

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of T.D. and N.D.
(Children in Need of Services),
and

K.D. (Mother) and B.D. (Father)
Appellants,

v.

Indiana Department of Child
Services,
Appellee.

October 30, 2020

Court of Appeals Case No.
20A-JC-1026

Appeal from the Boone Circuit
Court

The Honorable Lori N. Schein,
Judge

The Honorable Sally E. Berish,
Magistrate

Trial Court Cause Nos.
06C01-1903-JM-84
06C01-1903-JM-85
06C01-1903-JC-87
06C01-1903-JC-88

Brown, Judge.

[1] K.D. (“Mother”) and B.D. (“Father”) appeal the trial court’s denial of their motions for relief from judgment and petitions for writs of habeas corpus. We affirm.

Facts and Procedural History

[2] In March 2019, Mother and Father (“Parents”) and their two children, born in 2014 and 2017, resided in Lebanon, Indiana. On March 4, 2019, Mother was taken to the emergency room and then the St. Vincent Stress Center.

According to Parents, someone from the hospital contacted Father, and he expressed to the caller his political and religious views and that he is a Second Amendment enthusiast. According to its preliminary inquiry report, the Department of Child Services (“DCS”) received a report causing concern about the welfare of the children. DCS, together with law enforcement, went to Parents’ residence. Father asked if they had a warrant and asked them to leave his property.

[3] At about 1:45 p.m. on March 4, 2019, DCS filed motions to compel requesting that Parents be ordered to interview the children¹ and allow DCS to observe the home environment. An affidavit by a DCS family case manager supervisor was attached to the motions and stated: DCS received a report that Mother had

¹ One of the motions identified the child’s first name as “A” and stated “[u]nknown [D.] Child is 14 months old but the date of birth and sex of Child is unknown,” and the other motion identified the child’s first name as “B” and stated “[u]nknown [D.] Child is 4 years old but the date of birth and sex of Child is unknown.” Appellants’ Appendix Volume II at 36, 41.

been detained at St. Vincent Stress Center and presented as paranoid and would not allow her vitals to be taken; she had a drug screen that came back positive for marijuana; Father was contacted at 6:00 a.m. and was very paranoid, reporting that family members had sent the military and government after them; and Father reported having a small artillery in the house and will not sleep unless two people are guarding the home with rifles. The affidavit also stated that Father discussed how Mother was possessed with Satan; Father told law enforcement they had no right to be on his property and he had two lawyers on their way to the house; law enforcement had pulled DCS back as Father continued to look out the windows and had reported having rifles; and DCS was unable to verify the safety of the children. The trial court issued Orders to Compel which required Parents to permit DCS to interview the children and enter the home to determine the welfare and safety of all individuals.² “A several hours long standoff between Father and law enforcement then occurred,” and the children were eventually brought out of the residence.³ Appellants’ Appendix Volume II at 201, 222.

[4] On March 5, 2019, DCS filed a Request for Authorization to File a Petition and Request for Taking or Continued Custody of the Children. At the same time,

² The Orders to Compel referred to the children using the initials of “A.” and B.” for their first names. Appellants’ Appendix Volume II at 50, 51. The orders were signed by Magistrate Sally Berish and Judge Lori Shein.

³ A family case manager supervisor indicated there was a “twelve hour wait and negotiation throughout the day” which ended at approximately 8:00 p.m. Transcript Volume II at 16. Father indicated the standoff lasted for “[n]ine and a half hours.” *Id.* a 98.

DCS filed petitions alleging the children were children in need of services (“CHINS”). On March 6, 2019, DCS filed its preliminary inquiry report referenced above, and the court issued an order stating it had considered the preliminary inquiry report, found probable cause to believe the children were CHINS, and authorized the filing of the petitions.

[5] The court held an Initial and Emergency Detention Hearing on the morning of March 6, 2019, at which Father appeared and indicated he had retained counsel. The court informed him that his attorney needed to enter an appearance, it was going to set a status hearing for the following week which would allow Father’s attorney to be present, and that anything the court ordered would be reviewed at the status hearing, and Father replied “Great. Thank you.” Transcript Volume II at 5. The court also stated Mother was entitled to an attorney, Father stated he understood, and the court indicated it would appoint an attorney for her or she could hire one. The court reviewed the CHINS petitions, Father indicated he understood the allegations, and the court entered a preliminary denial of the allegation the children were CHINS and moved to the detention portion of the hearing. A family case manager supervisor testified as to the report received by DCS, the standoff, Mother’s condition, and DCS’s concerns. Following a discussion with Father and the children’s paternal grandmother, who traveled to Indiana when Mother was hospitalized, the court stated it was ordering the children be placed with their paternal grandmother who would be staying at the home of Father’s pastor. The court stated “[m]y understanding from law enforcement and we had a

short conversation was, there was nothing, no criminal activity occurred yesterday” and “[t]hey have to be able to be inside the house so that I know what’s inside the house,” and Father replied “[y]eah, makes sense.” *Id.* at 29. The court stated Father could visit the children, the “only order is that . . . you can have visitation with the kids this week with grandmother there at the [pastor’s] home,” and Father replied “that’s fine.” *Id.* at 31. The court scheduled a hearing for March 14, 2019.

[6] Later in the day on March 6, 2019, the court held an Emergency Hearing at which Father was present. The court referenced the hearing held earlier that day, stated it had placed the children with their grandmother in a home, and had set parameters for Father’s visitation which he immediately violated. Father said “No, I’m . . . ,” the court said “Sir!,” and Father replied: “I’m sorry, I’m sorry, I’m sorry, I’m sorry.” *Id.* at 37. The court indicated the order permitted Father to have visitation with the children with grandmother in the pastor’s home, stated “[t]hat’s not what happened,” ordered the children detained to foster care and that visitation be supervised by a provider, and stated that its order would be reviewed the following week. *Id.* On March 11, 2019, the court entered written orders on the March 6th hearings.⁴ DCS performed a home inspection on March 12, 2019, the children were returned to

⁴ The order on the initial and detention hearing was signed by Magistrate Berish, and the order on the emergency hearing was signed by Magistrate Berish and Judge Schein. The order on the initial and detention hearing stated that Father waived counsel.

Father on March 14, 2019, and Mother learned of the events regarding the children when she was released on or about March 26, 2019.

[7] On April 30, 2019, DCS filed a motion to dismiss the CHINS actions, stating Parents were voluntarily participating in services and requesting that the court dismiss the petitions without prejudice. That same day, the court entered an Order on Motion to Dismiss stating “[t]he Court finds the DCS has documented a compelling reason, based on the facts and circumstances stated in the Motion for concluding that filing and/or proceeding to a final determination on the Petition to Terminate Parental Rights is not in the best interests of the child” and “[t]he Court . . . hereby grants said Motion without prejudice.”⁵ Appellants’ Appendix Volume II at 91.

[8] On December 3, 2019, Parents filed motions for relief from judgment or, in the alternative, petitions for writs of habeas corpus. With respect to the Orders to Compel, they argued the orders were void because the court did not have personal jurisdiction over them, Mother was committed in the St. Vincent Stress Center on March 4 through March 22, 2019, Father was presented orally with the contents of the orders and complied, and they were deprived of due process when they were required to submit the children to an interview without a hearing. Parents requested that the court vacate the Orders to Compel. With respect to the Order on Motion to Dismiss, Parents argued the order was void,

⁵ The order was signed by Magistrate Berish.

the magistrate did not have the authority to enter the order, the court did not have personal jurisdiction over Mother and she was involuntarily committed and not notified of the CHINS proceedings, the court had an improper communication with the Sheriff, and the court received an email from DCS alleging Father had violated the court's order. Parents requested that the court vacate the orders of dismissal and dismiss the CHINS cases with prejudice.

[9] On January 27, 2020, DCS filed motions to correct error requesting the court correct the Order on Motion to Dismiss so that it referred to a dismissal of the CHINS petitions and not any termination proceedings. Parents filed a motion to strike or deny DCS's motion.

[10] On February 24, 2020, the court held a hearing on Parents' December 3, 2019 motions.⁶ Parents' counsel indicated they were requesting the Orders to Compel and the orders dismissing the CHINS petitions without prejudice be found void and that, ultimately, the CHINS actions be dismissed with prejudice. DCS's counsel argued that DCS was unable to file a CHINS action on the same facts. Father testified that he saw the Boone County Sheriff standing in front of the Magistrate in the courtroom before his initial and detention hearing, and alleged ex parte communication.

[11] On April 13, 2020, the trial court issued orders denying Parents' December 3, 2019 motions. The court found Mother was involuntarily committed to the St.

⁶ The hearing was held before Judge Schein.

Vincent Stress Center for eighteen days, DCS received a report of possible abuse/neglect and was obligated to conduct an assessment, Father refused to allow law enforcement or DCS to enter his home and see the children, the court did not set a hearing but rather issued the Orders to Compel, Father's counsel advised Father of the motions and orders, and Father eventually allowed DCS to see the children. The court concluded the information received by DCS, including Mother's commitment, statements made by Father and Mother to health care workers, DCS and others, and Father's behavior, gave rise to a reasonable suspicion that the children were in imminent danger of abuse and Parents' due process rights were not violated. It also found the court had personal jurisdiction over Father, the CHINS petitions were dismissed, the failure to serve Mother with the motions to compel was moot, the Orders to Compel referred to Father "and/or" Mother, and "[o]nce Father complied with the Orders to Compel, the matters concluded." *Id.* at 215.

[12] With respect to the Order on Motion to Dismiss, the court found that the order was not a final order and did not require the signature of the presiding judge, the reference to termination of parental rights was a scrivener's error, and, as for the dismissal without prejudice, that "DCS is legally precluded from bringing another CHINS Petition against Father and Mother based upon the same facts alleged in the CHINS Petitions filed under these cause numbers." *Id.* at 237. It also found Father did not present evidence that the Magistrate had an improper communication with the Sheriff or of how his due process rights were violated, and that, while the email sent by DCS to the Magistrate was an ex parte

communication, it was not improper as it fell under the emergency exception, and the court had already determined Father’s visitation should be supervised. The court found that Father was informed of the communication and stated he understood, DCS did not obtain any procedural or tactical advantage by sending the email, and Father’s due process rights were not violated. The court also found Parents’ and their children’s liberty interests were not being restrained by the Orders to Compel, which had expired, or in the CHINS proceedings, and dismissed the petitions for writs of habeas corpus.

Discussion

[13] Parents raise the issue of whether the trial court erred in denying their motions for relief from judgment and petitions for writs of habeas corpus. They assert their due process rights were violated by multiple errors, including that Mother was not served with process, DCS did not obtain authority to file the CHINS petitions, the court had improper communications with the Sheriff and in receiving an email from DCS, the children’s initials were not correctly stated in the Orders to Compel, the order dismissing the CHINS petition was signed by the Magistrate, and the March 11, 2019 order incorrectly stated Father waived his right to counsel. Parents argue they “do not want DCS left with the option of resurrecting the same allegations in a subsequent CHINS petition” Appellants’ Brief at 36.

[14] Trial Rule 60(B) provides in part that “[o]n motion and upon such terms as are just the court may relieve a party . . . from a judgment . . . for the following reasons: . . . (6) the judgment is void” A motion shall be filed within a

reasonable time for purposes of Trial Rule 60(B)(6). The burden is on the movant to establish grounds for Trial Rule 60(B) relief. *In re Paternity of P.S.S.*, 934 N.E.2d 737, 740 (Ind. 2010).

[15] The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty or property without a fair proceeding. *Matter of E.T.*, 152 N.E.3d 634, 640 (Ind. Ct. App. 2020) (citing *Lawson v. Marion Cty. Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005)). Due process is essentially the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* (citing *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). Although due process is not dependent on the underlying facts of the particular case, it is nevertheless flexible and calls for such procedural protections as the particular situation demands. *Id.* (citing *Lawson*, 835 N.E.2d at 580).

[16] To the extent Parents do not challenge the trial court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[17] To the extent Parents challenge the Orders to Compel, Ind. Code § 31-32-13-7 provides: "If: (1) the juvenile court determines on the juvenile court's review of the record that an emergency exists; or (2) the moving party demonstrates by sworn testimony or affidavit that an emergency exists; the juvenile court may

issue an emergency order without a hearing.”⁷ DCS attached an affidavit to its motions to compel which set forth DCS’s concerns with Parents’ mental health needs and Father’s statements. In denying Parents’ Trial Rule 60(B) motion, the trial court found, “[e]ven though DCS does not explicitly use the word ‘emergency’ in its Motions to Compel, the Court finds as a matter of law that DCS demonstrated that an emergency existed which justified the Court granting the Orders compelling Father and/or Mother [to] produce the children for an interview.” Appellants’ Appendix Volume II at 217. Although Mother was hospitalized, the court found that Father’s counsel advised him of the court’s Orders to Compel, the orders required Father “and/or” Mother to permit entry into the residence and produce the children, and Father complied with the orders. While the Orders to Compel referred to the children using the initials “A.” and “B.” for their first names, the orders identified the children’s last names, Parents, and the address of the residence, and Father, at the initial and detention hearing, confirmed his name, the names of Mother and the children, their relation to each other, the children’s dates of birth, and the address of the residence where they all lived. Additionally, Ind. Code § 31-32-

⁷ In addition, Ind. Code § 31-33-8-1 requires DCS to initiate an assessment of every report of known or suspected child abuse or neglect the department receives, and provides that, if the department believes a child is in imminent danger of serious bodily harm, it shall initiate an onsite assessment immediately and no later than two hours after receiving the report and that, if the safety or well-being of a child appears to be endangered or the facts otherwise warrant, the assessment shall be initiated regardless of the time of day. Ind. Code § 31-33-8-7(b) provides the assessment may include a visit to the home and an interview of the child. Ind. Code § 31-33-8-7(d) provides that, if consent to an interview cannot be obtained, DCS may petition the court to order the parent to make the child available to be interviewed. Also, Ind. Code § 31-33-8-8 provides that, if before the assessment is complete, the opinion of the law enforcement agency or DCS is that immediate removal is necessary to protect a child, the court may issue an order.

13-8 provides in part that an emergency order is “valid for not more than seventy-two (72) hours, excluding Saturdays, Sundays, and legal holidays,” and, in any event, the court found Father complied with the Orders to Compel, and the CHINS petitions were dismissed. Based upon the record and under these circumstances, reversal of the Orders to Compel or a finding they were void on due process grounds is not warranted.

[18] To the extent Parents challenge the Order on Motion to Dismiss the CHINS petitions, we note the order was entered before there was any evidentiary hearing. As to any irregularities, while DCS filed its Request for Authorization to File a Petition and its CHINS petition at the same time on the afternoon of March 5, 2019,⁸ *see* Ind. Code § 31-34-9-1 (requiring DCS counsel to request the court to authorize the filing of a CHINS petition), and filed its preliminary inquiry report the following morning,⁹ we note the trial court’s March 6, 2019 order authorizing the filing of the CHINS petition expressly stated the court considered the preliminary inquiry report and found probable cause to believe the children were CHINS. *See* Ind. Code § 31-34-9-2 (providing the court shall consider the preliminary inquiry and the evidence of probable cause and authorize the filing of a petition if the court finds probable cause to believe that the child is a CHINS).

⁸ Both the request for authorization and the CHINS petition were file-stamped at 4:36 pm. on March 5, 2019.

⁹ The preliminary inquiry report was file-stamped at 8:26 a.m. on March 6, 2019.

[19] The record establishes that, while Mother was not served, Father appeared for the initial and detention hearing, he allowed DCS to see the children, DCS performed a home inspection and found the home to be appropriate, and the children were returned to Father on March 14, 2019. Additionally Mother was involuntarily committed to the St. Vincent Stress Center and was not released until after the children were returned to Father, Mother testified that she met with and hired an attorney at the end of March 2019 who represented her until the dismissal in April 2019, DCS stated in its motion to dismiss that Mother and Father were voluntarily participating in services, and the CHINS petitions were dismissed on April 30, 2019. As to Father's testimony regarding seeing the Sheriff in the courtroom and the court's statement there were no criminal charges, the record does not demonstrate that Father was not afforded a fair proceeding. The court heard from Father and the children's paternal grandmother and ordered that the children be placed with the grandmother at the pastor's home and that Father have supervised visitation. Although the court held an emergency hearing following a DCS report that Father had, within hours, violated its visitation order and placed the children in foster care, Father apologized, the children were released to Father the following week, and we cannot say under the circumstances the court's immediate action upon receipt of the report from DCS did not constitute an emergency action or deprived Parents of due process.

[20] In addition, while the court's written March 11, 2019 order included a statement that Father had waived counsel, the transcript of the initial and

detention hearing reveals the court recognized that Father had retained counsel, informed him that his attorney needed to enter an appearance, and stated it would set a status hearing for the following week which would allow Father's attorney to be present and any orders would be reviewed at the status hearing. The court also reviewed the CHINS petitions, Father indicated he understood the allegations, and the court entered a preliminary denial of the allegations on Father's behalf. We also note the statement of DCS's counsel at the February 24, 2020 hearing that "DCS cannot come back and file a new CHINS Petition based on the same set of facts that they have previously filed." Transcript Volume II at 62. We also cannot conclude the Order on Motion to Dismiss was void or Parents were deprived of due process because it was signed by the Magistrate or because the order, which referred to the CHINS cause numbers, mistakenly referred to termination proceedings.

[21] To the extent Parents sought habeas corpus, Ind. Code § 34-25.5-1-1 provides that "[e]very person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal." One is entitled to habeas corpus only if the person is entitled to immediate release from unlawful custody. *Hobbs v. Butts*, 83 N.E.3d 1246, 1248 (Ind. Ct. App. 2017). Parents have not shown that their or their children's liberty interests were restrained when they filed their requests for writs of habeas corpus or when the court entered its April 13, 2020 orders.

[22] For the foregoing reasons, we affirm the trial court.

[23] Affirmed.

Robb, J., and Crone, J., concur.