NO. COA06-1404

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN RE: J.T.S.

Rockingham County
Nos. 05 JT 128
05 JA 128

Appeal by respondent from order entered 29 August 2006 by Judge Stanley L. Allen in Rockingham County District Court. Heard in the Court of Appeals 2 April 2007.

Jacqueline D. Stanley, for respondent-appellant.

No brief filed by petitioner-appellee.

CALABRIA, Judge.

B.J.S. ("respondent") appeals from an order terminating his parental rights to J.T.S. ("J.T.S."), a minor child, on the ground that he was denied effective assistance of counsel. Although the order also terminated the parental rights of respondent-mother B.M.T. ("B.M.T."), she is not a party to the instant appeal. We affirm.

The record shows that J.T.S. was born prematurely at Forsyth Medical Center in July of 2005. The child tested positive for cocaine and was diagnosed with a heart condition called supraventricular tachycardia. B.M.T. admitted using cocaine within two weeks of the child's birth and identified respondent, who was

incarcerated, as the child's putative father. Other than a single telephone call on 1 August 2005, B.M.T. ceased her involvement with the child after leaving the hospital on 19 July 2005. J.T.S. remained in neonatal intensive care until being transferred to Brenner's Children's Hospital on 27 July 2005. Attempts by Rockingham County Department of Social Services ("DSS") to locate B.M.T. were unavailing.

J.T.S. was placed in therapeutic foster care due to the lack of an available parent and the special care required for her heart condition. DSS filed a petition for temporary custody on grounds of neglect and dependency in August of 2005. Respondent was released from prison in September of 2005. The District Court heard the petition on 29 November 2005, and entered an adjudication of neglect and dependency on 29 November 2005. The court found, *inter alia*, that respondent had no driver's license, lacked stable employment or suitable housing, and was in treatment for an "admitted cocaine habit." It further found that his incarceration for selling cocaine at the time of J.T.S.'s gestation and birth constituted neglect, and that his "failure to have a stable home for [himself] and the child, both at the time of her birth and at the time of th[e] hearing, consitute[d] dependence." Inasmuch as respondent had not sought services from DSS, the court found it reasonable for DSS to await the results of his paternity test before developing a case plan for him. The court noted that respondent did not return to the hearing after the midday recess.

Following a permanency planning hearing held 16 February 2006, the court ceased reunification efforts and changed J.T.S.'s permanent placement plan to adoption. In its order entered 5 April 2006, the court made the following findings related to respondent:

> 3. Since the previous hearing, paternity of the juvenile has been established through genetic testing. [Respondent] was found to be the child's father by more than a 99% probability. A letter was sent to [respondent] informing him of this and asking that he contact RCDSS but he has not done so. His last contact with RCDSS was at the Adjudication court date. Although he received notice of today's hearing, he is not present.
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> 5. The juvenile has been in a placement outside the home for six months, since August 2005, and the parents have not entered a services agreement or made any effort to correct the conditions that led to the child's removal. The parents have not even contacted RCDSS to request visitation with the child.

DSS filed a motion seeking termination of respondent's parental rights on 1 May 2006, on grounds that he had neglected J.T.S. and had willfully failed to pay a reasonable portion of the cost of her foster care for the six months preceding the motion's filing. N.C. Gen. Stat. § 7B-1111(a)(1), (3) (2005). At a hearing on the motion held 19 July 2006, DSS social worker Jan Williams ("Williams") testified that she wrote to respondent on 12 January 2006, asking him to contact her to begin reunification services and visitation with J.T.S. Williams also provided respondent with the name and telephone number of his child-support caseworker, Christy Bray, and instructed him to contact her. Respondent did not contact Williams until April of 2006. After a single visit with

J.T.S. in April, respondent did not attempt to contact Williams again until leaving a telephone message for her two weeks prior to the termination hearing. Williams attempted to contact respondent, leaving a message for him at his parents' home, but never heard back from him. Respondent never contacted his child-support caseworker. Williams also testified that J.T.S. remained in therapeutic foster care costing $1500 per month and that respondent had contributed nothing toward the child's care.

In his testimony, respondent acknowledged that he received Williams' letter in January of 2006, had not asked to visit J.T.S. until April, and had visited her only once. He testified that he stayed the majority of the time with his son in Winston-Salem, North Carolina. Although he also stayed occasionally with his parents in Belews Creek, North Carolina, respondent considered his residence to be the mobile home he owned "about 500 yards up the road" from his parents' house. His mobile home had running water but no electricity.

After he was released from prison in October of 2005, respondent worked for four weeks through a temporary agency in Winston-Salem, North Carolina. In the six months prior to the hearing, he had earned approximately $2000 hauling scrap with his brother. Although he did not need all of this money to support himself and "could have" paid child support, he "never did get around to it." Respondent was in good health and had applied for jobs in Pine Hall and Kernersville, North Carolina, but had not yet applied for work in Winston-Salem. He believed he could care for

J.T.S. in his mobile home but did not know when he would be able to obtain electricity for the residence.

In its order terminating respondent's parental rights, the District Court concluded that respondent had neglected J.T.S. and had willfully failed to pay a reasonable portion of the cost of her foster care in the six months preceding DSS's filing of its motion. N.C. Gen. Stat. § 7B-1111(a)(1), (3) (2005). The court further concluded that J.T.S. had been born out of wedlock and that respondent had failed to (1) establish paternity judicially or by affidavit filed with the Department of Health and Human Services; (2) legitimate the child; or (3) provide substantial financial support or consistent care to the child or her mother. N.C. Gen. Stat. § 7B-1111(a)(5) (2005). Having found grounds for termination under N.C. Gen. Stat. § 7B-1111(a) (2005), the court determined that J.T.S.'s best interests would be served by termination of respondent's parental rights.

In his lone assignment of error on appeal, respondent asserts that he "was denied due process of law in that he was denied his right to effective counsel." We note that this assignment of error does not identify any particular aspect of counsel's performance that was wanting and is unsupported by page references to the hearing transcript. *Cf. State v. Walters*, 357 N.C. 68, 95, 588 S.E.2d 344, 360 (citing N.C. R. App. P. 10(c)(1)) (2003). Notwithstanding the broadside nature of respondent's assignment of error, we will address the series of claims about counsel presented in his brief.

"A parent has a right to counsel in termination of parental rights proceedings." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) h[is] counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) h[is] attorney's performance was so deficient [h]e was denied a fair hearing." *Id.* Respondent must also overcome a "strong presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. al-Bayyinah*, 359 N.C. 741, 752, 616 S.E.2d 500, 509 (2005) (citing *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)).

Respondent asserts that counsel held only one thirty-minute meeting with him prior to the termination hearing, devoted only nine and one-half hours outside of court to his case, and generally did not "invest the time and effort needed" to represent him properly. He suggests that counsel's failure to interview him in detail prior to the termination hearing prevented counsel from raising unspecified objections to Williams' testimony thereby waiving respondent's "right to challenge any discrepancies in the testimony on appeal." Respondent characterizes counsel's cross-examination of Williams as "pedestrian" and suggests that his direct examination of respondent "clearly does not reflect nine hours of preparation." Respondent also notes counsel's failure to file responsive pleadings on his behalf.

The record reflects that counsel was appointed to represent respondent in the original neglect and dependency proceedings on 15 August 2005, representing respondent at each hearing in this cause and filing timely notice of appeal after entry of the termination order. Although the record does not reflect the number and length of respondent's meetings with counsel, respondent does not assert that he sought additional meetings with counsel or that he made himself available for such meetings. Indeed, respondent chose to absent himself from hearings in this cause which would have afforded him the opportunity to meet with counsel and discuss his case. While complaining of counsel's "pedestrian" performance at the termination hearing, respondent does not point to any evidence improperly admitted or excluded at the hearing due to counsel's handling of the witnesses. *In re L.C.*, __ N.C. App. __, __, 638 S.E.2d 638, 641 (2007). Likewise, respondent does not suggest any manner in which he was prejudiced by counsel's failure to file a written response to DSS's motion. Accordingly, we conclude respondent has not presented a "credible argument to establish how such counsel's alleged deficiency deprived h[im] of a fair hearing." *In re B.P.*, 169 N.C. App. 728, 733, 612 S.E.2d 328, 332 (2005); *see also State v. Harris*, 338 N.C. 129, 143, 449 S.E.2d 371, 376-77 (1994).

Respondent's remaining allegations find no support in the materials before this Court and do not suggest any deficiency by counsel affecting the fundamental fairness of the termination proceedings. While conceding that counsel advised him to pay child

support and to obtain employment, transportation, and substance abuse treatment, respondent claims counsel failed to explain the potential consequences of not paying child support. He further avers that there is "no evidence" his counsel arranged his child support payments with DSS. Similarly, respondent faults counsel for failing to explain "in terms that he could understand" the potential consequences of not visiting J.T.S., and for not arranging his visitation schedule with DSS. According to respondent, counsel also did not explain the importance of legitimating J.T.S. pursuant to N.C. Gen. Stat. § 49-10 (2005). Finally, respondent finds "no indication" that counsel assessed the extent of his substance abuse problem in order to determine if he was entitled to appointment of a guardian ad litem pursuant to N.C. Gen. Stat. § 7B-1101.1 (2005).

"There is a presumption of regularity in a trial. In order to overcome this presumption, it is necessary that matters which constitute material and reversible error appear in the record on appeal." *In re Howell*, 161 N.C. App. 650, 654, 589 S.E.2d 157, 159 (2003) (citing *State v. Sanders*, 280 N.C. 67, 72, 185 S.E.2d 137, 140 (1971)). The record before this Court does not reveal the nature or extent of counsel's advice to respondent regarding his responsibilities as a parent. However, the evidence does show that DSS social worker Williams contacted respondent directly on 12 January 2006, providing respondent with the information necessary to schedule visitations with J.T.S. and to begin paying child support if he were inclined to do so. It was not counsel's duty to

convince respondent to show an interest in his child before the motion for termination was filed. Inasmuch as counsel did not impede respondent's ability to visit or provide support for J.T.S., respondent's allegations do not touch upon the fundamental fairness of these proceedings.

To the extent respondent asserts that counsel should have advised him to legitimate J.T.S. pursuant to N.C. Gen. Stat. § 49-10 (2005), we note that lack of legitimation was not alleged as a ground for termination by DSS; nor was respondent's failure to legitimate J.T.S. the sole ground for termination found by the court. *Cf. In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) (providing that any single valid ground for termination is sufficient). Finally, while respondent suggests that counsel should have investigated the extent of his substance abuse with an eye to seeking appointment of a guardian ad litem under N.C. Gen. Stat. § 7B-1101.1 (2005), he does not assert that he qualified for appointment of a guardian. As amended effective 1 October 2005, the statute authorizes the appointment of a guardian ad litem for a parent only where "there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2005). Absent some indication that he was incompetent or suffering from diminished capacity, respondent cannot show deficient performance by counsel or prejudice arising therefrom.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).