ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CA05-936

May 17, 2006

AMY ANNE GILBERT
APPELLANT

AN APPEAL FROM WASHINGTON COUNTY CIRCUIT COURT
[JV2005-26-3]

V.

HON. STACEY A. ZIMMERMAN, JUDGE

DEAN RICHARDSON and
SHERON RICHARDSON
APPELLEES

AFFIRMED IN PART;
DISMISSED IN PART

This case arises from an order adjudicating the daughters of appellant Amy Gilbert to be dependent-neglected. Appellant asserts that the trial judge who entered the adjudication order erred when she recused herself but failed to grant a new trial. Appellant also asserts that the subsequent judge to whom the case was reassigned erred in failing to grant her a new trial because the decision was contrary to the law and was against the preponderance of the evidence.

We dismiss in part because appellant's motion for a new trial was deemed denied and she thereafter failed to properly appeal from the deemed denial of her motion. In addition, we summarily affirm the underlying adjudication order because appellant has abandoned any argument regarding the order since she offers no separate argument based on that order.

Prior to the dependency-neglect petition filed in the instant case, appellees, Dean and Sheron Richardson, who are appellant's parents and the grandparents of the children involved in this case, were awarded temporary custody of appellant's daughters due to

appellant's instability and drug usage. In that prior action, presided over originally by Judge Michael Mashburn and then by Judge Stacey Zimmerman, appellant regained custody of her two daughters on July 18, 2003, and was ordered to remain drug-free.

The instant appeal arises from a subsequent petition for dependency-neglect filed on January 11, 2005. The petition was based on appellant's two drug-related arrests in Washington and Sebastian County in November and December 2004, and it asserted that appellant failed to remain drug-free. It also alleged that the girls were at substantial risk of serious harm as a result of appellant's continued drug use. Finally, the petition also cited the children's "large number of tardies" during the previous school year.

At the probable cause hearing, Judge Zimmerman heard testimony from the arresting officers concerning appellant's arrests in late 2004. Michael Hendrix, an officer of the Springdale Police Department in Washington County, testified that he was a certified drug-recognition expert. He saw appellant in the parking lot of a grocery store, placing items commonly used to manufacture methamphetamine in her car, namely, over 2500 books of matches, Coleman camping fuel, two bottles of isopropyl alcohol, and two bottles of hydrogen peroxide. As Hendrix spoke to appellant, he observed that she was "real jittery" and "very nervous," that she talked nonstop, that she had scabs on her face and legs, that her face appeared "worn," and that she had bruises on her legs and track marks or puncture marks on each side of the brachial artery in her arm. Hendrix explained that the track marks were signs of intravenous drug usage. He also smelled a strong chemical odor in appellant's car, which he associated with manufacture of methamphetamine. Based on this activity, appellant was charged in Washington County with possession of drug paraphernalia with intent to manufacture methamphetamine.

While awaiting trial on the Washington County charge, appellant was arrested in Sebastian County for possession of methamphetamine with intent to deliver and possession of drug paraphernalia. Officer Josh Lovan of the Fort Smith Police Department testified that he obtained a cell phone from another suspect who was arrested on drug-related charges. The cell phone rang and the caller asked for Mikey. Lovan indicated that he was Mikey and the caller asked if he was going to bring her "stuff." Assuming that the caller wanted methamphetamine, Lovan made arrangements to meet the caller at a car wash. When he arrived at the car wash, appellant was standing outside of a vehicle and a seventeen-year old female was with her. Lovan originally identified himself as Mikey, but ultimately identified himself as an officer, told appellant that he knew she was there to buy drugs, and asked her to surrender any kind of drug paraphernalia in her possession. Appellant indicated several times that she did not have any drugs or syringes, but eventually surrendered from her purse two syringes and three baggies containing what Lovan described as "a sizable amount of methamphetamine." According to Lovan, appellant also admitted that she had used methamphetamine earlier that day.

Judge Zimmerman also heard testimony that appellant had taken her daughters out of school in January and requested that their records be sent to Massachusetts, but then returned to Arkansas, causing the girls to miss two weeks of school. Appellant insisted that she only intended to stay for the weekend and that she went to Massachusetts to marry her fiancé, but intended to return to Arkansas to resolve her criminal charges. She said that she was forced to stay in Massachusetts because appellee Dean Richardson locked her out of her house when she left and told her that she had no home. Appellant admitted that the Veteran's Administration had stopped providing her with medication for her bipolar condition due to her drug charges.

Judge Zimmerman found that appellant's testimony was not credible and that, based on appellant's history of drug usage and the conduct that led to her recent arrests, probable cause existed to support that the children were dependent-neglected. The children were again placed in the temporary custody of appellees. The judge also ordered that appellant have no contact with her daughters. Although appellant passed the drug test administered that day, the judge ordered that appellant submit to a hair-follicle test within seven days.

On March 1, 2005, appellant appeared in Sebastian County Circuit Court and pleaded guilty or no contest (the record is unclear) to possession of methamphetamine and possession of drug paraphernalia, both Class C felonies. She received a suspended sentence of sixty months that was contingent upon completing drug court in Washington County. The record did not indicate a disposition on the Washington County charges.

Two days later, Judge Zimmerman also presided over the adjudication hearing. Essentially, the same evidence was presented as was presented at the probable-cause hearing, with the additional evidence that appellant "failed" the hair-follicle test, testing positive for amphetamine and methamphetamine. Judge Zimmerman determined that the children were dependent-neglected and indicated orally that the finding was based on: 1) the fact that appellant allowed her bipolar condition to go untreated after the Veteran's Administration ceased providing her medication due to her then-pending drug charges; 2) appellant's felony possession of methamphetamine in Sebastian County in December 2004; 3) the fact that appellant had her children in her possession the day after she was arrested for using methamphetamine; 4) the fact that, despite appellant's testimony that she had not used methamphetamine since 1987, the results of the hair-follicle test performed on February 18, 2005, were positive for methamphetamine and amphetamine; 5) the fact that appellant placed the children in harm's way by continuing to use drugs; 6) the fact that appellant posed a flight

risk, as evidenced by her prior conduct of leaving Arkansas and requesting that the children's records be transferred; 7) the fact that appellant manifested an indifference to discharging her duties as evidenced by her poor choices, her use of drugs, and her plea involving a drug-related crime.

On March 21, 2005, Judge Zimmerman issued a written adjudication order stating that appellant's daughters were adjudicated to be dependent-neglected as a result of appellant's unfitness. This order incorporated the judge's oral findings, stating that she found that appellant's daughters were at a substantial risk of serious harm as a result of appellant's acts and omissions for "those reasons announced from the bench."

On March 31, 2005, appellant filed a motion for a new trial and a separate motion asking Judge Zimmerman to recuse. The motion to recuse is not the subject of this appeal but is related to appellant's arguments concerning her motion for a new trial. The motion to recuse was based on the following comment that Judge Zimmerman made in the prior case, in a hearing held on July 18, 2003:

> JUDGE: Oh, there she is. That [sic] if I were Ms. Watson [appellees' then attorney], Ms. Gilbert, and you fell off the wagon again, I would file a dependent-neglect action, and I'd ask for permanent custody, and she'll probably get it, and then I can do that, and I won't get reversed. True, Ms. Watson?
>
> WATSON: Yes.
>
> JUDGE: I just wanted everybody to know that. Okay, thank you.

The motion for a new trial was based on Arkansas Rule of Civil Procedure 59(a)(1), which allows for a new trial due to an irregularity in the proceedings that materially prevent a party from having a fair trial. Appellant specifically asserted that Judge Zimmerman's "bias" against her, as demonstrated by the comments that were the basis for the motion to recuse, materially prevented appellant from receiving a fair trial.

Appellant also requested a new trial based on Rule 59(a)(6), which allows for a new trial if the decision is contrary to the law. Appellant asserted that she was found to be unfit because of certain drug-related criminal charges, one of which was possession of drug paraphernalia with intent to manufacture methamphetamine. However, because the items she possessed were not drug paraphernalia under Arkansas law, she maintained that she could not be guilty of possession of drug paraphernalia with intent to manufacture methamphetamine and thus, her purchase of the items was lawful and cannot constitute a basis for finding she was unfit.

Finally, appellant asserted entitlement to a new trial pursuant to Rule 59(a)(6) because the adjudication determination was clearly contrary to the evidence. She specifically argued that there was no evidence that she was unfit and that there was no evidence that her daughters had been adversely affected or placed at substantial risk of harm.

At the hearing on the motion to recuse, Judge Zimmerman explained that her comments were merely an admonition, but acknowledged that, when the remarks were taken in isolation, "I could see how Ms. Gilbert might think I have it in for her." Accordingly, Judge Zimmerman agreed to recuse. Moreover, because Judge Zimmerman recused, she did not rule on the motion for a new trial, stating, "I don't think, in candor, I should even rule on that motion for a new trial since I'm recusing."

The case was reassigned to Judge Michael Mashburn, who originally presided over the prior action involving appellant and her children. An order reassigning the case to Judge Mashburn was entered on April 29, 2005; an order of recusal was entered on May 2, 2005. Judge Mashburn reviewed the tape recordings of the hearing and the record produced at the adjudication hearing. He entered an order on June 1, 2005, denying the motion for a new trial for essentially the same reasons that Judge Zimmerman determined that the children

were dependent-neglected. Judge Mashburn found that appellant was unfit, that her daughters were dependent-neglected, and denied the motion for new trial.

Appellant purports to appeal from the denial of the motion for a new trial, which would necessarily bring up for review any underlying orders, including the adjudication order. Ark. R. App. P. – Civil 2(b). However, we dismiss that portion of appellant's appeal relating to her motion for a new trial because the motion was deemed denied on May 2, 2005, and appellant has not timely appealed from that denial.

The adjudication order was entered on March 21, 2005. The motion for a new trial was timely filed within ten days thereafter, on March 31, 2005. *See* Ark. R. Civ. P. 59(b). The timely filing of a motion for new trial normally extends the time for filing a notice of appeal until thirty days from the entry of the order disposing of the last motion outstanding. Ark. R. App. P. – Civil 4(b)(1). However, if the trial court neither grants nor denies the motion, it is deemed denied as of the thirtieth day and the notice of appeal shall be filed within thirty days from that date. Ark. R. App. P. – Civil 4(b)(1).

In this case, the motion for a new trial was deemed denied on May 2, 2005, because it was neither granted nor denied within thirty days of its filing on March 31, 2005.[1] Therefore, pursuant to Arkansas Rule of Appellate Procedure – Civil 4(b)(2), appellant's notice of appeal from the deemed denial of her motion should have been filed no later than June 1, 2005. While appellant filed a notice of appeal on May 31, 2005, in that notice of appeal, she appeals only from the March 21 adjudication order. Thus, she has submitted to this court no timely notice of appeal from the deemed denial of her motion for a new trial. Accordingly, we dismiss that portion of appellant's appeal relating to the denial of her

[1]The thirtieth day after filing was April 30, which was a Saturday. Therefore, according to Arkansas Rule of Civil Procedure 6(a), the end of the period was May 2, the following Monday.

motion for a new trial.[2]

Further, although appellant appeals from the underlying adjudication order, she raises no separate argument concerning the sufficiency of the evidence supporting the adjudication order. As such, we do not address any argument based on the adjudication order because appellant has abandoned any appeal related to that order. *Marshall v. Madison County,* 81 Ark. App. 57, 98 S.W.3d 452 (2003) (refusing to address issues abandoned on appeal).

Affirmed in part; dismissed in part.

GLADWIN and NEAL, JJ., agree.

2We note that the June 1, 2005 order entered by Judge Mashburn purporting to deny appellant's motion for a new trial is without effect because the judge failed to act on the motion within the thirty-day period following its filing, and thus, lost jurisdiction to thereafter rule on that motion. *See Wal-Mart Stores, Inc. v. Isely,* 308 Ark. 342, 823 S.W.2d 902 (1992); *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).