

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001155-ME

D.L.

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 98-J-00059-007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, THOMPSON, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Appellant appeals from orders of the Carter County Family Court finding that the Appellant (hereafter, “Father”) neglected his teenage daughter. The issue to be decided is whether the trial court erred in finding neglect based on the facts presented at the adjudication and whether the trial court erred in failing to grant Father’s motion to vacate under Kentucky Rules of Civil Procedure

(CR) 60.02. Finding ample evidence in support of the trial court's decisions on both issues, we affirm.

A Carter County DCBS social worker came into contact with Father's sixteen-year-old daughter (hereafter known as "Daughter") at the home of a neighbor, P.W., on February 5, 2014. Daughter was wearing a sports bra and short pants with an exposed midriff. She appeared to be under the influence of substances, as her speech was slurred. There were a number of unidentified males at the home who quickly left the scene after the social worker's arrival. A petition alleging neglect was filed against Father and Daughter's mother.¹

The trial court entered a temporary removal order and removed Daughter from Father's home based on the neglect petition. Daughter was placed in the custody of the cabinet in a non-relative placement and an adjudication hearing was held on June 16, 2014.

At the adjudication hearing, testimony was taken from eight different witnesses regarding the charge of neglect, including Daughter and Father, as well as the mother, a number of social workers and Father's sister.

Social worker Brittany Davis, who spoke with Father regarding the allegations, testified that Father did not believe Daughter's own reports of drug use and promiscuity. She stated that Father laughed at Daughter's assertions. Ms. Davis testified that Father said he would let Daughter go where she wanted, but

¹ Daughter's mother did not have primary custody of Daughter and only exercised visitation rights. Further, though the trial court entered a finding of neglect against the mother, she did not appeal.

that Daughter was supposed to report her whereabouts. Father reported that Daughter did have a curfew of 9:00-10:00 p.m. Father reported that he was aware that Daughter would go to a number of different homes. Father told Ms. Davis that Daughter was beyond control and did not listen to him. Ms. Davis testified that Father tested positive for marijuana and that to her knowledge, Daughter had accumulated fourteen absences in her first semester of school, including five unexcused absences.

Social worker Ruby Jo Bailey testified that she was the one who actually discovered Daughter at the home of P.W. on February 5, 2014. She testified that Daughter was scantily dressed in a low-cut sports bra, and that several males quickly exited the scene. Ms. Bailey testified that Daughter appeared to be under the influence by her slurred speech. Ms. Bailey identified the location as that of a neighbor to Father's residence; and that after some investigating, she discovered that Daughter was residing there. Ms. Bailey also testified that some of the males she interviewed had children of their own who were present at the home.

Daughter testified that she was residing with P.W. and that she went to P.W.'s home almost every day and would spend the night there, without question from Father. Daughter testified that she became sexually active at thirteen and had been with approximately fifty different sexual partners to date. Daughter testified that Father was aware of her sexual activity, but did not want to believe it. She testified that she didn't see her mother often and that she had sexual relations with J.C., her mother's paramour. Daughter testified that her mother did

not know about the sexual relationship with J.C. because Daughter was embarrassed that she had sexual relations with her mother's paramour. Daughter was sixteen at the time.

Daughter testified that she had marijuana in her possession at school and that she used marijuana daily at P.W.'s residence. Daughter admitted that she turned the marijuana in to the school counselor, resulting in a criminal charge filed against her. Daughter testified that although she had never actually seen her Father use marijuana, she knew he smoked marijuana outside their home at night. She testified that she has not smoked marijuana since being placed in foster care. Daughter also testified that she would take Neurontin, taking up to twenty pills at one time, and has tried both crack cocaine and methamphetamine.

Daughter testified that she did manipulate Father as to whether or not he had given her allowance and would sometimes manipulate him as to where she was going. She admitted that it was easy to manipulate Father. Daughter testified that she did not lie to Father about where she was going when she was engaging in sexual relations, but then later testified that she would sometimes pay someone to lie to Father about her whereabouts. Daughter admitted that Father trusted her and loved her and that she did have a curfew on school nights.

Social Worker Melissa Barker testified that she was the ongoing worker on Father and Daughter's case from 2010-2012. She testified that Father did come in to attempt to file a petition for beyond parental control at some prior point, but that the case did not meet the statutory criteria.

Father's sister, P.B., testified that she has told Daughter that she is available to take Daughter places. P.B. testified that she worked at some point with Melissa Barker to fill out the beyond parental control petition. She testified that she saw Father attempt to ground Daughter, but that he would forget later that Daughter was grounded. P.B. testified that Father needs to be stricter with Daughter.

Father testified that he was electrocuted in Magnolia, Arkansas, where he was working as a lineman. He testified that he attempted to supervise Daughter the best he could and agreed that he let her stay at P.W.'s, but he stated that Daughter would not stay there every night. He said that he knew he could not believe Daughter and stated that he would simply guess and hope for the best as to whether or not she was telling the truth. He admitted that Daughter was sneaky and manipulative.

Father testified that he knew she was sexually involved with a T.C., which, according to Daughter happened at age thirteen. However, according to Father, he estimated her relationship with T.C. occurred approximately one to two years ago. He then testified that he became aware of Daughter being sexually active approximately one year ago when he took her to Olive Hill Urgent Care and Daughter tested positive for herpes. He also testified that he was aware she went to the health department in 2013 to get a prescription for birth control, but that he did not want her on the medication. Father testified that he believed Daughter only had engaged in sexual relations with two men.

Father testified that he did not believe that Daughter was smoking pot daily, nor that she had used crack cocaine or Neurontin. He didn't believe that she had a drug problem. Father admitted to his marijuana use and testified that he purchased the marijuana from J.W., P.W.'s daughter, and that he would go up to P.W.'s house to get the marijuana from J.W. Father estimated that he spent approximately \$200.00 per year on marijuana. He also testified that he had been given two drug tests during these proceedings and failed them both.

On June 16, 2014, after an approximately four-hour hearing, the Court found that Daughter was neglected. The trial court judge made the following findings of fact:

- 1) lack of supervision for the above child;
- 2) this child lived with another adult, parental duties were abandoned to P.W. by the father;
- 3) the mother failed to supervise the child while in her care;
- 4) child engaged in promiscuous sex with multiple partners and contracted STD;
- 5) child engaged in substantial drug abuse;
- 6) Father fails to believe/recognize child's drug use and sexual promiscuity; and
- 7) this child has had suicidal ideations for which she is in need of counseling.

The Court ordered that Daughter remain in the custody of the Cabinet for Health and Human Resources and that she be ordered into further counseling for her suicidal tendencies. The disposition hearing was set for July 1, 2014, and the Appellant filed his notice of appeal on July 15, 2014.

On July 31, 2014, the trial court heard arguments on a CR 60.02 motion to vacate the Court's June 16, 2014 order, filed by Father. In the motion, Father alleges that new information regarding the fact that Daughter continued to engage in the same behaviors while in foster care warranted that the trial court's previous finding of neglect be vacated. Father alleged that Daughter continued sneaking out, was lying to the foster parents and, pursuant to a report filed by the Cabinet for Health and Family Services on July 25, 2014, was still engaging in inappropriate behavior with males, including her sending nude pictures of herself and inviting males to meet her on her lunch break at McDonald's. This motion was overruled by the trial court and this appeal follows, in regards to both the initial finding of neglect and the CR 60.02 motion.

Under CR 52.01, if an action is tried upon the facts without a jury or with an advisory jury, the court shall find the facts and those findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A finding of fact is clearly erroneous when it is not supported by substantial evidence, which is defined as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883 (Ky. App. 2010).

This Court is merely challenged with determining whether or not the trial court was clearly erroneous in its findings of neglect. As stated above, the

clearly erroneous standard means simply that it must not be supported by substantial evidence. This Court is not responsible for judging the credibility of the witnesses.

Here, the trial court found the Father guilty of neglect under Kentucky Revised Statutes (KRS) 600.020(1), which defines that “an ‘abused or neglected child’ is a child whose health or welfare is harmed or threatened with harm when:

- (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child;
 - 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
 - 2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
 - 3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
 - 4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;

5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
9. 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; or

- (b) A person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age.

KRS 600.020(1). Here, the trial court specifically found that there was a lack of supervision under KRS 600.020(1)(a)(8) and that the parental duties had been abandoned to P.W. under KRS 600.020(1)(a)(7). This Court's responsibility is to

review the facts presented at the adjudication to see if the trial court's findings were clearly erroneous.

A number of witnesses, including Father himself, provided testimony on whether Father failed to provide adequate supervision for his daughter. Brittany Davis, social worker, testified that in 7 months at school, Daughter had 14 absences, 5 ½ of which were unexcused. Social worker Ruby Jo Bailey testified that when she first encountered Daughter, the encounter that spawned this whole case, she appeared under the influence and was scantily clad in a home with a number of males present.

