STATE OF MICHIGAN

COURT OF APPEALS

In re SOULES, Minors.

UNPUBLISHED
January 12, 2016

No. 328102
Newaygo Circuit Court
Family Division
LC No. 13-008313-NA

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the minor children, ES1 and ES2, at the initial disposition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case stems from an investigation that took place after SL, respondent's then-15-year-old stepdaughter, disclosed that respondent had been sexually molesting her periodically since she was 12 years old. In subsequent forensic interviews, SL disclosed various instances of sexual contact between her and respondent, and stated that she believed respondent had installed cameras in her bedroom, which he used to obtain nude photographs of her. SL said that respondent confronted her with the photographs and threatened to distribute them on the internet if she did not have sex with him. SL's allegations ultimately led to respondent being convicted of five counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) and (b), one count of accosting a child for immoral purposes, MCL 750.145a, and one count of installing an eavesdropping device, MCL 750.539d. Following his convictions, the trial court adjudicated respondent on the basis of a no-contest plea on March 23, 2015. A termination hearing was held on May 28, 2015. On the basis of SL's disclosures, as relayed by various witnesses and the transcript from respondent's criminal trial, and the certified copy of respondent's criminal convictions, the trial court terminated respondent's parental rights to ES1 and ES2.[1]

[1] On appeal, respondent does not challenge the trial court's findings that a statutory ground for termination was proven by clear and convincing evidence, or that termination was in the children's best interests. Nonetheless, we have reviewed the record and conclude that the trial

II. DUE PROCESS

Respondent first argues that his due process rights were violated when petitioner failed to provide him with notice of or access to an audio recording and/or typed transcript of one of SL's forensic interviews before the termination hearing. We review this unpreserved constitutional claim for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

The record reflects that one of SL's forensic interviews was recorded by a Michigan State Police trooper. From that recording, a typed transcript of the forensic interview was produced. Ultimately, the audio recording was inadvertently destroyed, but the transcript was admitted into evidence at respondent's termination hearing. Respondent argues that because he was never provided notice of or access to this evidence, his due process rights were violated by its admission at the termination hearing. We disagree.

There is no general constitutional right to discovery "in any judicial or quasi-judicial proceeding[.]" *Henderson v Dep't of Treasury*, 307 Mich App 1, 9; 858 NW2d 733 (2014). Instead, discovery in child protective proceedings is governed by MCR 3.922, which, if adhered to, "should avoid prejudice to either party's due process rights." *In re Dearmon*, 303 Mich App 684, 699; 847 NW2d 514 (2014). MCR 3.922 provides, in relevant part, that "all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing," are discoverable "as of right in all proceedings *provided they are requested* . . . ." MCR 3.922(A)(1)(a) (emphasis added). The record does not indicate that respondent's trial counsel ever made any discovery requests, despite being aware that the interview had occurred. Therefore, under the plain terms of MCR 3.922(A), petitioner was not required to disclose the audio recording or written transcript.

Respondent's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), does not alter this conclusion. Although there is no general constitutional right to discovery in judicial proceedings, the Supreme Court in *Brady*, 373 US at 87, held that in the context of criminal trials, "the suppression by the prosecution of evidence favorable to an accused *upon request* violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added.) Even assuming that *Brady* applies in the context of child protective proceedings, no violation occurred in this case because respondent's attorney made no discovery request. Further, nothing suggests that SL's forensic interview contained any exculpatory evidence. When evidence is not exculpatory, "the due process concerns of *Brady* . . . [a]re not involved." *People v Taylor*, 159 Mich App 468, 479; 406 NW2d 859 (1987). Simply put, respondent was not denied due process by petitioner's failure to provide notice of or access to the audio recording or transcript.

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court did not clearly err by finding that at least one statutory ground was met and that termination was in the children's best interests.

III. NO-CONTEST PLEA

Respondent next argues that the trial court erred by "assuming" a no-contest plea was entered at the March 23, 2015 adjudication when, in fact, it was not. Alternatively, respondent argues that the no-contest plea was invalid. We disagree. We review these unpreserved claims for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App at 135.

At the outset, to the extent respondent suggests that he did not actually enter a no-contest plea, his claim lacks merit. The record from the March 23, 2015 hearing reflects that the trial court never explicitly asked respondent how he was pleading to the allegations. Likewise, respondent did not expressly state that he was pleading no contest. Nonetheless, given the context of the proceeding, there is no dispute that respondent was entering a no-contest plea. His attorney confirmed as much on the record. In response, the trial court engaged in a plea colloquy with respondent, during which respondent expressed that he understood his rights and that it was his voluntary choice to enter the plea. The trial court then heard testimony, at the conclusion of which it found that respondent's plea was "appropriate." Accordingly, even though it was not explicitly stated, it is abundantly clear that respondent entered a no-contest plea.

Respondent's alternative claim that the plea was invalid also lacks merit. MCR 3.971 governs a respondent's plea in a child protective proceeding and provides that a respondent may enter a plea of admission or no contest to an original or amended petition at any time. MCR 3.971(A). Before accepting a plea, the trial court is required to advise the respondent on the record of the allegations in the petition, his right to an attorney, the rights that he will be giving up if he pleads no contest, and the consequences of the plea. MCR 3.971(B)(1) through (4). The trial court "shall not accept a plea . . . of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made," MCR 3.971(C)(1), and "without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true," MCR 3.971(C)(2). If the respondent seeks to enter a plea of no contest, the trial court may not question the respondent in order to obtain a factual basis for the plea, but rather must obtain a factual basis "by some other means[.]" MCR 3.971(C)(2).

The record reflects that the trial court complied with MCR 3.971 and that respondent's no-contest plea was knowingly, understandingly, and voluntarily made. As noted above, respondent's attorney indicated at the March 23, 2015 hearing that respondent intended to enter a no-contest plea. In response, the trial court engaged in a plea colloquy with respondent, during which the court advised respondent of his rights and the consequences of entering the plea. Respondent indicated that he understood the allegations against him, the rights he was giving up by pleading no contest, and that the decision was his own. After the colloquy, the court took testimony from a caseworker and concluded that there was an independent factual basis for assuming jurisdiction. Accordingly, there was no plain error in the plea proceedings.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, respondent argues that he was deprived of the effective assistance of counsel based on his trial counsel's various shortcomings. We disagree. Because no evidentiary hearing was held on respondent's claims, we review the claims for errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001), overruled on other grounds by *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). To prevail on a claim of ineffective assistance, a respondent must establish both that (1) his trial counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

Respondent first argues that his trial counsel was ineffective for failing to adequately investigate and/or prepare for the case; i.e., "no discovery was made, no subpoenas [were] sent, [and] no interviews [were] conducted on [respondent]'s behalf." Because it is not apparent from the lower court record what actions respondent's trial counsel took or did not take to prepare for the termination hearing, this claim is precluded from our review. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). In any event, respondent has not established a reasonable probability that further preparation by his trial counsel would have altered the outcome of the proceedings. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Respondent has not identified any witnesses or evidence that, with additional preparation, his trial counsel could have discovered or presented that would have affected the outcome of the termination hearing. As the appellant, respondent bears the burden of establishing a factual predicate for his claims. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). He has failed to do so here.

Respondent next argues that his trial counsel was ineffective for failing to insist that SL testify in person at the termination hearing. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *Horn*, 279 Mich App at 39. Respondent has failed to overcome the strong presumption that his trial counsel's decision was anything other than sound trial strategy. There are several possible reasons why respondent's trial counsel could have decided not to have SL testify in person, including, for example, if he wanted to limit the extent of the evidence regarding respondent's sexual abuse and instead focus on whether, in light of respondent's convictions, termination was warranted. See *People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589, vacated in part on other grounds, 493 Mich 864 (2012). Because there were legitimate strategic reasons for choosing not to have SL testify, counsel's conduct "fell within the range of reasonable professional conduct." *Id*.

Respondent next argues that his trial counsel was ineffective for agreeing to the trial court's dismissal of several other children, including SL,[2] from the case without first consulting with respondent or considering how this decision would affect the outcome of the case.

[2] The record reflects that the children were all respondent's step-children, i.e., the biological children of ES1 and ES2's mother.

Respondent was not the biological father of the other children, and there is nothing in the record to indicate that he adopted them. As such, he had no parental rights to those children. See MCR 3.903(A)(7) (defining the term "father"). Moreover, neither the mother nor the children's respective fathers were respondents in the proceedings. Accordingly, the trial court correctly concluded that there was no reason for the children to remain parties to the proceedings. Any objection by respondent's counsel would have been meritless, and defense counsel is not ineffective for failing to raise a futile objection. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Respondent argues that his trial counsel was ineffective for advising him to enter a no-contest plea. To the extent respondent argues that his trial counsel did not consult with him about entering a no-contest plea, such an assertion is belied by the record of the February 11 and March 23, 2015 proceedings, during which his attorney indicated that he had discussed the matter with respondent and that it was respondent's intention to enter a no-contest plea. Regarding the propriety of the advice, we express no opinion as to whether respondent's trial counsel was objectively deficient for advising respondent to enter a no-contest plea because even assuming that fact, respondent cannot show prejudice. A trial court has jurisdiction over any child whose home environment is an unfit place for a child because of criminality or depravity on the part of the parent. MCL 712A.2(b)(2). A petitioner is only required to prove a statutory ground for jurisdiction by a preponderance of the evidence. MCR 3.972(C)(1).

In this case, the evidence ultimately admitted at the termination hearing—including SL's disclosures and the certified copy of respondent's convictions for multiple counts of CSC II, accosting a child for immoral purposes, and installing an eavesdropping device—clearly proved, by a preponderance of the evidence, that respondent's home was an unfit place for ES1 and ES2. MCL 712A.2(b)(2). Therefore, proceeding to trial instead of entering a no-contest plea would have been a futile endeavor. Because respondent cannot show that he was prejudiced by his trial counsel's advice, he has not established that his counsel's assistance was ineffective.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien