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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000658-ME
AND
NO. 2006-CA-001103-ME

S.H.R.M.[1] APPELLANT

v.

APPEALS FROM BOONE FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NOS. 05-AD-00052 AND 05-AD-00053

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; N.R., AN INFANT; AND E.R.,
AN INFANT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: S.H.R.M. has appealed from two orders of the Boone Family Court entered on February 23, 2006, which, following a bench trial, terminated her parental

[1] In order to protect the privacy of the children, we will use initials to identify the parents and children.

rights to her son N.R., and her daughter, E.R. Having concluded the trial court did not err, we affirm.

On October 4, 2005, the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereinafter "Cabinet"), filed two petitions in the Boone Circuit Court seeking termination of S.H.R.M.'s and B.R.'s parental rights to their two children, N.R. and E.R. B.R. did not respond to the petition nor did he appear at trial, and his parental rights to the children were terminated. In the Cabinet's case-in-chief against S.H.R.M., Dr. Ed Connor (hereinafter "Dr. Connor"), a licensed clinical psychologist who is the consultant and treating psychologist for the Northern Kentucky Children's Home where N.R. was placed; Nikki Schild (hereinafter "Schild"), a residential therapist at the Northern Kentucky Children's Home; and Anne Eason (hereinafter "Eason"), a licensed clinical social worker previously employed with Northkey Community Care, testified on behalf of the Cabinet and provided the bulk of the evidence against S.H.R.M. Their testimony, as well as other evidence presented, reveals the following:

S.H.R.M. and B.R. are the biological parents of both N.R. and E.R. N.R. was born on July 18, 1996, and E.R. was born on May 28, 1998. At some point following E.R.'s birth, S.H.R.M. was convicted of welfare fraud in Texas and served over one year in prison. During her incarceration, B.R. was the primary caregiver for the children. Subsequent to her release from custody, S.H.R.M. and B.R. divorced in 2001 and she became the primary caregiver for the children. S.H.R.M. became involved with

child protective services in Texas regarding her care of the children, and subsequently moved to Kentucky in 2003.

N.R. was enrolled in kindergarten in Boone County, Kentucky. N.R. was frequently absent from school. When he was present, his severe educational delays and behavioral issues often disrupted class. N.R. was prescribed medication for hyperactivity, but S.H.R.M. administered it irregularly.

On June 18, 2003, the Cabinet became involved with the family following a report of abuse and neglect and information that N.R. had performed oral sex on a boy in the neighborhood where the family resided. Following a meeting with S.H.R.M., the Cabinet also learned N.R. had previously sexually abused E.R. The Cabinet scheduled counseling sessions for S.H.R.M. and the children, but S.H.R.M. failed to appear with the children for the counseling.

On September 12, 2003, the Cabinet received a report that N.R., now in first grade, was acting out in school; that N.R. was not regularly receiving his medication; and that E.R. was not attending kindergarten. The Cabinet referred the family to Northkey Community Care for counseling and treatment, but S.H.R.M. failed to take the children for the scheduled appointments.

On October 29, 2003, the Cabinet substantiated another report of abuse and neglect of the children. The report, made by the clinical social worker employed by N.R.'s school, stated that N.R. was acting out and had to be carried "kicking and

screaming" from the classroom. Further information revealed that N.R. had again been sexually acting out on E.R.

The Cabinet filed its first petition regarding the abuse and neglect of the children by S.H.R.M. on November 26, 2003. The Boone Family Court did not initially remove the children from S.H.R.M.'s care, but did hold a hearing on February 4, 2004, regarding the allegations set forth in the Cabinet's petition. The family court found both children to be neglected, but permitted them to remain in S.H.R.M.'s home on the condition that she monitor the children's interactions with each other.

On July 8, 2004, the Cabinet filed a second petition with the Boone Family Court regarding the abuse and neglect of the children. The Cabinet stated S.H.R.M. had failed to abide by the family court's previous orders and also stated S.H.R.M. had married a registered sexual offender with whom she and the children were currently residing. An emergency custody order was entered by the family court and the Cabinet removed the children from the home.

An adjudication hearing was held on August 31, 2004. The family court again found S.H.R.M. had neglected the children and formally committed the children to the custody of the Cabinet. The children were initially placed together in the same foster home; however due to N.R.'s behavior he was psychiatrically hospitalized and then placed at the Northern Kentucky Children's Home. Following evaluation by Dr. Connor, N.R. was diagnosed with post traumatic stress disorder (PTSD) resulting from the sexual abuse he had been subjected to by B.R. Schild testified she individually counseled with

N.R. and S.H.R.M. during supervised visitation. Schild opined that S.H.R.M. had minimized the severity of N.R.'s mental health issues and had repeatedly failed to take responsibility for his well-being.

Eason began treating E.R. once the child entered foster care. Eason testified E.R. had feelings of resentment and anger towards S.H.R.M., and therefore Eason opposed family counseling between E.R. and S.H.R.M. Eason stated counseling between E.R. and S.H.R.M. could begin when E.R. was more stable in her life and when S.H.R.M. became more cooperative with the Cabinet's reunification and treatment plan. However, E.R. has shown no interest in seeing or pursuing a relationship with S.H.R.M.

The Cabinet continually offered services to S.H.R.M. in an effort to reunite her with the children before filing its petitions on October 4, 2005, requesting involuntary termination of her parental rights to the children. On February 26, 2006, the family court issued its extensive and thorough findings of fact and conclusions of law, entering two orders granting the Cabinet's petition and terminating S.H.R.M's parental rights to both N.R. and E.R. This appeal followed.

I. DUE PROCESS VIOLATIONS

S.H.R.M.'s first category of errors centers upon alleged due process violations which she claims deprived her of her fundamental constitutional rights. She first contends the trial court failed to give her proper notice of the termination hearing. It is axiomatic that due process requires adequate notice and a reasonable opportunity to be heard. *See P.J.H. v. Cabinet for Human Resources*, 743 S.W.2d 852, 853 (Ky.App.

1987). Thus the threshold issue is whether the notice given, if any, was adequate to allow for proper preparation of S.H.R.M.'s defense. After a careful review of the record, we hold S.H.R.M. was not denied her due process rights by the trial court's actions.

S.H.R.M. claims she was given no notice of the termination hearing which was held on February 6, 2006. At most, she claims she received notice no more than seven days prior to the hearing, an insufficient amount of time in which to secure witnesses and adequately prepare a defense. However, S.H.R.M. actually appeared on the scheduled trial date along with her counsel. No objection was raised nor was a request made for a continuance. Further, there was no indication counsel was unprepared for the hearing as he actively participated in the cross-examination of witnesses for the Cabinet and produced witnesses on behalf of S.H.R.M. Contrary to her assertions, S.H.R.M. and her counsel had several months, not just a few days, from the time the petitions were filed in which to prepare for trial.

Although the Cabinet asserts the trial date was set by agreement of the parties, we find nothing in the record to support this contention. The record is silent as to any notice being given to either side of the proposed trial date. However, the competent representation provided on behalf of both S.H.R.M. and the Cabinet during the hearing clearly indicates both sides were aware of the date with sufficient time to prepare. Finally, as no objection was made before the trial court, the issue is not properly before us as it is wholly unpreserved. *See Todd v. Commonwealth*, 716 S.W.2d 242, 248 (Ky. 1986); Kentucky Rules of Civil Procedure (CR) 46.

Next, S.H.R.M. contends her due process rights were violated by the Cabinet's alleged failure to use "reasonable efforts" to reunite her with E.R., as her request to participate in family therapy was denied. S.H.R.M. bases her contention on the language of KRS 620.130(2) which requires the Cabinet, after removal of a child from the home, to provide services to the parent and child which are "designed to promote the protection of the child and the return of the child safely to the child's home as soon as possible." Thus, she argues, the Cabinet must utilize all available services to facilitate the reunification of the parent and child, a requirement which was not fulfilled in her case. We disagree.

KRS 620.020(10), in pertinent part, defines "reasonable efforts" as "the exercise of ordinary diligence and care by the department to utilize all preventive and reunification services available to the community . . . which are necessary to enable the child to safely live at the home." Preventive and reunification services are further defined by KRS 620.020(9) and (11), respectively. A careful reading of these statutory provisions reveals the Cabinet is required to provide only those services necessary to *safely* return the child to his or her home, but only if such a return is in the best interests of the child. Nothing in the applicable statutes indicates the Cabinet must utilize every available service for every family. To judicially require such would be in contravention of the legislature's intent.

In the case *sub judice*, the social worker testified S.H.R.M. had repeatedly requested family therapy with E.R. She further testified that E.R.'s therapist had notified

the Cabinet she felt family therapy was not clinically indicated, as evidenced by E.R.'s unwillingness to participate in such counseling or even continue a relationship of any kind with S.H.R.M. No evidence was presented to support S.H.R.M.'s contention that family therapy would be beneficial or facilitate reunification in any way. The Cabinet provided individual counseling, parenting classes, parent/child visitation, employment counseling, and numerous other services in its efforts to reunify this family. Thus, the trial court correctly found the Cabinet to have fulfilled its obligation to provide reasonable efforts at reunification. We will not disturb such finding on appeal.

II. DENIAL OF RIGHT TO COUNSEL

S.H.R.M. next contends she was denied her right to counsel as the trial court allowed the proceedings to commence in the absence of her attorney.[2] S.H.R.M. had retained private counsel to represent her throughout these proceedings. Her counsel was tardy in returning from a lunch break by approximately five minutes.[3] During his absence, the trial court contacted, via telephone, Dr. James J. Rosenthal (hereinafter "Dr. Rosenthal"), a clinical psychiatrist from Northkey Community Care, who had performed a psychological evaluation of S.H.R.M.

Prior to counsel's appearance in the courtroom, the trial court inquired of S.H.R.M. if she objected to proceeding in the absence of her counsel. She affirmatively

[2] We note trial counsel does not represent S.H.R.M. on this appeal.

[3] A careful review of the videotape of the proceedings reveals counsel's absence to have been no more than five minutes as he can be seen at the bench within that time frame. However, due to the manner in which the cameras are installed in the courtroom, it is impossible to verify precisely when counsel entered the courtroom.

stated she had no such objection. The trial court then initiated the teleconference with Dr. Rosenthal, informed him as to the status of the proceedings, swore him in as a witness, inquired as to his name and occupation, and then turned questioning over to the Commonwealth. The Commonwealth asked three to four perfunctory questions of Dr. Rosenthal before S.H.R.M.'s counsel can be seen in the videotape of the proceedings. No substantive questioning occurred in counsel's absence. Further, upon his arrival, counsel made no objection to the proceedings, made no mention of the reason for his tardiness, made no request to go back over the missed questioning, or in any other way indicated to the trial court that he perceived a problem. S.H.R.M. likewise made no such statement to the trial court. Counsel was present for all of Dr. Rosenthal's substantive testimony.

The absence of a contemporaneous objection or notification to the trial court of a perceived error in the admission or presentation of evidence and the desired remedy therefore, forecloses appellate review of such alleged error as it is wholly unpreserved. CR 46; *Commonwealth, Department of Highways v. Spillman*, 489 S.W.2d 814 (Ky. 1973); *Dr. Pepper Bottling Co. v. Ricks*, 376 S.W.2d 299 (Ky. 1964). Thus, S.H.R.M. cannot now be heard to complain. Further, even if this alleged error had been preserved, we would be unable to conclude on the facts before us that the trial court abused its discretion in its decision to commence the proceedings in counsel's absence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

S.H.R.M. next contends she was denied the effective assistance of counsel throughout the proceedings below. She further contends counsel's performance was so

deficient it entitles her to a reversal of the judgment terminating her parental rights. We disagree.

In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency caused actual prejudice resulting in a proceeding that was fundamentally unfair and unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Tamme*, 83 S.W.3d 465, 469 (Ky. 2002); *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000); *Humphrey v. Commonwealth*, 153 S.W.3d 854 (Ky.App. 2004). The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient or that under the circumstances counsel's action might be considered "trial strategy." *Strickland*, 466 U.S. at 689; *Moore v. Commonwealth*, 983 S.W.2d 479, 482 (Ky. 1998); *Sanborn v. Commonwealth*, 975 S.W.2d 905, 912 (Ky. 1998). A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing counsel's actions based on hindsight. *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001); *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998). In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness. *Strickland*, 466 U.S. at 688-89; *Tamme*, 83 S.W.3d at 470; *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999). "'A defendant is not guaranteed errorless counsel, or counsel adjudged ineffective by hindsight, but counsel reasonably likely to render and

rendering reasonably effective assistance.'" *Sanborn*, 975 S.W.2d at 911 (quoting *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997)). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. . . . There are countless ways to provide effective assistance in any given case." *Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003).

In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different or was rendered fundamentally unfair and unreliable. *Strickland*, 466 U.S. at 694; *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury. *Strickland*, 466 U.S. at 694-95. *See also Bowling*, 80 S.W.3d at 412; and *Foley*, 17 S.W.3d at 884.

In the case *sub judice*, S.H.R.M. contends her counsel's failure to subpoena witnesses to testify on her behalf is sufficient to show counsel's performance fell below an objective standard of reasonableness. However, on the record before us, we are unable to determine that counsel's failure to utilize the subpoena power of the court was anything more than trial strategy. Further, S.H.R.M. is unable to show what witnesses would have been called, what their testimony would have been, nor that the outcome of

the trial would have been any different had subpoenas been issued. Thus, we shall not substitute our judgment for that of trial counsel.

Next, S.H.R.M. alleges counsel failed to conduct any discovery in preparation for the trial. This allegation stems from the lack of written requests for discovery or other such entries in the record. However, the absence of entries in the record is indicative only of a lack of written discovery, not a lack of discovery *in toto*. Discovery can occur in many different ways including orally or by mutual agreement of the attorneys. We cannot extrapolate from the failure to make a written request for discovery that no discovery occurred. Thus, S.H.R.M.'s argument on this point is without merit.

Finally, S.H.R.M. contends counsel's unexplained tardy return from the lunch recess indicates such severely deficient conduct as to render the entire proceeding invalid. Again, we disagree. As previously stated, Counsel's absence was very brief and caused him to miss only the introductory portion of testimony from one witness. Contrary to S.H.R.M.'s assertion, counsel was able to effectively cross-examine Dr. Rosenthal. Further, the portion of testimony from which counsel was absent was not, in fact, relied upon by the trial court in making its determination. The brief absence of counsel during this period was not prejudicial to S.H.R.M., and she is again unable to show how the outcome of the trial would have been different had counsel not been tardy in his return. Thus, we cannot hold counsel was ineffective.

IV. SUFFICIENCY OF EVIDENCE

S.H.R.M.'s final allegation of error is that the evidence presented to the trial court was insufficient to support the ruling terminating her parental rights. We disagree. Pursuant to the termination statute, KRS 625.090, the court may involuntarily terminate all parental rights of a parent to the named child if it finds by clear and convincing evidence that: (1) the child is abused or neglected; (2) termination would be in the child's best interest; and (3) one or more of several listed grounds for termination are present.[4]

[4] KRS 625.090(2) states as follows:

> No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
>
> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
>
> (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
>
> (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
>
> (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;
>
> (f) That the parent has caused or allowed the child to be sexually abused or exploited;
>
> (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;
>
> (h) That:

Here, the family court specifically found the children were abused and neglected, termination would be in their best interest, and that many of the statutory factors were present. The orders terminating parental rights and accompanying findings of fact and conclusions of law clearly and extensively set forth the evidence the family court accepted and relied upon in making its decision. The family court made no less than twenty-eight specific findings supportive of her decision.

Our "review in a termination of parental rights action is 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." *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998) (citing *V.S. v. Commonwealth, Cabinet for Human Resources*, 706 S.W.2d 420, 424 (Ky.App. 1986). Clear and convincing evidence must not necessarily be uncontradicted, but must merely be "proof of a probative and substantial nature carrying the weight of evidence sufficient to

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> 1. The parent's parental rights to another child have been involuntarily terminated;
>
> 2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
>
> 3. The conditions or factors which were the basis for the previous termination finding have not been corrected;
>
> (i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or
>
> (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.

convince ordinarily prudent-minded people." *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934). Further, a trial court is granted broad discretion in determining whether a child is abused or neglected and whether such abuse or neglect is sufficient to warrant termination of parental rights. *Department of Human Resources v. Moore*, 552 S.W.2d 672 (Ky.App. 1977). The record reveals numerous episodes of sexual abuse and exploitation or the risk thereof, emotional abuse, educational neglect, medical neglect, and refusal to cooperate with the Cabinet. In light of these numerous episodes and the otherwise overwhelming amount of substantial evidence presented to the family court, we are convinced the family court committed no clear error in determining the children were abused and neglected.

Next we must examine the family court's conclusion that termination of parental rights would be in the best interests of both children. At the termination hearing, ample testimony was presented in support of the family court's decision on this issue. In addition to the previously mentioned findings, the family court also found that S.H.R.M. had previously had her parental rights to another child terminated in another state, she was unable to provide a safe and nurturing home for the children, and she had failed to provide for the protection, nurturing, and physical and emotional well-being of the children. Further, the family court concluded S.H.R.M. was unable to put her children's needs before her own, thus potentially putting the children at further risk if termination was not granted. Based upon these findings, which were supported by substantial evidence, the family court concluded it would be in the children's best interests to

terminate S.H.R.M.'s parental rights. We see no basis upon which to conclude the family court erred in this determination, and we will not substitute our decision for the judgment of the family court. *Wells v. Wells*, 412 S.W.2d 568 (Ky. 1967).

Finally, the third prong of KRS 625.090 requires the family court to find by clear and convincing evidence that one or more of the listed factors was present. In the case *sub judice*, the family court specifically found by clear and convincing evidence that the grounds set forth in KRS 625.090(2)(a), (c), (e), (f), (g), and (h) were present. There is substantial evidence in the record to support these findings as previously noted, and thus we cannot conclude the family court was clearly erroneous in finding the existence of these factors. Further, the Cabinet clearly met "its burden of proving its case by clear and convincing evidence as required by KRS 625.090 (citations omitted)." *R.C.R.*, *supra* at 40. Thus, there was no error.

For the foregoing reasons, the February 23, 2006, orders of the Boone Family Court terminating S.H.R.M.'s parental rights to N.R. and E.R. are affirmed.

ALL CONCUR.

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