S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

In re R J D MYERS, Minor.

UNPUBLISHED
December 13, 2016

No. 332817
Oakland Circuit Court
Family Division
LC No. 2015-837227-NA

Before: JANSEN, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(*ii*), (b)(*iii*), (g), and (j). We affirm.

Respondent agreed to plead no contest to a statutory basis for jurisdiction and to the existence of statutory grounds for termination of her parental rights. The case thereafter proceeded to a contested hearing to determine whether termination of respondent's parental rights was in the child's best interests. Following the hearing, the trial court found that termination of respondent's parental rights was in the child's best interests, and accordingly, it terminated respondent's parental rights to the child.

On appeal, respondent first argues that her procedural due-process rights were violated during the plea proceeding. She therefore asserts that the plea must be set aside and the adjudication and termination orders vacated. We disagree.

Respondent failed to raise any due-process claim in the trial court. Consequently, this claim is unpreserved and our review is limited to plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. Reversal is warranted only if the plain error seriously affects the fairness or integrity of the judicial proceeding. *Id*.

Initially, petitioner argues that this Court should reject respondent's due-process challenges because they constitute an impermissible collateral attack on the trial court's exercise of jurisdiction. We disagree. Generally, "an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re SLH*, 277 Mich App 662, 668; 747 NW2d

547 (2008). "That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order." *Id*. This Court has clarified that when termination occurs at the initial disposition based on a request for termination in the original or amended petition, then the respondent's attack on her adjudication is direct, rather than collateral, if the appeal is from an initial order of disposition containing a finding that an adjudication was held and that the child came within the court's jurisdiction. *Id*. at 668-669. In addition,

> because an initial order of disposition is the first order appealable as of right, an appeal of the adjudication following the issuance of an initial dispositional order is not a collateral attack on the initial adjudication, but a direct appeal, notwithstanding that a termination of parental rights may have occurred at the initial dispositional hearing. [*Id*. at 669 n 13.]

Accordingly, because the initial petition requested termination and respondent appeals the initial dispositional order terminating her parental rights, respondent's attack is direct, rather than collateral.

Although the collateral-attack rule does not bar respondent's challenge, we conclude that respondent is not entitled to the requested relief because she has failed to demonstrate a plain error affecting her substantial rights. Respondent argues that she was denied procedural due process because the trial court did not comply with the requirements of MCR 3.971 when accepting the plea. MCR 3.971 governs pleas of admission or no contest and provides that "[a] respondent may make a plea of admission or of no contest to the original allegations in the petition." MCR 3.971(A). However, before accepting a plea of admission or a plea of no contest and taking jurisdiction based on a parent's plea, a trial court must advise the respondent of the following, either on the record or in a writing that is made a part of the file:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
>
> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
>
> (c) have witnesses against the respondent appear and testify under oath at the trial,
>
> (d) cross-examine witnesses, and
>
> (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent. [MCR 3.971(B).]

In addition, the court "shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made." MCR 3.971(C)(1). Further, the court shall not accept a plea "without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true." MCR 3.971(C)(2). And as a final requirement, "[t]he court shall state why a plea of no contest is appropriate." MCR 3.971(C)(2). In this case, respondent argues that the trial court (1) failed to advise her of the consequences of her plea, and (2) failed to state why a plea of no contest was appropriate. After reviewing the proceedings, we disagree.

On January 19, 2016, at the time scheduled for adjudication, the prosecutor advised the court that respondent intended to plead no contest to a statutory basis for jurisdiction and to the existence of statutory grounds for termination. In response, respondent's counsel represented that respondent had "signed an advice of rights form and a plea," and that counsel had "gone over the consequences of that plea with her." Thereafter, respondent was sworn and the court initially ascertained that respondent had read the petition and understood what it said. The court also advised respondent that she had a right to have an attorney, and that one would be appointed if she could not afford one. Thereafter, the following colloquy between the court and respondent transpired:

> *The Court*: Do you also understand that you have a right to have a trial of the matter, either by the Court or by a jury?
>
> *Ms. Good*: Yes, your Honor.
>
> *The Court*: And do you understand that at the trial the petitioner has the burden of proof, and with respect to jurisdiction, has to establish the allegations by at least a preponderance of the evidence, and in order to terminate parental rights they would have to establish the allegations by clear and convincing evidence; do you understand that?
>
> *Ms. Good*: Yes, your Honor.
>
> *The Court*: Do you also understand that at the trial your attorney would have the chance to cross-examine any witnesses who appear against you?
>
> *Ms. Good*: Yes, your Honor.
>
> *The Court*: And if you have witnesses on your behalf we would order them to appear and to give testimony?
>
> *Ms. Good*: Yes.
>
> *The Court*: And do you understand that by entering into a plea of this matter you will not have a trial of any kind?

Ms. Good: Yes, your Honor.

The Court: Is it your voluntary decision to enter into this plea?

Ms. Good: Yes.

The Court: And do you understand that once the Court accepts your plea we would take jurisdiction over your child and we would make placement decisions, so [the child] could be placed in foster care, relative care, institutional care, any of those kinds of things could be occurring once we have jurisdiction; do you understand that also?

Ms. Good: Yes.

Then, because this was a no-contest plea, rather than take testimony, the court accepted the 94 pages of discovery, which included DHS Form 154 and the accompanying police report, for support of the court's finding that one or more of the statutory grounds alleged in the petition were true. Thereafter, the court stated, "Thank you, ma'am, I will accept your plea, finding that it is knowingly and voluntarily made[.]"

In addition to the foregoing, the lower court file contains a copy of respondent's plea to the petition that respondent's counsel referred to in the opening moments of the hearing. In this document, respondent's initials precede the following statements: "I understand that my plea today may lead to the loss of my legal rights to the child(ren). This loss of parental rights would be **PERMANENT**. This means that I would have no right to make decisions about my child(ren) or to see them."

Although the trial court's plea colloquy was not a verbatim recitation of MCR 3.971, considering the totality of the lower court record, we conclude that respondent was adequately informed of the consequences of her no-contest plea, including that the plea could lead to the loss of her parental rights to her child. Additionally, the trial court ascertained that respondent understood her rights before it accepted the no-contest plea. Then, after being advised of her rights, respondent freely offered her no-contest plea and understood that she was relinquishing her right to a trial. Respondent's claim that she was not aware of the consequences of her plea is unsupported by the record.

With respect to the requirements of MCR 3.971(C)(2), while the trial court did not use any "magic words," the circumstances confirm that the court effectively stated why the plea of no contest was appropriate. The court (1) acknowledged that respondent was agreeing to a no-contest plea, (2) accepted several documents to support the factual basis for the no-contest plea, and then, (3) accepted respondent's plea after determining that it was knowingly and voluntarily made. Because this issue is unpreserved, respondent is required to establish a plain error affecting her substantial rights, and reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Carines*, 460 Mich at 763. Respondent has failed to meet her burden of establishing a plain error that affected her substantial rights and seriously affected the fairness and integrity of the proceedings.

Respondent next argues that she was denied the effective assistance of counsel. We disagree.

A respondent in a termination of parental rights proceeding has the right to the effective assistance of counsel. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). "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). Because respondent did not raise this issue in a motion for a new trial or an evidentiary hearing, she failed to preserve the issue, and our review is limited to mistakes apparent on the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). The issue of ineffective assistance of counsel is a mixed question of fact and law. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). We review any findings of fact for clear error, and we review de novo questions of law. *Id*.

Respondent cites several instances in support of her claim that she was denied the effective assistance of counsel. "Effective assistance of counsel is presumed, and [respondent] bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). To establish ineffective assistance, respondent must demonstrate that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, [respondent] must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id* at 52.

First, respondent argues that counsel was ineffective for waiving a probable cause determination to authorize the petition. A trial court may authorize the filing of a petition if there is probable cause to believe that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). MCR 3.965(B)(12). Respondent argues that counsel was ineffective for waiving a probable cause determination because the facts were insufficient to establish neglect based on a failure to protect. However, the record establishes that months before Child Protective Services (CPS) began its investigation of respondent, the minor child went to respondent and reported sexual abuse at the hands of the child's grandfather. Although respondent confronted the child's grandfather, she did not go to the authorities to report the abuse. Indeed, she did not even prohibit the grandfather from having contact with the child. Respondent's father and boyfriend confessed to sexually abusing the child while she was in respondent's care. Thus, contrary to respondent's assertions, the record supports a finding that there was probable cause that one or more of the allegations in the petition were true and fell within MCL 712A.2(b). Consequently, even if counsel had performed in the manner suggested by respondent, there is no reasonable probability that the trial court would not have found probable cause and not authorized the petition. Accordingly, this claim must fail.

Next, respondent asserts that trial counsel was ineffective when he advised her to plead no contest to the allegations in the petition. Respondent contends that "[a] plea agreement is a dismissal or reduction in charges in exchange for a guilty or no contest plea," and complains that she received nothing favorable in exchange for her plea. However, 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. See *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). Based on the existing record, there is no indication that respondent did not understand the nature of her no-contest plea. On the contrary, the record indicates that the plea was knowingly and voluntarily made. Consequently, respondent has failed to establish that she was denied the effective assistance of counsel in this regard.

Respondent next argues that the attorney who represented her at the plea hearing was ineffective for agreeing to use "94 pages of documents, consisting of the police reports and DHHS investigative summary" to establish the factual basis for her no-contest plea. Respondent contends that these documents were full of inaccuracies and hearsay, but respondent does not specify which portions were inaccurate or improper. It is impossible for this Court to engage in a meaningful analysis of respondent's claim when she fails to identify with any specificity the alleged inaccuracies or hearsay. "A party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for [her] claims, or unravel and elaborate for [her her] argument, and then search for authority either to sustain or reject [her] position." *In re TK*, 306 Mich App 698, 712; 859 NW2d 208 (2014) (quotation marks and citation omitted; alterations in original). Respondent also argues that she was denied the effective assistance of counsel because the attorney who represented her at the plea hearing sent a different attorney to represent her at the best-interest hearing. However, respondent has not articulated any manner in which she was prejudiced by having two different attorneys. Because respondent has not properly presented these claims of ineffective assistance of counsel, she has not established entitlement to relief.

Finally, respondent contends that counsel's failure to call the minor child as a witness constituted ineffective assistance of counsel. Respondent contends that the child's testimony was vital to show the bond that existed between herself and the child, and to show that the child wished to return to her mother's care. However, "[d]ecisions regarding whether to call or question witnesses are presumed to be matters of trial strategy." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). " '[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the [respondent] of a substantial defense.' " *Id*. (citation omitted; first alteration in original). A substantial defense is one that might have made a difference in the outcome of the proceeding. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The existence of a bond and the child's desire to return to respondent's care were uncontested. In addition to respondent, the court psychologist testified that a strong bond existed between respondent and her daughter. Even the trial court concluded that there existed a bond. Further, both the foster-care case manager and the psychologist testified that the child wanted to return home. Respondent has not overcome the presumption that counsel's decision not to call the child as a witness was a matter of trial strategy and has not shown that the failure to do so deprived her of a substantial defense. Accordingly, respondent has failed to demonstrate that she was denied the effective assistance of counsel.

Lastly, respondent challenges the trial court's finding that termination of her parental rights was in the child's best interests. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). Whether termination of parental rights

is in the child's best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We review for clear error a trial court's finding that termination of parental rights is in the child's best interests. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

The court may consider several factors when deciding if termination of parental rights is in the child's best interests, including "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones*, 286 Mich App at 131.

The trial court did not err in concluding that termination of respondent's parental rights was in the child's best interests. It is undisputed that a strong bond existed between respondent and the child and that because of the child's special needs, adoption will be a difficult endeavor. However, while the foregoing factors are compelling, they truly pale in comparison to the one most important factor—respondent is simply not capable of protecting the child. The child, who has cognitive and social deficits, is dependent on the adults in her life for support, stability, and protection. There was testimony that the child is particularly vulnerable. Parenting a child with special needs requires, as the psychologist explained, hyper-vigilance. Respondent lacks the ability to exercise this type of hyper-vigilance. Instead, she demonstrated a pattern of bringing individuals into her home that created a risk of harm to her child. Moreover, respondent minimized her role in the harm that has befallen her child. She never took any responsibility for the sexual abuse that others perpetrated on her child. There was evidence that respondent continued to permit her boyfriend and father to have contact with the child even after respondent learned of the abuse. Respondent's ability to gain insight is impaired, and will likely remain impaired, because respondent distrusts therapists, represses past experiences, lacks financial independence, and possesses a poor self-concept. Respondent's lack of insight has interfered with, and will continue to interfere with, her ability to engage in appropriate relationships and protect the child. Accordingly, the trial court did not clearly err when it found that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra