STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 1, 2011

In the Matter of T. R. COLLINS, Minor.

No. 300227
Oakland Circuit Court
Family Division
LC No. 10-767430-NA

Before: Wilder, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right from an order that terminated her parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury), (b)(*ii*) (failure to protect), (g) (failure to provide proper care or custody), (j) (child would likely be harmed if returned to the parent), (k)(*iii*) (battering, torture, or severe physical abuse), (k)(*iv*) (loss or serious impairment of an organ or limb), and (k)(*v*) (life-threatening injury). The parental rights of the child's father were also terminated, but he is not participating in this appeal. We affirm.

I. FACTS

Petitioner filed an initial petition to terminate respondent's parental rights, which indicated that the minor child, who was then approximately 13½ months old, had been brought to the hospital "with ten percent of her body covered in third degree partial thickness burns" "from her knees to her feet and on her buttocks and perineum." The child also had "first degree burns to her chest and abdomen." Respondent reported that she was giving the child a bath and had the hot and cold water faucets running. Respondent left the room for 30 seconds. When she returned, the child appeared fine, but when respondent touched the water, she noticed it was hot. Respondent took the child out of the tub and saw skin coming off of her. Respondent reported that she brought the child to the emergency room immediately. The petition alleges that respondent's report of what happened did not match the child's injuries, and respondent gave several different accounts of how the child received her injuries to petitioners, police, and medical professionals. The doctors who examined the child indicated that her injuries were "consistent with submersion burns and that none of the explanations provided by mother are consistent with the injuries." The child would have to undergo extensive medical treatment, including skin grafts, pressure bandages, and ongoing therapy. Respondent pleaded no contest to the allegations in the petition. The factual basis for the plea was 1,500 pages of medical records.

At the best interests hearing, the relevant testimony was as follows. Margaret Stack, an associate professor of clinical psychology at the University of Detroit Mercy and a consultant to the Oakland County Court Psychological Clinic, performed a psychological evaluation on respondent on April 28, 2010, in order to make a recommendation to the court regarding the best interests of the child. Stack testified that respondent demonstrated a limited intellectual ability, had problems with impulsivity and emotional immaturity, and that there was at least a reasonable question about whether she could adequately protect her daughter. Stack admitted that she did not conduct a full evaluation on respondent, but noted that respondent had difficulty taking in enough information to make logical and rational decisions. Stack further noted that respondent relied heavily on her grandmother for support and direction.

Although respondent did not have a criminal history or a problem with substance abuse, Stack questioned whether she could be a positive role model. Respondent had remorse regarding the incident, care and concern for the child, and an understanding of developmental expectations. Respondent also appeared to grasp the severity of the child's injuries, or at least was making an effort to understand how the injuries happened. Nevertheless, Stack believed that "it is probably in [the child's] best interest for the rights to be terminated" based on the severity of the child's injuries and respondent's "problem areas." Stack was concerned that respondent told more than one version of what occurred when the child was burned. However, Stack did not believe that the child's injuries were intentional. Stack was concerned whether respondent would be able to provide the child with the care she would need in recovering from her injuries.

CPS special investigator Andrea Foren testified that she reported to the hospital on December 30, 2009, and observed that respondent was very unemotional and had a flat affect at first. Respondent was smiling and laughing during the interview, but became tearful when it occurred to her that a criminal investigation would take place. Respondent began to cry and asked if she would be going to jail.

According to Foren, the first explanation respondent gave was that the child had gone to the bathroom in her diaper and needed a bath. Respondent gave her a bath, and the child was enjoying it so much that she cried when it was time to get out of the tub. Respondent decided to go ahead and run the bathwater again to allow the child to play longer, so she let some of the water out and turned on both the hot and cold water knobs. Respondent walked a few steps to the closet outside of the bathroom. When respondent came back into the bathroom, she reached for a toy in the water and realized how hot it was and removed the child. Respondent then changed her story and said she left the bathroom to go to the kitchen and retrieve soap. She heard a splash and later figured that the child must have turned off the cold water and then sat back down. When respondent walked back into the bathroom, she noticed that the child did not appear to be enjoying the bath, although the child was not crying or distressed. Respondent noticed that the water was steaming and removed the child from the tub. Respondent finally told a third story, explaining that she answered the phone and was talking to her sister when the child went to the bathroom in her diaper. This occurred at approximately 9:00 p.m. Respondent ran the water and sat the child in it without first checking the temperature. Respondent talked to her sister for approximately 17 minutes before removing the child from the tub and realizing that the water was hot. Respondent immediately noticed skin falling off, applied ointment to the area, and called her grandmother for advice as to what to do.

Foren testified that she did not believe respondent understood that the child's injuries were life-long injuries and deformities. In contrast to Stark, Foren never observed respondent with a remorseful attitude. Foren did not believe that respondent was able to care for the child independently. In recommending that the trial court terminate respondent's rights, Foren testified,

> I don't feel that she is able to put [the minor child's] needs first. She continues to provide explanations, even in her psychological evaluation that are not consistent with any of the explanations that she's provided to me, and to the police. [The child] just will not get the care that she needs to be safe and healthy for the rest of her life.

Foren, however, did not believe that respondent intentionally harmed the child.

The child's foster care mother, Sandra Williams, testified that she had been caring for the child since January 21, 2010. The child's skin grafts had healed, but she initially needed medication for pain and to fight infection. She needed to be bathed in a certain way and needed at least two or three daily massages. The child also attended physical therapy. The child's skin was not smooth, had a wrinkly, lumpy appearance, and the toes of her feet curled up instead of under. The child was required to wear a compression garment to keep down the swelling and control the pain. The child also needed to visit the burn center once a month or more. The child used to wake frequently during the night, and Williams would massage her legs. The child was now waking on average twice a night. It was critical to apply ointment to the burn areas at least twice a day to keep the skin from becoming itchy. The child was going to need therapy and grafts throughout her growing years.

Williams took the child to the agency to allow respondent to visit every week. Respondent and the child appeared to be bonded, and respondent would bring lunch or treats. On one occasion, respondent brought a man that seemed to scare the child, who wrapped her arms around Williams's legs.

Dr. Michael Klein testified that he was a pediatric surgeon in the burn center at Children's Hospital. Dr. Lelli was the initial physician to treat the child, but Dr. Klein was on call starting January 4, 2010. The child had full thickness, third-degree burns to her lower legs and feet. The child also had second-degree burns to her buttocks, perineum, and lower back. Third-degree burns required skin grafts. There was less pain with a third-degree burn because all of the nerve endings were destroyed. Second-degree burns were very painful. Dr. Lelli "incised" the legs to prevent swelling. After that, surgery was required to remove the dead skin. Swelling was too severe to do an immediate skin graft, so cadaver skin was used. Once the legs were stabilized, skin from the child's thigh was used to graft to the lower legs. Dr. Klein believed the child had four surgeries in all. Dr. Klein testified that with continued physical therapy, the child would not need more surgery. Skin grafted skin would grow with the child if given proper care, and therefore, it was important for anyone caring for the child to be consistent.

Dr. Klein did not believe that the injuries were accidental. The burn marks were consistent with the child being held in hot water for six or seven seconds, as opposed to accidentally placing the child in hot water, because the child would splash about trying to get

out. In this instance, the child's burns were uniform, or a "stocking distribution" from her foot up to her knees. Dr. Klein would have expected to see burns on the child's hands from attempting to push herself out of the water. That the child would sit in hot water without screaming was unlikely, so Dr. Klein did not believe respondent's version of events. Dr. Klein admitted that he did not know who immersed the child or whether the immersion, though intentionally done, was done by someone who knew the water was hot.

Respondent testified that she was 19 years old. She had her high school diploma and had been working at McDonald's since April 2010. On the night the child was injured, respondent's cousin Jolisa (12 or 13 years old) was at respondent's home. At approximately 8:00 p.m., respondent took Jolisa home and left the child with her friend, Marcus Buggs. Respondent and Buggs had known one another for approximately three years, and he had watched the child on a previous occasion. While respondent was out, Buggs called respondent on her cell phone and told her that the child had a bowel movement, and he was looking for baby wipes. Respondent had the wipes with her in the car, so she told Buggs to use a rag. Buggs called again to say that he put the child in the tub because she had "boo boo all up her back and she cut the water off, and she got burnt." Although Buggs was "hysterical," respondent did not think the child had been burned badly.

When respondent walked into the house, she saw the child lying across Buggs's lap wearing only a diaper. Buggs explained that he put the child in the tub, but the child turned off the water. Once Buggs realized how hot it was, he snatched her out of the tub. He immediately noticed that her skin was soft, so he applied some ointment and put her diaper on. Respondent called her grandmother, who advised her to take the child to the hospital. Respondent put sweat pants and socks on the child, and, although there was no blistering, she noticed that some skin pulled off near the child's buttocks and the skin was very red. The skin began to blister in the car on the way to the hospital.

Respondent admitted that she gave several explanations for what had happened, but the truth was that she was not at home when the child was injured. Respondent explained that she lied on advice she received from Buggs's mother, who told her to "say that I was there, because if I was not there, then they were going to take my baby, because I left her there [with] somebody." When respondent talked to an attorney and explained that she had lied, the attorney told her "not to switch my story."[1] Respondent finally told the police the truth about what happened on July 13, 2010, and also submitted to a polygraph examination that day.

Respondent testified that she visited weekly with the child. Respondent also completed a 12-week parenting class, and she believed she was able to provide for the child's special medical needs because she had done so at the hospital. Respondent and Buggs were still friends, and respondent believed that Buggs cared about the child, and thus, she even took him on a visit. Buggs also attended all of the court proceedings. Nevertheless, respondent was not sure whether Buggs submerged the child on purpose.

[1] This was not the same attorney who represented her at the hearing.

II. ARGUMENTS

A. PLEA

On appeal, respondent first argues that she should be allowed to withdraw her plea because she did not understand the consequences of pleading no contest and the plea was not knowingly, voluntarily, or understandingly entered into. We disagree.

Because respondent did not move to withdraw her plea in the trial court, the issue is not preserved, *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989), and we therefore review this issue for plain error affecting respondent's substantial rights, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The adequacy of the advice of rights required for acceptance of a plea of admission in a proceeding to terminate parental rights is reviewed on appeal under the same standard of review used to determine the adequacy of advice of right in proceedings involving a criminal guilty plea. *In re Waite*, 188 Mich App 189, 192; 468 NW2d 912 (1991). The question is whether the decision to enter into the plea was knowing and voluntary pursuant to MCR 3.971.

The transcripts of the plea hearing undermine respondent's claim that she was not fully advised of the consequences of her plea:

> *THE COURT*: [Your attorney] said that you're going to plead not responsible [sic] to the allegations contained in the petition. And if I accept your plea, that means that we'll—*the Court will find that there are grounds to terminate your rights, and we have a best interest hearing for me to decide whether to do that or not; you understand that*?
>
> *[RESPONDENT]*: Yes.
>
> *THE COURT*: Now, you don't have to do any of this, you can have a trial here today; the prosecutor has to prove this case by clear and convincing evidence; you don't have to prove anything. You have a right to cross examine witnesses, ask questions, bring in your own witnesses if you want something. If they won't come voluntarily, have me order the police bring [sic] them in. You also have a right to testify, if you want to. *All those rights go with the trial, but if you plead no contest today, then there won't be a trial*; you understand that?
>
> *[RESPONDENT]*: Yes.
>
> *THE COURT*: And I will decide, if there are grounds to terminate rights to the child, then we'll have a best interest hearing where I will decide whether that's best for the child to terminate your rights; you understand that? *Are you still willing to plead no contest*?

[RESPONDENT]: Yes.

THE COURT: Are you satisfied she understands her rights and she's doing this feely and voluntarily?

MR. KIRSCHNER [respondent's attorney]: Yes. [Emphasis added.]

Not only did the trial court fully apprise respondent of her rights as required by MCR 3.971, but respondent received and initialed each of these rights in the advice of rights form.

Respondent additionally argues that she lacked the capacity to make a plea. She points to her psychological evaluation in which Stack noted that respondent demonstrated "limited intellectual ability." However, respondent was a high school graduate, and she testified intelligently during the best interests hearing. Thus, there is simply no support for the claim that she lacked the legal capacity to enter the plea.

B. FINDINGS OF FACT

Respondent next argues that the trial court erred because it made no findings of fact when accepting the plea and terminating her rights, but rather, simply accepted 1,500 pages of medical records. Additionally, respondent asserts that her due process rights were violated when the trial court terminated her parental rights pursuant to MCL 712A.19b(3)(b)(*ii*), (k)(*iii*), and (k)(*v*) when those subsections were never addressed on the advice of rights form or pleaded in the original petition. We disagree.

First, respondent provides no case law or authority to support her position that the trial court erred when it accepted only the child's medical records as a factual basis for respondent's no contest plea. A party may not simply state its position and leave it to the Court to search for support of that position. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005). Additionally, respondent may not assign as error on appeal something that she deemed proper in the lower court because allowing her to do so would allow respondent to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Respondent's attorney specifically advised the court "that's fine" when the court indicated that it was using the medical records as the factual basis for accepting the plea.

At any rate, respondent does not dispute anything in the medical records[2]; instead, she argues that the records did not affirmatively demonstrate that she intentionally injured the child.

[2] Although the medical records were not included with the lower court file, petitioner included some of the relevant records from Children's Hospital of Michigan, in Detroit, with its brief on appeal. An emergency treatment note from December 30, 2009, at approximately 12:30 a.m., indicated that petitioner told hospital staff that she left the child alone in the bathtub, at which time the child turned off the cold water, causing the bath water to become hot. An emergency room consultation report, also from December 30, 2009, indicated that respondent stated that the injury to the minor child occurred on December 29, 2009, between 9:00 and 10:00 p.m. The records submitted also included four forms indicating respondent's "consent for surgery,

However, the petition alleged only that the child was injured and that respondent provided numerous explanations for how the injuries occurred. Moreover, because respondent pleaded no contest to the allegations in the petition, the trial court was not required to make additional factual findings on the record. Findings of fact under MCR 3.977(I)(1) were not necessary because there were no "contested matters."

Respondent is correct that the petition did not specifically enumerate MCL 712A.19b(3)(b)(*ii*) (failure to protect), (k)(*iii*) (battering, torture, or severe physical abuse), and (k)(*v*) (life threatening injury), as a basis for termination; however, petitioner only had to establish one ground for termination of respondent's parental rights. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Respondent pleaded no contest to the allegations in the petition, which included MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury), (g) (failure to provide proper care or custody), (j) (child would likely be harmed if returned to the parent), and (k)(*iv*) (loss or serious impairment of an organ or limb). Clearly then, respondent's plea and the medical evidence provided clear and convincing evidence to support termination of her rights under those subsections.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that counsel was ineffective in advising her to plead no contest without fully explaining what the consequence of the plea would be. Respondent asserts that counsel should have moved to have respondent's plea withdrawn or, at the very least, have informed DHS of the fact that respondent had been exonerated in the separate criminal proceedings. We disagree.

The right to counsel guaranteed by the United States Constitution, US Const, Am VI, applies to child protective proceedings, and the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in termination of parental rights proceedings. *In re KMP*, 244 Mich App 111, 121; 624 NW2d 472 (2000). Generally, to establish ineffective assistance of counsel, a respondent must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed. *Id.* Where a party claims that counsel was ineffective during a plea process, the focus is on whether the plea was knowingly and voluntarily entered into. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001), modified on other grounds 468 Mich 233 (2003). The question is not whether counsel was right or wrong in rendering advice, but whether the advice was within the range of competent advice. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

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anesthesia, invasive and/or diagnostic procedures" to be performed on the minor child. A social work assessment indicated that respondent's varying accounts of what transpired were not consistent with the child's injuries and indicated "environmental neglect and possible intentional scalding." Finally, the discharge summary listed the minor child's diagnoses as (1) full-thickness burns to bilateral lower extremities, and (2) child abuse.

Because there was no evidentiary hearing in the lower court, there is simply no record of what respondent was advised before making her plea. Regardless, it was not until after the first day of the best interests hearing that respondent changed her story and claimed that she was not at home when the child was injured. Counsel likely recognized that a motion to withdraw the plea at that point would be futile, and counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Moreover, the trial court specifically stated that its decision to terminate respondent's rights would not be affected by which version of events was accurate:

> believing either the original story where she was there or the story now before us that she was not there, I don't think she understands the significance of the injuries to the child nor what she needs to do in the future to protect this child. Even if she was not there and there was this other man who injured [the] child, she isn't sure it was accidental or intentionally, and she needs to associate with this individual, takes him to the visits.

Thus, respondent has failed to demonstrate that counsel was deficient or that any alleged deficiency was outcome determinative.

D. BEST INTERESTS

Finally, respondent argues that the trial court erred in finding that termination of her parental rights was in the child's best interests. We disagree. To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *Trejo*, 462 Mich at 355. If a statutory ground for termination is established, and the trial court finds "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). On appeal from termination of parental rights proceedings, this Court reviews the trial court's findings under the clearly erroneous standard. MCR 3.977(K); *Trejo*, 462 Mich at 356-357.

At issue during the best interest phase was not whether respondent or Buggs was responsible for the child's burns, but rather, whether respondent could keep the child safe. Not only did respondent lie to medical providers and law enforcement about what happened, but she continued to lie to the court, the case worker, and the psychologist throughout the case. Respondent only told the "truth" about what happened some nine months into the case. Respondent brought Buggs, the alleged perpetrator, to the court hearings and even brought him to a visit with the child. This behavior was in keeping with the psychologist's finding that respondent was focused on her own needs and had poor judgment. It is true that there were many factors in respondent's favor, including the fact that she had housing and employment, she did not suffer from mental illness or drug addiction, and she visited consistently with the child. The severity of the child's injuries, however, and the fact that respondent was deceptive about how those injuries were obtained are cause for concern. Additionally, both the foster care mother and Dr. Klein testified about the need for the child to receive consistent and conscientious care, including numerous massages a day, monthly visits to the burn clinic, and physical therapy. Respondent did not demonstrate the maturity necessary to provide the child

with a safe home, nor did she demonstrate an ability to care for the child's special needs. Given respondent's parental deficits and the severity of the child's injuries, the trial court did not err in finding that termination of her parental rights was in the child's best interests.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood