

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of L. Price, Minor.

UNPUBLISHED

August 10, 2010

No. 296016

Clinton Circuit Court

Family Division

LC No. 08-020728-NA

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Respondent S. Coon appeals as of right the order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

Respondent does not challenge the existence of the above statutory grounds. Rather, she contends that her trial counsel was ineffective. The issue is not preserved where respondent did not move for a new trial or an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Our review is, therefore, limited to the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a claim of ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness and that she was prejudiced by counsel's deficient performance. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

In this case, respondent does not identify any information omitted by counsel that would have been helpful to her case. She failed to show that counsel's performance fell below an objective standard of reasonableness and that she was prejudiced by counsel's deficient performance. See *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001). Even if respondent's trial counsel's assistance fell below an objective standard of reasonableness, there was no reasonable probability that the result of the proceedings would have been different given respondent's lengthy substance abuse problem and her failure to comply with or benefit from court ordered services. Thus, respondent failed to meet her burden of proof and is not entitled to relief on this ground. See *In re CR*, 250 Mich App at 198.

Respondent contends that her counsel was ineffective because he failed to appear at some dispositional review hearings. An unpreserved claim of constitutional error, like the instant one, is reviewed for plain error affecting substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). A hearing held without counsel can be harmless error where, as in this case, testimony was later taken at the permanent custody hearing and counsel was present. See *In re Hall*, 188 Mich App 217, 223; 469 NW2d 56 (1991). While the appearance of counsel at

every hearing would have better served respondent's need for representation, and more fully protected her constitutional rights, the process afforded her minimally satisfied the United States Constitution. In this case, respondent was represented by counsel throughout the majority of the case, respondent failed to demonstrate that she could maintain a drug and alcohol free lifestyle and provide L. Price with a stable home life, and the outcome of the case would not have been different had respondent's counsel appeared for every hearing. Therefore, reversal is not warranted on this ground.

Respondent next argues that, because her attorney failed to appear for the January 8, 2009 dispositional review hearing, he was unable to elicit testimony from the caseworkers about services that could have assisted respondent given the diagnosis made in her psychological assessment. Respondent's argument is without merit. The caseworkers made recommendations for services that would assist with respondent's issues. Moreover, if necessary, respondent could have sought to have additional services implemented at any point during the case. She also argues that, due to her attorney's absence, there were no questions asked about whether she was provided assistance with housing. This argument is also not outcome determinative of the case. If respondent or her attorney had any concerns about housing assistance or assistance with any other services, they could have addressed them outside of the courtroom, at any time after the hearing, or at any future hearing, which they did not do. Additionally, the trial court indicated its willingness to schedule another hearing if respondent needed to address something with her counsel's assistance. Although respondent indicated that she was not comfortable without counsel and that she wanted to reschedule the hearing, she did not identify any issues that needed to be addressed.

Respondent further argues that, because her attorney failed to appear for the hearing on January 8, 2009, evidence was admitted without the benefit of cross-examination. Respondent fails to demonstrate how cross-examination would have made a difference in her case. And, although respondent's attorney also failed to appear for the next dispositional review hearing on April 16, 2009, the trial court continued that hearing for the presence of her counsel. Respondent then argues that the evidence she sought to admit was not admitted at the continued hearing when her counsel appeared, but respondent failed to show how this prejudiced her case. To the contrary, it may have been a matter of trial strategy that her counsel decided against seeking the admission of this evidence. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Therefore, respondent failed to establish that she was denied the right to counsel on this basis.

Respondent further argues that her counsel performed ineffectively by failing to object to petitioner's leading questions at the permanency planning hearing on October 8, 2009. The record does reflect that the prosecuting attorney posed some leading questions; however, use of them was not pervasive. Respondent has not overcome the presumption that counsel's decision not to object constituted sound trial strategy. See *Unger*, 278 Mich at 242. Counsel may have refrained from objecting so as not to unnecessarily attract unfavorable attention to respondent. For this reason, it cannot be concluded that counsel's performance fell below an objective standard of reasonableness because he failed to object to some leading questions.

Respondent also argues that her attorney did not object to the admission of or ask questions about the physician's letter or the police report admitted into evidence by petitioner. However, she does not indicate how an objection to the documents' admission or questions about

the documents would have made a difference to her case. Here again, respondent has not overcome the presumption that counsel's decision not to object to the admission of the documents constituted sound trial strategy. See *Unger*, 278 Mich at 242. To the contrary, had respondent's attorney asked questions about these documents he might have influenced the trial court to give them additional weight and attention to the detriment of respondent's case.

Respondent contends that, during the termination hearing on December 16, 2009, her counsel failed to object to hearsay statements made by the caseworker. This argument is also without merit as the trial court may consider all relevant and material evidence, including hearsay, at the dispositional phase of a termination proceeding. See MCR 3.973(E); *In re Ovalle*, 140 Mich App 79, 82; 363 NW2d 731 (1985). Thus, it would have been improper for respondent's counsel to object to hearsay testimony in this instance.

Finally, on January 4, 2010, respondent's attorney requested that any line of questioning related to her September 20, 2009 car accident be limited so that she would not subject herself to criminal liability. Respondent argues that her attorney did not object when the prosecuting attorney asked about the accident. Once again, respondent failed to show that she was prejudiced by counsel's allegedly deficient performance. See *Carbin*, 463 Mich at 590. In her brief on appeal, respondent indicates that the trial court advised her to invoke her Fifth Amendment right to protect herself against criminal liability if she were questioned about the accident and, when asked, respondent stated that her attorney requested that it not be discussed. Although respondent argues that she did not know what to do and her attorney did not intervene on her behalf, she never subjected herself to criminal liability through her testimony. Even though she did not specifically reference her Fifth Amendment rights, she clearly communicated that she would not testify on the subject. Respondent's counsel could have objected, but there was no reason for him to do so. Moreover, his failure to object might have been trial strategy aimed at avoiding additional scrutiny of the issue. See *Unger*, 278 Mich at 210.

Under the circumstances of respondent's longstanding substance abuse problems and her failure to benefit from treatment, the trial court was unlikely to rule in any way other than terminating her parental rights. Clear and convincing evidence was presented warranting termination pursuant to MCL 712A.19b(3)(c)(i), (g), and (j) and warranting a finding that termination was in the child's best interests. Thus, respondent's argument fails.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad