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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

***In re* T.G., B.G.-1, B.G.-2, and J.A.**

No. 21-0140 (Wood County 19-JA-252, 19-JA-253, 19-JA-254, and 20-JA-13)

MEMORANDUM DECISION

Petitioner Father D.A., by counsel Michele Rusen, appeals the Circuit Court of Wood County's January 20, 2021, order terminating "any guardianship and/or custodial rights he may have to" T.G., B.G.-1, and B.G.-2, and his parental rights to J.A.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel Lee Niezgoda, filed a response in support of the circuit court's order. The guardian ad litem, Jeffrey B. Reed, filed a response on behalf of the children in support of the circuit court's order. Petitioner filed a reply. On appeal, petitioner argues that the circuit court erred in adjudicating him as an abusing parent in regard to J.A., denying his motion to extend his post-adjudicatory improvement period, and denying his motion for a post-dispositional improvement period.[2]

[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). Additionally, because two children share the same initials, we will refer to them as B.G.-1 and B.G.-2, respectively, throughout this memorandum decision.

[2]On appeal, petitioner raises no specific assignment of error regarding the termination of his parental and other rights to the children. Two of petitioner's assignments of error, alleging error in the denial of his motion for a post-dispositional improvement period and his adjudication, include the allegation that because the court erred in those regards, then "as a result, the lower court erred in terminating the petitioner's parental rights to J.A." However, petitioner provides no substantive argument attacking the circuit court's ultimate disposition. Because we find that petitioner is entitled to no relief in regard to his specific assignments of error, it follows that he cannot be entitled to relief in regard to the court's termination of his parental rights. Because petitioner advances no specific arguments in this regard, this memorandum decision does not include an analysis of the court's ultimate disposition.

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 December of 2019, the DHHR filed an amended petition to include allegations that petitioner and his live-in girlfriend abused and/or neglected the girlfriend's three children.[3] According to the amended petition, Child Protective Services ("CPS") visited the home and found it to be in an unsafe condition. Specifically, CPS indicated that it was difficult to even enter the home because of "piles of dirty laundry, toys, books, boxes full of clothes, and trash in the front room." According to the petition, "the family had a small tunnel-like pathway through the piles that led through the home." Although the three children[4] had their own bedroom, CPS indicated that it was almost entirely full of boxes and other material. It appeared that the children slept on three toddler mattresses in the living room that had no sheets or bedding. CPS also observed unsanitary conditions in the kitchen, including dead cockroaches and improperly stored food in the refrigerator. Petitioner admitted that the home lacked running water, leading CPS to observe a bucket in the bathroom that contained human feces. The bathtub was full of cigarette butts. While CPS inspected the home, petitioner and the mother continually yelled at the children to clean the home "despite the fact that the messes and clutter in the home were not anything that the children could have or should have attempted to clean up due to multiple safety risk[s] and health hazards." CPS also noted that then-nine-year-old T.G. was "soaking wet with urine," and petitioner and the mother reported that the child had been suffering incontinence issues as reported by the Boys and Girls Club. CPS also discussed with petitioner that it had received a referral that he physically abused the children, which petitioner denied. However, CPS noted that T.G. appeared to be frightened of petitioner. CPS then spoke with the children privately, at which point T.G. informed CPS that petitioner was lying and had physically abused him by beating him with a belt and dragging him across the floor. B.G.-1 also disclosed physical abuse by petitioner, and B.G.-2 indicated that she witnessed this abuse.

Ultimately, police arrived on the scene after petitioner displayed a handgun tucked in his waistband and told CPS he "would do anything to protect his family." CPS admitted that petitioner did not directly threaten them but stated that they felt threatened by the action, nonetheless. Once CPS obtained emergency custody, they discovered a rash on two of the children and took them for a medical examination. B.G.-1 was diagnosed with ring worm on his feet and legs, T.G. had an unspecified skin irritation likely caused by his incontinence, and B.G.-

[3]Petitioner did not include the initial petition in the appendix record on appeal. It appears that the original petition concerned children who are not at issue in this appeal.

[4]At the time this petition was filed, J.A. was not yet born.

2 was diagnosed with head lice. When medical personnel attempted to examine T.G., the child "got on the ground in a fetal position and was crying uncontrollably." During the CPS investigation, petitioner informed workers that he feared the mother would react negatively to the children's removal and had previously thrown a can of soup at his head. According to petitioner, the mother was "paranoid and has thought people were in the back[]yard." CPS asked petitioner if the mother was abusing drugs, which petitioner denied, although he claimed that she kept "a 'pharmacy' in her purse[] of pills that were prescribed to her." Based on these facts, the DHHR alleged that petitioner failed to provide safe and adequate housing for the children, physically abused the children, and neglected the children's medical needs and hygiene. Following the amended petition's filing, petitioner waived his right to a preliminary hearing.

In January of 2020, the DHHR filed a second amended petition to include J.A. in the proceedings following his birth. The DHHR alleged that petitioner tested positive for THC twice shortly before the child's birth. The DHHR also included additional allegations concerning the other children. Specifically, the three older children underwent finding words interviews after their removal, during which they detailed additional instances of physical abuse, including petitioner waking child T.G. up by "hitting him on the head with his hand and yelling." Further, B.G.-1's foster parent informed CPS that the child was taken for medical treatment for an ear condition. Upon having the ear irrigated, "parts of brown bugs . . . with broken pieces of legs and antenna[e] . . . came out." Petitioner again waived his right to a preliminary hearing in regard to this petition.

Prior to adjudication, petitioner filed a written stipulation in which he admitted that he neglected all the children, including J.A. Petitioner further admitted that, "[b]ased upon this stipulation, the above-named children are abused and neglected within the meaning of West Virginia Code § 49-6-1 et seq." At the adjudicatory hearing in February of 2020, petitioner informed the court that he did not contest the adjudication that all the children were abused and neglected. The court then informed petitioner of the rights he forfeited by virtue of his stipulation, "including the right to contest the allegations in the petition . . . and the right to appeal any adverse adjudication." Petitioner informed the court that he "understood and knew the rights and privileges which would be waived and forfeited upon the [c]ourt's acceptation of the stipulations" and that he had not been coerced or pressured into the admissions or stipulations. The court then found that all the children, including J.A., were abused and neglected children and that petitioner was an abusive and neglectful parent. The court further granted petitioner a post-adjudicatory improvement period. At a hearing the following month, the parties entered the terms and conditions of the improvement period on the record, including the requirements that petitioner sign all releases for information; attend all court hearings and scheduled appointments; obtain and maintain a residence and environment that is safe and stable for the children, has utilities, and is free of trash, clutter, and other safety concerns; submit to a parental fitness examination and follow any recommendations incorporated into the case plan; participate in individualized parenting and adult life skills education; attend visits; undergo a Batterers Intervention Prevention Program ("BIPP") evaluation; and participate in individualized therapy, among other requirements.

Over the next several months, the court held review hearings and permitted petitioner's improvement period to continue. The court also ordered petitioner to undergo a psychological

evaluation. During this period, petitioner and the mother indicated that they intended to separate, although evidence throughout the remainder of the case established that they continued in their relationship. Despite the court's extension of the improvement period, the DHHR filed a progress report in July of 2020 indicating that petitioner was only partially compliant with the terms and conditions of his improvement period. Petitioner attended parenting and adult life skills education and visits, but the report indicated that petitioner "fails to take responsibility for the current CPS case, as he makes excuses and blames his girlfriend's children['s] father for the situation." At the time, petitioner had not provided documentation of a BIPP evaluation, and the DHHR was unsure if he had begun therapy. The report also noted continued concerns about the conditions inside the home.

In September of 2020, the DHHR submitted another report indicating that petitioner's parental fitness examination resulted in a poor prognosis for improved parenting. When asked about the case, petitioner indicated that the house was simply "messy," that he did not agree with the allegations against him, and that he "had to take the guilty plea to get this over with." Petitioner was emphatic that the children's removal was "not [his] fault." Petitioner further denied having struck the children with a belt, other than perhaps accidentally, and indicated that the children fabricated these allegations because "they were afraid of something else." Petitioner also accused the individual who interviewed the children of "irritat[ing] the children into saying whatever the interviewer wanted them to say." When asked specifically whether he believed he had done anything abusive or neglectful, petitioner was clear in responding, "No." Petitioner also reported having learned nothing in his parenting class. According to the report, "there is no indication that [petitioner] has genuinely and sincerely accepted responsibility for the abuse and neglect in the home" and that "[w]ithout insight and acceptance of responsibility, there is little reason to believe [petitioner] is motivated to make long-term changes in his behavior and his parenting." The report noted that petitioner's parenting provider indicated that petitioner admitted to harming the children, but this same provider also raised concerns about petitioner lying to her. Based on this information, the DHHR believed that petitioner had not shown sufficient improvement to warrant an extension of his improvement period.

That same month, the court held another review hearing, during which the DHHR recommended that the court deny petitioner a further extension of his improvement period. The court found that petitioner had not substantially complied with the terms and conditions of his improvement period and denied his request for an extension. Shortly after this hearing, petitioner filed a motion for a post-dispositional improvement period.

Beginning in October of 2020, the court held a series of dispositional hearings that concluded in January of 2021. After hearing extensive evidence, including testimony from multiple DHHR workers, service providers, and petitioner, the court denied petitioner's request for a post-dispositional improvement period because he could not establish a substantial change in circumstances such that he was likely to fully comply. According to the court, it was initially prepared to grant a post-dispositional improvement period, but subsequently came to the determination that petitioner "lack[s] credibility and honesty." Specifically, the court addressed petitioner's contention that he and the mother ended their relationship, finding that "the number of encounters that these . . . parents had in a very short period of time means nothing more than these . . . parents are in a continued relationship." The court also found that "one of the most

believable witnesses" was petitioner's mother, who made it clear that she was testifying in the children's best interests. The court noted that the grandmother was "in a tough position" given that she was testifying against her son's interest. Regardless, the grandmother testified that petitioner admitted he was still in a relationship with the children's mother. The court further addressed petitioner's unwillingness to admit that his conduct was abusive or neglectful, as he denied in court having used a belt to discipline the children. Based on the evidence, the court was "unable to find that . . . [petitioner was] progressing in any manner through the improvement period that is going to correct the conditions that led to the abuse and neglect." The court further found that petitioner failed to follow through with the case plan and that termination of his parental and other rights to the children was necessary for their welfare. Accordingly, the court terminated petitioner's parental rights to J.A. and "any guardianship and/or custodial rights he may have" to the remaining children.[5] It is from the dispositional order that petitioner appeals.

The Court has previously established the following standard of review:

> "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." 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).

On appeal, petitioner argues that it was error to adjudicate him in regard to J.A. It is unnecessary to address his arguments in support of this assignment of error, however, because petitioner stipulated to his adjudication below. Petitioner acknowledges that he failed to object to any alleged deficiencies in the petition related to J.A. or his adjudication in regard to that child by requesting that this Court apply plain error to this issue. We decline to do so, because beyond simply waiving this issue, petitioner affirmatively invited any alleged error of which he now complains. Indeed, on appeal to this Court, petitioner argues that "there was no evidence that [J.A.] was ever abused or neglected by petitioner," while ignoring the fact that his affirmative stipulation to having abused and neglected that child obviated the taking of evidence on that very

[5]All parents' parental rights were terminated below. The permanency plan for the children is adoption in their current foster homes.

issue. We have previously held that "'[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.' Syllabus Point 1, *Maples v. West Virginia Dep't of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)." Syl. Pt. 2, *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, 719 S.E.2d 381 (2011). Further,

> "[a] judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syllabus Point 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966), *overruled on other grounds by Proudfoot v. Dan's Marine Service, Inc.*, 210 W.Va. 498, 558 S.E.2d 298 (2001).

Id. at 215, 719 S.E.2d at 383, syl. pt. 3. It is unnecessary to analyze petitioner's arguments to determine if an error occurred in regard to his adjudication of J.A. because any alleged error would have been induced by petitioner's willing stipulation to having abused and neglected that child. Indeed, at adjudication, the court ensured that petitioner understood that by entering his stipulation, he forfeited the right to contest the allegations in the petition or otherwise appeal his adjudication. Accordingly, we find that petitioner is entitled to no relief.

Petitioner next argues that the circuit court erred in denying his request for an extension of his post-adjudicatory improvement period. Petitioner takes issue with the wording of the court's order, in that it specifically ruled as follows: "The [c]ourt cannot find that . . . [petitioner has] substantially complied with the terms and conditions of [his] post-adjudicatory improvement period[]." Petitioner cites to West Virginia Code § 49-4-610(6), which provides that a court may extend a post-adjudicatory improvement period "when the court finds that the [parent] has substantially complied with the terms of the improvement period." Petitioner's argument is one of semantics that does not entitle him to relief. He asserts that the court did not make sufficient findings to support the denial, while ignoring this Court's prior direction that "before a circuit court can grant an extension of a post-adjudicatory improvement period, *the court must first find* that the respondent has substantially complied with the terms of the improvement period." Syl. Pt. 2, *In re J.G.*, 240 W. Va. 194, 809 S.E.2d 453 (2018) (emphasis added) (citation omitted). Contrary to petitioner's argument that the circuit court's order was deficient, we find that the record clearly shows that an extension of petitioner's post-adjudicatory improvement period would have been inappropriate because the court did not find that he was substantially compliant.

Petitioner further argues that he demonstrated substantial compliance through his supervised visits with J.A., for which he asserts that he was "praised . . . for being attentive and loving"; participation in parenting and adult life skills education; efforts toward improving the condition of the home; and completion of the BIPP evaluation. Petitioner also asserts that "[i]t is regrettably rare these days to find an abuse and neglect case where the parent has no issues with drugs or alcohol" and that his case is notable because he was never suspected of having a problem with either. While petitioner is correct that he complied with some aspects of his improvement period, he ignores the fact that he failed to fully comply. The record shows that the circuit court considered substantial evidence in ruling on petitioner's motion for an extension, including the DHHR's report on petitioner's performance during the improvement period. Contrary to petitioner's assertion that he improved the conditions in the home, the DHHR's

report indicated that petitioner lacked stable housing entirely at the time of the hearing on his motion. Further, despite the fact that petitioner and the mother supposedly ended their relationship, the report also included information that petitioner remained in a relationship with her and may have been living in the home with her. Although ending his relationship with the mother was not required under the case plan, petitioner repeatedly indicated that the relationship was over, and evidence to the contrary speaks to petitioner's dishonesty during the proceedings. The report also cited heavily from petitioner's parental fitness evaluation, which concluded that his prognosis for improved parenting was poor. According to petitioner, the circuit court placed an inappropriate emphasis on his statement during his parental fitness evaluation that he did not agree that he had abused the children and stipulated at adjudication simply to "get this over with." Petitioner asserts that at other points during this evaluation, and in conversations with other service providers, he clearly admitted to having "gotten too out of line regarding discipline" or having been "a little too much with the discipline." What petitioner fails to recognize, however, is that his limited admissions to having abused or neglected the children held little to no weight, given that he lied to service providers throughout the improvement period.

In addressing circuit courts' analysis regarding a parent's compliance in an improvement period, we have explained that

> "'it is possible for an individual to show "compliance with specific aspects of the case plan" while failing "to improve . . . [the] overall attitude and approach to parenting." *W.Va. Dept. of Human Serv. v. Peggy F.*, 184 W.Va. 60, 64, 399 S.E.2d 460, 464 (1990).'" *In re Jonathan Michael D.*, 194 W.Va. 20, 27, 459 S.E.2d 131, 138 (1995). Moreover, "'[t]he assessment of the overall success of the improvement period lies within the discretion of the circuit court . . . "regardless of whether . . . the individual has completed all suggestions or goals set forth in family case plans."' *In Interest of Carlita B.*, 185 W.Va. 613, 626, 408 S.E.2d 365, 378 (1991)." *In re Jonathan Michael D.*, 194 W.Va. at 27, 459 S.E.2d at 138.

Here, petitioner cannot establish that the circuit court abused its discretion in determining that he did not substantially comply and that his requested extension should have been denied. On appeal, each of petitioner's arguments center on his assertion that the circuit court improperly weighed certain evidence, such as giving too much weight to the conclusion of the parental fitness evaluation or too little weight to his progress in services. This is simply insufficient to establish error, as we have routinely held that "[a]n appellate court may not . . . weigh evidence as that is the exclusive function and task of the trier of fact." *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995). Accordingly, petitioner is entitled to no relief.

Petitioner next argues that the circuit court erred in denying his request for a post-dispositional improvement period. In support of this assignment of error, petitioner relies entirely on the same arguments as the prior assignment of error. According to West Virginia Code § 49-4-610(3)(D), in order to obtain a post-dispositional improvement period after having already been granted an improvement period, a parent must "demonstrate[] that since the initial improvement period, the [parent] has experienced a substantial change in circumstances" and

"that due to that change in circumstances, the [parent] is likely to fully participate in the improvement period." Although petitioner argues that the same evidence he relied upon above establishes that he underwent a substantial change in circumstances, we disagree. Indeed, if this evidence was insufficient to establish that petitioner substantially complied with his post-adjudicatory improvement period, it follows that it is insufficient to satisfy the burden necessary to obtain a post-dispositional improvement period. As we have explained, the decision to grant or deny an improvement period rests in the sound discretion of the circuit court. *See In re M.M.*, 236 W. Va. 108, 115, 778 S.E.2d 338, 345 (2015) ("West Virginia law allows the circuit court discretion in deciding whether to grant a parent an improvement period."); Syl. Pt. 6, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996) ("It is within the court's discretion to grant an improvement period within the applicable statutory requirements . . . .").

Petitioner further ignores the fact that in ruling on this motion, the court explicitly found that his testimony lacked credibility, undermining a significant portion of his argument on appeal concerning his alleged acceptance of his abusive and neglectful conduct. This is a determination we decline to disturb on appeal. *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."). Further, we have routinely explained that

> [i]n 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.

In re Timber M., 231 W. Va. 44, 55, 743 S.E.2d 352, 363 (2013) (citation omitted). As the circuit court noted, petitioner continued to deny having physically abused any of the children with a belt, despite detailed disclosures of such conduct from the children. Further, the statements petitioner relies on to assert that he did, in fact, acknowledge this conduct instead establish that he sought to minimize his actions and failed to truly acknowledge them. Based on petitioner's refusal to fully acknowledge the conditions of abuse and neglect at issue, in addition to his untruthful statements regarding the ongoing relationship with the mother and other issues of noncompliance, the court explained that it was "unable to find that [petitioner was] progressing in any manner through the improvement period that is going to correct the conditions that led to the abuse and neglect." As such, we find no error in the circuit court's finding that petitioner failed to satisfy his burden for obtaining a post-dispositional improvement period, and he is entitled to no relief on appeal.

For the foregoing reasons, we find no error in the decision of the circuit court, and its January 20, 2021, order is hereby affirmed.

Affirmed.

ISSUED: August 27, 2021

CONCURRED IN BY:

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

CONCURRING, IN PART, AND DISSENTING, IN PART:

Justice Wooton concurs in the Court's decision affirming termination of petitioner's guardianship/custodial rights to T.G., B.G.-1, and B.G.-2, but would consider the sufficiency of the allegations concerning petitioner's parental rights to J.A. on the Court's Rule 19 docket.