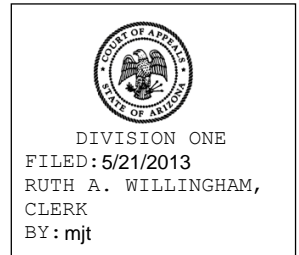


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DAVID P.,) 1 CA-JV 13-0013
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz.R.P. Juv.
SECURITY, F. P., V.P.,) Ct.; Rule 28 ARCAP)
G. F., M. P.,)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD21171

The Honorable Joan M. Sinclair, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Nicholas Chapman-Hushek, Assistant Attorney General
Attorneys for Appellees

John L. Popilek, PC Scottsdale
By John L. Popilek
Attorneys for Appellant

G O U L D, Judge

¶1 David P. ("Father") appeals the juvenile court's order severing his parental rights to his four children, F.P., V.P., G.F., and M.P. (collectively, "children").¹ For the following reasons, we affirm.

Facts and Procedural Background

¶2 In December 2011, Father's children were found alone in the home and covered with rashes. The eldest child, F.P., who was eight years old, reported that he was caring for his three younger siblings. A neighbor reported that the mother had been gone from the home for two days and that the neighbor had recently bathed the children herself. The home had a strong sour unpleasant smell, and rotting food was found in the refrigerator. The kitchen floor was smeared with a brown residue, and there appeared to be feces in the living room. A bottle of Crown Royal liquor was found on the bathroom counter, and a glass pipe for smoking methamphetamine was found on the edge of the bed. The youngest child, M.P., had a rash that was so severe that he was immediately taken to Phoenix Children's hospital, where he received a urinary screen that tested positive for methamphetamine.

¶3 The children were removed in December 2011, and were found dependent as to Father in May 2012. On August 9, the case

¹ The caption has been amended to safeguard the identity of the juveniles pursuant to Administrative Order 2013-0001.

plan was changed from reunification to severance and adoption. At the August 9 hearing, the court provided Father with a Form 3 Notice to Parent in Termination Action, which included the following paragraph:

You are required to attend all termination hearings. If you cannot attend a court hearing, you must prove to the Court that you had good cause for not attending. If you fail to attend the Initial Termination Hearing, Termination Pre-trial Conference, Status Conference, or Termination Adjudication Hearing without good cause, the Court may determine that you have waived your legal rights and admitted the grounds alleged in the motion/petition for termination. The Court may go forward with the Termination Adjudication Hearing in your absence and may terminate your parental rights to your child based on the record and evidence presented.

Ariz. R. Juv. Ct., Form 3.

¶4 In September 2012, the State moved to terminate Father's parental rights. At the initial termination hearing, Father denied the State's allegations, and a pretrial conference was set for November 20. Father was also given a copy of ADES's Notice of Hearing on Motion for Termination of Parent-Child Relationship, which contained the following warning:

You have a right to appear as a party in this proceeding. You are advised that your failure to personally appear in the court at the initial hearing, pretrial conference, status conference or dependency adjudication, without good cause shown, may result in a finding that you have waived your legal rights and have admitted the

allegations in the Motion. In addition, if you fail to appear, without good cause, the hearing may go forward in your absence and may result in an adjudication of dependency, termination of your parental rights or the establishment of a permanent guardianship based upon the record and the evidence presented to the court.

¶5 When the pretrial hearing began on November 20, Father was not present in the courtroom. The court asked Father's counsel where Father was, and counsel replied that she did not know. The court found that no good cause supported his absence and found that Father had waived his rights by failing to appear. The court then heard testimony from the case manager and admitted four case reports into evidence. Father's counsel participated in the hearing, objecting to certain testimony and cross-examining the case manager.

¶6 Based on the evidence presented by ADES, the court terminated Father's parental rights pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(3) (substance abuse) and 8-533(B)(8)(a)-(b) (time-in-care) (West 2013).² At the conclusion of the hearing, the court ordered ADES to file proposed findings of fact and conclusions of law.³

² We cite to the current version of the statute when no revisions material to this decision have occurred.

³ The hearing, which was set to begin at 8:30 a.m., started at 8:38 a.m. and ended at 8:54 a.m.

¶7 After the hearing was over, Father's counsel discovered Father standing outside the courtroom. Father explained that he had taken a city bus to court and had to walk from the bus stop to the courthouse, and was therefore slightly late for the hearing. Based on Father's statements, counsel moved to set aside the termination ruling the next day on the grounds there was good cause for Father's failure to appear at the hearing.

¶8 While Father's motion was pending, ADES submitted its proposed findings of fact and conclusions of law supporting the termination, which the court signed on December 20, 2012, creating a final, appealable judgment. Father timely appealed this judgment on January 3, 2013. After Father filed his notice of appeal, on January 9, 2013, the trial court denied Father's motion to set aside the termination ruling. Father did not, however, file a notice of appeal based on this ruling.

¶9 Given that Father's notice of appeal was filed before the court ruled on his motion to set aside the termination order, we lack jurisdiction to consider whether the court abused its discretion by denying his motion. See *Lindsey v. Dempsey*, 153 Ariz. 230, 235, 735 P.2d 840, 845 (App. 1987) ("Since the ruling of which Lindsey complains occurred after the entry of judgment and the filing of the notice of appeal, we do not have jurisdiction to address it."). Thus, we do not have jurisdiction to consider whether the facts alleged in Father's motion to set

aside the termination order presented good cause for his failure to appear at the pretrial/termination hearing.⁴

¶10 We do, however, have jurisdiction to consider whether the trial court abused its discretion by determining, based on the evidence presented at the pretrial/termination hearing, that there was no good cause for Father's absence and that Father had waived his rights by failing to appear. Further, based on A.R.S. § 8-235(A), we also have jurisdiction to review the trial court's decision to terminate Father's parental rights.

⁴ Our review of the record reveals that the trial court simultaneously denied Father's motion to set aside and permitted Father's trial counsel to withdraw. Thus, Father was unrepresented by counsel from January 9 to January 14, for five of the fifteen days that were crucial for the preservation of his parental rights. See *Ariz. R. Juv. Ct. 104* (explaining that a "notice of appeal shall be filed with the clerk of the superior court no later than 15 days after the final order is filed with the clerk"). Nothing in our decision prevents Father's counsel from petitioning the trial court for an additional five days nunc pro tunc to file a notice of appeal from the order denying his motion to set aside the termination in the interests of equity and due process. See *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 283, ¶ 14, 237 P.3d 632, 636 (App. 2010) (explaining that a parent's right to counsel in a severance hearing "is of a constitutional dimension" and that judicial actions that result from the denial of such a right are void). See also *Ariz. State Dep't of Pub. Welfare v. Barlow*, 80 Ariz. 249, 253, 296 P.2d 298, 300 (1956) (explaining that the denial of counsel constitutes "a denial of due process of law so gross as to lack a necessary attribute of a judicial determination"); A.R.S. § 8-221(B) ("If a juvenile, parent, or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons unless counsel for the juvenile is waived by both the juvenile and the parent or guardian.").

Discussion

¶11 We review a trial court's finding that a parent failed to show good cause for failing to appear for an abuse of discretion. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007). In addition, we review the evidence concerning an order terminating parental rights in the light most favorable to affirming the trial court's order, and will affirm a termination order unless it is clearly erroneous. *Michael J. v. Ariz. Dep. of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000).

¶12 According to A.R.S. § 8-537(C), “[i]f a parent does not appear at the pretrial conference, status conference or termination adjudication hearing, the court, after determining that the parent has been instructed as provided in [§] 8-535, may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition by the failure to appear.” Similarly, Arizona Rule of Procedure of the Juvenile Court 66(D)(2) provides that a “failure to appear may constitute a waiver of rights” if a parent fails to appear at the termination adjudication hearing without good cause shown. In that instance, “the court may terminate parental rights based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.” *Id.*

¶13 Based on the record presented at the pretrial/termination hearing,⁵ we are unable to conclude that the trial court abused its discretion in finding there was no good cause for Father's absence from the hearing and that Father had waived his parental rights pursuant to A.R.S. § 8-537(C). The record demonstrates that Father had been instructed as to the potential consequences of his failure to appear at least twice, and Father's counsel presented no argument that good cause existed for Father's failure to appear at the pretrial/termination hearing.

¶14 In addition, though not disputed by Father, the evidence at the hearing supported termination. The case worker testified that in her opinion, Father was unable to discharge his parental responsibilities due to chronic substance abuse and the fact that he had tested positive for methamphetamine in the past. She also explained that Father had been offered several services, including urinalysis testing, supervised visitation, substance abuse services, and parent aide services, but that he had missed

⁵ Because we do not have jurisdiction to consider the facts alleged in Father's motion to set aside the termination, on appeal we cannot consider the fact that Father was standing outside the courtroom during at least some of the hearing; this fact was unknown to the trial court at the time it made its finding regarding good cause. See *Cella Barr Assocs., Inc. v. Cohen*, 177 Ariz. 480, 487 n. 1, 868 P.2d 1063, 1070 n. 1 (App. 1994) (when reviewing trial court's decision we consider only evidence presented to the trial court and do not consider evidence provided in a subsequent motion for reconsideration).

months of urinalysis testing and that he had not completed his drug rehabilitation program through TERROS. She also stated that Father had been inconsistent with visits with the children, he had not maintained contact with the Department, and had not shown up to meetings related to behavioral issues of one of the children. The case worker confirmed that the children had been in an out-of-home placement for a cumulative total period of nine months and that Father had substantially neglected or willfully refused to remedy the circumstances that caused the out-of-home placement. Finally, she testified that in her opinion, severance and adoption was in the children's best interests.

Conclusion

¶15 For the foregoing reasons, we affirm.

/S/
ANDREW W. GOULD, Presiding Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Judge

/S/
PATRICIA A. OROZCO, Judge