RENDERED: MAY 31, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000102-MR

P.E.T. APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 97-AD-00002

IN THE INTEREST OF: C.J.T., AN INFANT

CABINET FOR FAMILIES AND CHILDREN,
COMMONWEALTH OF KENTUCKY, AS
PETITIONER AND NEXT FRIEND OF
C.J.T., AN INFANT APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order terminating the parental rights of appellant, who is currently serving a seventy-year prison sentence. Appellant argues that his incarceration alone is not a ground for termination, that the finding that he sexually abused the child was clearly erroneous as it was based on improper hearsay evidence, and that the court abused its discretion in failing to make additional findings under KRS 625.090(6). As to the first and third assignments of error, we

deem them to be without merit. As to his second argument, although we agree that the court based his finding of sexual abuse on improper hearsay evidence, the issue was not preserved for review, and said error was not substantial error pursuant to CR 61.02. Hence, we affirm.

Appellant, P.E.T., is the natural father of C.J.T., a girl born May 20, 1994. He and C.J.T.'s mother are divorced. In June of 1994, when C.J.T. was two months old, P.E.T. was given temporary custody of C.J.T. In August of 1996, C.J.T. was removed from P.E.T.'s custody pursuant to a petition alleging that P.E.T. was incarcerated and that the mother could not care for the child due to her mental state. Also, sometime in July of 1996, prior to the removal of the child, a social worker visited P.E.T.'s home and documented that it was filthy, there were animal feces lying about, there were safety concerns, and there was little food.

Sometime after C.J.T. was removed, P.E.T. was arrested on other charges in Indiana stemming from events which occurred on September 27, 1996. P.E.T. was ultimately convicted in Indiana of two counts of burglary, attempted rape, sexual battery, and criminal deviate battery and is currently serving a seventy-year sentence in that state. He will not be eligible for parole until 2031. There is little in the record regarding the offenses committed in Indiana, but it is undisputed that none of the offenses had anything to do with C.J.T.

After C.J.T. was removed from P.E.T.'s custody, she was first briefly placed with Joyce and John Brewer, relatives of the

mother. Thereafter on December 13, 1996, an order was entered placing C.J.T. in the temporary custody of the Cabinet for Families & Children ("the Cabinet"). On that same date she was placed in a foster home with her other three siblings where she remains today.

The petition for involuntary termination of parental rights was filed on October 6, 1997. At the termination hearing, it was established that since C.J.T. was removed from P.E.T.'s home, P.E.T. only visited the child once or twice and never inquired about her placement or well-being. The record does not indicate exactly when P.E.T. began serving his sentence, but the petition for termination states that P.E.T. was incarcerated at that time. It is undisputed that in prison, although P.E.T. obviously could not visit the child, he was not prohibited from telephoning, writing letters or e-mailing the Cabinet. It is also undisputed that P.E.T. has not paid anything toward the support of the child since her removal.

C.J.T.'s foster mother testified at the hearing that in January of 1997, while bathing C.J.T., C.J.T. told her that her daddy had "put his bone in my booty." She also stated that C.J.T. masturbated, had sleep problems, and was afraid that her natural parents would regain custody of her. The foster mother testified that she reported the child's statement to the Cabinet which prompted an investigation by the Cabinet and the police.

Stacy Crawford, a family services clinician with the Cabinet, testified that she took the report of sexual abuse from the foster mother and contacted the state police. Based on their

investigation, which included interviews with C.J.T., Crawford testified that she substantiated that P.E.T. had sexually abused C.J.T. She stated that from her interview with the child, she had the impression that the sexual abuse by P.E.T. was ongoing. She did not, however, contact P.E.T. during the course of that investigation. A narrative prepared by Crawford regarding the investigation of the allegations of sexual abuse of C.J.T. by P.E.T. was also admitted into evidence.

C.J.T.'s mother testified that she had witnessed P.E.T. hitting, slapping, pushing, pulling, jerking, and shoving C.J.T. She claimed that she did not report said conduct to social workers because P.E.T. had threatened her. The mother further testified that she believed the allegations that P.E.T. had sexually abused C.J.T.

By telephonic deposition, P.E.T. testified that besides the offenses for which he presently stands convicted, he also has a conviction based on an act of domestic violence against his ex-wife (C.J.T.'s mother), and a second-degree forgery conviction from 1994. P.E.T. also acknowledged that his parental rights to his three other children had been terminated. P.E.T. stated that he knew C.J.T. had been placed with the Cabinet, but did not know where the child was living after the Cabinet obtained custody. P.E.T. testified that he had attended parenting and anger management classes and was presently taking GED classes. P.E.T. denied that his trailer was in a filthy condition and that he had ever sexually abused C.J.T. P.E.T. stated that he did not want

to have his parental rights terminated and that he wished to maintain a relationship with C.J.T.

On December 5, 2000, the court entered its findings of fact, conclusions of law, and order terminating P.E.T.'s and the mother's parental rights to C.J.T. In it, the court found that P.E.T. "has abandoned the child for a period of not less than ninety (90) days" and "has caused or allowed the child to be sexually abused or exploited." Additionally, the court found that P.E.T. has continuously failed to provide or is substantially incapable of providing essential parental care and protection for C.J.T. for at least six (6) months and there is no reasonable expectation of improvement in said care and protection. The court also made the requisite findings that C.J.T. was an abused and neglected child under KRS 600.020(1), the Cabinet had rendered all reasonable services to P.E.T., and no additional services would likely allow the parent to regain custody of the child within a reasonable time, considering the age of the child. The court further noted that C.J.T. has bonded with her foster parents and her physical, emotional, and mental health have improved in their care and would likely improve further if termination of parental rights were ordered. From this order of involuntary termination, P.E.T. now appeals.

P.E.T. first argues that incarceration alone cannot support a finding of abandonment. While it has been held that incarceration alone does not constitute abandonment under KRS 625.090, J.H. v. Cabinet for Human Resources, Ky. App., 704 S.W.2d 661 (1985), incarceration is a factor to be considered in

a termination of parental rights case. Cabinet for Human Resources v. Rogeski, Ky., 909 S.W.2d 660 (1995). In Rogeski, the Court adjudged that the father's incarceration for raping the child's half sister, coupled with the fact that the father never contributed to the support of the child, was sufficient evidence to warrant termination of the father's parental rights. Id. at 661. Although P.E.T.'s current conviction was not for a sexual offense regarding C.J.T. or another child in the family, it was, nonetheless, for a violent sexual offense. In addition, P.E.T. admitted to a previous conviction for an act of domestic violence against his ex-wife. Further, P.E.T. has not made any attempt to contribute anything toward the support of C.J.T. since her removal and has not even tried to contact the Cabinet to inquire as to her placement or well-being. Finally, there was also evidence that the living conditions in his home when he had custody of C.J.T. were unsafe and less than sanitary, which calls into question his ability to parent. Accordingly, P.E.T.'s incarceration was simply one of several factors which the court considered in deciding to terminate his parental rights.

P.E.T. next argues that the finding that he sexually abused C.J.T. was clearly erroneous. P.E.T. claims that the only grounds for such a finding was the hearsay testimony of the foster mother which he maintains was contradicted by other evidence that C.J.T. was not sexually abused. In particular, P.E.T. points to a medical examination of C.J.T. performed approximately one month after the child's placement with the

Cabinet which revealed no symptoms or behaviors consistent with a child who has been sexually abused.

We would first note that, although the medical report P.E.T. refers to is in the appendix of his brief, P.E.T. does not point to where in the record this medical report is located. See CR 76.12(4)(c)(v). He only cites to his testimony at the hearing in which he refers to this medical examination. We have searched the record and cannot find the medical report at issue.

The foster mother testified that while giving C.J.T. a bath, C.J.T. told her, "Daddy put his bone in my booty." The foster mother then stated that she established that the "Daddy" C.J.T. was referring to was P.E.T. Counsel for the mother (not P.E.T.'s counsel) objected to the testimony on grounds of hearsay, and the court's subsequent ruling on the matter is inaudible on the videotape.

Out-of-court statements introduced to prove the truth of the matter asserted are inadmissible as hearsay unless they fall under one of the exceptions to the hearsay rule. KRE 801-803. The statement made by C.J.T. to the foster mother in this case does not fall under any of the exceptions set forth in KRE 803, including the excited utterance exception in KRS 803(2). See McClure v. Commonwealth, Ky. App., 686 S.W.2d 469 (1985). C.J.T. was removed from P.E.T.'s home in August of 1996 when she was 27 months of age, and the statement to the foster mother was made in January of 1997, five months after the child's last contact with P.E.T.. Under the circumstances, C.J.T. could not have been speaking "under the stress of nervous excitement and

shock produced by the act in issue. . . .” Preston v. Commonwealth, Ky., 406 S.W.2d 398, 401 (1966). Accordingly, we agree that the testimony of the foster mother should not have been admitted. However, in reviewing the trial court’s findings, it appears that the court did not rely on the testimony of the foster mother as to what C.J.T. told her. See G.E.Y. v. Cabinet for Human Resources, Ky. App., 701 S.W.2d 713, 715 (1985). The court’s findings only state the fact that the foster mother made a report to the Cabinet that C.J.T. had told her that P.E.T. had sexually abused her, which was evidence only that such a report was made and not evidence meant to prove the truth of the child’s statement. There is no mention in the court’s findings as to exactly what C.J.T. told her foster mother. Hence, admission of this hearsay statement was harmless error.

