DIVISION ONE
FILED: 07-08-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	1 CA-MH 09-0070
	)	
	)	DEPARTMENT B
	)	
	)	**MEMORANDUM DECISION**
	)	
IN RE MH2009-001747	)	Not for Publication –
	)	(Rule 28, Arizona Rules
	)	of Civil Appellate Procedure)
	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. MH2009-001747

The Honorable Patricia Arnold, Judge *Pro Tempore*

AFFIRMED

Maricopa County Public Defender's Office — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

Maricopa County Attorney's Office — Phoenix
By Anne C. Longo, Deputy County Attorney
Victoria M. Mangiapane, Deputy County Attorney
Attorneys for Appellee

G E M M I L L, Judge

¶1 Appellant seeks reversal of the July 23, 2009 court order for involuntary mental health treatment. She argues that the treatment court should have determined whether she had knowingly, intelligently, and voluntarily waived her right to have the evaluating physicians testify at her treatment hearing. She also argues that the treatment order should be vacated because the petition for court-ordered treatment and the supporting affidavits were statutorily defective. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On July 12, 2009, Officer Rabago submitted applications for involuntary evaluation and emergency admission for evaluation of Appellant, alleging she was a danger to herself and a danger to others. Appellant's behavior -- threatening others and damaging property, resisting arrest, and asserting that she was working for and protected by various government agencies -- prompted Officer Rabago to take Appellant to Magellan Urgent Psychiatric Care for further evaluation. Dr. Williamson, the Medical Director at Magellan, filed a petition for court-ordered evaluation of Appellant.

¶3 On July 16, 2009, Dr. Olson filed a petition for court-ordered treatment supported by the affidavits of Dr. Olson and Dr. Santos as evaluating physicians, concluding Appellant was persistently or acutely disabled and recommending combined

inpatient and outpatient treatment. The superior court issued a detention order for evaluation and notice, and set a hearing on the petition for court-ordered treatment for July 23, 2009.

¶4 At the hearing, both parties stipulated to the admission of the affidavits of Dr. Olson and Dr. Santos in lieu of their testimony and to the admission of the 72-hour medication affidavit signed by Nurse Practitioner Fagen. Officers Rabago and Schabron testified on behalf of the petitioner, and Appellant testified on behalf of herself. Upon review of the file, including the affidavits, all matters presented, and the testimony of the witnesses, the court found by clear and convincing evidence that Appellant was persistently or acutely disabled and in need of mandatory treatment. The court ordered that Appellant undergo combined inpatient and outpatient treatment for a period not to exceed 365 days with the inpatient treatment not to exceed 180 days. Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 36-546.01 (2009).

ANALYSIS

¶5 The issues Appellant raises on appeal have recently been resolved by this court in *In re MH 2009-001264*, __ Ariz. __, 229 P.3d 1012 (App. 2010).

A. The Stipulated Admission of the Affidavits.

¶6 Appellant claims the court's failure to perform a colloquy to determine whether she knowingly, voluntarily, and intelligently waived her right to cross-examine the evaluating physicians violated her due process rights. Relying on *In re MH 2007*-001275, 219 Ariz. 216, 196 P.3d 819 (App. 2008), she argues that the right to cross-examine witnesses is similar to the right to a hearing, and thus, the court is required to investigate whether that right was knowingly, voluntarily, and intelligently waived. *See* 219 Ariz. at 221, ¶ 18, 196 P.3d at 824 (holding that a court must investigate whether waiver of the "rights to present evidence and subpoena, confront and cross-examine witnesses at a 539 hearing . . . is voluntarily, knowingly and intelligently made").

¶7 Appellant's analogy to *MH 2007-001275* is not persuasive. As explained in *MH 2009*-001264, waiving "the *entire adversarial hearing* by stipulating to the contents of the court's file" is significantly different from waiving the right to confront and cross-examine the evaluating physicians. *MH 2009-001264*, __ Ariz. at __, ¶ 9-10, 229 P.3d at 1014-1015 (emphasis in original). The latter is a tactical decision of the attorney that is presumed to have been made after assessing the "effect of the evaluating physicians' testimony and determin[ing] whether they should appear in person." *Id.* at __,

¶ 10, 229 P.3d at 1015. Accordingly, we find no error in the superior court's failure to perform a colloquy regarding Appellant's knowing, voluntary and intelligent waiver of her right to procure the evaluating physicians' testimony.

¶8 Moreover, because Appellant did not raise the argument below, we will not consider the issue on appeal. *See id.* at __, ¶ 7, 229 P.3d at 10134.

B. Statutory Basis for the Order for Involuntary Treatment.

¶9 Appellant also contends that the court order for involuntary treatment should be vacated because the supporting affidavits and the petition for court-ordered treatment are statutorily defective.

¶10 Appellant argues that the physicians' qualifications are not adequately established in the record. As Appellant's opening brief acknowledges, however, the record contains evidence of the physicians' qualifications. In *MH 2009-001264*, we found that sufficient proof of the physicians' qualifications was satisfied by the signed affidavits stating the affiant is "experienced in psychiatric matters" and is an "M.D.," and the inclusion of both physicians as attending psychiatrists that could be chosen to evaluate the Appellant. *Id.* at __, ¶ 14, 229 P.3d at 1015. Similarly, in this case, the affidavits each indicate the affiant is an "M.D." and "is experienced in psychiatric matters." Both affidavits are subscribed and sworn

before a notary public. And both physicians are listed as attending physicians at the Desert Vista Campus on Appellant's Notice of Right to Choose Evaluating Psychiatrist.

¶11 Additionally, the objection to the physicians' qualifications is untimely because it is raised for the first time on appeal. *See MH 2009-001264*, __ Ariz. at __, ¶ 13, 229 P.3d at 1015 ("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." (quoting *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317 (2000))).

¶12 Appellant also challenges the qualifications of Nurse Practitioner Fagen, who completed the 72-hour medication affidavit. The purpose of her affidavit is to verify that reasonable precautions have been taken to insure that the patient will "not be so under the influence of or so suffer the effects of drugs, medication or other treatment as to be hampered in preparing for or participating in the hearing." A.R.S. § 36-539(A) (Supp. 2009). The statute does not set out specific requirements regarding the qualifications of the affiant, and we see no reason to inject any. Furthermore, rather than raising an objection at the proper time, Appellant stipulated to the admission of the 72-hour medication affidavit.

Thus, this argument has also been waived. *See MH 2009-001264*, __ Ariz. at __, ¶ 13, 229 P.3d at 1015.

¶13 As her final argument, Appellant contends that the petition for court-ordered treatment was statutorily defective because it did not comply with A.R.S. § 36-523(D) (2009), which states that "[a] petition and other forms required in a court may be filed only by the screening agency which has prepared the petition." The statutory requirements of § 36-523(D), however, apply only to the petition for evaluation -- not to the petition for court-ordered treatment. Only the latter is at issue in this appeal. The inclusion of "other forms" in § 36-523(D) contemplates additional documents that may be required to be filed with the petition for evaluation. In contrast, the petition for court-ordered treatment is governed by § 36-533 (2009), which requires accompanying "affidavits of the two physicians who conducted the examinations during the evaluation." The petition for court-ordered treatment in this case is supported by the affidavits as stipulated to by Appellant, and there is no statutory defect.

¶14 Additionally, we note that Appellant raises her objection to the petition for court-ordered treatment for the first time on appeal, and we consider it to have been waived. *See MH 2009-001264*, __ Ariz. at __, ¶ 7, 229 P.3d at 1014.

CONCLUSION

¶15 For these reasons, we affirm the court order for Appellant's involuntary mental health treatment.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge