

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

YOLANDA LAVETTE DIGGS,
Petitioner,

v.

HON. DEBORAH BERNINI, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2014-0055
Filed October 7, 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NOT FOR PUBLICATION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).

Special Action Proceeding
Pima County Cause No. CR20140517

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

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COUNSEL

Lori J. Lefferts, Pima County Public Defender
By Lisa M. Surhio, Assistant Public Defender, Tucson
Counsel for Petitioner

Barbara LaWall, Pima County Attorney, Tucson
By Jacob R. Lines, Deputy Pima County Attorney
Counsel for Real Party in Interest

DECISION ORDER

Presiding Judge Miller, Chief Judge Eckerstrom, and Judge Espinosa

PER CURIAM:

¶1 Pursuant to the special-action petition and related pleadings filed in this case, the state not taking a position, and petitioner having no equally plain, speedy, and adequate remedy by appeal, we accept jurisdiction of the special action and grant relief in part. Ariz. R. P. Spec. Actions 1(a), (3).

¶2 We first review the procedural history of this case in order to provide the context of the petitioner's arguments for extraordinary relief. The petitioner was placed on probation on July 7, 2014, after pleading guilty to a class six, undesignated felony involving theft of a vehicle in January 2014. Although the petitioner was a decorated veteran and possessed a graduate degree, she was unemployed and sometimes homeless, and there were significant questions about her mental health before and after the offense. Because of her psychiatric history, she was assigned to the Seriously Mentally Ill (SMI) probation caseload.

¶3 At a restitution hearing on August 4, 2014, the respondent judge continued that hearing to August 28 on the

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request of defense counsel, with no objection from the state. The parties informed the respondent that the August 28 date might well be vacated because they thought a stipulation to the restitution amount was probable. The respondent then advised the petitioner that she would need to be present at the new date. The petitioner asked the respondent to set a different date and eventually explained that she previously had received permission from the probation officer to travel to California to either visit her son or attend a custody hearing during the same time as the newly set restitution hearing. During the ensuing exchange, the respondent emphasized her authority over both the petitioner's probation officer and the petitioner.

¶4 The record and defense counsel's subsequent statements suggest the petitioner became increasingly agitated and stated the following:

I'm, -- what I'm saying is I'm going through my probation officer, because I'm on probation. That's what I'm saying. So whatever I'm here for now is restitution. So I don't really think you have any say in where I go or don't go.

Without further comment, the respondent judge then ordered the petitioner into custody. The respondent articulated no specific grounds for the arrest. Apparently believing she had just been given a jail sentence, the petitioner asked about the length of her stay, to which the respondent replied that she would talk with her probation officer. A probation review hearing was scheduled eight days hence.

¶5 A petition to revoke probation (PTR) was filed later that day by the petitioner's probation officer. The PTR alleged only that the petitioner had failed to take prescribed medications on August 4 as required by the terms of her probation. Counsel asserts in the petition for special action that the respondent judge informed counsel in chambers that she had directed the probation officer to file the PTR. At the August 12 hearing, defense counsel waived a formal reading of the PTR and the respondent set a combination

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mental health court status hearing and evidentiary hearing for August 18. The respondent did not address release conditions, although the minute entry stated that they had been revoked. In a minute order issued on August 18, the respondent stated the hearing was continued to September 8 because “defendant is medically incapable of attending.”

¶6 On August 19, defense counsel filed a motion pursuant to Rule 11, Ariz. R. Crim. P., stating that she was “concerned that [the petitioner] may be unable to understand the proceedings against her and/or assist in her own defense.” The motion was accompanied by a request to expedite because counsel wanted a ruling and stay before the September 1 deadline for the evidentiary hearing. The competency hearing was scheduled for August 25.

¶7 Two days after filing the competency petition, however, defense counsel sought immediate dismissal of the PTR. She unsuccessfully sought an expedited hearing to present Veteran’s Administration (VA) medical records she had just received that caused her to question the factual basis for the PTR. She filed a motion to dismiss, arguing that the petitioner’s psychiatrist had withdrawn the prescription for the medication in question, and that petitioner therefore had not violated probation by failing to take that medication. In that motion, counsel further contended that that the respondent judge had violated the petitioner’s procedural rights at the August 4 hearing. Counsel additionally filed a motion to modify the petitioner’s release conditions.

¶8 At the August 25 hearing, defense counsel withdrew the Rule 11 motion. The respondent judge then ordered a Rule 11 evaluation on her own motion, declined to hear the motion to dismiss, and set a competency hearing for November 24. The petitioner then filed the instant special action.

¶9 Therein, the petitioner first alleges that the respondent judge abused her discretion by remanding the petitioner into custody without articulating any basis for doing so. Our examination of the record supports the petitioner’s claim. We recognize that a trial court has authority to eject a disruptive defendant. *See generally Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

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But—even assuming the petitioner’s conduct could reasonably be described as disruptive—the court cannot take a defendant into custody without first warning the defendant. *Id.* And, even if the respondent’s exercise of her contempt power could justify the summary incarceration of the petitioner, nothing in the record suggests the respondent held petitioner in contempt before having her removed and transferred to jail. And, if the respondent intended to take the petitioner into custody for an alleged violation of her probation conditions, she was required to inform the petitioner of that fact. *See* A.R.S. §§ 13-901(C), 13-3888; *Padilla v. Superior Court*, 133 Ariz. 488, 489-90, 652 P.2d 561, 562-63 (App. 1982) (probation officer required to advise probationer of cause for warrantless arrest).

¶10 As we noted above, later on the day of the petitioner’s detention, the probation officer filed the PTR. Thereafter, the respondent judge failed to provide the petitioner a timely initial appearance. The eight-day delay between the beginning of the petitioner’s custody and her initial appearance and arraignment violated Rule 27.7, Ariz. R. Crim. P., which requires that an arraignment occur “without reasonable delay.” On the record before us, no basis for the delay exists.¹ The delay was unreasonable and deprived the petitioner a timely opportunity to argue that her continued detention was not necessary. *See Padilla*, 133 Ariz. at 490, 652 P.2d at 563 (finding delay of six days unreasonable notwithstanding intervening weekend and state’s delay in filing petition).

¶11 The petitioner asserts that we should remedy these violations of her procedural rights by dismissing the PTR and releasing her forthwith. But, a person denied a timely hearing on such a petition must demonstrate resulting prejudice or that “the acts complained of must be of such quality as necessarily prevent a

¹Given a trial court’s authority to schedule hearings, to direct incarcerated inmates be transported and to direct probation officers be present at such hearings, the petitioner should have been provided an initial appearance within twenty-four hours of her detention and the filing of the petition.

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fair hearing.” *Padilla*, 133 Ariz. at 490, 652 P.2d at 563. The petitioner has made no such argument. To the contrary, defense counsel voiced no objection to the respondent judge’s failure to conduct a timely initial appearance, either by motion or by argument, at the first hearing after her arrest. Because she has shown no prejudice arising from the violations of due process, she is therefore not entitled to the relief she seeks for those violations.

¶12 Lastly, the petitioner asserts that the respondent judge erred in refusing to consider her motion to dismiss the lone violation alleged in the PTR. We agree. In refusing to rule on the petitioner’s pending motion to dismiss and motion to modify release conditions, the respondent stated, “the proceedings are stayed because of [the petitioner’s] mental status,” presumably the pending evaluation pursuant to Rule 11. But nothing in Rule 11 automatically stays the proceedings or precludes a trial court from ruling on pending motions. Instead, Rule 11.1 states only that “[a] person shall not be tried, convicted, sentenced or punished for a public offense . . . while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.” Ruling on a motion to dismiss or to modify release conditions would not violate Rule 11.1. Accordingly, we direct the respondent to rule on petitioner’s pending motions.

¶13 Additionally, in ordering that the petitioner be evaluated pursuant to Rule 11.2(a), the respondent judge noted that the petitioner had been “off psychotropic medications” for some time and was “acting out at the jail to the point where” she might harm herself or others. Thus, the respondent concluded that a Rule 11 examination was in the petitioner’s “best interests.” But a finding of best interests is not relevant to whether a trial court should order a competency evaluation pursuant to Rule 11. Instead, the relevant legal question is whether the defendant is competent to understand the nature of the proceedings against her and assist her counsel in those proceedings or whether there is reason to investigate the defendant’s mental status at the time of the offense. Ariz. R. Crim. P. 11.2(a); *see also State v. Amaya-Ruiz*, 166 Ariz. 152, 162, 800 P.2d 1260, 1270 (1990). Application of an incorrect legal

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standard constitutes an abuse of discretion. *State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010).

¶14 For the reasons stated, we accept jurisdiction of this special action and grant partial relief. We vacate the respondent judge's order that the petitioner be evaluated pursuant to Rule 11.2(a). The respondent is directed to rule on the petitioner's pending motions and, if necessary, to reevaluate using the correct legal standard to determine whether a competency evaluation is warranted under Rule 11.2(a).