STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 28, 2010

In the Matter of LACY, Minors.

No. 298305
Wayne Circuit Court
Family Division
LC No. 07-470450

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Respondent father appeals by right an order terminating his parental rights to his children pursuant to MCL 712A.19b(3)(c)(*i*), (g), (j), and (k)(*i*). We affirm.

I. BASIC FACTS

The trial court obtained jurisdiction of the children in July 2007. The children, who were living in Michigan with their mother, had been referred to the Department of Human Services (DHS) because their mother did not have a stable home to care for them. At the time, respondent father had recently been released from prison. When the court took jurisdiction over the children, and during the pendency of the proceedings below, respondent resided in Ohio.

Respondent attended the dispositional hearing in October 2007 and expressed his desire to be reunited with the children. An initial service plan had not been adopted for respondent. Consequently, the trial court ordered the DHS to provide respondent with referrals for counseling, parenting classes, and domestic violence classes in Ohio and to obtain an "out of town investigation" (OTI), see MCL 3.711 *et seq.*, from Ohio so that respondent could begin receiving services in Ohio.

The OTI had not been returned from Ohio at the next dispositional hearing in February 2008. In the meantime, respondent was required to participate in parenting classes and individual counseling, although he would not be provided with a formal parent agency agreement (PAA) until the OTI had been completed. Thus, respondent was provided with a list of agencies that provided services in Ohio, but no referrals could be made.

By the next dispositional hearing in May 2008, respondent had completed a parenting class and the trial court had received the OTI. The investigation found that respondent had been convicted of attempted aggravated murder of the children's mother. It noted that respondent had made positive changes in his life, but due to his prior conviction placement of the children with

him was prohibited under Ohio law. See Ohio Revised Code, 2151.414(E)(7)(a) (listing attempted aggravated murder, ORC 2903.01, as an excludable offense that prohibits placement of the children with respondent).

At the hearing in August 2008, respondent suggested that the trial court place the children with him in Ohio. The court responded that it did not have the authority to do so. Respondent failed to appear at dispositional hearings in November 2008 and January 2009. At the January 2009 hearing, DHS recommended termination of respondent's parental rights. Respondent did not appear in court again until the termination hearing on May 11, 2010. After receiving relevant testimony, the trial court terminated respondent's rights.

II. REUNIFICATION EFFORTS

Respondent argues that the trial court's order should be vacated because DHS failed to make reasonable reunification efforts and provide him with a services plan. In his view, the present matter is similar to *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), and the trial court should have proceeded with a reunification plan despite Ohio law that barred placement of the children with him in Ohio. We disagree. Because respondent never objected on these grounds below, our review is for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009). Further, to the extent that resolution of this appeal involves questions of law, our review is de novo. See *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

Certainly, Michigan law requires that "reasonable efforts" toward reunification be made in all cases except those in which "aggravated circumstances" exist. MCL 712A.19a(2). Because respondent's conviction for attempted aggravated murder does not constitute an aggravated circumstance under Michigan law, the DHS was required to make reasonable efforts to reunify respondent with the children. See MCL 712A.19a(2). The failure to provide services deprives a parent of meaningful participation and renders insufficient the basis on which a trial court concludes that termination is appropriate. *In re Rood*, 483 Mich at 114-122; *In re Mason*, 486 Mich at 159-160.

Contrary to respondent's allegations, the record shows that the DHS did undertake reasonable efforts under the circumstances. The DHS required respondent to participate in certain programs and provided him with a list of agencies where he could obtain these services in Ohio. Respondent was allowed visitation in Michigan, although he did not regularly take advantage of it, and he had regular telephone contact with the children. The DHS also initiated an investigation under the Interstate Compact, MCL 3.711, with Ohio and Ohio verified respondent's housing and employment. In short, respondent was evaluated for future placement of his children and both the court and the DHS facilitated his access to services and agencies. Nonetheless, respondent contends he was not provided with services because no formal PAA was ever finalized. However, the lack of a PAA was the result of the fact that placement of the children with respondent in Ohio had to be approved by that state. See MCL 3.711. Ultimately, placement in that state was not approved and thus no PAA was warranted.

Given the foregoing, we fail to see how *In re Mason*, 486 Mich at 142, compels a conclusion that respondent was denied due process based on a lack of reasonable reunification

efforts. In *Mason*, 486 Mich at 156-157, the father was denied the opportunity to plan for his child because the DHS made no efforts to reunite the father with the child simply because the father was incarcerated. In contradistinction, the DHS in the present matter made efforts to place the children with respondent in Ohio. That Ohio law prohibits such a placement does not somehow make the DHS's efforts non-existent. Rather, respondent was given a meaningful and adequate opportunity to participate in the proceedings and services were provided to the extent necessary under the circumstances.

Lastly, we also reject respondent's related argument that the DHS should have proceeded with a reunification plan despite Ohio law that barred placement of the children with him in Ohio In respondent's view, Ohio's refusal to monitor the children and arrange services for him did not prevent a Michigan court from doing so. Respondent cites no authority for this proposition and, thus, we are not required to consider this argument. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Nonetheless, we note that respondent's suggested course of action is contrary to law. Article III, § 4 of the Interstate Compact, MCL 3.711,[1] prohibits the DHS from sending the children, or "causing [them] to be sent" to Ohio until Ohio notifies the DHS that the placement is not "contrary to the interests of the child[ren]." However, Ohio informed the DHS that placement with respondent in Ohio was prohibited because respondent had committed an excludable offense under Ohio law. Thus, the law prohibited the court from ordering the DHS to continue reunification efforts that culminated in sending the children to Ohio, or to otherwise monitor placement of the children in that state.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent also argues that he was denied effective assistance of counsel. In his view, counsel should have corrected the trial court's alleged misconception that his crime was not an excludable offense under Michigan law and argued that respondent was entitled for planning under Michigan law. This argument is unavailing. The record shows that counsel did suggest that planning continue under Michigan law despite the Interstate Compact. And, while the trial court may have misstated that respondent's crime was an excludable offense under Michigan law, a review of the entire proceeding demonstrates that the trial court understood the law and simply misspoke. No objection was necessary under the circumstances. Because counsel did not error, his performance was not deficient. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994) ("[To establish ineffective assistance of counsel, a respondent] must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the [respondent] as to deprive him of a fair trial."). Nonetheless, to the extent that the trial court did have some misconception regarding excludable offenses, this

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[1] That provision provides in relevant part:

> (4) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

alleged error did not render the proceedings fundamentally unfair or unreliable. Thus, respondent is not entitled to any relief on appeal.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello