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STATE OF MICHIGAN

COURT OF APPEALS

In re D. R. WHITE, Minor.

UNPUBLISHED
December 12, 2019

Nos. 349140; 349141
Wayne Circuit Court
Family Division
LC No. 18-000945-NA

Before: FORT HOOD, P.J., and SERVITTO and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondent-mother and respondent-father appeal by right the trial court's order terminating their parental rights to their infant son. We vacate the adjudication and termination orders and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondents are the parents of DRW. When DRW was eight weeks old, he was taken to the hospital, where it was discovered that he had suffered numerous broken bones and injuries at various stages of healing, and was also diagnosed with "failure to thrive." Respondents initially informed the hospital staff that, two weeks earlier, when the child was six weeks old, he had "rolled off the bed," but they denied "any other recent trauma." During a later conversation with the hospital staff, however, respondent-mother indicated that the child had fallen off the couch while she was changing his diaper. DRW was removed from respondents' care and placed in non-relative foster care.

The Department of Health and Human Services (petitioner) filed a petition based on DRW's injuries and diagnosis, seeking termination of respondents' parental rights at the initial dispositional hearing. Respondents both agreed to enter a plea of admission to the trial court's exercise of jurisdiction over DRW. Before accepting respondents' pleas, the court advised them

[1] See *In re D.R. White, Minor*, unpublished order of the Michigan Court of Appeals, entered June 3, 2019 (Docket Nos. 349140, 349141).

of the rights they were waiving by entering a plea; however, the trial court did not advise respondents that their admissions could be used against them in the dispositional phase of the proceedings.[2] After the trial court finished advising respondents, it asked all of the attorneys present if they were "satisfied" with the advice of rights. The attorneys for both respondents responded that they were satisfied. The parties subsequently entered a stipulation concerning the factual basis for respondents' pleas. The court found that respondents' pleas had been made knowingly, voluntarily, and understandingly, and that the pleas sufficed for the trial court to exercise jurisdiction over the child.

After two dispositional hearings, the trial court issued an opinion and order terminating respondents' parental rights. These appeals followed.

II. STANDARD OF REVIEW

Generally, "[w]hether child protective proceedings complied with a parent's right to due process presents a question of constitutional law, which we . . . review de novo[.]" *In re Ferranti*, 501 Mich 1, 14; 934 NW2d 610 (2019). However, we review unpreserved claims arising out of child protective proceedings for plain error. See *In re Ferranti*, 504 Mich at 29 and n 13; *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

"The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). The determination of whether a respondent has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

III. ANALYSIS

We conclude that, in light of our Supreme Court's recent decision in *Ferranti*, both respondents were denied due process of law during the adjudicative proceeding and that the adjudication and termination orders must therefore be vacated.

Respondent-father argues that his jurisdictional plea is invalid because he received constitutionally deficient advice of rights concerning his jurisdictional plea, and that the plea consequently was not made knowingly, intelligently, and voluntarily, and was therefore invalid. We agree.

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[2] The trial court did advise respondents that if their rights were not terminated at the initial dispositional hearing and they were given a service plan that they failed to complete, petitioner could file a new petition, at which point their admissions could be used against them "as part of that future trial."

At the outset, we note that when the trial court asked counsel whether they were "[s]atisfied with the advice of rights" that the court had provided, respondent-father's trial counsel replied, "Satisfied Your Honor[.]" We have held in certain circumstances that an attorney's express approval of a trial court's conduct waives appellate review of that conduct. See *People v Carter*, 462 Mich 206, 209, 214-215; 612 NW2d 144 (2000) (holding that counsel's express approval of the trial court's action constitutes a waiver, which "extinguishes any error and precludes defendant from raising the issue on appeal"); *Hoffenblum v Hoffenblum*, 308 Mich App 102, 117; 863 NW2d 352 (2014) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted); *The Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009) ("A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error.").

However, under the circumstances of this case, and given *Ferranti* and the fundamental nature of the rights denied, we decline to invoke doctrine of waiver to foreclose respondent-father's argument, particularly because respondent-father has specifically argued that his counsel was ineffective in relation to the plea. Consequently, we decline to hold that respondent-father has waived appellate review of this issue.

With regard to respondent-mother, we note that she does not raise this specific issue on appeal. Nonetheless, in the interests of justice, judicial efficiency, avoiding inconsistent results, and safeguarding the fundamental rights at issue, we elect to grant her the same relief we grant to respondent-father. See MCR 7.216(A)(7) (providing that this Court "may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just" "enter any judgment or order or grant further or different relief as the case may require"); see also *Mack v Detroit*, 467 Mich 186, 206-209; 649 NW2d 47 (2002); *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

We therefore proceed to consider whether deficiencies in the advice of rights given to respondents in connection with the jurisdictional plea deprived them of the due process of law. We conclude, in the circumstances of this case and in light of our Supreme Court's holding in *Ferranti*, that they did.

Respondents' jurisdictional pleas had the effect of waiving, among other things, their rights to a jury trial, to cross-examine the witnesses against them, and to force petitioner to prove grounds for adjudication at a trial; additionally, admissions made during the plea process may be used in later dispositional proceedings as evidence to support termination. See MCR 3.971(B)(3) (enumerating the rights that a respondent must be advised that he or she will waive by entering a jurisdictional plea); *In re Ferranti*, 501 Mich at 21. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970). Hence, for a plea to constitute a valid waiver of constitutional rights, the person entering it must be made "fully aware of the direct consequences of the plea." *People v Cole*, 491 Mich 325, 333; 817 NW2d 497 (2012) (quotation marks and citation omitted).

In the context of jurisdictional pleas in child protective proceedings, "[o]ur court rules reflect this due-process guarantee." *Ferranti*, 504Mich at 21. Specifically:

> MCR 3.971(C)(1) demands that the trial court ensure that a respondent's plea be knowingly, understandingly, and voluntarily made before the court can accept it. And MCR 3.971(B) requires the trial court to advise the respondent, "on the record or in a writing that is made a part of the file," of the allegations in the petition, the right to an attorney, the rights the respondent will be waiving by entering a plea, the consequences of that plea (including the possibility that the plea will "be used as evidence in a proceeding to terminate parental rights," MCR 3.971(B)(4)), and to provide advice about the respondent's posttermination support obligations. [*Id.*]

In this case, the trial court orally advised respondents regarding *most* of what is required by MCR 3.971, but it failed to advise them, as is required by MCR 3.971(B)(4), that their pleas could "later be used as evidence in a proceeding to terminate parental rights[.]" Nor does a written advice of rights containing such information appear in the record. By failing to properly advise respondents as required by MCR 3.971(B)(4), the trial court plainly erred, and such error yielded a jurisdictional plea that was "invalid." See *Ferranti*, 504 Mich at 30 ("Due process and our court rules require a trial court to advise respondents-parents of the rights that they will waive by their plea and the consequences that may flow from it. The court erred by failing to advise these respondents of the consequences of their pleas and the rights they were giving up; those errors were plain.").

Like the respondents in *Ferranti*, respondents in this case were not advised that their admissions could be used against them in the dispositional phase of the current proceedings.[3] In *Ferranti*, our Supreme Court rejected the argument that any such error was harmless because the petitioner could have established sufficient grounds for adjudication had the matter proceeded to trial:

> [T]he Department believes that the errors did not affect the respondents' substantial rights because it would have been able to prove the allegations had the case proceeded to an adjudication trial. This misses the point; *the constitutional deficiencies here are not forgiven by what might have transpired at trial*. The respondents' pleas were not knowingly, understandingly, and voluntarily made.
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> The respondents were deprived of their fundamental right to direct the care, custody, and control over JF based on those invalid pleas. And the invalid pleas relieved the Department of its burden to prove that the respondents were unfit at a jury trial, with all of its due-process protections. These constitutional deprivations affected the very framework within which respondents' case

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[3] Indeed, as noted, the trial court used language that could be understood as meaning that the admissions could *only* be used in a later proceeding, on a new petition, if respondents were given but failed to comply with a service plan.

> proceeded. There was error, it was plain, and it affected the respondents' substantial rights.
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> Finally, we conclude that the error here seriously affected the fairness, integrity, or public reputation of judicial proceedings. The trial court did not advise the respondents that they were waiving any of the important rights identified in MCR 3.971(B)(3). And it failed to advise the respondents of the consequences of entering their pleas. MCR 3.971(B)(4). This failure resulted in the respondents' constitutionally defective pleas and undermined the foundation of the rest of the proceedings. The defective pleas allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child. Due process requires more: either a plea hearing that comports with due process and the court rule or, if respondents choose, a trial. [*In re Ferranti*, 504 Mich at 30-32 (citations omitted; emphasis added).]

For the same reasons, we cannot find the error to be harmless in this case. Whether the error was that of the trial court, of respondents' counsel, or a combination, it was plain error that "gave the trial court the dispositional authority to terminate the respondents' parental rights." *Id.* at 36. It affected respondents' fundamental rights, as well as the fairness, integrity, or public reputation of judicial proceedings.[4] We therefore vacate the termination and adjudication orders for both respondents, and remand these matters to the trial court for further proceedings consistent with this opinion.

Vacated and remanded. We do not retain jurisdiction.[5]

/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto
/s/ Mark T. Boonstra

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[4] This remains true notwithstanding the fact that the trial court in this case did advise respondents of *some* of the rights about which the trial court in *Ferranti* had failed to advise.

[5] Because we conclude that errors at the adjudication phase require reversal, we decline to address respondents' arguments concerning the dispositional phase. However, having reviewed the lower court record, we note that the social file is unbound and contained in a folder within the legal file, and that the social file—which contains sensitive information concerning the minor child—is not properly marked as confidential. See MCR 3.925(D). Accordingly, on remand, the trial court shall duly segregate the "confidential file," as that phrase is defined by MCR 3.903(A)(3), from the public file. See MCR 7.216(A)(7).