IN THE COURT OF APPEALS OF IOWA

No. 9-666 / 09-0486
Filed November 25, 2009

IN THE INTEREST OF J.A.P. and A.A.P.,
Minor Children,

M.A.M., Mother,
Petitioner,

A.E.P., Father,
Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

A father appeals from the decision terminating his parental rights. **AFFIRMED.**

Thomas P. Graves of Graves Law Firm, P.C., West Des Moines, for appellant father.

Todd E. Babich and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee mother.

Lora McCollom-Sinclair, West Des Moines, for minor children.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Sackett, C.J., takes no part.

DOYLE, J.

A.E.P., the father of two children born in 2002 and 2004, appeals a ruling terminating his parental rights. A.E.P. contends that District Court Judge Eliza J. Ovrom should have recused herself from the proceedings and that he received ineffective assistance of trial counsel. We affirm.

***I. Background Facts and Proceedings*.**

This action was brought by A.E.P.'s former wife, the mother of his two children. Her marriage to A.E.P. was dissolved by decree in December 2005. The decree, signed by District Court Judge D.J. Stovall, incorporated the parties' agreement, which provided that sole legal custody and primary physical care[1] of the children was placed with their mother. A.E.P. was given supervised visits and ordered to pay child support of $341.33 a month. Judge Stovall also entered an order of protection for the mother and the two children ordering, among other things, that A.E.P. stay away from them. A.E.P. did not pay all the child support he was ordered to pay, and he had limited contact with the children.

There is evidence that in the early morning hours of May 9, 2006, A.E.P. broke into the home of his former wife and hit and detained her when the children were present. There is evidence that he also made threats to kill his former wife and her parents. As a result of the incident, A.E.P. was charged by trial information with burglary in the second degree, false imprisonment, domestic abuse assault with intent to inflict serious injury, and harassment in the first degree.

[1] Although the term "primary physical care" is not used in Iowa Code chapter 598, we nevertheless use the term in this opinion because it was used by the parties and the district court.

On June 7, 2006, as a result of the events above, the Iowa Department of Human Services (Department) found A.E.P. had committed child abuse in that he denied his two children critical care and failed to provide them proper supervision. The Department found the incident was not minor, isolated, or unlikely to reoccur, and A.E.P.'s name was placed on the child abuse registry.

On February 13, 2007, A.E.P. with his attorney appeared before District Court Judge Eliza J. Ovrom and entered an *Alford* plea[2] to all counts. Judge Ovrom found:

> By direct conversation with [the] defendant on the record, the court finds the defendant understands the charge and its penal consequences, the rights being waived, and that there is a factual basis of the plea and that the plea is voluntary. The court further finds that the defendant has acknowledged 1) that it is in his/her best interest to enter this plea, 2) he/she has nothing to gain at trial and will gain much more by pleading, 3) that there is strong evidence of actual guilt, and 4) that he/she wishes to take advantage of the plea bargain.

Judge Ovrom then accepted A.E.P.'s *Alford* plea. She found he was advised of and waived his rights to file a motion in arrest of judgment and that he asked for immediate sentencing. Judge Ovrom then sentenced A.E.P. on all the counts finding the sentences should run consecutively for a period not to exceed fifteen years.

On June 22, 2008, A.E.P.'s former wife filed a petition to terminate A.E.P.'s parental rights. The petition alleged that A.E.P. had not had any significant contact with the children since May 2006 and that he did not contribute to their support. She sought termination pursuant to Iowa Code section

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[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Buhr*, 243 N.W.2d 546 (Iowa 1976).

600A.8(3)(b), 3(c), (4), and (9) (2007). She also requested that a guardian ad litem be appointed to represent the children. A guardian ad litem was then appointed.

On March 5, 2009, a hearing was held on the petition. The parents were each represented by counsel, and a guardian ad litem appeared for the children. The record shows that Judge Stovall had recused himself from this case.[3] The mother's second witness was testifying when A.E.P.'s trial counsel noted it had come to his attention that Judge Ovrom was the judge who accepted A.E.P.'s *Alford* plea and sentenced him. On that basis, he requested that Judge Ovrom recuse herself from the proceedings. The attorney for the mother and the guardian ad litem for the children were satisfied to allow Judge Ovrom to continue hearing the case.

Judge Ovrom responded to the motion noting she noticed when exhibits were admitted that she was the judge who had accepted A.E.P.'s *Alford* plea and sentenced him. She said she had no independent recollection of doing so, that she believed she could be fair, and she did not have any predisposition for or against either party. She determined taking the plea was not an automatic ground for recusal and she believed she could be fair. Judge Ovrom denied the request and heard the evidence.

On March 13, 2009, Judge Ovrom filed the ruling that led to this appeal. The factual findings addressed, among other things, the facts leading to the charges that formed the basis of A.E.P.'s *Alford* plea. The court found that on

[3] There is no record as to why he did so.

May 9, 2006, A.E.P. went to his former wife's house, kicked in the door, went inside, grabbed her, and yelled he would kill her and her father. The court further found A.E.P. pounded his former wife's head into the floor while the two children were in nearby bedroom. The court found the police were called, and A.E.P. was charged with burglary in the second degree, false imprisonment, domestic abuse assault with intent to inflict serious injury, and harassment in the first degree. The court found that A.E.P. pled guilty to the charges, was sentenced to fifteen years of prison pursuant to a plea agreement, and was currently serving the sentence.

The court also found the children were about seven months and two years old at the time the dissolution petition was filed and that A.E.P. had not been around the children for about three years. The court further found that A.E.P. was not capable of caring for the children and that there was a no-contact order preventing him from seeing the children. The court terminated A.E.P.'s parental rights under Iowa Code section 600A.8(3).[4]

[4] Section 600A.8(3) provides that the juvenile court may termination parental rights if the parent has abandoned the child. A parent is deemed to have abandoned the child pursuant to subsection 600A.8(3)(b) if:

> [T]he child is six months of age or older when the termination hearing is held, . . . unless the parent maintains substantial and continuous or repeated contact with the child as demonstrated by contribution toward support of the child of a reasonable amount, according to the parent's means, and demonstrated by any of the following:
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> (1) Visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person having lawful custody of the child.
>
> (2) Regular communication with the child or with the person having the care and custody of the child, when physically and financially unable to visit the child or when presented from visiting the child by the person having lawful custody of the child.

The court found that A.E.P. was ordered to make payments of child support of $341.33 beginning December 1, 2005, and had only made one payment, which was in the amount of $244.83 on April 10, 2006. The court also found that although he gave some additional money to his former wife through his attorney, A.E.P. did not pay the amount ordered and he paid no support while in prison though he had a job at the prison. The court terminated A.E.P.'s parental rights under section 600A.8(4).[5]

A.E.P. appeals.

***II. Discussion*.**

***A. Recusal*.**

A.E.P. contends that because Judge Ovrom accepted his *Alford* plea and sentenced him to incarceration, she should have recused herself from hearing the chapter 600A termination of parental rights case against him. He advances that we should accept a broad perspective when considering the fairness of chapter 600A proceedings. A.E.P.'s appellate attorney, in appellant's brief, makes the following statement: "I could not adequately express the overpowering sense of unfairness communicated to me by [A.E.P.] and his family over the simple fact that the [j]udge who sentenced him also ruled on an application to terminate his parental rights." A.E.P. asks that we adopt a rule that any judge who presides over the plea and sentencing of an individual should not preside over the same individual's termination of parental rights proceeding.

[5] Section 600A.8(4) provides that the juvenile court may terminate parental rights if "[a] parent has been ordered to contribute to the support of the child . . . and has failed to do so without good cause."

A.E.P. acknowledges that he is unaware of any jurisdiction that has adopted such a rule. For the reasons that follow, we decline to adopt such a broad rule.

"We review a court's decision to recuse or not to recuse itself for an abuse of discretion." *Taylor v. State*, 632 N.W.2d 891, 893-94 (Iowa 2001) (citing *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994); *State v. Farni*, 325 N.W.2d 107, 110 (Iowa 1982)). The court abuses its discretion when its decision is based on untenable grounds or it has acted unreasonably. *Id*. at 894. "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005) (citing *Bousman v. Iowa Dist. Ct.*, 630 N.W.2d 789, 796 (Iowa 2001)). "Actual prejudice must be shown before a recusal is necessary." *In re C.W.*, 522 N.W.2d 113, 117 (Iowa Ct. App. 1994). When a judge does not recuse herself, the burden is on the party seeking recusal to prove that she should have. *Millsap*, 704 N.W.2d at 432; *Taylor*, 632 N.W.2d at 894. This burden is substantial. *Farni*, 325 N.W.2d at 110.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, 946 (1955). Parties have a right to a neutral and detached judicial officer. *McKinley v. Iowa Dist. Ct*., 542 N.W.2d 822, 827 (Iowa 1996); *Mann*, 512 N.W.2d at 532; *see also In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007).

We look to the Iowa Code and the Iowa Code of Judicial Conduct for pertinent rules concerning recusal. Iowa Code section 602.1606 provides, in applicable part:

> A judicial officer is disqualified from acting in a proceeding, except upon the consent of all the parties, if any of the following circumstances exists:
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> 1. The judicial officer has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Canon 3(C)(1) of the Iowa Code of Judicial Conduct provides:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be question, including but not limited to the following instances:
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> a. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

"If a judge's impartiality might reasonably be questioned because of such bias or extrajudicial knowledge, the judge should recuse himself or herself." *State v. Haskins*, 573 N.W.2d 39, 44 (Iowa Ct. App. 1997). We apply a "reasonable person" test, which inquires whether reasonable persons with knowledge of all facts would conclude that the judge's impartiality might reasonably be questioned. *Id*.

> Even a judge who is unaware of disqualifying factors may nevertheless be expected to recuse if the "reasonable person" test is met. The reason "is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."

Mann, 512 N.W.2d at 532 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65, 108 S. Ct. 2194, 2205, 100 L. Ed. 2d 855, 875 (1988)). "The appearance of impropriety is not sufficient to merit recusal." *C.W.*, 522 N.W.2d at 117. Only personal bias or prejudice stemming from an extrajudicial[6] source that results in an opinion on the merits on some basis other than what the judge

[6] "Outside court; outside the functioning of the court system." Black's Law Dictionary 606 (7th ed. 1999).

learned in the case stands as a disqualifying factor per se. *See State v. Jacobs*, 644 N.W.2d 695, 699 (Iowa 2001); *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979); *Haskins*, 573 N.W.2d at 45-46. Generally, prior judicial encounters with the trial court will not provide a basis for prejudice requiring a different judge. *See Smith*, 282 N.W.2d at 142.

A.E.P. does not dispute that Judge Ovrom did not remember his plea and sentencing.[7] Upon our review of the record, we find A.E.P. failed to demonstrate any personal bias stemming from an extrajudicial source, and he failed to show the judge abused her discretion in not recusing herself. We therefore conclude the trial judge did not abuse her discretion in refusing to recuse herself from this case.

***B. Ineffective Assistance of Counsel*.**

Our review of a termination of parental rights case is de novo. *In re S.R.,* 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). When the court terminates parental rights on more than one ground, we only need to find grounds to terminate under one of the sections cited by the court in order to affirm the court's ruling. *In re A.S.*, 743 N.W.2d 865, 867 (Iowa Ct. App. 2007). "The grounds for termination must be proven by clear and convincing evidence." *S.R.*, 600 N.W.2d at 64. Even if the statutory requirements for termination of parental rights are met, the decision to terminate must be in the children's best interests. *In re M.S.*, 519 N.W.2d 398, 400 (Iowa 1994); *A.S.*, 743 N.W.2d at 867. Our primary concern is the best interests of the children. *S.R.*, 600 N.W.2d at 64.

[7] His appellate brief states: "It is clear that the trial court did not remember the plea and sentence in question."

A.E.P. contends his trial counsel was ineffective in failing to obtain and admit evidence, call the appropriate witnesses, and sequester certain witnesses. There is no procedural equivalent to postconviction relief following proceedings to terminate parental rights. *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). Direct appeal is the only way for a parent to raise an ineffective assistance of counsel claim in a termination case. *Id*. Such a claim is reviewed de novo. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). As no Sixth Amendment protections are implicated, there is no constitutional right to effective assistance of counsel. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). Nevertheless, due process requires that counsel appointed pursuant to a statute provide effective assistance. *Id*. at 579-80; *see also In re Voeltz*, 271 N.W.2d 719, 722 (Iowa 1978). Although the Sixth Amendment is not implicated here, we apply the same standards adopted for counsel appointed in a criminal proceeding. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687-98, 104 S. Ct. 2052, 2064-70, 80 L. Ed. 2d 674, 693-700 (1984); *State v. Losee*, 354 N.W.2d 239, 243-44 (Iowa 1984); *State v. Neal*, 353 N.W.2d 83, 86-87 (Iowa 1984).

The *Strickland* principles require the party claiming ineffective assistance of counsel to show (1) that counsel's performance was deficient and (2) that actual prejudice resulted. Unless both showings are made, the claim must fail. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Our scrutiny of the counsel's performance must "be highly deferential," *id*. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the

challenged action 'might be considered sound trial strategy.'" *Id*. at 689, 104 S. Ct. at 2066, 80 L. Ed. 2d at 694-95 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)); *see also State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006). Therefore A.E.P., as an unsuccessful litigant in a termination of parental of rights proceeding, must prove both a deficiency in counsel's performance and actual prejudice. *In re T.P.*, 757 N.W.2d 267, 274 (Iowa Ct. App. 2008).

In its findings of fact, the court stated:

> Child support records show that he made one payment of $244.83 on April 10, 2006. In addition, [A.E.P.] paid some monies to [his former wife] through his attorney, although this fell far short of the amount ordered under the decree. While in prison, [A.E.P.] has paid no child support. [A.E.P.] has had a job while he has been incarcerated, and he receives money from family members.

In its discussion terminating A.E.P.'s parental rights under section 600A.8(4), the court stated:

> [A.E.P.] has failed to pay child support. He has made one official (partial) payment since entry of the decree in December 2005. After he was sentenced to prison in February 2007, he has not made any payments at all. He has had money available to him during this time. There is no good cause for [A.E.P.'s] failure to pay child support under these circumstances.

As one ground for termination, the court terminated A.E.P.'s rights under section 600A.8(4).

A.E.P. testified that he made more than one payment and the total was probably $2500 to $3000. A.E.P.'s appellate attorney represents that he found evidence that more payments were made and that evidence should have been found before trial and admitted. He points to copies of documents, included in the appendix, that he claims show: (1) one check on January 16, 2006, from

A.E.P.'s employer to A.E.P.'s former wife, for $244.83 (returned by the Collection Services Center); (2) A.E.P.'s pay slips from February 28, 2006, to March 31, 2006, showing garnishment for child support and a year to date garnishment of $1940.39; and (3) six garnishment checks to A.E.P.'s former wife, each in the amount of $244.83 covering the period February 15, 2006, to March 31, 2006. A.E.P. also argues the documents raise a question as to his former wife's credibility. These documents are not a part of the record, and we do not consider issues based on information outside the record. *Rasmussen v. Yates*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994). Nevertheless, upon a careful reading of the trial transcript, this information is not inconsistent with the former wife's testimony, nor is it inconsistent with the district court's findings. A.E.P. has shown no actual prejudice in his counsel's failure to present this information to the district court.

A.E.P. also contends that his counsel was ineffective in not calling his mother and other witnesses, alleging they would have testified A.E.P. had provided care to the children before the divorce and that there was a strong bond between A.E.P. and his daughters that should have been maintained. Again, we do not consider issues based on information outside the record. *Id*. at 846. Nevertheless, the clear and convincing evidence in the record overwhelmingly supports termination of A.E.P.'s parental rights. There is no likelihood that the results would have been any different had the additional witnesses testified. A.E.P. has not shown actual prejudice in his counsel's failure to call additional witnesses.

A.E.P. also argues his trial counsel was ineffective for failing to make a timely request to sequester witnesses. He makes no cognizable argument as to how such failure caused him prejudice. A.E.P. makes no showing of actual prejudice for his counsel's failure to request sequestration of witnesses.

We find the district court's well-reasoned ruling terminating A.E.P.'s parental rights under sections 600A.8(3) and 600A.8(4) to be supported by clear and convincing evidence. We will not disturb it.

***III. Postscript*.**

Although the parties' appendix is not lengthy, we note the names of the witnesses were not inserted at the top of each page where witnesses' testimony appeared. This violation of Iowa Rule of Appellate Procedure 6.905(7)(*c*) may seem inconsequential, but having the witness's name at the top of each page makes our job navigating an appendix much easier. Additionally, the exhibits included in the appendix were not properly identified or described in the table of contents as required by rule 6.905(4). Compliance with the rules facilitates our duty to achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1).

AFFIRMED.