STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
May 10, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: Robert W., Jr., Ariel W., and Oceana W.

No. 11-0789 (Mercer County 10-JA-125-OA, 10-JA-126-OA, 10-JA-127-OA)

MEMORANDUM DECISION

This is an appeal by a father, Robert W., Sr. (hereafter "father" or "Petitioner"),[1] of the May 6, 2011, order of the Circuit Court of Mercer County terminating his parental rights to his three children. Having thoroughly reviewed the parties' briefs, appendix on appeal, arguments of counsel, and applicable law, this Court concludes that the underlying order establishing sexual abuse as the basis for terminating parental rights is flawed. Specifically, the order adjudicating the existence of sexual abuse fails to meet requisite statutory standards. Because the termination of the father's rights is based on an inadequate adjudication order, the order terminating his parental rights must be vacated and the matter remanded for further proceedings. As this case presents no new or substantial question of law, its proper disposition is by memorandum decision as contemplated by Rule 21 of the Revised Rules of Appellate Procedure.

[1]Initials are used to identify the last names of parties in cases which involve sensitive facts such as those in abuse and neglect proceedings. *See In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

This abuse and neglect action was initiated by a petition filed by the Department of Health and Human Resources (hereafter "DHHR" or "State") on behalf of three children, Robert W., Jr., Ariel W. and Oceana W.[2] The petition seeking emergency removal of the children from the home was based on an anonymous report about Robert W., Sr. sexually abusing his son. The petition contained the following allegation:

> On or about October 20, 2010, an anonymous referral was received regarding the sexual abuse of a six year old child. The referent stated that he overheard a conversation between two men about how the father was making his son "s _ _ _ his d_ _ _" and the father was "f_ _ _ing him in the a_ _."

According to the petition, the reporter of the sexual abuse was identified during the course of the DHHR investigation, and the investigation also included interviews with the son and the child's mother. As alleged in the petition, the son told the worker that "his daddy has 'stabbed him in the b_ _ _, and it hurt really bad.' R.[]W.[], Jr. also stated that his 'daddy rammed me through the wall and choked me' . . . .[and] that his 'sister A. puts her b_ _ _ in his face [. . . .]." The petition alleges that when the mother was told what the son had said to the worker the mother said "there is 'no way possible that her husband would ever do anything like this to any of her children.' She stated that she 'would know if that was

[2]At the time the petition was filed on October 21, 2010, Robert W., Jr. was five years old, Ariel W. was fifteen, and Oceana W. was seventeen. Oceana has reached majority during the pendency of this matter.

happening'. [Mrs.] W. stated on several occasions that, '[the son] is nothing but a liar and he lies all of the time.'"

At the March 4, 2011, adjudicatory hearing, the man who reported the sexual abuse testified that he was "flea marketing" when he overheard a conversation between two people sitting in a truck next to him selling wood. He had previously learned the name of the person he heard make the statement to be Robert W., Sr. He further said the father made the statement while he was "carrying on" with "[s]ome old man . . . sitting beside of him" in the truck. The man who had made the report to DHHR testified that the father said: "When I get horny and my wife doesn't want to do anything, I take my boy out and get him to s_ _ _ my d_ _ _, and if that doesn't work, I f_ _ _ him in the a_ _."

The DHHR worker who filed the petition also testified at the hearing. In the course of questioning by the prosecution about where the family members were residing, the father's counsel objected to any potential testimony the DHHR worker may offer regarding statements R.W., Jr. may have made to her during her initial investigation since she was not a play therapist. The prosecutor responded with "I have no intention of asking those questions." Thereafter, the prosecution established through the testimony of the DHHR worker that the mother and the three children were living in Pulaski County (Virginia) and the father was living separately in Mercer County (West Virginia). She also testified that of

the three children, there was one male child. During cross examination by the guardian ad litem, the DHHR worker testified that after receiving the report of sexual abuse she determined where the father's truck was located and went to meet with him; the father revealed that the son was in school at the time. The guardian ad litem asked the worker if she met with the child, which the worker simply said she had without further elaborating on anything the child said or what the worker observed about the child at that initial meeting. The worker also testified that she had scheduled a forensic interview of the child, and removed all of the children from the home. The State then rested its case.

The father did not testify and offered no other evidence. During closing argument, the prosecution maintained that the evidence before the court was uncontroverted and "[s]ilence in these cases can be used against a respondent, unlike criminal court."[3] Petitioner's counsel argued that testimony about a statement someone has made is not clear and convincing evidence that what was said actually occurred since a statement could be made for any number of reasons. The judge responded by stating "I disagree with you. I strongly disagree with you, strongly disagree with you. I find the State has proven by clear and convincing evidence that Mr. W. has abused this child, and the State is asking that abuse finding apply to all three children [since they reside in the same household and] I'll make

[3]*See* Syl. Pt. 2, *W.Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996) (holding that a court may consider failure of a parent to respond to probative evidence in an abuse and neglect hearing as evidence of culpability).

that finding." The court later clarified that the finding of abuse was sexual abuse. The April 14, 2011, adjudication order contains the following ruling of the court: "After due consideration of the pleadings filed herein, the evidence presented, and the argument of counsel, the Court FINDS by clear and convincing evidence that the respondent father has sexually abused the infant child, Robert W[.], Jr."

On April 18, 2011, a disposition hearing was held at which the State's motion for termination of the father's parental rights was considered along with the father's motion for an improvement period. The guardian ad litem advised the court that both daughters wished that the father's parental rights not be terminated. Nevertheless, the lower court made the following announcement from the bench: "The Court's going to find that the facts that give rise to this were so compelling that I'm going to terminate the parental rights to all three of these children – that's parental, custodial, the whole works." The May 6, 2011, disposition order contained the following ruling:

> After due consideration of the pleadings filed herein, the evidence previously presented, and the argument of counsel, the Court FINDS that all three (3) infant children were adjudicated as abused children because of the sexual assault of the respondent father upon Robert W[], Jr., and that such constitute aggravated circumstances, and the Department was not required to make reasonable efforts to preserve the relationship between the respondent father and these infant children or to reunify those children with that [sic] respondent. Furthermore, and despite the wishes of the older two (2) female children, the Court FINDS that neither continuation in the home nor reunification is in the best interest of the infant children because

> of the aforementioned sexual assault. The Court FINDS that there is no reasonable likelihood that the conditions of abuse case [sic] be substantially corrected in the near future, and it is necessary to terminate the parental, custodial, and guardianship rights of the respondent father as to all three (3) infant children.

On appeal Petitioner argues that the termination of his parental rights was based on insufficient evidence of sexual abuse. He renews the argument made below that testimony about a statement someone has made is not clear and convincing evidence that what was said actually occurred. He maintains that the only thing that his standing silent could prove under the circumstances was that he was culpable of making such a statement, not that an abusive act was committed. Petitioner also emphasizes that the DHHR worker's testimony at the adjudication hearing did not contain any information regarding actual incidents of sexual abuse, nor did it contain any information relative to anything anyone, including the son, told her about the family situation. Additionally, the State presented no forensic evidence of sexual abuse.

This Court has said that the procedures in abuse and neglect cases "vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children." *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). Rule 25 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings states that "[t]he final adjudicatory

hearing shall be conducted in accordance with the provisions of W.Va. Code § 49-6-2(c) and -2(d). Subsection (c) contains specific direction relevant to the adjudication ruling by expressly providing:

> The petition shall not be taken as confessed . . . . At the conclusion of the hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected and, if applicable, whether the parent, guardian, or custodian is a battered parent, all of which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

W.Va. Code § 49-6-2 (c).

The heightened burden placed on the State to establish the existence of abuse and/or neglect by clear and convincing evidence in these cases respects the constitutional dimensions of the rights and interests of all family members. The United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), recognized the heightened burden of proof as essential to the determination of whether to terminate parental rights because the private interest affected is commanding and the threatened loss is permanent. *Id.* at 758. The Supreme Court further noted in *Santosky* that children and parents are not presumed adversaries at the fact-finding or adjudication stage of an abuse and neglect proceeding. It is not until "[a]fter the State has established parental unfitness . . . that the interests of the child and the natural parents do diverge. . . . [U]ntil the State proves parental unfitness, the

child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Moreover, the burden of proof never shifts from the State to the parent throughout a child abuse and neglect case. Syl. Pt. 2, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981). Clearly, the State's interference with the parent-child relationship in abuse and neglect cases can only be justified when the State meets its burden of producing clear and convincing proof of abuse and/or neglect through the admission of evidence.

From the Appendix accompanying this appeal,[4] the shallowness of the evidence produced by the State is readily apparent. The only evidence of record was the testimony of a man who overheard the father utter a vulgar statement regarding abusive sexual acts with his son and the testimony of the DHHR worker. The worker's testimony established that she met with the child alleged to be sexually abused, scheduled a forensic interview with the child alleged to be sexually abused, met with the father, and took steps to remove all three children from the home. While the allegations as stated in the petition represent that the father actually committed the unspeakable acts depicted in the statement he was overheard saying, the governing statute makes it clear that "the petition *shall not* be

[4]The Appendix Petitioner certified to this Court after having "conferred in good faith with counsel for all parties" was limited to the order of adjudication, the order of disposition, the child abuse and neglect petition, the transcripts of the adjudication and disposition hearings and a certified copy of the docket sheet of the circuit court clerk.

taken as confessed." W. Va. Code § 49-6-2 (c) (emphasis added). The statute expressly provides that a court's adjudication of abuse or neglect must be based upon clear and convincing evidence presented at the adjudication hearing.

The prosecution in this case had the responsibility to establish the truth and validity of the allegations by clear and convincing evidence. Our review reveals that this responsibility was simply not fulfilled. The child alleged to be sexually abused did not testify, nor did the State call a qualified individual who could relate any corroborating statements the child made regarding the sexual abuse alleged. Additionally, no offer was made by the State of the results of a forensic interview, physical evidence of sexual abuse, results of a medical examination of the son, or any testimony of an eye witness, older siblings, mother or other family member which would establish that the father committed the perverse acts of which he spoke. Without question, the acts depicted in the statements which were overheard involve abhorrent and unconscionable behavior. While it is hard to imagine why anyone in a civilized society would make such statements if they were not true, that is not the question before us. Terminating constitutionally protected parental rights upon utterance of such statements alone without clear and convincing evidence supporting a finding that the stated sexual abusive acts were carried out falls shy of this evidentiary standard courts are bound to apply in these actions.

The weakness of the presentation of the case by the State that the acts of sexual abuse occurred is reflected in the oral and written adjudication rulings of the lower court. Those rulings merely state the ultimate conclusion that the father sexually abused his son. Without reference to specific facts relied upon as establishing clear and convincing evidence of sexual abuse, this Court has no basis on which to conduct a review.

This Court's holding in syllabus point five of *In re Edward B.* provides an applicable remedy to the situation before us.

> Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

210 W.Va. at 624, 558 S.E.2d at 623. Accordingly, the May 6, 2011, order of the circuit court terminating the parental rights of Robert W., Sr. is vacated. The case is remanded to the circuit court to be placed on the active docket and scheduled for an adjudication hearing at which additional evidence may be offered.[5] If the hearing results in an adjudication of the

---

[5]The guardian ad litem established through cross-examination of the DHHR worker at the adjudication hearing that a forensic interview of the son had been conducted. When questioned in this regard during oral argument, the guardian ad litem alluded to the availability of further relevant evidence. *See* 5 Am. Jur. 2d *Appellate Review* § 762 (2007) (recognizing the general power of an appellate court to provide for the introduction of (continued...)

sexual abuse alleged, then the case should proceed in normal course to disposition. Following established procedure, the lower court's relevant rulings made at any subsequent hearings should be reflected in written orders containing statutorily sufficient detail to afford a basis for appellate review.

This Court is not suggesting through the decision reached in this matter that the circuit court should entertain any efforts to reunite the family at this point. The desired result is that another hearing be held so that further evidence may be presented and the case fully developed and properly resolved. We were informed during oral argument that the mother and minor children are still living together in Virginia. The circuit court may need to enter orders continuing this arrangement and providing any other necessary safeguards for the welfare of the minor children through the final disposition of this case.

Vacated and Remanded with Direction.

[5](...continued)
additional evidence on remand of a case when "necessary to reach a just decision and to prevent a miscarriage of justice.")

ISSUED: May 10, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTED IN BY:

Justice Margaret L. Workman

No. 11-0789 – In Re: Robert W., Jr., Ariel W., and Oceana W.

Workman, Justice, dissenting:

This case required the Court to determine whether the circuit court erred by terminating the parental rights of the petitioner father to his three children. The majority's decision reversed the circuit court's order because it found that the "underlying order establishing sexual abuse as the basis for terminating parental rights is flawed." The majority focused on the "weakness of the presentation of the case by the State," but failed to give proper recognition to the overwhelmingly damaging evidence that was presented which led to the circuit court's finding by clear and convincing evidence that the respondent father has sexually abused the infant child. It is for this, and other reasons outlined below, that I believe this Court erred in reversing the circuit court's order.

This Court has explained that: "'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.' Syllabus Point 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996)." Syllabus Point 1, *In re: Tonjia M.*, 212 W.Va. 443, 573 S.E.2d 354 (2002). Moreover, "'[i]n a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided.' Syl. pt. 1,

State ex rel. Cash v. Lively, 155 W.Va. 801, 187 S.E.2d 601 (1972)." Syllabus Point 4, *State ex rel. David Allen B. v. Sommerville*, 194 W.Va. 86, 459 S.E.2d 363 (1995).

In this case, the majority ignores existing law by relegating it to a footnote instead of sending a clear and strong message that an individual's silence during an abuse and neglect proceeding can be used as affirmative evidence of that individual's culpability. Here, the alleged perpetrator was the victim's father. During the adjudication proceedings on March 4, 2011, testimony was presented that the father said: "When I get horny and my wife doesn't want to do anything, I take my boy out and get him to s*ck my d*ck, and if that doesn't work, I f*ck him in the a**." This was not the only reason that the DHHR filed its original child abuse and neglect petition. Within its October 21, 2010, petition, the DHHR explained:

> An investigative interview was conducted with [R.W, Jr.] at [his elementary school]. [R.W. Jr.] disclosed to Worker Karey Hedlund that, "His daddy puts his penis on his face and lips" and that his daddy has "stabbed him in the butt, and it hurt really bad." [R.W. Jr.] also stated that his "daddy rammed me through the wall and choked me."

Thereafter, in its order granting the DHHR's application for ratifying emergency custody of the petitioner's children, the circuit court explained that the petitioner's son had disclosed sexual abuse by the petitioner and noted that: "The child's safety can not be guaranteed for the children. Father is still in the home."

Despite all of the allegations against the petitioner, in addition to the fact that his children had been removed from his custody, the petitioner chose to remain silent at the adjudication hearing. He kept silent even though it was explained during the hearing that "[s]ilence in these cases can be used against a respondent, unlike in criminal court."

This Court made it clear in Syllabus Point 1 of *W. Va. Dept. of Health & Human Resources v. Doris S.*, 197 W.Va. 489, 475 S.E.2d 865 (1996), that "implicit in the definition of an abused child under West Virginia Code § 49-1-3 (1995) is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent." This Court has explained:

> There is no basis in law for requiring that a court be disallowed from considering a parent's or guardian's choice to remain silent as evidence of civil culpability. Moreover, the invocation of silence by a parent or guardian in an abuse and neglect proceeding goes to the heart of the treatability question which is essential in these cases, as the nature of the proceedings is remedial and not punitive. Thus, in order to remedy the abuse and/or neglect problem, the problem must first be acknowledged. Failure to acknowledge the existence of the problem, i.e., the truth of the basic allegation pertaining to the alleged abuse and neglect or the perpetrator of said abuse and neglect, results in making the problem untreatable and in making an improvement period an exercise in futility at the child's expense.

197 W.Va. at 498, 475 S.E.2d at 874. In Syllabus Point 2 in *Doris S.*, we further held:

> Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

The petitioner father made horrific statements about raping his five-year-old son, but sat silently when given the opportunity to explain himself. In consideration of all of the above, the circuit court had no other choice but to find that the petitioner sexually abused his son. "When, as in the case before us, there is credible evidence of sexual abuse, the risk of harm to the child weighs heavily in this balance, and ***courts should err on the side of caution*** if necessary to protect children at risk of possible abuse." *Mary Ann P. v. William R.P., Jr.*, 197 W.Va. 1, 10, 475 S.E.2d 1, 10 (1996) (emphasis added). Moreover, this Court "may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus Point 1, in part, *In re Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). In this case, it would have been incomprehensible to have placed these children back into the care of the father. As Syllabus Point 2 of *Doris S.* makes clear, the father's "silence [was] affirmative evidence of [his] culpability." These children need to be placed in a safe, secure, and stable environment.

Upon remand, the circuit court will hopefully fashion an order acceptable to the majority which will continue to protect these children. Therefore, for the reasons set forth above, I respectfully dissent.