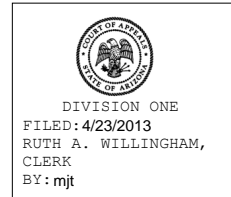


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VERONICA A.,) 1 CA-JV 12-0244
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G), Ariz. R.P. Juv. Ct.;
SECURITY, Y.F., L.B., L.B., I.B.,) Rule 28, ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Yuma County

Cause Nos. S1400JD201100357, S1400JD201100358
S1400JD201100359 and S1400JD201200353

The Honorable Kathryn E. Stocking-Tate, Judge Pro Tempore

AFFIRMED

Terri L. Capozzi, Attorney at Law
Attorney for Appellant

Yuma

Thomas C. Horne, Attorney General
by Amanda Holguin, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Phoenix
Mesa

P O R T L E Y, Judge

¶1 Veronica A. ("Mother") appeals from the order terminating her parental rights to her four children. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 After receiving reports that Mother was abusing methamphetamine, the Arizona Department of Economic Security ("ADES") removed the children in July 2011. The children were found to be dependent and services were offered to Mother to attempt family reunification. Mother, however, failed to fully participate in the services, particularly substance abuse treatment. In fact, she gave birth to two children who were substance-exposed after services were in place. ADES successfully had the permanency plan modified to termination and adoption, and moved to terminate her parental rights for neglect, a history of chronic substance abuse, and out-of-home placement for nine months or longer.

¶13 At the contested severance hearing, counsel made an oral motion to withdraw and continue the trial date. She told the court that she was unable to effectively represent Mother because Mother did not stay in contact with her. The court placed Mother under oath and questioned her about the alleged lack of communication. During the questioning, the court, without objection, asked Mother if she had been "using drugs" in the weeks leading up to the trial. After Mother's answer, counsel's motions were denied.

¶14 Just before ADES called Mother as its first witness, counsel asked for a brief recess so that Mother could compose

herself. Mother failed to return after the recess and, after the court took testimony, her parental rights were terminated *in absentia*.¹ We have jurisdiction over her appeal pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235(A), 12-2101(A)(1), and -2101(B) (West 2013).

DISCUSSION

¶15 Mother contends that her due process rights were violated at the severance hearing. Specifically, she argues that both the court and her attorney failed to advise her of her Fifth Amendment² right against self-incrimination and, after the court's questions about her drug use, she believed she had no "other options than flight." As a result, she argues that she was denied the opportunity to remain and participate in the hearing. We review the issue *de novo*. *State v. Harrod*, 218 Ariz. 268, 279, ¶ 38, 183 P.3d 519, 530 (2008).

¶16 "The right against self-incrimination extends to all proceedings, civil or criminal, when the answer to a question put to a witness may tend to incriminate him in future criminal proceedings." *State v. Carvajal*, 147 Ariz. 307, 310, 709 P.2d 1366, 1370 (App. 1985); *see also Castro v. Ballesteros-Suarez*,

¹ The court also terminated the parental rights of the children's biological father. He is not a party to this appeal.

² The Fifth Amendment of the U.S. Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

222 Ariz. 48, 53, ¶ 20, 213 P.3d 197, 202 (App. 2009). In severance proceedings, the right against self-incrimination is "self-executing[;] that is, it does not have to be expressly raised . . . where the individual is deprived of his free choice to admit, to deny, or refuse to answer." *Minh T. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 76, 79, ¶ 13, 41 P.3d 614, 617 (App. 2001) (internal quotation marks omitted).

¶7 Here, the court did not need to put Mother under oath to determine whether she had an excuse for not staying in contact with her lawyer. The court only needed to determine whether she had an excuse that may have required granting a short continuance. For example, the court could have asked whether she had been in an accident, had been hospitalized or was in jail – matters that could have prevented Mother from easily contacting her lawyer in anticipation of the severance trial.

¶8 Moreover, the court should not have asked Mother the questions about her recent drug use under oath without advising her of her Fifth Amendment rights against self-incrimination because her answers to those questions could be used against her in future criminal proceedings. By requiring her to answer the questions about her drug use, the court clearly violated Mother's Fifth Amendment rights. See, e.g., *Carvajal*, 147 Ariz. at 310, 709 P.2d at 1370 (reasoning that the trial court

violated defendant's Fifth Amendment rights when, during a probation revocation hearing, it required defendant to testify regarding misrepresentations he made to the court regarding restitution).

¶19 Although Mother's Fifth Amendment rights were violated by the court, Mother has failed to show any prejudice warranting a new severance trial. After she failed to return from the recess, ADES was still required to prove that there was a statutory basis for termination and that termination was in the children's best interests. ADES put on its evidence and counsel was given the opportunity to cross-examine the four witnesses and challenge exhibits. The court subsequently found that: Mother had a long history of substance abuse; she admitted to ADES that she was using drugs during her pregnancy; and she tested positive for methamphetamine only two weeks after completing her treatment program. The court also found from the evidence presented at the trial that her condition was likely to continue for a prolonged indeterminate period, and she had failed to remedy the circumstances that caused her children to be in out-of-home placements for over nine months despite being provided with services designed to help reunify the family. Accordingly, the court determined by clear and convincing evidence that there were two statutory bases for the termination and that termination was in the best interests of the children.

Because the court did not use any statements Mother made in response to the court's questions, and Mother does not dispute the factual findings or conclusions of law, the error in this case was harmless.

¶10 Although Mother argues that she felt compelled to flee after being questioned by the court, there is no factual basis for her argument.³ Mother was told at various stages of the proceedings that if she failed to appear her parental rights could be terminated in her absence. Because she voluntarily chose not to return after the recess and her disclosure about her drug use was not considered by the court in making its determination, we find no reversible error here.

CONCLUSION

¶11 Based on the foregoing, we affirm the termination of Mother's parental rights.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PHILIP HALL, Judge

³ An affidavit from Mother was submitted with her opening brief. Because we only review matters in the record on appeal, we will not consider the affidavit.