

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH
No. MH20130807213

No. 2 CA-MH 2013-0006
Filed June 17, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. MH20130807213
The Honorable David Ostapuk, Judge Pro Tempore

AFFIRMED

COUNSEL

Barbara LaWall, Pima County Attorney, Tucson
By Jonathan Pinkney-Baird, Deputy County Attorney
Counsel for Appellee

Mental Health Defender's Office, Tucson
By Ann L. Bowerman
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Following court-ordered evaluations, one of appellant’s evaluating physicians petitioned for court-ordered treatment, averring appellant suffered from schizoaffective disorder and was persistently and acutely disabled. After an evidentiary hearing, the trial court found by clear and convincing evidence that appellant was persistently and acutely disabled as the result of a mental disorder as defined by A.R.S. § 36-501(32), was in need of treatment, and was “willing but unable to comply with treatment on a voluntary basis.” The court ordered that appellant receive treatment for one year. *See* A.R.S. § 36-540(A). Appellant appeals from that order.

¶2 Appellant argues the trial court erred by denying his motion to dismiss the petition for court-ordered treatment, which he made both before and at the conclusion of the hearing. He also contends the physicians’ evaluations were not independent and he was not provided with an explanation of the advantages, disadvantages and alternatives to treatment by both physicians. For the reasons set forth below, we affirm.

¶3 The trial court is to order involuntary treatment if it finds “by clear and convincing evidence that the proposed patient, as a result of mental disorder, is a danger to self, is a danger to others, is persistently or acutely disabled or is gravely disabled and in need of treatment, and is either unwilling or unable to accept voluntary treatment.” § 36-540(A). In reviewing an order for involuntary treatment, we view the facts in the light most favorable to sustaining the trial court’s findings and judgment. *In re Maricopa Cnty. Mental Health No. MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). Because involuntary commitment

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“may result in a serious deprivation of liberty,” strict compliance with the applicable statutes is required. *In re Coconino Cnty. Mental Health No. MH 1425*, 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995). The determination of “whether there has been sufficient compliance is a question of statutory interpretation, an issue of law that we review de novo.” *In re Pima Cnty. Mental Health No. MH-2010-0047*, 228 Ariz. 94, ¶ 7, 263 P.3d 643, 645 (App. 2011). “However, we will only disturb a court order for involuntary treatment if it is ‘clearly erroneous or unsupported by any credible evidence.’” *In re Maricopa Cnty. Mental Health No. MH2010-002348*, 228 Ariz. 441, ¶ 7, 268 P.3d 392, 395 (App. 2011), quoting *In re Maricopa Cnty. Mental Health No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995).

¶4 Appellant contends the trial court erred by denying his pretrial motion to dismiss the petition for treatment, asserting that the affidavit of Dr. Umee Davae, one of the physicians who had evaluated him, did not contain sufficient details to support her diagnosis, thereby violating his due process rights. See A.R.S. § 36-533(B) (petition for court-ordered treatment shall be accompanied by affidavits of evaluating physicians “describ[ing] in detail the behavior that indicates that the person . . . is a danger to self or to others, is persistently or acutely disabled” based on the “observations of the patient and the physician’s study of information about the patient” and shall include a summary of facts supporting the allegations of the petition). Specifically, appellant contends that Dr. Davae’s affidavit “failed to describe in detail the behavior” supporting her conclusion that appellant suffers from “Psychosis NOS [not otherwise specified]” and that she failed to provide a summary of the facts supporting that conclusion, rendering the petition for treatment insufficient and requiring his immediate release pursuant to A.R.S. § 36-535(C).

¶5 Appellant asserts that Dr. Davae provided only conclusory statements, rather than specific facts or behaviors, to support her diagnosis. By way of example, he points out that Dr. Davae noted appellant had been “recently diagnosed with psychotic break” at another clinic a month earlier, and that she had reported he was “guarded and [a] poor historian[, that he had a] subdued affect, poverty of thought flow and . . . internal stimuli.” He also

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argues appellee erroneously asserted at the hearing that it could supplement any deficiencies in Dr. Davae's written materials with her testimony.

¶6 The trial court denied the motion to dismiss at the beginning of the hearing, finding "sufficient allegations have been made in the physician[s] affidavit submitted by Dr. Davae together with the addendum and the written evaluation so that it survives the motion to dismiss without hearing and without further evidence."¹ The court then ordered "the matter to proceed to a full evidentiary hearing," and noted that clear and convincing evidence would be required in order to grant the petition for court-ordered treatment.

¶7 We view the facts before the trial court when it denied the motion to dismiss in the light most favorable to affirming its denial of that motion. *Maricopa Cnty. No. MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d at 1163. From that perspective, we find no error. Although Dr. Davae's affidavit did not contain abundant details, we conclude her description of appellant as "guarded," a "poor historian," and demonstrating "subdued affect, poverty of thought flow and [] internal stimuli" was minimally sufficient to support her diagnosis of psychosis NOS. See §§ 36-540(A), 36-501(32), 36-533(B). Accordingly, the court properly concluded that Dr. Davae's affidavit, addendum and evaluation were adequate to "survive[]" the

¹We note that the trial court had before it not only the information submitted by Dr. Davae, but that of Dr. Janis Petzel, the other evaluating physician, as well as the records of two other doctors who had evaluated appellant a month earlier, all of whom concluded appellant was persistently or acutely disabled. However, because appellant does not appear to challenge the documents submitted by Dr. Petzel, we do not address them. In addition, although the affidavits, evaluations and addendum submitted with the earlier petition contained more details describing appellant's behavior than the documents submitted by Drs. Davae and Petzel, because appellant was discharged in the first matter, a new petition was filed.

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motion to dismiss without hearing and without further evidence,” thereby permitting the court to proceed with the hearing.²

¶8 Moreover, while Dr. Davae’s affidavit provided sufficiently detailed behavior supporting the allegation that appellant was persistently and acutely disabled, it did not support the allegation that he was a danger to others. However, because the trial court ultimately dismissed that allegation, that deficiency is of no consequence. Nor do we find persuasive appellant’s argument that the behaviors Dr. Davae observed and relied upon were not in fact behaviors, but were instead conclusions. *See Coconino Cnty. No. MH 1425*, 181 Ariz. at 291, 889 P.2d at 1089 (suggesting patient’s “guarded, suspicious, and uncooperative” conduct was abnormal behavior).

¶9 At the hearing, Dr. Davae testified that although appellant had refused to participate in the evaluation, she had diagnosed him as having psychosis “[b]ased on the review of the chart information as well as discussion with the treatment team including the nurses and observing his behavior in the . . . dayroom . . . [and] observ[ing] that he tends to be quite guarded and has internal stimuli.” She added that appellant “seemed preoccupied and [she] felt that he was staring at the wall at one point in a manner that would lead [her] to conclude that he had internal stimuli.” We thus agree with the trial court’s denial of the motion to dismiss at the end of the hearing, and its finding that “all of the evidence presented, including oral testimony,³ the file and the

²Because the trial court denied the motion to dismiss at the beginning of the hearing, before considering Dr. Davae’s testimony at the hearing, we decline to address appellant’s argument that Dr. Davae was not permitted to cure any deficiencies in the affidavit with such testimony.

³Officer Umbaldo Velazques, the police officer who had responded to a call regarding appellant a few months before the hearing, testified that appellant had told him he had been “hearing things, hearing voices coming from vehicles, gravel, from people who were walking,” and that “the dumpster was talking to him,”

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affidavits . . . including Dr. Davae's testimony and affidavits, addendum and evaluation, altogether establish by a clear and convincing standard of the evidence" that appellant was persistently or acutely disabled.

¶10 And to the extent appellant suggests he should have been released before the hearing pursuant to § 36-535(C), that statute directs a court to release a patient only if it first finds the patient is not, *inter alia*, persistently or acutely disabled once it has reviewed the petition, the attachments, and "other evidence at hand." The court made no such finding here, nor does the record suggest it should have done so. Similarly, to the extent appellant asserts that Dr. Davae's characterization of him as "fully oriented" was inconsistent with her opinion that he suffers from severe mental illness, this was a question for the trial court to resolve. *See Pima Cnty. Mental Health No. MH-2010-0047*, 228 Ariz. 94, ¶ 17, 263 P.3d at 647 (trial court resolves conflicts in evidence).

¶11 Appellant also maintains Dr. Davae's addendum failed to support her conclusion that he "is unable to make a reasonable decision regarding treatment at this time," arguing the trial court thus incorrectly found him persistently or acutely disabled. *See In re MH 91-00558*, 175 Ariz. 221, 225, 854 P.2d 1207, 1211 (App. 1993) ("[A]s a predicate to [the court] determining whether a mentally-ill person is capable of engaging in a rational decision-making process" concerning treatment, "the doctors must explain the advantages and disadvantages of accepting treatment . . . and . . . the alternatives of such treatment and the advantages and disadvantages of such alternatives."); *see also* § 36-501(32)(b). Appellant argues that Dr. Davae "clearly misled" the court by indicating on her addendum that she had explained to him the advantages, disadvantages, and alternatives to accepting treatment, while she testified that she had "attempted [to explain this] but . . . was unable to get any

"planes flying overhead . . . were talking to him," and "the flies were speaking to him and that they had evil inside of them."

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meaningful information” from him.⁴ He also asserts that Dr. Davae further failed to comply with § 36-501(32)(b) by not revisiting this topic with appellant after her first attempt was unsuccessful.

¶12 Contrary to appellant’s assertion that Dr. Davae had “clearly misled” the court, she testified that she had “attempted” to discuss with appellant the advantages, disadvantages, and alternatives of treatment, but “[h]e didn’t want the discussion.” She stated she “felt that . . . if [she] continued further then [appellant] may have escalated and [she] didn’t want to risk that.” She also acknowledged that appellant’s mental illness “substantially impair[s] his insight, judgment, reason, behavior or perception of reality.” Relying on a nursing note from appellant’s chart made a few days before the hearing, a source Dr. Davae would “normally look to or rely upon” to perform her evaluation, she stated that appellant had reported incorrectly that he had not seen the doctor or discussed medications with her, and the nurse had noted appellant was “paranoid at that time.” This contributed to Dr. Davae’s opinion that appellant was unable to make an informed decision about his treatment.

¶13 In addition, Dr. Petzel opined that although appellant had told her he did not need treatment when she had discussed treatment options with him, she nonetheless concluded that his mental illness impaired his ability to make an informed decision regarding his treatment. She explained “we can see from the symptoms reported from his family and from the high-energy paranoid grandiose behaviors . . . that [he has] actually responded

⁴To the extent appellant contends Dr. Davae “admitted” that the form on which she indicated she had explained to appellant the advantages, disadvantages, and alternatives of treatment had been filled out by someone else, suggesting she personally had not fulfilled this requirement, the record suggests otherwise. At the hearing, Dr. Davae explained that although another individual may have placed her words on the form on her behalf, that person did so “based on [her] words [which are] then . . . written in [her] evaluation that [she] look[s] over and then . . . sign[s].”

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quite well to medication so far, so without treatment he had a manic episode and with treatment he's calmed down." Accordingly, based on the record, including Dr. Davae's testimony, we cannot say the trial court erred by implicitly finding that appellant had been properly advised of the advantages, disadvantages and alternatives of treatment, providing him with sufficient notice to address this issue at the hearing.

¶14 Appellant also argues that because Dr. Davae concurred with Dr. Petzel's diagnosis and used some of the same language in her affidavit and addendum that Dr. Petzel had used, the doctors' evaluations were not independent, as required by § 36-501(12)(a)(i). As previously noted, however, Dr. Davae testified that she had observed appellant, had reviewed his chart, and had consulted with the treatment team before concluding he was psychotic NOS, a diagnosis that is distinct from Dr. Petzel's diagnosis of schizoaffective disorder. *See* § 36-533(b) (petition for treatment shall be based, in part, on "physician's study of information about the patient.").

¶15 Moreover, although Dr. Davae testified that she concurred with Dr. Petzel's diagnosis "as well," she did not change her initial diagnosis as a result. In denying the renewed motion to dismiss at the conclusion of the hearing, the court noted it had considered the testimony; the file; and the doctors' affidavits, addendum, and evaluations in determining that "Dr. Davae's testimony suffices under [the] statutory standard." The record supports this finding. *See Maricopa Cnty. No. MH 2010-002348*, 228 Ariz. 441, ¶ 7, 268 P.3d at 395 (appellate court will only disturb court order for involuntary treatment if clearly erroneous or unsupported by credible evidence).

¶16 For the reasons stated, we affirm the trial court's order that appellant undergo mental health treatment.⁵

⁵We do not condone Dr. Davae's cavalier approach to her duties concerning the affidavit and testimony. Strict compliance with the statute is required. *In re Coconino Cnty. Mental Health No. MH 1425*, 181 Ariz. at 293, 889 P.2d at 1091. That strict compliance

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must begin with her evaluation and affidavit. An affidavit that fails to support any ground for involuntary commitment would require dismissal of the entire petition.