

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Plaintiff/Appellee*,

v.

MICHAEL PETRAMALA, *Defendant/Appellant*.

No. 1 CA-CV 16-0523
FILED 5-18-2017

Appeal from the Superior Court in Maricopa County
No. CR2004-019118-001
The Honorable Sam J. Myers, Judge

AFFIRMED

COUNSEL

Michael Petramala, Phoenix
Defendant/Appellant

Scottsdale City Prosecutor's Office, Scottsdale
By Kenneth M. Flint
Counsel for Plaintiff/Appellee

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MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia A. Orozco joined.¹

P O R T L E Y, Judge:

¶1 Michael Petramala appeals the superior court’s denial of his petition for restoration of his right to possess firearms, filed pursuant to Arizona Revised Statutes (“A.R.S.”) section 13-925. For the following reasons, we affirm.

BACKGROUND

¶2 Petramala was charged with a misdemeanor criminal offense in Scottsdale City Court in 2003. The case was transferred to the Maricopa County Superior Court for a determination of competency under Arizona Rule of Criminal Procedure 11. Following two court-ordered psychological examinations and a hearing, the court declared Petramala incompetent to stand trial and dismissed the charge against him. The Rule 11 finding resulted in Petramala losing his legal right to possess firearms and, according to Petramala, being included in the FBI’s National Instant Criminal Background System (“NICS”). *See* A.R.S. § 13-3101 (stating a person who has “been found incompetent pursuant to rule 11, Arizona rules of criminal procedure, and who subsequently has not been found competent” is prohibited from possessing a firearm in Arizona).

¶3 In September 2014, Petramala petitioned the superior court to restore his right to possess firearms under A.R.S. § 13-925.² The court issued an order summarily denying the petition without a hearing. On appeal,

¹ The Honorable Maurice Portley and Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² The events following the dismissal of the criminal charge and leading up to this appeal are more fully set forth in paragraphs 3-12 of this court’s memorandum decision, *State v. Petramala*, 1 CA-CR 14-0685, 2015 WL 4538384 (Ariz. App. July 28, 2015) (mem. decision).

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this court vacated that order and remanded for further proceedings. *See Petramala* at 4, ¶15.

¶4 In June 2016, Petramala filed another petition to restore his right to possess firearms. The court held a hearing on the petition to allow Petramala to present evidence of his competency pursuant to A.R.S. § 13-925. Petramala participated in the hearing telephonically, testified, and argued in support of his petition. The court subsequently denied the petition stating it was “unable to find by clear and convincing evidence that [Petramala] is not likely to act in a manner that is dangerous to public safety or that the requested relief is not contrary to the public interest.” Petramala timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(d).

DISCUSSION

I. Constitutional Issues

¶5 Petramala argues that § 13-925 is unconstitutional because it places the burden of proof on the person seeking restoration of his right to possess firearms. The statute provides that a person seeking to restore his right to possess firearms must file a petition with the court and “shall present . . . evidence in support of the petition.” A.R.S. § 13-925(C). A petitioner must prove by clear and convincing evidence that he “is not likely to act in a manner that is dangerous to public safety” and that “[g]ranting the requested relief is not contrary to the public interest.” A.R.S. § 13-925(D)(1)-(2).

¶6 Petramala asserts we should apply “strict scrutiny” and “re-interpret A.R.S. § 13-925 such that the burden of proof is shifted to the state.” Strict scrutiny is the highest level of judicial review and we apply it only “in cases where a statute applies to a suspect class or impinges on a fundamental right.” *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 349 (App. 1992). Section 13-925 does not deprive Petramala of his fundamental right to possess a firearm. Instead, it creates only a limited liberty interest that allows Petramala to petition to *restore* his right, which had been previously revoked pursuant to a lawful order. *See Pinal Cty. Bd. of Sup'rs v. Georgini* (“*Georgini*”), 235 Ariz. 578, 585, ¶ 22 (App. 2014) (holding “liberty interest arising from § 13-925 is a state interest created by Arizona law”); A.R.S. § 13-925. Moreover, “no decision in a § 13-925 proceeding will cause any further deprivation” of a person’s right to possess a firearm. *Georgini*, 235 Ariz. at 585, ¶ 21. Therefore, because § 13-925 does not impinge on any of Petramala’s constitutional rights, we will not “re-interpret” the statute, and decline to apply a strict scrutiny analysis to it. Further, we do not find

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in the record that Petramala's burden-shifting argument was raised below, and it is therefore waived. *See Ruth v. Indus. Comm'n*, 107 Ariz. 572, 574 (1971) (stating a party generally cannot argue on appeal legal issues and arguments that have not been specifically presented to the trial court).

¶7 Petramala also argues the court violated his procedural due process rights when it denied his request for a court-appointed psychologist. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Georgini*, 235 Ariz. at 583, ¶ 14 (internal quotations and citation omitted). As mentioned, in a restoration hearing, the trial court does not deprive the petitioner of his right to possess a firearm, but is giving him the opportunity to *restore* a right which was previously revoked.

¶8 In *Georgini*, we held that the Due Process Clause did not require the appointment of counsel for an indigent petitioner seeking to restore her rights under § 13-925. *Id.* at 587, ¶ 33. We further held that § 13-925 provides a person only a "limited, state-created interest" in a civil proceeding to restore his right to possess firearms. *Id.* at 585, ¶ 24. We acknowledged that the procedure provided by the statute was likely intended to be "more investigatory than adversarial in nature" and that it is the petitioner's burden to present evidence showing why the petition should be granted. *Id.* at 586-87, ¶ 29. We further concluded that § 13-925 "provides all the process [a petitioner] is due." *Id.* at 587, ¶ 33.

¶9 Section 13-925 does not include a requirement that the court appoint a psychologist for a petitioner. Instead, it requires the petitioner to "present psychological or psychiatric evidence in support of the petition." A.R.S. § 13-925. Further, Petramala has not cited any persuasive authority,³ and we are aware of none, suggesting that the appointment of a psychologist in a restoration hearing is required to satisfy due process. Therefore, the court did not err by refusing to appoint a psychologist for Petramala's restoration hearing.

³ Petramala cites to *Tyler v. Hillsdale Cty. Sheriff's Dep't*, but that 6th Circuit decision interpreting a non-analogous statute was vacated when the circuit reviewed the case *en banc*. 775 F.3d 308 (6th Cir. 2014), *vacated on rehearing en banc*, 837 F.3d 678 (6th Cir. 2016).

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II. Sufficiency of the Evidence

¶10 Petramala also challenges the sufficiency of the evidence supporting the ruling denying his petition. He argues the “trial court reversibly erred because NICS expungement was supported by substantial clear and convincing evidence.” In reviewing a court’s ruling after an evidentiary hearing, we defer to the court’s determinations regarding the credibility of witnesses and resolutions of conflicts in the evidence, and do not reweigh the evidence on appeal. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13 (App. 1998). Rather, “[w]e examine a trial court’s findings of fact . . . to determine if they are clearly erroneous.” *State v. Berryman*, 178 Ariz. 617, 620 (App. 1994).

¶11 Section 13-925(C) states that the person seeking to have his firearm rights restored “shall present psychological or psychiatric evidence in support of the petition.” Further, subsection (D) states that the petitioner must show he “is not likely to act in a manner that is dangerous to public safety” and that “[g]ranting the requested relief is not contrary to the public interest.”

¶12 At the restoration hearing, Petramala testified, and attempted to have the court admit an October 2013 psychological report. The court, however, excluded the report because it lacked foundation; the psychologist was not called to testify and was therefore unavailable for cross-examination; and an affidavit from the psychologist was not presented for the court’s consideration. *See* Ariz. R. Evid. 702 and 703 (providing rules for testimony by expert witnesses); *see also* Ariz. R. Evid. 901 (explaining requirements for authenticating an item of evidence). Any evidence offered in the restoration hearing, which is a civil proceeding, must comply with the Arizona Rules of Evidence. *See Georgini*, 235 Ariz. at 588, ¶ 35 (“[A] proceeding to restore firearm rights pursuant to § 13-925 is civil in nature.”); Ariz. R. Evid. 1101 (stating the rules apply to “civil actions and proceedings”). The court, as a result, did not abuse its discretion by precluding the exhibit. *See In re Marriage of Gibbs*, 227 Ariz. 403, 406, ¶ 6 (App. 2011) (“We review a trial court’s findings of fact for abuse of discretion and reverse only when clearly erroneous.”).

¶13 Further, Petramala’s testimony regarding the psychological exam and results was not admissible under Rule 701, which prohibits lay witnesses from offering testimony “based on . . . specialized knowledge.” Despite Petramala’s assertion that a psychologist’s testimony would have had no more evidentiary value than his own, he is not qualified under the Rules of Evidence to offer an opinion as to his own psychological health, or

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whether his mental state from 2013 remained unchanged. Therefore, given the lack of admissible evidence, the court did not abuse its discretion by finding that Petramala had not met his burden of proof to have his right to possess a firearm restored.⁴

III. “Clearance of Record” and “Limited Transfer Order”

¶14 Petramala has two final arguments. First, he contends the court “erred in failing to grant [his] Clearance of Records” motion he filed in November 2013 pursuant to A.R.S. § 13-4051. His motion sought to clear, or expunge, his record of the 2003 criminal charge for lack of probable cause. We find no error.

¶15 The charges were dismissed because Petramala was found incompetent, not because there was no probable cause for the charge. And, as Petramala notes, the court did not rule on the motion; at that time, he had the opportunity to challenge the implicit denial of the ruling by special action or in his earlier appeal, and did not do so. *See State v. Hill*, 174 Ariz. 313, 323 (1993) (“A motion that is not ruled on is deemed denied by operation of law.”); A.R.S. § 12-2101. Moreover, Petramala did not renew his motion to the court leading up to this appeal. Therefore, Petramala’s request for review of the implied denial of his motion is waived and untimely, and we will not address it. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶¶ 16-17 (App. 2008) (stating a defendant waives an argument when he fails to raise it below and fails to show fundamental error); ARCAP 9(a).

¶16 Petramala also asserts the court erred in handling the 2003 Rule 11 hearing by “violat[ing] the Municipal Court’s limited transfer order and exceeded its jurisdiction.” We disagree. Petramala stipulated to submit the matter of his competency to the court. The municipal court then transferred the case to the superior court, which has exclusive jurisdiction

⁴ Petramala argues the court erred in “admit[ting] into evidence” the 2004 psychological reports prepared for the Rule 11 hearing. His argument is misplaced. The court did not consider the 2004 reports as evidence in the current hearing, but only as part of the record. As the court correctly noted during the restoration hearing, the reports were considered in the 2004 Rule 11 hearing which resulted in Petramala being declared a prohibited possessor. *See Petramala*, 1 CA-CR 14-0685 at *1, ¶ 2. Thus, the court did not err in recognizing them as part of the record. *See State v. Rushing*, 156 Ariz. 1 (1988) (stating a court may take judicial notice of actions tried in the same court).

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over competency determinations. *See* Ariz. R. Crim. P. 11.2. Because the superior court had jurisdiction to determine his competency to stand trial after he stipulated to the examinations, and he did not dispute the finding of incompetency, he has waived this argument. *See State v. Rockwell*, 161 Ariz. 5, 10 (1989) (“Usually a stipulation waives defendant’s right to object to the evidence on appeal.”); *cf. Gustafson v. Riggs*, 10 Ariz. App. 74, 76 (1969) (“The stipulation of evidence into the record . . . waives any error arising from the introduction of the evidence itself.”). Consequently, we find no error.

CONCLUSION

¶17 For the foregoing reasons, we affirm the superior court’s order denying Petramala’s petition for restoration of his right to possess firearms.



AMY M. WOOD • Clerk of the Court
FILED: AA