Daughter herself testified that Father would just let her go where she pleased and that she was spending all day and night at P.W.'s, where she had no curfew and Father was not supervising her curfew while there. Her paternal aunt, P.B., stated that Father needed to be stricter. Father said that he attempted to supervise Daughter "as best as he could." He also testified that he would just "guess" as to whether or not Daughter was lying and would simply "hope for the best." Father was not shocked that Daughter manipulated him and stated that he didn't know when to believe Daughter or not, yet continued to let her live outside the home with a neighbor from whose home he regularly purchased his marijuana.

Additionally, as a product of this lack of supervision, the trial court additionally found that Daughter had engaged in sexual relations with a number of partners and had a serious drug problem. Daughter testified that she had pot at school, which led to juvenile criminal charges. Daughter testified that she used pot

daily while up at P.W.'s. Daughter also testified that she would take twenty Neurontin pills at a time and had tried crack cocaine and methamphetamine. Father testified that he simply didn't believe that she was taking drugs, not that he had firsthand knowledge whether or not Daughter was engaging in drug use.

In regards to Daughter engaging in sexual relations, the testimony presented showed that Daughter testified that she became sexually active at thirteen and had sex with approximately fifty partners. She testified that Father was aware she was having relations with other men at thirteen because Father allegedly threatened at least one older man, T.C. Father said he had become aware that Daughter was sexually active approximately six months to a year prior when he took her to the health department where she tested positive for herpes.

The trial court found that the parental duties of Father had been abandoned to P.W. Social worker Ruby Jo Bailey testified that Daughter was residing in the home of P.W. and that Daughter had clothing there at the residence. Daughter testified that she was at P.W.'s home daily and all night and that P.W. bought her underwear and food. Daughter said that Father never came to check on her. Mother testified that whenever she called for Daughter, Father would have to take the phone up to P.W.'s house. All of these facts support the Court's finding that Father had abandoned his parental duties to P.W. and that Daughter was residing there.

After reviewing the evidence of record, the trial court had substantial evidence upon which to base its finding of neglect against Father. Although

Father presented some evidence to the contrary, it is insufficient to warrant reversal because the Commonwealth presented adequate evidence in support of the conclusion that Father was guilty of neglect under KRS 600.020(1). In arguing otherwise, Father has essentially asked us to reweigh the evidence and to find his evidence more persuasive. That is simply not our function, as the discretion of judging the credibility of the witnesses lies with the trial court. *Smith vs. Smith*, 450 S.W.3d 729, 734 (Ky. App. 2014). Furthermore, when the testimony before the trial court is conflicting, we will not substitute our decision for the trial court's judgment, as the family court, in their broad discretion, "may choose to believe or disbelieve any part of it." *Bailey vs. Bailey*. 231 S.W.3d 793, 796 (Ky. App. 2007).

In regards to Father's motion to vacate the June 16, 2014 order, under CR 60.02, "on motion a court may upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02." CR 60.02. CR 59.02 requires that a motion for a new trial be filed within ten days after the entry of judgment. Here, Father filed his motion on July 25, 2014, well beyond ten days after the entry of the Adjudication Order on June 16, 2014.

This Court has ruled that in order to sustain a successful motion to vacate a judgment or finding under CR 60.02, the moving party must show: "(1) the evidence was discovered after entry of judgment; (2) the moving party was

diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.” *Hopkins v. Ratliff*. 957 S.W.2d 300, 301-302. (Ky. App. 1997). Additionally, this Court has also held that while CR 60.02 affords the trial court discretion to “reopen a judgment or order for the consideration of newly discovered evidence, which is unavailable at the time; it does not, however, allow for a judgment to be reopened and altered on the basis of the facts which occurred after the judgment was entered. *West Vale Homeowners Ass’n, Inc. v. Small*, 367 S.W.3d 623, 628 (Ky. App. 2012).

In the current case, there is no evidence that the fact that Daughter continued to engage in the same behavior would change the trial court’s decision. As stated above, the trial court could rely on a number of facts from a number of witnesses in its findings of neglect against Father. The fact that Daughter was sneaking out and lying to anyone was not the single deciding factor in the trial court’s findings. Therefore, this Court declines to find that the newly discovered evidence alleged by the Father would probably change the trial court’s decision at the adjudication hearing. Additionally, the testimony presented at the hearing was that Daughter continued to engage in such behaviors after the ruling of the trial court. Actions that continued to occur after the ruling do not constitute newly discovered evidence for purposes of CR 60.02. Therefore, the ruling of the trial court must be affirmed.

The June 16, 2014 Order of the Carter Circuit Court, Family Court Division is hereby AFFIRMED. The July 31, 2014 Order of the Carter Circuit Court, Family Court Division, overruling the Appellant's CR 60.02 motion is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert W. Miller
Grayson, Kentucky

BRIEF FOR APPELLEE:

Justin D. Criswell
Grayson, Kentucky