STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 29, 2010

In the Matter of R. WAMBAR, Minor.

No. 295302
Wayne Circuit Court
Family Division
LC No. 07-462809

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Respondent father appeals as of right from the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g), (i), (j), and (k)(*i*). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Respondent first argues that the trial court referee committed error requiring reversal in referring to his failure to testify during the termination hearing. Respondent claims that this violated his privilege against self-incrimination guaranteed by the Fifth Amendment. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. As written, the Fifth Amendment privilege applies only to criminal cases. Child protective proceedings are civil in nature. MCL 712A.1(2); see *In re Stricklin*, 148 Mich App 659, 666; 384 NW2d 833 (1986). In *Baxter v Palmigiano*, 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976), the Court held that the Fifth Amendment does not preclude an adverse inference where the privilege against self-incrimination is claimed by a party to a civil case. Further, the privilege against self-incrimination is not among the rights the court must advise the parent he or she is giving up by pleading to allegations in a custody petition. MCR 3.971(B)(3). Clearly, the court's remarks did not violate the privilege against self-incrimination.

Respondent's claim concerning the Fifth Amendment privilege is also factually inaccurate. The referee was mainly responding to an objection regarding respondent's counsel's claims concerning his intentions in raising the child. Because respondent did not testify, the referee observed that his plans were unknown. This was not a comment on his "guilt" or "innocence," or an adverse inference that his plans would be unsuitable. Rather, it was a statement of fact that no evidence was presented concerning his plans. Trial counsel's statements are not evidence, as the referee noted.

Respondent further contends that trial counsel's failure to have him testify, and counsel's reference to this in closing argument, constituted ineffective assistance of counsel. The record does not support respondent's claim. The right to counsel in child protective proceedings

includes the right to competent counsel. *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). Courts apply by analogy the standards from criminal cases. *Id.* The respondent must show that counsel's performance was defective, and that the deficient performance was prejudicial and deprived the parent of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). To show prejudice, the respondent must show that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

Here, the record shows no denial of the right to effective assistance of counsel. Respondent clearly made the choice not to testify. His counsel's presumed advice to this effect would not have been a "serious error" depriving him of a fair trial. Had respondent testified, petitioner and the lawyer/guardian ad litem could have elicited additional facts surrounding his prior convictions, termination of parental rights involving an older child, and possibly other damaging evidence based on his testimony. Respondent has failed to overcome the presumption that not calling him to testify constituted sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel's performance was otherwise not deficient. Our review of the record shows no denial of the right to effective assistance of counsel.

Further, we find no clear error in the trial court's finding that the evidence was clear and convincing to satisfy MCL 712A.19b(3)(g), (i), and (j), and that termination was in the child's best interest. MCL 712A.19b(5).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck