[Cite as *In re D.J.M.*, 2011-Ohio-6836.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF: D.J.M. AND H.A.M.	**:**	**O P I N I O N**
	:	**CASE NO. 2011-L-022**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2010 CV 01738.

Judgment: Affirmed.

Jeffrey A. Swank, pro se, P.I.D. 542-267, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Appellant).

Robert L. Moore, 34950 Chardon Road, #210, Willoughby, OH 44094-9162 (For Appellee Anna Manley).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeffrey A. Swank, appeals the judgment of the Lake County Court of Common Pleas, Juvenile Division, granting the motion of appellee, Anna Manley, to dismiss and deny his request for visitation of the parties' minor children. At issue is whether the trial court violated appellant's constitutional rights by denying his request for visitation. For the reasons that follow, we affirm.

{¶2} Ms. Manley and appellant are the biological parents of two minor children, D.J.M. and H.A.M., although they were never married. At the time appellant filed his petition for visitation in 2010, the children were nine and six years old, respectively.

{¶3} Three years earlier, on July 22, 2007, appellant was living with Ms. Manley and the children in a trailer park in Madison Township. On that date, Christine Carson went to a party in a park in Madison given by one of her co-workers. Late that night, while Ms. Carson was waiting in her car for her friends, she fell asleep. Sometime after midnight, she was awakened by appellant, a complete stranger to her, putting his hand over her mouth and grabbing her around her waist. Appellant was not a guest at the party, but had heard it from his nearby trailer.

{¶4} Appellant pulled Ms. Carson from her car and dragged her toward the woods. Ms. Carson struggled with appellant, and he pushed her against a truck several times. At one point, appellant put his hand over Ms. Carson's mouth so she could not breathe and put his hands around her neck and choked her. She believed he was going to kill her.

{¶5} Appellant carried Ms. Carson into the woods and she fell to the ground. She struggled with appellant for several minutes before he was able to remove her pants. He tried to rape her vaginally, but he was unable to achieve an erection. He then forced her to perform oral sex on him. Appellant then tried to force Ms. Carson to submit to him performing oral sex on her. However, she continued to struggle with him, and he eventually abandoned the effort. During this period, appellant achieved an erection.

{¶6} Appellant then forced Ms. Carson to submit to vaginal intercourse, during which he ejaculated inside her. Ms. Carson subsequently ran back to the party. On her arrival, she reported the rape to her friend who took her to the hospital.

{¶7} Following appellant's indictment, on November 29, 2007, he pled guilty to two counts of rape and attempted kidnapping. Based on the serious physical and psychological harm sustained by Ms. Carson; appellant's prior convictions of theft, assault, and drug abuse; his failure to take advantage of prior opportunities for treatment through the criminal justice system at the Lake/Geauga Center for Alcoholism and Drug Abuse; and his continued daily abuse of alcohol and drugs, the trial court sentenced appellant to a mandatory prison term of eight years on each of the two counts of rape and four years in prison for attempted kidnapping, with each sentence to be served consecutively, for a total of 20 years in prison.

{¶8} Appellant filed a direct appeal and this court affirmed his conviction, sentence, and sex offender classification in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, sex offender classification reversed and remanded at 2011-Ohio-5348.

{¶9} On February 3, 2010, the Ohio Department of Rehabilitation and Correction found that appellant had been sending correspondence to Ms. Manley and the children after the Department had determined that appellant had been harassing or threatening them and after the Department had notified appellant that Ms. Manley did not want to receive correspondence from him, in violation of Administrative Regulation 5120-9-18. Based on this finding, the Department issued an order directing appellant to cease all correspondence and contact with Ms. Manley and the children. The Department personally served appellant with a copy of this determination and order on February 3, 2010. Appellant did not appeal this administrative order.

{¶10} On October 4, 2010, appellant filed his petition for visitation with his children, alleging that Ms. Manley "is using the children to get back at [him] for her own hateful reasons." In his petition, appellant requested that the court appoint counsel to represent him, and he included a proposed schedule for the children to visit him in prison. Despite the no-contact order, three months prior to filing his petition for visitation, appellant had his father, Stephen Swank, serve Ms. Manley with a copy of appellant's petition in July 2010.

{¶11} On November 27, 2010, appellant filed an application with the Lake County Public Defender requesting representation on his petition. He alleged that if the public defender denied his request, his due process rights would be violated. On November 29, 2010, the public defender denied appellant's request, stating that appellant's "issue does not qualify for *** court appointed counsel." On December 9, 2010, appellant filed a motion to compel the public defender to represent him. On December 28, 2010, the court denied appellant's motion, finding that the public defender had determined that appellant's petition for visitation did not qualify for court-appointed counsel.

{¶12} On November 30, 2010, the magistrate held a pretrial following which he entered an order stating that Ms. Manley was to file a motion to dismiss with evidentiary materials in support within 21 days and appellant was to file his response within 21 days after receipt of her motion. The magistrate stated that once the briefs were filed, he would rule on the motion based on the parties' filings. Appellant did not object to this stated procedure.

{¶13} On December 17, 2010, Ms. Manley filed a motion to deny visitation arguing that, while a noncustodial parent's right of visitation should only be denied in extraordinary circumstances, appellant's imprisonment was such an extraordinary circumstance. She further argued that appellant failed to meet his burden to demonstrate it would be in the children's best interests to have regular visitation with him in prison.

{¶14} In her affidavit filed in support of her motion, Ms. Manley stated that appellant has not been and is not presently in the children's lives and that it would not be in their best interests to award appellant visitation with them. She also said it would not be in their best interests to be transported to and from prison and, in fact, would be harmful to them. She said she supports the children on her own and has provided a safe environment for them. She stated that appellant's attempt to obtain court-ordered visitation is part of a continuing pattern of harassment by him of her and her family.

{¶15} Appellant timely filed a brief in opposition to Ms. Manley's motion to deny visitation. In his brief, he asked that the court grant him visitation based on the materials he presented. He disputed Ms. Manley's motion by way of argument in his brief, the affidavit of his father, Stephen Swank, and excerpts of various unsworn documents. He did not, however, present his own affidavit to rebut the affidavit submitted by Ms. Manley.

{¶16} In his brief, appellant challenged Ms. Manley's allegations that he had harassed her and the children. He argued the reason he is in prison has nothing to do with the children and should not be used against him. He argued that Ms. Manley is conducting a "dishonest and irrelevant smear campaign" against him. Although

appellant denied in his brief the factual contentions in Ms. Manley's affidavit, because he did not submit an affidavit or other evidence in opposition, the testimony in her affidavit was undisputed.

{¶17} In his brief, appellant berated Ms. Manley for allegedly keeping the children away from him and using them "as pawns to obtain what [she] want[s]." Appellant trivialized the serious nature of his conviction and sentence, blaming Ms. Manley rather than his sentence for the separation from his children. He argued it would be no more harmful to transport the children to and from prison than it would be to take them to a relative's home, store, or restaurant. Appellant offered no evidence that it would be in the children's best interests to see him. Further, he did not submit any evidence that the children want to have visitation with him. Instead, he simply argued that the children would be damaged if they do not have him in their lives. He argued that the court should "stop punishing the children" by depriving them of his involvement in their lives.

{¶18} Appellant presented the affidavit of his father, Stephen Swank, in which Mr. Swank presented a long list of his grievances against Ms. Manley. Although he did not allege he has been awarded visitation or that he has helped to support the children, he complained that on numerous occasions, Ms. Manley only permitted him to visit with the children for brief periods of time. He complained that on one occasion, Ms. Manley moved without telling him first. He alleged that on another occasion at a party, Ms. Manley told the children not to talk to him. He alleged that on some occasions, she did not return his phone calls. He said, "I feel that Ms. Manley maybe [sic] keeping the children away from us all in an effort to hurt or punish my Son [sic] and the Swank

family for what ever [sic] reason." Like appellant, Mr. Swank blamed Ms. Manley rather than appellant's sentence for the separation between him and the children. He did not, however, dispute the substantive averments in Ms. Manley's affidavit.

{¶19} On January 6, 2011, the magistrate entered his decision recommending that appellant's request for visitation be denied. The magistrate found that visitation is not in the best interest of the children at this time due to appellant's incarceration and the order to cease contact and correspondence issued by the Ohio Department of Rehabilitation and Correction. Appellant filed an objection to the magistrate's decision, arguing that his incarceration was insufficient grounds to deny his request for visitation.

{¶20} On January 31, 2011, the trial court entered judgment adopting the magistrate's decision. Appellant appeals the trial court's judgment, asserting three assignments of error. For his first assigned error, he alleges:

{¶21} "The trial court errord [sic] when it did not give a full hearing for visitation with minor child. in [sic] violation of appellant's rights and due process. Appellant's rights to access the courts is guaranteed by the 1ST [sic] 5TH [sic] 14TH Amendment of the U.S. Constitution."

