

[Cite as *In re T.E.*, 2016-Ohio-5935.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104228

**IN RE: T.E.
A Minor Child**

[Appeal By T.E., Mother]

**JUDGMENT:
DISMISSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 13916373

BEFORE: Boyle, J., McCormack, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: September 22, 2016

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MARY J. BOYLE, J.:

{¶1} Appellant, T.E. (“mother”), appeals from a juvenile court judgment granting legal custody of her child, T.E., born on October 22, 2013, to her relatives. Mother’s appointed appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and now seeks leave to withdraw as counsel because of the lack of any meritorious grounds for appeal.

I. *Anders* Standard and Potential Issues for Review

{¶2} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Further, counsel must also furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief. *Id.* In this case, appointed counsel fully complied with the requirements of *Anders*.

{¶3} Once the appellant’s counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.*; Loc.App.R. 16(C). If we determine that the appeal is wholly frivolous, we may grant counsel’s request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires. *Anders*; Loc.App.R. 16(C).

{¶4} On June 17, 2016, this court ordered appointed counsel’s motion be held in abeyance pending our independent review of the case. We further notified mother that she had until August 5, 2016, to file her own appellate brief, but she did not do so.

{¶5} Mother’s appointed counsel has fully complied with the requirements of *Anders* and Loc.App.R. 16(C). Mother’s appointed counsel stated that she attempted to contact mother but that mother has not responded to her calls or correspondence. Mother’s appointed counsel further states in her *Anders* brief that she thoroughly reviewed the record, and concluded that there are no meritorious arguments that she could make on mother’s behalf. Appointed counsel has submitted the following two potential assignments of error:

1. The trial court [erred] by denying the request for continuance and proceeding without appellant present.
2. [Due to the ineffective assistance of trial counsel,] [t]he appellant cannot dispute any factual findings or legal conclusions made by the trial court because she failed to object to the magistrate’s decision.

{¶6} After conducting an independent review of mother’s case, we dismiss mother’s appeal and grant appointed counsel’s motion to withdraw.

II. Procedural History and Facts

{¶7} Cuyahoga County Division of Children and Family Services (the “agency”) became involved with mother in 2012 when she was pregnant with T.E. after mother and her other child, M.C. (d.o.b. Nov. 17, 2010), were physically abused by M.C.’s father, S.C. Because of the domestic violence, the agency obtained temporary custody of M.C., and he was later placed in the legal custody of mother’s relatives.

{¶8} When T.E. was born, the agency received emergency temporary custody of her. The juvenile court subsequently found T.E. to be dependent and granted the agency temporary custody of her in May 2014. The agency placed T.E. with mother's relatives (not the same one who had custody of M.C.). Mother named two potential fathers for T.E., including S.C. and another man.¹

{¶9} In April 2015, the agency moved to modify temporary custody to legal custody to mother's relatives, R.P. and M.P. In June 2015, mother moved for T.E. to be returned to her custody, or for "more time to continue working on her case plan."

{¶10} In January 2016, a magistrate held a hearing on the motions. Present at the hearing were the agency's attorney, mother's attorney, mother's guardian ad litem ("GAL"), T.E.'s GAL, and the social worker assigned to the case. Mother did not appear for the hearing.

{¶11} At the beginning of the hearing, mother's attorney moved for a continuance because mother was not present. Mother's attorney explained to the court that mother had issues with her eyes that morning and had to go to the doctor. When mother returned home from her doctor's appointment, she "lost track of the day and forgot [the] hearing this afternoon." Mother's attorney argued that mother had been to the last several hearings, and "has continued to be actively involved in this case and visits the child regularly and very much wishes for legal custody to be given to her."

{¶12} The court denied the request for a continuance, stating:

¹At the hearing, the social worker assigned to the case only discussed S.C.

This court did make the mother aware of today's hearing by issuing to her a notice of today's hearing, which does appear to bear her signature. I also stated in open court that this would be the only notice that the parties would receive in regard to today's hearing. It's not like mother was sick today. It's just mother forgot. So it's a different thing to forget or have an emergency take place and then you're just unavailable.

{¶13} One of mother's case plan objectives was to complete domestic violence classes and refrain from relationships that are potentially harmful to her. Although mother completed the classes as required by her case plan, she continued to have a relationship with S.C., placing herself and her children at risk. S.C. refused to cooperate with the agency and did not complete any of his case plan requirements.

{¶14} Mother also told the social worker that S.C. would "steal her food" and her bank card that contained her Social Security disability income. S.C. also made mother work and "then give him the money." Thus, the agency had concerns that mother could not maintain "healthy boundaries."

{¶15} The social worker had talked mother into obtaining a protection order against S.C. Mother told the social worker that the court would not grant her the order. The social worker found out, however, that when mother went to court to get the order, she would not cooperate with the victim's advocate who was attempting to help mother. Mother claimed that she did not have information as to where S.C. was, but mother was on the phone with S.C. Mother got "irate" with the victim's advocate and was asked to leave.

{¶16} The social worker testified that mother has mental health issues; mother had been diagnosed with an anxiety and mood disorder, as well as "borderline intellectual

functioning.” As part of mother’s case plan, she was supposed to remain compliant with taking her mental health medications, but was not consistent in doing so. The social worker explained that mother is supposed to go to the Center for Families and Children once a week to get a pill box filled with all of her medications. According to the social worker, mother did not always get her pill box filled. Once, when the social worker went to mother’s home unannounced, she asked to see mother’s pill box. The social worker stated that the medications were just “all scrambled together,” and mother could not describe “which pill was which.” On another visit, the social worker again asked to see mother’s pill box, and it was full — meaning mother had not taken any of the pills even though she had gotten the box filled almost one week earlier.

{¶17} The social worker explained that mother needs to take her medication so that she can manage not only her own medical needs, but T.E.’s “medical needs.” The social worker stated that T.E. was born with a “genetic deficiency” that “has to do with the regulation of protein” in her system. T.E. must take two oral medications daily for this genetic deficiency. Mother was “inconsistent” with providing medication daily.

{¶18} The social worker explained that she referred mother to “Ohio Guidestone supportive visits program.” Mother worked with a visitation coach who “had a long history of working with clients with cognitive limitations and different developmental disabilities.” She worked with mother “one-on-one” once a week to teach her how to give T.E. daily medications. When the sessions were over, the coach reported to the social worker that mother was “inconsistent in providing the baby medication and

requires supervision.”

{¶19} The social worker also tried to help mother keep a notebook to write down the days she visited T.E., as well as when she gave medications to T.E. and how much medication. The social worker stated that a notebook had helped other clients “with some disabilities.” But mother would not remember to bring the notebook to her supervised visits with T.E., or she “would bring a variety of different notebooks each time.” The social worker tried to help her list the dates and times, but stated it was not clear if mother understood what had been written. The social worker attributed mother’s inability to properly administer T.E.’s medications to the fact that mother had been diagnosed with “borderline intellectual functioning.”

{¶20} Mother did complete parenting classes in 2012 as part of her case plan involving her other child. Mother was required to take the parenting class because it was reported to the agency that mother was not consistently feeding her son, who was only two years old at that time. The social worker stated that even after mother completed the parenting class, she still had “the same parenting issues.” The social worker explained that when she would supervise mother’s visits with T.E. at the library, mother was “inattentive” toward T.E., and had to be reminded to “watch the baby.” One time there was a person at the library who was yelling and being very disruptive. The library staff had to hold the person down. Mother went right up to the person “in the middle of all of this behavior,” with T.E. right behind her. The social worker had to explain to mother that it was not safe to take T.E. around that person. During other visits, mother would

“stay off task,” and listen to music on her headphones, or use the computers at the library during the visitations.

{¶21} The social worker further testified that at a supervised visit in December 2015, mother came to the visit acting “out of character.” She was laughing uncontrollably for 20 to 30 minutes. She told the social worker that she was “high” because she had taken two Oxycontin pills before the visit. She said that she had some pills left over from going to the dentist, but was not able to show the social worker the prescription bottle.

{¶22} The social worker made mother take a urine test. The report came back that the urine appeared to be tainted. Mother’s family members told the social worker that mother was “using fake urine.” When the social worker asked mother about it, mother told her that an adult male gave her his urine and told her to use it if she ever had to take a drug test. Mother denied that she used it. The drug testing facility said that the urine test result was consistent with being “very old urine or tampered with.” Mother did not complete a substance abuse assessment, which she was also supposed to do after the library incident.

{¶23} Mother had supervised visits with T.E. three times a week for four hours. The social worker stated that up until the previous two months, mother had consistently visited T.E. three times a week. But in the last month, mother had only visited three or four times for the whole month. At the time of the hearing, mother had not visited T.E. for over two weeks. Mother had reported that she had not been visiting T.E. because she

was sick and had doctor appointments, but could not provide proof to the social worker that she had been to the doctor.

{¶24} The social worker testified that the alleged father, S.C., had not established paternity or completed any of his case plan. S.C. had only visited T.E. twice since she was born.

{¶25} The social worker stated that mother's relatives, R.P. and M.P., had raised mother and all of her siblings. T.E. had been in their care since she had been released from the hospital at birth, and she was doing well. R.P. and M.P. met all of the requirements to obtain legal custody of T.E. R.P. and M.P. also stated that they would continue to facilitate visits between mother and T.E. after they obtained legal custody.

{¶26} Mother's counsel cross-examined the social worker, getting her to admit that mother continued to go to domestic violence classes and that there had not been any reported incidents of domestic violence for about a year. Mother's counsel also got the social worker to admit that it would be difficult for mother to completely sever ties with S.C. because he is the father of her other child and the alleged father of T.E. The social worker further agreed on cross-examination that mother "may have" benefitted "from some counseling."

{¶27} The social worker further agreed with mother's counsel on cross-examination that mother tested negative for drugs on a hair follicle test that was done a few days after mother had taken Oxycontin. Mother also completed another urine test about a week after the first "tainted" one, which was negative. The social worker

further admitted that besides the Oxycontin incident, there were no other concerns about substance abuse issues. The social worker also agreed that she had not seen any “atypical mental health symptoms that are serious” in mother.

{¶28} The children’s GAL testified that he recommended in his report that the court grant legal custody to R.P. and M.P. The GAL opined that he had serious concerns about mother being able to meet T.E.’s needs.

{¶29} At the close of the evidence, the magistrate found that mother had not made significant progress on her case plan, and that the agency made reasonable efforts to prevent the removal of the child from the home, as well as to finalize a permanency plan for the child. The magistrate also found that mother has not properly addressed the medical needs of T.E. and has been inconsistent in addressing her own medical needs. The magistrate further found that the return of the child to mother’s home would be contrary to the child’s best interest.

{¶30} The magistrate recommended granting the agency’s motion and awarding legal custody of T.E. to R.P. and M.P., and denying mother’s motion for custody. The magistrate also recommended that mother receive at least six hours of visitation with T.E. per week with the day and time to be worked out between mother and the legal custodians.

{¶31} Mother did not object to the magistrate’s decision. The juvenile court conducted an independent review of the magistrate’s decision, approved it, and adopted it in its entirety. The trial court granted the agency’s motion and awarded legal custody of

T.E. to R.P. and M.P., and denied mother's motion for custody. The juvenile court also ordered that mother receive at least six hours of visitation with T.E. per week with the day and time to be worked out between mother and the legal custodians.

III. Mother's Request for Continuance

{¶32} In the first potential assignment of error, appointed counsel maintains that it could be argued that the trial court erred when it denied mother's counsel's request for a continuance when mother failed to appear for the hearing. After review, we agree with appointed counsel that this argument lacks merit.

{¶33} The decision to grant or deny a motion for continuance lies within the discretion of the trial court and will not be reversed on appeal unless the trial court has abused its discretion. *Burton v. Burton*, 132 Ohio App.3d 473, 725 N.E.2d 359 (3d Dist.1999). "Abuse of discretion" has been described as a ruling that lacks a "sound reasoning process." *State v. Torres*, 8th Dist. Cuyahoga No. 99596, 2013-Ohio-5030, ¶ 51, quoting *AAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶34} "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981), quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). A trial court should consider certain factors when deciding whether to grant a motion for a

continuance: (1) the length of the requested delay; (2) whether the requesting party has requested and received other continuances; (3) the inconvenience to each of the parties and their attorneys, witnesses, or the court; (4) the legitimacy of the request or whether it is simply a dilatory tactic; (5) whether the requesting party's actions created the need for the delay; and (6) any other relevant factors based on the facts of the case. *Id.*

{¶35} In this case, mother simply forgot about the hearing; there was no emergency or illness that prevented her from going to court. It is undisputed that she was aware of the hearing because the magistrate had her sign an acknowledgment of the upcoming hearing at the previous hearing. Further, mother had been served a summons to appear at the hearing. The children had been in the agency's care for over two years and in its temporary custody for nearly two years. Moreover, mother's attorney and GAL were present at the hearing to argue on her behalf and represent her interests. We cannot say that the trial court abused its discretion in denying mother's counsel's motion for continuance. Accordingly, we agree with appointed counsel that this potential argument has no merit.

IV. Failure to Object to the Magistrate's Decision.

{¶36} In the second potential assignment of error, appointed counsel argues that mother's counsel was ineffective for failing to object to the magistrate's decision because mother cannot now challenge the trial court's adoption of the magistrate's decision on appeal. After review, we agree with appointed counsel that this argument lacks merit.

{¶37} Failure to object to a magistrate's decision waives all but plain error on

appeal. *In re B.C.*, 9th Dist. Summit Nos. 26976 and 26977, 2014-Ohio-2748, ¶ 24.

[T]he plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶38} Further, mother would only succeed on an ineffective assistance of counsel argument if she was prejudiced by counsel's failure to object to the magistrate's decision.

See In re J.D., 2d Dist. Montgomery No. 26588, 2015-Ohio-4114, ¶ 80, citing *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Therefore, if this court does not find plain error on the record, then mother's potential argument would have no merit.

{¶39} After a review of the record in this case, we find the magistrate's decision to be sound and well supported by the evidence presented at the hearing. There was substantial evidence presented at the hearing that although mother made some progress on her case plan and despite the agency attempts to help mother benefit from assistance on many levels, mother was unable to meet the child's needs due to mother's "borderline intellectual functioning." Accordingly, there is no plain error on the record, and we agree with appointed counsel that this potential argument has no merit.

{¶40} Further, we have independently examined the record as required by *Anders*, and have found no error prejudicial to mother. We therefore conclude that this appeal is wholly frivolous and grant appointed counsel's motion to withdraw.

{¶41} Case dismissed.

It is ordered that appellee recover from appellant the costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR