IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-192

Filed: 18 October 2016

Rowan County, Nos. 14 JA 226-30

IN THE MATTER OF: M.R., J.R., P.R., H.R., E.R.

Appeal by respondent-mother from orders entered 5 August 2015 and 21 December 2015 by Judge Beth Dixon in Rowan County District Court. Heard in the Court of Appeals 19 September 2016.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Richard Croutharmel for respondent-appellant mother.

Parker Poe Adams & Bernstein LLP, by Kay Linn Miller Hobart, for guardian ad litem.

McCULLOUGH, Judge.

Respondent-mother appeals from orders adjudicating her children neglected and ordering that reunification efforts with the children cease. The fathers are not party to this appeal. We affirm the adjudicatory order but vacate the dispositional order and remand for a new dispositional hearing.

I. Background

At the start of this case, the minor children M.R. ("Mary"), J.R. ("Joe"), P.R. ("Patty"), H.R. ("Hillary"), and E.R. ("Eve") lived with respondent-mother and her

husband Mark S. in Rowan County.[1] The five juveniles were the biological children of three different fathers-Mark S. fathered Eve, Raymond P. fathered Hillary and Patty, and John R. fathered Joe and Mary. On 10 December 2014, the Rowan County Department of Social Services ("DSS") filed a juvenile petition alleging the children were neglected as a result of extensive drug use, domestic violence, mental health issues, and criminal activity associated with respondent-mother and the fathers. The petition alleged that the children had been the subject of over twenty-five child protective services calls dating back to 2007. Non-secure custody of the children was granted to DSS on the same day.

Following a 2 July 2015 hearing, the trial court entered an order on 5 August 2015 adjudicating the children neglected based on stipulations by the parties. The dispositional hearing was continued, and on 20 August 2015, the hearing was continued again to 10 September 2015. On 10 September, respondent-mother, who had been transferred from jail to be present for the hearing, informed the trial court that she wanted to discharge her court-appointed juvenile attorney and retain her criminal attorney to represent her in the juvenile matter. Respondent-mother reported that she believed she would be released from incarceration by late October. The trial court had respondent-mother sign a waiver of court-appointed counsel and then released her court-appointed juvenile attorney. The court continued the hearing

[1] Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

to 19 November 2015 to allow respondent-mother time to bond out of jail and hire her criminal attorney.

On 18 November 2015, the day before the scheduled dispositional hearing, DSS filed an addendum to the 2 July 2015 court report in which it requested for the first time that the trial court cease reunification efforts with the parents. At the 19 November 2015 dispositional hearing, respondent-mother came into court and immediately became agitated and disruptive and was escorted from the courtroom. The trial court found that respondent-mother had forfeited her right to be present for the hearing, citing the fact that "she fought several officers after they asked her to calm down, and she did not appear to have the ability to control herself." The court inquired of the attorneys for the other parties as to whether anyone had made an appearance in the matter on respondent-mother's behalf. No such person was identified, and the hearing proceeded without respondent-mother or counsel representing her. The trial court entered an order on 21 December 2015 ceasing reunification efforts with respondent-mother and the fathers and prohibiting contact between the children and parents until otherwise recommended by mental health professionals involved in the children's care. Respondent-mother appeals.

II. Discussion

It must first be noted that respondent-mother appealed from the adjudicatory and dispositional orders on 16 December 2015, five days before the trial court entered

its dispositional order. Respondent-mother therefore did not follow the proper procedure for appealing from a final order. *See* N.C. Gen. Stat. § 7B-1001(b) (2015) ("Notice of appeal . . . shall be made within 30 days after entry and service of the order[.]"). However, "[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion," and we exercise our discretion in this case to review the trial court's adjudicatory and dispositional orders. *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)).

Respondent-mother does not contest the validity of her waiver of court-appointed counsel or the trial court's determination that she had forfeited her right to be present for the dispositional hearing. Instead, respondent-mother's sole argument on appeal is that the trial court erred in conducting the dispositional hearing without any attorney present on her behalf. We agree.

Our General Statutes provide that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2015). Furthermore, "[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only

after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1).

While respondent-mother expressly waived her right to *appointed* counsel, the trial court never conducted the inquiry and fact finding required under section N.C. Gen. Stat. § 7B-602(a1) before determining that a parent knowingly and voluntarily waived her right to *any* counsel. Thus, respondent-mother could not be said to have waived her right to counsel in advance of the dispositional hearing.

The fact that respondent-mother did not waive her right to counsel does not end our inquiry, however. As in the case of criminal defendants, a parent who does not waive her right to counsel may nonetheless forfeit that right. *See In re S.L.L.*, 167 N.C. App. 362, 364, 605 S.E.2d 498, 499 (2004) ("Because criminal matters are the only other legal matters wherein the accused has a right to counsel, we look to our criminal case law for guidance.").

> Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the [parent's] knowledge thereof and irrespective of whether the [parent] intended to relinquish the right. A forfeiture results when the state's interest in maintaining an orderly trial schedule and the [parent's] negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of [the parent's] right to counsel[.]

State v. Montgomery, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (internal quotation marks, citations, and alteration omitted).

Recently, in *State v. Blakeney*, __ N.C. App. __, 782 S.E.2d 88 (2016), this Court acknowledged that "[t]here is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel." *Id.* at __, 782 S.E.2d at 94. The Court then reviewed published North Carolina cases in which a defendant was held to have forfeited the right to counsel in order to determine the type of conduct that could lead to a determination that the right to counsel had been forfeited:

> 1. *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000): the defendant fired several lawyers, was disruptive and used profanity in court, threw water on his attorney while in court, and was repeatedly found in criminal contempt.
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> 2. *State v. Quick*, 179 N.C. App. 647, 634 S.E.2d 915 (2006): the defendant in a probation revocation case waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact any attorney, instead waiting until the day before trial.
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> 3. *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009): over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior.
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> 4. *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009), *disc. review denied*, 691 S.E.2d 414 (2010): during a period of more than a year, the defendant refused to cooperate with two different attorneys, repeatedly told one attorney that the case "was not going to be tried,"

was "totally uncooperative" with counsel, demanded that each attorney withdraw from representation, and "obstructed and delayed" the trial proceedings.

5. *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011): for more than a year after defendant was arraigned, he refused to sign a waiver of counsel or state whether or not he wanted counsel, instead arguing that the court did not have jurisdiction and making an array of legally nonsensical assertions about the court's authority.

6. *State v. Cureton*, 223 N.C. App. 274, 734 S.E.2d 572 (2012): the defendant feigned mental illness, discharged three different attorneys, "consistently shouted at his attorneys, insulted and abused his attorneys, and at one point spat on his attorney and threatened to kill him."

7. *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014): the defendant appeared before four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was represented by an assistant public defender, refused to state his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and refused to participate in the trial.

8. *State v. Joiner*, ___ N.C. App. ___, 767 S.E.2d 557 (2014): the defendant gave "evasive and often bizarre" answers to the court's questions, shouted and cursed at the trial court, smeared feces on the holding cell wall, had to be gagged during trial, threatened courtroom personnel with bodily harm, and refused to answer simple questions.

9. *State v. Brown*, ___ N.C. App. ___, 768 S.E.2d 896 (2015): like the defendants in *Mee* and *Leyshon*, this defendant offered only repetitive legal gibberish in response to simple questions about representation, and

refused to recognize the court's jurisdiction.

Blakeney, __ N.C. App. at __, 782 S.E.2d at 94-95.

While the present facts present a close case, we believe the trial court erred in making an implicit determination that respondent-mother had forfeited her right to counsel at the dispositional hearing. On the one hand, respondent-mother's outburst at the outset of the hearing was regrettable and rightfully not tolerated by the trial court. Furthermore, the dispositional hearing was held more than two months after respondent-mother had waived her right to appointed counsel, giving her ample time to hire an attorney to represent her at the hearing. Finally, the State undoubtedly had a strong interest in maintaining an orderly trial schedule given that more than three months had elapsed since the trial court entered its adjudicatory order.

On the other hand, respondent-mother's interest in having her right to counsel preserved was at least as strong. DSS changed its recommendation for the disposition the day before the hearing to ask that the court cease reunification efforts, and respondent-mother likely did not learn of this changed recommendation until she arrived in court for the hearing on 19 November. The dispositional hearing was the first time this case had come before the court since respondent-mother had waived her right to appointed counsel, in contrast to some cases listed above in which the defendant fired numerous attorneys or caused multiple delays in the proceedings. Moreover, without the trial court having inquired of respondent-mother why she

appeared at the hearing without counsel, we cannot say that respondent-mother deserved blame for the lack of counsel appearing on her behalf. In any event, respondent-mother's actions cannot be said to have risen to the level of obstruction or threatening and disruptive behavior found in the cases summarized above. Given the need for "fundamentally fair procedures" when the State "moves to destroy weakened familial bonds," *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007), the trial court erred in determining that respondent-mother had forfeited her right to counsel at the dispositional hearing. We therefore vacate the court's dispositional order and remand for a new dispositional hearing. Respondent-mother has not challenged the adjudicatory order and that order is therefore affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and ENOCHS concur.

Report per Rule 30(e).