

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2004

D.F.,

**

Appellant,

**

vs.

**

CASE NO. 3D03-1478

FLORIDA DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,

**

LOWER
TRIBUNAL NO. 97-15179

**

Appellee.

**

Opinion filed April 21, 2004.

An Appeal from the Circuit Court for Miami-Dade County,
William E. Gladstone, Judge.

Karl E. Hall, Jr., for appellant.

Calianne P. Lantz and Mercedes Scopetta, for appellee.

Before COPE, GREEN, and RAMIREZ, JJ.

RAMIREZ, J.

D.F. appeals the trial court's April 21, 2003 final judgment
for termination of the parental rights to her three children. We

find that the trial court abused its discretion when it denied D.F.'s counsel's repeated requests for a continuance of the final adjudicatory hearing and therefore reverse.

In April of 1997, the appellee Florida Department of Children and Family Services adjudicated D.F.'s three children dependent. After being reunited with her children and returned to State custody several times, on July 28, 2001, pick-up orders issued for the children based upon D.F.'s arrest and the department's inability to locate the children. The department eventually located the children and determined that D.F. was incarcerated in Alachua County, Florida.

In January of 2002, the department filed a Termination of Parental Rights Petition on the grounds of abandonment, and it reported that D.F. was incarcerated. In May of 2002, the trial court granted the defense a continuance to August 5, 2002. On that same day, the court terminated the father's parental rights by default. D.F. was thereafter reported to be in federal custody. Her location was unknown.

In September of 2002, the trial court granted the defense a second continuance. The trial commenced on October 8, and continued on October 9, 2002 and November 18, 2002. D.F.'s location in federal custody remained unknown during the first two days of trial during which defense counsel moved for another continuance. The trial court denied the motion and agreed to allow D.F. to appear

telephonically. D.F.'s counsel eventually located D.F. on November 18, the day of the final adjudicatory hearing, and moved for a continuance. Defense counsel proffered that he had witnesses and relevant evidence to present at trial, and he expressed his need for more time within which to prepare D.F.'s case for trial. The trial court again denied the motion. Defense counsel then communicated with D.F. telephonically for a period of twenty minutes prior to the presentation of D.F.'s case on the last day of the final adjudicatory hearing. The trial court thereafter entered its order terminating D.F.'s parental rights.

We sympathize with the trial court's frustration with all the delays occasioned by D.F.'s incarceration and the apparent lack of cooperation by the federal authorities, but we conclude that the denial of defense counsel's motions to continue on the last day of the trial mandate reversal. We are mindful that it is well within the trial court's discretion to determine whether it should grant a request for continuance. See Bouie v. State, 559 So. 2d 1113, 1114 (Fla. 1990). This determination will not be disturbed unless justice requires. Id. See also Beachum v. State, 547 So. 2d 288, 289 (Fla. 1st DCA 1989). It is quite common, however, to grant a continuance before or during a hearing for good cause shown by any party. See e.g. Fla. R. Juv. P. 8.255(f).

The trial court had a number of options at its disposal to ensure that D.F.'s due process rights were not violated. The trial

court could have allowed D.F. to testify telephonically, after a reasonable amount of time to confer with counsel, see C.W. v. Dep't of Children & Families, 843 So. 2d 362 (Fla. 3d DCA 2003) (permitting a telephone appearance) and M.R.L. v. Dep't of Children & Families, 835 So. 2d 1261, 1262 (Fla. 1st DCA 2003) (allowing the prisoner to appear telephonically). The trial court could have permitted a reasonable period of time for D.F. to present her own witnesses. See § 39.013(10), Fla. Stat. (2002) (allowing for reasonable periods of delay that result from a continuance granted at the party's request).

The trial court's decision to deny defense counsel's motions to continue in effect denied D.F. due process. At the time in which the trial court denied defense counsel's motion on the final day of the final adjudicatory hearing, D.F.'s location had already been determined. The trial court did not allow for arrangements for D.F. to appear telephonically. The court then only permitted defense counsel to confer with D.F. for an unreasonably short period of time given the circumstances. We reject the department's argument that defense counsel had been provided with reasonable access to D.F. in light of the time constraints (twenty minutes on the last day of the trial).

This is not a case in which the parent neglected any court proceeding upon which the entry of default would have been proper. See § 39.801(3)(d), Fla. Stat. (2002) (stating that failure of a

parent to personally appear at the adjudicatory hearing constitutes consent for the termination of parental rights). See also J.B. v. Dep't. of Children & Family Servs., 768 So. 2d 1060, 1064-65 (Fla. 2000) (discussing the statutory scheme which permits termination of parental rights based upon a parent's neglect of the proceedings); J.T. v. Dep't. of Children & Families, 800 So. 2d 692, 693-94 (Fla. 5th DCA 2001) (upholding the termination of parental rights where the parents failed to appear at the termination hearing and counsel did not offer any grounds for the parents' non-appearance). Nor is this a case where there was any need for expediency as there was no pending adoption. The status of the children's custody or future would not have been affected by a short delay.

This is a case in which the parent's failure to appear in court was due to incarceration. The court simply did not give D.F. a meaningful opportunity to appear and respond to the charges. The record is devoid of any evidence that reflects that D.F. had an unwillingness to appear at her trial. D.F. had also reunited with her children on at least two occasions and had custody of the children at the time of her arrest.

The trial court thus erred by denying defense counsel's motions to continue. Although we find troublesome the difficulties encountered in locating a federal prisoner,¹ we cannot allow this to

¹ If this is a recurring problem, as suggested by the department, perhaps a better procedure can be devised between the department and the federal authorities.

trump the fundamental rights that are at stake in proceedings to terminate parental rights. We therefore reverse the final judgment of termination of parental rights of D.F.

Reversed.

COPE, J., concurs.

GREEN, J. (dissenting).

Under the facts and circumstances of this case, I simply cannot find the trial court's refusal to continue the trial terminating the appellant/mother's parental rights to be an abuse of discretion. For that reason, I would affirm.

This case was filed in the dependency court in 1997. Since that time, the State has taken the children into custody but later reunified the mother with the children on several occasions. On the last such occasion, the mother and children were reunited on a Friday, but the mother was arrested and incarcerated on the following Monday in the federal penal system on a parole violation. It is significant to note that the mother's trial counsel below has also represented the mother in the dependency proceedings for at least two years prior to her arrest and she was therefore very familiar with him. Despite this fact, she made no efforts whatsoever to contact her trial counsel after her arrest to apprise him of her whereabouts in the federal penal system or inquire about the status of her children in the state dependency proceedings.¹

On January 17, 2002, a termination of parental rights petition was filed against the mother on the grounds of

¹ Thus, contrary to the majority's assertion, I do believe that this is precisely a case where the mother neglected this proceeding in part.

abandonment and case plan non-compliance under section 39.806(1)(e), Florida Statutes (2001), and noted that the mother was incarcerated. Prior to the commencement of this trial, this case was continued twice on the grounds that the mother could not be located in federal custody. Both the mother's counsel and the appellee made efforts to locate the mother in the federal penal system² prior to the trial but were unsuccessful. The only information conveyed by the authorities in the federal penal system regarding the mother's whereabouts stated that she was "in transit."³ The trial court continued the trial twice on the grounds that the mother's whereabouts in federal prison remained unknown.

Finally, on October 8, 2002, the trial commenced in this cause over the defense's objection that the mother still had not been located. In denying the defense's motion for yet another continuance, the trial court agreed to a procedure which attempted to maintain a balance between the due process rights of the mother and the need of the children for permanent placement. The trial court decided to proceed with the trial, but not rule on the same until after the mother's counsel was given a specified amount of additional time within which to get a transcript of the trial and attempt to contact the mother. Thereafter, if the mother wished

² Indeed, the mother's attorney's Herculean efforts in this regard included writing letters to the President of the United States and his brother, the Governor of the State of Florida, seeking assistance.

³ Even this limited information was gleaned from an internet web search of a federal corrections database.

to be heard by telephone or any other means, the trial court agreed to hear from her prior to ruling on this case. The majority's assertion to the contrary is simply wrong. See Maj. Op. 3-4.⁴

Approximately one month later, on November 18, 2002, the trial was still pending. The mother's counsel informed the trial court that he had located the mother in a correctional facility in Tallahassee by using the corrections website that morning. Because the federal authorities do not transport their inmates to civil state court proceedings such as the terminations proceeding below, the trial court made arrangements with the federal correctional facility to permit the mother to participate telephonically in the proceeding for approximately two hours. The trial court also permitted the mother's counsel to speak privately to the mother during the morning hours of the proceeding for approximately twenty minutes and during the afternoon hours of the proceeding for approximately twenty minutes. After speaking to the mother, the defense counsel declined to present the mother's testimony telephonically based upon his asserted inability to

⁴ The court: What I am going to do is deny Mr. Metcalfe's motion for continuance at the moment and I am going to try the case. I am not going to rule on the case, but I am going to give Mr. Metcalfe X amount of time to get a transcript and to contact his client if he can, and if she wishes to be heard by telephone or any other means, I will hear from her prior to ruling on the case.

I must confess to you that this is not my original idea, I understand it's one that Judge Lederman uses sometimes in the same situation, and it sounds to me to be eminently fair. But it is far more unfair to deny these children permanency ad infinitum. This woman has her obligations as well, and I commend counsel, I think that the one thing that's stipulated is that everyone has tried everything they can to locate her and haven't been able to do so thus far. Does anyone deny that?

adequately prepare her. On April 23, 2003, the trial court entered its Final Order terminating the mother's parental rights, and this appeal followed.

The mother essentially asserts that her due process rights were violated when she was given only two twenty-minute telephonic communications with her counsel to prepare and defend this termination proceeding. Under ideal circumstances, no one would dare disagree with her. No one can disagree, however, that the circumstances presented in this case are less than ideal as well. Through no fault of the trial court, appellee or defense counsel, the mother was unable to be physically present at the trial of this cause. She was only able to be present telephonically at the latter stage of the proceedings. The trial court was faced with the dilemma of continuing this trial still further with the very strong possibility that the mother might not be locatable in the federal penal system at the time of the next hearing⁵ or permitting the mother's input, albeit limited, at the final hearing on November 18, 2002. The trial court's decision not to continue this proceeding still further under such circumstances cannot be deemed an abuse of discretion particularly where the overwhelming evidence established by clear and convincing proof adduced by the appellee supports the Final Order terminating the mother's parental rights. See Gore v. State, 599 So. 2d 978, 984

⁵ Indeed, on the date of oral argument, the mother's appellant counsel candidly acknowledged that neither he nor trial counsel knew of the current custodial whereabouts of the mother.

(Fla. 1992); C.J. v. Dep't of Children & Families, 756 So. 2d 1108, 1109 (Fla. 3d DCA 2000); see also F.A.F. v. Dep't of Children & Family Servs., 804 So. 2d 616 (Fla. 3d DCA 2002); T.C.V. Dep't of Health & Rehab. Servs., 681 So. 2d 893 (Fla. 4th DCA 1996). As I see it, a retrial of this case is an exercise in futility and only prolongs and/or frustrates the appellee's ability to secure adequate permanent placement for the minor children at issue in this case.