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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RAYMOND V.,) No. 1 CA-JV 12-0079
)
) DEPARTMENT C
Appellant,)
) MEMORANDUM DECISION
v.)
) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
ARIZONA DEPARTMENT OF ECONOMIC) ARCAP 28)
SECURITY, MATTHEW V., CHRISTIAN)
V.,)
)
Appellees.)

Appeal from the Superior Court in Mohave County

Cause No. JD2009-07017

The Honorable Richard Weiss, Judge

AFFIRMED

Mohave County Appellate Defender's Office Kingman
By Diane S. McCoy
Jill L. Evans
Attorneys for Appellant

Thomas C. Horne, Attorney General Mesa
By Amanda L. Holguin, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

H A L L, Judge

¶1 Raymond V. (Father) appeals the juvenile court's order terminating his parental rights to M.V. and C.V. (collectively, the children).¹

FACTUAL² AND PROCEDURAL BACKGROUND

¶2 Father is the biological parent of M.V. and C.V., born August 2006, and August 2009, respectively. On November 23, 2009, Child Protective Services (CPS) received a report that Mother and C.V. tested positive for marijuana at C.V.'s birth. When the CPS case manager initially assigned to the case met with Mother, Mother admitted that she had used drugs during the first sixteen weeks of her pregnancy and then to ease her labor pains. Although Mother claimed that she and the children were welcome to live with her ex-husband upon their release from the hospital, the case worker discovered that, prior to giving birth to C.V., Mother had been living with M.V. in her ex-husband's unimproved garage amidst numerous hazards such as power tools and a space heater connected to a propane tank.

¶3 The Arizona Department of Economic Security (ADES) removed the children from Mother's custody, placed them in

¹ The children's Mother has also had her parental rights terminated, but is not a party to this appeal.

² We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

foster care, and filed a petition alleging that the children were dependent as to Mother and Father. ADES also submitted a "parent-locate" referral for Father.

¶4 In December 2009, ADES personally served Father with the dependency petition. Father denied the dependency allegations, submitted the matter on the record, and the juvenile court found the children dependent as to Father in March 2010.

¶5 As relevant here, Father has been incarcerated for substantial periods of time and, as a result, has not parented M.V. and C.V. for substantial periods of time. Father was taken into custody on a criminal warrant on June 18, 2006 and remained in custody until August 10, 2006, two days after M.V. was born. On August 10, 2006, Father pled guilty to two class six undesignated felonies committed on two different dates with two different victims in May and June 2006. On September 7, 2006, Father was placed on supervised probation for three years.

¶6 In early October 2007, Father was taken into custody on three new felony charges (including unlawful flight and possession of methamphetamine) and continuously remained in custody until his sentencing in April 2008. After pleading guilty to a class five felony and a class six felony in this 2007 case, Father was sentenced to 1.5 years in prison. By that

time, M.V. was 26 months old and Father had been incarcerated for nearly half of M.V.'s life.

¶17 On January 25, 2010, Father was arrested and then charged with aggravated burglary, a class four felony, and has remained in custody continuously since that time. On April 29, 2010, Father pled guilty to attempted burglary, a class five felony, and agreed to an aggravated prison term. On May 24, 2010, Father was sentenced to three years in prison, with credit for time served, and ordered to pay restitution of more than \$10,000. In August 2010, the juvenile court permitted Father's appointed counsel in the dependency proceedings to withdraw because Father failed to maintain contact with her.

¶18 During the time of Father's incarceration in 2010, Mother complied with her case plan and the children were returned to her custody on December 7, 2010. In May 2011, however, Mother was arrested and charged with possession of drug paraphernalia. ADES then removed the children from Mother's care and again placed them in foster care.

¶19 At a November 15, 2011 permanency planning hearing, the children's advocate reported that Father has "admitted paternity, but is in prison for several years and has had no contact with the [children]." The juvenile court then approved a case plan of severance and adoption.

¶10 On November 30, 2011, ADES filed a motion to terminate Mother's and Father's parental rights. As relevant here, the motion to terminate alleged that (1) Father has neglected the children, pursuant to Arizona Revised Statutes (A.R.S.) section 8-533(B)(2) (Supp. 2011), by engaging in criminal activities and failing to take an active role in their care; (2) the children have been cared for in an out-of-home placement pursuant to court order for a cumulative period of fifteen months or longer, pursuant to A.R.S. § 8-533(B)(8)(c); (3) ADES made diligent efforts to provide appropriate reunification services; (4) Father has been deprived of his civil liberties due to a felony conviction and the sentence is of such length that the children will be deprived of a normal home for a period of years, pursuant to A.R.S. § 8-533(B)(4); and (5) termination is in the children's best interest.

¶11 The juvenile court held a contested severance hearing on March 15, 2012. At the hearing, the CPS case manager, Tracie Jarrah, testified that Father was not providing any care or support for the children at the time they were taken into custody in November 2009. She explained that CPS attempted to locate Father "in order to begin services," but they were only able to locate him shortly before he was arrested in January 2010. Jarrah testified that Father had not "initiated" a relationship with the children while in prison through letters,

cards, or gifts and had not requested telephone calls or visits. Jarrah further testified that Father's maximum release date is February 2013 and further explained that, due to his criminal and drug history (based on prior drug-related arrests), as well as the absence of a relationship with the children, Father would need to participate in extensive services following his release before he could be reunified with the children. Finally, Jarrah testified that the children would benefit from the termination of Father's parental rights because they are in a potential adoptive family that can provide them with secure, permanent care-giving and to whom the children are "very bonded."

¶12 Father testified that he was not present at C.V.'s birth because he and Mother had a "falling-out." Although Father knew Mother and M.V.'s address, he testified that he was unaware Mother and M.V. were living in a garage and stated that he only saw M.V. when Mother would bring him for a visit. Father admitted that his limited financial support for the children, before his most recent term of imprisonment, consisted of providing a package of diapers twice a month.

¶13 Father acknowledged that he was arrested in 2006 and was in jail when M.V. was born, though he testified that he was released from jail in August 2006, shortly after M.V.'s birth. Father also admitted that he was arrested in September 2007 and, after he entered a guilty plea, sentenced to one and one-half

years in prison on April 8, 2008. Father testified, however, that following his release from prison in August 2006 until he was resentenced to prison in April 2008, he saw M.V. "every day."³ Father also testified that he was M.V.'s primary caregiver after his release from prison in October 2008 until July 2009. At that point, Father and Mother ceased living together and Father only had sporadic visits with M.V. Father admitted that, after his most recent incarceration, he has only seen C.V. twice for a total period of less than an hour. He likewise acknowledged that he has only visited M.V. twice for a total period of less than one hour since November 2009. Father explained that he did not request visits with the children through CPS because he was arrested shortly after his paternity was established.

¶14 The juvenile court found that ADES proved by clear and convincing evidence that Father's parental rights should be terminated: (1) pursuant to A.R.S. § 8-533(B)(2) because Father has neglected the children; (2) pursuant to A.R.S. § 8-533(B)(8)(c) because the children have been cared for in an out-of-home placement pursuant to court order for a cumulative period of fifteen months or longer; and (3) pursuant to A.R.S. § 8-533(B)(4) because Father has been deprived of his civil

³ During approximately nine months of this time, Father was incarcerated facing the September 2007 charges and then awaiting sentencing.

liberties due to a felony conviction and the sentence is of such length that the children will be deprived of a normal home for a period of years. The juvenile court additionally found that ADES proved by a preponderance of the evidence that termination was in the best interest of the children.

¶15 Father timely appealed. We have jurisdiction under A.R.S. §§ 8-235 (2007) and 12-120.21 (2003) and Arizona Rule of Procedure for the Juvenile Court 103(a).

DISCUSSION

¶16 Before the juvenile court may terminate parental rights, ADES must prove, by clear and convincing evidence, a minimum of one of the factors listed in A.R.S. § 8-533(B) and that termination is in the best interest of the children. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). We will affirm the judgment unless the juvenile court abused its discretion by making "factual findings [that] are clearly erroneous[;] that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted). "Because the trial court is 'in the best

position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings,' this court will not reweigh the evidence but will look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004) (quoting *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987)).

¶17 Father first contends that the juvenile court erred by finding the State proved a statutory basis for termination. The State contends on appeal that the juvenile court properly terminated Father's parental rights based on the length of his sentence and has not argued that termination was proper on the alternative grounds of time in care or neglect.⁴ Thus, the State has waived the ability to argue that those alternative grounds justify the termination of Father's parental rights and, given

⁴ In waiving these alternative bases for severance, the State cites *Jesus M. v. Arizona Department of Economic Security*, 203 Ariz. 278, 280, ¶ 3, 53 P.2d 203, 205 (App. 2002), for the proposition that "if evidence supports any one ground for severance, this Court need not consider an appellant's challenge to any other ground." This court's prudential decision to refrain from addressing redundant grounds for a superior court's ruling is very different from a party's decision on appeal to brief less than all of the grounds for a superior court's ruling. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim [on appeal] usually constitutes abandonment and waiver of that claim."). Accordingly, a party that elects to brief a subset of the grounds relied upon by the superior court in issuing a ruling does so at its own peril.

