STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* S.S. and H.S.**

No. 20-0205 (Kanawha County 18-JA-640 and 18-JA-641)

FILED
November 4, 2020
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Father D.S., by counsel J. Rudy Martin, appeals the Circuit Court of Kanawha County's February 7, 2020, order terminating his parental rights to S.S. and H.S.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed a response in support of the circuit court's order and a supplemental appendix. The guardian ad litem, Matthew Smith, filed a response on behalf of the children in support of the circuit court's order. Petitioner filed a reply.[2] On appeal, petitioner argues that the circuit court erred in adjudicating him as an abusing parent and terminating his parental rights.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In October of 2018, in response to a referral from the family court, the DHHR filed an abuse and neglect petition against the mother and petitioner. The DHHR alleged that the mother abused alcohol, lacked stable housing, left her children in various locations with friends and

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

[2]Petitioner's reply brief contains exhibits which were not properly supplemented to the appendix in accordance with Rule 7(g) of the Rules of Appellate Procedure. Additionally, the exhibits are not "accurate reproductions of the papers and exhibits submitted to the lower court" in accordance with Rule 7(a) of the Rules of Appellate Procedure. Accordingly, this Court will not consider these exhibits on appeal.

family, and failed to protect an older sibling of S.S. and H.S. from being sexually abused.[3] Included within the petition was a portion from the family court's order finding that petitioner had "extreme mental health issues and a drinking problem." In late October of 2018, the circuit court held a preliminary hearing, wherein petitioner appeared in person, and the circuit court ordered that he participate in services such as parenting and adult life skills classes, random drug and alcohol screenings, and a parental fitness/substance abuse evaluation. In December of 2018, petitioner appeared intoxicated at the adjudicatory hearing, which was continued. After receiving petitioner's positive test for alcohol that was gathered immediately after the hearing, the DHHR amended the petition in January of 2019 to include this allegation. Later that same month, petitioner completed his parental fitness/substance abuse evaluation.

The circuit court held an adjudicatory hearing in April of 2019, wherein petitioner failed to appear, but was represented by counsel. Given petitioner's absence, his counsel moved to continue the hearing, but proffered that petitioner knew of the hearing date and had been in contact with the mother regarding the hearing. Petitioner's counsel had no explanation for petitioner's absence. The circuit court denied the motion to continue and proceeded with adjudication. The DHHR presented the testimony of the licensed psychologist who performed petitioner's parental fitness evaluation. The psychologist stated that petitioner had a history of alcohol abuse, had his driver's license revoked, lacked stability in housing and employment, had no history of providing financially for the children, and expressed only a desire to occasionally babysit the children. These findings led the psychologist to the opinion that petitioner's prognosis for improved parenting was "extremely poor." Finally, the mother testified that she spoke with petitioner about the hearing and he stated to her that he would not attend. Petitioner's counsel presented no evidence. Ultimately, the circuit court adjudicated petitioner as an abusing parent based upon his alcohol abuse and inability to parent the children.

Review hearings were held in July and September of 2019, and petitioner again failed to appear without explanation. In December of 2019, the circuit court held a final dispositional hearing, at which petitioner failed to appear. The DHHR requested the termination of petitioner's parental rights based upon his lack of participation in the proceedings and failure to remedy the conditions of abuse and neglect. Ultimately, the circuit court found that there was no reasonable likelihood that petitioner could correct the conditions of abuse and neglect in the near future and that the termination of his parental rights was necessary for the children's welfare. The circuit court terminated petitioner's parental rights by order entered on February 7, 2020.[4]

The Court has previously held:

> "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

[3]The older sibling is not at issue in this appeal.

[4]The mother successfully completed an improvement period, and the children have been reunified with her.

> 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." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

At the outset of our analysis, it is important to address petitioner's assertion on appeal that his lack of participation below was the result of his incarceration during the proceedings. We note that the record contains no evidence that petitioner was incarcerated. Instead, petitioner merely asserts, for the first time on appeal and with no corroboration, that his lack of participation stemmed from his incarceration. Contrary to petitioner's assertion, however, the record shows that petitioner was in contact with both his attorney and the mother during the proceedings. Indeed, the record shows that petitioner explicitly stated to the mother his intention not to attend the adjudicatory hearing while making no mention of incarceration as a factor in his willful refusal to appear. As such, any argument that petitioner advances on appeal predicated on his alleged incarceration has no basis in the record and entitles him to no relief.

On appeal, petitioner argues that the circuit court erred in adjudicating him as an abusing parent. We disagree. We have previously held as follows:

> At the conclusion of the adjudicatory 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 . . . . The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing evidence.

In re F.S., 233 W. Va. 538, 544, 759 S.E.2d 769, 775 (2014). This Court has explained that "'clear and convincing' is the measure or degree of proof that will produce in the mind of the factfinder a firm belief or conviction as to the allegations sought to be established." *Id*. at 546, 759 S.E.2d at 777 (citation omitted). However, "the clear and convincing standard is 'intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.'" *Id.* (citation omitted).

Having reviewed the record, we find that sufficient evidence existed to adjudicate petitioner as an abusing parent. On appeal, petitioner fails to challenge the circuit court's findings, which were based upon the conditions of abuse alleged at the time of the filing of the petition. Petitioner's sole argument is that his absence at the adjudicatory hearing was due to his incarceration. However, petitioner's incarceration, which allegedly occurred after the petition's filing, was wholly irrelevant to the circuit court's determination of adjudication as it did not relate to the conditions that existed at the time of the petition's filing. At the adjudicatory hearing, the DHHR provided evidence that petitioner had a history of alcohol abuse, lacked stable housing and

employment, had no history of financially supporting the children, and had only acted as their babysitter. The DHHR also presented evidence that petitioner's prognosis for improved parenting was "extremely poor." Based on the unrebutted evidence presented, the circuit court adjudicated petitioner as an abusing parent due to his alcohol abuse and inability to parent. As mentioned previously, the circuit court was unaware of petitioner's whereabouts. The onus to contact his attorney or the circuit court sat squarely upon petitioner. Having received no explanation for petitioner's absence, the circuit court properly proceeded with adjudication. We, therefore, find no error in the circuit court's adjudication of petitioner.

Next, petitioner asserts that the circuit court's decision to terminate his parental rights was improper because it terminated his parental rights solely on the basis of abandonment of the children, which was due to his incarceration.[5] In petitioner's view, he should have been "afforded the opportunity to participate in services" so that he could have corrected the conditions of abuse and neglect.[6] He further alleges that he was denied due process. However, we find no error.

Based on the evidence of petitioner's noncompliance and apparent unexcused lack of participation in the remainder of the proceedings, the circuit court found that petitioner failed to follow through with the DHHR's rehabilitative services and failed to remedy the conditions of abuse and neglect. This constitutes a situation in which there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future under West Virginia Code § 49-4-604(d)(3). Further, petitioner's assertion that his abandonment of the children during the proceedings was the lone reason for his termination is simply untrue. The final dispositional order specifically found that petitioner's failure to appear, his unaddressed substance abuse issues, and his alleged physical and psychological harm to the children were also considered in the circuit court's determination to terminate his parental rights.

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[5]In support of this argument, petitioner erroneously relies on cases in which this Court has discussed a parent's abandonment of their children as a basis for adoption under Chapter 48 of the West Virginia Code, which is not at issue in this matter. Instead, under West Virginia Code § 49-1-201, "abandonment" is defined as "any conduct that demonstrates the settled purpose to forego the duties and parental responsibilities to the child" and can be included as an allegation in a child abuse and neglect petition. Here, the DHHR did not include allegations of abandonment in the petition, and the circuit court did not adjudicate petitioner based upon abandonment. Instead, the circuit court, in the final dispositional order, found that petitioner abandoned his children through his lack of participation in the proceedings. This colloquial use of the word abandonment to describe petitioner's lack of participation in the proceedings in the final dispositional order does not rise to the level of an official finding of abandonment in the context of an adjudicatory determination pursuant to West Virginia Code § 49-4-601(i). As such, petitioner's reliance on cases concerning findings of abandonment do not entitle him to relief on appeal.

[6]Within this assignment of error, petitioner alleges that he should have been granted an improvement period. However, according to the record, petitioner did not request an improvement period. We have long held, "'[o]ur general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.' *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)." *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

Regarding petitioner's hollow due process argument, he glaringly ignores that he initially participated in the proceedings, previously communicated with his attorney, participated in several services such as supervised visitations, attended two hearings, and completed a psychological evaluation. Petitioner was afforded all process that was due and his own failure to alert his counsel, the DHHR, or the circuit court of his whereabouts cannot be found as error by the circuit court. As the record contains no evidence that the circuit court was aware of petitioner's incarceration, it could not have improperly considered it when terminating his parental rights. The circuit court's findings are based on substantial evidence that petitioner failed to avail himself of the services offered, including communicating with his attorney or the DHHR to inform the circuit court of his whereabouts.

Finally, the circuit court found that termination of petitioner's parental rights was in the children's best interests. The record indicates that petitioner's role with the children was not that of a parent as he was little more than their occasional babysitter. Indeed, on appeal, petitioner concedes that he "does not seek custody of his children or to upset their placement in any way." Accordingly, termination of petitioner's parental rights was clearly in the children's best interest. Pursuant to West Virginia Code § 49-4-604(c)(6), the circuit court found that there was no reasonable likelihood that the conditions of abuse and neglect could be substantially corrected and that termination was in the children's best interests, and petitioner does not challenge these findings on appeal. As such, he cannot establish error in the termination of his parental rights.

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 7, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison