

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re A.B.

No. 23-296 (Fayette County CC-10-2021-JA-96)

MEMORANDUM DECISION

Petitioner Father T.M.¹ appeals the Circuit Court of Fayette County’s April 25, 2023, order terminating his parental and custodial rights to the child, A.B.² He argues that the court erroneously adjudicated him and terminated his rights based on his incarceration and that there were less restrictive dispositional alternatives. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court’s order is appropriate. *See* W. Va. R. App. P. 21.

In July 2021, the DHS filed a child abuse and neglect petition alleging that petitioner and the mother were caring for the child while under the influence of heroin and methamphetamine. When a Child Protective Services (“CPS”) worker spoke with the mother at a well-known “drug house,” the mother revealed that petitioner fled when he believed law enforcement was arriving because there was a warrant out for his arrest. Petitioner did not appear for the first several hearings

¹Petitioner appears by counsel Robert P. Dunlap II. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrissey and Assistant Attorney General Heather L. Olcott. Counsel Vickie L. Hylton appears as the child’s guardian ad litem (“guardian”).

Additionally, pursuant to West Virginia Code § 5F-2-1a, the agency formerly known as the West Virginia Department of Health and Human Resources was terminated. It is now three separate agencies—the Department of Health Facilities, the Department of Health, and the Department of Human Services. *See* W. Va. Code § 5F-1-2. For purposes of abuse and neglect appeals, the agency is now the Department of Human Services (“DHS”).

²We use initials where necessary to protect the identities of those involved in this case. *See* W. Va. R. App. P. 40(e).

in this matter, and his whereabouts were unknown.³ In December 2021, the circuit court was advised that petitioner was incarcerated.

The circuit court held an adjudicatory hearing in March 2022, at which time petitioner was present, although he remained incarcerated at the time. Petitioner testified that he was currently incarcerated for a probation violation, with the underlying charge being delivery of a controlled substance. When asked about his substance abuse issues, petitioner denied having any and asserted that he had been clean for six months due to his incarceration. He claimed that the only reason he previously failed a drug test was because he had gotten pulled over and had to swallow a bag of drugs that someone had thrown in his vehicle. He admitted that he had substance abuse issues in the past, but denied using substances at the time the petition was filed. Based on petitioner's testimony, the court determined that the child was abused and neglected, finding petitioner to be an abusing and neglecting parent based on his substance abuse and his failure to protect the child from the mother's substance abuse. The court further ordered petitioner not to have any contact with the mother or the child following proffer from counsel for the DHS that petitioner had been sending "disturbing," "vulgar," and "threatening" correspondence to the mother. According to a DHS status report filed in June 2022, petitioner continued to harass the mother via email. As a result, the mother was granted a domestic violence protective order in a separate proceeding.

In September 2022, petitioner was released from incarceration on parole and filed a motion for a post-adjudicatory improvement period. However, petitioner failed to appear for the next hearing in November 2022, and his counsel advised that petitioner was incarcerated for violating terms of parole and the domestic violence protective order.

The circuit court proceeded to disposition in April 2023, at which time the DHS and guardian supported termination of petitioner's parental rights. Petitioner was present but remained incarcerated. Although he did not wish to relinquish his parental rights, petitioner elected not to contest disposition. Petitioner testified, confirming that he was currently incarcerated for violating the domestic violence protective order and terms of his parole and that the underlying charge was for delivery of a controlled substance, methamphetamine. Also pending was a charge for possession of drugs in Maryland, which petitioner advised had a possible sentence of three years. He stated that he had been incarcerated for eight of the last ten years of his life. He was briefly released in 2021 when he met the child, but he had not seen her since that time. The court then heard testimony of a CPS worker who stated that the recommendation was termination of petitioner's parental rights due to petitioner's failure to contact the DHS throughout the proceedings and the length of his incarceration. At the conclusion of the testimony, the court terminated petitioner's parental and custodial rights noting petitioner did not contest disposition and finding that there was no reasonable likelihood that petitioner could correct the conditions of

³These hearings included a preliminary hearing held in August 2021, an adjudicatory hearing related to the mother held in September 2021, and a review hearing regarding the mother's improvement period held in December 2021.

abuse and/or neglect in the near future and that it was necessary for the welfare and best interests of the child to do so.⁴ It is from the final dispositional order that petitioner appeals.⁵

On appeal from a final order in an abuse and neglect proceeding, this Court reviews the circuit court's findings of fact for clear error and its conclusions of law de novo. Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011). On appeal, petitioner argues that the court erroneously adjudicated him and terminated his rights based on his incarceration and that there were less restrictive dispositional alternatives.⁶ Upon our review, we find no error.⁷

Petitioner argues that his adjudication and subsequent termination were in error because the court based its decisions on his incarceration. However, it is critical to note that petitioner's position regarding incarceration is contrary to our clearly established law. Specifically, this Court has explained that incarceration can serve as a basis for adjudication. *See* Syl. Pt. 3, *In re B.P.*, 249 W. Va. 274, 895 S.E.2d 129 (2023) ("A parent's absence from a child's life because of incarceration

⁴The mother successfully completed an improvement period, and the child was returned to her care.

