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

IN RE:	1 CA-MH 09-0072
	DEPARTMENT D
NO. MH 2009-001824	**MEMORANDUM DECISION**
	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH-2009-001824

The Honorable Patricia Arnold, Commissioner

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

Richard M. Romley, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
And Victoria M. Mangiapane, Deputy County Attorney
Attorneys for Appellee

T H O M P S O N, Judge

¶1 Appellant seeks reversal of the trial court's order for involuntary mental health treatment. She argues that the

court was required to engage in a colloquy with her to determine whether she knowingly, voluntarily, and intelligently waived her right to have the physicians who evaluated her testify at her treatment hearing. She also argues the petition for court-ordered treatment (PCOT) and physicians' affidavits were statutorily defective. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellant is diagnosed with probable paranoid schizophrenia and a cognitive or mood disorder. In July, 2009, an emergency room psychologist submitted an Application for Involuntary Evaluation (AIE) to Urgent Psychiatric Care (UPC), alleging appellant was persistently or acutely disabled (PAD). The psychologist noted that appellant had a long history of psychiatric care for paranoid schizophrenia and an unspecified personality disorder. She further noted appellant's paranoia resulted in her refusal to comply with health care for her cellulitis, lymphedema, and diabetes. The psychologist further noted appellant refused wound care of her bilateral leg infections and was non-compliant with follow-up appointments with her physicians.

¶3 A crisis therapist prepared a Pre-Petition Screening Report and recommended an inpatient evaluation, noting appellant had "hugely swollen legs" with bubble-like infections. She further noted appellant showed poor insight into her medical

needs and severity of her medical condition and an unwillingness to consider the possible relationship between mental health issues and poor self-care.

¶4 A few days later, a physician filed a petition for court-ordered evaluation (PCOE) asserting that there was reasonable cause to believe appellant was PAD and in need of treatment as a result of a mental disorder. He noted appellant consistently refused voluntary treatment, has multiple medical problems that her paranoia interferes with, had been diagnosed with schizophrenia in the past, and was not caring for her medical problems due to her paranoia.

¶5 The superior court ordered appellant to be evaluated. Following evaluations by two physicians, a PCOT was filed. The petition was supported by the affidavits of the evaluating physicians who concluded that appellant was PAD and gravely disabled. The court set a hearing on the PCOT.

¶6 At the hearing in August 2009, counsel for both parties stipulated to the admission of the 72-hour medication affidavit and the affidavits of the two evaluating physicians in lieu of in-person testimony. During the hearing, two witnesses testified and were cross-examined by appellant’s attorney. Appellant testified on her own behalf and her counsel made closing arguments.

¶7 At the conclusion of the hearing, the court found, by clear and convincing evidence, that appellant was persistently and acutely disabled as a result of a mental disorder. The court concluded that because appellant was either unwilling or unable to accept voluntary treatment, there was no appropriate or available alternative to court-ordered treatment. The court ordered appellant to undergo a combination of inpatient and outpatient treatment for a period not to exceed 365 days, with inpatient treatment not to exceed 180 days.

¶8 Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-2101(K) (2003) and 36-546.01 (2009).

DISCUSSION

¶9 Appellant raises two issues on appeal, which we consider in turn.

1. Stipulation of Physicians' Affidavits

¶10 Appellant first argues that the trial court violated her right to due process when it did not ascertain whether appellant knowingly, intelligently, and voluntarily waived her right to have the physicians testify at her treatment hearing prior to accepting the stipulation to admit the physicians' affidavits. Appellant raises this issue for the first time on appeal. We generally do not consider issues on appeal that were not raised in the superior court, even constitutional issues.

Englert v. Carondelet Health Network, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000). However, waiver is procedural, not jurisdictional, and we may address the issue in our discretion. *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 11, 196 P.3d 819, 822 (App. 2008).

¶11 Civil commitment hearings "may result in a serious deprivation of liberty." *In re Commitment of Alleged Mentally Disordered Person, Coconino County No. MH 1425,* 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995). The proposed patient, therefore, is entitled to due process, which includes "a full and fair adversarial proceeding." *In re MH 2007-001275*, 219 Ariz. at 220, ¶ 13, 196 P.3d at 823. The trial court must hold a hearing prior to ordering treatment. A.R.S. § 36-539(B) provides "[t]he evidence presented by the petitioner or the patient shall include . . . testimony of the two physicians who performed examinations in the evaluation of the patient . . . . The physicians shall testify as to their personal examination of the patient."[1]

[1]We note that the legislature amended A.R.S. § 36-537(B), which now explicitly permits the parties to stipulate to the admission of the physicians' affidavits. A.R.S. § 36-537(B) (Supp. 2009) (testimony of physicians "may be satisfied by stipulating to the admission of the evaluating physicians' affidavits"). This statute became effective September 30, 2009. *See* 2009 Ariz. Sess. Laws, ch. 153, § 7 (1st Reg. Sess.). Because appellant's treatment hearing took place prior to the effective date of the new statute, we consider this appeal under the prior version of the statute.

¶12 Appellant relies on *In Re MH 2007-001275*, in which we held the superior court erred by accepting a patient's waiver of the entire hearing required by A.R.S. § 36-539 without first establishing that the waiver was given knowingly, intelligently, and voluntarily. 219 Ariz. 216, 217, ¶ 1, 196 P.3d 819, 820 (App. 2008). In that case, however, we stated, "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." *Id.* at 221, n.5, ¶ 19, 196 P.3d at 824, n.5.

¶13 Here, appellant did not waive her right to the entire hearing. Appellant's attorney cross-examined the two witnesses who testified and appellant testified on her own behalf. By stipulating to the admission of the physicians' affidavits, appellant's attorney effectively made the decision not to cross-examine the evaluating physicians. "Typically, whether and how to present and cross-examine witnesses is a question of trial strategy that is controlled by counsel and does not require a knowing, voluntary, and intelligent waiver by the client." *In re MH 2009-001264*, ___ Ariz. ___, ___, n.5, 229 P.3d 1012, 1015 (App. 2010) (citations omitted).

¶14 We addressed the same issue in *In re MH 2009-001264*, where the appellant stipulated to the admission of the two evaluating physicians' affidavits in lieu of live testimony but

otherwise was present at trial, testified, and cross-examined other witnesses. *Id.* at ___, ¶ 4, 229 P.3d at 1012. We held no colloquy was required in such cases because (1) the appellant did not raise the issue in the trial court; (2) the appellant invited the alleged error by jointly stipulating to the admission of the affidavits; and, (3) counsel for the appellant made a tactical decision to waive the patient's right to confront and cross-examine witnesses. *Id.* at ___, ¶¶ 7-11, 229 P.3d at 1013.

¶15 The same circumstances are presented here. Consistent with *In re MH 2009-001264,* we find the trial court did not deprive appellant of her right to due process by failing to conduct a colloquy with appellant prior to accepting the stipulation for admission of the physicians' affidavits.

2. Sufficiency of the PCOT and Physicians' Affidavits

¶16 Appellant claims her due process rights were violated, alleging the PCOT and physicians' affidavits were statutorily defective. "Because involuntary treatment proceedings may result in a serious deprivation of appellant's liberty interests, statutory requirements must be strictly met." *In re Maricopa County Superior Court No. MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8, 54 P.3d 380, 382 (App. 2002) (citation omitted). Questions of statutory interpretation in this context are reviewed de novo. *Id.*

¶17 Appellant failed to raise these issues in the trial court and has therefore waived them. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.,* 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317 (2000) ("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.") However, even if the issues were not waived, we find no error.

A. PCOT

¶18 Appellant asserts the PCOT is deficient because it does not identify the screening agency that prepared the petition. She contends that A.R.S. § 36-523(D) (2009) "clearly requires the PCOT to be filed *only* by a *named screening agency* which has prepared the petition." We reject appellant's interpretation of the statute. We note that A.R.S. § 36-523(D) applies only to the PCOE; not to the PCOT. *See* A.R.S. § 36-523 (entitled Petition for evaluation). Subsection (D) of the statute provides that "[a] petition and other forms required in a court may be filed only by the screening agency which has prepared the petition." A.R.S. § 36-523(D). Nothing in this language demands that the screening agency be named in the petitions. The identity of the screening agency in this case is easily discernable by the record.

¶19 The applicable statute is A.R.S. § 36-533 (2009). Similar to § 36-523, nothing in § 36-533 requires the screening

agency be named. A PCOT requires only that certain information about the patient be alleged, that it be accompanied by affidavits of two physicians who conducted examinations during the evaluation period, and that it request the court to order a period of treatment for the patient. A.R.S. § 36-533. We find no deficiency in this case because the PCOT conformed to the statutory requirements.

B. Physicians' Affidavits

¶20 Appellant also contends the physicians' affidavits were defective because they failed to describe the physicians' qualifications to perform the evaluations of appellant. Pursuant to A.R.S. § 36-501 (12) (a) (2009), evaluating physicians must be "licensed physicians, who shall be qualified psychiatrists, if possible, or at least experienced in psychiatric matters[.]"

¶21 Here, each affidavit was signed, dated, and notarized, and stated that the "affiant is a physician and is experienced in psychiatric matters[,]" and indicates the physician is an M.D. We find nothing in the record to support appellant's assertion that the affidavits proffered by the Petitioner were deficient in asserting the physicians' credentials. *See In re MH 2009-001264,* ___ Ariz. at ___, ¶ 14, 229 P.3d at 1015 (finding sufficient proof of physicians' credentials based on affiants' statements that they were physicians and experienced

in psychiatric matters). Accordingly, we reject appellant's claim and find the PCOT and physicians' affidavits met all statutory requirements.

CONCLUSION

¶22 For the foregoing reasons, we affirm the trial court's order.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
SHELDON H. WEISBERG, Judge