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: 04-01-2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH 2009-001463	1 CA-MH 09-0057 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001463

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
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorney for Appellant

K E S S L E R, Judge

¶1 Appellant appeals from an order under Arizona Revised Statutes ("A.R.S.") section 36-540(A)(2)(Supp. 2009) requiring a combined inpatient/outpatient treatment program in a mental

health treatment facility. Appellant contends that the court erred by failing to expressly find that he voluntarily, knowingly, and intelligently agreed to waive his right to live testimony of the evaluating physicians by stipulating to the admission of one physician's affidavit. For the following reasons, we affirm.

FACTS AND PROCEDURUAL HISTORY

¶2 In June 2009, Appellant's daughter completed an Application for Involuntary Evaluation because she believed her father was a danger to himself. The Maricopa County Superior Court ordered an involuntary mental health examination of the Appellant based on a petition, which stated there was reasonable cause to believe that Appellant was a danger to self, a danger to others, and was persistently or acutely disabled. Dr. Premkumar, Deputy Medical Director at Desert Vista Hospital, then filed a petition for court-ordered treatment. Appellant contested the petition, and a hearing was held.

¶3 Both Dr. Premkumar and Dr. Sadr evaluated the Appellant. In their affidavits, both doctors diagnosed Appellant as having a "Psychotic Disorder, Not Otherwise Specified," and both doctors determined that Appellant was a danger to self, a danger to others, and persistently or acutely disabled.

¶4 At the hearing, the parties stipulated to the admission of the affidavits of Dr. Premkumar and Dr. Sadr; however, counsel for the Petitioner informed the court that Appellant's counsel would be questioning Dr. Sadr. She stated,

> Ms. Como: [Counsel for the Petitioner] . . . The parties have agreed to stipulate to the admission of the affidavits of Dr. Primkamar . . . and Dr. Sadar . . . in lieu of their testimony. . . .[1] The parties have also agreed, Ms. Miller has indicated to me that she is agreeing to stipulate to the admission of the affidavits of Dr. Sadar, but she does have some questions that she wants to follow up with his affidavit. Is that correct?
>
> Ms. Miller: [Counsel for the Appellant] That's correct.

¶5 Ms. Como informed the court that Dr. Premkumar would be testifying instead of Dr. Sadr. Ms. Como explained that she understood that Ms. Miller wished to have one of the doctors present to testify and that it did not matter whether it was Dr. Sadr or Dr. Premkumar. Ms. Como also informed the court that Dr. Sadr was available for questioning by telephone.

> Ms. Como: . . . And for the Court's information, it's Dr. Primkamar will be here to testify. Is that all right? Dr. Sadar is at the other clnic and so it would have to be by phone.
>
> The Court: Uh-huh.
>
> Ms. Miller: You didn't know he was unavailable?
>
> Ms. Como: He's available. It's just by phone.

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[1] The transcripts reflect phonetic spelling of Dr. Sadr's and Dr. Premkumar's names; however, the record indicates the correct spellings as "Sadr" and "Premkumar."

> Ms. Miller: No, he’s not. He’s some place else.
>
> Ms. Como: But he’s available by phone.
>
> Ms. Miller: Okay. If you want him by phone, I don’t care. Just one of them. I don’t care.

Later, the court clarified with Ms. Miller that she agreed to question Dr. Premkumar in place of Dr. Sadr:

> The Court: Ms. Miller, did you wish to question both doctors or just one?
>
> Ms. Miller: Your Honor, I had told the hospital that I wished to have one of the doctors present. The hospital determined that that doctor would be Dr. Sadar. Now it appears as though Dr. Sadar is not available here in the facility to talk apparently . . . . . And now the hospital would like Dr. Primkamar to testify, and that’s fine with me too.
>
> Witness (Dr. Premkamar): He could have been brought here. He’s at the East Mesa Clinic.
>
> Ms. Miller: Okay.
>
> Ms. Como: Your Honor, he is at the -- he is not unavailable. He’s certainly available by phone and he’s at the East Mesa Clinic, and he is available.
>
> The Court: Well, Ms. Miller just indicated she’s okay with Dr. Primkamar testifying.
>
> Ms. Como: That’s correct. So, I just want to point out to the Court that it’s not that Dr. Sadar isn’t available. It’s just Ms. Miller just told me five minutes ago that she would be calling a doctor, so he would have been available had that -- and she indicated to me that either doctor would be fine. Is that correct?
>
> Ms. Miller: Precisely.

¶6 The court also heard testimony from Appellant's daughter, Appellant's sister, and the Appellant himself. After reviewing all affidavits, and after having listened to all testimony, the court found by clear and convincing evidence that the Appellant suffered from a mental disorder that rendered him persistently or acutely disabled, but the court did not find by clear and convincing evidence that the Appellant presented a danger to himself or others. Additionally, the court found that Appellant was in need of treatment and was either unwilling or unable to accept treatment voluntarily. Thus, the court ordered that the Appellant undergo a combined inpatient/outpatient treatment program not to exceed 365 days.

¶7 Appellant timely filed this appeal. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) (2003), -2101 (A),(B),(K)(1) and (2) (2003) and 36-546.01 (2009).

STANDARD OF REVIEW

¶8 The application and interpretation of statutes as well as constitutional claims are reviewed *de novo* because they are questions of law. *In re Jesse M.*, 217 Ariz. 74, 76 ¶ 8, 170 P.3d 683, 685 (App. 2007); *In re MH 2006-000749*, 214 Ariz. 318, 321, ¶ 13, 152 P.3d 1201, 1204 (App. 2007).

DISCUSSION

¶9 The issue on appeal is whether the court was required to conduct a colloquy with the Appellant to determine that he

voluntarily, knowingly, and intelligently agreed to waive his right to testimony of an evaluating physician by stipulating to the admission of his affidavit in lieu of his testimony.

¶10 This court has held that "involuntary treatment by court order is a 'serious deprivation of liberty'. . . [and][a]n adult who is the subject of a proposed involuntary treatment order is 'entitled to [a] full and fair hearing[]." *In re MH 2006-000749*, 214 Ariz. at 321, ¶ 14, 152 P.3d at 1204 (citation omitted). A.R.S. § 36-539 (Supp. 2009) sets forth the requirements of a court-ordered treatment hearing. A.R.S. § 36-539(B) states, "The evidence presented by the petitioner or the patient shall include the testimony of two or more witnesses acquainted with the patient at the time of the alleged mental disorder, . . . and the testimony of the two physicians who performed examinations in the evaluation of the patient . . . ." This statute does not preclude a patient's attorney from waiving the patient's statutory rights to present evidence and subpoena, confront and cross-examine witnesses. However, this court has held that a superior court "must ensure from a colloquy with the patient or from the record itself that the patient has voluntarily, knowingly and intelligently waived his statutory right to present evidence and to subpoena, confront and cross-examine witnesses." *In re MH 2007-001275*, 219 Ariz. 216, 217, ¶ 1, 196 P.3d 819, 820 (App. 2008).

¶11 The Appellant relies on *In re MH 2007-001275* to argue that the court erred by failing to conduct a colloquy to confirm that he voluntarily, knowingly, and intelligently waived his right to have a physician testify by accepting a stipulation to the admission of the physician's affidavit. The State contends *MH 2007-001275* is fundamentally distinct from the present case. In *MH 2007-001275*, the patient waived the right to the entire hearing and agreed to the resolution of the case based on the court's file, "including the affidavits of the evaluating physicians in lieu of their testimony." 219 Ariz. at 218, ¶ 4, 196 P.3d at 821. In that case we held that the patient's waiver of his right to an entire hearing was not effective without a determination by the court that the right was waived voluntarily, knowingly, and intelligently. *Id.* at 221, ¶ 19, 196 P.3d at 824. We reasoned that,

> [L]ike the waiver of counsel and like the waiver of the right to be present at the hearing, we hold that it is incumbent on the superior court to ascertain that a waiver of these rights [rights to present evidence and subpoena, confront and cross-examine witnesses at a 539 hearing] is voluntarily, knowingly and intelligently made. The requirement for a voluntary, knowing and intelligent waiver of counsel and waiver of personal appearance 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 waiving.

Id. at 221, ¶ 18, 196 P.3d at 824.

¶12 *In re MH 2007-001275* is not controlling. In the present case, the Appellant did not waive his right to a hearing. Rather, Appellant's counsel stipulated to the admission of one doctor's affidavit in lieu of his testimony. Appellant and his counsel were present at the hearing and had an opportunity to present evidence and to subpoena, confront and cross-examine witnesses, including an evaluating physician. Thus, the issue in this case is not a waiver of the general right to a hearing; rather it is the waiver of the right to confront and cross-examine one witness.[2]

¶13 We need not decide if *MH 2007-001275* should be expanded to stipulation of one physician's affidavit because in the case at bar, we find no reversible error. First, the record shows that any error was invited error. There is no reversible error when the party complaining of the error invited it. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33

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[2] In the criminal context, the Arizona Supreme Court has ruled that colloquy is not required when a defendant stipulates to two of the three elements of an offense but does not enter a guilty plea. *State v. Allen*, 223 Ariz. 125, 127-28, ¶ 14, 220 P.3d 245, 247-48 (2009). The Court held, "stipulations to facts combined with 'not-guilty' pleas are 'simply not equivalent to a guilt plea for *Boykin* purposes . . . .' The constitution does not compel a full *Boykin* colloquy in the absence of a formal guilty plea." *Id.* (citing *Adams v. Peterson*, 968 F.2d 835, 842 (9th Cir. 1992)). In the context of a court-ordered treatment hearing, it is possible that stipulating to the admission of a physician's affidavit in lieu of his testimony is not equivalent to the stipulation of the resolution of the entire case on the basis of the court's file. However, we need not decide that in this case.

(2001); *see also State v. Diaz*, 168 Ariz. 363, 365, 813 P.2d 728, 730 (1991) (invited error is waived for appeal purposes); *State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982) ("A defendant who invites error at a trial may not then assign the same as error on appeal.").

¶ **14** Counsel for the Appellant stated repeatedly that she was satisfied to question Dr. Premkumar in place of Dr. Sadr. The State noted several times that Dr. Sadr was available to testify telephonically. This Court has upheld the constitutionality of telephonic testimony in court-ordered treatment hearings. *In re MH 2004-001987*, 211 Ariz. 255, 261, ¶ 26, 120 P.3d 210, 216 (App. 2005). When telephonic testimony "further[s] the important public policy of providing a mental health hearing on an expedited basis . . . [and when there is] adequate indicia of reliability as to that witness, the lack of face-to-face confrontation d[oes] not violate appellant's procedural due process rights." *Id. But cf. In re MH 2008-000867*, 222, Ariz. 287, 292, ¶ 23, 213 P.3d 1014, 1019 (App. 2009) (review granted February 4, 2010) (when an Appellee failed to demonstrate that a witness was unavailable to appear in person, this Court held, "[A]bsent a showing of true necessity, based on unavailability, telephonic testimony of a doctor at such a hearing violates the patient's rights."). Appellant's counsel declined Dr. Sadr's telephonic testimony on four

different occasions and agreed to question Dr. Premkumar only. Moreover, construing the record in favor of affirming the trial court, it appears Dr. Sadr could have appeared in person. Thus, Appellant may not assign the admission of Dr. Sadr's affidavit in lieu of his live testimony as error on appeal.[3]

¶15 Second, in all aspects, the doctors' affidavits are identical. Both Dr. Sadr's and Dr. Premkumar's affidavits conclude that the Appellant was a danger to self, a danger to others, and persistently or acutely disabled. Both doctors diagnosed Appellant as having a "Psychotic Disorder, Not Otherwise Specified (DMS Code 298.90)." Both doctors recommended court-ordered treatment. Both doctors concluded that Appellant's judgment and insight into his own illness was impaired. There is no evidence that Dr. Sadr's testimony in addition to Dr. Premkumar's testimony would have resulted in a different outcome. Thus, there is no reversible error.

[3] This court did not address the invited error doctrine in *In re MH 2007-001275*. Moreover, the invited error here is plain on its face because Appellant's counsel was repeatedly offered the chance to examine Dr. Sadr, but declined. Thus, we need not decide whether a mere stipulation amounts to invited error. *See State v. Lucero*, 223 Ariz. 129, 136, ¶ 22, 220 P.3d 249, 256 (App. 2009) ("[I]nvited error does not occur when the defendant stipulates to the error unless it can be shown from the record that the defendant proposed the stipulation and was thus the source of the error.").

Conclusion

¶16 For the reasons stated above, we affirm the treatment order.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

MICHAEL J. BROWN, Judge