⁵This appeal was filed pursuant to Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure, which observes certain requirements "when counsel . . . is directed by a client to file an appeal where counsel lacks a good faith belief that an appeal is reasonable and warranted under the circumstances."

⁶Petitioner also argues that the court erred in failing to hear his motion for a post-adjudicatory improvement period; however, we find this argument misplaced. Petitioner filed a motion for a post-adjudicatory improvement period in September 2022, and the court held a hearing in November 2022. Petitioner did not appear for the hearing and did not raise the motion for an improvement period for the court's consideration at that time because petitioner was incarcerated. It is within the circuit court's discretion to refuse to grant an improvement period, particularly under circumstances such as these, when clearly improvement would not be likely. *See In re Tonjia M.*, 212 W. Va. 443, 448, 573 S.E.2d 354, 359 (2002) ("[T]he circuit court has discretion to deny an improvement period when no improvement is likely.").

⁷Petitioner further argues that the circuit court failed to adhere to procedural timeframes which resulted in a delay of disposition. Upon our review, we find no error. We have explained that "where a nonconstitutional error has been asserted, we have adopted the rather general rule that the case will not be reversed unless the error is prejudicial to the defendant." *State v. Rexrode*, 243 W. Va. 302, 317 n.22, 844 S.E.2d 73, 88 n.22 (2020) (citations omitted). Here, petitioner has pointed to no evidence that the court's delay in holding a dispositional hearing in any way prejudiced him, and he explicitly did not contest disposition. Moreover, we have stated that "a mere procedural technicality does not take precedence over the best interest of the children." *In re Tyler D.*, 213 W. Va. 149, 160, 578 S.E.2d 343, 354 (2003). Petitioner at no time demonstrated that the best interests of the child would be reunification. He had only met the child once due to his consistent incarceration, and the circuit court found that petitioner continuously put his own interests above the interests of the child and left the child for the mother to raise. Because the best interests of the child required termination, we do not find error in this regard.

that results in the inability of the parent to provide necessary food, clothing, shelter, medical care, education, or supervision is a form of neglect under the definition of ‘neglected child’ set forth in West Virginia Code § 49-1-201 (2018).”). Further, we have explained that incarceration can similarly support a finding that there is no reasonable likelihood a parent can substantially correct conditions of abuse and neglect in support of termination of parental and custodial rights. *See Cecil T.*, 228 W. Va. at 91, 717 S.E.2d at 875, Syl. Pt. 3 (permitting circuit courts to find no reasonable likelihood conditions of abuse and neglect can be substantially corrected solely upon incarceration when considering other factors relevant to incarceration). Because petitioner’s entire argument is predicated on the faulty assumption that incarceration cannot serve as a basis for either adjudication or termination, he is entitled to no relief.

In any event, the circuit court did not solely consider petitioner’s incarceration in its decisions at adjudication or disposition. At adjudication, the court specifically found petitioner’s substance abuse and his failure to protect the child from the mother’s substance abuse as the reasons the child was determined to be abused and neglected. Although petitioner maintains on appeal that he did not have a substance abuse issue, the court made a credibility determination that we refuse to disturb. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) (“A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.”). Furthermore, important to the court’s decision to terminate petitioner’s parental rights was the fact that petitioner did not contest disposition. While petitioner’s incarceration was also considered at disposition, other factors relevant to incarceration were considered, including the length of his sentence, his pattern of breaking the law, and only having met the child once in her life. Therefore, upon our review, we can find no error by the circuit court.

Finally, petitioner argues that because the child was reunified with the mother and petitioner may have been able to be released from incarceration in August 2023, there were less restrictive dispositional alternatives to the termination of his parental rights. However, petitioner’s argument ignores our holding that “simply because one parent has been found to be a fit and proper caretaker for [the] child does not automatically entitle the child’s other parent to retain his/her parental rights if his/her conduct has endangered the child and such conditions of abuse and/or neglect are not expected to improve.” *See In re Emily*, 208 W. Va. 325, 344, 540 S.E.2d 542, 561 (2000). Ultimately, the circuit court properly terminated petitioner’s parental and custodial rights to the child, and, upon our review, we find no error.

Accordingly, we find no error in the decision of the circuit court, and its April 25, 2023, order is hereby affirmed.

Affirmed.

ISSUED: April 15, 2024

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn