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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000177-ME

A.R.D., SR. — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 18-AD-00011

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND A.R.D., JR.,
A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND K. THOMPSON, JUDGES.

CALDWELL, JUDGE: A.R.D., Sr.[1] (Father) appeals from a judgment of the Logan Circuit Court terminating his parental rights to a minor child, A.R.D., Jr.[2] (Child). Counsel for Father filed a motion to withdraw and an *Anders*[3] brief, stating that counsel has thoroughly reviewed the record and finds no non-frivolous or meritorious issues to raise on appeal. Father filed a *pro se* supplemental brief as well as a *pro se* reply brief. Following our independent review of the record and briefs, we affirm the trial court's judgment. *See A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361, 371-72 (Ky. App. 2012) (holding that *Anders* briefs may properly be filed in appeals of involuntary termination of parental rights

[1] To protect the privacy of the minor child, we will refer to the child and his natural parents by their initials or "Father" and "Child" rather than their names.

[2] The child (A.R.D., Jr.) was not named as an Appellee in the body of the notice of appeal, a potentially fatal error. *See, e.g., A.M.W. v. Cabinet for Health and Family Services*, 356 S.W.3d 134, 135 (Ky. App. 2011) ("If a parent appeals an order terminating parental rights, the child is a principal focus of the appeal. Therefore, the child must be made a party to the appeal to protect his interests. The child is a necessary and indispensable party to an appeal from the termination of parental rights and the failure to join the child to the appeal requires this Court to dismiss this appeal."). However, A.R.D., Sr., by counsel, did refer to the child (A.R.D., Jr.) in the caption of the notice of appeal and—unlike *A.M.W.*—mailed a copy of the notice to the child's guardian *ad litem*. Therefore, dismissal of the appeal is unnecessary. *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002) ("Appellants' notice of appeal named the minor child, CJM, in the caption, and, although he was not included in the certificate of service, copies of the pleadings were provided to the child's guardian ad litem. These factors together substantially comply with the requirements of [Kentucky Rule of Civil Procedure] CR 73.03 and provided sufficient notice to all parties concerned that the minor child was also an Appellee."). We further note that the child's natural mother, T.C.W., is also listed in the caption on the notice of appeal as she was also a party to the trial court proceedings in Action No. 18-AD-00011 in Logan Circuit Court. Also, she is listed in the caption on the Cabinet's Appellee Brief. However, T.C.W. is not a party to this appeal.

[3] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

cases under certain circumstances, establishing a "blueprint" for briefing processes in such cases, and stating that: "After all briefs are filed, this Court will fully examine the record and decide whether the appeal is wholly frivolous pursuant to *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400."). By separate order, we also grant the motion to withdraw filed by Father's counsel.

From our review of the briefs, it appears that Father's key assertions of error relate to the trial court's consideration of his incarceration and possible release date and to alleged inadequate efforts by the Cabinet to place Child with relatives and reunify the family.[4]

We agree with the trial court that relative placement was not a relevant issue at the involuntary termination hearing as it is not a factor listed in Kentucky Revised Statute (KRS) 625.090. We further agree with counsel's assessment that the trial court's findings of fact are supported by substantial evidence and that there was no overall abuse of discretion in terminating Father's parental rights. We believe that one argument raised in the supplemental brief of Father merits further discussion, namely, his contention that the termination of his

[4] Although counsel for A.R.D., Sr. found no meritorious bases for appeal following her review of the record, she identified arguments which A.R.D., Sr. (apparently) wished to make upon appeal in the *Anders* brief. He also appears to take issue with the quality of his representation, at least as to the issue of relative placement. The overall quality of his representation at the hearing appears more than adequate from our review of the record. In his reply brief, he focuses on issues about relative placement and his release date.

parental rights was improperly based on incarceration alone. Nonetheless, we ultimately affirm the trial court's judgment given our review of case law about the consideration of incarceration as a factor in termination of parental rights cases, the trial court's findings, and other evidence of record which supports its decision.

FACTS AND PROCEDURAL HISTORY

Many of the underlying facts appear undisputed. Father is the putative father of Child, who was born December 19, 2016. Father has been incarcerated in Tennessee since before Child's birth; as of November 2018, his serve-out date was not until 2038 and his earliest possible parole date was in 2019.

T.C.W. (Mother), Child's natural mother, left Child with the paternal grandmother beginning in late January 2017. Except for doing so for just one day while the grandmother recovered from surgery, Mother never returned to take care of Child.[5]

The Cabinet became involved a few months after Child's birth due to the parents' absence and concerns about Child's safety in the grandmother's home. In May 2017, the Logan District Court granted the Cabinet's request for emergency custody and Child was removed from the grandmother's home. The

[5] We note that T.C.W.'s parental rights to A.R.D., Jr. were also terminated by the trial court in the same proceeding. T.C.W. is not a party to this appeal and, thus, we will attempt to only discuss the facts relating to her which are relevant to resolving the instant appeal filed by A.R.D., Sr.

grandmother had a history of drug use and had her parental rights terminated as to her own children. In July 2017, the Logan District Court entered an order adjudging that Child was neglected on bases including: 1) the parents' continuous or repeated failure or inability to provide essential care or protection for Child, and 2) their failure to provide necessities such as food, clothing, shelter, medical care, and supervision. There were no successful attempts to place Child with relatives, and Child was placed in foster care.

The Cabinet and Father had some contact following the removal of Child from the grandmother's home and Father does not apparently dispute the following summation of these contacts:

> Cabinet staff have only had two (2) telephone contacts with father. Father was uncooperative during those telephone calls, refusing to tell social worker what his charges were, who his former probation officer was or what county he was on probation from. Cabinet staff received two (2) letters from father in March 2018. Father never asked either during the phone calls or in the letters about how child is doing. Father has not provided any documentation regarding any programs he has completed while incarcerated.

(*Anders* Brief for Appellant, pp. 3-4).

The Cabinet filed a petition to terminate the parental rights of Father and Mother as to Child. The trial court conducted a bench trial on the petition,

which Father participated in telephonically from his corrections center.[6] His guardian *ad litem*, Mother's counsel, Child's guardian *ad litem*, and counsel for the Cabinet were also present. Mother did not participate and apparently could not be located. Three social workers testified in person at the hearing, and Father testified by telephone.

Two of the testifying social workers had participated in a telephone call with Father in 2017. They testified that when asked about his charges, Father told them that his charges had nothing to do with whether he could parent a child and that he would be released by the end of the year (2017) because he was appealing his sentence. Similarly, a third social worker (who had taken over the case in late 2017) testified to talking with Father on the phone in 2018 and to him being hostile and uncooperative, refusing to disclose what he had been convicted of, or who his probation or parole officer was. She testified to his stating he was incarcerated due to a "technical violation" and that he would be released soon. One of these social workers also testified to contacting the corrections center concerning when he might be released and being told of a serve-out date of 2039

[6] A.R.D., Sr. asserts that participating by phone from his place of incarceration was inadequate to allow him to be meaningfully heard. (Supplemental Brief for Appellant, p. 1, n. 2). We disagree, especially as he did not timely raise any objections in the trial court and cites no binding authority to support his position.

and an earliest parole date of 2023 at that time. The social workers testified that Father never asked about Child.

Father testified that he was currently incarcerated based on a "technical violation" because he had failed a drug test, explaining that he had gotten "high" after a close friend committed suicide, but that he accepted responsibility for his choice. Apparently, he had violated the terms of his conditional release. He testified to having been previously incarcerated in a county jail in Tennessee for about two years while he challenged his charges, and that he was released in 2015. He then lived in Russellville, Kentucky, until he was returned to incarceration in Tennessee around June 2016. When asked by Cabinet counsel, he testified that the original charge was for robbery. He testified that he could possibly be released from prison as early as August 2019. Father testified that he asked social workers where Child was, but they would not tell him.

Child's guardian *ad litem* presented documentary evidence including certified copies of Father's Tennessee convictions. His convictions included two convictions for robbery and convictions on other charges, including possession of a weapon by a convicted felon, theft, evading arrest, and violations of probation.

Following the presentation of proof, each guardian *ad litem* and counsel for the Cabinet made closing statements. Child's guardian *ad litem* agreed with the Cabinet that it would be in Child's best interest for the natural parents'

parental rights to be terminated and for him to be placed for adoption. It was noted that Child had been with the same foster family since he was six months old, that he was doing well in the foster home, and that the foster parents wished to adopt him.

At the end of the hearing, the trial judge stated that he found that the requirements to terminate both natural parents' parental rights under KRS 625.090 were met by clear and convincing evidence. He noted that there was an adjudication from district court that Child was neglected, thus satisfying KRS 625.090(1)(a), and that the Cabinet had filed a petition for termination, thus satisfying KRS 625.090(1)(b). He also found that there were two grounds of parental unfitness satisfied under KRS 625.090(2): specifically, KRS 625.090(2)(e) (failure or inability to provide parental care and protection) and KRS 625.090(2)(g) (failure or inability to provide necessities such as food and medical care). Lastly, he found that it was in Child's best interests for parental rights to be terminated, satisfying KRS 625.090(1)(c) and (3). He noted the young age of Child and that Child needed care now and could not wait indefinitely to receive such care. He also expressed his belief that case law would support termination, especially as Father could not take care of Child due to his incarceration, and explained that it did not have to do with being a bad person but with having made choices that made it practically impossible to take care of a child; the trial judge

also made a stray comment that "unless he's getting out tomorrow, I'm going to terminate."

The trial judge rendered his written findings of fact and conclusions of law and order of termination and judgment several weeks later, making specific findings of fact and conclusions of law that the requirements of KRS 625.090 had been shown by clear and convincing evidence. We note that his written findings of fact and conclusions of law and order both stated that Mother had abandoned Child, but did not state that Father had abandoned Child. He found that both parents had failed to or had been unable to provide essential care and protection and had failed to or had been unable to provide necessities, without a reasonable chance for significant improvement in the near future, thus stating grounds for parental unfitness under KRS 625.090(2)(e) and (g).[7]

His findings of fact also included the following discussion:

> Father is incarcerated in Tennessee on numerous charges. His serve-out date is in 2038. His first possibility for parole is in October 2019. Cabinet staff have only had two (2) telephone contacts with father.

[7] KRS 625.090(2)(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[.]" KRS 625.090(2)(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[.]"

> Father was uncooperative during those telephone calls, refusing to tell social worker what his charges were, who his former probation officer was or what county he was on probation from. Cabinet staff received two (2) letters from father in March 2018. Father never asked either during the phone calls or in the letters about how child is doing. Father has not provided any documentation regarding any programs he has completed while incarcerated.

STANDARD OF REVIEW

When the sufficiency of the evidence is challenged on appeal, we are permitted to reverse only if the trial court's findings of fact are clearly erroneous. *Cabinet for Health & Family Services v. I.W., Jr.*, 338 S.W.3d 295, 299 (Ky. App. 2010). All that is needed "is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 117 (Ky. App. 1998) (citation omitted).

ANALYSIS

From our independent review of the record and the briefs, we believe that Father's argument that the trial court terminated his parental rights based solely on his incarceration merits discussion. We note that in Father's view, "[a]ll the record shows is conclusory allegation [sic] that the appellant has abuse [sic] or neglected his son due to his incarceration standing alone."

Kentucky case law makes clear that a parent's incarceration does not, by itself, always establish that parental rights should be terminated. "However, absence, voluntary or court-imposed, may be a factor to consider in determining whether the children have been neglected[.]" *J.H. v. Cabinet for Human Resources*, 704 S.W.2d 661, 664 (Ky. App. 1985).[8] For example, a parent's choosing a "criminal lifestyle" which results in him being incarcerated and creating risks of physical or mental injury to his children can be construed as neglecting a child. *Id*. We believe that the trial court may have been referring to *J.H.* and similar cases when orally discussing how case law supported terminating parental rights of an incarcerated parent who had "made choices" which resulted in incarceration and, thus, being unable to care for a child.

Kentucky case law does not favor termination of parental rights based solely on an isolated instance of incarceration, but clearly incarceration is something to be considered among all other factual circumstances. *Cabinet for Human Resources v. Rogeski*, 909 S.W.2d 660, 661 (Ky. 1995). For example, a parent's argument that his parental rights were terminated based solely on incarceration was rejected in *Rogeski* because he was shown to have neglected his children through refusing to make efforts to support the children financially even

[8] We note that this case was decided under former statutes but that its reasoning is still sound.

before his incarceration and through subjecting the children to deplorable living conditions. *Id*.

We believe that the trial court's written findings indicate that Father's parental rights were not terminated solely due to his incarceration. For example, the trial court specifically found that Father never asked how Child was doing in his contacts with Cabinet personnel and this finding is supported by the social workers' testimony. We further note that although Father testified to inquiring about Child (specifically asking where he was), the trial court as finder of fact could properly determine which testimony it found more credible and reliable.[9]

The trial court also made findings that Father was not cooperative in sharing information about what his charges were, who his probation officer was, or what county he was on probation from with Cabinet personnel. These findings are supported by substantial evidence (testimony from the social workers), and his lack of cooperation about sharing such information could support an inference that he had something to hide about his criminal history.

The trial court also specifically found that Father had not provided any documentation regarding any programs he has completed while incarcerated. Father testified to his corrections center not offering classes on relevant topics such

[9] *See* CR 52.01, providing that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" at a bench trial.

as parenting or anger management and generally opined that he did what he could while he was incarcerated, but he does not point to any documentation showing that he completed any relevant programs.

Perhaps most importantly, the trial court's findings reflect that there was not just an isolated instance of incarceration as the trial court found that Father was incarcerated on "numerous charges" in Tennessee. This finding is supported by substantial evidence as the trial court was presented with certified copies of several convictions in Tennessee, including two convictions of robbery, and Father admitted in his testimony to having violated the terms of his conditional release by using drugs. Clearly, Father had not just been incarcerated for an isolated, minor criminal offense but had committed multiple serious criminal offenses, including at least two instances of a violent felony (robbery). Despite Father's contentions that this criminal history is not relevant considering that he was not in prison for murder or voluntary manslaughter of a sibling, half-sibling, or other child in the home, his repeated criminal history (including at least two violent felonies and use of drugs in violation of conditions of his supervised release) is a relevant factor to consider under precedent such as *J.H.*, *supra*, and *Rogeski*, *supra*. His argument that the sentence he is currently serving is illegal is also of little avail here as it does not change his prior conviction history or affect his present ability to parent Child.

As for his potential release date, we note that it ultimately makes little difference whether the earliest possible parole date at the time of the hearing would have been October 2019 (as found by the trial court and based on social worker testimony) or an earlier date in 2019 such as April 2019. Even assuming that he could have been released in April 2019, that would have been several months after the termination hearing—a long time in the life of the then two-year-old child. We also take judicial notice that as of the time he filed his reply brief in December 2019, he listed his address as the corrections center in Clifton, Tennessee and, thus, he remained incarcerated at least a year after the termination hearing.

While we also accept that the offenses he was convicted of all took place before Child was born, we cannot say that makes the trial court's decision erroneous in light of his repeated criminal history, including at least two violent felonies, and the fact that he was likely to remain incarcerated and be unable to actively take care of Child or provide for his needs for a substantial time in the future. In short, based on the trial court's findings and additional evidence of substance in the record, we conclude that the trial court did not err in terminating the parental rights of Father.

For the foregoing reasons, we AFFIRM the judgment of the Logan Circuit Court.

ALL CONCUR.

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