

STATE OF MICHIGAN
COURT OF APPEALS

In re SMITH, Minors.

UNPUBLISHED
April 26, 2016

Nos. 329212; 330101
Hillsdale Circuit Court
Family Division
LC No. 15-000317-NA

Before: SAWYER, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent mother and respondent father appeal as of right the trial court's order terminating their parental rights to the minor children, NS and JS, at the initial disposition pursuant to MCL 712A.19b(3)(g), (j). We affirm.

The record in this case reflects that the parents have a lengthy history of involvement with the Department of Health and Human Services (DHHS) and the trial court stemming from the parents' abuse of various drugs, including methamphetamine. In May 2013, a child protective proceeding regarding mother's oldest son, XJ, was initiated. At the outset of that case, even though mother was pregnant with NS and JS, she tested positive for methamphetamine. She subsequently admitted that she had used methamphetamine throughout her pregnancy, and JS's meconium tested positive for methamphetamine at birth. When mother tested positive for methamphetamine again in October 2013, a second child protective proceeding was initiated and NS and JS were removed from the respondents' care.

In conjunction with these two proceedings, the parents were offered numerous services to address their substance abuse issues so that they could provide suitable care for XJ, NS, and JS. Mother initially struggled to obtain sobriety and voluntarily relinquished her parental rights to XJ in December 2013. Eventually, though father was no longer living with mother, the parents made progress and NS and JS were returned to their mother's care in July 2014. For the next seven months, mother remained under court supervision and father was afforded supervised parenting time. Ultimately, the case involving NS and JS was dismissed in February 2015. Shortly thereafter, the parents reunited and, from then until June 2015, the children remained in the parents' care.

On June 1, 2015, the children were again removed after the parents were arrested in connection with police searches of their two residences, during which methamphetamine, components for making methamphetamine, and active one-pot methamphetamine laboratories were found. This current child protective proceeding was initiated on June 2, 2015, and the trial

court assumed jurisdiction over the children following a July 28, 2015 adjudication trial. Ultimately, on August 19, 2015, both parents' parental rights with respect to NS and JS were terminated.

I. TRIAL COURT'S EXERCISE OF JURISDICTION

On appeal, both parents argue that the trial court erred in finding proof of a statutory ground sufficient for the trial court to exercise jurisdiction over NS and JS. We disagree. We review a trial court's decision whether to exercise jurisdiction for clear error. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013).

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014) (citation omitted). "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase." *Id.* Jurisdiction is established pursuant to MCL 712A.2(b). *Id.* As relevant to the instant case, that statute provides that a trial court has jurisdiction in proceedings concerning children under 18 years of age "[w]hose home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the juvenile to live in." MCL 712A.2(b)(2). To exercise jurisdiction, the trial court is required to find that this or another statutory ground found in MCL 712A.2(b) has been proved by a preponderance of the evidence. *In re BZ*, 264 Mich App at 295; MCR 3.977(E)(2).

The evidence produced at the adjudication trial was sufficient to support the trial court's jurisdictional determination. The police executed search warrants at two residences connected to the parents: one at a trailer on East Drive, and another at an apartment on Heathcliff Avenue. At the East Drive trailer, the police found four active one-pot methamphetamine laboratories as well as several components for manufacturing methamphetamine on the floor of the living room. They also found methamphetamine in a drawer in the living room and components for making methamphetamine in a burn pit outside the trailer. At the Heathcliff apartment, the police again found methamphetamine and components for manufacturing methamphetamine. The parents were subsequently arrested and interviewed. Both admitted to recently using methamphetamine and mother admitted having previously witnessed father manufacture methamphetamine at the East Drive trailer on a "handful of occasions." Given this evidence, the trial court did not clearly err in determining that the children's home was unfit "by reason of neglect, cruelty, drunkenness, criminality, or depravity" on the part of the parents. MCL 712A.2(b)(2).

In support of their challenge to the trial court's jurisdictional decision, the parents emphasize the apparent lack of evidence actually connecting them or the children to the East Drive trailer. Specifically, the parents assert that they were no longer living at the East Drive trailer at the time of the June 1, 2015 drug raid, but rather were living at the Heathcliff apartment. As such, they claim that there was no evidence that they were actually part of the methamphetamine laboratories found at the East Drive trailer or that the children were ever exposed to the hazardous conditions at the East Drive trailer. We disagree. There was ample

evidence presented to connect the parents and children to the hazards present in the East Drive trailer. As far as respondents are concerned, the trailer was leased in the names of both respondents, mail and other items bearing the respondents' names were found inside, and the police observed mother drive by the trailer when they were searching it. Moreover, mother admitted to police that she had personally witnessed father manufacture methamphetamine in the trailer on a "handful of occasions." With regard to NS and JS's exposure to the hazardous materials at the East Drive trailer, children's toys, children's clothes, and mail bearing NS's name were found inside the trailer and many of the hazardous materials used to manufacture the methamphetamine were also found in areas accessible to children. Nonetheless, the trial court's jurisdictional decision did not rest solely upon the conditions present in the East Drive trailer as it was also supported by the fact that methamphetamine and components for making methamphetamine were found at the Heathcliff apartment and the fact that the parents both admitted using methamphetamine in the days before their arrest. We therefore conclude that the trial court did not clearly err in finding that a statutory ground for jurisdiction was proved by a preponderance of the evidence.¹

II. STATUTORY GROUNDS FOR TERMINATING RESPONDENTS' PARENTAL RIGHTS

Next, both parents argue that the trial court clearly erred in finding proof of a statutory ground sufficient for the trial court to terminate the parents' parental rights with respect to NS and JS. We disagree. "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). The trial court's determination is reviewed for clear error. *Id.*; MCR 3.977(K).

The trial court did not clearly err in finding sufficient evidence under MCL 712A.19b(3)(g) and (j) to terminate both parents' parental rights. The trial "court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [MCL 712A.19b(3)(g), (j).]

¹ We note that in her brief on appeal, mother appears to also argue that the trial court erred in finding probable cause to authorize the petition following the preliminary hearing. We need not address this additional argument, however, because any error in that regard was rendered moot by the trial court subsequently acquiring jurisdiction over the children at the adjudication.

Respondents abused methamphetamine during the four months in which the children were in their care, likely manufactured methamphetamine while the children were present or at least exposed them to the hazardous materials used in the manufacturing process, and allowed the children to reside in an apartment where methamphetamine and components for manufacturing methamphetamine were found. The parents were ultimately arrested in connection with their criminal behavior, leaving the children without proper care or custody. Respondents' conduct has thereby consistently placed the children at a substantial risk of harm.

Additionally, despite having been offered a plethora of services as part of their previous child protective proceedings, at the time of their arrest, both parents admitted to being currently addicted to methamphetamine. Even though services were offered in the instant case, father has demonstrated an unwillingness to try to make the changes necessary to protect the children by failing to comply with the services offered or maintain contact with DHHS. Though mother has complied with the services offered in the instant case and maintained a short period of sobriety, her substance abuse assessment and psychological evaluation returned a bleak prognoses for her ability to maintain that sobriety without constant DHHS supervision. Finally, at the time of termination, father remained incarcerated, with no certainty as to when he would be released, and mother was unemployed. There was thus no reason to expect that the parents would be able to correct their detrimental conduct and provide NS and JS with a suitable living environment within a reasonable time considering JS and NS's age. The trial court found that respondents failed to provide proper care or custody for NS and JS with no reasonable expectation that either parent will be "able to provide proper care and custody within a reasonable time," MCL 712A.19b(3)(g), and that a reasonable likelihood exists that NS and JS will be harmed if returned to respondents' home. MCL 712A.19b(3)(j). As respondents conduct presents a substantial risk of harm to NS and JS and respondents have shown either an inability or an unwillingness to correct this dangerous conduct, respondents have failed to prove their claim that the trial court lacked a statutory ground to terminate respondents' parental rights.

III. TRIAL COURT'S BEST INTERESTS DETERMINATION

Mother additionally argues that the trial court clearly erred in determining that termination of her parental rights was in the children's best interests. We disagree.

We review the trial court's determination for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012) (citations omitted). See MCL 712A.19b(5). The trial court's determination that termination is in the children's best interests must be supported by a preponderance of the evidence. *In re Moss*, 301 Mich App at 90.

"[T]he focus at the best-interest stage" is on the child, not the parent. *Id.* at 87. The trial court should weigh all the evidence available to it in determining best interests, *In re Trejo*, 462 Mich at 356-357, and may consider such factors as

the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. [*In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted).]

Other considerations include the length of time the child was in foster care or placed with relatives, the likelihood that "the child could be returned to her parent's home within the foreseeable future, if at all[.]" and compliance with the case service plan. *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). The trial court may also consider the parent's visitation history with the child. *In re BZ*, 264 Mich App at 301.

The record in this case contained sufficient evidence to support, by a preponderance of the evidence, that termination of respondents' parental rights was in the children's best interests. At the outset, the twins, who were not quite two years old at the time of termination, had been placed outside the parents' home for more than half their lives as a result of two separate child protective proceedings. Moreover, for almost the entire time the parents retained custody of the children without DHHS supervision, they were abusing methamphetamine. Though mother has complied with her case service plan, her evaluations indicate a weak prognosis for her continued sobriety without permanent DHHS services. Additionally, there is evidence that respondents were manufacturing methamphetamine and that the children were exposed to this process as well as the harmful materials used therein. Both parents were arrested for their possession and manufacture of methamphetamine. As such, at the time of termination, the children were in desperate need of permanence and stability. As discussed above, there was no reasonable likelihood, at the time of termination, that the parents would be able to provide NS and JS with a permanent, stable, and safe living environment within a reasonable time, if ever.

On the other hand, the children were provided a safe, healthy environment by both the foster family that cared for the children during the first child protective proceeding and by the children's grandmother, who cared for the children during the second proceeding. Both the foster family and the children's grandmother indicated a willingness to adopt the children. The evidence did show that the children had bonded with their mother. However, the evidence also showed that the children were bonded with the foster family and their grandmother and, as the trial court recognized, any bond that the children had with the parents was outweighed by their need for a safe and stable environment, which the parents were not capable of providing. Given the totality of these circumstances, the trial court did not clearly err in finding that termination of mother's parental rights was in the children's best interests.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Mother finally argues that she was deprived of the effective assistance of trial counsel based on her trial counsel's various shortcomings. We disagree. We review respondent's claims for errors apparent on the existing 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 (2002), overruled on other grounds by *In re Sanders*, 495 Mich at 422-23. To prevail on a claim of ineffective assistance of counsel, a respondent must establish that (1) her trial counsel’s performance was deficient; and (2) the deficient performance prejudiced respondent, denying respondent a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish deficient performance, respondent carries the burden of proving that her counsel’s representation “fell below an objective standard of reasonableness” under prevailing professional norms. *Pickens*, 446 Mich at 303; *In re CR*, 250 Mich App at 198. To establish prejudice, a respondent must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Pickens*, 446 Mich at 314; *In re CR*, 250 Mich App at 198.

It is well settled that a respondent claiming ineffective assistance of counsel must establish *both* prongs of the *Strickland* analysis. *People v Reed*, 449 Mich 375, 400-401; 535 NW2d 496 (1995). Accordingly,

“a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” [*Id.*, quoting *Strickland*, 466 US at 697.]

In the instant case, we need not decide whether the assistance of mother’s trial counsel was objectively deficient as mother cannot demonstrate a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

Mother’s claims of ineffective assistance of counsel all relate to her insistence that there was insufficient evidence connecting the parents to the methamphetamine, methamphetamine components, and methamphetamine laboratories found at the East Drive trailer. She argues that her trial counsel should have more thoroughly cross-examined witnesses to make clear to the trial court that the parents were no longer living at the East Drive trailer when it was raided by police and thus had not exposed their children to the items found in that trailer. Additionally, mother argues that her trial counsel should have produced witnesses on the mother’s behalf, including the testimony of Christine Stempien, whom mother claims would testify that she began proceedings to evict the parents from the East Drive trailer on May 16, 2015, and that she had not actually seen the parents at the trailer since April 2015. Finally, she argues that her trial counsel should have objected to the trial court’s taking of jurisdiction.

As discussed above, there was sufficient evidence to find respondents were responsible for the methamphetamine laboratories found at the East Drive trailer and that the children had likely been exposed to hazardous materials while present in that trailer. At preliminary examination, although testifying that she had not seen the respondents since April, Stempien testified that respondents did not return the keys to the trailer to her until June 19, 2015 (i.e., after it was searched by police), and that she did not know when the parents actually moved out. Moreover, as we noted above, the trial court’s jurisdictional decision—as well as its decision to terminate respondents’ parental rights—did not rest solely on the fact that the parents had operated a methamphetamine laboratory at the East Drive trailer. The trial court’s decision to exercise jurisdiction over - and terminate respondents’ parental rights with respect to - NS and JS

was also based on evidence that the parents possessed methamphetamine and components for making methamphetamine at the residence where the children actually resided, respondents' admitted use of methamphetamine during the four months the children were in their unsupervised care, and respondents' inability to maintain sobriety despite being offered numerous rehabilitative services. Given this evidence, mother has not proven a reasonable probability that the outcome of the proceedings would have been different had mother's trial counsel more thoroughly cross-examined the various witnesses, presented Christine Stempien as a witness, or objected to the trial court's assumption of jurisdiction. *Pickens*, 446 Mich at 314; *In re CR*, 250 Mich App at 198.

In this termination of parental rights appeal, respondent father has already made a motion to remand this matter for a Ginther hearing to gather record evidence of ineffective assistance of counsel and this Court denied that motion. Although the argument of ineffective assistance of counsel was not a part of father's brief on appeal, we have reviewed the issue as the motion for a Ginther hearing was made and denied. Respondent father had little contact with his trial attorney. After being served, signing a notice of hearing and speaking with his attorney in the community, he failed to attend the hearing. When respondent father did appear for the dispositional/termination hearing, he was awaiting sentencing for his felony conviction and he did speak at this hearing. With respondent father not communicating with his lawyer, combined with failing to appear for a hearing, the argument that counsel was ineffective fails.

Affirmed.

/s/ David H. Sawyer

/s/ William B. Murphy

/s/ Amy Ronayne Krause