

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000746-MR

SCOTCH POLICK

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 01-AD-00026

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN;
AND A.P., AN INFANT

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: Scotch Polick (Scotch) appeals from the Campbell Circuit Court's order terminating his parental rights in his infant daughter and order of judgment vesting the Cabinet for Families and Children (Cabinet) with the infant daughter's full care, custody and control. On appeal, Scotch argues that there was not sufficient evidence to prove under KRS 600.020

that he neglected his daughter, thus subjecting him to involuntary termination of his parental rights under KRS 625.090. Finding no error, we affirm.

Crystal Rose Qualls (Crystal), then 16 years old, gave birth to A.P on July 6, 1999, in Campbell County, Kentucky. Scotch is A.P.'s natural father, and he was 19 years old when A.P. was born. After A.P.'s birth, Crystal, Scotch and A.P. resided with Crystal's mother, although Crystal's father had legal custody of Crystal after her parents' divorce.

The Cabinet became involved with Crystal and Scotch soon after A.P.'s birth because, when asked, neither Crystal nor Scotch could remember the last time anyone had changed or fed A.P., nor could the couple remember how much or how often she should be fed. As a result, the Cabinet brought services into the home to assist Crystal and Scotch and developed a case plan for the couple to follow. Part of the plan required Crystal and Scotch to attend parenting classes. At one point, the social worker assisting the couple recommended that Scotch should not be left alone with A.P. Moreover, Scotch was to leave the room if he was with A.P., and he started hearing voices. More of Scotch's psychological profile will be developed later in this opinion.

At the beginning of November of 1999, Crystal moved from her mother's home to her father's home. Crystal's father

did not permit Scotch to move in with Crystal. Scotch and Crystal's father argued frequently.

On November 9, 1999, Crystal ran away with Scotch and took A.P., age 4 months, with her. According to Crystal's father, who reported Crystal missing, the couple did not take any supplies for A.P., including food, diapers or clothing. Eight days later, Crystal showed up at her mother's house with A.P. After this incident, the Cabinet asked the Campbell District Court for temporary custody of A.P. to keep her safe, which the court granted.

The Cabinet placed A.P. in foster care and continued to work with Crystal and Scotch in developing a case plan to reunite them with their daughter. Specifically, as of December 6, 1999, Scotch was to (1) attend parenting classes (preferably with Crystal); (2) get a psychological/parenting assessment; (3) get a CD assessment; (4) work with a resource mom; (5) work with the family preservation program; (6) obtain stable housing; (7) attend counseling; and (8) get a steady job and create a budget. In addition, the Campbell District Court later ordered Scotch to pay monthly child support of \$120. Scotch made little or no effort to comply with the case plan.

Crystal and Scotch ran away again in early January of 2000 and remained on the run for at least a couple of weeks, during which time they failed to visit A.P. and failed to attend

her doctor's appointments. They also did not attend a disposition hearing regarding A.P.

As a result of running away with Crystal, the Campbell County Grand Jury charged Scotch with custodial interference. Scotch pleaded guilty to the charge on March 2, 2000. The court sentenced him to confinement in the Campbell County Detention Center and further ordered him to have no contact with Crystal or her family.

At the time that Scotch pleaded guilty to custodial interference, there were already charges against him in Campbell Circuit Court for second degree burglary stemming from his actions on August 28, 1999. Scotch initially entered a plea of not guilty; however, he changed his plea to guilty on March 16, 2000, and received a sentence of five years in prison. Scotch was to remain in the Campbell County Detention Center for the remainder of his six month sentence on the custodial interference charges, and then he was to be committed to the Kentucky Department of Corrections.

On April 20, 2000, while on work release, Scotch escaped from the Campbell County Detention Center, and the Campbell County Grand Jury charged him with second degree escape. Scotch pleaded guilty to this charge, and the court sentenced him to 18 months in prison, to be served consecutively with his second degree burglary charge.

Prior to his arrest for custodial interference, in August of 1999, Scotch sought treatment at a community care center for having staring spells when he started to get the shakes and hearing voices that sometimes told him to hurt himself. The nurse who conducted the initial interview with Scotch noted that Scotch came from an abusive childhood with alcoholic parents and that he was apparently of limited intellectual ability. His preliminary diagnoses were psychotic disorder not otherwise specified, provisional; alcohol abuse, in remission; and, with later treatment, the community care center was to rule out mood disorder. They scheduled a couple of follow-up appointments with Scotch, but Scotch failed to keep the scheduled appointments.

While incarcerated, Scotch underwent a psychiatric evaluation. Upon completing this evaluation, the initial diagnostic impression was depressive disorder not otherwise specified; history of alcohol abuse; and personality disorder not otherwise specified.

On June 26, 2001, the Cabinet filed a petition for involuntary termination of parental rights against Crystal and Scotch. The trial court appointed a guardian ad litem to represent Scotch. The case proceeded to trial on January 22, 2002. Scotch testified at trial. After the trial on March 26, 2002, the trial court issued its findings of fact and

conclusions of law. Specifically and without repeating those facts set out above, based upon the clear and convincing evidence presented by the Cabinet at trial, the trial court found and concluded as follows:

- (1) A.P. has been in foster care since November 24, 1999.
- (2) On January 26, 2000, the Campbell District Court committed A.P. to the Cabinet.
- (3) A.P. is an abused and neglected child.
- (4) Crystal and Scotch failed to protect and preserve A.P.'s fundamental right to a safe and nurturing home.
- (5) Crystal and Scotch, for a period of not less than six months, continuously or repeatedly failed or refused to provide or were substantially incapable of providing essential parental care and protection for A.P.
- (6) There is no reasonable expectation of improvement in parental care and protection of A.P. considering her age.
- (7) Crystal and Scotch, for reasons other than poverty alone, have continuously or repeatedly failed or refused to provide or are incapable of providing essential food, clothing, shelter,

medical care or education reasonably necessary for A.P.'s well-being. Moreover, there is no reasonable expectation of significant improvement in the parents' conduct in the immediately foreseeable future, considering the age of the child.

- (8) A.P. has been in foster care under the responsibility of the Cabinet for fifteen of the most recent twenty-two months preceding the filing of the petition to terminate parental rights.
- (9) Scotch has adopted a criminal lifestyle, which has resulted in his repeated and current incarceration.
- (10) Prior to his incarceration, Scotch failed to pay his child support as ordered by the court.
- (11) The Campbell District Court entered an order on June 13, 2001 waiving reasonable efforts to reunite A.P. to Scotch.
- (12) Scotch has been consistently unable to care for the immediate and ongoing physical or psychological needs of his child because of emotional illness, mental illness, mental

deficiency and the condition has been diagnosed by a qualified medical health professional.

(13) The Cabinet has attempted to render services to the family since July 1999 in an effort to keep the family together, including working with the family while A.P. was placed in foster care.

(14) A.P. has made substantial improvements while in foster care and is expected to make more improvements upon termination of parental rights.

(15) Termination of parental rights is in A.P.'s best interest, and the Cabinet has facilities available to accept the care, custody and control of her and is the agency best qualified to receive custody.

Based on the findings and conclusions listed above, the trial court terminated both Scotch and Crystal's parental rights. Moreover, the trial court ordered and adjudged that the full care, custody and control of A.P. be vested in the Cabinet with authority to place her for adoption and that A.P. shall be and hereby is made a ward of the state of Kentucky. Scotch appeals the trial court's order involuntarily terminating his parental rights. Crystal did not appeal.

In his one-page brief, Scotch attacks the sufficiency of evidence before the trial court upon which the termination of

parental rights would be proper. Notwithstanding the fact that Scotch did not properly preserve his argument for our review because he failed to raise it at the trial court level, even if we now consider his argument on the merits, the record refutes his position. See Barnard v. Stone, Ky., 933 S.W.2d 394, 396 (1996) (holding that question not raised at the trial court level was not properly preserved for appellate review).

"The standard of proof before the trial court necessary for the termination of parental rights is clear and convincing evidence." V.S. v. Com., Cabinet for Human Resources, Ky. App., 706 S.W.2d 420, 423 (1986). "This court's appellate function is confined to the 'clearly erroneous' review of the trial court's findings of fact based upon clear and convincing evidence, pursuant to CR 52.01." Id. at 424.

"[F]indings of fact are clearly erroneous only if there exists no substantial evidence in the record to support them." Id.

Statutorily, under KRS 625.090, "[t]he Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:" (1) the child is an abused or neglected child, as defined in KRS 600.020(1), and (2) termination would be in the best interest of the child.

Under KRS 600.020(1), an

"[a]bused or neglected child" means a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child:

. . .

(d) Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

. . .

(h) Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being . . . or

(i) Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months[.]

Under KRS 625.090(2), however, a court shall not order termination of parental rights unless it also finds by clear and convincing evidence the existence of one or more of a number of enumerated grounds including, in relevant part, a finding

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

. . .

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

. . .

(j) That the child has been 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 to terminate parental rights.

KRS 625.090(3) specifies those factors that a court shall consider in determining the best interest of the child and the existence of a ground for termination. Such factors are as follows:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

. . .

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the

District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

In this case, concerning the facts of abuse and neglect presented to the trial court, we conclude the proof is substantial; therefore, it is not clearly erroneous. On the issue of abuse and neglect, the Cabinet presented proof that Scotch repeatedly failed to provide adequate care, supervision, food, clothing, shelter, and education or medical care necessary for A.P.'s well-being. Specifically, when A.P. was only weeks old, Scotch could not remember how much he was supposed to feed her and how often. There is no record of Scotch ever holding a job or providing a home for A.P. Moreover, after the Cabinet became involved, they recommended that Scotch not be left alone with A.P. because he heard voices telling him to hurt himself.

When A.P. was only a couple of months old, Scotch turned to criminal activity. In rapid succession, he burglarized someone's home, ran away with Crystal while her

father had legal custody of her, and then escaped from the detention center. While incarceration alone is insufficient to terminate parental rights, see M.P.S. v. Cabinet for Human Resources, Ky. App., 979 S.W.2d 114, 117 (1998), the record as a whole supports the conclusion that Scotch simply did not provide for A.P.'s well-being and failed to follow any directives of the Cabinet and the courts that were formulated to prevent involuntary termination of his parental rights. The Cabinet told Scotch over and over again what he needed to do to keep his daughter, and over and over again, he failed to comply.

The Cabinet also presented substantial evidence to support the trial court's conclusion that termination of Scotch's parental rights would be in A.P.'s best interest. Specifically, a qualified health professional diagnosed Scotch as having a mental illness. Scotch made no effort in his conduct or circumstances to make it in A.P.'s best interest to return to him. Despite Scotch's assertion that he wishes to keep his daughter, his actions show a consistent pattern of superficially beginning to comply with case treatment plans and failing to follow through.

Moreover, the Cabinet presented substantial evidence that A.P.'s physical and emotional health improved when she was no longer in Crystal and Scotch's care. At age four months, when the Cabinet removed A.P., she had a misshapen head due to

being placed in one position all the time, and she had urinary reflux disease, which required medication over a six-month period to treat. In addition, when the Cabinet first took custody of A.P., her care providers felt that she was distant and unresponsive. Her emotional well-being also improved in foster care.

Because the Cabinet presented clear and convincing evidence that A.P. was an abused or neglected child and that it would be in her best interest to terminate Scotch Polick's parental rights, we affirm the trial court.

ALL CONCUR.

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