DIVISION ONE
FILED: 04-20-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	) No. 1 CA-MH 09-0060
	)
	) DEPARTMENT D
	)
	) **MEMORANDUM DECISION**
IN RE MH-2009-001538	)
	) (Not for Publication –
	) Rule 28, Arizona Rules
	) of Civil Appellate Procedure)
	)

Appeal from the Superior Court in Maricopa County

Cause No. MH-2009-001538

The Honorable Patricia A. Arnold, *Judge Pro Tempore*

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorney for Appellant

J O H N S E N, Judge

¶1 Patient appeals the superior court's order committing him to 365 days of involuntary mental health treatment. For the following reasons, we affirm the superior court's order.

FACTUAL AND PROCEDURAL HISTORY

¶2 Patient's mother applied to have him evaluated, and a petition for court-ordered evaluation was filed by Dr. Andrea Raby. Patient was evaluated by two physicians, who submitted affidavits and a petition for court-ordered treatment. The superior court held a hearing at which the parties stipulated to submission of the two physicians' affidavits. According to the hearing transcript, the State's attorney said, "The parties have stipulated to the admission of the affidavits of [the two physicians] in lieu of their testimony here this morning." The court asked if those were the agreements, and Patient's attorney responded, "Yes, Judge."

¶3 In her affidavit, one physician concluded Patient had a history of being noncompliant with psychiatric treatment and "a history of aggressive behavior when . . . noncompliant with psychiatric medications." She further noted that Patient "was recently placed in jail for 10 days after allegedly assaulting a convenience store employee." She reported that Patient's "thought process was frequently tangential . . . [and h]e had described always hearing God talk with him telling him what to do." The second physician averred Patient "has been diagnosed with schizophrenia and court ordered for treatment in the past but is currently refusing treatment."

¶4 Five witnesses testified at the hearing, including a police officer who had contact with Patient, a mental health counselor at the Lower Buckeye Jail, Patient's mother, Patient and Patient's friend. The police officer testified Patient told the officer that he was "on the phone with Washington . . . The government, Washington D.C.," but that Patient did not have a phone at the time. Instead, Patient described the "microchip that was in his ear, that he could talk to the government through the microchip in his ear."

¶5 The superior court found Patient was a danger to others and persistently or acutely disabled and ordered that he undergo inpatient mental health treatment not to exceed 365 days. Patient timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B) (2003) and 36-546.01 (2009).

DISCUSSION

¶6 Patient argues the superior court violated his constitutional right to due process "in not establishing that [Patient] had knowingly, intelligently, and voluntarily waived his right to have [the physicians] testify in person at his treatment hearing." Having stipulated to the admission of the two physicians' affidavits, Patient raises this issue for the first time on appeal. We generally do not consider on appeal issues that were not raised in the superior court, even

constitutional issues. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). Waiver is procedural, however, not jurisdictional, and we may address the issue in our discretion. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 11, 196 P.3d 819, 822 (App. 2008). We review statutory and constitutional claims *de novo*. *Id.* at ¶ 9.

¶7 Civil commitment hearings "may result in a serious deprivation of liberty." *In re Commitment of Alleged Mentally Disordered Person, Coconino County No. MH 1425*, 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995). A proposed patient therefore is entitled to due process, which includes "a full and fair adversarial proceeding." *MH 2007-001275*, 219 Ariz. at 220, ¶ 13, 196 P.3d at 823. The superior court must hold a hearing prior to ordering treatment. "The evidence presented by the petitioner or the patient shall include . . . testimony of the two physicians who performed examinations in the evaluation of the patient . . . . The physicians shall testify as to their personal examination of the patient." A.R.S. § 36-539 (B)(2009).[1]

[1] We note that A.R.S. § 36-539(B) has been amended and now explicitly permits the parties to stipulate to the admission of the physicians' affidavits. A.R.S. § 36-539(B) (Supp. 2009) This statute became effective September 30, 2009. *See* 2009 Ariz. Sess. Laws, ch. 153, § 7 (1st Reg. Sess.). Because this hearing occurred prior to the effective date of the new statute, we consider this appeal under the prior version of the statute.

¶8 Patient relies upon *MH 2007-001275*, in which we held the superior court erred by accepting a patient's waiver of the entire hearing required by A.R.S. § 36-539 without first establishing that the waiver was given knowingly, intelligently and voluntarily. 219 Ariz. at 217, ¶ 1, 196 P.3d at 820. In that case, however, we cautioned, "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." *Id.* at 221 n.5, ¶ 19, 196 P.3d at 824 n.5.

¶9 Patient offers no authority, nor are we aware of any, that strategy decisions a patient's attorney makes at a contested hearing, such as whether to cross-examine a witness, require the patient's intelligent, knowing and voluntary agreement. By stipulating to the admission of the physicians' affidavits, Patient's counsel effectively made the decision not to cross-examine them. As noted, the affidavits included the testimony required by A.R.S. § 36-539 and provided the superior court with the necessary information on which to make a final determination. In addition, Patient's lawyer had the opportunity to cross-examine the two acquaintance witnesses who testified, the lawyer cross-examined Patient's mother and

Patient testified on his own behalf and presented his own witness.[2]

¶10 On this record, we cannot conclude the court was required to conduct a colloquy into whether Patient intelligently, knowingly and voluntarily waived his right to have the physicians testify in person, nor can we conclude that Patient was deprived of "a full and fair adversarial proceeding." *Id.* at 220, ¶ 13, 196 P.3d at 823.[3]

CONCLUSION

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

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
PATRICIA A. OROZCO, Presiding Judge

/s/_____
JON W. THOMPSON, Judge

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[2] Patient's attorney did not cross-examine the two acquaintance witnesses. We see no substantive difference between this decision and the decision to stipulate to the admission of the physicians' affidavits in lieu of their live testimony.

[3] There is no indication that Patient's attorney failed to explain his rights to him, including the "procedures leading to court-ordered treatment." A.R.S. § 36-537(B) (2009).