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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* L.B.**

No. 23-545 (Wayne County CC-50-2021-JA-84)

MEMORANDUM DECISION

Petitioner Father L.J.[1] appeals the Circuit Court of Wayne County's September 1, 2023, order terminating his parental rights to L.B., arguing that the circuit court erred by finding that the child was neglected and subsequently terminating his parental rights.[2] 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 October 2021, the DHS filed a petition alleging that the petitioner knew of the mother's drug use while pregnant with the child, who was born drug-affected. At the preliminary hearing held the same month, the DHS submitted evidence of the petitioner's illegal use of marijuana. The DHS further provided testimony regarding the petitioner's knowledge of the mother's drug use while pregnant. The petitioner testified and admitted to his knowledge, explaining that the mother was living with him at the time and a family member told him that the mother was using methamphetamine. Following the preliminary hearing, the court granted the petitioner supervised visitation.

The circuit court held an adjudicatory hearing in February 2022, during which a DHS worker testified regarding the petitioner's positive drug screens for marijuana and his knowledge of the mother's drug use while pregnant. Pivotally, the DHS worker advised that the petitioner recently disclosed a past criminal conviction in Ohio for sexually abusing a minor. The petitioner testified that he pled guilty to the crime twenty years prior. Although he failed to register as a sex

[1] The petitioner appears by counsel Juston H. Moore. The West Virginia Department of Human Services appears by counsel Attorney General Patrick Morrisey and Assistant Attorney General Kristen E. Ross. Counsel Sara E. Chapman appears as the child's guardian ad litem.

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").

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

offender, which resulted in further criminal charges, the petitioner stated that he was now registered in West Virginia. The petitioner further admitted to using marijuana; however, he claimed to have recently stopped. The court found clear and convincing evidence that the petitioner neglected the child based on his illicit substance abuse and failure to protect the child from the mother's drug abuse. The court further ordered the petitioner to submit to a forensic psychological examination of parental fitness, sex offender evaluation, and criminal background check. The petitioner thereafter filed a written motion for an improvement period, which the court granted upon the agreement of the parties at a hearing held in June 2022. Because the petitioner was substantially compliant with improvement period terms, the court granted an extension at a hearing held in December 2022.

After receiving the petitioner's parental fitness examination, sex offender evaluation, and background check, the DHS filed an amended petition in May 2023, which included the petitioner's criminal history and the findings and recommendations of the evaluators who conducted the psychological examination of parental fitness and sex offender evaluation. The amended petition indicated that the petitioner tested positive for marijuana in March 2023, and that the petitioner reported being diagnosed with major depressive disorder and disclosed a history of alcoholism, although he stated that he no longer used alcohol.

In June 2023, the circuit court held a second adjudicatory hearing regarding the allegations in the amended petition. A DHS worker testified to the petitioner's recent positive drug screen and criminal history. The petitioner had felony and misdemeanor charges from 1994 to 2017, which included rape, unlawful sexual conduct with a minor, failure to register as a sex offender, kidnapping, receiving stolen property, and domestic violence. Regarding the petitioner's sexual conduct with a minor crime, the DHS worker stated that the petitioner initially told her that the victim was seventeen years old and he was nineteen years old; however, evidence revealed that the victim was under the age of sixteen and that the petitioner was twenty-five years old. The petitioner also lied about who the victim was, asserting that it was his significant other at the time, although records indicated it was a different minor female. The petitioner's criminal records were submitted to evidence. The psychologist who conducted the petitioner's parental fitness examination testified to his poor prognosis for improved parenting, stating that he took no responsibility for failing to protect the child, his illicit substance abuse, depression issues, or sexually abusing a minor. Specifically, the psychologist asked the petitioner if he believed there was anything he did that was abusive and neglectful, to which he responded, "no" and "blame[d] others for everything." The psychologist also discussed the petitioner's history of "self-medicat[ing]" with alcohol and marijuana, which she stated placed him in jeopardy of relapse until his depression issues were addressed. Both the psychologist and the evaluator who conducted the petitioner's sex offender evaluation testified regarding the petitioner's evasiveness, defensiveness, and failure to take responsibility for sexually abusing a minor, minimizing his actions. They stated this was indicative of a high risk that he would commit a sexual crime against a minor in the future and that this child's safety could not be guaranteed. This conclusion was reached even considering that the petitioner's conviction was twenty years prior because, as one evaluator testified, "research indicates that individuals who have these desires . . . it tends to be something that follows an individual their lifetime."

When the petitioner testified, he denied any sexual encounter with the victim although he stated it was possible that he hugged or kissed her, indicating "that's why I pled guilty." The petitioner further revealed that two of his other minor children were in the room at the time of the incident for which he was convicted.[3] Additionally, the petitioner denied using marijuana, proffering that his positive drug screen could be from a vaping device, and further disclosed that he was still in contact with the mother. The petitioner admitted that he was not participating in offered therapy services and denied having any mental health issues despite his prior disclosure of major depressive disorder. However, he testified that he threatened to commit suicide after the previous adjudicatory hearing, which resulted in law enforcement involvement. The petitioner then put on evidence from the supervised visitation specialist who observed his visits with the child to be going well. At the conclusion of the evidence, the court adjudicated the petitioner, finding the child to be neglected due to the petitioner's history of unlawful sexual conduct with a minor and continued drug use. The petitioner thereafter filed a written motion for an additional improvement period.

The circuit court proceeded to disposition in August 2023, at which time the DHS and guardian ad litem supported termination of the petitioner's parental rights. The court took judicial notice of the prior testimony and heard further testimony from a DHS worker and the petitioner. According to the DHS worker, although the petitioner was mostly compliant with the case plan and improvement period terms, the DHS was reliant upon the petitioner's evaluations in recommending termination, stating that "no one can definitively say the child is safe unsupervised with him." The DHS worker pointed to not only the petitioner's sex offender status, but his failure to take responsibility and inconsistent statements. Additionally, since his last drug screen in March 2023, the petitioner had missed approximately twenty scheduled drug screens with no explanation. The petitioner denied missing any drug screens, insisted that his positive drug screen for marijuana in March 2023 was incorrect, and reiterated that he had complied with the case plan and improvement period terms. He further denied failing to take responsibility for his actions, asserting that he "paid [his] debt to society" when he pled guilty and served his sentence for the sexual abuse crime. Based on the foregoing, the court denied the petitioner's motion for an improvement period and terminated his parental rights, finding that there was no reasonable likelihood that the petitioner could correct the conditions of abuse and neglect and that it would not be in the child's best interests to be returned to the petitioner's care. It is from the dispositional order that the petitioner appeals.[4]

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). Before this Court, the petitioner challenges the sufficiency of the evidence for the circuit court's adjudication of him in regard to several different conditions of neglect. At the outset, we note that "[West Virginia Code § 49-4-601(i)], requires

[3] The petitioner has other children, who are not relevant to this appeal as they were not involved in the underlying proceedings.

[4] The mother's rights were also terminated. The permanency plan for the child is adoption by her foster placement.

the [DHS], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing [evidence].'" Syl. Pt. 1, in part, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997) (quoting Syl. Pt. 1, in part, *W. Va. Dep't of Health and Hum. Res. ex rel. Wright v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996)). Furthermore, "[c]lear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt." *In re A.M.*, 243 W. Va. 593, 598, 849 S.E.2d 371, 376 (2020).

The petitioner first argues that the circuit court erred in finding that the child was neglected based on his prior conviction, which required him to register as a sex offender. Pursuant to West Virginia Code § 49-1-201, a "neglected child" is one "[w]hose physical or mental health is harmed or *threatened* by a present refusal, failure or inability of the child's parent . . . to supply the child with necessary . . . supervision." (Emphasis added). Here, the court did not err in finding that the child met the definition of a "neglected child," particularly considering the testimony of the evaluators, along with the petitioner's continued dishonesty regarding sexually abusing a minor, both of which supported a finding of threat of harm to the child. Despite conviction following his guilty plea, the petitioner maintained that he did not sexually abuse the minor victim, exhibiting a lack of candor to the court. The court clearly made a credibility determination on that basis that we refuse to disturb on appeal. *See State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) ("An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact."). We, therefore, find no error in the court's adjudication of the petitioner and finding that the child was neglected.

The petitioner asserts further error with his adjudication, arguing that there was not clear and convincing evidence that he used drugs in the presence of the child or that his marijuana use had any effect on his ability to parent the child. The petitioner disregards his own testimony admitting to using marijuana at the time the petition was filed and during the time frame when he was granted visitation with the child. *See In re S.C.*, 248 W. Va. 628, 634, 889 S.E.2d 710, 716 (2023) (determining that adjudication was proper when the petitioner "failed drug screens and *admitted* to abusing [drugs]") (emphasis added). Furthermore, there was evidence that the petitioner's drug use would affect his ability to parent the child if he were given unsupervised custody. The parental fitness evaluator discussed the petitioner's history of self-medicating with marijuana and alcohol, which placed him at risk of relapse until his issues with depression are addressed. The petitioner admitted that he was not participating in therapy and denied having any mental health issues despite further evidence that he threatened self-harm. *See* W. Va. Code § 49-1-201 (defining "neglected child," in part, as one whose health or welfare is *threatened* by certain conduct) (emphasis added). Therefore, we discern no error in the court's adjudication based on the petitioner's illegal substance use.

The petitioner further argues that there was no evidence of his actions or inactions regarding the mother's drug use; therefore, the circuit court erred by finding he failed to protect the child. However, the petitioner's argument ignores our prior determination in *In re A.L.C.M.*, 239 W. Va. 382, 801 S.E.2d 260 (2017) that child abuse and neglect statutes allow a finding of abuse and neglect based upon a parent's knowledge that another person is harming their child and that "the parent charged with such abuse need not commit the abuse him/herself so long as he/she

knew that the subject abuse was being perpetrated, even if the alleged abuse occurs outside the presence of the parent charged with such abuse." *Id.* at 392, 801 S.E.2d at 270. Not only did the DHS worker testify regarding the petitioner's knowledge of the mother's drug use, but the petitioner admitted to this knowledge during the proceedings. Therefore, the court did not err in finding that the petitioner failed to protect the child on this basis.

Finally, the petitioner argues that it was error for the circuit court to terminate his parental rights when he was compliant with the case plan and improvement period terms. However, as we have held, "[i]n making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child." Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014). Here, the best interests of the child clearly support termination in consideration of the evaluators' testimony regarding the risk of the petitioner reoffending against a child and the petitioner's consistent failure to acknowledge any wrongdoing. *See In re Timber M.*, 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) ("In order to remedy the abuse and/or neglect problem, the problem must first be acknowledged." (quoting *In re Charity H.*, 215 W. Va. 208, 217, 599, S.E.2d 631, 640 (2004))). Therefore, we find no error in the circuit court's dispositional conclusion. *See* W. Va. Code § 49-4-604 (permitting termination "[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child").

Accordingly, we find no error in the decision of the circuit court, and its September 1, 2023, order is hereby affirmed.

Affirmed.

ISSUED: August 27, 2024

CONCURRED IN BY:

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