STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In Re: J.W., K.W., T.W. and M.S.:

No. 11-1403 (Webster County 10-JA-53, 54, 55, & 56)

FILED
March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father, by Dennis J. Willet, his counsel, appeals the termination of his parental rights to his child and step-children.[1] The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The West Virginia Department of Health and Human Resources ("DHHR"), by attorney Lee A. Niezgoda, has filed its response. The guardian ad litem, Michael W. Asbury, Jr., has filed his response on behalf of the children.

Having reviewed the appendix and the relevant decision of the circuit court, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review and the appendix presented, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

"'Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit 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. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing 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 the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996)." Syl. Pt. 1, *In re Faith C.*, 226 W.Va. 188, 699 S.E.2d 730 (2010).

The petition in this matter was instituted after a walkthrough of the home revealed drug

[1]M.S. is Petitioner Father's biological child. J.W., K.W. and T.W. are his step-children. The circuit court terminated petitioner's parental rights to all of the children.

paraphernalia and items used to create methamphetamine. The DHHR, through Child Protective Services ("CPS"), had been involved with this family for a period of time prior to the walkthrough of the home, based on several referrals that the parents were using drugs. Prior interviews and investigations into the home did not reveal drug abuse. The mother was on probation for fraudulent schemes at the time of the walkthrough, and therefore was subject to random drug screens, which she had passed. At the time of the relevant walkthrough of the home, a CPS employee appeared with two deputy sheriffs and a state police officer to investigate an alleged referral of drug abuse in the home, but record of a particular call on that date informing CPS of further drug abuse in the home was unavailable. During the search, used and unused needles and various other items were found, including six matchbooks, fertilizer, betadine lotion, muratic acid, lighter fluid, charcoal, and twelve pseudophedrine pills. There were also gas masks found in a closet, and used needles along with blood covered alcohol pads found in a bathroom. The parents allege that the materials were not in the home to create a drug laboratory, and that the needles found were from the father's former work as a paramedic. During the search, Petitioner Father was found hiding in the back bedroom closet, and stated his fear that the officers had come to arrest him on an outstanding warrant. Both parents were arrested for conspiracy and attempting to operate a clandestine drug laboratory, and the children were taken into the custody of the DHHR. The parents were later indicted on the same charges, as well as three counts of gross child neglect creating a substantial risk of bodily injury. Both parents entered *Kennedy* pleas to attempting to manufacture methamphetamine and were sentenced to one to three years.

The mother testified before the circuit court that she did not give the officers permission to enter her home, but did give the CPS worker permission. She also testified that there were no needles in the home, contrary to the testimonies of the police officers and the DHHR worker ,and that the materials found were not used to make methamphetamine. The mother also testified that she had dealt with CPS since at least 2005. Petitioner Father testified that the materials in the home were not used to make methamphetamine. He also testified that the needles were from his paramedic bag, but could not testify what they would be used for in his work as a paramedic. He testified that the gas mask was in his home because he collects military items.

Both parents were adjudicated as abusive and/or neglectful, based on the fact that the components of a methamphetamine laboratory were found in their home, and many capped and uncapped needles were found. These facts showed imminent danger to the children. The circuit court then terminated the parental rights of Petitioner Father, and the custodial rights of the mother. The court found that the mother has a drug history including hospitalization for an overdose. Further, mother and father have failed to take responsibility, even denying the meth lab in their apartment. Mother denied all past drug use, which is not credible. Mother was incarcerated at the time for one to ten years due to probation revocation. However, it is contrary to the children's interests to terminate parental rights of the mother, due to the bond with her children. Both the mother and father then filed motions to reconsider based on the fact that the DHHR had failed to turn over some of its contact sheets in discovery, and this was determined through the criminal proceedings. The DHHR at that time remitted all missing contact sheets. The circuit court denied the motions to reconsider,

stating that the parents failed to establish by any competent evidence that any information was withheld from them that was relevant and/or exculpatory in the matter, and found that the mother gave consent for the search of the home.

On appeal, Petitioner Father first argues that the DHHR violated his constitutional rights. He argues that the abuse and neglect investigation was conducted without due cause as there was no referral telephone call logged on the date the investigation was made. Further, the law enforcement officers present violated his right against unreasonable search and seizure. The mother testified that she did not give consent for the officers to search.

The guardian responds, arguing that the evidence showed that the mother gave valid consent for the DHHR worker to enter her home to investigate allegations of abuse and neglect, and thus evidence obtained during this search does not violate Petitioner Father's rights. The evidence shows that items used to manufacture methamphetamine were found in the master bedroom, and the children stated that they were not allowed in this room. Petitioner Father indicated that he crushed pills in the home, and showed the officers the apparatus used to crush pills. Further, multiple syringes and blood covered alcohol pads were found in the bathroom. Although petitioner admits letting the DHHR worker into the home on at least three occasions, he claims that the DHHR employee should have informed him of his criminal rights. Petitioner admits that the DHHR worker made his presence and purpose clear, in compliance with DHHR procedure, and petitioner has failed to demonstrate how the DHHR violated his rights. Importantly, petitioner has already made these arguments in his motion to reconsider, and the circuit court noted that criminal and civil proceedings are different, and suppression of evidence in each case is different. Since the search was proper in relation to the abuse and neglect proceeding, the termination in this matter should not be disturbed. Moreover, petitioners both pled guilty to the charges regarding the attempt to operate a methamphetamine laboratory.

The DHHR also responds, arguing that the mother gave a valid consent for the worker to enter her home to investigate the allegations, and was informed of the substance of the allegations against her. Therefore, any evidence yielded by the investigation cannot be said to violate petitioner's rights. The search did not violate the law or DHHR regulations. The DHHR employee did not have to inform the petitioner that police officers with him could find incriminating evidence, and if so, that he could be prosecuted, as this is outside the scope of the duties of the DHHR officer. The DHHR worker has the duty not to compromise a criminal proceeding, as per departmental policy. Petitioner failed to make a legitimate argument as to how his constitutional rights were infringed upon by the DHHR.

The circuit court, after hearing the evidence, determined that the search was proper. The circuit court indicated that it is not bound, in an abuse and neglect proceeding, by any determination on evidentiary issues made in a criminal proceeding. Under the facts of this case, this Court finds

no error in the circuit court's determination that the search was proper in relation to the abuse and neglect proceeding.

Petitioner also argues that the DHHR did not provide full discovery as required by the Rules of Procedure for Child Abuse and Neglect Proceedings. Petitioner argues that counsel realized during the criminal proceedings that not all of the DHHR records were disclosed by the State. Petitioner also argues that there was no record sheet showing the referral call on the date of entry into the house. Petitioner argues that this denied him meaningful and fair process.

The guardian responds, arguing that even if the DHHR had late entries on its contact sheets, this does not negate the imminent danger the children were in. Moreover, the parents both pled guilty to the charges in this matter. The guardian also states that while he is troubled by the allegations that discovery was not timely in this matter, any delay or deficiency in the receipt of discovery did not substantially prejudice the petitioner, and is not reversible error.The DHHR argues that late entries on contact sheets and lack of documentation on the referral that led to the discovery of drug paraphernalia do not constitute a reason to overturn the termination. These data entries or lack thereof do not change the fact that the children were in imminent danger. Petitioner pled guilty to the charges.

While this Court is troubled by the failure of the DHHR to properly respond to discovery requests in a timely manner and to disclose all requested information to the petitioner, a review of the discovery in question shows that the materials were not exculpatory in nature. This Court finds no reversible error in the failure of the DHHR to initially provide all records.

Petitioner also argues that the circuit court erred in failing to grant him an improvement period, and in terminating his parental rights. He claims that the conditions could have been remedied, and that termination was not in the best interests of the children.

The guardian responds, arguing that the circuit court properly adjudicated the parents based on the needles scattered throughout the residence which were readily accessible to the children, and the various items in the home that are used to operate a methamphetamine laboratory. These items created imminent danger to the children. The DHHR worker testified that a new allegation caused him to go to the home on the relevant date, and the police officers were with the DHHR employee at the time due to their investigation of another case. The guardian argues that termination was in the best interests of the children, as the parents failed to take responsibility for their actions, even after pleading guilty to criminal charges relating to their actions. Thus, an improvement period would have been futile. Importantly, the guardian argues that the petitioner attempts to appear to be the victim in this matter, but has chosen not to take responsibility for his actions. Thus, he asserts that termination was proper and in the best interests of the children.

The DHHR argues that termination was proper, as the circuit court made several findings that the children were neglected. These included capped and uncapped needles spread throughout the residence, which created a risk to the children; and items in the home consistent with the operation or attempt at operation of a methamphetamine laboratory, which also created a risk. These facts constitute imminent danger to the children. Petitioner contends there was no new allegation of abuse and neglect in the home, but has presented no evidence that the call to the DHHR was somehow fabricated. The DHHR argues that there is no evidence of a conspiracy. The mother allowed a search of the home, and that multiple components of a methamphetamine laboratory were found in the home. The DHHR worker even testified that the new referral noted that the father had been fired recently for possibly stealing morphine, so this was a referral based on new facts. Petitioner argues that because some evidence was suppressed in the criminal proceeding, that this should somehow cause suppression in the abuse and neglect proceeding, but this is simply not based in fact or law. It is in the best interests of the children to terminate Petitioner Father's parental rights.

This Court has stated:

> As a general rule the least restrictive alternative regarding parental rights to custody of a child under W.Va. Code [§] 49–6–5 (1977) will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened . . . ." Syllabus point 1, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 4, in part, *In re Kristin Y.*, 227 W.Va. 558, 712 S.E.2d 55 (2011). This Court has stated that " . . .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." *W. Va. Dept. of Health and Human Res. ex rel. Wright v. Doris S.*, 197 W.Va. 489, 498, 475 S.E.2d. 865, 874 (1996). 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. 2, *In the Interest of Kaitlyn P.*, 225 W.Va. 123, 690 S.E.2d 131 (2010) (internal citations omitted).

In the present matter, there was an abundance of evidence that the children were in danger; the components of a methamphetamine laboratory were found in the home where the children were residing. Petitioner denies that these materials were used for making drugs, but made no explanation for the possession of most of the materials. Moreover, petitioner pled guilty to charges regarding the attempt to operate a methamphetamine laboratory. Furthermore, the testimony of the investigating officers and the DHHR worker showed that there were capped and uncapped needles in the home, and evidence that some of the needles were used. Petitioner Father denies this, but the circuit court determined that his denial was not credible. This Court finds no error in the adjudication or in the termination of parental rights without an improvement period.

This Court reminds the circuit court of its duty to establish permanency for the children. Rule 39(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings requires:

> At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

Further, this Court reminds the circuit court of its duty pursuant to Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings to find permanent placement for the children within eighteen months of the date of the disposition order.[2] As this Court has stated, "[t]he eighteen-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record." Syl. Pt. 6, *In re Cecil T.*, 228 W.Va. 89, 717 S.E.2d 873 (2011). Moreover, this Court has stated that "[i]n determining the appropriate permanent out-of-home placement of a child under *W.Va.Code* § 49-6-5(a)(6) [1996], the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found." Syl. Pt. 3, *State v. Michael M.*, 202 W.Va. 350, 504 S.E.2d 177 (1998). Finally, "[t]he guardian ad litem's role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard* , 185 W.Va. 648, 408 S.E.2d 400 (1991).

For the foregoing reasons, we find no error in the decision of the circuit court and the termination of parental rights is hereby affirmed.

Affirmed.

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[2] Rule 43 was amended effective January 3, 2012. The amended rule reducing the eighteen-month period for permanent placement to twelve months only applies to final dispositional orders entered after January 3, 2012.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

NOT PARTICIPATING:

Justice Margaret L. Workman