

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KYLE LEE LLOYD, AUSTIN
RAY SUDBURY and CHRISTOPHER JAMES
PETERS, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHERYL BETH PETERS,

Respondent-Appellant.

UNPUBLISHED

May 26, 2009

No. 289848

Oakland Circuit Court

Family Division

LC No. 08-748096-NA

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(g) and (j). We affirm.

On appeal, respondent does not challenge the trial court's finding that petitioner proved the statutory grounds for terminating her parental rights. Rather, she argues that she was denied the effective assistance of counsel when counsel allowed her to enter a no contest plea to the allegations in the termination petition. Respondent claims her plea was not made knowingly and voluntarily. We disagree.

In reviewing a claim of ineffective assistance of counsel in a termination of parental rights case, this Court must determine (1) whether counsel's performance was objectively unreasonable and (2) whether the respondent was prejudiced by counsel's defective performance. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). This Court does not question whether counsel's advice was right or wrong, but whether the advice was within the range of competence required of attorneys in these cases or whether counsel was not functioning as an attorney as guaranteed under the Sixth Amendment of the United States Constitution.¹ *People v Thew*, 201 Mich App 78, 89; 506

¹ This Court has applied the test for ineffective assistance of counsel in criminal matters to
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NW2d 547 (1993). And, it requires a showing of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

There is no evidence that counsel's advice was not within the range of competence required of attorneys in these cases or that respondent was deprived of the effective assistance of counsel when counsel failed to move to withdraw her plea. Clearly, the result of the proceedings would not have been different even if respondent had not entered a plea of no contest. The court had independent evidence supporting the assertion of jurisdiction and termination of respondent's parental rights. The court took judicial notice of its file, which contained information about respondent's extensive history with child protective services. Services had previously been provided to this family following referrals for improper supervision, including an incident in which one of the infant children nearly drowned in the bathtub because he was left without adult supervision. Testimony provided by the caseworker and respondent's sister revealed that respondent allowed her children continuing contact with her brother, who was suspected of sexually abusing the children. Further, the evidence established that respondent failed to seek immediate medical attention after one of the children overdosed on prescription medication. Thus, respondent is unable to prove prejudice because there was substantial independent evidence to conclude that the court had a basis for jurisdiction and the petitioner would have established the statutory grounds for termination of respondent's parental rights regardless of her plea.

Respondent argues that the outcome of the case would have been different had she not entered a no contest plea because she had completed services prior to the initiation of this case. However, the record reveals that respondent had not sufficiently benefited from services because there was limited improvement in her parenting skills. The recent incident involving the medication overdose demonstrated that respondent did not have the necessary parenting skills to keep the children safe. A parent must benefit from services offered so that he or she can improve parenting skills to the point where the children would not longer be at risk in the parent's custody. *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). Because the resulting termination of respondent's parental rights would not have been different if respondent had not pleaded no contest, respondent has not shown she was denied the effective assistance of counsel arising out of her plea.

Respondent also argues that, under MCR 3.971(C)(1), the trial court erred in accepting her plea and in not raising the issue of her competence because it was clear that she did not understand the plea. When reviewing a claim of ineffective assistance of counsel arising out of a guilty or no contest plea, the relevant inquiry is whether the plea was made voluntarily and understandingly. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). However, unlike in criminal matters, child protective proceedings are not automatically suspended where a respondent is not competent to enter a plea.

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termination proceedings even though the right to counsel in child protective proceedings is statutory, not constitutional. *In re AMB*, 248 Mich App 144, 221-222; 640 NW2d 262 (2001); *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987).

Respondent's assertion is unsupported by the record because there was no indication that she did not understand the nature of the proceedings or was unable to assist her counsel in representing her. Both respondent's counsel and her guardian ad litem (GAL) stated at the plea hearing that respondent knowingly and voluntarily answered the court's questions at the time she entered the no contest plea. In an effort to address any confusion during the court's questioning of her, the GAL stated that she reviewed the petition with respondent and was satisfied that respondent understood the proceedings. The GAL also explained that respondent was nervous when the court questioned her. In response to the court's questioning, respondent stated that she understood what was happening at the termination proceeding. Because respondent had sufficient ability to consult with her lawyer with a reasonable degree of rational understanding and, according to her GAL, had a rational and factual understanding of the proceedings against her, the plea was made knowingly and voluntarily. *People v Belanger*, 73 Mich App 438, 447; 252 NW2d 472 (1977).

Finally, respondent correctly argues that, under MCR 3.971(C)(2), the trial court was required to state why a no contest plea was appropriate. Although no such statement was made, the court's error was harmless because it had no effect on the court's ability to exercise jurisdiction over the children and was not decisive to the outcome. This Court does not reverse on the basis of harmless error. *In re Gazella, supra* at 675; see also MCR 2.613(A).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro