

**STATE OF LOUISIANA
IN THE INTEREST OF Z.D.**

*

NO. 2017-CA-0616

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COURT OF APPEAL

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. 2017-00095-01-NA-A, SECTION "A"
Honorable Ernestine S. Gray, Judge

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Judge Daniel L. Dysart

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(Court composed of Judge Daniel L. Dysart, Judge Rosemary Ledet, Judge Regina Bartholomew Woods)

LEDET, J., DISSENTING WITH REASONS

Leon Cannizzaro
DISTRICT ATTORNEY
Scott G. Vincent
ASSISTANT DISTRICT ATTORNEY
J. Taylor Gray
ASSISTANT DISTRICT ATTORNEY
PARISH OF ORLEANS
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REVERSED

NOVEMBER 15, 2017

The State seeks review of the juvenile court's ruling that the State did not meet its burden of proving Z.D. to be a child in need of care as to his father, J.B.¹ For the following reasons, we reverse.

BACKGROUND:

The Louisiana Department of Children and Family Services (DCFS) received a referral on March 15, 2017, that Z.D., two years of age, had been abused, neglected, and/or was a dependent child in need of care. The juvenile court issued an instant order and Z.D. was placed in the State's custody. An investigation revealed that the child's mother was neglectful and abusive to Z.D., and that the child's father, J.B., was incarcerated in Texas.

A continued custody hearing was held April 5, 2017, at which time the attorney for the father stipulated that DCFS had probable cause as to the father to place the child in the State's custody. On May 2, 2017, that State filed a child in need of care petition, and an answer hearing was held. The father's attorney

¹ The initials of the parties will be used to protect and maintain the privacy of the minor child involved in this proceeding.

entered a general denial to the allegations of the petition, except to admit that J.B. was Z.D.'s father. The juvenile court ordered that Z.D. remain in the State's custody, and set an adjudication hearing for June 6, 2017. On that date, Z.D. was adjudicated a child in need of care as to his mother only, and the adjudication as to J.B. was continued to June 27, 2017.

On June 27, 2017, Tacarra Charles, an investigator for DCFS, testified that she had determined that J.B. was incarcerated in Texas, with a release date in 2027. She testified that she had not been allowed to speak directly with J.B., but rather had communicated with him through a prison employee. Based on those conversations, Ms. Charles determined that J.B. was unable to provide food, clothing and/or shelter for Z.D. Ms. Charles also testified that Y.B., J.B.'s mother and the child's paternal grandmother, contacted her to say she would care for Z.D. Unfortunately, she later withdrew her offer as she questioned whether the child was indeed her grandchild. Ms. Charles also testified that she identified other relatives of J.B., and attempted to contact them via telephone and certified or regular mail. All telephone numbers were disconnected and all mail was returned marked "return to sender." Ms. Charles admitted that she did not have any contact with J.B. after his mother refused to care for Z.D.

On cross-examination, Ms. Charles testified that J.B. had given her a plan, the aforementioned placement with his mother. She also testified that he gave her other names. It is unclear if Ms. Charles looked for those persons, or if these are the same people she attempted to locate via telephone and mail.

The juvenile court ruled that the State had not met its burden in proving that Z.D. was a child in need of care as to his father. This appeal followed.

DISCUSSION:

The State's sole assignment of error is that as J.B. failed to raise a contemporaneous objection to the hearsay testimony at the adjudication hearing, J.B. waived his right to object on appeal.²

Before a juvenile court may adjudicate a child in need of care as defined by the Louisiana Children's Code, the State must allege and prove by a preponderance of the evidence one or more of the statutorily expressed allegations in La. Ch.C. art. 606 A. *State ex rel. J.A.*, 99-2905, p. 11 (La. 1/12/00), 752 So.2d 806, 812. Further, the court must make a predicate finding of abuse or neglect. *Id.*, 99-2905, p. 12, 752 So.2d at 813.

In its petition, the State alleged that Z.D. was a child in need of care as to both parents, citing the following sections of Article 606 A:

A. Allegations that a child is in need of care must assert one or more of the following grounds:

(1) The child is the victim of abuse perpetrated, aided, or tolerated by the parent or caretaker, by a person who maintains an interpersonal dating or engagement relationship with the parent or caretaker, or by a person living in the same residence with the parent or caretaker as a spouse whether married or not, and his welfare is seriously endangered if he is left within the custody or control of that parent or caretaker.

(2) The child is a victim of neglect.

(3) The child is without necessary food, clothing, shelter, medical care, or supervision because of the disappearance or prolonged absence of his parent or when, for any other reason, the child is placed at

² No brief was filed on behalf of J.B.

substantial risk of imminent harm because of the continuing absence of the parent.

“Neglect” as defined at La. Ch.C. art. 603(18) in effect at the time of the subject hearing is, in part:

Refusal or unreasonable failure of a parent or caretaker to supply the child with necessary food, clothing, shelter, care, treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child’s physical, mental, or emotional health and safety is substantially threatened or impaired.... [T]he inability of a parent or caretaker to provide for a child due to inadequate financial resources shall not, for that reason alone, be considered neglect....

At an adjudication hearing, the State bears the burden of proving by a preponderance of the evidence that a child is in need of care. La. Ch. C. art 665, *State ex rel. L.B.*, 08-1539 (La. 7/17/08), 986 So.2d 62. The applicability of the rules of evidence during child in need of care proceedings depends on the stage at which the evidence is being presented. For example, at a continued custody hearing, “hearsay evidence is admissible.” La. Ch.C. art. 624 F.

However, La. Ch.C. art. 663 A provides that in a child in need of care proceeding, “the adjudication hearing shall be conducted according to the rules of evidence applicable to civil proceedings.” Additionally, La. C.E. art. 1101 A(1) provides in part that “[j]uvenile adjudication hearings in non-delinquency proceedings shall be governed by the provisions of this Code applicable to civil cases.”

At the hearing, the juvenile court noted on the record:

No objection to the testimony by the witness (Tacarra Charles) which is all hearsay in an Adjudication.

The juvenile court continued:

And while a worker may testify about what a parent said that is generally when a parent said it to the worker, not through a second person. ... Well as to the father, I'm not finding that the child is in need of care based on the insufficient evidence produced by the State.

Although we agree with the juvenile court that Ms. Charles' testimony as to what J.B. related to her through a prison employee was inadmissible hearsay, we nonetheless find that Ms. Charles testimony relative to her investigation, particularly her attempt to locate suitable relatives of J.B. who would be willing to care for Z.D., is adequate to meet the State's burden of showing that Z.D. was a child in need of care as to his father, J.B.

In *State in the Interest of A.N.*, 46,597 (La.App. 2 Cir. 7/20/11), 70 So.3d 1041, the Second Circuit also found that the part of the testimony of the DCFS investigator was impermissible hearsay; however, the court found that the non-hearsay testimony was sufficient to sustain the State's burden. The investigator testified as to conversations she had with a relative of the mother and child and a DCFS supervisor. Nevertheless, the investigator also testified that she became involved in the case when no legal guardian was present when the child was released from the hospital for a severe urinary tract infection, and no legal caretaker was present to take the child. DCFS had learned that the maternal grandmother, who had custody of A.N. prior to the hospitalization, was herself homeless. The investigator was unaware of the whereabouts of either parent, although she learned that the mother had contacted her supervisor later that day. ,

In this case, it was related to Ms. Charles through prison personnel, that J.B. identified his mother as a caregiver. This testimony is impermissible hearsay. However, Ms. Charles testified that J.B.'s mother called her directly and declined to care for the child as she had doubts that Z.D. was indeed her grandchild.

Attempts also were made by Ms. Charles to locate other relatives via telephone and mail, but to no avail. Ms. Charles ascertained that J.B. would be incarcerated until September of 2027, more than ten years from the date of the hearing. Clearly, the State met its burden of proving by a preponderance of the evidence that J.B. could not provide food, clothing, shelter, medical care or supervision of Z.D. due to his prolonged absence. La. Ch.C. art. 606 A(3).

The purpose of Title 6, Child in Need of Care, of the Louisiana Children's Code is to protect children whose physical or mental health and welfare is substantially at risk of harm by abuse, neglect, or exploitation. La. Ch.C. art. 601. The health, safety and best interest of the child are of paramount concern. *Id.*; *see also, State in the Interest of D.A.*, 10-1040, p. 7 (La.App. 5 Cir. 6/14/11), 70 So.3d 960, 963. To reverse a factfinder's determination of fact, an appellate court must review the record in its entirety and find that a reasonable factual basis does not exist, and further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State, through DOTD*, 617 So.2d 880 (La. 1993); *State in the Interest of D.H.*, 04-2105, pp. 7-8 (La.App. 1 Cir. 2/11/05), 906 So.2d 554, 560.

After reviewing the record in its entirety and considering the best interests of Z.D., we find that the juvenile court erred in not adjudicating Z.D. as child in need of care as to his father, J.B. The ruling of the juvenile court is reversed.

REVERSED