

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003136-MR

LATRIS JONES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 99-FC-005554

HON. RICHARD FITZGERALD, Jefferson Family
Court, Division 9; COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN; J.N.J., an
infant; and K.L.J., an infant

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, GUIDUGLI, and MILLER, Judges.

COMBS, JUDGE: Latris Jones appeals from the September 20, 1999, orders of the Jefferson Circuit Court terminating her parental rights to her children, J.N.J. and K.L.J. We affirm.

Jones is the natural mother of J.N.J. and K.L.J., both daughters, born August 7, 1992, and December 20, 1989, respectively. The children were initially committed to the care of the Cabinet for Families and Children on a dependency petition in February 1993; they remained committed until September 1994. During that time, Jones's alcohol addiction prevented her from

being able to care for them. After regaining custody of her children, Jones managed to keep her addiction in check for a period of time. However, she became romantically involved with a man who was physically violent with her and who sexually abused J.N.J. In 1997, he burned Jones's house. That relationship ended, but Jones had returned to using alcohol and drugs and exhibited inappropriate parenting behaviors, again necessitating the Cabinet's intervention on behalf of the children.

On August 6, 1997, the children were returned to the custody of the Cabinet. For more than a year, Cabinet employees worked with Jones in an effort to facilitate reunification of the family. In March 1999, however, the agency's goal changed to that of adoption for the children as it became apparent that Jones could not sustain sobriety in order to care for them. A petition for involuntary termination of her parental rights was filed on April 20, 1999, alleging: that J.N.J. and K.L.J. were "abused and neglected" as defined by KRS 600.020; that it was in their best interest for Jones's parental rights to be terminated; that Jones had "continuously or repeatedly failed to provide" essentials for them; that there was "no reasonable expectation or significant improvement" in her conduct in the "immediately foreseeable future"; that she had "failed to consistently implement appropriate parenting techniques and follow treatment for her drug abuse problems"; that the children had been in foster care for fifteen (15) of the most recent twenty-two (22) months; and that the Cabinet had "provided all reasonable and available services to promote a successful reunification."

After a hearing, the trial court entered orders terminating Jones's parental rights with respect to each child. The trial court's findings were extensive and reflected upon her struggle with substance addiction -- alcohol and cocaine -- and her inability to maintain sobriety. It specifically found that Jones:

has not successfully addressed sobriety, drug rehabilitation and relapse prevention. There had not been significant improvements in the mother's lifestyle which would improve the prospect of these children who have been [in] foster care since the date of their commitment within a reasonable period of time. . . . [Jones] was clearly told in the juvenile proceedings the expectation of her to be clean and sober and to cooperate. She was required to complete an intensive out-patient program at J.A.D.A.C.¹ and comply with their recommendations. Being clean and sober was clearly spelled out as no alcohol, no cocaine, no marijuana or unprescribed medication.

. . .

By her continued use of controlled substance[s] she has failed to protect and preserve the children's right to a safe and nurturing home. The children have been neglected both by her originally leaving the children with various caretakers without prearrangement as well as her failure to achieve reunification through sobriety.

. . .

Based on her history of failed treatments, there is not a reasonable expectation of significant improvement in her conduct in the immediately foreseeable future considering the ages of the children.

The trial court also found that it was in the best interest of the children that they become free to be adopted.

¹Jefferson Alcohol and Drug Abuse Center.

In this appeal, Jones argues that her due process rights were violated and that reversible error occurred because of the failure of the trial court to conduct a hearing within the sixty-day time period mandated by KRS 625.080(5). While so contending, however, Jones has failed to comply with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv), which requires a statement at the beginning of each argument containing "reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Our review of the record reveals that Jones never complained about the date set for the hearing on the Cabinet's petition – nor did she raise the issue of the non-compliance with KRS 625.080(5) before the trial court in any manner. As the Supreme Court held in Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986), in order "to be considered for appellate review [error] must be precisely preserved and identified in the lower court." This court "is without authority to review issues not raised in or decided by the trial court." Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989); see also, Commonwealth v. Phillips, Ky., 15 S.W.3d 376, 379-380 (2000).

Because of the gravity of the violation alleged, we have reviewed this issue despite the preservation problem and have found no error. We agree with the Commonwealth that Jones waived the sixty-day time period when her attorney acquiesced to a hearing beyond the prescribed period. Jones argues that waiver cannot be presumed or inferred merely because of her silence, urging that it was the Cabinet's burden to comply with the

pertinent time limits. She relies on Roberson v. Commonwealth, Ky., 913 S.W.2d 310 (1994), a case concerning the issue of a criminal defendant's waiver of the time limits contained in the Interstate Agreement on Detainers:

[a]s long as [the prisoner] did not affirmatively request the court to follow a procedure inconsistent with the IAD, it was not necessary that he demand the court comply with the IAD, since, as stated previously, the burden of complying with the IAD is on the Commonwealth.

Id. at 315.

Roberson, however, has been superseded and pre-empted more recently in New York v. Hill, 528 U.S. 100, 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000), in which the United States Supreme Court has re-visited the waiver issue. In that case, the Court held that defense counsel could be deemed to have effectively waived a defendant's right to be brought to trial within the time periods specified under the IAD by agreeing to a trial date outside the time period. The Supreme Court found that scheduling matters are generally within the control of counsel and that requiring a defendant's express consent for scheduling determinations would serve no apparent purpose. Id. Thus, Jones is deemed to have waived her statutory right to have the termination proceedings conducted within the time prescribed by KRS 625.080.

Next, Jones contends that the trial court erred in retroactively applying KRS 625.090(2)(j), as amended effective March 17, 1998, which provides an additional justification for termination of parental rights where the child "has been placed

in foster care under the responsibility of the Cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition." At the time the petition was filed in April 1999, this statute had been in effect for more than a year. Nonetheless, Jones insists that the trial court's use of this provision amounted to improper retroactive application of the statute resulting in a violation of her due process protections. She reasons that although her children were in foster care for fifteen months, the first three months of this period of time occurred before the statute's effective date.

Once again, Jones has not cited to the record to indicate where this issue was preserved for review. Our review of the record reveals that the issue was neither raised in nor considered by the trial court and thus is not properly before us for review. Although Jones was put on notice by the allegations contained in the petition that the Cabinet intended to proceed under KRS Chapter 625, *et. seq.*, as amended in 1998, and specifically, KRS 625.090(2)(j), she lodged no objections. The record is devoid of any complaint in this regard. Error – if any be found – has thus been waived. Additionally, since the trial court based its decision to terminate Jones's parental rights on several other statutory factors, any arguable error in its application of KRS 625.090(2)(j) was rendered harmless.

Jones next argues that the evidence fails to support several of the trial court's findings of fact. M.P.S. v. Cabinet for Human Resources, Ky.App., 979 S.W.2d 114, 116 (1998) has defined our standard of review as being:

confined to the clearly erroneous standard in CR 52.01 based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.

See also V.S. v. Commonwealth, Cabinet for Human Resources, Ky.App., 706 S.W.2d 420, 424 (1986). We have reviewed the video-taped recording of the hearing. With one minor exception, we find no merit to Jones's argument that the evidence is insufficient to support the trial court's findings. On the contrary, we believe that there is abundant evidence to support the trial court's findings – particularly with respect to Jones's ~~Jones is a particularly~~ ~~by~~ ~~error~~ ~~in~~ ~~the~~ ~~trial~~ ~~court's~~ ~~finding~~ ~~of~~ ~~no~~ ~~reasonable~~ ~~expectation~~ ~~of~~ ~~improvement~~ ~~in~~ ~~parental~~ ~~care~~ ~~and~~ ~~protection~~ ~~concerning~~ two of the criteria for termination in KRS 625.090(2)(e): (1) that she is "incapable of providing essential parental care" and (2) that there is "no reasonable expectation of improvement in parental care and protection." She contends that the finding that she was not clean and sober is clearly erroneous and points to her testimony that she completed a substance abuse program through the Wayside Christian Mission. She also states that "[i]n light of the uncontroverted testimony regarding [her] recovery, the Trial Court's finding of no reasonable expectation of improvement is clearly erroneous."

Jones asserts that uncontroverted evidence established that she was no longer abusing drugs and alcohol. However, the record reveals otherwise. Velva Poole, the social worker responsible for Jones's case, testified that one of the reasons that the Cabinet's goals changed from reunification to adoption was Jones's repeated failure to have drug screenings performed as

well as her failure to complete the drug program at J.A.D.A.C. Although Jones testified that she was clean and sober, she did admit that during the pendency of this case and just days before the birth of another child on May 28, 1999, she had used both alcohol and cocaine – and that her new born child tested positive for cocaine. She also admitted to buying, packaging, and selling cocaine in order to earn money. The evidence demonstrated that although Jones has been clean and sober for various periods of time, she has been unable to exhibit the consistency necessary to provide and maintain a safe and secure environment for her children.

Jones also disputes the trial court's finding with respect to KRS 625.090(f), contained in both orders of termination, that she "has caused or allowed the child to be sexually abused or exploited." However, evidence was presented that K.L.J. was sexually molested by Jones's live-in boyfriend; we agree that evidence was more than sufficient to support the trial court's finding. However, there was no evidence that J.N.J. had suffered any sexual abuse; thus, we agree that the finding in the order pertaining to her is erroneous. However, we do not find that this mistake rises to the level of reversible error since other adequate statutory grounds were relied upon and were articulated by the trial court in terminating Jones's parental rights to J.N.J. We believe that any error with regard to J.N.J. is harmless.

Jones last argues that the orders omitted a finding mandated by KRS 615.100(1), which states in pertinent part:

If the circuit Court determines that parental rights are to be terminated involuntarily in accordance with the provisions of this chapter, it shall enter an order that the termination of parental rights and the transfer of custody are in the best interest of the child, and that each petitioner is fully aware of the purpose of the proceedings and the consequences of the provisions of this chapter.

Jones maintains that there is no finding which "remotely addresses" her awareness of the purposes of the proceedings or its consequences. She urges that this court must, therefore, vacate the orders of termination. Jones has not alleged that she was unaware of the nature of the proceedings or the potential outcome. Despite her awareness of the nature of the proceedings, which is abundantly clear from our review of the record, she argues that the omission of a finding on this point in the proceedings below is a fatal flaw.

We agree with the Cabinet that KRS 625.100 is not implicated in this matter as Jones was not the "petitioner" but the respondent. Actions for the involuntary termination of parental rights can be brought by entities and individuals other than the Cabinet - including "any child-placing agency licensed by the cabinet, any county or Commonwealth's attorney or parent." KRS 625.050. Thus, KRS 625.100(1) is designed to ensure that those persons seeking to obtain the involuntary termination of another's parental rights are aware of the serious and irrevocable nature of such an action.

Although the trial court was not required to make such a finding as to Jones, she again has waived the error she alleges

by virtue of her failure to comply with CR 52.04, which provides that:

a final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Our review of the record reveals that Jones did not request a specific or additional finding of fact by the trial court regarding her level of awareness of the purpose for the proceedings. Any deficiency was thus waived. See Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John H. Helmers, Jr.
Rebecca L. Adams
Louisville, KY

BRIEF FOR APPELLEE

COMMONWEALTH OF KENTUCKY
CABINET FOR FAMILIES AND
CHILDREN:

Robert L. Bell, Sr.
Louisville, KY