

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JAVAREA KEONTAY DIVERS,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

NATUNIA LEE DIVERS,

Respondent-Appellant.

UNPUBLISHED

October 22, 2009

No. 290925

Kent Circuit Court

Family Division

LC No. 08-050693-NA

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody). Because respondent does not challenge the trial court's substantive decision to terminate her parental rights, and has not established the claimed procedural errors on appeal, we affirm.

Respondent effectively consented to termination of her parental rights, having executed a document indicating "that she is unable to provide a safe, stable nonneglectful home environment for her minor child, Javarea Divers, and will be unable to do so within a reasonable amount of time," that termination of her parental rights was in the child's best interests, and that she "does not contest termination of her parental rights to Javarea Divers." Respondent thus does not challenge the trial court's decision to terminate her parental rights per se, but she alleges that various procedural errors warrant reversal.

Respondent first contends that the trial court erred in failing to conduct a permanency planning hearing (PPH). Respondent did not raise this issue below and thus it has not been preserved for appeal. *Keenan v Dawson*, 275 Mich App 671, 681; 739 NW2d 681 (2007). Therefore, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19; 745 NW2d 754 (2008).

If a child is placed in foster care, the court must conduct regular hearings to review "the progress made to comply with any order of disposition and with the case service plan" and to evaluate "the continued need and appropriateness for the child to be in foster care." MCR

3.975(A); MCL 712A.19(3), (6), (8). Within 12 months following the child's removal from the home, the court must hold a PPH to review the progress being made toward reunification and to review the permanency plan for the child. MCR 3.976(A), (B)(2); MCL 712A.19a(1), (3). If the court determines that the child should not be returned to his parent, it may order petitioner to initiate termination proceedings. MCL 712A.19a(6).

The trial court began the PPH in November 2008 and adjourned the hearing to January 2009 when the court learned that respondent was absent from the hearing because she was incarcerated. For reasons unclear from the record, the PPH was never completed. Instead, the court entered an order authorizing the filing of a supplemental petition for termination and setting a termination hearing for February 2009. However, this omission did not prejudice respondent. It was clear from the October 2008 updated service plan and review hearing that respondent had not made substantial progress toward reunification, that the child remained at risk of harm if returned to respondent, and that permanent wardship was recommended. The record shows that respondent's situation thereafter only deteriorated. She was arrested on additional criminal charges and sentenced to prison on a prior conviction without making any additional progress toward reunification. Thus, it is unlikely that the court would have concluded that the child should be returned to respondent or that termination was not an appropriate permanency plan for Javarea had it completed the PPH and therefore, respondent was not prejudiced by the court's omission to complete the PPH, particularly where, as here, she did not contest termination of her parental rights.

Respondent next contends that the trial court erred in accepting her plea to the supplemental petition as amended because her plea was not voluntarily made. Respondent did not raise this issue below and thus it has not been preserved for appeal. *Keenan, supra* at 681. Therefore, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust, supra* at 285.

The court rules governing child protective proceedings permit a respondent to enter a plea to an original or amended petition, but not to a supplemental petition. MCR 3.971(A); MCR 3.977. Although not specifically authorized under the court rules, a plea to a supplemental petition is not unknown. Such a plea may include an agreement for termination, as was the case here, or merely an agreement that a statutory basis for termination exists plus a request for a best interests hearing. A plea must be knowingly, understandingly, and voluntarily made. MCR 3.971(C). In the criminal context, a plea is voluntary if the terms of any plea agreement are disclosed and the plea is the defendant's own choice, i.e., it is not tendered under threat or duress. MCR 6.302(C). Whether a plea is voluntary is a question of fact. *People v Taylor*, 383 Mich 338, 359; 175 NW2d 715 (1970).

The trial court advised respondent that by agreeing to the amendment to the petition she would give up her right to a hearing on the supplemental petition, to have petitioner prove its case by clear and convincing evidence, to cross-examine witnesses, to subpoena witnesses, and to testify on her own behalf. If the plea were accepted, she would not have any rights concerning the child. When asked if her plea was the product of any promises or threats, respondent initially stated that she had been threatened and explained that "he" (apparently a reference to her attorney) had told her "if I took it to trial I would lose everything." The court indicated that it could not accept a plea "from someone who says they've been threatened" and questioned respondent further. Respondent then conceded that she had not been threatened and wanted to

proceed with the termination. Because respondent admitted that she had not been threatened, her plea was not involuntary and thus the court did not plainly err in accepting the plea.

Respondent also contends that the court erred by failing to advise her of each of the rights required by MCR 3.971(B). As noted, this rule applies to pleas to jurisdiction, not to termination, and thus strict compliance with the rule was impossible. It would have been improper to advise respondent that petitioner had to prove its case by a preponderance of the evidence or that the plea could later be used as evidence in a termination proceeding. MCR 3.971(B)(3)(b), (4). Here, the court did the best it could to tailor the court rule to the amended petition and advised respondent accordingly. There was no error.

Respondent finally contends that the court erred in accepting her plea without first ascertaining that she was competent to tender a plea and not under the influence of drugs or alcohol. Respondent did not raise this issue below and thus it has not been preserved for appeal. *Keenan, supra* at 681. Therefore, “review is limited to determining whether a plain error occurred that affected substantial rights.” *In re Egbert R Smith Trust, supra* at 285.

In the criminal context, a defendant must be competent in order to plead guilty. *People v Whyte*, 165 Mich App 409, 411; 418 NW2d 484 (1988). A defendant “is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense.” *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). Where the defendant does not raise the issue, “the trial court ha[s] no duty to *sua sponte* order a competency hearing,” *People v Inman*, 54 Mich App 5, 12; 220 NW2d 165 (1974), unless facts are brought to the trial court’s “attention which raise a ‘bona fide doubt’ as to the defendant’s competence.” *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

The child came into care in part because respondent had a serious substance abuse problem. However, there was nothing in the record to indicate that respondent was under the influence of drugs at the time she entered her plea. She responded appropriately to the court’s questions, never indicated that she was unable to understand the proceedings, and no one made reference to any behaviors that would indicate respondent was under the influence of drugs. Further, given that respondent had been incarcerated for the past two months, there was no reason to suspect that she even had access to drugs. Accordingly, respondent has not shown plain error.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio