NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 01-05-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH 2008-000579

1 CA-MH 09-0033

DEPARTMENT E

MEMORANDUM DECISION
(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2008-000579

The Honorable Patricia Arnold, Judge Pro Tempore

AFFIRMED

Osborn Maledon, P.A. — Phoenix
By Debra A. Hill
Sharad H. Desai
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorney for Appellant

H A L L, Judge

¶1 Appellant appeals an order for continued mental health treatment after review and examination because the court did not expressly find that he knowingly and intelligently agreed to the

admission of the evaluating doctor's affidavit. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 27, 2008, a court determined that Patient was persistently or acutely disabled and ordered him to submit to 365 days of inpatient and outpatient treatment pursuant to Arizona Revised Statutes (A.R.S.) section 36-539 (2009). Patient's court-ordered treatment provider, Bridgeway Health Care Solutions (Bridgeway), filed an Application for Continued Treatment (ACT) pursuant to A.R.S. § 36-543 (2009) on March 5, 2009. Patient moved for a hearing on the ACT pursuant to A.R.S. § 36-543(G), and the court granted the motion.

¶3 At the hearing, the parties stipulated to admission of an Affidavit of Evaluator prepared by Dr. Waldeck Charles. Bridgeway called three witnesses to testify to Patient's behavior during treatment. Patient's counsel cross-examined each of these witnesses, and did not call any witnesses on Patient's behalf. The record does not reflect any attempt by Patient's counsel to subpoena Dr. Charles.

¶4 Dr. Charles' affidavit stated that Patient suffered from an unspecified mood disorder and was persistently or acutely disabled (PAD). It listed his symptoms: auditory and visual hallucinations, violence, unpredictable behavior, and talking to

himself. It also disclosed that Patient got "involved in altercations with other residents" despite being compliant with his medications. The affidavit deemed other alternatives to court-ordered treatment inappropriate because the patient was compliant with his medications only because of the court order, which Dr. Charles viewed as necessary "leverage for patients to comply with treatment."

¶5 After the hearing, the court found by clear and convincing evidence that Patient "continue[d] to suffer from a mental disorder and . . . remain[ed] persistently and/or acutely disabled, in need of treatment, and either unwilling or unable to accept treatment." Accordingly, the court ordered the court-ordered treatment to continue for "a period not to exceed 365 days or until such time as the patient no longer requires such treatment."

¶6 Patient timely filed this appeal. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) (2003), -2101(K) (2003) and 36-546.01 (2009).

STANDARD OF REVIEW

¶7 We review issues of statutory interpretation and constitutional claims de novo because they are questions of law. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008).

DISCUSSION

¶8 We have held that a superior court "must ensure from a colloquy with the patient or from the record itself that a patient has voluntarily, knowingly, and intelligently waived his statutory right to present evidence and to subpoena, confront, and cross-examine witnesses" at a treatment hearing under A.R.S. § 36-539.[1] *MH 2007-001275*, 219 Ariz. at 217, ¶ 1, 196 P.3d at 820. Patient asks us to extend this waiver rule to A.R.S. § 36-543, arguing that a renewal hearing seeks a deprivation of liberty similar to a treatment hearing. Bridgeway contends that § 36-543 does not guarantee a statutory right to a hearing, because it provides a process for renewal without a hearing under the circumstances presented in this case, thus taking Patient's waiver outside the scope of our waiver rule and making it effective.

¶9 To evaluate Patient's claims, we must examine the statutory process to continue court-ordered treatment. "When analyzing statutes, we apply 'fundamental principles of statutory construction, the cornerstone of which is the rule that the best

[1] We note that the Legislature has revised A.R.S. § 36-537(D) to provide that "[a]t a hearing held pursuant to this article, the patient's attorney may enter stipulations on behalf of the patient." 2009 Ariz. Sess. Laws, Ch. 153, § 7 (1st Reg. Sess.). Although this revision seems to apply to hearings under both A.R.S. § 36-539 and -543, it took effect on September 30, 2009, after the hearing in this case, so we do not consider it here.

and most reliable index of a statute’s meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute’s construction.’” *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8, 152 P.3d 490, 493 (2007) (quoting *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991)). “Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.” *Id.* (quotation omitted).

¶10 Section 36-543 defines the process for the release or renewal of patients who are gravely disabled (GD) or PAD. If the medical director of the patient’s mental health facility determines that the patient has been “substantially noncompliant with treatment,” the patient must have an “annual examination and review to determine whether the continuation of court-ordered treatment is appropriate.” A.R.S. § 36-543(E). Each of the examiners[2] conducting the examination and review must submit a report to the medical director with conclusions on: 1) “whether the patient continues to be [GD] or [PAD] and in need of treatment”; 2) the availability of alternatives to court-ordered treatment; 3) whether

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[2] Patient argues that the ACT provided insufficient proof that Dr. Charles was a psychiatrist as required by A.R.S. § 36-543(E). However, we have independently determined that Dr. Charles is licensed and did his residency in psychiatry by viewing the Arizona Medical Board website. Arizona Medical Board, http://www.azmd.gov (last visited December 11, 2009).

voluntary treatment is appropriate; and 4) the need for guardianship or conservatorship. A.R.S. § 36-543(F).

¶11 The director then must forward the results of the examination and review to the court, including the director's recommendation of whether to release the patient, and whether to do so with or without delay. A.R.S. § 36-543(G). If the director recommends "no release or release with delay," the court has discretion to either "accept the report and recommendation of the medical director or order a hearing." *Id.*

¶12 The parties argue at some length whether a hearing was statutorily required, and what impact the requirement (according to patient) or non-requirement (according to Bridgeway) of a hearing has on the patient's right to cross-examine witnesses. Patient contends that a hearing had to be held because the medical director did not recommend that Patient not be released. Bridgeway argues a hearing was not required because, fairly construed, the ACT recommended no release, and thus Patient had no cross-examination right to waive, even though the hearing took place.[3] We need not

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[3] In its Application to Continue Treatment, Bridgeway asked the court to "accept[] the report of the medical director as submitted and attached," and to "continue [Patient's] court-ordered treatment." The attached report was Dr. Charles' affidavit, in which he found Patient to be "violent" and "unpredictable." The medical director implicitly adopted the evaluator's conclusions and recommended continuing Patient's treatment through the Application, which asked the court to continue Patient's treatment.

resolve this dispute between the parties because we conclude that, in either event, Patient had the right to cross-examine witnesses at the § 36-543 hearing. We move on.

¶13 Patient argues that he had both a statutory right under § 36-543 and a due process right to confront and cross-examine Dr. Charles because "adults facing involuntary treatment 'are entitled to full and fair adversary hearings.'" *In re MH 2004-001987*, 211 Ariz. 255, 259-60, ¶ 20, 120 P.3d 210, 214-15 (App. 2005) (citing *Parham v. J.R.*, 442 U.S. 584, 627 (1979)). Patient contends that the trial court erred by failing to conduct a colloquy to confirm that his waiver of this right was voluntary, knowing, and intelligent. We conclude that Patient waived any constitutional or statutory confrontation right he had through counsel's stipulation to admit the affidavit and decision not to subpoena Dr. Charles to testify.

¶14 We only consider arguments first raised on appeal under exceptional circumstances. *McDowell Mountain Ranch Land Coalition v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997). But one of these special circumstances is that "an inherently personal right of fundamental importance" may not be waived by counsel. *See State v. Swoopes*, 216 Ariz. 390, 402, ¶ 39, 166 P.3d 945, 957 (App. 2007) (quoting *State v. Espinosa*, 200 Ariz. 503, 505, ¶ 8, 29 P.3d 278, 280 (App. 2001)). The waiver rule is procedural, not

jurisdictional, and was "established for the purpose of orderly administration and the attainment of justice." *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17, 160 P.3d 223, 228 (App. 2007) (quoting *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987)).

¶15 "[C]ivil commitment constitutes a significant deprivation of liberty." *In re MH 2008-000867*, 222 Ariz. 287, 291, ¶ 17, 213 P.3d 1014, 1018 (App. 2009). This liberty interest necessitates due process at civil commitment hearings, *id.*, and requires us to strictly construe statutory requirements pertaining to civil commitment procedures. *In re MH 2007-001236*, 220 Ariz. 160, 165, ¶ 15, 204 P.3d 418, 423 (App. 2008). Although the intended beneficiary of a statute may generally waive its benefit, such a waiver is usually not effective unless it is given voluntarily, knowingly, and intelligently. *See In re MH 2006-000749*, 214 Ariz. 318, 322, ¶¶ 18, 20, 152 P.3d 1201, 1205 (App. 2007).

¶16 We have generally allowed parties in mental health cases to "stipulate to the admission of an affidavit in place of the physician's testimony." *See, e.g.*, *In re MH 2002-000767*, 205 Ariz. 296, 301, ¶ 23, 69 P.3d 1017, 1022 (App. 2003); *In re Maricopa County Superior Court No. MH 2001-001139*, 203 Ariz. 351, 352, ¶ 6, 54 P.3d 380, 381 (App. 2002). With regard to waiver of particular rights, we have held that the trial judge conducting an involuntary

commitment hearing under A.R.S. § 36-539 must ascertain whether the waiver is voluntary, knowing, and intelligent either from the record or by colloquy. *See, e.g.*, *MH 2006-000749*, 214 Ariz. at 324, ¶ 27, 152 P.3d at 1207 (waiver of the right to be present at the hearing); *In re Jesse M.*, 217 Ariz. 74, 80, ¶¶ 29-30, 170 P.3d 683, 689 (App. 2007) (waiver of the right to counsel in order to self-represent).

¶17 Patient cites an involuntary commitment case in which we held that the waiver of the "statutory right to present evidence and to subpoena, confront, and cross-examine witnesses" required a judicial finding of voluntary, knowing, and intelligent waiver, either by colloquy or from the record. *MH 2007-001275*, 219 Ariz. at 217, ¶ 1, 196 P.3d at 820. In *MH 2007-001275*, the patient waived the right to a hearing altogether and agreed to the case's resolution on the basis of the Court's file, "including the affidavits of the evaluating physicians in lieu of their testimony." *Id.* at 218, ¶ 4, 196 P.3d at 821. The patient also agreed through counsel that "the witness statements in the Court's file . . . support[ed] a finding of persistently and acutely disabled." *Id.* We held that this waiver of the patient's statutory right to a hearing was not effective without a determination by the court that the waiver was voluntary, knowing, and intelligent. *Id.* at 221, ¶ 19, 196 P.3d at 824. We observed

prior cases that required a knowing and intelligent waiver of counsel and the right to be present, and we reasoned that these rights "would be hollow indeed if the patient then could waive the rights to present evidence and confront and cross-examine witnesses without knowingly and intelligently understanding what he was doing." *Id.* at 221, ¶ 18, 196 P.3d at 824.

¶18 The case at hand, however, is fundamentally distinct from *MH 2007-001275*. Unlike *MH 2007-001275*, Patient here did not waive his entire right to a contested hearing and agree to a finding that dictated the hearing's outcome. Rather, Patient's counsel decided not to contest the admission of Dr. Charles' report or call him as a witness for cross-examination while still contesting Patient's continued treatment. Patient and counsel appeared at the hearing, and counsel cross-examined Bridgeway's three behavioral witnesses with questions on Patient's ability to care for himself, compliance with treatment, and interactions with others. Patient's counsel did not call any of her own witnesses.

¶19 At issue here is the right to cross-examine individual witnesses, not the general right to a contested hearing at issue in *MH 2007-001275*. We have noted that "[t]he right to confrontation under procedural due process is 'similar' to the right to confrontation under the Confrontation Clause of the Sixth Amendment to the United States Constitution." *MH 2008-000867*, 222 Ariz. at

291, ¶ 17, 213 P.3d at 1018. Recently, the Arizona Supreme Court ruled that a court need not engage in a colloquy with a defendant who stipulates to two elements of a charged offense and does not contest the third. *State v. Allen*, 1 CA-CR 08-0369-PR (Ariz. Dec. 8, 2009). In the criminal context, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano*, 507 U.S. 725, 733 (1993).

¶20 Arizona law recognizes that "a defendant may be bound by his counsel's trial strategy decision to waive even constitutional rights." *State v. West*, 176 Ariz. 432, 447, 862 P.2d 192, 207 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998). Generally, whether counsel's waiver will bind a defendant depends upon whether the right is personal or tactical. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval."). In fact, counsel can waive some rights even in the face of client

disagreement because they are "firmly in the domain of trial strategy." *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (upholding appellate counsel's ability to select the strongest arguments on appeal and waive others); *Wilson v. Gray*, 345 F.2d 282, 286 (9th Cir. 1965) ("[T]he accused may waive his right to cross examination and confrontation and . . . the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy.").

¶21 Unlike the clear waiver of the entire hearing in *MH 07-001275*, counsel's decision not to call Dr. Charles was likely based on strategic considerations. Counsel presumably interviewed Dr. Charles within three days of being appointed as required by A.R.S. § 36-543(G) and met with Patient within 24 hours of appointment to discuss his rights and alternatives pertaining to the hearing as required by A.R.S. § 36-537(B)(1). As a result of these meetings, counsel could have seen calling Dr. Charles as a poor strategy for helping her client prevail at the hearing for various reasons. Calling Dr. Charles to cross-examine him would also allow the opposing party to question him, thereby enabling him to elaborate on and clarify any ambiguities in his report. Based on the interview, counsel could have seen Dr. Charles as a particularly effective witness, and thus damaging to her client's case.

CONCLUSION

¶22 The decision by Patient's attorney to stipulate to the admission of Dr. Charles' affidavit did not implicate a right that could only be waived *personally* by Patient following a colloquy between the Patient and the court. We therefore affirm the treatment order.

/s/
PHILIP HALL, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
MARGARET H. DOWNIE, Judge