IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-394

Filed 2 January 2024

Henderson County, No. 21 JT 16-17

In the Matter of:

E.T.P. and H.E.P.

Appeal by respondents from order entered 23 January 2023 by Judge Kimberly G. Justice in Henderson County District Court. Heard in the Court of Appeals 4 October 2023.

W. Michael Spivey for the respondent-mother.

Mark L. Hayes for the respondent-father.

Susan Davis for the petitioner Henderson County Department of Social Services.

Blair M. Carpenter, Guardian ad Litem.

STADING, Judge.

Respondent-mother and respondent-father (respondents) appeal the trial court's order terminating their parental rights to their minor children, Beth and Ben.[1] For the reasons set forth below, we affirm.

[1] Pseudonyms are used to protect the identity of the minor children. *See* N.C. R. App. P. 42.

I. Background

Respondents have a history of interactions with the Henderson County Department of Social Services (DSS) stemming from concerns of domestic violence by both respondents in the presence of their children, substance abuse by both respondents, and conditions of the family home. In 2019, DSS removed Ben from the home and returned him after respondents entered into and complied with their case plan. Subsequently, respondents became involved in another incident of domestic violence, in which five-year-old Ben called 911. Moreover, respondents were facing truancy charges for Ben's school attendance, admitted to recent methamphetamine use, and were unemployed. On 17 March 2021, DSS took non-secure custody of Beth (ten months old) and Ben (six years old). At this time, respondents were in jail. The trial court appointed counsel for respondents in this matter.

On 27 May 2021, the trial court conducted a hearing and adjudicated the children as neglected juveniles. That same day, the trial court held a disposition hearing and provided respondents with a reunification plan to regain custody of the children and have weekly supervised visitation. At this hearing, respondents were represented by their attorneys. As to each respondent, the plan provided substantially similar requirements for reunification.

On 12 August 2021, the trial court held the first permanency planning and review hearing with respondents present and represented by their attorneys. In an order filed 22 September 2021, the trial court found that respondents made

inadequate progress on their reunification plan in numerous ways. The deficiencies included but were not limited to failure to submit to drug screens, enroll in domestic violence and parenting classes, provide financial support, and maintain consistent contact with DSS.

On 10 February 2022, the next permanency planning and review hearing was held with respondents present and represented by their attorneys. The trial court filed an order on 8 March 2022 and, again, found that respondents failed to make adequate progress on their reunification plan in multiple ways. Some problems persisted, while others were novel, among them: a domestic violence incident from 1 January 2022 and failure to comply with a child support order from 1 September 2021. Despite respondents' shortcomings, the trial court kept the primary plan as reunification with a secondary plan of termination of parental rights, with subsequent adoption of the juveniles.

The trial court continued the following permanency planning and review hearing on two occasions at respondent-father's request. Finally, on 30 June 2022, the hearing took place with respondents and their attorneys present. Again, the trial court filed an order on 5 August 2022, finding that respondents fell short of the previously provided objectives for familiar reasons. Additionally, this time, respondent-mother tested positive for several illegal substances and failed to attend visitation with the children on multiple occasions. Respondent-father continued to display complete noncompliance with drug screens and program attendance for

domestic violence or parenting classes. Echoing the conclusions of previous hearings, the trial court found that respondents had not made adequate progress within a reasonable time. However, on this occasion, the trial court changed the primary plan from reunification to termination of parental rights with subsequent adoption, and reunification became the secondary plan.

On 22 August 2022, DSS filed a petition to terminate respondents' parental rights. The hearing was scheduled for 3 November 2022 and notice was provided to respondents. Again, respondents appeared with their attorney. However, respondents requested their attorneys "get out of the case." Respondent-mother stated "[w]e're going to hire our own attorneys or represent ourselves." Respondent-father confirmed his shared intention. Respondents requested a new court date in "about two or three months." Before the attorneys were officially released from the matter, the trial court initially informed respondents that the matter would not be continued for the length of time requested. As required by statute, the trial court found extraordinary circumstances to continue the case. *See* N.C. Gen. Stat. § 7B-1109(a), (d) (2023). The hearing was set for 1 December 2022 and the trial court judge warned respondents that it was necessary that they retain legal representation before that date. Moreover, the trial court cautioned respondents that the pending action is to terminate their parental rights, inquired if they understood and were acting knowingly and voluntarily, and informed them that they were entitled to court-appointed counsel. Confronted with this information, respondents responded

affirmatively to their understanding, elected to proceed without court-appointed counsel, and signed to their understanding of waiving counsel.

On 1 December 2022, in spite of the trial court's previous warnings, respondents failed to procure counsel. Respondent-father offered the following explanation: "We got rid of our lawyers, and they pulled away from our case because failure of communication . . . and they're not doing their job as well as we figured that they could." Respondents both claimed that once paperwork for a loan "clears," they would retain an attorney. The trial court judge retorted that the discharged attorneys regularly practice in this area of law and "have a good reputation within this Court." Moreover, the trial court emphasized that "my primary responsibility is to make sure [the children are] cared for," and reminded respondents that "the children have been in [DSS] custody over 600 . . . days." Finally, the trial court judge denied the motion to continue after it acknowledged the "pattern" of previous continuances attributed to respondents.

Following the denial of respondents' motion, the matter proceeded to a hearing wherein the social worker testified and was cross-examined by respondents. Respondents testified in their presentation of evidence. Thereafter, the trial court found grounds existed to terminate the parental rights of respondents, concluding that they neglected the juveniles and there was a probability that neglect would recur. Additionally, the trial court found respondents left the juveniles in placement outside of the home for more than twelve months without showing reasonable

progress under the circumstances in correcting those conditions which led to the removal. The trial court also received evidence concerning the best interests of the children. The trial court took the matter under advisement, recessed, and filed its order finding grounds existed to terminate parental rights on 8 December 2022.

On 5 January 2023, the matter reconvened, and the trial court made findings of fact that it was in the best interests of the children to terminate the parental rights of respondents. The trial court's order made pursuant to these findings was filed on 23 January 2023. Respondents filed their notice of appeal on 21 February 2023 and petitioned for writ of *certiorari* on 19 and 22 May 2023.

II. Jurisdiction

This Court has jurisdiction to hear an appeal of a trial court's order terminating parental rights pursuant to N.C. Gen. Stat. §§ 7B-1001(a)(7) and 7A-27(b)(2) (2023). Therefore, we review respondents' arguments with respect to the order of termination under the relevant statutory authority. *See In re A.B.C.*, 374 N.C. 752, 757–58, 844 S.E.2d 902, 907 (2020) (holding there is "no final order terminating parental rights from which respondent could appeal pursuant to [N.C. Gen. Stat.] § 7B-1001 until the trial court entered its disposition order" and "appeal of both the adjudication order and the disposition order is properly before [the] Court pursuant to [N.C. Gen. Stat.] § 7B-1001(a1)(1).")

Respondents also petitioned our Court for a writ of *certiorari* to consider the trial court's permanency planning order filed on 5 August 2022. Respondents

maintain that the order deprived them of the right to reunification and prevented appellate review. "A petition for writ of *certiorari* must demonstrate merit or that some error was probably committed at the trial level." *See State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 369 (2017) (citation omitted); *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (2013) (citation omitted). The decision to issue a writ is discretionary, consequently, "the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a[n appellant] has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (citation omitted).

While the trial court's permanency planning order filed on 5 August 2022 employs language similar to the elimination of reunification requirement used in N.C. Gen. Stat. § 7B-906.2(b), it does not necessarily discard reunification as the secondary plan. In view of respondents' multiple and repeated shortcomings, the wording of finding of fact no. 48 contained in the order explains the circumstances before the trial court that resulted in reunification shifting from the primary plan to secondary. Although the trial court's order was not optimally drafted, in our discretion, we deny respondents' petition for *certiorari*.

