IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 08/18/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

	)	No. 1 CA-MH 11-0032
	)	
IN RE MH2011-000074	)	DEPARTMENT B
	)	
	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH2011-000074

The Honorable Veronica W. Brame, Judge *Pro Tempore*

VACATED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Bruce P. White and Anne C. Longo, Deputy County Attorneys
Attorneys for Appellee

Bruce Peterson, Maricopa County Legal Defender — Phoenix
By Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Appellant seeks to vacate the superior court's order for involuntary mental health treatment, arguing the order is void because the State did not strictly comply with applicable

statutes governing court-ordered treatment.[1] For the following reasons, we vacate the order.

BACKGROUND

¶2 In response to a call made to emergency medical services by Appellant's sister, who was unable to contact Appellant by phone to check on his well-being, paramedics delivered Appellant to the emergency room at Phoenix Baptist Hospital. Appellant was disoriented, appeared to be experiencing short-term memory loss, and mumbled repeatedly about religious topics.

¶3 A few days later, Dr. Bunuel filed a petition for court-ordered evaluation ("PCOE"), alleging that Appellant suffered from a mental disorder and was in need of supervision, care, and treatment. He noted that Appellant had a history of "bipolar disorder mania" and was experiencing manic symptoms, including pressured speech and religious preoccupation. He also noted that although Appellant had a seizure disorder, he had sub-therapeutic levels of anti-seizure medication in his system, which could lead to life-threatening seizures. Bunuel stated that Appellant was unable to undergo a voluntary evaluation because Appellant did not believe he needed medication for the

[1] Appellant recently filed a motion for accelerated appeal pursuant to ARCAP 29(a)(2). Because this decision is being filed well before any deadline that would be imposed by ARCAP 29(d), we deny the motion as moot.

seizure disorder and admitted he "probably" had a mental disorder. Attached to the PCOE was an application for involuntary evaluation, as well as an application for emergency admission for evaluation, both completed by a crisis counselor with Compass Mental Health. The superior court ordered that Appellant be involuntarily detained and evaluated.

¶4 Following evaluations by two physicians, a petition for court-ordered treatment ("PCOT") was filed pursuant to Arizona Revised Statutes ("A.R.S.") section 36-533 (2009), alleging that Appellant was persistently or acutely disabled as a result of a mental disorder and recommending combined inpatient and outpatient treatment. The PCOT was supported by affidavits completed by the evaluating physicians, Dr. Boskailo and Dr. Dockins, who both concluded that Appellant was persistently or acutely disabled. Dockins completed the section marked "Physical Examination" on the affidavit but Boskailo left it blank. The court ordered detention of Appellant, appointed counsel to represent him, and set a hearing on the PCOT.

¶5 At the hearing, the State offered the testimony of Boskailo and Dockins, as well as an emergency room nurse and a crisis counselor. Appellant testified on his own behalf and offered the testimony of his family and friends. The court found that Appellant was persistently or acutely disabled, was in need of psychiatric treatment, and was unwilling or unable to

accept voluntary 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. Appellant timely appealed.

DISCUSSION

¶6 Appellant asserts that the order for involuntary treatment must be vacated because Boskailo's examination of Appellant failed to strictly comply with A.R.S. §§ 36-533, -539 (Supp. 2010) and -501(14) (Supp. 2010),[2] as interpreted in *Pinal Cnty Mental Health No. MH-201000029*, 225 Ariz. 500, 240 P.3d 1262 (App. 2010). Appellant contends that Boskailo's failure to conduct a "complete physical examination" renders the superior court's treatment order void.

¶7 Appellant, however, failed to raise this argument to the superior court. Although appellate courts generally will not address issues raised for the first time on appeal, *see Reid v. Reid*, 222 Ariz. 204, 208, ¶ 16, 213 P.3d 353, 357 (App. 2009), given the liberty interests at stake, this case presents "one of 'the extraordinary circumstances' in which an error not presented to the trial court may be presented to an appellate

[2] We cite to the versions of the statutes that were in effect at the time of these proceedings.

court in the first instance,"[3] *see In re MH 2006-000023*, 214 Ariz. 246, 249, ¶ 11, 150 P.3d 1267, 1270 (App. 2007) (vacating the trial court's involuntary treatment order).

¶8 Because involuntary commitment "may result in a serious deprivation of liberty," strict compliance with the applicable statutes is required. *In re Coconino Cnty No. MH 1425,* 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995). Failure to strictly comply "renders the proceedings void." *In re Burchett,* 23 Ariz. App. 11, 13, 530 P.2d 368, 370 (1975).

¶9 At the time of these proceedings, A.R.S. § 36-533, which governs petitions for court-ordered treatment, read as follows:

> B. The petition shall be accompanied by the affidavits of the two physicians who conducted the examinations during the evaluation period and by the affidavit of the applicant for the evaluation, if any. The affidavits of the physicians shall describe in detail the behavior which indicates that the person, as a result of mental disorder, is a danger to self or to others, is persistently or acutely disabled

[3] Although Appellant failed to raise this argument before the superior court, he did not stipulate to admission of the affidavits at the hearing, and therefore did not invite the error. *See In re MH2009-002120*, 225 Ariz. 284, 287, ¶ 8, 237 P.3d 637, 640 (App. 2010) (finding waiver under circumstances where the issue was not raised before the trial court and the appellant invited the error by stipulating to the admission of the physicians' affidavits into evidence). Instead, he objected to the introduction of both affidavits on the grounds that the doctors were available to testify, but his objections were overruled.

> or is gravely disabled and shall be based upon the physician's examination of the patient and the physician's study of information about the patient. A summary of the facts which support the allegations of the petition shall be included.

The physicians who execute the affidavits, absent a stipulation, were required to testify at the hearing on the petition to their "personal examination of the patient." A.R.S. § 36-539(B) (evidence required shall include the testimony of the two physicians who performed examinations in the evaluation of the patient). For purposes of these statutes, at the time of Appellant's commitment proceedings in the superior court, "examination" was defined as "exploration of the person's past psychiatric history and of the circumstances leading up to the person's presentation, a psychiatric exploration of the person's present mental condition *and a complete physical examination*." A.R.S. § 36-501(14) (emphasis added).[4]

¶10 In *Pinal Cnty Mental Health No. MH-201000029*, 225 Ariz. 500, 240 P.3d 1262 (App. 2010), this court rejected the State's argument that a complete physical examination requires

[4] These statutes have since been amended. A.R.S. § 36-533 now requires the affidavit include results of a "complete physical examination of the patient *if this is relevant to the evaluation*." A.R.S. § 36-533 (West 2011) (emphasis added). "Examination" is now defined as ". . . a complete physical examination that is conducted pursuant to § 36-533, subsection B[.]" A.R.S. § 36-501(14) (West 2011). Additionally, physicians are now required to testify to their personal "observations" of the patient. A.R.S. § 36-539(B) (West 2011).

"nothing more than a visual assessment of the patient's presentation and demeanor." We determined that "[t]ogether, §§ 36-533(B) and 36-501(14) require that two physicians must each personally conduct a 'complete physical examination' of the patient." 225 Ariz. at 502, ¶ 7, 240 P.3d at 1264. We interpreted "complete physical examination" as a physical examination directed to the physical as well as the mental health of the patient. *Id.* at 503, ¶ 14, 240 P.3d at 1265. Further, we clarified that such an examination required a physician to conduct a hands-on, "head to foot" examination, "assess[ing] the patient's various bodily systems using various diagnostic techniques." *Id.* at 504, ¶ 15, 240 P.3d at 1266. Therefore, we concluded that a psychiatrist's teleconference evaluation failed to strictly comply with the statute, and we vacated the involuntary treatment order.

¶11 Here, both affidavits contained a heading titled "Physical Examination," which included items such as "Vital Signs," "Cardiovascular," and "Neurologic." Dockins completed this section, noting, *inter alia*, that Appellant's "[h]eart sounds are noted to have regular rate and rhythm," Appellant's "[g]ait is sym[m]etrical and within normal limits," and "patient demonstrates no focal neurological deficits." Boskailo, however, left this section blank. Further examination of the affidavit reveals that Boskailo does not reference any physical

examination he may have conducted of Appellant. Moreover, at the hearing, although Boskailo testified that Appellant suffered from temporal lobe epilepsy, and noted that Appellant had low levels of anti-seizure medication in his system, Boskailo never gave any indication that he conducted a physical examination as contemplated by *MH-201000029*. *See* A.R.S. § 36-539(B) (the physician must testify regarding his "personal examination of the patient"). Accordingly, because the statutory requirements were not strictly complied with, we vacate the superior court's order for involuntary treatment.[5] *See In re MH 2006-000490*, 214 Ariz. 485, 488, ¶ 10, 154 P.3d 387, 390 (App. 2007) (strict compliance with statutory requirements in civil commitment proceedings is imperative because such "proceedings may result in a serious deprivation of appellant's liberty interests") (citation omitted); *see also In re Pinal Cnty Mental Health No. MH-201000076,* 226 Ariz. 131, __, ¶¶ 4-5, 244 P.3d 568, 569 (App. 2010) (relying on *Mental Health No. MH-201000029* to vacate treatment and commitment order because psychiatrist failed to

[5] Because we decide this case on this basis, we do not address Appellant's argument that the order must be vacated because insufficient evidence existed to support the superior court's commitment order.

conduct a "complete physical examination" by interviewing the appellant remotely through video conferencing technology).[6]

[6] The State, in a footnote, "respectfully urges, as authorized by *Neil B. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 62, 406 P.2d 409, 412 (1965), and Arizona Supreme Court Rule 42, E.R. 3.1, that this court reach a different conclusion [than the *MH-201000029* case] for the reasons stated herein." Because the State fails to support this assertion with legal argument, however, we cannot discern what the State is attempting to argue. Although this could result in abandonment and waiver of this issue, *see* ARCAP 13(a)(6), in our discretion, we briefly address the State's assertion. The State appears to suggest that *MH-201000029*, a Division II case, is not binding on this court. *See Neil B. McGinnis*, 2 Ariz. App. at 62, 406 P.2d at 412. Although prior decisions of this court are not binding on us, we find no reason to depart from the court's holding in *MH-201000029* that two physicians must each perform a complete physical examination of the patient before a commitment order may be issued. *See State v. Patterson*, 222 Ariz. 574, 580, ¶ 19, 218 P.3d 1031, 1037 (App. 2009) (The Court of Appeals "consider[s] decisions of coordinate courts as highly persuasive and binding, unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable") (citations omitted). To the extent that the State relies on *Neil B. McGinnis* for the proposition that "the court may look to subsequent changes of the law by the legislature in support of its own view of the prior act," this is only applicable when an "ambiguity" in the law exists, which is not present here. *See Neil B. McGinnis*, 2 Ariz. App. at 62, 406 P.2d at 412. Moreover, that rule of statutory construction applies only when the statute at issue has not been substantively changed by the legislature, and a question arises as to the meaning of its terms. *See id*. Under those circumstances, it is appropriate to consider subsequent legislation with similar language in an effort to understand the meaning of the statute at issue. *See Moore v. Pleasant Hasler Const. Co.*, 51 Ariz. 40, 48, 76 P.2d 225, 228 (1937) (When the "legislature employs in a *subsequent clause* of the same act or in later *legislation on the same subject* language clarifying a doubtful expression theretofore used, the court should give that language the meaning the legislature intended.") (emphasis added). Furthermore, it is without question that pursuant to Arizona Rule of Supreme Court

¶12 The State asserts, however, that we should not rely on *MH-201000029* because the court there "misinterpreted the legislative intent" of the statutes, as reflected by the legislature's "swift[] reject[ion]" of *MH 201000029*'s definition of "complete physical examination." Although the legislature amended the pertinent statutory provisions after *MH-201000029*, these amendments were not effective until April 25, 2011, four months after conclusion of Appellant's hearing on the PCOT, and the statute does not have retroactive application. *See State v. Carver*, 1 CA-CR 10-0594, 2011 WL 2547027, at *5, ¶ 19 (Ariz. App. June 28, 2011). The amendment therefore does not apply here and we express no opinion as to whether it would change our conclusion.

¶13 The State also relies on language from our prior cases stating that an "examination" consists of "not the typical annual physical but a component of a psychiatric examination, which includes observing the patient's demeanor and physical presentation, and can aid in diagnosis." *See In re MH 2008-000438*, 220 Ariz. 277, 279-80, 205 P.3d 1124, 1126-27 (App. 2009); *see also In re MH 2009-002120*, 225 Ariz. 284, 290, ¶ 17, 237 P.3d 637, 643 (App. 2010) (relying on *MH 2008-000438*). We acknowledged this case precedent in *MH-201000029*, but observed

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42, ER 3.1, Appellant had a good faith basis in law for bringing this appeal.

that "the question of what constitutes a 'complete physical examination' was neither squarely before the court in *MH 2008-000438* nor essential to the court's disposition." 225 Ariz. at 505, ¶ 19, 240 P.3d at 1267. Those cases are inapplicable here.

CONCLUSION

¶14 For the foregoing reasons, we vacate the superior court's order for involuntary mental health treatment.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Chief Judge

/s/
_____
PETER B. SWANN, Judge