IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04-27-2010
PHILIP G. URRY, CLERK
BY: GH

	1 CA-MH 09-0051
	DEPARTMENT E
	MEMORANDUM DECISION
IN RE: MH 2009-001270	
	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001270

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

Andrew P. Thomas, Maricopa County Attorney
by Anne C. Longo, Deputy County Attorney
Bruce P. White, Deputy County Attorney
Civil Division
Attorneys for Appellee Phoenix

James J. Haas, Maricopa County Public Defender
by Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant Phoenix

W E I S B E R G, Judge

¶1 E.B. ("Appellant") asks this court to vacate an order that he undergo combined inpatient and outpatient treatment on two grounds, neither of which he raised in the superior court proceedings. He argues that the court failed to ensure he knowingly, intelligently, and voluntarily waived the right to have two physicians testify at his hearing on court-ordered treatment ("COT") and that no evidence shows that the two physicians were sufficiently qualified as psychiatrists. For reasons that follow, we affirm.

BACKGROUND

¶2 On May 15, 2009, Dr. Balbir Sharma, a psychiatrist at Magellan Health Services, completed a petition for court-ordered evaluation and alleged that Appellant was a danger to self and to others, was gravely disabled, and was persistently and acutely disabled. Shawn Gibbs, Appellant's case manager, completed an application for involuntary evaluation noting that Appellant refused to take medication, was "extremely violent and had had multiple incidents of violence toward other witnesses in the last 90 days." A prepetition screening report indicated that Appellant was in jail on "charges of attempted vehicular manslaughter, shoplifting, assault, destruction of property and trespassing." Gibbs noted that Appellant had been diagnosed with cerebral palsy and mild mental retardation. The detention order was served on Appellant on May 21, 2009.

¶3 On May 27, Dr. Andrew Parker, D.O., filed a petition for COT. His affidavit stated a diagnosis of bipolar disorder not otherwise specified, that Appellant had agreed to be interviewed and had denied prior hospitalizations, the existence of mental illness, or a need for medication. He also denied being a danger to self or others, admitted that he had been convicted of assault, but denied any auditory hallucinations. He said that his father wanted his Social Security money.

¶4 Dr. Parker noted that Appellant's affect was inappropriate, that his thought processes and memory were impaired, and that he was distracted and displayed some paranoia. Since his admission for evaluation, he was "irritable, grandiose, delusional, distracted and hyperactive." He also appeared to respond to internal stimuli, was at times agitated and yelling, and his "judgment [was] considered poor."

¶5 The affidavit for persistent/acutely disabled stated that Appellant was incapable of good judgment, reasoning, or recognizing reality. His poor insight impaired his ability to make an informed decision about treatment or to understand the advantages of or alternatives to treatment. Those matters were explained, however.

¶6 Dr. Payam Sadr also filed an affidavit with a diagnosis of mood disorder not otherwise specified. He stated that Appellant "completely minimizes his aggressive behavior

toward others . . . [but said] that he had to hit someone in the face." He denied having a mental disorder but admitted non-compliance with medications. His insight and judgment were poor, and he "insists that his parents have lied about him." He had refused treatment, medication, day programs, DDD services, and counseling and had "no insight into the severity of his mood fluctuations." The affidavit of persistently/acutely disabled noted Appellant's assaults, minimal insight, and denial of any need for treatment. Dr. Lydia Torio signed an affidavit that she was supervising Dr. Sadr and was available to all parties for discussion or a court appearance.

¶7 Notice of the filing of the petition for COT and appointment of counsel was served on Appellant on May 27. A hearing took place on June 2, 2009, at which Appellant's counsel announced that the parties had stipulated to admission of the affidavits of Doctors Parker and Sadr in lieu of their testimony. Appellant's counsel also stated that Dr. Sadr "is in an AMA-approved psychiatric residency program being supervised by Dr. Torio, who's a licensed and qualified psychiatrist."

¶8 Appellant's former case manager testified that she had known Appellant for approximately six months and that he was not taking his medication. She related an incident four months previously in which she, Appellant, and his mother were discussing living arrangements and said that suddenly Appellant

began calling names and became so verbally abusive that she wanted to leave the room. Appellant also began yelling, screaming, and posturing in a discussion with his father and when he began yelling and calling the case manager names, police were called to the scene. In describing his assault on a clerk at Walgreen's, Appellant said that it was all her fault, and he saw nothing wrong with his conduct.

¶9 Shawn Gibbs testified that he had met with Appellant at the jail and at Desert Vista over a two-month period. Gibbs reported that Appellant had said that a woman at Walgreens had "disrespected him . . . and pretty much said that he slapped her." He also mentioned a violent confrontation while in jail and that he was being prosecuted for having stolen game consoles. Appellant refused to discuss a short-term residential placement or treatment goals and said that he had taken his medications "sporadically." Appellant got visibly angry when talking about how his father felt threatened by Appellant and said that he "wanted to kick his father's ass."

¶10 Appellant testified that before being in jail, he had lived independently and received Social Security disability payments. He said that he had been prescribed several medications, most of which did not work but that he was doing better while at Desert Vista and the medications were helping him to feel more calm.

¶11 The court found from all of the evidence and by clear and convincing evidence that Appellant was, as a result of a mental disorder, a danger to others, persistently or acutely disabled, and in need of psychiatric treatment. [Id. at 42] The court ordered combined inpatient and outpatient treatment for a maximum of 365 days with a maximum of 180 days of inpatient treatment. Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") 36-546.01 (2009).

DISCUSSION

¶12 On appeal, we review a treatment order to determine if substantial evidence supports the order. *In re MH 2008-001188*, 221 Ariz. 177, 179, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). Whether the evidence at the hearing was sufficient to meet the statutory requirements is a question of law for our de novo review. *In re Matter of MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 744 (App. 1995).

¶13 In what has become a continuing pattern, counsel for a mental health patient is raising contentions on appeal that were never raised with the superior court during the COT hearing. Under normal circumstances, we deem such arguments waived, particularly when, had the issue been timely raised, the superior court could have addressed and resolved the issue. See *Englert v. Carondelet Health Network,* 199 Ariz. 21, 26, ¶ 13, 13

P.3d 763, 768 (App. 2000) (appellate court generally declines to consider even constitutional issues when raised for the first time on appeal).

¶14 In this case, the superior court certainly could have dealt with questions about the physicians' qualifications but Appellant's counsel raised no objection. Appellant now asserts that because the superior court failed to expressly find that Appellant knowingly and intelligently waived his right to a hearing and failed to ascertain that the physicians' credentials complied with the statutory requirements, we should vacate the treatment order.

¶15 The record reveals that Appellant's counsel stipulated to allow the court to consider the physicians' affidavits in lieu of requiring them to personally appear and to testify. Appellant cites no authority that bars his counsel from waiving the right to call the physicians as witnesses. To the contrary, we have allowed parties to "stipulate to the admission of an affidavit in place of the physician's testimony." *MH 2002-000767*, 205 Ariz. 296, 301, ¶ 23, 69 P.3d 1017, 1022 (App. 2003); *In re Maricopa County Superior Court No. MH 2001-001139*, 203 Ariz. 351, 352, ¶ 6, 54 P.3d 380, 381 (App. 2002). We also

note that the legislature amended A.R.S. § 36-537(D (2009)[1] to allow a patient's attorney to enter stipulations on his behalf.

¶16 We note that waiver of some rights does require a colloquy with the court. Thus, to establish an intelligent, knowing, and voluntary waiver of the right to be present at the hearing on the petition for COT, the court must speak with the potential patient to make this determination. *In re MH 2006-000749*, 214 Ariz. 318, 324, ¶ 27, 152 P.3d 1201, 1207 (App. 2007). Similarly, we have required a colloquy to establish total waiver of the right to counsel at an involuntary commitment hearing. *In re Jesse M.*, 217 Ariz. 74, 80, ¶¶ 29-30, 170 P.3d 683, 689 (App. 2007).

¶17 By contrast, the right to call and to cross-examine particular witnesses is a tactical or strategic decision that we allow counsel for a criminal defendant to make, and a defendant then is bound by his counsel's strategic decision to waive even constitutional rights. *State v. West*, 176 Ariz. 432, 447, 862 P.2d 192, 207 (1993) (counsel may stipulate to facts without a defendant's consent), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). Similarly, our supreme court has held that "the power to decide questions of

[1]After an amendment effective September 30, 2009, A.R.S. § 36-537(D) (Supp. 2009) states: "At a hearing held pursuant to this article, the patient's attorney may enter stipulations on behalf of the patient." 2009 Ariz. Sess. Laws, Ch. 153, § 6 (1st Reg. Sess.).

trial strategy and tactics," including which witnesses to call at trial, rests with counsel. *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) (citing *Henry v. Mississippi*, 379 U.S. 443, 451 (1965)).

¶18 Although this is not a criminal case, important liberty interests are at stake in both contexts, and we see no reason to adopt a different set of principles in the mental health setting. Therefore, we conclude that the superior court did not err in accepting the stipulation by Appellant's counsel to admit the physicians' affidavits in lieu of their testimony at the hearing on COT.

¶19 Appellant next argues that the court failed to ensure that the two physicians were sufficiently qualified and that no evidence in the record established that the physicians were psychiatrists as defined by A.R.S. § 36-501(38) (2009) or even were licensed physicians. Each affidavit, however, stated that the individual physician was "a physician and experienced in psychiatric matters," and that each was a medical doctor. Appellant has not offered any reason whatsoever that his trial counsel could not have objected to the physicians' qualifications if he had any doubts about those qualifications. We deem this contention forfeited by the failure of trial counsel to timely raise it. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317

(2000) ("An objection to proffered testimony must be made either prior to or at the time it is given, and failure to do so constitutes a waiver.").

CONCLUSION

¶20 For the reasons stated, we find no error in the superior court's acceptance of the stipulation by Appellant's counsel to admit the physicians' affidavits. We decline to address the untimely challenge to the physicians' qualifications. The involuntary treatment order is affirmed.

/s/
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/
PHILIP HALL, Judge

/s/
JOHN C. GEMMILL, Judge