III. Analysis

This case presents an all-too-familiar scenario confronted by trial courts in which litigants become dissatisfied with their representation and seek multiple continuances to procure new counsel. In termination of parental rights proceedings,

the trial court is tasked with properly weighing several competing interests to reach its determination, among them "the best interest of the child," "right to counsel," and "the effective administration of justice." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251–52 (1984); N.C. Gen. Stat. § 7B-1101.1(a) (2023); *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 422 (1988). Disagreeing with the trial court's decision here, respondents submit the following arguments for our consideration on appeal: (1) whether the trial court erred by denying respondents' motions to continue, and (2) whether this decision of the trial court resulted in respondents proceeding self-represented at the termination of parental rights hearing absent waiver or forfeiture of their right to counsel. After a careful review of the record, we conclude respondents' arguments lack merit.

As a preliminary matter, we note that respondents allege the trial court's decision to deny respondents' motion to continue on 1 December 2022 *caused* them to proceed self-represented and violated their rights to counsel. By framing the argument in this manner, respondents fail to comprehensively account for the sequence of events that led to them proceeding self-represented. To provide clarity and context, our analysis begins with an assessment of respondents' waivers of counsel, followed by an evaluation of respondents' joint motion to continue.

A. Waiver of Counsel

In cases such as this, "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, *unless the parent waives the right*." N.C. Gen. Stat. §

7B-1101.1(a) (emphasis added). Moreover, "[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." *Id.* § 7B-1101.1(a)(1). "[A] waiver of counsel, generally speaking, requires a knowing and intentional relinquishment of that right[.]" *In re K.M.W.*, 376 N.C. 195, 209, 851 S.E.2d 849, 860 (2020) (citation omitted). This waiver "must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980). On the other hand, the finding of forfeiture of right to counsel "has been restricted to situations involving egregious dilatory or abusive conduct on the part of the [litigant]." *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (citation omitted). Furthermore:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a de novo standard of review.

Id. at 209–10, 851 S.E.2d at 860.

1. Waiver of Appointed Counsel

The record shows that respondents' behavior regarding the status of their legal representation was not so egregious as to amount to a forfeiture of the right to counsel. Thus, we consider whether respondents' conduct amounted to a waiver of counsel. Citing *In re K.M.W.*, respondents correctly point out that this waiver of court appointed counsel is not a waiver of the right to representation by counsel. *Id.* at 211, 851 S.E.2d at 861. Here, as in *In re K.M.W.*, the record reflects that respondents read, signed, and checked the box on the waiver of appointed counsel form, which expressly states "I do not want a court-appointed lawyer. I will hire my own lawyer at my own cost." *Id.* at 211–12, 851 S.E.2d at 861. Moreover, the respondent in *In re K.M.W.* "never expressed the intention of representing herself." *Id.* at 211, 851 S.E.2d at 861. In view of these circumstances, our Supreme Court determined "that the trial court had an obligation to make inquiry of [the] respondent-mother concerning the issue of whether she wished to represent herself . . . at the termination hearing as required by [N.C. Gen. Stat.] § 7B-1101.1 (a)(1)." *Id.*

The transcript of the 3 November 2022 proceeding provides that upon learning that respondents no longer wished to be represented by their assigned attorneys, but before signing their waivers of counsel, the trial court engaged in the following colloquy with respondents:

> THE COURT: Ma'am, what do you intend to do about counsel?

[RESPONDENT-MOTHER]: We're going to hire our own attorneys or represent ourselves.

THE COURT: Is that—are you in the same boat, sir?

[RESPONDENT-FATHER]: Yes, sir.

THE COURT: How much time do you need to hire counsel? Have you spoken to an attorney yet?

[RESPONDENT-FATHER]: I've spoken to a couple of different ones. It's probably going to about two or three months to be able to afford a good attorney that will come in and do the paperwork and the investigation work that would (inaudible).

THE COURT: You can't have that long. You've got counsel now. Are you sure you want to go down that road and have your counsel released at this point in time? Because this matter won't be continued that long.

[RESPONDENT-FATHER]: Yes, we do.

[RESPONDENT-MOTHER]: Yes, sir.

THE COURT: All right. Respective counsels are hereby released. When are we going to set this matter for hearing?

THE COURT: By law we are limited to the length of time we can continue these matters.

[RESPONDENT-FATHER]: Yes, sir, and

[RESPONDENT-MOTHER]: I understand.

[RESPONDENT-FATHER]: I spoke with my boss man, and he's going to try and help us as much as he can.

THE COURT: What's the longest we can set this out within the statutory limitations?

. . . .

THE COURT: I'll need you to sign waivers saying you're going to hire your own attorney.

[RESPONDENT-FATHER]: Yes, sir.

[RESPONDENT-MOTHER]: Yes, sir.

. . . .

THE COURT: I am going to find extraordinary circumstances in light of the fact that there's communication breakdown between one of the parties and their attorney, and, also, the parties are requesting to hire their own counsel to represent them in this matter. But the matter is going to be set for December 1st. You need to have your counsel retained by then. All right, fill out waivers, and [w]e need them sworn in on those waivers.

. . . .

THE COURT: We're going to deal with these waivers. Let's see if they filled out those waivers so we can get them sworn in. Swear them in. Okay. Now, let me ask you all—you do realize that what you're facing is an action to terminate your parental rights? Do you understand that?

[RESPONDENT-MOTHER]: Yes, sir.

[RESPONDENT-FATHER]: Yes, sir.

THE COURT: And what you have done is signed a waiver to your right to court-appointed counsel. Do you understand that?

[RESPONDENT-MOTHER]: Yes, sir.

[RESPONDENT-FATHER]: Yes, sir.

THE COURT: And do you realize what you're doing?

[RESPONDENT-FATHER]: Yes, sir.

THE COURT: And you're doing it knowingly and

voluntarily?

[RESPONDENT-MOTHER]: Yes, sir.

[RESPONDENT-FATHER]: We – we've got no choice.

THE COURT: Well, you have a choice. You had court-appointed counsel.

. . . .

[RESPONDENT-MOTHER]: We didn't feel that they had the best interest of our family.

[RESPONDENT-FATHER]: . . . they have not spoken up.

[RESPONDENT-MOTHER]: They're too busy.

[RESPONDENT-FATHER]: . . . about nothing. They've not kept in any kind of contact.

. . . .

THE COURT: We're not going to get into all of that. I'm just making sure you understand completely what you are doing.

[RESPONDENT-MOTHER]: Yes, sir.

[RESPONDENT-FATHER]: Yes.

THE COURT: And you do understand that your next court date is December 1?

[RESPONDENT-MOTHER]: Yes, sir.

THE COURT: And you need to have your counsel retained by that date.

[RESPONDENT-FATHER]: Yes, sir.

THE COURT: And ready to appear in this court on that date.

> [RESPONDENT-MOTHER]: We will.
>
> . . . .
>
> THE COURT: All right. Your next court date is December 1. Make sure you have your counsel retained and here.
>
> [RESPONDENT-MOTHER]: Thank you, Your Honor.

Thus, a careful review of the record provides a clear illustration that respondents voluntarily and knowingly waived their rights to appointed counsel.

2. Waiver of Right to Counsel

The events of the 3 November 2022 proceeding, in a vacuum, are insufficient to formulate a determination of whether respondents' conduct constituted a complete waiver of counsel. As we conduct further review on this issue, we consider respondents' actions in context—accounting for conduct at both the 3 November 2022 and 1 December 2022 hearings. *See In re T.A.M.*, 378 N.C. 64, 74, 859 S.E.2d 163, 170 (2021) (holding "such cases as these are fact-specific and hence dependent on the unique facts of any given case.").

Here, DSS filed the petition to terminate parental rights on 2 August 2022 and the hearing was scheduled for 3 November 2022. Evident in the portions of the transcript cited above, respondents stated that they would either (1) hire attorneys or (2) proceed self-represented, and moved to continue the hearing in furtherance of either of these goals. Cognizant of the requirement that adjudicatory hearing continuances "beyond [ninety] days after the initial petition shall be granted only in

extraordinary circumstances when necessary for the proper administration of justice," the trial court found extraordinary circumstances and granted respondents' motion to continue at this hearing. N.C. Gen. Stat. § 7B-1109(d). The trial court also cautioned respondents that "[y]ou've got counsel now," "the matter is going to be set for December [first]," and inquired "[a]re you sure you want to go down that road and have your counsel released at this point in time?" Respondents agreed separately to the trial court's inquiry. As the proceeding neared its end, the trial court warned respondents twice to be present with their retained counsel. Respondents confirmed their understanding and agreed to do as the court cautioned.

Equipped with the trial court's warnings and a month-long continuance, respondents returned to court on 1 December 2022 and provided several reasons for their inability to hire a specific attorney who was not yet retained. On this occasion, the trial court informed respondents that "[t]he law is very specific, as to [] timelines as to hearing these cases," and expressed concern that "the children have been in [DSS] custody over 600 and something days." Then, the trial court noted the "numerous continuances in this matter for . . . [respondents]," and stated "with all due respect, you all should have retained another attorney before you all asked for release of . . . [court-appointed] counsel." Thereafter, the trial court concluded that "extraordinary circumstances do not exist which would warrant a second continuance," and respondents proceeded self-represented at the hearing.

Respondents' completion of the waiver of appointed counsel form shows they were literate. *Thacker*, 301 N.C. at 354, 271 S.E.2d at 256. Furthermore, the colloquy from both proceedings clearly shows that respondents were competent, understood the consequences of their actions, and were acting voluntarily. *Id.* On 3 November 2022, when requesting the release of their appointed counsel, respondents unequivocally expressed the desire to "hire our own attorneys or represent ourselves." Moreover, the trial court went to great lengths to inform respondents about the time-sensitivity of this matter, explain the choice available to proceed represented by their appointed counsel, and warn them to appear with their retained attorney at the next hearing on 1 December 2022. Nonetheless—in this context—respondents requested to "hire our own attorneys or represent ourselves" and failed to procure counsel within the time allowed which resulted in a voluntary and knowing waiver of their right.

Respondents presume an error by the trial court and contend that they "must be granted a reasonable time in which to obtain counsel of [their] own choosing, and must be granted a continuance to obtain counsel of [their] choosing where, through no fault of [their] own, [they are] without counsel." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citations omitted). This view overlooks the fact that the trial court previously granted respondents' continuance that provided a reasonable time to obtain counsel of their choosing. The time-sensitivity of this action, as well as the procedural history are relevant to our determination of reasonableness.

B. Motion to Continue

Having determined that respondents voluntarily and knowingly waived their right to counsel, we now consider whether the trial court erred in denying their joint motion to continue. Our Court has held that "[a] trial court's ruling on a motion to continue ordinarily will not be disturbed absent a showing that the trial court abused its discretion, but the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989) (citing *State v. McFadden*, 292 N.C. 609, 617, 234 S.E.2d 742, 747 (1977) (holding the trial court erred in denying the defendant's motion to continue on the day of trial when his privately retained attorney was engaged in a trial in federal court)). In that case, our Court's *de novo* review led to the conclusion that "[w]here the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue." *Id.* And "regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (citation omitted).

We turn to precedent for guidance in assessing the trial court's decision with respect to the continuance. Analogous to our Supreme Court's considerations in *In re T.A.M.*, the trial court here "respected the sanctity of [respondents'] statutory right to counsel" by (1) finding extraordinary circumstances and granting the initial

continuance, (2) emphasizing the significance of the timeline, (3) questioning the desire to release court appointed counsel, and (4) warning respondents to have retained counsel at the next proceeding. 378 N.C. at 75, 859 S.E.2d at 170. Additionally, as evident in the trial court's concern for the length of time the children had been in DSS custody, we can soundly say that the trial court "reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of a parent." *Id.*

Citing *In re K.M.W.*, respondents urge us to conclude that a new trial is required in this matter, premised on a finding that the trial court's denial of their motion to continue was erroneous and a presumption of prejudice is axiomatic. 376 N.C. at 213–14, 851 S.E.2d at 862–63. However, this assertion fails since our analysis leads to the conclusion that the trial court did not commit an underlying error of law. *See In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (citation omitted). Thus, the trial court did not err in denying the motion to continue at the 1 December 2022 hearing.

IV. Conclusion

For the reasons set forth above, we affirm the trial court's actions in this matter and find no error committed by the trial court.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).