

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-724

DAVID WEAVER

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES and MINOR
CHILDREN

APPELLEES

Opinion Delivered NOVEMBER 9, 2011

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. JV 2010-156]

HONORABLE MICHAEL MEDLOCK,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

ROBIN F. WYNNE, Judge

The Crawford County Circuit Court terminated the parental rights of David Weaver in his children, G.W. and D.W.¹ Weaver's counsel has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(i), in which counsel asserts that there are no issues that would support a meritorious appeal in this case. Appellant filed pro se points in response to his counsel's brief. Appellees elected not to file a brief. We affirm the order terminating appellant's parental rights and grant his counsel's motion to withdraw.

The first issue for us to address is whether there was sufficient evidence to support the circuit court's decision to terminate appellant's parental rights. See *Linker-Flores v. Ark. Dep't of Human Servs. (II)*, 364 Ark. 224, 217 S.W.3d 107 (2005). Prior to their removal by the

¹The children's mother is deceased.

Arkansas Department of Human Services (DHS), G.W. and D.W. lived in a home with appellant, appellant's girlfriend Sherri Smith, and Smith's four children. DHS filed a petition for emergency custody and dependency-neglect of G.W. and D.W. on August 13, 2010. The affidavit in support of the petition stated that G.W. reported that she was sexually abused by appellant and four other individuals, including two of Smith's children. The children were adjudicated dependent-neglected by the circuit court in an order entered on September 16, 2010. In the order, the circuit court found the allegations of sexual abuse by G.W. to be true and correct. Appellant did not appeal from this order. On January 18, 2011, DHS filed a petition to terminate appellant's parental rights. The ground for termination alleged in the petition was that the children were found to be dependent-neglected as a result of sexual abuse by a parent and, as a result, appellant was found to have subjected the children to "aggravated circumstances."

The only witness called at the termination hearing was the caseworker, Misty Cates. Cates testified that DHS felt it was in the children's best interest to terminate appellant's parental rights because appellant denied the allegations by G.W. and felt that appellant would not be able to protect his children and prevent the abuse from occurring again. Cates also testified that the children were placed with a maternal aunt and uncle. Cates stated that if appellant's rights were terminated, it was possible that the children would be adopted and that the aunt and uncle had expressed a desire to adopt the children. At the conclusion of the termination hearing, the court granted DHS's petition, finding that one of the children was

subjected to aggravated circumstances. The circuit court later entered a written order terminating appellant's parental rights.

We agree with counsel that there would be no merit to an appeal based on the sufficiency of the evidence to support the granting of DHS's termination petition. In the order adjudicating the children dependent-neglected, the circuit court found that appellant sexually abused G.W. Among the grounds for termination is a finding that the parent has subjected any juvenile to aggravated circumstances. Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3)(A) (Supp. 2009). Sexual abuse is included in the definition of "aggravated circumstances." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3)(B)(i) (Supp. 2009). Because appellant did not appeal from the adjudication order in which the circuit court found the sexual-abuse allegations to be true, he would be precluded from arguing on appeal that the trial court erred by finding that DHS proved a ground for termination.

There would also be no merit to an argument that DHS failed to prove that termination was in the children's best interest. In determining the children's best interest, the circuit court is to consider the likelihood that the children will be adopted if termination is granted and the potential harm caused by returning the children to the custody of appellant. Ark. Code Ann. § 9-27-341(b)(3)(a)(i) and (ii) (Supp. 2009). Concerning the adoptability of the children, DHS presented evidence that a maternal aunt and uncle wanted to adopt the children. Concerning the potential harm to the children if they were to be returned to appellant, as stated above, appellant was found by the circuit court to have sexually abused his child, which was never challenged on appeal. Despite that unchallenged finding, appellant

continued to deny that the abuse occurred. The evidence produced at the termination hearing supports the circuit court's determination that the children would be subjected to potential harm if they were returned to appellant's custody.

In his pro se points, appellant argues that the termination order should be reversed due to the "ineptitude" of his attorney. Although appellant claims that his attorney told him that he could not appeal from the adjudication order and that the attorney failed to seek evidence that could have aided in his defense to the termination petition, appellant never raised any claim of ineffective assistance of counsel before the trial court. Arkansas appellate courts will not consider a claim of ineffective assistance of counsel as a point on appeal unless it was first raised in the trial court. See *Jones v. Ark. Dep't of Human Servs.*, 361 Ark. 164, 205 S.W.3d 778 (2005).

Appellant also argues that the circuit judge in the dependent-neglect case was prejudiced against him because he was also the judge that presided over appellant's criminal trial. Appellant never requested that the circuit judge in this case recuse. He has likewise provided no evidence to support his assertion that the judge was prejudiced against him. None of appellant's pro se points raise any meritorious arguments for reversal of the termination order.

The only other ruling at the termination hearing that was adverse to appellant was the circuit court's denial of his motion for a continuance. At the beginning of the hearing on DHS's termination petition, appellant objected to proceeding with the termination hearing and made an oral motion to continue or dismiss, arguing that it had not been a year since the

children had been removed from appellant's custody. The circuit court denied appellant's motion to continue or dismiss. Although appellant argued before the circuit court that he was entitled to twelve months from the date the children were removed until the termination hearing, the ground for termination pled by DHS in its petition does not require that the children be out of the parent's custody for twelve months. We agree with counsel's assertion that the denial of the motion for continuance does not present a meritorious issue for appeal.

Affirmed; motion to withdraw granted.

ROBBINS and GLOVER, JJ., agree.