No. 29965 - In Re: Daniel D. and Samantha D.

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, Chief Justice, dissenting:

Daniel D., father of the unfortunate children involved in this case, contends that he was denied due process when the circuit court terminated his parental rights. Daniel D. has argued that he did not have adequate protection against self-incrimination in order to fully participate in the improvement periods extended to him by the circuit court. The majority opinion agreed with Daniel D. and reversed the circuit court's termination orders. Because the majority opinion has not properly applied existing precedent, and, in reaching its ultimate resolution of this case, has utterly and inexcusably failed to consider the best interests of the two innocent children involved, I am compelled to dissent.

Our Prior Holding in *State v. James R.* Should Have Controlled this Case

The record clearly shows that the evidence established without a doubt that Daniel D. repeatedly sexually abused his four year old daughter.[1] However, the majority opinion has determined that Daniel D. needs yet another opportunity to demonstrate that he has

[1]The majority opinion did not disturb the circuit court's determination that Daniel D. engaged in sexual activity with his daughter. In other words, even the majority opinion has agreed that Daniel D. sexually abused his daughter.

changed and will never again sexually assault his children. This determination is wrong.

The circuit court initially awarded Daniel D. a three month improvement period. During this improvement period, Daniel D. absolutely refused to participate in any activity that would assist in proving he was on the road to recovery. Nevertheless, the circuit court was patient with Daniel D. In fact, the circuit court gave Daniel D. a second three month improvement period. However, Daniel D. once again refused to cooperate in rehabilitation efforts. Faced with unrefutable evidence that Daniel D. had engaged in sexual activities with his adolescent daughter, and further faced with the fact that Daniel D. refused to cooperate with efforts toward rehabilitation, the circuit court fulfilled its obligation under the law to protect the innocent children by terminating Daniel D.'s parental rights. The majority opinion, by reversing the termination orders, has rewarded Daniel D. for refusing efforts of rehabilitation, and has failed to protect the interests of the D. children.[2]

The majority opinion attempts to justify its decision by erroneously asserting

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[2]Even when addressing parents' rights in child abuse and neglect cases, the best interests of the child(ren) must be given priority. *See In re Emily*, 208 W. Va. 325, 336, 540 S.E.2d 542, 553 (2000) ("A parent's rights are necessarily limited in this respect because the pre-eminent concern in abuse and neglect proceedings is the best interest of the child subject thereto."); Syl. pt. 3, *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999) ("'Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).' Syllabus point 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)."); *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) ("[T]he best interests of the child is the polar star by which decisions must be made which affect children." (citation omitted)).

that our law is unclear as to whether Daniel D. would have incriminated himself by participating in an improvement period. To this end, the majority opinion crafted the illusion that a new and novel issue was raised in this case. That is, the majority opinion asserted that our law is unclear as to whether a parent in a child abuse and neglect proceeding could meaningfully participate in an improvement period without having such participation used against the parent in a subsequent criminal prosecution. This issue is neither new nor novel. In fact, the exact issue was squarely addressed by the Court in *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992).

James R. involved a father who was charged, in a civil child abuse and neglect proceeding, with sexually abusing his three children and forcing his wife to engage in sex with their oldest son. The circuit court found that sexual abuse had occurred, but granted the father an improvement period. After the improvement period, criminal charges were brought against the father based upon his sexual abuse of the children. The father motioned the circuit court to disqualify the prosecutor from the criminal proceeding because the prosecutor had taken part in the civil child abuse and neglect proceeding. The circuit court granted the motion. The State appealed the order of disqualification.

This Court held in *James R.* that the circuit court erroneously disqualified the prosecutor. We explained "a prosecutor does not represent conflicting interests by representing the State first in a civil abuse and neglect proceeding and then in subsequent

criminal proceedings against the same person." *James R.*, 188 W. Va. at 47, 422 S.E.2d at 524. The reasoning in *James R.* was based upon the fact that the prosecutor could not use evidence against the father that had been obtained during the course of the father's cooperation with the requirements of the improvement period. *James R.* made this point abundantly clear in syllabus point 3 of the opinion:

> No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W. Va. Code § 49-6-4(a) (1992).

James R. controlled the disposition of this case. The father in the instant matter alleged that he did not cooperate with the mental health evaluators during the improvement period, because he believed that his cooperation would have been used against him in a criminal proceeding. The contention was baseless. *James R.* made clear that the father in the instant case could cooperate with authorities during the improvement period, and none of that evidence could be used in any subsequent criminal proceedings. The majority opinion has engaged in a long-winded dissertation to come to the exact same conclusion that was reached in *James R.*[3] The majority opinion considered its holding unprecedented, which enabled it to

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[3]For example, compare syllabus point 7 of the majority opinion with syllabus point 3 of *James R.*, which is quoted above. Syllabus point 7 of the majority opinion states:

> West Virginia Code § 49-6-4 (1984) (Repl. Vol. 2000) was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through

(continued...)

conclude that Daniel D. was unaware he could participate in the improvement period without the threat of incriminating himself. In light of the existing precedent of *James R.*, the majority opinion's conclusion in this regard is clearly flawed.[4]

In the final analysis, this case presented a simple issue that this Court previously resolved in *James R.* The majority opinion elected to ignore *James R.* by holding that our law was unclear as to the consequences of cooperating with professional authorities during an improvement period. As a result of the majority decision, the lives and mental stability of two innocent children must continue to be held in limbo. Such an outcome is certainly not in these children's best interest. *See* Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d

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[3](...continued)

> court-ordered psychological examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

This construction of W. Va. Code § 49-6-4 constitutes no new law and is nothing more than an unnecessary restatement of syllabus point 3 of *James R.*

[4]The majority opinion was also disingenuous with its creation of syllabus points 8 and 9. Those syllabus points were intended to hold that when a parent consults with non-medical professionals during an improvement period, the parent's cooperation cannot be used against him or her. Such a holding has no basis in this case. Daniel D. *refused* to cooperate with the mental health evaluators. The trial court's decision in this case was not based upon the failure to cooperate with anyone else. Thus, the majority opinion should never have addressed a matter that had no application to the facts presented. Similarly, because the Court was not asked in this case to address the question of post-termination visitation, the topic should not have been raised. I am appalled that the majority opinion, nevertheless, seems to suggest that such visitation may be appropriate where a father has sexually abused his child and then unequivocally refused any treatment.

365 (1991) ("Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. . . ."). Meanwhile, Daniel D. gets to decide for the third time whether or not he is prepared to take responsibility for conduct he was unequivocally found to have committed during the abuse and neglect proceedings. In deciding to allow Daniel D. a third improvement period, the majority opinion has clearly failed in its duty to consider the best interests of the children whose well being is at stake. "'The goal of an improvement period is to facilitate the reunification of families *whenever that reunification is in the best interests of the children involved*.'" *In re Emily*, 208 W. Va. 325, 334, 540 S.E.2d 542, 551 (2000) (emphasis added) (quoting *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 258, 470 S.E.2d 205, 212 (1996)).

For the reasons stated, I dissent from the majority decision. I am authorized to state that Justice Maynard joins me in this dissenting opinion.