

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

January 25, 2011

In the Matter of KYRTSOS, Minors.

No. 294937

Oakland Circuit Court

Family Division

LC No. 2008-747768-NA

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In this child-protective services proceeding, respondent father appeals as of right from the trial court's order terminating its jurisdiction to the minor children. We affirm.

I

On June 12, 2008, the Department of Human Services (DHS) and the Oakland County Prosecuting Attorney jointly filed a petition seeking to terminate the parental rights of both parents, pursuant to MCL 712A.19b(3)(b)(ii), (g), and (j), based on allegations that respondent physically and mentally abused his daughter, perpetrated domestic violence on his other children, and the mother failed to protect the children. On August 7, 2008, the day scheduled for a jury trial, the petition was dismissed without prejudice and another petition was filed the same day, which was later amended. A bench trial on the issue of jurisdiction commenced on November 24, 2008, and continued on January 12, January 22, and March 30, 2009. On May 1, 2009, the day the bench trial was scheduled to continue, respondent entered into a plea of responsibility to a portion of the allegations in the amended petition in exchange for a withdrawal of the request to terminate his parental rights, no plea being required of his wife, and the petitioner not seeking a change of placement for the children. The trial court accepted the plea and assumed jurisdiction over the children.¹

Respondent participated in services recommended by DHS and attended dispositional review hearings on June 15, June 22, and August 24, 2009. At the August 24, 2009, dispositional review hearing, the children's guardian ad litem recommended that the matter be dismissed, and respondent's counsel concurred. The trial court expressed its satisfaction that the

¹ The trial court dismissed the petition as to the mother in a May 8, 2009, order.

parents had engaged in therapy as requested by the Court and indicated that it was terminating jurisdiction over the children, at which time respondent thanked the court. Jurisdiction was terminated by way of an August 25, 2009, order.

On September 16, 2009, respondent filed a motion for reconsideration of termination of jurisdiction, requesting that the court reinstate jurisdiction so he could move to withdraw his plea. On October 16, 2009, the trial court issued an opinion and order denying respondent's motion for reconsideration of termination of jurisdiction, and it is from that order that this appeal follows.

II

“We review a trial court's decision on a motion for reconsideration for an abuse of discretion.” *Woods v SLB Property Management, LLC*, 227 Mich App 622, 629; 750 NW2d 228 (2008). To succeed on a motion for reconsideration, “[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.” MCR 2.119(F)(3). Also, MCR 3.992, provides in part, “[a] motion [for rehearing] will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case.” MCR 3.992(A). In this case, respondent has not demonstrated palpable error that would have led to a different disposition.

Respondent argues that his plea was not made knowingly, voluntarily, and understandingly as required by MCR 3.971(C)(1), because his trial counsel, who was unprepared for trial, pressured him to enter a plea of admission. The trial court's record does not support respondent's contention. Respondent signed a written consent form in which he indicated that he understood his plea may be used against him in the future. This written statement also indicated that no one threatened respondent in order to get him to plead and it was his choice to offer the plea. In addition to this written statement, respondent testified under oath and verbally reiterated his written statements. Respondent also stated that he had no questions about his rights at trial. After extensive questioning to ensure that respondent understood the consequences and implications of entering a plea of admission, the trial court properly found that respondent's plea was knowingly and voluntarily made.

Respondent also argues that he did not understand the consequences of his plea. He contends that he did not know his name would be placed on the Children's Protective Services (CPS) central registry, which could affect his job prospects. MCR 3.971(B)(4) does not require that respondent be advised that his name might be included on the central registry or that a prospective employer may be wary of hiring him if his name were to appear on the central registry. Moreover, respondent's lack of knowledge about his placement on the central registry would not undermine a finding that he voluntarily and knowingly entered a plea.

Respondent further argues that his attorney provided him with ineffective assistance of counsel because he was unprepared for trial. In reviewing a claim of ineffective assistance of counsel this Court must determine (1) whether counsel's performance was objectively unreasonable and (2) whether the respondent was prejudiced by counsel's defective performance. *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. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). A claim of ineffective assistance of counsel also 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).

In this case, there is no evidence that respondent's counsel was unreasonable or that respondent was prejudiced by his allegedly defective performance. There is no reason to believe that the proceeding would have had a different result had respondent not entered a plea of admission. Moreover, the evidence does not show that respondent's counsel pressured him into entering a plea. Respondent stated to the trial court that it was his own choice to offer the plea. Additionally, respondent elected to hire a new attorney before the May 1, 2009, court date even though he was aware that any new attorney he hired would not have the benefit of having attended earlier proceedings. In a letter dated April 28, 2009, respondent's new attorney advised him that his present counsel would be in a better position to advance his case because she was familiar with his case and had all of the necessary materials, unlike the new attorney. There is no evidence that this attorney pressured respondent into entering a plea. The evidence only showed that he encouraged respondent not to change attorneys in the middle of trial.

Even if the trial court were to reinstate jurisdiction and allow respondent to withdraw his plea, there is no reason to believe the trial court would have dismissed the case against him or that he would have had a clean CPS record. Before respondent's plea was entered, the trial court had already begun to hear testimony indicating that respondent abused his children and there was domestic violence in the home. Although respondent did not have the opportunity to contest the evidence already admitted and the trial court did not make findings following a trial, there was enough evidence to show that the case against respondent would not have been dismissed had his plea been withdrawn.

Moreover, in its opinion denying respondent's motion for reconsideration terminating jurisdiction, the trial court found that respondent could have filed a motion to withdraw his plea before the trial court terminated jurisdiction on August 25, 2009. Respondent argues that the timing of his motion was appropriate because he sought to withdraw his plea within four months of the plea and within a month after the case ended, as soon as he learned through new counsel of the possibility of setting aside the "unjust plea." Respondent argues that, by way of analogy, his motion would have been timely under MCR 6.310(C), which allows a criminal defendant six months after sentencing to file a motion to withdraw his or her plea. Respondent minimizes the effect of the timing of his motion. Respondent's request to withdraw his plea, after jurisdiction was terminated, would effectively undermine all of the trial court's proceedings in this case. Respondent entered the plea, allowing the trial court to assume jurisdiction, in order to avoid continuation of the bench trial. If jurisdiction were reasserted as respondent requests, the children would again be vulnerable to removal, and respondent would be at risk of termination of his parental rights. This is not a practical resolution for the case given that respondent already received the benefit of a bargain with the prosecutor, completed counseling, and the family has been reunified. Moreover, there is no guarantee that respondent's CPS record would have been expunged from the central registry if he had had a trial. Respondent cannot show that a different disposition of the motion would result, as required by MCR 2.119(F)(3).

Finally, respondent argues that he was not afforded the relief offered to someone in a criminal case because a criminal defendant is allowed a forum in which to set aside his plea. This contention is also without merit. While child protective cases need not conform to all the requirements of a criminal proceeding, this Court applies the essential requirements of due process and fair treatment developed in criminal cases for plea withdrawals. *In re Zelzack*, 180 Mich App 117, 125; 446 NW2d 588 (1989). In the criminal context, there is no right to withdraw a plea once it is accepted. The defendant must establish a fair and just reason for withdrawing the plea. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). In this case, respondent has not established a just reason to withdraw his plea. Therefore, the trial court properly accepted his plea.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering