

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

In Re: K.B.

No. 11-1676 (Raleigh County 11-JA-50-H)

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Michael Cooke, arises from the Circuit Court of Raleigh County, wherein the circuit court dismissed the Juvenile Abuse and Neglect Petition that was filed against K.B.'s mother. The Circuit Court of Raleigh County dismissed this petition by order entered on November 7, 2011. Petitioner Father appeals this dismissal. The child's guardian ad litem, Stacey Lynn Fragile, filed a response on behalf of the child in support of Petitioner Father's appeal. The Department of Health and Human Resources ("DHHR"), by its attorney William L. Bands, filed a response in support of the circuit court's order. K.B.'s mother, by her counsel Winifred Bucy, has also filed a response in support of the circuit court's dismissal order.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In March of 2011, DHHR and Petitioner Father filed the co-petition in the instant case. This petition alleged abuse by K.B.'s mother, based on K.B.'s visit to the hospital in February of 2011. This hospital visit arose after K.B. and his mother spent an evening and morning, on or about February 3, 2011, with the mother's friend C.W. and her son at the home of C.W. and C.W.'s husband. That evening, K.B.'s mother was in the kitchen and K.B. was in a nearby room with the friends' toddler son. Nobody else was in the home that evening. The mother reported that she would check in on K.B. occasionally while she was helping C.W. with dinner. During this time, she heard a toy hit the ground, followed by K.B. crying from the next room, but did not see any physical marks or bruising on him when she went to go check on him. K.B. seemed fine the rest of the evening crawling around and eating dinner. Later that evening, K.B. cried a few times at night and the mother gave him some medicine, thinking he might have a fever. The next morning, however, K.B.'s mother noticed that he was avoiding placing weight on his right side. K.B.'s mother thereafter brought him to the hospital and the child was diagnosed with an oblique non-displaced mid-right tibial fracture. Because the injury was unexplained, the hospital contacted Child Protective Services ("CPS") worker James Rhodes, who reported to the hospital and interviewed the mother. From his interview with the mother, he learned that the child had had a previous injury to his other leg several months ago from when she fell with the child in her

arms and from that fall, the child hit his leg. She did not know, however, how the current leg injury occurred. At the preliminary hearing in April of 2011, K.B.'s mother moved to dismiss this petition, arguing that DHHR failed to show probable cause and highlighted that the petition was not filed until thirty-five days after the alleged abuse. The circuit court denied this motion to dismiss and set the matter for an adjudicatory hearing. At the adjudicatory hearing in September of 2011, the circuit court heard testimony from several witnesses. Among them were the child's examining nurse, Nurse Hamblin; the child's examining physician, Dr. Nelson; and another physician who testified as a medical expert for K.B.'s mother. The child's examining physician concluded that his injury was caused by abuse, whereas the examining nurse and the mother's expert physician gave the opinion that K.B.'s injury was accidental and not caused by abuse. The circuit court took this matter under advisement and issued its dismissal order in November of 2011.

In its dismissal order, the circuit court made findings that the evidence was not clear and convincing that the injuries K.B. sustained constituted abuse and/or neglect. The circuit court recapped the testimony it heard from various witnesses and in doing so, it found that those of K.B.'s mother and the family friends were consistent with each other that K.B.'s injury was "an accidental break of unknown origin." Moreover, the circuit court also found that when the petition in this case was initiated, although Nurse Hamblin referred the case to CPS due to misinformation that there was a current open CPS case concerning K.B., CPS worker Elizabeth Roberts testified that at the time of the hospital visit, there was actually not an open CPS case on K.B. and his mother. In light of witness testimony by K.B.'s mother and others that K.B. had no markings or bruises on him, the circuit court also found that "Dr Nelson, during his examination in court, could offer no explanation for the absence of bruising, swelling, redness or lack of visible irritation." Mother's expert Dr. Shaw testified that he reviewed K.B.'s medical records and x-rays and "testified to a reasonable degree of medical certainty that the injury was a mere 'toddler's fracture,' and . . . the injury was not child abuse under any theory presented by the Department." Dr. Shaw also opined that the child's young age, torticollis, and lazy eye conditions could have also contributed to him falling or tripping. The circuit court concluded that based upon the evidence, the definitions of "abuse" as defined by West Virginia Code § 49-1-3(d), and DHHR's burden of proving abuse by clear and convincing evidence, DHHR did not meet its burden and the circuit court ordered that the action be dismissed. Petitioner Father appeals this order, arguing one assignment of error.

In reviewing abuse and neglect decisions, the Court has previously established the following standard of review:

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply

because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt.1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011).

Petitioner Father argues that the circuit court erred in its dismissal of the petition by not properly applying the testimony of the examining physician to the facts presented at the adjudicatory hearing. Petitioner Father argues that the circuit court's reliance on *State ex rel. West Virginia Department of Health and Human Resources v. Fox*, 218 W.Va. 397, 624 S.E.2d 834 (2005), is misplaced because that decision was based on a writ of prohibition concerning a child who was allowed to return to his parents. Petitioner Father argues that the evidence clearly showed that the mother's explanation did not comport with the results of K.B.'s injury, even though her medical expert concluded otherwise at the adjudicatory hearing. Petitioner Father contends that rather, K.B.'s examining physician testified that K.B.'s injury could not have been caused by a toy striking his leg because his injury was a spiral fracture; an injury from a thrown toy would have caused a crushing type of fracture. Petitioner Father states that Nurse Hamblin's testimony "somewhat supports" Dr. Shaw's testimony, but Petitioner Father also argues that she is not qualified to evaluate x-rays, unlike Dr. Nelson. Moreover, Petitioner Father argues that Dr. Shaw did not ever examine K.B. and that his testimony merely corroborates the mother's explanation. Accordingly, Petitioner Father argues that because Dr. Nelson's testimony is more credible than Dr. Shaw's testimony, DHHR met its burden in proving clear and convincing evidence of abuse, and the circuit court erred in dismissing the petition.

The guardian ad litem responds in agreement with Petitioner Father and argues that the circuit court erred in dismissing the petition in the instant case. The guardian notes that the Court has held as follows:

[I]n assessing evidence, the trier of fact is the ultimate judge of credibility and is free to accept or reject any testimony it does not find credible. However, when a judge, sitting without jury, decides against the greater amount of the evidence, the judge is obligated to give a fuller explanation for his or her ruling. Under these circumstances, the findings in a bench trial must be sufficiently detailed, reasoned, and logical to enable the reviewing court to trace a persuasive path between the evidence and the judgment. *See Schneiderman v. United States*, 320 U.S. 118, 129-31, 63 S.Ct. 1333, 1338-40, 87 L.Ed. 1796 (1943); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2579, pp. 539-41, 546-48 (2d ed. 1995). Where the determinative factor at trial is the credibility of the witnesses, this requires a trial court to specify what witnesses were not credited and why.

Brown v. Gobble, 196 W.Va. 559, 569, 474 S.E.2d 489, 499 (1996). The guardian argues that here, the circuit court's order found that Dr. Shaw's testimony was more credible than Dr. Nelson's because "he [Dr. Shaw] is a pediatric orthopedic surgeon, and more credentialed in the specialty of pediatric orthopedics than Dr. Nelson; furthermore, Dr. Nelson considered

information in his determination that was later proven to be false.” The guardian argues that the circuit court never explained what alleged “false information” Dr. Nelson relied on in his exam and consequently dismissed the examining physician’s testimony in favor of a paid expert who did not review the same information. The guardian further argues that K.B.’s mother has not been able to state with specificity as to what caused K.B.’s injury. Accordingly, the guardian argues that because the circuit court did not give a full explanation for its ruling and discredited Dr. Nelson without a proper reason, this matter should be remanded to the circuit court for further proceedings.

The child’s mother responds, arguing that the circuit court did not err in its decision to dismiss the petition in this case. The mother stresses that, pursuant to Syllabus Point 2 of *In re Katelyn T.*, 225 W.Va. 264, 692 S.E.2d 307 (2010), DHHR has the burden of proof in establishing clear and convincing evidence that a parent has committed abuse and/or neglect of the subject child. Petitioner Mother argues that here, Dr. Nelson did not have an explanation for the absence of K.B.’s swelling, bruising, or redness, but he concluded that the recent injury was due to abuse because it was the second fracture the child has suffered. On the other hand, Dr. Shaw explained that the child’s injury was a “toddler’s fracture” and explained that it was possible that he could have hurt himself by falling to the ground after being hit by the thrown toy. Moreover, the mother sought timely, appropriate treatment for K.B. after she found him injured and there was no other bruising or swelling or other evidence to show any sort of intentional abuse to the child. K.B.’s mother also stresses the standard in reviewing abuse and neglect decisions, as originally set forth in *Tiffany Marie*, i.e., that findings of fact shall not be set aside unless clearly erroneous. Further, the mother also argues that, pursuant to West Virginia Code § 49-6-1(a), an abuse and neglect petition must “allege specific conduct including time and place, [and] how such conduct comes within the statutory definition of neglect or abuse. . . .” Here, the circuit court correctly found that there was no abuse or neglect by K.B.’s mother. It found that the mother’s explanation for K.B.’s fracture was corroborated by Dr. Shaw and to a great extent by Nurse Hamblin. Accordingly, the mother argues that granting relief based upon Petitioner Father’s petition for appeal would be inconsistent with statute and could result in children being removed from their parents from any unexplained injury and could improperly shift the burden of proof to a child’s parents. DHHR also responds in support of the circuit court’s decision, asserting that the circuit court considered all the evidence before it prior to making its decision and accordingly, did not commit error.

The Court finds no error by the circuit court in dismissing the petition of the instant case. The record on appeal contains a copy of the adjudicatory hearing transcript. As indicated by the circuit court’s findings, the transcript reveals witness testimonies that compete with each other. We have recognized as follows: “A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.” *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997). A review of this transcript indicates that the circuit court did not err in its findings of fact, nor did it err in its decision to dismiss this case. Nurse Hamblin testified of her thorough review and examination of the child and interactions with the child’s mother. Nurse Hamblin testified that the child appeared well-nourished and did not have any marks anywhere on his body. The child became fussy when she started to manipulate his leg and as a result, an x-ray was taken and an atypical fracture to the tibial shaft was found. Nurse

Hamblin further testified that when she discussed this fracture with the radiologist, Dr. Setliff, and asked of his opinion concerning abuse. Dr. Setliff discussed with her that based on the look of the fracture, he would not consider it “a child abuse type fracture” because it “did not have the appearance you normally see in a child abuse type fracture, which are more spiral type fractures.” Nurse Hamblin further testified that, “You always have to have a suspicion when you have a small child with a fracture to consider child abuse, but after my examination of the child and the type of fracture that we found, I did not really consider it a child abuse issue at that point.” She testified that this opinion was based not only on her observations of the fracture but also from factoring in the child’s general condition.

A review of Dr. Nelson’s testimony provides that although he dismisses others’ explanations of the child injuring himself from falling or being hit by a thrown toy, he himself does not provide an explanation as to what may have caused the child’s injury other than abuse by twisting. Dr. Nelson similarly testified that he did not find any markings on the child and that he did not speak to the radiologist, Dr. Setliff. The guardian argued that the circuit court did not provide an explanation concerning any “false information” Dr. Nelson might have relied on in his opinion. However, a review of the dismissal order indicates that the circuit court previously made a finding that Dr. Nelson “had been informed that there was an open CPS case” but that CPS worker Elizabeth Roberts also testified that during the child’s February of 2011 hospital visit, there was not an open CPS case on him.

Moreover, the guardian also argues that this case should be remanded because the circuit court discredited Dr. Nelson without a proper reason. We reiterate our recognition of the principle from *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997), concerning a trial court’s position in assessing credibility of all witnesses. The guardian asserts that Dr. Shaw admitted that he was not told the same information concerning the circumstances of K.B.’s injury. A review of this portion of his testimony, however, reveals that Dr. Shaw testified that information concerning the timeline of when the child went to bed and then woke up with pain would not change his opinion that the child’s injury was accidental. A review of the adjudicatory hearing transcript indicates that no witnesses could provide a definite explanation as to how the child was injured and that all witnesses agreed that the child had no markings, bruises, or swelling after his injury. No evidence was presented to prove that K.B.’s mother abused or neglected him to cause the injury she discovered in the morning. The circuit court considered the evidence presented as a whole and given these circumstances and the applicable standard of review, we find no error by the circuit court.

For the foregoing reasons, we find no error in the circuit court’s decision to dismiss the petition against K.B.’s mother and accordingly, we affirm this dismissal.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh