STATE OF MICHIGAN

COURT OF APPEALS

In re BACKUS, Minors.

UNPUBLISHED
February 20, 2018

No. 339638
Shiawassee Circuit Court
Family Division
LC No. 16-013842-NA

Before: CAVANAGH, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right an order terminating his parental rights to his children AB,[1] JB, BB, and KB, pursuant to MCL 712A.19b(3)(j), (k)(*ii*), and (n)(*i*). We affirm.

Respondent was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b. The victim was one of his minor children. Respondent was sentenced to 50 to 70 years in prison. After sentencing, the Department of Health and Human Services (DHHS) sought termination of respondent's parental rights. Following a hearing, the trial court found clear and convincing evidence to support termination of respondent's parental rights to each child under MCL 712A.19b(3)(j),(k)(*ii*), and (n)(*i*). The trial court also concluded that termination of respondent's parental rights was in the children's best interests. This appeal followed.

Respondent first argues that he was not afforded the effective assistance of counsel. We disagree.

"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). Claims of ineffective assistance of counsel are preserved by making a motion for a new trial or a *Ginther*[2] hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Respondent did not move for a new trial or a *Ginther* hearing in the trial court; therefore, this

[1] AB was no longer a minor at the time of the termination trial, but was a minor when the petition was filed.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

issue is unpreserved. We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *Id.* (citation omitted). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012) (citation omitted).

Parents have a right to counsel in parental rights termination cases. *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009). "The right to counsel includes the right to competent counsel." *Simon*, 171 Mich App at 447. To establish ineffective assistance of counsel, a respondent must show that counsel's performance was below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Lockett*, 295 Mich App at 187. Effective assistance of counsel is strongly presumed. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (citation omitted).

Respondent argues that his trial counsel was ineffective because he failed to call more witnesses or present additional evidence to prove respondent's bond with the children, and because he did not seek independent psychological evaluations for two of the children. He alleges that these actions would have made it reasonably probable that the court would not have terminated his parental rights. However, the decisions to call only respondent and his mother to testify, as well as to not show photos, videos, or Facebook postings, all fall under the purview of trial strategy. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Thus, respondent fails to show that his trial counsel's performance fell below an objective standard of reasonableness. See *Lockett*, 295 Mich App at 187.

Further, the court's decision was not based on a lack of bonding with the children; rather, the court found that respondent's sexual abuse had created a toxic environment for all the children. Cumulative evidence of respondent's alleged bond with his children was unnecessary in light of his sexual abuse convictions. Similarly, it is unlikely that psychological evaluations of two of the children could outweigh the evidence of respondent's sexual abuse of their sibling. Furthermore, the record does not indicate whether counsel investigated such a course of action and found that it would be futile to do so. See *Lockett*, 295 Mich App at 186. Respondent has "the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Moreover, respondent is unable to show there is a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. See *Lockett*, 295 Mich App at 187. Once a statutory ground for termination has been established by clear and convincing evidence, the court need only find that a preponderance of the evidence shows that termination is in a child's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). Here, the trial court was presented with respondent's judgment of sentence, which showed that he had been convicted of five counts of first-degree criminal sexual conduct against one of his children. Additionally, a crisis counselor expert testified that there was a greater likelihood of respondent sexually abusing his other children, and she said that it was in the children's best interests to sever any further relationship with their father. The court also heard

testimony from the Child Protective Services worker who explained that respondent could not provide the children with a "safe, loving, stable environment" because of his incarceration. Accordingly, a preponderance of evidence supported the determination that termination was in the children's best interests and there is no reasonable likelihood that respondent's suggested course of action would have changed the result of the proceedings. Therefore, respondent cannot demonstrate that he was prejudiced by any purported errors of his counsel. See *Lockett*, 295 Mich App at 187.

Finally, respondent argues that his trial counsel erred by not fully contesting the sexual abuse allegations made against him. However, none of the information that respondent believes should have been raised is part of the record; therefore, these issues are waived. *Id.* at 186. Furthermore, respondent had already been found guilty beyond a reasonable doubt of five counts of criminal sexual conduct. Respondent provides no legal authority to support his claim that his counsel should have, in effect, relitigated or appealed these convictions in this termination proceeding. Trial counsel cannot be held ineffective for failing to assert a meritless argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Respondent also argues that the trial court clearly erred in terminating his parental rights. This contention is based mainly on respondent's assertion that the trial court erred in admitting certain evidence from an expert witness at trial. We disagree.

We review a decision to terminate parental rights for clear error. *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007). A decision is clearly erroneous if, although there is evidence to support it, we are left with the definite and firm conviction that a mistake was made after examining all the evidence. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Archer*, 277 Mich App at 77. A court abuses its discretion when it "chooses an outcome that falls outside the range of principled outcomes." *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014) (citation omitted).

"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). In determining a child's best interests the court should consider "the child's bond to the parent, the parent's parenting ability, the child's need for permanence, stability, and finality," and other relevant factors. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014) (citation omitted).

Respondent argues that the trial court erred by allowing expert testimony regarding the best interests of two of the children. Marvel Beebe-Mulholland, a trauma counselor qualified as a "crisis counselor expert" by the court, testified that studies indicated that if a child has a sibling who is sexually abused, there is a greater likelihood that that child will also be sexually abused. In cases of child sexual abuse, an expert's "opinion whether abuse in fact occurred is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony." *In re Brimer*, 191 Mich App 401, 407; 478 NW2d 689 (1991). However, here, the expert did not testify whether any abuse occurred. Instead, the trial court rephrased the question so that she could answer it hypothetically based on her experience as an expert in

counseling children who have suffered from sexual abuse. Allowing this type of questioning was not an abuse of discretion. See *Archer*, 277 Mich App at 77.

Similarly, respondent argues that because the expert did not have a therapeutic relationship with those children, she could not form an opinion about their best interests. During the termination trial, Beebe-Mulholland gave a brief explanation of her opinion on whether it was in the children's best interests to have respondent's parental rights terminated. She explained that based on her training and experience it was her opinion that it would not be good "for any child" to have respondent as a parent and that the sexual abuse would likely have a negative impact on those children. Respondent does not cite any legal authority to support the notion that this testimony was irrelevant or inadmissible at the termination trial. Furthermore, the court did not rely on the expert's opinion when making the best interests determination. Instead, the court found that it was in the children's best interests to terminate respondent's parental rights as a way to gain permanence and move beyond the stigma and toxicity brought to the home by respondent's actions. The trial court did not clearly err when it found that termination of respondent's parental rights was in the best interests of the children. See *In re JK*, 468 Mich at 209.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering