STATE OF MICHIGAN

COURT OF APPEALS

In re A. A. BETKE, Minor.

UNPUBLISHED
June 20, 2017

No. 336188
Kalamazoo Circuit Court
Family Division
LC No. 2015-000116-NA

Before: GADOLA, P.J., TALBOT, C.J., and GLEICHER, J.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to his minor child under MCL 712A.19b(3)(c)(*i*) (the conditions that led to the adjudication continue to exist), (c)(*ii*) (other conditions exist that cause the child to come within the court's jurisdiction), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if the child is returned to the home of the parent). We affirm.

This case arose in March 2015, when the trial court issued an order removing the child from her mother's home due to allegations of substance abuse.[1] Respondent agreed that he was unavailable to care for the child at the time of her removal due to his heroin addiction and lack of housing. Respondent was incarcerated on multiple occasions throughout the proceedings. At the time of the termination hearing, respondent was incarcerated due to absconding from his parole. The trial court issued the order terminating respondent's parental rights in November 2016.

On appeal, respondent argues that the trial court violated his due process rights by failing to appoint an attorney for him during the initial preliminary hearings. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *In re England*, 314 Mich App 245, 263; 887 NW2d 10 (2016). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citations omitted). An error affects substantial rights if it alters the outcome of the proceeding. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

[1] The child's mother voluntarily relinquished her parental rights over the minor child.

MCR 3.915(B)(1)(a) states the following:

> At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
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> (*i*) the respondent has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney, and,
>
> (*ii*) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.

Likewise, MCL 712A.17c(4) states that a trial court "shall advise the respondent at the respondent's first court appearance" of the right to an attorney at each stage of the proceedings. Trial courts should advise parents of their right to counsel at the beginning of the preliminary hearing and should not continue a preliminary hearing after an unrepresented party has requested counsel. *In re Jones*, 137 Mich App 152, 156-158; 357 NW2d 840 (1984).

When the Department of Health and Human Services (DHHS) filed the initial petition in this case, the child was residing with her mother. Based on the allegations in the petition, the trial court ordered the removal of the child on March 6, 2015. However, at the time of the preliminary hearing on March 7, 2015, the DHHS was unable to locate the child and the trial court adjourned the hearing. The preliminary hearing resumed on March 9, 2015, but the child's location was still unknown. Respondent attended this hearing, but was not represented by an attorney. The trial court did not advise respondent of his right to counsel, but it took testimony from a caseworker regarding the child's location. At the close of the hearing, the trial court ordered the child to the care and custody of the DHHS. The trial court held a third preliminary hearing on March 10, 2015, but noted that respondent had not been appointed counsel and adjourned the hearing. A fourth preliminary hearing was held on March 18, 2015. At this hearing, respondent was represented by an attorney and waived the showing of probable cause. The trial court subsequently authorized the petition and took jurisdiction over the child.

Because both MCR 3.915(B)(1)(a) and MCL 712A.17c(4) require the trial court to notify a respondent of his or her right to an attorney at the respondent's "first court appearance," we requested the transcript of the March 7, 2015 preliminary hearing. However, respondent failed to timely provide that transcript. Given the failure to provide the requested transcript, we could deem this issue waived on this ground alone. See *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006) (refusing to consider an issue for failure to provide a transcript of the relevant hearing).

Assuming, however, that respondent did not attend the March 7 hearing, the trial court's failure to advise respondent of his right to counsel at the March 9 hearing violated MCR 3.915(B)(1)(a) and MCL 712A.17c(4). Both MCR 3.915(B)(1)(a) and MCL 712A.17c(4) state that the trial court "shall advise the respondent" of his or her right to an attorney, indicating that the trial court was required to do so. See *In re Harper*, 302 Mich App 349, 355-356; 839 NW2d 44 (2013) (recognizing that use of the word "shall" generally indicates a mandatory and

imperative directive). Therefore, if respondent first appeared in court at the March 9 hearing, the trial court's failure to advise him at that time of his right to counsel constituted plain error.

To the extent the trial court may have erred, however, this error did not affect respondent's substantial rights. After the trial court appointed counsel for respondent, respondent appeared with his counsel at the March 18, 2015 preliminary hearing and waived the probable cause determination. Given this waiver, respondent cannot show that the outcome of the proceeding would have been different if he was represented by counsel at the prior hearings.

Respondent next argues that the DHHS failed to provide reasonable efforts to reunite him with his child. We disagree. The DHHS claims that this issue is unpreserved on appeal. However, at a review hearing on June 1, 2016, respondent's counsel argued that respondent's casework had been "inconsistent" and that his caseworkers had failed to "get information" from respondent to "see what his prospects [were] to future placement with his child." Therefore, the issue of whether the DHHS provided reasonable reunification efforts is preserved. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). A challenge to the reasonableness of the reunification efforts made by the DHHS ultimately relates to the sufficiency of the evidence underlying the trial court's decision that a ground for termination in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Fried*, 266 Mich App 535, 541-543; 702 NW2d 192 (2005). We review the trial court's decision for clear error. *Id.* at 541. "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re LaFrance*, 306 Mich App 713, 723; 858 NW2d 143 (2014).

"Generally, when a child is removed from the parents' custody, the [DHHS] is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App 444, 462; 781 NW2d 105 (2009); see also MCL 712A.19a(2) (stating that "[r]easonable efforts to reunify the child and family must be made in all cases" unless specific circumstances, which are not present in this case, apply). "The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "While the [DHHS] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App at 248.

On appeal, respondent argues that the DHHS failed to provide reasonable reunification efforts from approximately November 2015 through June 2016, during most of which he was incarcerated. Respondent asserts that the DHHS did not make any effort to locate him or facilitate communication between him and the child during this time. Respondent supports this argument by stating that, at the February 9, 2016 review hearing, his caseworker believed that he was in prison when he was actually in boot camp. Respondent is correct. However, the record shows that respondent had been placed in boot camp just 6 days before the February 9th review hearing, and apparently had not informed the DHHS of this move. Moreover, the DHHS was aware that respondent was previously in prison despite respondent's failure to inform the DHHS of this development. Therefore, it appears that the DHHS did make attempts to locate respondent during this time. With regard to respondent's communication with the child, once respondent informed the DHHS of his location at boot camp, the DHHS sent respondent a letter with instructions for how he could mail letters to the child. At the termination hearing,

respondent testified that he sent the child approximately 10 letters using these instructions. Therefore, respondent's assertion that the DHHS did not facilitate communication between him and the child is inaccurate.

Respondent correctly asserts on appeal that the DHHS did not update his service plan during the time that he was incarcerated; following a service plan from September 28, 2015, the DHHS did not issue another service plan for respondent until May 27, 2016. See MCL 712A.18f(5) ("If a child continues in placement outside of the child's home, the case service plan shall be updated and revised at 90-day intervals . . . ."). However, given the DHHS's subsequent efforts to assist respondent, this error was harmless. See MCR 2.613(A) ("[A]n error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.").

Once respondent was released from boot camp and on parole, the DHHS actively engaged respondent in services. Respondent was on a tether for the first 120 days of his parole. During this time, respondent attended drug screens through the parole office and was in daily contact with his caseworker. Respondent lived in a parole house and was informed that he needed to find his own housing for the time following the removal of his tether. When respondent's caseworker learned of this need, she put respondent in contact with the DHHS's Housing Resources. Respondent's caseworker also assisted respondent in budgeting to determine which apartments he could afford. The caseworker then personally drove respondent to different apartments, gathered applications, and assisted respondent in filling out those applications. Respondent's caseworker instructed respondent to collect the fees for the applications and turn them in, and she offered respondent bus tokens to assist him with transportation.

Despite his caseworker's efforts, respondent never turned in his housing applications. As a result, when respondent's tether was removed, he became homeless. Respondent testified at the termination hearing that the stress of not having a place to live eventually led him to lose his job. Once respondent lost his job, he went back to using drugs and absconded from parole. Within two weeks of having his tether removed, respondent completely stopped contacting his caseworker and eventually was placed back in jail. Respondent indicated that, upon his release from jail, he would be on a tether and back in the parole house, which was unfit for the child due to the other felons who resided there. Respondent's inability to benefit from the DHHS's services was due to his own apparent lack of motivation to submit his housing applications and his ongoing misconduct, for which respondent must take some responsibility. See *In re Frey*, 297 Mich App at 248. Considering the reunification efforts made by the DHHS following respondent's release from jail and his lack of participation and continued misconduct, the trial

court did not clearly err by concluding that sufficient evidence established the statutory grounds for termination in this case. See *In re Fried*, 266 Mich App at 541-543.

Affirmed.

/s/ Michael F. Gadola
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher