

[Cite as *In re Hatfield*, 2003-Ohio-7339.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

IN THE MATTER OF: :
: Case No. 03CA15
CARLIE HATFIELD :
: DECISION AND JUDGMENT ENTRY
ALLEGED NEGLECTED & DEPENDENT CHILD : RELEASED 12/30/03

APPEARANCES:

COUNSEL FOR APPELLANT¹ Frederick C. Fisher, Jr.
SHELLY HATFIELD - MOTHER: 311 Park Avenue
Ironton, Ohio 45638

COUNSEL FOR APPELLEE J.B. Collier, Jr.
LAWRENCE COUNTY DEPARTMENT Lawrence County Prosecuting Attorney
OF JOB AND FAMILY SERVICES: Kevin J. Waldo
Assistant Prosecuting Attorney
Lawrence County Court House
One Veterans Square
Ironton, Ohio 45638

EVANS, P.J.

{¶1} This is an appeal from the Lawrence County Court of Common Pleas, Juvenile Division, which granted permanent custody of Carlie Hatfield to Appellee Lawrence County Department of Job and Family Services, Children Services Division, thereby terminating the parental rights of Appellant Shelly Hatfield. Appellant asserts that the trial court's judgment was erroneous in that appellee did not

¹ Appellant was represented by other counsel below.

present adequate evidence to satisfy its burden of proof. Appellant also asserts that she was denied the effective assistance of counsel in this matter. Consequently, appellant asserts that the judgment of the trial court should be reversed.

{¶2} For the reasons that follow, we disagree with appellant and affirm the judgment of the trial court.

Proceedings Below

{¶3} Appellant Shelly Hatfield is the mother of Carlie Ann Hatfield, who was born on January 31, 2001. Carlie's father is unknown and thus, did not participate in this action. Shortly after giving birth to Carlie, appellant was incarcerated and granted custody of Carlie to Stephanie Crance through a legal guardianship.

{¶4} Appellant was subsequently released from jail, but the guardianship remained intact. On May 31, 2002, Appellee Lawrence County Department of Job and Family Services, Children Services Division (LCCS), received a report that a child, later found to be Carlie, was being exposed to drug use that was taking place in the home of Arlene Hatfield, appellant's mother. The report specifically informed LCCS that crack pipes were located in a kitchen drawer and that drugs, such as OxyContin, were under the couch. An LCCS agent, accompanied by an Ironton Police Officer went to Arlene's residence and found appellant sitting on the porch. LCCS told appellant about the report and asked if they could enter the residence and check the contents of the kitchen drawer mentioned in the report. Appellant

acquiesced, and three crack pipes were subsequently discovered. Arlene Hatfield, who was present at the time, indicated that she and appellant were babysitting Carlie while Stephanie was at work. Stephanie was contacted at work, and she sent a friend to pick up the child. LCCS informed Stephanie that the child should not return to Arlene's residence or be left unattended with appellant. Stephanie agreed to these terms and agreed to sign a safety plan with LCCS the following week.

{¶5} Within a week, however, Ironton Police were dispatched to Arlene's residence on a domestic disturbance complaint. Upon arrival, they found an intoxicated appellant holding Carlie, outside in a thunderstorm, without any type of cover. LCCS obtained an ex parte order granting the agency temporary custody of Carlie, and on June 6, 2002, the agency filed a complaint alleging that Carlie was a neglected and dependent child. The Lawrence County Court of Common Pleas, Juvenile Division, held a hearing on the matter and maintained the temporary custody order in favor of LCCS.

{¶6} LCCS placed Carlie in her aunt's home. Thereafter, Stephanie withdrew her guardianship, and appellant was permitted supervised visits with Carlie. Subsequently, appellant entered an admission to LCCS's dependency allegation, and LCCS dismissed the neglect allegation. The trial court adopted the case plan agreed to by the parties. The case plan required appellant to undergo substance abuse counseling. She was required to regularly attend

counseling sessions and demonstrate progress to counselors. The case plan also required appellant to maintain a home environment free of alcohol and drugs. Further, appellant was required to attend parenting classes and undergo anger management counseling.

{¶7} LCCS made the necessary arrangements and referrals for appellant to commence substance abuse and anger management counseling. Appellant began attending her counseling sessions, and LCCS made arrangements for her to commence parenting classes. In early August 2002, LCCS filed a progress report indicating that appellant was cooperating with LCCS and working towards the completion of her case plan.

{¶8} In September 2002, appellant began missing her appointments. Appellant's probation officer contacted LCCS and informed them that appellant was not complying with her probation rules, including weekly drug tests. The probation officer located appellant and informed her that she had one last opportunity to comply with weekly drug testing. Appellant failed to attend her scheduled drug test and was subsequently arrested. Appellant tested positive for cocaine upon arrest. Appellant was sentenced to complete 150 days in the county jail after turning down an offer from the court to send her to a six-month drug rehabilitation program. Due to her incarceration, appellant could not participate in her case plan.

{¶9} On December 23, 2002, appellant was granted early release from jail. As a part of her early release, appellant was to undergo drug and alcohol counseling with random drug testing. She also was to meet with her caseworker at LCCS. Appellant failed to keep her counseling and testing appointments scheduled by the probation department or LCCS. A warrant was issued for her arrest on probation violations. On January 16, 2003, appellant contacted LCCS and informed them that she intended to turn herself in to authorities. Appellant failed to do so. On February 24, 2003, appellant was arrested on new charges and for violating the terms of her probation.

{¶10} Shortly after appellant's release from jail, LCCS placed Carlie with a foster family, removing her from her aunt's custody. Carlie's aunt was allegedly a drug informant for the police and had a previously undisclosed criminal conviction.

{¶11} On February 13, 2003, while appellant was a fugitive, LCCS filed a motion seeking permanent custody of Carlie. Appellant's counsel was given notice of the motion, and a hearing was scheduled for April 14, 2003. In mid-March, appellant sought a continuance of the permanent custody hearing, asserting that she was being interviewed for a six-month substance abuse program and would be unavailable for the hearing. LCCS opposed appellant's motion and the trial court denied the motion to continue. Appellant was sentenced to a six-month treatment corrections center.

{¶12} In April 2003, the trial court held a hearing on LCCS's motion for permanent custody. LCCS presented the testimony of appellant's caseworkers, law enforcement officers involved with appellant's case, appellant's probation officer, and one of Carlie's foster parents. Counsel for appellant presented no witnesses on appellant's behalf, and appellant did not attend the hearing. At the close of the hearing, the trial court postponed rendering its judgment until after the guardian ad litem filed his report. Subsequently, the guardian ad litem filed his report recommending that the trial court grant LCCS's motion for permanent custody.

{¶13} In June 2003, the trial court granted LCCS permanent custody of Carlie.

The Appeal

{¶14} Appellant timely filed her notice of appeal and presents the following assignments of error for our review.

{¶15} First Assignment of Error: "The trial court erred in ordering permanent custody to the Lawrence County Department of Job and Family Services, Children Services Division, as such was against the manifest weight of the evidence."

{¶16} Second Assignment of Error: "Appellant was denied her right to effective assistance of counsel at the permanent custody hearing."

{¶17} We will address appellant's assigned errors in reverse order as this is more conducive to our analysis.

I. Ineffective Assistance of Counsel

{¶18} In her Second Assignment of Error, appellant asserts that she was denied the effective assistance of counsel. Appellant complains that her counsel failed to present any evidence or witnesses on her behalf. Appellant claims that counsel, knowing appellant could not be present at the hearing, should have sought other forms of evidence to "substantiate" her position.

{¶19} The right to counsel, guaranteed in permanent custody proceedings by R.C. 2151.352 and by Juv.R. 4, includes the right to the effective assistance of counsel. See *In re Wingo*, 143 Ohio App.3d 652, 666, 2001-Ohio-2477, 758 N.E.2d 780 (citing *In re Heston* (1998), 129 Ohio App.3d 825, 827, 719 N.E.2d 93). "'Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, *** the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody.'" Id. (quoting *In re Heston*).

{¶20} To reverse a trial court's judgment based upon a claim of ineffective assistance, the defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Noling*, 98 Ohio St.3d 44, 65, 2002-Ohio-7044, 781 N.E.2d 88; *State v. Bradley* (1989), 42 Ohio St.3d 136,

538 N.E.2d 373. Counsel's performance may be found to be deficient if counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687; see, also, *State v. Bradley*, 42 Ohio St.3d 136 at paragraph two of the syllabus (stating that counsel's performance is deficient if it falls below an objective standard of reasonable representation); *State v. Peeples* (1994), 94 Ohio App.3d 34, 44, 640 N.E.2d 208 (stating that counsel's performance is deficient if it "raise[s] compelling questions concerning the integrity of the adversarial process"). "To establish prejudice, 'the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.'" *State v. Tibbetts*, 92 Ohio St.3d 164, 2001-Ohio-132, 749 N.E.2d 226, quoting *State v. Bradley*, 42 Ohio St.3d 136 at paragraph two of the syllabus; see, also, *Strickland v. Washington*, 466 U.S. at 687; *Noling*; *State v. Bradley* at paragraph three of the syllabus ("To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.").

{¶21} Moreover, when a reviewing court considers an ineffective assistance of counsel claim, the reviewing court should not consider what, in hindsight, may have been a more appropriate course of action. See *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171,

656 N.E.2d 643 (stating that a reviewing court must assess the reasonableness of the defense counsel's decisions at the time they are made). Rather, the reviewing court "must be highly deferential." *Strickland v. Washington*, 466 U.S. at 689. As the *Strickland* Court stated, a reviewing court: "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689; see, also, *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476, cert. den. (1988), 488 U.S. 975, 109 S.Ct. 515 (stating that a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness).

{¶22} Based upon our review of the record, we do not agree with appellant that trial counsel's performance was deficient. Appellant has failed to overcome the strong presumption that trial counsel acted within the realm of reasonable trial strategy and that counsel was competent. The decision to present, or not present, witnesses falls within the realm of trial strategy. Moreover, appellant has not shown how counsel's decision not to present witnesses affected the outcome of the proceedings. Therefore, appellant's claims do not demonstrate ineffective assistance of counsel. See *In re Riley*, Washington App. No. 03CA19, 2003-Ohio-4109; see, also, *State v. Grahek*, 8th Dist. No. 81443, 2003-Ohio-2650 (concluding that

ineffective assistance of counsel claim that calling other witnesses would have exonerated the defendant amounts to speculation); *In re Kramer*, Franklin App. Nos. 02AP-1038 and 02AP-1039, 2003-Ohio-2277 (stating that claim as to what other witnesses would have testified amounts to speculation and is insufficient to establish ineffective assistance of counsel).

{¶23} Accordingly, based upon the foregoing reasons, we overrule appellant's Second Assignment of Error.

II. Permanent Custody

{¶24} In her First Assignment of Error, appellant asserts that the trial court's judgment granting LCCS's motion for permanent custody was against the manifest weight of the evidence.

{¶25} In order to grant permanent custody to a children services agency, a court must determine that permanent custody is in the best interest of the child pursuant to R.C. 2151.414(D), and that the child cannot be placed with either of her parents within a reasonable time for at least one of the reasons enumerated in R.C. 2151.414(E). Here, the trial court found that appellant failed to substantially comply with the case plan for reunification within a reasonable period of time. Additionally, the trial court found that appellant's continued behavioral and addiction problems, and her failure to address these problems in a timely manner, were keeping Carlie in unstable and uncertain circumstances during her formative years. See R.C. 2151.414(E)(1). Appellant argues that "the State placed the

[a]ppellant in jail and then blamed her for not attending her counseling classes."

{¶26} An award of permanent custody must be supported by clear and convincing evidence. See *In re Hiatt* (1993), 86 Ohio App.3d 716, 725, 621 N.E.2d 1222. The Supreme Court of Ohio has defined "clear and convincing evidence" as "[t]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-04, 495 N.E.2d 23.

{¶27} This Court will not reverse an order terminating parental rights if we find, upon reviewing the record, that the record contains sufficient evidence to satisfy the clear and convincing standard. See *In re Baby Girl Doe*, 149 Ohio App.3d 717, 2002-Ohio-4470, 778 N.E.2d 1053, at ¶89; *In re Wise* (1994), 96 Ohio App.3d 619, 626, 645 N.E.2d 812. We will not reverse the trial court's judgment if there is some competent, credible evidence going to all the essential elements of the case. See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. Furthermore, we will not substitute our judgment for that of the trial court when there is some competent, credible evidence supporting the trial court's findings and decision. *Id.* Moreover, issues regarding the

credibility of witnesses and the weight to be given to the evidence are primarily for the trier of fact, and we give deference to the trial court as the trier of fact because it is "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶28} Appellant argues that she was complying with the case plan until she was incarcerated. She also argues that her present placement in a drug treatment corrections facility is helping her with her drug addiction, the main problem preventing her from regaining custody of Carlie.

{¶29} We are unconvinced by appellant's assertions. While it is true that her current incarceration prevents her from complying with her case plan, appellant had already failed her case plan before her current incarceration. Appellant has continually placed her desire for drugs ahead of the well-being of her child, and while we hope that her current treatment is successful in overcoming her addictions, Carlie's best interests are not served by remaining in limbo awaiting a mother who may or may not stay clean and sober.

{¶30} A review of the record reveals that some competent, credible evidence supports the trial court's judgment and creates a firm belief that LCCS's case has been proven. Therefore, we overrule appellant's First Assignment of Error.

Conclusion

{¶31} For the foregoing reasons, we overrule appellant's assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

Abele, J., and Kline, J.: Concur in Judgment Only.

FOR THE COURT

BY:

David T. Evans
Presiding Judge