DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE:	No. 1 CA-MH 09-0061
	DEPARTMENT C
No. MH 2009-001140	**MEMORANDUM DECISION**
	(Not for Publication – Rule 28, Arizona Rules Of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001140

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

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

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

B R O W N, Judge

¶1 Appellant seeks reversal of the superior court's order for involuntary mental health treatment. She argues that the court was required to engage in a colloquy with her to determine whether she knowingly, voluntarily, and intelligently waived her right to have the physicians who evaluated her testify in person. She also argues that the evaluating physicians' credentials were not sufficiently established and thus confinement based on their affidavits constitutes a violation of her due process rights. For the following reasons, we affirm.

BACKGROUND

¶2 Appellant is diagnosed with depressive disorder and borderline personality disorder and has received mental health treatment for many years; most recently through Magellan Health Services. In June 2009, Dr. Michael Levitt filed a petition for court-ordered evaluation ("PCOE") asserting that Appellant was "refusing contact" with her clinical treatment team and accusing the team of working against her. He noted that she was unable to make informed decisions regarding her mental health, as evidenced by her inability to follow directions on her medication bottles. He also noted that Appellant was unable to maintain a safe living environment and had been given an eviction notice for failure to keep her apartment clean; she also refused to allow anyone in to assist her with the cleaning. Appellant fell in her apartment twice on the same day due to

garbage accumulation. Dr. Levitt concluded that Appellant was unable to care for herself, including bathing, preparing meals, or following directions on medication bottles.

¶3 An application for involuntary evaluation was completed by a member of Appellant's clinical team at Magellan Health Services and submitted with the PCOE. The superior court ordered Appellant to be involuntarily detained and evaluated. Following evaluations by two physicians, a petition for court-ordered treatment ("PCOT") was filed. The petition was supported by the affidavits of the evaluating physicians who concluded that Appellant was persistently or acutely disabled. A combination of inpatient and outpatient treatment was recommended. The court ordered detention of Appellant, appointed counsel to represent her, and set a hearing on the PCOT.

¶4 At the hearing, counsel for both parties stipulated to the admission of the 72-hour medication affidavit and the affidavits of the two evaluating physicians in lieu of in-person testimony. Appellant's counsel expressly confirmed the stipulation. During the hearing, two acquaintance witnesses testified and were cross-examined. Appellant testified on her own behalf and her counsel made closing arguments.

¶5 At the conclusion of the hearing, the court found, by clear and convincing evidence, that Appellant was persistently

and acutely disabled as a result of a mental disorder and in need of psychiatric treatment. The court concluded that because Appellant was either unwilling or unable to accept voluntary treatment there was no appropriate or available alternative to court-ordered treatment. It ordered Appellant to undergo a combination of inpatient and outpatient treatment for a period not to exceed 365 days, with inpatient treatment not to exceed 180 days. Appellant timely appealed.

DISCUSSION

I. Affidavits in lieu of In-Person Testimony

¶6 Appellant first argues that the superior court violated her right to due process by stipulating to the physicians' affidavits in lieu of their testimony without first determining that Appellant knowingly, intelligently, and voluntarily waived her right to have the doctors testify before her. Generally, we review constitutional and statutory claims de novo. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008). Appellant, however, failed to raise this argument in the superior court "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) (citation omitted). Even assuming that the issue was properly raised, we disagree with Appellant's argument.

¶7 Before mandating court-ordered treatment, the court is required to conduct a hearing in accordance with Arizona Revised Statutes ("A.R.S.") section 36-539(B) (Supp. 2009).[1] At the time of the PCOE, the statute read in pertinent part:

> The evidence presented by the petitioner or the patient shall include the . . . 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. They shall also testify as to their opinions concerning whether the patient is, as a result of mental disorder[,] persistently or acutely disabled[.]

