DIVISION ONE
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PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH 2009-001258	1 CA-MH 09-0052 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001258

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

James J. Haas, Maricopa County Public Defender
by Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant — Phoenix

Andrew P. Thomas, Maricopa County Attorney
Civil Division
by Anne C. Longo, Deputy County Attorney
Davina Bressler, Deputy County Attorney
Attorneys for Appellee — Phoenix

W E I S B E R G, Judge

¶1 T.H. ("Appellant") asks this court to vacate the superior court's order that he undergo both inpatient and outpatient treatment on two grounds, neither of which were 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 12, 2009, Appellant's mother completed an application for involuntary evaluation pursuant to Arizona Revised Statutes ("A.R.S.") section 36-520 (2009), stating that Appellant refused a voluntary evaluation, denied any mental illness, engaged in verbal and physical violence toward his parents, had been diagnosed with depression, and had attempted suicide eleven times. In addition, a petition for court-ordered evaluation filed on May 14 stated that Appellant was persistently and acutely disabled ("PAD") and reiterated his aggression toward his parents.

¶3 On May 27, Dr. Jacqueline Pynn filed a petition for COT noting that Appellant was PAD. Her affidavit stated that Appellant, aged 44, suffered from mood and borderline personality disorders. He had decided to jump out of a moving

car being driven by his stepfather and broke the window. He had begun psychiatric treatment at age 17, had admitted to 12 or 13 suicide attempts, and he probably had a borderline personality disorder. He was taking two antidepressants but declined to take other recommended medications or to participate in individual counseling. He was cooperative but "very emotional, labile and anxious." The addendum stated that his mental disorder impaired his judgment and capacity to make a decision regarding treatment.

¶4 Dr. Esad Boskailo also filed an affidavit indicating that Appellant was probably bipolar and PAD. He found Appellant verbose, and his mood was "irritable, angry, elevated, and expansive." Appellant described himself as a mystic and was obsessed with philosophy, denied any hallucinations, and minimized his aggression toward his mother. He said the outside world is a prison for him, and when "you are in the prison you have to think about suicide."

¶5 After finding Appellant clearly and convincingly PAD, the court issued an order for treatment for a maximum of 365 days, with a maximum of 180 days of in-patient treatment. A detention order was served on Appellant on May 28. The hearing took place on June 2, 2009. Counsel for both sides stipulated to admission of the physician affidavits and medication affidavit.

¶6 Appellant's stepfather testified that at the end of April, Appellant began getting very upset, very animated, and verbally aggressive. He stated that Appellant had tried to get out of his car while it was traveling on a highway in excess of 40 m.p.h. Later the same day, Appellant succeeded in jumping out of the car.

¶7 Appellant's mother testified that at about the end of April Appellant had become very angry, aggressive, was yelling and slamming doors, and had jumped out of the car. She said that she was afraid of him. She had called police when Appellant tried to get into her house after the locks were changed and his keys would not work; she also called police when he drove a trailer up to the house and started throwing all of his belongings onto the lawn.

¶8 Appellant testified that he had changed his name to "T-om" on all of his records. He explained that he was upset that his parents had packed his belongings into the trailer and was uncertain that everything that was his had been removed from the house. He said he thought it safe to jump out of a moving car because "more and more extreme sports are burgeoning every day." He added that he jumped out because he thought his stepfather was enraged at him.

¶9 The court found from the testimony, the medication affidavit, and the physicians' affidavits that Appellant was in need of COT. Appellant timely filed a notice of appeal.

DISCUSSION

¶10 Appellant first argues that his hearing took place before the legislature amended A.R.S. § 36-537(D (2009)[1] to allow a patient's attorney to enter stipulations on his behalf. Therefore, he contends that the superior court erred by failing to conduct a colloquy to determine that he had "voluntarily, knowingly, and intelligently waived his statutory right to present evidence and to subpoena, confront, and cross-examine witnesses" at the hearing on the petition for COT. He cites *In re Maricopa Count Superior Court No. MH 2007-001275*, 219 Ariz. 216, 217, ¶ 1, 196 P.3d 819, 820 (App. 2008), in which we imposed an obligation on the superior court when the patient's counsel had waived the patient's right to a hearing and submitted the matter solely on the written record. *Id*. at 217-18, ¶ 4, 196 P.3d at 820-21.

¶11 That is not what occurred here. Both counsel for Appellant and Appellee stipulated to the court's consideration of the physicians' affidavits in lieu of requiring them to

[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, § 7 (1st Reg.Sess.).

personally appear and to testify at the hearing. Appellant cites no authority that bars Appellant's counsel from waiving the right to call the physicians as witnesses at the evidentiary hearing. Instead, 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).

¶12 We have held that a colloquy is necessary to establish an intelligent, knowing, and voluntary waiver of the right to be present at the hearing on the petition for COT in *In re MH 2006-000749*, 214 Ariz. 318, 324, ¶ 27, 152 P.3d 1201, 1207 (App. 2007). We also required a colloquy to establish 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). By contrast, however, the right to call and to cross-examine particular witnesses is a tactical or strategic decision that we allow a criminal defendant's counsel to make. A criminal defendant 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, in *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), our supreme court held that "the power to decide questions of trial strategy and tactics," including which witnesses to call at trial, rests with counsel (citing *Henry v. Mississippi*, 379 U.S. 443, 451 (1965)).

¶13 Although this is not a criminal case, we see no reason why the same principles would not apply in this context. Accordingly, 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.

¶14 Also for the first time, Appellant challenges the qualifications of the physicians. He argues that no evidence in the record establishes that they were psychiatrists as defined by A.R.S. § 36-501(38)(2009) or that they were even licensed physicians as required by A.R.S. § 36-501(12)(a) or (23). He concedes that each affidavit stated that the physician was "a physician and experienced in psychiatric matters," and that each was a medical doctor, but nevertheless suggests that had they appeared for the hearing, Appellant could have cross-examined them about their qualifications. Appellant has not shown 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 in the superior court.

CONCLUSION

¶15 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.

/S/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

_/S/_____
PHILIP HALL, Judge

_/S/_____
JOHN C. GEMMILL, Judge