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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001822-ME

A.S. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 17-J-502005

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; M.M., MOTHER; AND I.M., A CHILD APPELLEES

AND NO. 2017-CA-001823-ME

A.S. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 17-J-502006

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; M.M., MOTHER; AND M.M., A CHILD APPELLEES

AND NO. 2017-CA-001824-ME

A.S. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 17-J-502007

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; M.M., MOTHER; AND A.M., A CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

LAMBERT, D., JUDGE: In this case the Appellant ("A.S.")[1] appeals a ruling of the Jefferson Circuit Court. The circuit court found that A.S. abused and neglected three children who lived with A.S. and the children's mother ("M.A.M.") and ordered that he have no contact with any of the children. After reviewing the record, we affirm.

[1] The names of all involved parties are abbreviated to protect their privacy.

I. FACTUAL BACKGROUND

On May 2, 2017, the Cabinet for Health and Family Services ("CHFS") filed a Juvenile Dependency, Neglect, or Abuse Petition against A.S. and M.A.M.[2] The Petition was filed in relation to a domestic violence incident that occurred in their home on March 30, 2017. At the time of the incident A.S. and M.A.M. were unmarried cohabitants living with three children: I.M., A.M., and M.M. A.S. and M.A.M. share two of the children in common: M.M., who was two years old at the time of the incident, and A.M. who was one. The third child, I.M., who was eight at the time of the incident, is M.A.M.'s child with another man.

The uncontroverted evidence presented at trial[3] showed that on the night of the incident A.S. came home at around 1:30 a.m. after a night of drinking. After he fell asleep, M.A.M. looked through his phone and saw text messages from another woman he had been with that night. Upset, she woke him up to confront him about it and he denied it. When he denied it, she became even more enraged and slapped him. After she slapped him, he punched her in the face five to six times. At some point during their argument and scuffle the oldest child, I.M., came

[2] Although the original Petition named both A.S. and M.A.M. as being responsible for the abuse or neglect, CHFS ultimately proceeded with charges against only A.S.

[3] We note that A.S. was not present at trial. His counsel offered no explanation as to why.

into their bedroom and saw A.S. punch his mother. The other two children were in the house during the fight but did not witness it. Shortly after the fight M.A.M. realized her lip was split open and bleeding. She left the house with I.M. and drove herself to the hospital for medical treatment. Her injuries included a pump knot on her forehead, a busted lip, and bruised and swollen cheeks. Her treating physician called the police, and CHFS got involved pursuant to the police report.

At the conclusion of the evidence, the circuit court found that A.S. had abused or neglected the children under Kentucky Revised Statute ("KRS") 600.020(1). Though his parental rights to M.M. and A.M. were not terminated, the court ordered him to have no contact with any of the children until further orders. This appeal followed.

Additional facts are discussed below as necessary.

II. ANALYSIS

A.S. asserts three arguments on appeal: (1) the circuit court lacked sufficient evidence to find the children were abused or neglected under KRS 600.020(1); (2) the circuit court erred by not giving him statutory immunity under KRS 503; and (3) we must revisit and reverse our holding in *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012). For the following reasons, we affirm.

First we address A.S.'s argument that the trial court lacked sufficient evidence to find the children were abused or neglected under KRS 600.020(1). Whether the CHFS presented enough evidence for the circuit court to find the children were abused or neglected within the meaning of KRS 600.020(1) is a factual determination. "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 witnesses." Kentucky Rule of Civil Procedure ("CR") 52.01. Therefore, the dispositive question we must answer is "whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (quotations omitted). Family courts are given great discretion to determine whether a child fits within the abused or neglected category,[4] and "mere doubt as to the correctness of a finding will not justify its reversal."[5]

As previously mentioned, the factual determination at issue in this case revolves around KRS 600.020(1). That statute provides in pertinent part:

> (1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:

[4] *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

[5] *Moore*, 110 S.W.3d at 354.

> (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; [or]
>
> 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[.]

In this case, the circuit court found that the children were abused or neglected based on uncontroverted evidence that: A.S., while intoxicated, punched the children's mother in the head and face five to six times; all the children were present in the house when the incident occurred; and the eldest child witnessed his mother being struck.

We find this was substantial evidence to support the court's conclusion that the children were abused or neglected, as a reasonable mind would accept it as adequate to support that conclusion. Seeing his mother being hit over and over again until her lip was busted open was clearly enough to inflict an emotional injury upon I.M., an eight-year-old child. Further, the other children's presence in the home during the incident put them at a risk of emotional or physical injury. Therefore, we affirm the circuit court's finding of abuse or neglect under KRS 600.020(1).

Next, we address A.S.'s argument that the trial court erred by not granting him statutory immunity under KRS 503, specifically KRS 503.085. KRS 503.085 provides immunity from criminal prosecution and civil action for use of force in a person's self-defense or defense of others. A.S. asserts he was defending himself and his family from M.A.M. when he began punching her and therefore is entitled to immunity under the statute.

However, A.S.'s counsel did not raise the issue of statutory immunity at any point during the trial. Indeed A.S. did not even bother to show up to trial to provide his side of the story. It is a well-established rule that "[a]n appellate court is without authority to review issues not raised in or decided by the trial court." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (internal quotations omitted). In other words, "a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011) (abrogated on other grounds by *Nami Res. Co. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018)). Therefore, we are without jurisdiction to address this claim of error.

Finally, A.S. argues we must revisit and reverse our holding in *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012). This court's primary holding in *A.C.* was that appointed counsel in an involuntary

parental rights termination case may file an *Anders*[6] brief if they can find no issue of merit for argument on appeal. *Id*. at 371. However, before this court could reach that holding, it first had to find that indigent parents have a right to appointed counsel on appeal in involuntary termination cases. *Id*. at 366. This court held, based on its interpretation of KRS 625.080(3)[7] that our General Assembly "intended to afford indigent parents the benefits of counsel during the entire course of the termination proceedings, including any appeal." *Id*. It is this holding that A.S., or rather his counsel, urges us to overrule. Counsel argues this constitutes the "conscription of legal counsel without compensation," and was based on insufficient legal support.

We decline to revisit our holding in *A.C.* because A.S.'s counsel is completely without standing to challenge it. It is a "fundamental rule that courts must refrain from deciding matters that have not yet ripened into concrete case and controversies. Stated otherwise, courts are not authorized to render advisory opinions concerning moot or hypothetical issues." *Sullivan v. Tucker*, 29 S.W.3d

[6] In *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the Supreme Court held that in criminal cases in which the Sixth Amendment right to counsel applies, appointed counsel may request permission to withdraw for purposes of appeal if they believe, and present evidence, that an appeal would be wholly frivolous.

[7] KRS 625.080(3): "The parents have the right to legal representation in involuntary termination actions. The Circuit Court shall determine if the parent is indigent and, therefore, entitled to counsel pursuant to KRS Chapter 31. If the Circuit Court so finds, the Circuit Court shall inform the parent; and, upon request, if it appears reasonably necessary in the interest of justice, the Circuit Court shall appoint an attorney to represent the parent pursuant to KRS Chapter 31[.]"

805, 808 (Ky. App. 2000). Therefore, our courts "will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered." *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. App. 1962) (quoting *Black v. Elkhorn Coal Corporation*, 233 Ky. 588, 26 S.W.2d 481, 483 (1930)).

Here, A.S.'s counsel is asking us to right a wrong he has not yet suffered. Counsel could have properly challenged *A.C.* by refusing to represent A.S. on appeal, and then arguing against the validity of *A.C.* following any sanctions he received for doing so. Instead, he chose to represent A.S. on the merits of the appeal. He is asking this court to render what amounts to an advisory opinion, which we are without authority to do.

III. CONCLUSION

After thorough review of the record, we find the circuit court's determination that A.S. abused or neglected the children in this case within the meaning of KRS 600.020(1) was supported by substantial evidence. We further find that we are without authority to review A.S.'s other arguments on appeal. We therefore affirm the Jefferson Circuit Court.

MAZE, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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