the State's waiver, our discussion is limited to whether the length of Father's felony sentence is a proper statutory basis for termination. See *Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

¶18 To justify severance pursuant to A.R.S. § 8-533(B)(4), the State "is required to prove that a parent has been ordered to serve a prison sentence 'of such length that the child will be deprived of a normal home for a period of years.'" *Jesus M.*, 203 Ariz. at 279-80, ¶ 2, 53 P.3d at 204-05 (quoting A.R.S. § 8-533(B)(4)). The inquiry is very fact-specific and the court is directed "to consider each case on its particular facts." *Michael J.*, 196 Ariz. at 251, ¶ 29, 995 P.2d at 687. In evaluating whether a parent's prison sentence justifies termination, the juvenile court:

should consider all relevant factors, including, but not limited to: (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue. After considering those and other relevant factors, the trial court can determine whether the sentence is of such a length as to deprive a child of a normal home for a period of years.

Michael J., 196 Ariz. at 251-52, ¶ 29, 995 P.2d at 687-88. "What matters to a dependent child is the total length of time the parent is absent from the family, not the more random time that may elapse between the conclusion of legal proceedings for severance and the parent's release from prison." *Jesus M.*, 203 Ariz. at 281, ¶ 8, 53 P.3d at 206 (concluding "the words 'will be deprived' in § 8-533(B)(4) mean 'will have been deprived' in total, [] encompass[ing] the entire period of the parent's incarceration and absence from the home").

¶19 Applying these principles to the unique facts of this case, we conclude the State met its burden of proving, by clear and convincing evidence, that Father's imprisonment will have deprived the children of a normal home life for a period of years. First, Father had no relationship with C.V. before he was incarcerated, having spent less than one hour with him. Father testified that he spent considerable time with M.V. during two periods when he was not incarcerated. Father admitted, however, that during the six months preceding his current term of imprisonment, he had only seen M.V. for a few brief visits. In addition, Father has been incarcerated for nearly two-thirds of M.V.'s life. Father's financial contribution to the care of the children consisted of purchasing one or two packages of diapers per month. Second, the testimony at the severance hearing reflects that, during his imprisonment,

Father failed to send letters, cards, or gifts to the children or request telephone calls or visitation that would establish or nurture a parent-child relationship.⁵

¶20 Third, M.V. and C.V. are young children, ages six and three respectively. Given their age, Father's incarceration will deprive the children of a normal home for a substantial portion of their lives. Fourth, although the length of the current sentence is not great, it has encompassed nearly all of C.V.'s life and nearly half of M.V.'s life. *See Michael J.*, 196 Ariz. at 251, ¶ 29, 995 P.2d at 687 ("In some instances, a 20-year sentence might not provide sufficient basis for severing an incarcerated parent's rights, while in another case a 3-year sentence could provide the needed basis."). Fifth, another parent is not available to provide a normal home life as Mother's parental rights have been terminated. Finally, given the young ages of the children, the deprivation of a parental presence is likely to have a great effect. Thus, applying these factors here, the superior court did not abuse its discretion in terminating Father's parental rights pursuant to A.R.S. § 8-533(B)(4).

⁵ To the extent Father asserts that he was unable to request visitation with the children because the juvenile court "allowed his counsel to withdraw in August 2010," approximately seven months after his arrest, we note that the Father's attorney requested withdrawal because Father failed to maintain contact with her.

¶21 Next, Father contends the juvenile court erred by finding that the State proved by a preponderance of the evidence that termination of his parental rights was in the children's best interest.

¶22 The juvenile court must make a "finding as to how the child would benefit from a severance or be harmed by the continuation of the [parental] relationship" when considering the child's best interest. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (citations omitted). Evidence that a child is adoptable supports a finding that severance is in the child's best interest. *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

¶23 At the severance hearing, the case manager testified that the children are "receiving excellent care" in the home of a potential adoptive placement and they are bonded with the placement. The case manager also testified that termination of Father's parental rights was in the best interest of the children because it would provide stability and permanence that Father could not provide. The Foster Care Review Board Findings and Recommendations also state that "[t]he children love the foster family" and "[t]he foster family is willing to adopt the children." Thus, the record reflects that the children are both adoptable and in the care of a potential adoptive placement that

will provide them stability and permanence. Therefore, the juvenile court did not err by finding that severance was in the children's best interest.

CONCLUSION

¶24 For the foregoing reasons, we affirm the judgment terminating Father's parental rights to the children.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Judge

_____/s/_____
PETER B. SWANN, Judge