DIVISION ONE
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PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	No. 1 CA-MH 09-0059
	DEPARTMENT B
	MEMORANDUM DECISION
IN RE MH 2009-001539	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001539

The Honorable Patricia Arnold, Judge Pro Tem

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 Appellant seeks dismissal of an order of commitment for involuntary mental health treatment asserting the superior court was required to ensure Appellant voluntarily, knowingly, and intelligently waived his right to have live testimony of the two evaluating physicians. Finding no such requirement, we affirm.

Facts and Procedural History

¶2 Appellant is a case-managed patient with Magellan and has a history of bipolar disorder, substance abuse, and alcohol abuse. Appellant was depressed and stressed because he was facing a ten-year prison sentence for a drunk driving offense. In response, Appellant drank several bottles of vodka and ingested thirty to forty lithium tablets, which resulted in medical personnel performing emergency hemodialysis on Appellant. This was Appellant's second suicide attempt in two weeks. Appellant previously stabbed himself in the neck with a knife.

¶3 While Appellant was recovering in the hospital, mental health professionals filed a petition for court-ordered evaluation, application for involuntary evaluation, and application for emergency admission. The superior court issued a detention order for evaluation and notice. During Dr. Carol Olson's evaluation of Appellant, Appellant's insight and judgment appeared fair, but

Appellant did not think he needed supervised treatment. Dr. Olson made a probable diagnosis of bipolar disorder and alcohol dependence and believed Appellant was a danger to himself. Dr. Tuan-Anh Nguyen also evaluated patient and made a probable diagnosis of bipolar disorder and alcohol dependence. Dr. Olson filed a petition for court-ordered treatment because Appellant had a mental disorder and was a danger to himself. Affidavits from Dr. Olson and Dr. Nguyen detailing the evaluation and their findings accompanied the petition.

¶4 At the hearing for court-ordered treatment on June 26, 2009, the attorneys for both sides stipulated to admission of Dr. Olson's and Dr. Nguyen's affidavits in lieu of live testimony. Two acquaintance witnesses appeared and testified about Appellant's mental health history and his recent suicide attempts. At the conclusion of the hearing, the superior court found by clear and convincing evidence that Appellant had a mental disorder, was a danger to himself, and was unable or unwilling to seek voluntary treatment. The court ordered combined inpatient and outpatient treatment not to exceed 365 days and inpatient treatment not to exceed 90 days. Appellant filed a timely notice of appeal.

¶5 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 36-546.01 (2009), 12-120.21(A)(1) (2003), and 12-2101(K) (2003).

Discussion

¶6 Appellant contends the superior court was required to engage in a colloquy with him to ensure that he voluntarily, knowingly, and intelligently waived his right to have two evaluating physicians testify in person at the hearing on the petition for court-ordered treatment. We review constitutional claims *de novo*. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008). At the hearing, Appellant made no objection to the court's acceptance of the stipulation. Accordingly, Appellant waived the issue. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) ("[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal.").

¶7 In addition, Appellant invited the alleged error by stipulating to admission of the affidavits and cannot now attempt to profit from the alleged error. "[O]ne may not invite error at the trial and then assign it as error on appeal." *Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971).

¶8 Furthermore, even if we were to consider Appellant's constitutional claim on the merits, we would find no error. Appellant relies on past cases requiring or suggesting that the court engage in a colloquy with the patient to determine whether the patient voluntarily, knowingly, and intelligently agrees to waive statutory rights. *See In re MH 2008-001752*, 222 Ariz. 567, 568 n.1, ¶ 4, 218 P.3d 1024, 1025 n.1 (App. 2009) (identifying stipulation to the admission of physician affidavits in lieu of testimony as a scenario that could require the court to engage in a colloquy with patient); *In re MH 2007-001275*, 219 Ariz. at 221, ¶ 19, 196 P.3d at 824 (requiring court to engage in colloquy with patient when patient waives right to an adversarial hearing); *In re MH 2006-000749*, 214 Ariz. 318, 324, ¶ 27, 152 P.3d 1201, 1207 (App. 2007) (holding court must find patient's waiver of right to be present at hearing is voluntary, knowing, and intelligent). In *MH 2007-001275*, a patient stipulated to admission of the entire court file, including witness statements and physician affidavits and agreed the evidence would show he was persistently or acutely disabled. 219 Ariz. at 217-18, ¶ 4, 196 P.3d at 820-21. We remanded for the superior court to determine whether the patient voluntarily, knowingly, and intelligently agreed to waiver

of the entire adversarial process. *Id.* at 221, ¶ 19, 196 P.3d at 824. If not, we required the superior court to "conduct the A.R.S. § 36-539 hearing and afford the patient the rights to subpoena witnesses, present evidence and confront and cross-examine witnesses." *Id.* We further noted:

> We are not opining that this test would affect every decision made by counsel at the hearing, e.g., whether to cross-examine particular witnesses. Rather, we only address the issue before us – that it must be apparent from the record or from a discussion with the patient that waiving the rights attendant to a contested testimonial hearing were voluntarily, knowingly and intelligently made.

Id. at n.5. Furthermore, notwithstanding the holding in *MH 2007-001275*, there is an inherent tension in obtaining knowing, intelligent, and voluntary consent from an individual who is alleged to have a mental defect or disease of such magnitude that involuntary treatment is required. *See In re Jesse M.*, 217 Ariz. 74, 77-80, ¶¶ 17-30, 170 P.3d 683, 686-89 (App. 2007) (analyzing whether a patient can knowingly, intelligently, and voluntarily waive the right to counsel at an involuntary commitment proceeding).

¶9 Here, Appellant cross-examined the two witnesses at the hearing and only waived the right to confront and

cross-examine the evaluating physicians. Counsel's stipulation to the admission of the physician affidavits in lieu of live testimony was a tactical decision. *See State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) ("[T]he decision as to what witnesses to call is a tactical, strategic decision. Tactical decisions require the skill, training, and experience of the advocate." (citations omitted)). Therefore, the court was not required to engage in a colloquy with Appellant.[1]

Conclusion

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

/S/
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DANIEL A. BARKER, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
_____
PETER B. SWANN, Judge

[1] We note that this issue is moot to the extent it arises in future cases because recently enacted amendments to A.R.S. § 36-539(B) specifically allow parties to stipulate to the admission of physician affidavits. 2009 Ariz. Sess. Laws, ch. 153, § 7 (1st Reg. Sess.).