## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Civil Commitment of B.N.,

*Appellant-Respondent,*

v.

Health and Hospital Corporation d/b/a Sandra Eskenazi Mental Health Center,

*Appellee-Petitioner*

April 19, 2022

Court of Appeals Case No. 21A-MH-2525

Appeal from the Marion Superior Court

The Honorable Melanie Kendrick, Magistrate

Trial Court Cause No. 49D08-2110-MH-35009

**Crone, Judge.**

## Case Summary

[1] After a remote hearing at which B.N. appeared in person and by counsel, the trial court found that B.N. was gravely disabled and committed her to Health and Hospital Corporation d/b/a Sandra Eskenazi Mental Health Center (Eskenazi) for treatment. On appeal, B.N. argues that conducting the hearing remotely over her objection violated various administrative rules, statutes, and constitutional provisions. Finding B.N.'s arguments waived, we affirm.

## Facts and Procedural History

[2] The relevant facts are undisputed. Sixty-nine-year-old B.N. was admitted to Eskenazi on October 16, 2021, and was diagnosed with schizophrenia, from which she has suffered for many years. On October 18, Eskenazi filed an application for emergency detention with the trial court. On October 20, Eskenazi filed a report following emergency detention with a statement from Dr. Charles Matias indicating that B.N. was unable "to differentiate reality from her paranoid delusions" and had refused voluntary treatment. Appellant's App. Vol. 2 at 21. On October 21, the trial court issued an order setting a commitment hearing for October 25 in Marion Superior Court in the City-County Building, and a summons was issued to B.N. On October 22, public defender Samantha Zawodni entered an appearance for B.N. That same day, Zawodni filed a motion indicating that the matter had been set for a remote

hearing[1] and that B.N. "object[ed] to the hearing being held remotely" and requested an in-person hearing. *Id*. at 29. The trial court summarily denied the motion later that day.

[3] On October 25, the trial court started the hearing by addressing B.N. as follows:

> So, we're here today on what's called a request for Court ordered treatment, so because of that you have a few certain rights. One of the rights is to be present, which you are right now through this Court call. Another is to have an attorney, that's Miss Zawodni who you see there on the screen if you have your own attorney you would be welcome to ask for more time to bring them in. And then you also have the right to participate, so the way it works is the hospital will go first they'll put on any witnesses or evidence they have and then after that you'll be able to testify if you want to, you do not have to, but if you'll like to you'd be able to talk then and say whatever it is you'd like to say okay?

Tr. Vol. 2 at 4. B.N. responded, "Ok." *Id*. Zawodni renewed her motion for an in-person hearing, and the court replied, "Okay well the Court will deny that

[1] The record is silent regarding how or when B.N. and Zawodni were informed that the hearing would be conducted remotely.

motion, we're proceeding um remotely due to the [COVID] 19 pandemic." *Id*. at 5. Zawodni made no further record regarding the trial court's ruling.[2]

[4] Eskenazi called Dr. Matias as its only witness. Zawodni called B.N.'s daughter as a witness, briefly conferred with B.N. in a private online "room[,]"*id*. at 21,[3] and then called B.N. as a witness. At the conclusion of the hearing, the trial court found that B.N. "is indeed suffering" from schizophrenia and "is currently gravely disabled." *Id*. at 26. The court found that "a regular commitment is the least restrictive option at this time" and issued a written order to that effect that same day. *Id*. B.N. now appeals.

## Discussion and Decision

[5] B.N. does not challenge the merits of the trial court's commitment order. Instead, she challenges only the denial of her motion for an in-person hearing, claiming that this violated various administrative rules, statutes, and constitutional provisions, none of which were ever cited to the trial court.

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[2] At that time, Indiana's courts were operating under a May 2020 Indiana Supreme Court order, subsequently extended until further notice, which authorizes the use of "audiovisual communication to conduct proceedings whenever possible to ensure all matters proceed expeditiously and fairly under the circumstances." Emergency Order Permitting Expanded Remote Proceedings, 144 N.E.3d 197, 197 (Ind. 2020). The order also states, "Any party not in agreement to the manner of the remote proceeding must object at the outset of the proceeding, on the record, and the court must make findings of good cause to conduct the remote proceeding." *Id*. at 198. Zawodni did not argue that the trial court's reference to the pandemic as a justification for holding a remote hearing was either insufficient to constitute a finding of good cause or unsupported by existing circumstances.

[3] The bailiff apparently encountered a minor technical difficulty in "mov[ing] [Zawodni and B.N.] into a room[,]" Tr. Vol. 2 at 21, but there is no indication that they were unable to confer in private.

Eskenazi suggests, and we agree, that B.N. has therefore waived her arguments on appeal.

[6] "As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court." *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002).

> This rule exists because trial courts have the authority to hear and weigh the evidence, to judge the credibility of witnesses, to apply the law to the facts found, and to decide questions raised by the parties. Appellate courts, on the other hand, have the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision. *The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider. Conversely, an intermediate court of appeals, for the most part, is not the forum for the initial decisions in a case.*[4] Consequently, an argument or issue not presented to the trial court is generally waived for appellate review.

*Id*. (emphasis added) (citations omitted). "Furthermore, a party on appeal may waive a constitutional claim, including a claimed violation of due process

[4] In her initial brief, B.N. asks us to take judicial notice of various information that allegedly establishes that the COVID-19 pandemic was not sufficiently virulent in late October 2021 to justify a remote hearing. Eskenazi responds in kind with information that allegedly supports the contrary position. Not to be outdone, in her reply brief, B.N. tosses in a couple screen shots of oral arguments held by this Court and the Indiana Supreme Court in late October 2021, which show judges and justices on the bench without masks. We decline the parties' invitation to take judicial notice of information that could have and should have been presented for the trial court's consideration, and we observe that trial courts and appellate courts operate in markedly different environments, as counsel is well aware.

rights, by raising it for the first time on appeal." *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016).

[7] Here, the trial court never had an opportunity to consider B.N.'s arguments, raised for the first time on appeal, that the COVID-19 pandemic was not sufficiently virulent to justify a remote hearing, that holding such a hearing violated B.N.'s due process rights and the "open courts" and "liberty" provisions of the Indiana Constitution, and that Indiana's commitment statutes do not authorize remote hearings. B.N. was given notice of the hearing as well as an opportunity to be heard, to be represented by (and confer with) counsel, and to confront Eskenazi's witness, and she does not suggest, let alone establish, that the result of an in-person proceeding would have been any different. Indiana Appellate Rule 66(A) provides,

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.

Therefore, we affirm.

[8] Affirmed.

Vaidik, J., and Altice, J., concur.