STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 14, 2010

In the Matter of J. M. BAILEY, Minor.

No. 298706
Wayne Circuit Court
Family Division
LC No. 00-389987

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Respondent mother appeals as of right from an order that terminated her parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (g), (j), and (k)(*i*). We affirm.

Respondent first argues that a new trial must be ordered because the tapes of the termination hearing were lost and there is no transcript. We disagree. Respondent has waived this issue for appellate review by stipulating to a settlement of facts, see MCR 7.210(B)(2)(c). If respondent believed that the statement was incomplete or inaccurate, she could have requested an evidentiary hearing. Instead, she stipulated that the settlement was an accurate, fair, and complete statement of the proceedings. A party cannot acquiesce to an event in the lower court and then raise it as an issue on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). We will nevertheless address respondent's argument. Whether the unavailability of a trial transcript denies a parent her due process right to appellate review is a constitutional issue that is reviewed de novo on appeal. See *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

Although a settled statement of facts was stipulated to by the parties, respondent argues that it was not an adequate substitute for the full hearing transcripts. The inability to obtain transcripts of lower court proceedings may so impede a party's right to appeal that a new trial must be ordered. *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981). Where it is impossible to review the regularity of the proceedings due to the lack of transcripts, reversal is required to ensure that a party's right to appeal as guaranteed by Const 1963, art I, § 20, is protected. *Horton*, 105 Mich App at 331. This Court must examine whether the lack of transcripts so impedes the enjoyment of the party's constitutional right to appeal that a new trial must be ordered, but if the remainder of the record sufficiently allows evaluation of a party's appellate claims, his constitutional right is satisfied. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). The sufficiency of the record depends on what questions the Court is being asked to resolve. *Id.* at 835. It is the appellant's burden to show that he has suffered prejudice because of the lack of transcripts, providing more than just speculation to

support his claim. *People v Abdella*, 200 Mich App 473, 475-476; 505 NW2d 18 (1993); *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986).

Respondent has failed to show that the inability to review the termination hearing transcript has so impeded her right of appeal that a new trial must be ordered. Child protective proceedings are one continuous proceeding. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). The remainder of the record, which includes the transcripts of numerous review and permanency planning hearings, allows this Court to evaluate respondent's issues on appeal. The transcripts from the termination hearing are not necessary for a meaningful review of respondent's claims. As will be discussed at further length below, there was clear and convincing evidence to support termination of respondent's parental rights based on her failure to substantially comply with and benefit from the parent-agency agreement. Respondent was represented by the same attorney throughout the entire proceedings. He stipulated to the settlement of facts with regard to the termination hearing. Respondent has failed to show that she has been prejudiced by loss of the transcript.

Respondent next argues that the trial court erred in terminating her parental rights. We disagree and hold that the trial court did not clearly err in finding that statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Termination of parental rights is appropriate if at least one ground for termination has been proven by clear and convincing evidence. *Id.*

The evidence supports the referee's finding that, although partially compliant with her treatment plan, respondent had not made sufficient progress in reuniting with the child. Drug use was one of the primary reasons the child was removed from respondent's care. Respondent did nothing for several months, but then eventually became involved and attended an inpatient treatment clinic. However, respondent began to test positive for opiates without proof of a valid prescription and, after testing positive, she stopped testing altogether. Respondent's long history of drug abuse, therefore, remained an issue that was not adequately remedied.

Additionally, respondent had become inconsistent in attending family therapy. While the child was steadfast in his desire not to be reunified with respondent, respondent did not take full advantage of family therapy which she attended with the minor child. Although respondent faults the agency's administration of services, she did not utilize and benefit from the services that were available. She cannot now complain that services were inadequate.

Further, the child was 12 years old when the proceedings began. Unlike situations in which very young children are involved, the child was provided the opportunity to express his opinion and desires. The referee did not err in taking the child's opinion into account. In fact, it was in keeping with the professionals' advice. Respondent's Clinic for Child Study evaluation concluded:

> However, despite [respondent's] current efforts, she has only maintained sobriety for a short period of time thus far. Her refusal to acknowledge the abuse her son sustained is also concerning, and suggests that she still needs to work on accepting that this has severely damaged her relationship with her son or that

> perhaps her ability to recall the extent of the abuse has been hindered by her history of substance abuse at the time. Nevertheless, [the child] continues to struggle with the long-term effect of these circumstances to such a degree that he expressed a desire to remain in his current placement. Thus, a lot of issues need to be addressed in individual and family treatment before reunification can be considered. Given [respondent's] history, even with such assistance, the prognosis for her ability to provide a safe, stable environment for her son is guarded. Consideration of transitioning her son to her care should be done gradually, and *only after they have addressed the issues discussed above in family therapy and [the child] has consented to contact with his mother*. [Emphasis added.]

Respondent complied with many aspects of her treatment plan, but she did not adequately benefit. Her drug use remained an issue, and she failed to understand the child's needs. Respondent became defiant and detached. She stopped drug screening and also stopped communicating with the foster care worker. Respondent tried to maintain contact with the child, but he was not interested in visiting his mother, much less returning to her care. His opinion was best expressed by the worker when she said that the child could forgive his mother, but simply did not trust her. This was reasonable in light of the extensive physical abuse the child experienced over the years. Therefore, the conditions leading to adjudication continued to exist with no likelihood that they would be remedied within a reasonable time. Respondent was without the ability to provide the child with proper care and custody. It was not just a matter of respondent being able to provide adequate food and shelter. Respondent also needed to provide for the child's mental well-being. The evidence demonstrated that their relationship had been damaged beyond repair. Forcing the child to return to his mother's care would have likely caused him significant psychological damage.

Having found statutory grounds for the termination of respondent's parental rights established by clear and convincing evidence, the referee then had to determine whether termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5). The child spent much of his time out of respondent's care from the time he was born until he was age five. He was sexually assaulted by his mother's teenaged brother. The child testified that he suffered nearly daily beatings and that he often watched respondent abuse drugs. He was no longer interested in maintaining a relationship with her. The child was placed with the same temporary guardians that had played such an important role in his early life. He was happy, safe, and content in their care. He had suffered a life of uncertainty and turmoil while with respondent. He was entitled to permanence and stability.

Respondent next argues that the trial court erred in proceeding with certain hearings in her absence. Generally, the Court reviews a ruling on a motion for a continuance for an abuse of discretion. *In re Jackson,* 199 Mich App 22, 28; 501 NW2d 182 (1993). However, respondent failed to raise the issue in the trial court and did not ask the trial court to exercise its discretion. Because it has not been properly preserved, the Court's review is limited to plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights if it caused prejudice and affected the outcome of the proceedings. *Id*. Plain error occurs when an error seriously affected the fairness, integrity, or public reputation of

the judicial proceedings. *In re Osborne (After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

From the outset, it should be noted that, contrary to respondent's assertions, counsel did, in fact, appear at the April 7, 2010, permanency planning hearing. Counsel indicated that respondent "does not appear to be here. I did send her a letter at her last address I had for her advising her of this court date." Counsel then proceeded to cross-examine the foster care worker.

MCR 3.972(A) requires that an adjudicative hearing be held within 63 days after the child's removal. Trial may be postponed on stipulation of the parties for good cause, because process cannot be completed, or because a necessary witness is absent. MCR 3.972(A)(1-3). MCR 3.923(G) also applies to adjournments and continuances in child protective proceedings and provides that an adjournment should only be granted for good cause, after taking into consideration the best interests of the child. This Court has held that "good cause" means a "legally sufficient or substantial reason." *In re Utrera,* 281 Mich App 1, 10-11; 761 NW2d 253 (2008). The trial court did not abuse its discretion in this case. The child was removed in February 2008. The adjudication hearing took place on May 23, 2008. Respondent did not attend, although she had received proper notice. Her attorney indicated that respondent was aware of the court date, but was sick. He was prepared to proceed in her absence. Respondent was adequately represented at the hearing and fails to indicate how her presence would have impacted the referee's decision.

Similarly, respondent fails to indicate how her absence from the June 23, 2008, dispositional hearing affected her substantial rights. MCR 3.973(D)(3) specifically provides that, with regard to a disposition hearing, the court "may proceed in the absence of parties provided that proper notice has been given." Respondent's attorney stated that respondent "is not here. I cannot explain her absence." Respondent sporadically attended the various hearings. There is simply no support for her contention that she was prejudiced when the court proceeded in her absence on these occasions.

Finally, respondent argues that she was denied the effective assistance of counsel at trial. Respondent failed to file a motion for a new trial or request a hearing in the trial court, as required by *People v Ginther,* 390 Mich 436, 441-442; 212 NW2d 922 (1973). Therefore, her allegation of ineffective assistance of counsel has not been preserved for appellate review, and review is limited to mistakes apparent on the record. *People v Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002).

Generally, to establish ineffective assistance of counsel, a respondent must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Odom,* 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and a respondent bears a heavy burden of proving otherwise. *People v LeBlanc,* 465 Mich 575, 578; 640 NW2d 246 (2002).

Respondent complains that counsel should have called her therapist to testify regarding her progress. However, decisions about what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Respondent fails to demonstrate how the proceedings would have ended any differently. The child did not want to be reunited with respondent and their relationship had been irreparably damaged, given respondent's treatment of him in the past. She was not in compliance with her treatment plan requirements for drug screens and family therapy. Thus, even if the therapist had offered favorable testimony, it is unlikely that the proceedings would have ended differently.

Additionally, as discussed above, there was no error in proceeding in respondent's absence at hearings. Any request for adjournment or continuance would have been futile. Counsel was not required to make meritless motions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Counsel's failure to move to adjourn did not fall below the objective standard of reasonableness.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood