IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CARLOS N.,
Appellant,

v.

HEATHER P. AND A.N.,
Appellees.

No. 2 CA-JV 2021-0038
Filed January 14, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. S20190152
The Honorable Joan L. Wagener, Judge

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

Domingo DeGrazia, Tucson
Counsel for Heather P.

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Judge Brearcliffe and Judge Staring concurred.

V Á S Q U E Z, Chief Judge:

¶1 Carlos N. appeals from the juvenile court's order of April 16, 2021, terminating his parental rights to A.N., on the ground of abandonment. *See* A.R.S. § 8-533(B)(1). Carlos challenges the court's finding that he abandoned A.N., argues it abused its discretion in denying his motion for a change of venue, and contends he received ineffective assistance of counsel resulting in fundamental unfairness. We affirm.

¶2 Before it may terminate a parent's rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2 (App. 2008).

Factual and Procedural Background

¶3 A.N. was born in September 2010, and for approximately the first six months of his life, Carlos had limited contact with him, sometimes questioning his paternity. In June 2011, after A.N.'s mother, Heather, and Carlos had broken up, he became angry with her after "a male friend dropped her off." Heather locked herself in her car as Carlos hit the driver side window and called her a "bitch." After another incident in July 2011, during which Carlos "collid[ed] his vehicle into hers" and "punched out [a] window," Heather successfully sought an order of protection against Carlos, including A.N. as a protected person. In April 2012, however, Carlos pled guilty to unrelated charges, and was thereafter sentenced to a prison term of sixty-three months. Carlos's mother and sister continued to visit A.N. for the next few years, but eventually stopped, at least in part because Heather avoided contact with them. Heather began dating another man in the fall of 2011 and initiated a proceeding in Cochise County Superior Court, seeking custody of A.N. and child support. The court

granted her sole legal custody of A.N., giving Carlos supervised parenting time, and ordered him to pay child support.

¶4 During this time, while he was incarcerated, Carlos had no contact with A.N. He did not send cards, letters, or gifts, or attempt to arrange contact with the child. He was released in October 2016 and in January 2017, he filed a petition for legal decision making and parenting time. He completed a Parent Information Program in relation to that proceeding. In March 2017, Heather waived "all [child] support arrears." She testified at the severance hearing that she had done so in hopes that Carlos would not seek custody in the absence of a support order. In total, Carlos paid $1,239.14 in child support.

¶5 After a hearing in August 2017, the Cochise County court found that Heather had not allowed A.N. to have contact with Carlos's family, but concluded that she had been "acting in the best interest of the child to preserve a peaceful and tranquil environment free of violence and anger. There have been instances of domestic violence in the past." The court, however, ordered it would "allow limited contact with the child. Possibly a card or letter and then maybe phone call or a skype visit. Not face to face. It will have to go at a very slow pace." It ordered that "[t]he interaction must be therapeutic and paid by the father." The court suggested a provider, and apparently directed Heather's attorney to assist in identifying a therapist.

¶6 Carlos sent A.N. a card for his seventh birthday. Heather had not yet told A.N. that Carlos was his biological father and put the card in with other cards that she told A.N. were from family. Some efforts were made toward finding a provider, but ultimately no therapeutic contact between Carlos and A.N. took place. In January 2018, Heather told A.N. that Carlos was his biological father.

¶7 In September 2018, Heather filed a petition for termination of Carlos's parental rights in Cochise County Superior Court. During that proceeding the parties reached a stipulation about therapy for A.N., but again no provider was found. Carlos and other family members sent Christmas gifts for A.N. that year. Carlos also sent cards in late December, in January 2019, February, and April. Heather voluntarily dismissed the proceeding in May 2019. She later explained that her previous counsel in Cochise County had been elected to the bench, and it had been difficult for her to find new counsel in Cochise County. She hired her current counsel, based in Tucson, but found it "prohibitively expensive" for them to travel to Cochise County, which she stated led to the dismissal there.

¶8 In July 2019, Heather filed a petition in Pima County Superior Court seeking to terminate Carlos's parental rights to A.N. on the ground of abandonment under § 8-533(B)(1). At the initial severance hearing in October 2019, Heather explained to the juvenile court that she had filed a severance petition in Cochise County, but it had been voluntarily dismissed. She had then filed in Pima County because the office of the attorneys representing her were there. She also acknowledged that A.N. did not live in Pima County, but noted that Carlos did.

¶9 The juvenile court appointed Michael Vaughan to represent Carlos and set a status conference in order to allow the parties time to try to reach an agreement. The parties appeared for status conferences in December 2019 and March 2020, and severance hearings were set for June and July. Carlos was again incarcerated in late December 2019 after a domestic violence incident with his fiancée at the time. During a January 2020 social study related to the proceedings, Carlos again questioned his paternity of A.N.

¶10 On the first scheduled day of hearings in June, Vaughan moved to withdraw after Carlos asked that he do so, and the juvenile court granted the motion. Derek Koltunovich was appointed to represent Carlos. At the next status conference in July, Koltunovich objected to venue in Pima County and made an oral motion for change of venue to Cochise County. Heather argued Carlos had waived the issue of venue by failing to object earlier or in writing and asked that he file a written motion. Carlos filed the motion in August 2020, and the court denied it shortly thereafter. Carlos filed a petition seeking special-action relief, but this court declined to accept jurisdiction. The severance hearings concluded in January 2021, and in its April 2021 under-advisement ruling, the court granted the petition for termination of Carlos's parental rights.

Discussion

Venue in Pima County

¶11 Preliminarily, we address Carlos's two arguments on appeal, which overlap substantially, concerning venue. Carlos argues that "[v]enue was not proper in Pima County" and the juvenile court abused its discretion by denying his motion for change of venue and that his counsel was ineffective in failing to timely raise the question of venue. "[A]n order

granting or denying a change of venue is not an appealable order."[1] *Goff v. Superior Courts*, 2 Ariz. App. 344, 347 (App. 1965). "Even if such an error could be preserved and raised on appeal subsequently, if the error is not jurisdictional, it would be seldom that there would be a reversal, in view of the clear mandate of our Constitution that no cause shall be reversed when substantial justice has been done." *Id.* (citing Ariz. Const. art. VI, § 27). As we will explain in relation to Carlos's claim of ineffective assistance of counsel, this is not such a rare case.[2]

¶12 Carlos contends he "was denied due process because his first appointed attorney provided ineffective assistance of counsel by failing to file a timely motion for change of venue." As detailed above, Carlos's first appointed counsel, Vaughan, did not object to venue in Pima County. As the juvenile court pointed out, it was only after "a number of hearings" that the issue was raised and, largely on that basis, the court denied Carlos's motion for change of venue.

¶13 This court has previously determined, in the context of a delinquency matter, that although under A.R.S. § 8-206, venue is proper in the county of residence of the child, an objection to improper venue may be waived if not asserted. *In re Maricopa Cnty. Juv. Action No. JV-117258*, 163 Ariz. 484, 485 (App. 1989). We explained that "venue is a privilege that permits one in whose favor it runs to have a case tried at a convenient place; it is personal and unless asserted may be waived." *Id.* Carlos attempts to distinguish this case, arguing in part that the court's application of the civil rules in *Maricopa County No. JV-117258* was erroneous and that venue in juvenile cases should be controlled solely by § 8-206. But whether Vaughan waived a timely objection to venue or failed to make the now-asserted

[1]Special-action jurisdiction is the appropriate procedure for raising challenges to pretrial rulings relating to venue. *Sierra Tucson, Inc. v. Lee*, 230 Ariz. 255, ¶ 6 (App. 2012) (noting that such orders are appropriately reviewable by special action because appeal cannot adequately cure incorrect venue ruling). As noted above, Carlos sought special-action relief in this court, and we declined to accept jurisdiction. *Carlos N. v. Heather P. & A.N.*, No. 2 CA-SA 2020-0047 (Ariz. App. Sept. 11, 2020) (order).

[2]We also note that our supreme court has amended the Rules of Juvenile Court Procedure, effective July 1, 2022, to eliminate the venue question presented here. Ariz. Sup. Ct. Order R-20-0044 (Dec. 8, 2021). Under new Rule 314 a party may move for a change of venue and a procedure for such a motion is provided. *Id.*

argument as to which statute should control, the record is clear that the motion was denied as a result of his failure.

¶14 In determining whether an order severing parental rights should be reversed on the basis of counsel's ineffectiveness, however, "we do not look first to whether counsel's conduct fell below professional norms." *Royce C. v. Dep't of Child Safety*, No. 2 CA-JV 2021-0005, ¶ 20, 2021 WL 3928610 (Ariz. Ct. App. Sept. 2, 2021). Instead, "we look first to the proceeding itself and, employing the long-standing rules of due process, we consider whether counsel's conduct was such that it undermined the fundamental fairness of the proceeding and cast doubt on the proceeding's 'protection of the individual against arbitrary action of government.'" *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). Thus, to justify reversal and "establish that counsel's deficiencies violated due process, the attorney's conduct must be such that it denies the parent fundamental fairness or shocks the conscience."[3] *Id.* ¶ 25.

¶15 Carlos, however, focuses on Vaughan's actions, arguing that his conduct "provides a prime example of ineffective counsel" because he failed to make a "slam-dunk motion for change of venue." But, as explained in *Royce*, that counsel failed to file a timely motion is not dispositive of the question of fundamental fairness. ¶¶ 19-20, 26. Rather, Carlos must establish that the proceedings were fundamentally unfair as a result of the denial of the motion for change of venue. *See id.* ¶ 20. He argues that such unfairness "is evident because the record clearly reflects that Carlos was, for the most part, successful in Cochise County." But this ignores the fact that the last ruling from the court in Cochise County, in which it allowed a slow therapeutic transition to visitation, was made in 2017. Carlos has been imprisoned again in the years since then and made little attempt to contact A.N. after April 2019. No evidence suggests that the Cochise County court necessarily would have reached a different conclusion from that reached in Pima County by the time the severance hearing concluded in January 2021.

[3]Heather argues that we should deny Carlos's motion for stay, filed in conjunction with his claim of ineffective assistance as directed by *Royce*, 2021 WL 3928610, ¶ 29, because he could have "pursue[d] his evidentiary ideas in the trial court but chose not to." As we pointed out in *Royce*, however, "the current rules of procedure in the juvenile court do not provide a mechanism for a parent to raise a claim regarding counsel's conduct in the juvenile court." ¶ 28.

¶16 Furthermore, the "superior court is not a system of jurisdictionally segregated departments but rather a 'single unified trial court of general jurisdiction.'" *State v. Marks*, 186 Ariz. 139, 142 (App. 1996) (quoting *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102 (1995)). Thus, venue is not a jurisdictional issue. *Id.* And in the absence of any suggestion of venue-based bias, such as pretrial publicity, *see Rideau v. Louisiana*, 373 U.S. 723, 725 (1963) (due process violated when defendant tried in venue where video of confession shown repeatedly on television), we cannot say Carlos has established that improper venue violates due process, *see State v. Williams*, 373 P.3d 353, 356 n.1 (Wash. Ct. App. 2016) ("Venue choices do not implicate fundamental rights, triggering heightened scrutiny."); *Schmutz v. State*, 440 S.W.3d 29, 36 (Tex. Crim. App. 2014) ("[V]enue error does not implicate the vicinage clause of the Sixth Amendment to the federal Constitution or the Due Process Clause of the Fourteenth Amendment."). Finally, Carlos has cited no authority, nor can we imagine any exists, to support the proposition that a proceeding is fundamentally unfair based solely on the fact that a judge of a different county's superior court presided over it. Therefore, we cannot say that this is one of the "egregious cases" in which the "extraordinary remedy" of reversal on the basis of ineffective assistance of counsel is required. *Royce*, 2021 WL 3928610, ¶ 26.

¶17 For all these reasons, we can conclude on the record before us that Carlos has not established "fundamental fairness requires that the appeal be suspended and the case remanded to the juvenile court so that it may permit the parties to develop an additional record." *Royce*, 2021 WL 3928610, ¶ 29. We therefore deny by separate order his motion to suspend the appeal. *See id.* ¶¶ 27, 29 (when record is sufficiently developed and this court may reach legal conclusion as to fundamental fairness, stay and remand not required).

Sufficiency of Abandonment Evidence

¶18 On appeal, Carlos contends the juvenile court abused its discretion by finding Heather had established he abandoned A.N.[4] *See* § 8-533(B)(1) (abandonment ground for termination of parent-child relationship). "We review the . . . court's order for an abuse of discretion and will affirm if it is supported by sufficient evidence in the record. . . .

[4] Carlos does not challenge the juvenile court's conclusion that severance was in A.N.'s best interests. Any such argument is therefore waived. *See Crystal E. v. Dep't of Child Safety*, 241 Ariz. 576, ¶ 5 (App. 2017).

However, we review *de novo* any issues of law, including the interpretation of a statute." *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶ 12 (App. 2010) (citation omitted).

¶19 "Abandonment" is defined as:

> [T]he failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1). As detailed above, Carlos has not physically seen A.N. since the child was six months old. He provided only minimal financial support for A.N. throughout his life and had no contact at all with the child from 2011 to 2017. He then sought contact in early 2017 after he was released from incarceration in October 2016, and subsequently sent a card for A.N.'s seventh birthday and Christmas in 2018. He sent several cards in early 2019, but had no further contact with the child after April 2019.

¶20 Carlos argues, however, that "[t]he evidence in this case is overwhelming that Heather interfered with [his] ability to be a parent to his son." In support of his argument he relies on *Calvin B. v. Brittany B.*, in which this court held "that a parent who has persistently and substantially restricted the other parent's interaction with their child may not prove abandonment based on evidence that the other has had only limited involvement with the child." 232 Ariz. 292, ¶ 1 (App. 2013). In that case the father of the child, who was alleged to have abandoned him, was found to have "consistently 'done something' to assert his right to have contact with his son." *Id.* ¶ 29. And the mother in that case actively limited the time the father could spend with the child during the father's visitation and ultimately ended the visits, blocked his phone calls, obtained an order of protection, and called law enforcement and had him arrested for violating the order. *Id.* ¶¶ 6-8.

¶21 The situation here is clearly distinguishable. Even crediting the facts on which Carlos relies—that Heather waived child support in hopes that he would abandon his effort to gain custody of A.N., that she dismissed the Cochise County proceeding, and that she avoided telling A.N. that Carlos was his biological father until January 2019—the record

does not establish Heather interfered in a manner similar to the interference in the "unusual" case of *Calvin B. Id.* ¶ 21. Carlos made only minimal efforts to maintain contact with A.N., and had no contact with him for nearly six years while he was incarcerated. He sent the child only a handful of cards and gifts during the nearly four years between his release from prison and the close of the severance hearings, and made no attempts to send cards or letters from June to December of 2020.

¶22 Carlos asserts that "[p]arents are not required to take obviously futile actions" and contends that Heather "intended to thwart any attempt by Carlos to be a father to his son." However, "abandonment is measured not by a parent's subjective intent, but by the parent's conduct." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 18 (2000). Regardless of Heather's reluctance to allow Carlos into A.N.'s life, the record shows that Carlos did not "act persistently to establish the relationship however possible" or "vigorously assert his legal rights to the extent necessary." *Id.* ¶ 22 (quoting *In re Pima Cnty. Juv. Action No. S-114487*, 179 Ariz. 86, 97 (1994)).

¶23 Carlos also suggests the juvenile court unfairly faulted him for not following up with a therapist in order to facilitate therapeutic visitation after the Cochise County court ordered it. Carlos asserts that "[i]t is unheard of" for a court to fault him only, even though he was unrepresented at the time and there was a "genuine misunderstanding" with Heather's counsel. But, a pro se litigant is held to the same standard as an attorney in regard to legal procedures. *See Higgins v. Higgins*, 194 Ariz. 266, ¶ 12 (App. 1999). In any event, whatever the confusion surrounding the Cochise County court's order about therapy, Carlos ultimately had the responsibility to "vigorously assert his legal rights," *Michael J.*, 196 Ariz. 246, ¶ 22.

¶24 In sum, Carlos's arguments essentially amount to a request for this court to reweigh the evidence presented to the juvenile court, which we will not do. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002). The court received substantial evidence to support the conclusion that Carlos had abandoned A.N., and we therefore affirm its ruling as to abandonment. *See id.* ¶ 4.

¶25 We affirm the juvenile court's order severing Carlos's parental rights to A.N.