¶8 Appellant cites *In re MH 2007-001275* to support her assertion that a colloquy is required. 219 Ariz. at 218, ¶ 4, 196 P.3d at 821. In that case, the patient waived his right to the entire hearing on court-ordered treatment and agreed to have the matter decided based solely on his file, which included affidavits from two evaluating physicians in lieu of their personal testimony. *Id*. On appeal, we concluded that such an extensive waiver—one that necessarily excludes the right to be present at trial, present evidence, and confront and cross-examine witnesses—required a determination that it had been made voluntarily, knowingly, and intelligently. *Id*. at 221, ¶ 19, 196 P.3d at 824.

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[1] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

¶9 Here, Appellant did not waive her right to the entire hearing. The hearing was conducted, Appellant was present and represented by counsel, she testified on her own behalf, and the testifying witnesses were cross-examined by Appellant's counsel. Appellant waived only the right to confront and cross-examine the evaluating physicians. We addressed the same issue in *In re MH 2009-001264*, 1 CA-MH 09-0048, 2010 WL 681685 (Ariz. App. February 25, 2010). There, the patient stipulated to the admission of the two evaluating physicians' affidavits in lieu of live testimony but otherwise was present at trial, testified, and cross-examined the witnesses who testified. *Id*., slip op. at *1, ¶ 4. In addition, the patient's counsel expressly stipulated to the admission of the physicians' affidavits in lieu of their personal testimony, presumably after reviewing the affidavits and interviewing both the physicians and the patient and explaining the patient's rights to him. *Id*., slip. op. at *3, ¶ 10. We held that no colloquy was required in such cases because (1) the patient failed to raise the issue in the superior court, (2) the patient invited the error by jointly stipulating to admission of the affidavits, and (3) counsel for the patient made a tactical decision to waive the patient's right to confront and cross-examine witnesses. *Id*., slip op. at **2-3, ¶¶ 7-11. The same circumstances are presented here. Thus, consistent with *In re MH 2009-001264*, we conclude that the

superior court did not deprive Appellant of her right to due process by failing to conduct a colloquy with Appellant prior to accepting the stipulation for admission of the physician affidavits.

II. Sufficiency of Evidence for Involuntary Treatment

¶10 Appellant next raises several arguments regarding the contents of the physicians' affidavits. However, she failed to raise any of these issues in the superior court and has therefore waived them. *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.") Even if the issues were not waived, we find no error.

¶11 Appellant argues that the PCOE, PCOT, and physicians' affidavits were statutorily defective. "Because involuntary treatment proceedings may result in a serious deprivation of appellant's liberty interests, statutory requirements must be strictly met." *In re Maricopa County Superior Court No. MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8, 54 P.3d 380, 382 (App. 2002) (citation omitted). Questions of statutory interpretation are reviewed de novo. *Id*.

¶12 Appellant asserts that the PCOE and PCOT are deficient because they do not identify the screening agency that prepared

the petition. She contends that A.R.S. § 36-523(D) (2009) "clearly requires the PCOE and PCOT to be filed *only* by a *named screening agency* which has *prepared* the petition." Appellant's interpretation of the statute cannot be supported.

¶13 First, we note that A.R.S. § 36-523(D) applies only to the PCOE; not to the PCOT. *See* A.R.S. § 36-523 (entitled Petition for evaluation). Second, subsection (D) of the statute provides that "[a] petition and other forms required in a court may be filed only by the screening agency which has prepared the petition." A.R.S. § 36-523(D). Nothing in this language demands that the screening agency be named in the petitions. Nevertheless, the record here shows that the identity of the screening agency is easily discernable.

¶14 Prior to completing and submitting a PCOE, an application for such an evaluation must be completed by "any responsible individual" and presented to "a screening agency." A.R.S. § 36-520 (2009). The application for PCOE in this case was completed by a member of Appellant's outpatient clinical team[2] and submitted to "Magellan Health Services" as the screening agency. The application accompanies the PCOE. In this case it is clear from reviewing these documents together that the screening agency was Magellan Health Services and that

[2] The application was signed by Barbara Bachicke who identified herself as "a member of CT."

Dr. Levitt, who signed the PCOE, prepared the petition in his capacity as medical director of that agency.

¶15 As for the PCOT, the relevant statute is A.R.S. § 36-533 (2009). Similar to A.R.S. § 36-523, nothing in § 36-533 requires that the screening agency be named. In fact, nothing in this section refers to a screening agency at all. A PCOT requires only that certain information about the patient be alleged, that it be accompanied by affidavits of two physicians who conducted examinations during the evaluation period, and that it request the court to order a period of treatment for the patient. A.R.S. § 36-533. Here, the PCOT properly included the necessary information about Appellant, it was accompanied by affidavits from two doctors, Dr. Sweeney and Dr. Nguyen, and it requested treatment. We find no deficiencies on these facts.

¶16 Appellant further argues that the PCOT affidavits are deficient because there is insufficient proof of the evaluating physicians' credentials. Specifically, she states that "[n]othing in the record demonstrates that the evaluating doctors were psychiatrists, or . . . licensed physicians" qualified to practice in Arizona. Pursuant to A.R.S. § 36-501(12)(a) (2009), evaluating physicians must be "licensed physicians, who shall be qualified psychiatrists, if possible, or at least experienced in psychiatric matters[.]"

¶17 The record indicates that the physicians' credentials were sufficient to meet the statutory requirements. Each affidavit, signed, dated, and notarized, asserts that the "affiant is a physician and is experienced in psychiatric matters[,]" and indicates that the physician is an "M.D." In addition, the Notice of Right to Choose Evaluating Psychiatrist provided to Appellant prior to evaluation lists Dr. Sweeney as a psychiatrist available for court-ordered evaluations. It also lists the physician supervising Dr. Nguyen in her residency, Dr. Hadziahmetovic. The record further includes a resident supervision affidavit from Dr. Hadziahmetovic attesting to Dr. Ngyuen's role as a resident physician at the Maricopa Medical Center, Psychiatric Services division. We find nothing in the record to support Appellant's assertion that the affidavits proffered by the Petitioner were deficient in asserting the physicians' credentials. *See In re MH 2009-001264*, 1 CA-MH 09-0048, slip op. at *4, ¶ 14 (finding sufficient proof of physicians' credentials based on affiants' statements that they were physicians and experienced in psychiatric matters).

¶18 Lastly, Appellant contends that the physicians' affidavits were deficient substantively because they contain internal inconsistencies.[3] We defer to the factual findings of

[3] Appellant makes much of the date on Dr. Nguyen's affidavit which predates the filing of the application for involuntary

the superior court, but review the legal conclusions de novo. *In re MH 2004-001987*, 211 Ariz. 255, 260, ¶ 24, 120 P.3d 210, 215 (App. 2005). "We view the facts in the light most favorable to sustaining the trial court's judgment and will not set aside the related findings unless they are clearly erroneous." *In re MH 2008-001188*, 221 Ariz. 177, 179, ¶ 14, 211 P.3d 1161, 1163 (App. 2009) (citation omitted).

¶19 There is ample evidence in the record to support the superior court's conclusion that Appellant was persistently or acutely disabled as a result of a mental disorder. Dr. Sweeney opined that Appellant was "actively psychotic," her thought processes were "extremely loose and disorganized," and that she was "unable to function in an independent way." Dr. Nguyen likewise noted that Appellant had "severe paranoid delusions" and "auditory hallucinations." Both physicians concluded that Appellant was disabled at the time and required supervised living for her health and safety. In addition, contrary to Appellant's assertion that no evidence supported a conclusion that she "would not accept voluntary treatment," the record clearly reflects that both Dr. Sweeney and Dr. Nguyen affirmatively stated that Appellant refused to accept voluntary psychiatric treatment.

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evaluation by several months. Based on the other evidence in the record, we view this as a typographical error and nothing more.

CONCLUSION

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

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge