with appellant the advantages and disadvantages of treatment and treatment alternatives. And, he believed her capacity to make an informed decision about her health was substantially impaired. Dr. William Lambert also testified at the hearing; he, too, diagnosed appellant as suffering from bipolar disorder, currently manic with psychotic features. His testimony about treatment, prognoses, and mental impairment was similar to that of Rosario.

¶13 Lambert testified he had "attempted to discuss" with appellant the treatment plan, advantages, disadvantages and alternatives, but "she basically terminated the evaluation prematurely when she kept insisting that she did not have a mental illness." He added that appellant became difficult and had stated the allegations in the petition for treatment were "full of lies and I didn't know what I was talking about." In this respect this case is similar to *Pima County No. MH-1140-6-93*, 176 Ariz. at 567, 863 P.2d at 286, in which the doctor testified the patient "'got up and walked away.'" It is also like *In re MH 2009-002120*, 588 Ariz. Adv. Rep. 43, ¶ 12 (Ct. App. Aug. 12, 2010), in which the

court found the patient had refused to participate in the examination, and "additional efforts would have been futile." Lambert was not required to restrain appellant in order to compel her to listen to his explanations. She terminated the interview, not Lambert.

¶14 The record amply supports the trial court's order committing appellant for treatment. We, therefore, affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge