IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. H.,	:	
Petitioner	:	
v.	:	No. 2588 C.D. 2009
	:	Submitted: July 23, 2010
Department of Public Welfare,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** November 24, 2010

Petitioner C.H. (C.H.) petitions for review of an adjudication of the Department of Public Welfare (DPW), denying her request to expunge an *indicated report*[1] of child abuse filed by Delaware County Children and Youth Services (CYS)[2] pursuant to the Child Protective Services Law (CPSL).[3] Upon review of the adjudication, the record, and the parties' briefs, we conclude that there is but a single issue presently before the Court. We must determine whether

[1] As noted below, C.H. is also the subject of a *founded* report of child abuse, arising out of the same incident that is the subject of the indicated report. This appeal, however, relates only to C.H.'s appeal from the *indicated* report.

[2] By order dated June 28, 2010, this Court granted Delaware County Children and Youth Services' petition to intervene.

[3] 23 Pa. C.S. §§ 6301-6386. The ALJ approached C.H.'s appeal as a request to expunge the indicated report of child abuse. This seems to be an accurate characterization of C.H.'s appeal, which challenged the manner in which CYS and the Department "maintained" the report. The Department maintains indicated reports of child abuse in a system known as the ChildLine Registry.

the decision of the Chief Administrative Law Judge (ALJ) to strike only a portion of a witness's testimony below is grounds to reverse the adjudication. On appeal, C.H. argues that the ALJ erred in failing to strike the entirety of the witness's testimony when CYS could not produce the notes on which the witness relied during his testimony.[4] For the reasons that follow, we affirm.

The relevant facts and procedural history are as follow. A.H. was born on December 12, 2006. (Finding of Fact (F.F.) 1; N.T. 104.) A.H. has a condition called bronchopulmonary dysplasis (F.F. 10; N.T. 138), which required her to have a tracheotomy with the placement of a permanent tube (CYS Exhibit C-2 (CY-47); N.T. 119) for the purpose of regular (approximately eight times per day) (F.F. 11; N.T. 110) suctioning of secretions that would otherwise interfere with her ability to breathe. (N.T. 110, 129.) A.H. needed her tracheotomy tube to be suctioned so it would not become clogged. (F.F. 12; N.T. 110). If secretions

[4] C.H. raises other issues in her petition for review: (1) whether the ALJ erred in refusing to grant C.H.'s request for a continuance after CYS offered a "CY-49" form (CY-49) into evidence when CYS had not provided C.H. with a copy of that document before the hearing; (2) whether the ALJ erred in concluding that C.H. had entered a guilty plea to the crime of leaving a child unattended in a vehicle; and (3) whether the ALJ erred in concluding that C.H. had entered a guilty plea to a "criminal charge" under a DPW child abuse regulation when the specific charge to which she pleaded guilty is a violation of the Pennsylvania Motor Vehicle Code. CYS contends that the ALJ's rejection of the purported guilty plea as a basis for a founded report of child abuse renders these issues moot. We agree with CYS. The ALJ never admitted the CY-49 into the record, and CYS does not contend that the ALJ erred in rejecting the purported guilty plea as a basis for denying C.H.'s appeal from the indicated report. For these reasons, we need not address these issues.

clogged A.H.'s tracheotomy tube and/or airway, she could die. (F.F. 12; N.T. 111.)

C.H. was A.H.'s babysitter and cared for A.H. twelve hours per day, seven days per week.[5] (F.F. 57; N.T. 175.) C.H. is also a Licensed Practical Nurse. (F.F. 56; N.T. 174.)

On May 6, 2008, when A.H. was approximately one and one-half years old, Kenneth Brown (Brown), a certified paramedic for Delaware County Memorial Hospital, and his partner responded to a 911 call. (F.F. 17-18; N.T. 55-58.) When Brown and his partner arrived at their destination, they observed A.H. buckled in her car seat (F.F. 20; N.T. 61) in a vehicle owned by C.H. (F.F. 15; N.T. 185). Brown observed that A.H. was unattended, except for police officers. (N.T. 59.) The temperature that day was "fairly warm." (F.F. 22; N.T. 61.) Brown testified variously that the inside of the car was "hot," (N.T. 61) "very warm," (N.T. 60) and "warm" (F.F. 21; N.T. 62). Brown observed that A.H. was sweaty, had difficulty breathing, and had blueness around her lips. (F.F. 25 and 26; N.T. 60, 66, 81-82.) Brown could hear pulmonary congestion in A.H.'s lungs. (F.F. 27; N.T. 63.) Brown suctioned secretions through A.H.'s tracheotomy tube and administered "blow-by" oxygen to A.H. (F.F. 28-29; N.T. 63-66.)

[5] The testimony of A.H.'s mother indicates that "nurses," including C.H., cared for A.H. (N.T. 105.)

C.H. was responsible for caring for A.H. when she left A.H. in the vehicle. (F.F. 14-15; N.T. 166.) C.H. admitted to A.H.'s mother that she had left A.H. in the vehicle for five minutes. (F.F. 15; N.T. 166.) C.H.'s testimony indicates that she observed police officers trying to open her vehicle (N.T. 180); however, there is no other testimony in the record indicating that C.H. was at the scene at that time. Her testimony suggests that when she returned to her vehicle, police took her into custody and placed her in the back of a police vehicle before driving her away. (N.T. 180-184.)

Brown transported A.H. to the emergency room at Delaware County Memorial Hospital based upon her condition and heat exposure. (F.F. 30; N.T. 66-67; CY-47.) On the same day, Thomas Sharp, a Detective Sergeant with the Upper Darby Police Department, investigated a complaint regarding the incident.[6] (N.T. 30.)

Dr. John O'Donnell (Dr. O'Donnell) examined and treated A.H. at the hospital. (F.F. 36; N.T. 118-119.) Dr. O'Donnell observed that A.H. was sweating and wheezing when she arrived and that she had to have secretions suctioned

[6] After investigating the incident, Sharp filed charges against C.H., including, *inter alia*, a charge of leaving a child unattended in a vehicle, a summary offense under Section 3701.1 of the Pennsylvania Motor Vehicle Code, 75 Pa. C.S. § 3701.1. (CYS Exhibit 1 (Criminal Complaint).) C.H. ultimately pled guilty to one of the charges. The documentary evidence does not clearly establish whether C.H. pled guilty to leaving a child unattended in a vehicle or to leaving a vehicle unattended, the latter of which is a violation of Section 3701 of the Vehicle Code, 75 Pa. C.S. § 3701. Nevertheless, C.H.'s *own admission* in her testimony is that she pleaded guilty to leaving a child unattended in a vehicle. (F.F. 16; N.T. 193.)

several times. (F.F. 37; N.T. 119-121.) Hospital staff also administered an albuterol breathing treatment. (F.F. 47; N.T. 136.) Dr. O'Donnell testified that A.H. had a lot of liquid coming from her airway. (N.T. 119.) At the time Dr. O'Donnell examined and treated A.H., A.H. had an elevated temperature (F.F. 39, N.T. 119-20), her pulse rate was a "little high" (F.F. 39; N.T. 120), and she was in "mild-to-moderate" respiratory distress (F.F. 40; N.T. 120). Dr. O'Donnell believed that A.H. was at risk of suffering "aspiration, respiratory failure" or death. (F.F. 45; N.T. 135.)

On May 29, 2008, CYS filed an indicated report of child abuse against C.H. On July 8, 2008, C.H. sent a letter to the Secretary of Public Welfare, seeking to appeal "any determinations made in this case by the [CYS]."[7] On July 17, 2008, DPW sent a letter to C.H., advising her that she had been identified as a perpetrator of child abuse. On September 9, 2008, DPW's Office of Children, Youth and Families (CYF) sent a letter to C.H., rejecting her request to expunge

[7] An "indicated report" is defined as:

> A child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based on any of the following:
>
> (1) Available medical evidence.
>
> (2) The child protective service investigation.
>
> (3) An admission of the acts of abuse by the perpetrator.

Section 6303(a) of the CPSL, 23 Pa. C.S. § 6303(a). C.H., as the subject of an indicated report of child abuse, could seek to have the report expunged if no basis in the CPSL existed to support the indicated report.

the indicated report. On October 1, 2008, C.H. appealed the denial of expungement, challenging the contents of the indicated report and asserting that CYF had not satisfied certain requirements of the CPSL. On October 2, 2009, CYS issued a founded report[8] of child abuse based upon C.H.'s guilty plea.[9] CYF assigned the matter to the ALJ, who held a hearing on October 8, 2009.

This appeal centers on Brown's testimony. Brown did not appear in person at the hearing; rather, he testified by telephone.[10] Counsel for CYS questioned Brown regarding his observations of A.H.'s condition and the measures he took in response to her condition. Counsel for CYS then began to question Brown regarding the timing of events, apparently seeking to establish some notion of the amount of time that C.H. had left A.H. unattended. Because the person who had called 911 was not identified, counsel for CYS sought to establish a time-line from the point at which Brown received the call from dispatch through the time he left the scene for the hospital with A.H.

[8] A "founded report" is an alternative means of identifying a perpetrator of child abuse for the purposes of the CPSL. Section 6303 of the CPSL defines a "founded report" as "[a] child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that a child who is a subject of the report has been abused, including the entry of a plea of guilty or nolo contendre of a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse."

[9] *See supra* n.l.

[10] There is no indication in the record of the reasons why Brown did not testify in person. There is likewise no indication that C.H.'s counsel objected to the telephonic testimony.

Counsel for C.H. began his cross-examination of Brown with the following exchange:

> Q. Is there a report that you are referring to, as we speak?
>
> . . .
>
> Q. Is there something that you have in writing that you are using to jog your memory for an event that happened over a year-and-a-half ago?
>
> A. Yes.
>
> Q. And what is it that you have in front of you?
>
> A. I have a copy of the CY-47 and my—some of my notes from the case.
>
> Q. Have you provided those notes to counsel, who just asked you those questions?
>
> A. I'm assuming that what she has is a CY-47.
>
> Q. Have you provided your notes to anyone?
>
> A. No, sir, none other than my—whatever my transfer of care would have been to the hospital.

(N.T. 77-78.) Counsel for C.H. then proceeded to cross-examine Brown on his substantive testimony. (N.T. 78-84.) He concluded his cross-examination without any objection to Brown's testimony.

On re-direct, counsel for CYS again sought to establish a general time period for which C.H. had left A.H. unattended. During this testimony, counsel for C.H. attempted to make an objection:

> Q. So the time you were on the scene, added to the time that it took for you to arrive, would be a total of 13 minutes?

A. *Let me look.*

Q. Okay.

MR. PARISH: Your honor, I would like to place an objection on the record inasmuch as the defendant's witness is referring to –

(N.T. 88.) The record shows that C.H.'s counsel did not complete his objection and that Brown completed his response to the pending question. CYS asked another question, to which C.H.'s counsel raised an "asked and answered" objection, which the ALJ sustained. (N.T. 89). CYS then completed its redirect.

At the conclusion of Brown's examination, the ALJ asked whether C.H.'s counsel had an objection, leading to this record exchange:

THE COURT: And counsel had an objection?

MR. PARRISH: I have an objection because the witness is referring to notes that we do not have access to and I do not have the ability to cross-examine based on those notes. He's using those notes to jog his memory and I would object to his testimony in its entirety inasmuch as he's referring to information that we do not have access to and it inhibits my ability to cross-examine.

MS. AMOROSO: Present recollection refreshed is allowed and he's using his notes to refresh his memory as to the specifics of it. I think that's allowed.

MR. PARRISH: It's allowed; but if he was sitting here in the court, I would say, "Sir, can I see what you are using to refresh your recollection?"

MS. AMOROSO: Well, the fact that we're doing it by telephone shouldn't preclude us from being able to offer it—

ALJ: Right. You can ask questions on cross-examination if you—

> MR. PARRISH: Yes, but I can't see the notes.
>
> MS. AMOROSO: I'm not offering the notes.
>
> ALJ: right, the notes aren't being offered.
>
> MR. PARRISH: I understand that, but he's using it to jog his memory and there's something on the notes that is exculpatory or helpful to my case, I don't have access to that.
>
> ALJ: I would agree with you there.
>
> MS. AMOROSO: Can I finish? I think all that you can do—first of all, if I am not offering his notes, then they are not—he doesn't have an opportunity to see them. I haven't seen them. This witness is simply using those notes to jog his memory and present recollection refreshed is allowed and that's what it is.
>
> ALJ: I would agree.
>
> MS. AMOROSO: I have no other questions.

(N.T. 88-92.) The ALJ thus agreed with CYS's Counsel that a witness could use notes to refresh his memory, but did not address the contention made by C.H.'s counsel that when a witness uses notes to refresh a memory, opposing counsel has a right to review the notes in order to cross-examine the witness.

Approximately two months later, the ALJ issued his November 30, 2009 adjudication and order. In his adjudication, the ALJ indicated that he incorrectly overruled C.H.'s objections regarding Mr. Brown's use of notes in his telephonic testimony and Dr. O'Donnell's use of a medical report in his testimony. He noted that on October 29, 2009, he issued an order directing CYS to provide C.H.'s counsel with a copy of (1) notes Brown used during his testimony, and (2) a

medical report Dr. O'Donnell had prepared. (Adjudication at 12.) According to the ALJ's decision, CYS provided C.H.'s counsel with the medical report and the CY-47 form (which had been produced during the hearing), but indicated that Brown had destroyed the notes he used during his testimony. In her post-hearing brief, C.H. requested that the ALJ strike the testimony of Dr. O'Donnell and Brown.

The ALJ rejected C.H.'s motion to strike as to Dr. O'Donnell, noting that CYS had ultimately given the report to C.H. and C.H. had the opportunity to reopen the hearing record. The ALJ granted *in part* the motion to strike as to Brown's testimony. The ALJ struck any testimony from Brown referring to time frames associated with the incident. The ALJ reasoned that although C.H. knew at the outset of Brown's testimony that Brown was referring to notes as he testified, C.H. did not object until re-direct examination and in response to yet another line of questioning in CYS's effort to establish a timeline. (N.T. 88.) As to other aspects of Brown's testimony, however, the ALJ noted that C.H. had a copy of the CY-47 (captioned as "Report of Suspected Child Abuse") form that Brown had filed, to which Brown had referred in his testimony, and which was entered as an exhibit into the record. (Adjudication at 12.)[11]

[11] Counsel for C.H. objected to the admission of the form CY-47 during the hearing, and the ALJ overruled his objection to the admission of the document. The ALJ, however, sustained

On the merits of the appeal, the ALJ addressed the primary issue of whether the Department is maintaining the indicated report of child abuse against C.H. in a manner that is consistent with the CPSL's definition of the term "child abuse." Section 6303(b) of the CPSL defines the term "child abuse" as an act or series of acts that "creates an imminent risk of serious physical injury."[12] In this regard, the ALJ concluded that CYS had sustained its burden to prove that C.H.'s conduct in leaving A.H. unattended created an imminent risk of serious bodily injury. The ALJ based his conclusion upon the testimony of Brown concerning A.H.'s condition when he arrived at the scene. The ALJ also found significant the testimony of Dr. O'Donnell, who described A.H.'s condition when he examined her and opined that, at the time he examined her, A.H. was at imminent risk of developing mucus plugs and, consequentially, suffering significant respiratory distress. The ALJ opined that the expert opinion of Dr. O'Donnell was sufficient to establish that, if emergency medical personnel had not removed A.H. from the car when they did, she would have experienced severe respiratory distress.

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a hearsay objection to the portion of the report in which Brown stated that a police officer had stated that A.H. had been left unattended in the vehicle for thirty minutes.

[12] The ALJ also considered whether CYS's founded report of child abuse acted as a bar to a decision on the merits, noting that the summary offense of leaving a child unattended in a motor vehicle could support a founded report. The ALJ concluded that the classification of the report as founded was not supported by substantial evidence because of conflicting evidence regarding C.H.'s actual guilty plea. Consequently, the ALJ reasoned that the founded report did not bar consideration of C.H.'s appeal of the indicated report of child abuse. (Adjudication at 13.)

C.H. now petitions for review.[13] As noted above, the only issue before us on appeal is whether the ALJ erred in failing to strike all of Brown's testimony because CYS could not (or, in C.H.'s view, deliberately did not) produce the notes Mr. Brown referred to in order to refresh his recollection.[14] On this question, C.H.'s only argument is that the ALJ's failure to strike Brown's testimony in its entirety violates her right to confront a witness under the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. (Appellant Br. at 14-16.) In support of her argument, C.H. relies on two cases from our Superior Court—both involving appeals from criminal prosecutions.[15] These rights to confront an adverse witness, however, are rights afforded to criminal defendants. They do not attach in an administrative

[13] This Court's standard of review of an order of DPW's Bureau of Hearings and Appeals is limited to considering whether the adjudicator erred as a matter of law, violated constitutional rights, or based his order on necessary factual findings that are not supported by substantial evidence. 2 Pa. C.S. § 704; *Woods Serv., Inc. v. Dep't of Pub. Welfare*, 803 A.2d 260 (Pa. Cmwlth. 2002), *aff'd*, 572 Pa. 228, 839 A.2d 184 (2003).

[14] In her letter brief to the ALJ, C.H.'s counsel identified Pennsylvania Rule of Evidence 612 in support of her position. That rule provides that, when a witness uses a "writing or other item to refresh" his memory during testimony, "an adverse party is entitled to have the writing . . . produced at the hearing . . . to inspect it, to cross-examine the witness on it and to introduce in evidence those portions that relate to the testimony of the witness." Pa. R.E. 612. In her petition for review, however, C.H. does not assert that the ALJ's ruling violated Pa. R.E. 612, and C.H. does not discuss the application of this rule in her brief to this Court. We note, on the other hand, that we are here reviewing a decision of an administrative agency, and, generally speaking, the Pennsylvania Rules of Evidence do not apply. *See* 2 Pa. C.S. § 505; *Pinnacle Health Sys. v. Dep't of Pub. Welfare*, 942 A.2d 189, 194 n.10 (Pa. Cmwlth. 2008).

[15] *Com. v. Redmond*, 577 A.2d 547 (Pa. Super. 1990); *Com. v. Pickering*, 533 A.2d 735 (Pa. Super. 1987).

proceeding on an expungement request. *R. v. Department of Public Welfare*, 535 Pa. 440, 448, 636 A.2d 142, 145-46 (1994).[16]

Accordingly, we reject C.H.'s confrontation clause argument. Because all other arguments are either moot or have been waived, we affirm the ALJ's adjudication and order.

P. KEVIN BROBSON, Judge

[16] Although the Supreme Court rejected the confrontation clause argument in *R. v. Department of Public Welfare*, it did analyze whether the petitioner's inability to see the victim testify (because she testified *in camera*) violated his due process rights under the United States Constitution and the Pennsylvania Constitution. *R.*, 535 Pa. at 448-63, 636 A.2d at 146-53. C.H., however, does not raise or preserve a due process argument in her Petition for Review, in her statement of issues on appeal, or in her brief. Accordingly, such an argument is not before us. Pa. R.A.P. 1513(d); *Greene v. Cnty. Children & Youth Serv. v. Dep't of Pub. Welfare*, 913 A.2d 974, 981 (Pa. Cmwlth. 2006), *appeal denied*, 593 Pa. 730, 928 A.2d 1291 (2007) (issues not raised in petition for review waived); *Com. v. Smothers*, 920 A.2d 922, 925 (Pa. Cmwlth.), *appeal denied*, 594 Pa. 691, 934 A.2d 75 (2007) (issues not discussed in argument section of brief waived).

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	:	
Department of Public Welfare,	:	
Respondent	:	

O R D E R

AND NOW, this 24th day of November, 2010, the order of the Department of Public Welfare, Bureau of Hearings and Appeals is AFFIRMED.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. H., Petitioner	:	
v.	:	No. 2588 C.D. 2009
Department of Public Welfare, Respondent	:	Submitted: July 23, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE COHN JUBELIRER **FILED: November 24, 2010**

I respectfully dissent from the majority opinion. I believe DPW's order should be vacated, Brown's testimony should be stricken in its entirety, and the matter remanded to DPW. In R. v. Department of Public Welfare, 535 Pa. 440, 636 A.2d 142 (1994), the Pennsylvania Supreme Court acknowledged that an individual in an expungement proceeding has a limited right in her reputation under the Pennsylvania Constitution that cannot be deprived without due process and that the right to confront a witness, as guaranteed by due process, must be balanced according to the test articulated in Matthews v Eldridge, 424 U.S. 319

(1976).[1] C.H. argues, as R. did, that she did not have the opportunity to reasonably cross-examine DPW's witness and, therefore, her rights were violated. See 2 Pa. C.S. § 505 (although technical rules of evidence do not apply at agency hearings, "[r]easonable examination and cross-examination shall be permitted"). Under the Matthews test, this Court must examine three factors in determining whether C.H.'s due process rights have been violated: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews, 424 U.S. at 335.

In this case, the first element, C.H.'s interest that will be affected by the expungement proceeding, is generally her reputation and specifically her ability to care for A.H. in the future. See, R. at 454, 636 A.2d at 149 (recognizing the right to reputation under Article I, section 1 of the Pennsylvania Constitution is implicated by DPW expungement proceedings). The risk of erroneous deprivation of these interests in the circumstances of this case, *where Brown destroyed his notes immediately after testifying and DPW took no steps to preserve these notes*, is that there is a substantial chance that C.H. may have been deprived of potentially exculpatory evidence. Finally, the Commonwealth has a very substantial interest

[1] The majority holds that R is not applicable because C.H. did not explicitly argue a violation of due process. I disagree. Although C.H. does not expressly invoke the words "due process" in her brief, she argues that she should have had the opportunity to review the notes relied upon by Brown and that the failure of DPW to take steps to preserve these notes was a violation of her rights. I believe this argument is sufficient to trigger a due process analysis such as the one the Supreme Court applied in R.

in expeditiously protecting children who may have been abused, R., 535 Pa. at 459, 636 A.2d at 151; however, the administrative burden of instructing Brown to preserve his notes would not have been great. Therefore, under the circumstances of this case, C.H. was erroneously deprived of the due process right to fully cross-examine a witness against her based on her inability to review the notes he used while testifying. Because of this due process violation, I believe that Brown's testimony should be stricken in full, and this matter should be remanded to DPW for a determination on the remainder of the record.

RENÉE COHN JUBELIRER, Judge