DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	No. 1 CA-MH 09-0069
	DEPARTMENT B
	MEMORANDUM DECISION
IN RE MH 2009-001797	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH2009-001797

The Honorable Patricia Arnold, Judge Pro Tem

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Edith M. Lucero, 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. Appellant argues he was denied due process of law because the superior court failed to ascertain 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 disagree with Appellant and affirm the superior court's order.

Facts and Procedural History

¶2 Appellant was detained pursuant to an application for involuntary evaluation after Magellan Urgent Psychiatric Care staff observed Appellant yell, scream, and threaten staff members in a car and assault a security guard. Appellant had a history of bipolar disorder and was hyper-talkative, paranoid, and delusional. Appellant refused medications and voluntary hospitalization. In the petition for court-ordered evaluation accompanying the application, Dr. Diana Fletcher found reasonable cause to believe Appellant had a mental disorder and was a danger to himself and to others. The superior court subsequently issued a detention order for evaluation and notice.

¶3 During Dr. Vernon Barksdale's evaluation of Appellant, he was hyper-verbal, was hard to follow, had pressured speech, and had flight of ideas. Dr. Barksdale

concluded Appellant had severe bipolar disorder with psychotic features and was dangerous to himself and others because of "assaultive behavior and poor impulse control over his anger." Dr. John Kingsley also interviewed Appellant and noted that Appellant had poor insight, severely impaired judgment, and did not understand why psychiatric treatment was necessary. Dr. Kingsley concluded Appellant was persistently or acutely disabled, a danger to others, and had a mood disorder that was severe with psychotic features. Dr. Barksdale and Dr. Kingsley submitted affidavits to the court detailing their evaluations of Appellant.

¶4 The superior court held a hearing on the petition for court-ordered treatment. The attorneys for both sides stipulated to the admission of the affidavits of Dr. Barksdale and Dr. Kingsley in lieu of testimony. Appellant did not object to the stipulation. After hearing testimony from two acquaintance witnesses and Appellant, the superior court found by clear and convincing evidence that Appellant was suffering from a mental disorder that made him persistently or acutely disabled and a danger to others. The court ordered combined inpatient and outpatient treatment not to exceed 365 days and inpatient treatment

not to exceed 180 days. Appellant filed a timely notice of appeal from the treatment order.

¶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 argues the superior court was required to engage in a colloquy with him and ensure that he knowingly, intelligently, and voluntarily agreed to waive his right to have the evaluating physicians testify in person. We generally review constitutional issues *de novo*. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008). However, a party waives such review by failing to assert the issue before the superior court. *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."). Here, Appellant waived his constitutional claim because he did not raise it below.

¶7 Appellant also invited the alleged error by stipulating to admission of the affidavits in lieu of live testimony. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Schlect v.*

Schiel, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953). Thus, Appellant cannot now seek relief on appeal for the alleged error he invited.

¶8 Moreover, even if we considered the constitutional claim, we would find no error. Appellant points out that we recently identified waiver of physician testimony as an issue that could require the superior court to engage in a colloquy with the patient. *See In re MH 2008-001752*, 222 Ariz. 567, 568 n.1, ¶ 4, 218 P.3d 1024, 1025 n.1 (App. 2009). However, the statement in that case is dicta, and stipulation to physician affidavits in lieu of live testimony is substantially different than the factual scenario in *MH 2007-001275* that requires the court to ensure the patient's waiver of statutory rights is voluntary, knowing, and intelligent.

¶9 In *MH 2007-001275*, patient's counsel waived the right to the entire adversarial process by stipulating to the admission of all evidence and by agreeing the evidence would demonstrate patient was persistently or acutely disabled. 219 Ariz. at 217-18, ¶ 4, 196 P.3d at 820-21. We remanded for the superior court to ensure that the patient voluntarily, knowingly, and intelligently agreed to waive the right to present evidence and confront and cross-

examine all witnesses. *Id.* at 221, ¶ 19, 196 P.3d at 824. We stated, however:

> 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).

¶10 Here, Appellant had a contested hearing because he cross-examined the acquaintance witnesses and explained his actions to the court when he testified. Counsel's stipulation to the admission of the physician affidavits and waiver of the right to cross-examine did not deprive Appellant of his constitutional rights because it was a

tactical decision left to the discretion of Appellant's counsel. *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)). Consequently, the superior court did not err by failing to ensure Appellant voluntarily, knowingly, and intelligently agreed to the stipulation.[1]

Conclusion

¶11 For the above-stated reasons, we affirm the superior court's involuntary commitment order.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge

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