

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04-22-2010
PHILIP G. URRY, CLERK
BY: GH

IN RE MH 2009-001492,) 1 CA-MH 09-0058
)
) DEPARTMENT A
)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001492

The Honorable Patricia Arnold, Commissioner

AFFIRMED

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

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

P O R T L E Y, Judge

¶1 Patient appeals from the order of involuntary
commitment. For the following reasons, we affirm the order.

FACTS AND PROCEDURAL BACKGROUND

¶2 A Magellan¹ clinical coordinator filed a petition for an involuntary evaluation of Patient's mental health that alleged that Patient was persistently or acutely disabled. Subsequently, Patient was admitted to the Urgent Psychiatric Care Center. Following evaluation, a petition for court-ordered treatment was filed. The petition included the affidavits of two evaluating physicians. At the subsequent hearing, the trial court heard testimony from two acquaintance witnesses, and one of the evaluating physicians was cross-examined.

¶3 The court also reviewed both the evaluating physicians' affidavits and the seventy-two-hour medication affidavit, which Patient stipulated to in lieu of in-court testimony. The court then ordered Patient to undergo a combination of inpatient and outpatient treatment for a period not to exceed 365 days, with the inpatient portion not to exceed 180 days.

¶4 Patient appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 36-546.01 (2009).

DISCUSSION

¶5 An involuntary commitment proceeding is a civil proceeding. *In re Pima County Mental Health Matter No. MH 863-*

¹ Magellan Health Services of Arizona, Inc., is the regional behavioral health authority of Maricopa County, and manages the publicly funded behavioral health care delivery system.

4-83, 145 Ariz. 284, 284, 700 P.2d 1384, 1384 (App. 1985). Because the commitment involves a significant deprivation of liberty, we examine to ensure that a patient's due process rights have not been violated. See *In re MH 2007-001275*, 219 Ariz. 216, 219-20, ¶¶ 13, 16, 196 P.3d 819, 822-23 (App. 2008). A patient is entitled to a full and fair adversarial proceeding. *In re MH 2007-001275*, 219 Ariz. at 220, ¶ 13, 196 P.3d at 823. We will uphold an order for treatment unless it is "clearly erroneous or unsupported by any credible evidence." *In re Mental Health Case No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995).

¶6 Patient argues her due process rights were violated because the superior court failed to meet the statutory requirements of A.R.S. § 36-539(B) (2009), which require the court to receive testimony from two physicians who have personally examined the patient.² Specifically, Patient argues

² We note that § 36-539(B) has been amended to provide that the "testimony of the two physicians who performed examinations in the evaluation . . . may be satisfied by stipulating to the admission of the evaluating physicians' affidavits." A.R.S. § 36-539 (Supp. 2009). Similarly, A.R.S. § 36-537(D) was amended to read "[a]t a hearing held pursuant to this article, the patient's attorney may enter stipulations on behalf of the patient," and subsection 36-537(B) clarifies that defense counsel has a duty to discuss with the patient "whether stipulations at the hearing are appropriate." See A.R.S. § 36-537(B), (D) (Supp. 2009). The amendments became effective September 30, 2009. Because Patient's hearing took place before the amendments were effective, the amendments do not resolve the case.

that the stipulation to admission of the evaluating physicians' affidavits violated her due process rights because the court did not address Patient in a colloquy to determine whether she knowingly, voluntarily, and intelligently agreed to the stipulation in lieu of in-court testimony.

¶7 Involuntary treatment proceedings must strictly meet the statutory requirements. *In re Maricopa County Superior Court No. MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8, 54 P.3d 380, 382 (App. 2002). We review constitutional and statutory claims de novo. *In re MH 2007-001275*, 219 Ariz. at 219, ¶ 9, 196 P.3d at 822. Patient failed to raise the argument below, however, "and we generally do not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). Consequently, Patient has waived the argument.

¶8 Even if Patient had not waived the argument, we find no error. "[P]arties may stipulate to the admission of an affidavit in place of the physician's testimony." *In re Maricopa County Superior Court No. MH 2002-000767*, 205 Ariz. 296, 301, ¶ 23, 69 P.3d 1017, 1022 (App. 2003). Patient relies almost entirely on two footnotes in prior opinions to support her argument that the court needed to determine that she knowingly, voluntarily, and intelligently agreed to the

stipulation.³ Both footnotes, however, specifically state that they do not address the issue, and are inappropriate to provide support for Patient's argument. See *MH 2008-001752*, 222 Ariz. at 568 n.1, ¶ 4, 218 P.3d at 1025 n.1; *MH 2008-002596*, 223 Ariz. at 34 n. 1, ¶ 8, 219 P.3d at 244 n.1.

¶9 Moreover, the case *In re MH 2007-001275*, 219 Ariz. 216, 196 P.3d 819, cited by one of the footnotes, is distinguishable from this case. In *MH 2007-001275*, we remanded the case to the trial court to determine whether "counsel's waiver [of a contested testimonial hearing] on behalf of the patient was in fact voluntarily, knowingly and intelligently made by the patient." *Id.* at 221, ¶ 19, 196 P.3d at 824. We

³ The first footnote is from the amended opinion *In re MH 2008-001752*, which stated:

Patient does not raise on appeal the issue of her counsel's stipulation to the admission of the physicians' affidavits. Therefore, we need not decide whether before accepting the stipulation, the court should have ascertained that the patient had voluntarily, knowingly and intelligently waived her statutory right to have the physicians testify.

222 Ariz. 567, 568 n.1, ¶ 4, 218 P.3d 1024, 1025 n.1 (App. 2009).

The second footnote from *In re MH 2008-002596* stated:

We note that the superior court did not have a colloquy with the patient as to whether the patient understood and would have agreed to the stipulation to waive live testimony from the physicians. We do not address that issue as it was not raised on appeal.

223 Ariz. 32, 34 n.1, ¶ 8, 219 P.3d 242, 244 n.1 (App. 2009).

noted, however, that “[w]e are not opining that this test would affect every decision made by counsel at a hearing, e.g., whether to cross-examine particular witnesses.” *Id.* at n.5.

¶10 Here, the parties stipulated to the admission of both evaluating physicians’ affidavits. Patient’s counsel, however, cross-examined one doctor. The decision to cross-examine a witness is a tactical decision. See *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Therefore, the stipulation to the admission of the physicians’ affidavits, and the decision to cross-examine only one doctor were tactical decisions and, as previously noted, do not fall within *MH 2007-001275*.⁴ Accordingly, the trial court did not need to engage in a colloquy to ascertain whether Patient voluntarily, knowingly, and intelligently waived her right for live testimony.

⁴ To the extent that recent legislative enactments have superseded *MH 2007-001275*, the case would not apply to matters that arise after the effective date of the legislation. See 2009 Ariz. Sess. Laws, ch. 153 (1st Reg. Sess.) (effective September 30, 2009) (amending, *inter alia*, A.R.S. §§ 36-537(D), -539(B)).

CONCLUSION

¶11 For the foregoing reasons, we affirm the court's involuntary commitment order.

/S/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/S/

LAWRENCE F. WINTHROP, Judge

/S/

MARGARET H. DOWNIE, Judge