STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of C.E.P., Minor.

JILL LOCKE,

Petitioner-Appellee,

v

PATRICK PETER PATTERSON,

Respondent-Appellant.

UNPUBLISHED
July 2, 2002

No. 238012
St. Clair Circuit Court
Family Division
LC No. 01-006581

Before: Hood, P.J., and Saad and Thomas, JJ.

PER CURIAM.

Respondent-appellant appeals as of right the November 2, 2001 order terminating his parental rights to the minor child pursuant to MCL 710.51(6), the stepparent adoption provision of the adoption code. Respondent-appellant argues that he was denied the effective assistance of counsel when his trial counsel failed to subpoena witnesses who could have corroborated his claim that the no-contact provision in his parole orders prohibited him from having any contact at all with the child or with petitioner-appellee. Respondent-appellant maintains that such witnesses would have established that he lacked the ability to send letters or cards to his child, or to send support checks to petitioner-appellee, thus precluding termination of his parental rights under MCL 710.51(6).

Respondent-appellant failed to move for a new trial or request an evidentiary hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Accordingly, this Court's review of this issue is limited to matters apparent from the record. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1999). In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). A criminal defendant claiming ineffective assistance of counsel must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). First, the defendant must show that counsel made errors so serious that counsel was not performing as the "counsel"

guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich App 590, 600; 623 NW2d 884 (2001). This requires overcoming the strong presumption that the counsel's performance was sound trial strategy. *Id*. Next, the defendant must show that the deficient performance prejudiced the defense, which requires a showing of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *Id*.; see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Here, respondent-appellant cannot satisfy the two prongs of this test. Respondent-appellant has not demonstrated that his counsel committed an error so serious that he was not performing as the counsel guaranteed by the Constitution. The lower court record does not establish that these witnesses would have corroborated respondent-appellant's testimony that the no-contact order was so broad that it prohibited even written and telephone contact. Although respondent-appellant tried to bolster his argument by attaching the no-contact order as an exhibit to his appellate brief, this document was not part of the lower court record and therefore cannot be used to establish his ineffective assistance claim. *Schmeltzer*, *supra* 175 Mich App 673. Furthermore, when respondent-appellant's trial counsel learned that petitioner-appellee was disputing respondent-appellant's allegation about the scope of the no-contact order, he made a reasonable effort to remedy the situation by moving for an adjournment so that he could subpoena the witnesses.

Furthermore, respondent-appellant's ineffective assistance claim is predicated on the assumption that if the trial court had decided the factual issue of the no-contact order's scope in his favor, it would have had to decide in his favor the underlying legal issue. However, it is not clear that the no-contact order deprived respondent-appellant of the ability to support his child and maintain contact with her within the meaning of MCL 710.51(6). Respondent-appellant relies on *In re Kaiser*, 222 Mich App 619; 564 NW2d 174 (1997) and *In re ALZ*, 247 Mich App 264; 636 NW2d 284 (2001). These cases are distinguishable from the instant case because neither *Kaiser* nor *ALZ* dealt with a situation where the parent was restricted by a no-contact order that resulted from a criminal conviction of a sexual offense against a minor. However, because respondent-appellant failed to establish that his trial counsel made an error in failing to subpoena the witnesses, it is not necessary for us to fully analyze the legal question.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas