

[Cite as *In re. D. H.*, 2010-Ohio-2998.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: D. H.
 A. H.
 S. B.
 D. Q.

C. A. No. 25095

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. DN 09-2-146
 DN 09-2-147
 DN 09-2-148
 DN 09-2-149

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

MOORE, Judge.

{¶1} Appellant, LaShaundra B. (“Mother”), appeals from a judgment of the Summit County Court of Common Pleas, Juvenile Division, that adjudicated her four children dependent and placed them in the temporary custody of Summit County Children Services Board (“CSB”). This Court reverses.

I.

{¶2} Mother is the natural mother of D.H., born May 15, 1998; A.H., born January 17, 2001; S.B., born October 26, 2002; and D.Q., born April 23, 2006. The fathers of the children are not parties to this appeal.

{¶3} On February 26, 2009, CSB filed complaints asserting that the children were neglected and dependent due to illegal drug activity in the home, which allegedly included manufacturing and selling crack cocaine and possession of marijuana. The complaints further

alleged that the police had seized evidence of this drug activity and arrested Mother and the father of D.Q. (“Father”) the day before. The children were removed from the home pursuant to Juv.R. 6 because both adults in the home were arrested.

{¶4} Following an adjudicatory hearing, the magistrate found that the children were neglected under R.C. 2151.03(A)(2) and dependent under R.C. 2151.04(C). The trial court adopted the magistrate’s decision, pending the filing of timely objections. Mother filed objections to the magistrate’s decision, maintaining that the evidence presented at the hearing did not support an adjudication of neglect or dependency. The trial court sustained Mother’s objection to the adjudication of neglect, but overruled her objection to the adjudication of dependency. The trial court adjudicated the children dependent under R.C. 2151.04(C) and placed them in the temporary custody of CSB. Mother appeals and raises one assignment of error.

II.

ASSIGNMENT OF ERROR

“THE JUVENILE COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND BY CLEAR AND CONVINCING EVIDENCE THAT D.H., A.H., S.B., AND D.Q. WERE DEPENDENT CHILDREN UNDER [R.C. 2151.04(C)].”

{¶5} Mother maintains that the trial court erred in adjudicating the children dependent under R.C. 2151.04(C). R.C. 2151.04(C) defines “dependent child” as “any child: [w]hose condition or environment is such as to warrant the state, in the interests of the child, in assuming the child’s guardianship[.]” Such an adjudication should concentrate on whether the children are receiving proper care and support and look to environmental elements that are adverse to the normal development of children. See *In re Bibb* (1980), 70 Ohio App.2d 117, 120. See, also *In re Burrell* (1979), 58 Ohio St.2d 37, 39. The focus should be on the child’s condition and

environment, not on the fault of the parent. *In re Pitts* (1987), 38 Ohio App.3d 1, 3. The conduct of the parent is relevant only insofar as it forms a part of the children's environment and it is significant only if it has a detrimental impact on them. *In re Burrell*, 58 Ohio St.3d at 39. "That impact cannot be simply inferred in general, but must be specifically demonstrated in a clear and convincing manner." *Id.*

{¶6} An adjudication of dependency requires clear and convincing evidence. Juv.R. 29(E)(4). Clear and convincing evidence is that which will produce in the trier of fact "a firm belief or conviction as to the facts sought to be established." *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶7} CSB had based its dependency complaints on allegations that the children's home environment was unsuitable because Mother and Father had been manufacturing and selling drugs there. At the adjudicatory hearing, however, CSB failed to present evidence to establish the truth of any of those allegations.

{¶8} The adjudicatory hearing was held before a magistrate. At the hearing, CSB presented the testimony of two of the police officers who searched the home of Mother and Father and the CSB case worker who was initially assigned to this case. The first police officer testified about his role in the search of the home. Police arrived with a K-9 drug dog that was certified to alert for marijuana, cocaine-based products, heroin, and methamphetamine. After the drug dog went through the house and did not alert to anything, the police officers conducted a search of the house.

{¶9} The police search resulted in the seizure of the following items: a plastic bag with 2.5 grams of a substance the officers believed was marijuana; a Pyrex measuring cup containing

a white, powdery residue; a plastic cover for a digital scale with a powder residue; \$244 in cash; and a box of plastic sandwich bags. CSB presented no evidence that the suspected marijuana or the white, powdery residue on the cup or the scale lid were illegal substances. Although one of the police officers testified that recovery of these items would have prompted testing, and that he was “assuming” that field tests were performed, he admitted that he had no personal knowledge of whether any of these items had been tested.

{¶10} Mother spoke to the intake case worker the next day, however, and admitted that the police had seized marijuana from her. The caseworker further testified that she “believe[d]” Mother admitted to her that she used marijuana. Mother denied that she had ever manufactured or sold drugs in her home.

{¶11} The police officers testified further that, aside from their suspicions about drug activity in the home, they had no concerns about the physical condition of the home or the children themselves. The home was otherwise appropriate, there was food in the refrigerator, and the children were clothed and appeared clean.

{¶12} Consequently, the only problem in Mother’s home that CSB demonstrated at the hearing was the presence of a small amount of marijuana. CSB presented conflicting evidence about where the marijuana was found. The police officer testified that the marijuana was found under a couch in the living room, but Mother told the caseworker that she had given the officers the bag of marijuana. At most, CSB established that Mother possessed a small quantity of marijuana for her personal use. CSB presented no evidence that Mother ever smoked marijuana in the home or in the presence of her children, nor did it offer evidence that the children’s environment had otherwise been negatively affected by Mother’s marijuana possession or use.

{¶13} In *In re R.S.*, 9th Dist. No. 21177, 2003-Ohio-1594, this Court reversed an adjudication of dependency that was based solely on the mother’s admitted use of marijuana outside the presence of her children. Because the agency failed to present any evidence that the children had been negatively affected by the mother’s marijuana use, this Court concluded that it had failed to establish dependency under R.C. 2151.04(C). *Id.* at ¶13. As we emphasized in *In re R.S.*:

“While this Court certainly does not condone a parent’s use of an illegal substance or abuse of a legal substance, parents have a fundamental right to raise their children. See *Stanley v. Illinois* (1972), 405 U.S. 645, 657-658, 31 L.Ed.2d 551; *In re Murray* (1990), 52 Ohio St.3d 155, 157. Without some evidence that [Mother’s] supervision of her children or the environment of her children has been affected in some negative way by her use of marijuana, there is not clear and convincing evidence of dependency.” *Id.* at ¶20.

{¶14} Although CSB argued, and the trial court concluded, that the facts of this case are legally distinguishable from *In re R.S.*, we cannot agree. Although CSB alleged that there was other evidence of drug activity in the children’s home, it failed to prove that any of the confiscated items was connected to drugs or other illegal activity.

{¶15} The trial court further found this case distinguishable from *In re R.S.* because the police arrested Mother and Father and there were no other adults available to care for the children. The court’s conclusion that the parents’ arrest left the children without a caregiver is unsupported by the evidence. Unlike other cases that this Court has reviewed, there was no evidence that Mother or Father was given any opportunity at the time of their arrest to attempt to contact another caregiver for the children. When the caseworker spoke to Mother the next day, Mother gave her the names of two relatives and CSB placed the children with one of them that same day.

{¶16} This case is legally indistinguishable from *In re R.S.* because the evidence adduced at the adjudicatory hearing demonstrated nothing more than a parent's admitted involvement with a small amount of marijuana, with no evidence that her marijuana use or possession had affected her children in any way. In fact, while the mother in *In re R.S.* admitted to daily use of marijuana, there was no evidence of regular drug use by this mother. The dissent *assumes* that probable cause of unlawful activity existed to support the execution of the search warrant, however, that is merely an assumption since the issue has not been determined by the court below and is not before us on the record.

{¶17} We must again emphasize that we do not condone a parent's use or possession of marijuana, but we cannot conclude that this parental fault, without evidence of its impact on the children, demonstrates a deficiency in the children's condition or environment. Because CSB failed to present any evidence that the condition or environment of these four children warranted their removal by the state, it failed to establish that they were dependent children under R.C. 2151.04(C). The assignment of error is sustained.

III.

{¶18} The assignment of error is sustained. The judgment of the Summit County Court of Common Pleas, Juvenile Division, is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and the cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

BELFANCE, P. J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶19} Because I believe that CSB presented ample evidence to support the trial court's adjudication of dependency, I respectfully dissent. The facts of this case are legally distinguishable from *In re R.S.*, 9th Dist. No. 21177, 2003-Ohio-1594. Unlike the mother in *In re R.S.*, who merely admitted that she used marijuana, the drug involvement of the mother in this case had led to involvement by the Akron Police Department. The police had received complaints from neighbors that drug activity was taking place in the home. After procuring a warrant to search the home for weapons and drugs, which was necessarily based on probable cause, several officers came to search the home. During the search of the home, the officers recovered a bag of marijuana and a digital scale lid with cocaine residue, both found in areas that

were accessible by the children. Moreover, prior to conducting the search, police arrested a man leaving the home who had cocaine in his possession.

{¶20} I believe that the agency met its burden of establishing that the home environment of these children warranted the state in assuming the children's guardianship. I would overrule the assignment of error and affirm the trial court's judgment that adjudicated these children dependent.

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.