

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: K.T.
 K.T.
 K.T.

C.A. No. 14CA010646

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE Nos. 13JC38912
 13JC38913
 13JC39779

DECISION AND JOURNAL ENTRY

Dated: June 15, 2015

SCHAFFER, Judge.

{¶1} Appellant, Marque T., appeals from a judgment of the Lorain County Court of Common Pleas, Juvenile Division, that terminated his parental rights to his three minor children and placed them in the permanent custody of Lorain County Children Services (“LCCS”). This Court reverses.

I.

{¶2} Shaniqua T. (“Mother”) and Marque T. (“Father”) are the parents of K.T., born on November 20, 2010, K.T., born January 24, 2012, and K.T., born on August 6, 2013. Father appealed from the judgment of the trial court, while Mother did not.

{¶3} LCCS had reportedly been involved with the family for a few years before this case was initiated due to domestic violence between the parents. The agency claimed it had

substantiated neglect of the oldest child on the basis of domestic violence between the parents in July 2011.

{¶4} The present case was initiated after concerns arose regarding the safety of the two oldest children. The complaint alleges that Mother took the second child to the hospital due to a fever and nosebleeds in March 2013. During that visit, medical staff discovered that the child's penis was swollen and bruised, with a scrape around the tip. The medical staff was unable to determine whether these injuries were accidental or the result of abuse. The same child also had a significant cut on his ear, which Mother claimed resulted from an accidental cut when shaving his head with a razor. He had a bone scan at that time and had another bone scan a month later. At the time of the second scan, it was discovered that he had a posterior fractured rib that was determined to have been caused by non-accidental means. Mother reported that she and Father had been the only caregivers for the two children except for one day when a friend cared for them.

{¶5} On April 16, 2013, LCCS filed a complaint in juvenile court, alleging that the second child was abused, neglected, and dependent, and that the oldest child was dependent. Thereafter, the two children were adjudicated as alleged, and placed in the temporary custody of the agency. The trial court adopted a case plan for both parents that addressed parenting skills; mental health, including anger management and domestic violence; establishment of paternity; demonstration of the ability to provide for basic needs; and visitation. Shortly after the birth of the third child, that child was taken into the emergency temporary custody of the agency. She was later adjudicated dependent and also placed in the temporary custody of the agency.

{¶6} In August 2013, both parents were participating regularly in visitation, beginning to meet with service providers, and reunification was looking possible when Father was arrested

for a probation violation. Mother's case plan compliance began to deteriorate significantly. She lost her housing and her job, and she stopped attending visits and service appointments.

{¶7} On February 5, 2014, LCCS filed a motion seeking the permanent custody of all three children. Following a hearing conducted in the absence of Father, the trial court granted permanent custody of the children to the agency and terminated the parental rights of Mother and Father. The trial court found that the children could not be placed with either parent within a reasonable time or should not be placed with a parent and also found that it was in the children's best interests to be placed in the permanent custody of LCCS.¹ In so finding, the trial court relied on determinations that (1) both parents failed to substantially remedy the conditions that caused the children to be removed from their home, (2) demonstrated a lack of commitment toward the children, and (3) were unwilling to provide basic necessities for the children or to prevent them from suffering abuse or neglect. *See* R.C. 2151.414(E)(1), (4), and (14). Specifically as to Father, the trial court also found that (1) he was incarcerated at the time of the filing of the motion for permanent custody and would remain incarcerated for at least eighteen months, and (2) he had been repeatedly incarcerated, preventing him from providing care for the children. *See* R.C. 2151.414(E)(12) and (13).

{¶8} Only Father appealed from the trial court judgment. In lieu of a merit brief, his appointed counsel filed an appellate brief in accordance with *Anders v. California*, 386 U.S. 738

¹ It is unclear whether the trial court also relied upon abandonment as a factor in granting the motion for permanent custody. The trial court found that the children were not abandoned under R.C. 2151.414(B)(1)(b) and failed to find R.C. 2151.414(E)(10), abandonment, as a best interest consideration under R.C. 2151.414(D)(1)(e). However, the court did find that Father abandoned the children under R.C. 2151.414(E)(10) in support of its determination under R.C. 2151.414(B)(1)(a), that the children could not be placed with a parent within a reasonable time or should not be placed with a parent. In so doing, the court relied on time accumulated during Father's incarceration. The finding of abandonment is not specifically challenged as error on appeal, and, in any event, the trial court made several alternate findings under R.C. 2151.414(E). *See, e.g.*, R.C. 2151.414(E)(1), (4), (12), (13), and (14).

(1967), in which he concluded that there were no meritorious issues to raise on Father's behalf and that an appeal would be frivolous. Counsel moved this Court to accept the *Anders* brief in lieu of a merit brief and to permit him to withdraw from the case. Father was served with a copy of the *Anders* brief and was given an opportunity to file a brief on his own behalf. Father filed a brief in which he claimed that he had wanted to attend the permanent custody hearing and asserted his right to participate in the hearing.

{¶9} Upon consideration, this Court determined that there were arguable issues to be raised and that an appeal would not be frivolous. The Court, therefore, appointed new counsel to prepare a merit brief. New counsel filed a brief presenting six assignments of error for review. Because we find it to be dispositive, we address Father's third assignment of error.

II.

ASSIGNMENT OF ERROR NO. III

FATHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY DID NOT PARTICIPATE IN ALL PORTIONS OF THE TRIAL, DID NOT OBJECT TO HEARSAY, DID NOT REQUEST FATHER TO BE TRANSPORTED OR ALTERNATIVES FOR FATHER'S PARTICIPATION, AND DID NOT OBJECT TO LACK OF PROPER NOTICE.

{¶10} Father claims that he was denied the effective assistance of trial counsel. In making this claim, he points to trial counsel's absence from the beginning of the permanent custody hearing; failure to object to hearsay regarding details of his sentence; failure to request that Father be transported to the permanent custody hearing or to otherwise arrange for his participation in the hearing; and failure to object to the fact that the motion for permanent custody served upon him did not include a full explanation of the meaning of permanent custody, as indicated in R.C. 2151.414(A)(1).

{¶11} Most troubling among Father's claims in support of this assignment of error is the fact that trial counsel failed to even request that Father be transported to the permanent custody hearing or, alternatively, to arrange for Father's meaningful participation in the hearing by some other means. There is no indication in the record that Father did not want to attend or participate in the permanent custody hearing. Trial counsel entered no objection to Father's absence from the hearing. For the following reasons, we conclude that trial counsel was ineffective in that she failed to protect Father's right to a fair trial by neglecting to ensure his meaningful participation in the permanent custody hearing involving his three children.

{¶12} It is well recognized that parents have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Furthermore, it has been said that this interest does not evaporate simply because he or she has not been a model parent or lost temporary custody of the child to a children services agency. *Id.* at 753. Accordingly, when the state initiates a permanent custody proceeding, the parent must be afforded every procedural and substantive protection the law allows. *In re Hayes*, 79 Ohio St.3d 46, 48 (1997). This includes the right to the effective assistance of counsel. *See State ex rel. Heller v. Miller*, 61 Ohio St.2d 6 (1980), paragraph two of the syllabus and *In re Heston*, 129 Ohio App.3d 825, 827 (1st Dist.1998).

{¶13} The test for ineffective assistance of counsel used in criminal cases is equally applicable to permanent custody proceedings. *In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶ 27, citing *Heston* at 827. This standard two-part test requires a demonstration of deficient performance and resultant prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. Proof of both parts of the test is necessary to establish the claim of ineffective

assistance of counsel. *Bradley* at 142. “The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland* at 670.

Deficient Performance

{¶14} To establish deficient performance, Father must show that counsel’s performance fell below an objective standard of reasonable representation. *Strickland* at 687-688; *Bradley* at 137. There must be “a substantial violation of [] counsel’s essential duties to his client.” *Id.* at 141, quoting *State v. Lytle*, 48 Ohio St.2d 391, 396-397 (1976). At the same time, trial counsel is entitled to a presumption of competency and a presumption that the challenged action might be considered sound trial strategy. *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999); *State v. Carter*, 72 Ohio St.3d 545, 558 (1995). Furthermore, the adequacy of counsel’s performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. *Strickland* at 688.

{¶15} At the beginning of the permanent custody hearing, Father’s trial counsel stated on the record that Father was incarcerated and explained that she did not file a motion to transport Father to the hearing because the trial court had denied her previous motion to transport Father for a different hearing, perhaps as a matter of policy. The record demonstrates that Father’s trial attorney had previously requested that Father be transported from the Lorain Correctional Institution to the Lorain juvenile court for the third child’s adjudicatory and dispositional hearings on October 22, 2013, and she requested alternatively that Father be permitted to participate via video conference for that hearing. The trial court denied the earlier motion and noted that “[c]ounsel has available to her an opportunity to take Father’s deposition if she chooses to do the same.” Trial counsel did not depose Father to obtain his participation for

the adjudicatory and dispositional hearings. In its written order, the court did not state that denial of transportation was a matter of policy. The trial judge acknowledged counsel's in-court statement by simply saying "[t]hank you" and made no further response.

{¶16} Ohio courts, including this one, have recognized that parents have a constitutionally protected right to be present at permanent custody hearings, but they also recognize that such right is not absolute if the parent is incarcerated. *See, e.g., In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, 23629, 2007-Ohio-3999, ¶ 14. The fundamental requirement of due process is an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, Father's due process right to be heard could have been satisfied by arranging for his presence at the permanent custody hearing or by an alternate method of meaningful participation. *See In re S.A.*, 2d Dist. Clark No. 07-CA-110, 2008-Ohio-2225, ¶ 12; *In re Roque*, 11th Dist. Trumbull No. 2005-T-0138, 2006-Ohio-7007, ¶ 18. *See also In re N.L.T.*, 9th Dist. Lorain No. 14CA010567, 2015-Ohio-433, ¶ 34 (Carr, J., dissenting). Father's trial counsel had a duty to protect Father's right to a fair trial by ensuring his meaningful participation at the permanent custody hearing.

{¶17} The Second District Court of Appeals has considered a case that is factually similar to the case at bar. *See In re S.A.* In that case, a child was removed from her mother's care when mother and child tested positive for cocaine at the child's birth. Five other children had previously been removed from the mother's care. Mother was making some progress on her case plan when she was arrested for a probation violation and incarcerated. The agency then sought permanent custody. The trial court refused to allow the mother to be returned from Marysville Prison to allow her to testify at the permanent custody hearing and denied a three-

month continuance that would have allowed her to testify after her release from prison. Trial counsel neglected to provide for any other input from the mother by way of deposition, affidavit, or telephone. The only evidence trial counsel offered on mother's behalf was a brief questionnaire that had been prepared for trial counsel. The Second District concluded that trial counsel had a duty to obtain more meaningful input from Mother and his failure to do so deprived the mother of a meaningful opportunity to participate in the permanent custody hearing and constituted deficient representation. *Id.* at ¶ 12-13.

{¶18} Similarly, the Eleventh District Court of Appeals reversed an order of permanent custody and found trial counsel to be ineffective where counsel had allowed three letters from his incarcerated client to serve as his client's only participation in the hearing. *See In re Rogue* at ¶ 12.

{¶19} Counsel's performance may be found to be deficient if counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Constitution. *Strickland*, 466 U.S. at 687. The primary consideration is whether counsel's performance was such as to "raise compelling questions concerning the integrity of the adversarial process." *State v. Peebles* 94 Ohio App.3d 34, 44 (4th Dist.1994). Therefore, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* at 686.

{¶20} In this case, trial counsel failed to request in writing or orally that Father be transported to the permanent custody hearing. Nor did counsel enter an objection to the absence of Father from the hearing. Trial counsel failed to arrange for a deposition or an affidavit by Father, and she failed to arrange for Father's participation by video or telephone. Any reliance

by trial counsel on the trial court's denial of transportation to the earlier adjudicatory hearing for the third child is misplaced and does not eliminate counsel's responsibility to address Father's right to participate in the permanent custody hearing. Moreover, the permanent custody hearing has a significance that is distinct from that of the adjudication of the third child. Because counsel did not provide Father with an opportunity to be heard at the permanent custody hearing in a meaningful manner, her representation was deficient and the first prong of the *Strickland* test is met.

Resultant Prejudice

{¶21} Father must also demonstrate that he was prejudiced by counsel's ineffectiveness. Prejudice is demonstrated when the appellant proves that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* at 695. "Prejudice sufficient to warrant reversal exists when the proceedings were fundamentally unfair due to counsel's defective representation." *In re S.A.*, 2008-Ohio-2225, ¶ 14, citing *State v. Carter*, 72 Ohio St.3d 545, 558 (1995), citing *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993).

{¶22} To demonstrate that this deficient performance prejudiced Father and warranted reversal, there must be a "showing that counsel's errors were so serious as to deprive [Father] of a fair trial, a trial whose result is reliable." *State v. Post*, 32 Ohio St.3d 380, 388 (1987), quoting *Strickland* at 687. The prejudice component of the *Strickland* test focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding unfair. *Lockhart* at 372. *See also Carter* at 558.

{¶23} In the context of considering prejudice and whether the result would have been different but for Father's participation, the question is not only whether Father would have regained custody of his children, but includes the question of whether a relative might have been awarded legal custody, thereby permitting Father to retain his parental rights. This was not a case where there was overwhelming evidence in favor of terminating parental rights. Father has argued that his absence from the hearing deprived him of the opportunity to provide "valuable information regarding great grandmother's motives [and] abilities as well as whether he abandoned his children as found by the trial court." He asserts, on appeal, that the paternal great grandmother would have been a suitable custodian for the children. He believes his personal testimony in support of his great grandmother would have been significant to the result.

{¶24} In this regard, although the guardian ad litem ultimately recommended that permanent custody of the minor children should be granted to the agency, she had "wrestled with" the question of whether the great grandmother should be given legal custody instead. The guardian ad litem testified that the great grandmother was physically and cognitively capable of being the custodian and that her home was suitable. She believed that Father would likely help the great grandmother with the children upon his release from prison. Correspondingly, the caseworker was uncertain if the great grandmother could care for three such young children, but she was not aware that she had any health issues. The agency's background check revealed no problems and the agency sought to place the children with the great grandmother early in the proceedings. The caseworker also reported that the children were happy when they were with Father. The caseworker stated that, before Father's incarceration, he had attended a couple parenting classes and regularly attended visits, presenting no overt concerns. She stated that the middle child's injuries were never explained, but that Father was not in the home at the time of

the injuries. The caseworker testified that the agency preferred to place the three children together, but it did not currently have a potential adoptive home that would accept all three. The great grandmother testified that she was “up to [the] task” of raising the children and that her family would provide assistance if needed.

{¶25} Otherwise, LCCS’s concern with granting custody to the great grandmother was that she had not been willing to provide care to the oldest child at the beginning of the case. The great grandmother testified that, at that earlier point time, she did not know about the paternity of the children and was content to let the parents attempt to regain custody themselves. She claims that she has, in fact, sought custody since she learned that the children were her biological relatives.

{¶26} Additionally, important discrepancies between the evidence and the trial court’s written decision undermine our confidence in that decision. First, the trial court stated in its opinion that “[r]eferrals have been made for detoxification for Mother and Father” and that the parents had an opportunity to access services for “drug treatment.” Significantly, substance abuse was not an issue in this case and was not a part of the case plan for either parent.

{¶27} Second, the trial court made two factual findings that involved the incarceration of Father: (1) that Father was incarcerated at the time of the filing of the permanent custody motion and would not be available to care for the children for at least eighteen months as he was serving a four year sentence of incarceration, under R.C. 2151.414(E)(12); and (2) that Father was repeatedly incarcerated and that the repeated incarcerations prevented him from providing care for the children, under R.C. 2151.414(E)(13). In support of these findings, the caseworker briefly offered hearsay testimony that Father was arrested for parole violations and was sentenced to four years in prison. LCCS introduced no documentary evidence of any judgments

of conviction for Father. Even more importantly, there is no evidence whatsoever to support the trial court finding of “repeated incarcerations” for Father. If a children services agency wishes to rely on the existence of criminal convictions in establishing its case for permanent custody, proper evidence of any judgments of conviction should be offered into evidence at the hearing. *See, e.g., In re E.M.*, 9th Dist. Wayne No. 14AP0030, 2015-Ohio-641, ¶ 22.

{¶28} Third, in its order granting permanent custody, the trial court reported that all of the children were adjudicated abused and neglected. That is inaccurate. According to the trial court’s judgment entries upon the adjudications in this case, the second child was adjudicated abused, neglected, and dependent, while the oldest child and the youngest child were adjudicated dependent.

{¶29} Accordingly, we conclude that the second prong of *Strickland* is met. Father’s trial counsel was ineffective in that she failed to protect Father’s right to a fair trial by failing to ensure his meaningful participation in the permanent custody hearing. Counsel’s errors were so serious as to deprive Father of a fair trial whose result is reliable. Father’s third assignment of error is sustained. The remaining assignments of error by Father are rendered moot.

III.

{¶30} Father’s third assignment of error is sustained. The remaining assignments of error are moot. The judgment of the Lorain County Court of Common Pleas, Juvenile Division, is reversed and the cause is remanded for further proceedings.

Judge reversed,
and 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 Lorain, 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(C). 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.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

DENISE E. FERGUSON, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and EMILY W. KIRSCH, Assistant Prosecuting Attorneys, for Appellee.

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