It appears that the court based its finding that P.E.T. sexually abused C.J.T. on the testimony of Stacy Crawford, the caseworker who conducted the investigation into the allegations of sexual abuse. Crawford testified that she took the report of sexual abuse from the foster mother and thereupon contacted the state police. She stated that she and the police interviewed C.J.T. and based on information obtained in this interview, she substantiated sexual abuse by P.E.T. The Cabinet then introduced into evidence a narrative report of the investigation prepared by Crawford. Upon review of Crawford’s testimony and the narrative, we acknowledge that they unquestionably contain hearsay evidence which could not have been admitted under KRE 803(6), the business records exception or KRE 803(8), the public record or report

exception. Prater v. Cabinet for Human Resources, Ky., 954 S.W.2d 954 (1997); Cabinet for Human Resources v. E.S., Ky., 730 S.W.2d 929 (1987); V.S. v. Commonwealth, Cabinet for Human Resources, Ky. App., 706 S.W.2d 420 (1986); G.E.Y. v. Cabinet for Human Resources, Ky. App., 701 S.W.2d 713 (1985).

Crawford's testimony that she had substantiated that P.E.T. had sexually abused C.J.T. was an opinion and conclusion which she was not qualified to render. See Prater, 954 S.W.2d at 958. The narrative contained the following:

> I asked [C.J.T.] if anyone has ever done anything to hurt her. She said "My daddy did." I asked where her daddy hurt her and she said "My butt." She went on to say that her daddy had put a spoon in her butt, pointing to her vaginal area. I asked her if she was sure about this and she said "Yes. A spoon. I'll show you." She then proceeded to go to the kitchen drawer and retrieve a spoon to show me. I asked what Daddy did with the spoon and she said "Put inside." I asked if daddy's name is Eugene and she said "yes." She said this happened when she lived with daddy.

The above evidence should not have been admitted because it was not an observation of the social worker; the child's statements in the narrative were prompted by questions of the social worker in the course of an investigation. See KRE 803(8)(B); Prater, 954 S.W.2d at 958-959; Drumm, 783 S.W.2d at 385, and Alexander v. Commonwealth, Ky., 862 S.W.2d 856, 861 (1992), overruled on other grounds by Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997).

However, no objection was made to either the testimony of Crawford or to the introduction of the narrative. Where the trial court has not been given an opportunity to pass on the appellant's contentions of error, the error is precluded from

appellate review. Payne v. Hall, Ky., 423 S.W.2d 530 (1968). As to whether the error affected the substantial rights of P.E.T. under CR 61.02, we cannot say that it did, considering that there was more than sufficient competent evidence, aside from P.E.T.'s alleged sexual abuse of C.J.T., to support the termination of P.E.T.'s parental rights. As noted above, P.E.T.'s conviction for a violent sexual offense and resultant seventy-year incarceration, his conviction for an act of domestic violence, his failure to contribute to C.J.T.'s support, his failure to attempt to communicate with the child or demonstrate interest in the child since her commitment to the Cabinet, and the deplorable living conditions when the child was in his custody were all substantial factors supporting the court's decision pursuant to KRS 625.090. We would note that the case at bar is distinguishable from G.E.Y., 701 S.W.2d 713 and Prater, 954 S.W.2d 954, wherein it was held that the Court's reliance on the incompetent hearsay statements constituted reversible error, by the fact that the issue regarding the hearsay evidence relied on by the court in the present case was not preserved.

P.E.T. next argues that the trial court abused its discretion by failing to make additional findings pursuant to KRS 625.090(5) which provides:

> If a parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

P.E.T. maintains that the court had a duty to make findings as to why it would not apply KRS 625.090(5) and allow P.E.T. to

nevertheless retain custody of the child. We do not agree that the court has such a duty. KRS 625.090(5) merely allows the court in its discretion to retain custody upon a required finding that the child will not continue to be abused or neglected. In our view, there is no opposite finding required if the court decides to terminate parental rights.

For the reasons stated above, the judgment of the Trimble Circuit Court is affirmed.

ALL CONCUR.

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