{¶22} As a preliminary matter, this court has recognized "*** the volume of case law supporting a trial court's decision to deny visitation to an incarcerated parent." *Ramos v. Ramos* (Sep. 30, 1998), 11th Dist. No. 97-A-0070, 1998 Ohio App. LEXIS 4605, *6. This court has stated that, "[w]hile a nonresidential parent's right of visitation should be denied only when extraordinary circumstances exist, *** imprisonment for a term of years is an extraordinary circumstance supporting a trial court's denial of visitation." Id. The Twelfth District Court of Appeals has held that imprisonment for a

term of three to ten years is an extraordinary circumstance permitting a trial court to deny visitation. *Calhoun v. Calhoun* (June 10, 1996), 12th Dist. No. CA 95-11-024, 1996 Ohio App. LEXIS 2384, *2. Further, this court in *Ramos*, supra, held that "a child's visitation with an incarcerated parent is presumed not to be in a child's best interest." Id. at *6-*7. Further, this court has held that "'an incarcerated nonresidential parent bears the burden of demonstrating that visitation between the child and parent at the place of incarceration is in the child's best interest.'" *Simms v. Simms* (Mar. 27, 1998), 11th Dist. No. 97-P-0005, 1998 Ohio App. LEXIS 1276, *17, quoting, *Calhoun*, supra.

{¶23} Appellant argues the court erred in not holding a "full hearing" on his request for visitation. The argument lacks merit for several reasons. First, as noted above, following the November 30, 2010 pretrial, the magistrate entered an order on that date stating that Ms. Manley was to file a motion to dismiss with evidentiary material within 21 days and that appellant was to file a response within 21 days after receipt of Ms. Manley's motion. The magistrate stated in his order that once the briefs were filed, the magistrate would make a ruling based on the parties' filings. Thus, the magistrate ordered that Ms. Manley's motion would be determined by a non-oral hearing. Appellant never objected to this procedure as ordered by the magistrate. "'[A]n appellate court will not consider any error which a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State v. Awan* (1986), 22 Ohio St.3d 120, 122, quoting *State v. Childs* (1968), 14 Ohio St.2d 56. Likewise, [c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time." Id., citing *State v. Davis* (1964), 1 Ohio St.2d 28; *State ex rel.*

Specht, v. Bd. of Edn. (1981), 66 Ohio St.2d 178. Because appellant failed to object to the magistrate's order concerning the procedure that would be followed in ruling on Ms. Manley's motion and further because appellant complied with that order by timely filing his response brief with evidentiary materials, this argument is waived.

{¶24} Second, even if appellant had not waived the issue, he fails to present any argument in support of this assigned error, in violation of App.R. 16(A)(7). Instead, he simply says that he feels that the court violated his due process rights by not hearing his complaint and filings. For this additional reason, this assignment of error lacks merit.

{¶25} Third, appellant fails to cite any pertinent authority in support of his apparent contention that the court was required to hold an evidentiary, as opposed to a non-oral, hearing on Ms. Manley's motion to dismiss, in violation of App.R. 16(A)(7). For this additional reason, the assignment of error lacks merit.

{¶26} Fourth, while appellant suggests that his due process rights were violated by the court's failure to hold an evidentiary hearing, he fails to reference any evidence in the record he would have presented if the matter had been determined in an evidentiary hearing. Thus, any error in the court's ruling on Ms. Manley's motion by way of non-oral hearing was harmless. An appellate court must disregard any error or defect in the proceedings that does not affect the substantial rights of the adverse party. R.C. 2309.59. Further, no judgment shall be reversed due to such harmless error. Id. Because appellant failed to cite any evidence, which was not before the court and which would likely have affected the outcome of the case, any error was harmless and not a ground for reversal of the court's judgment.

{¶27} Appellant's first assignment of error is overruled.

{¶28} For his second assigned error, appellant contends:

{¶29} "The trial court erred when it did not consider all the factors used to determine minor visitation. In [sic] accord with Ohio Revised Code. The court must consider many factors when determining the best interest of minor children. Appellant brought up several of these factors in brief form and none were considered by the court. The Fourteenth Amendment's due process clause was violated by not considering all factors set forth when considering weather [sic] or not to award visitation."

{¶30} Appellant argues that the trial court did not take into account any of the factors listed in R.C. 3109.051(D) in determining the best interest of the children. However, appellant does not reference the record for any evidence in support of this contention. The trial court is entitled to the presumption of regularity, that is, the trial court is presumed to know and follow the law in arriving at its judgment unless it affirmatively appears to the contrary. *State v. Eley*, 77 Ohio St.3d 174, 1996-Ohio-323. In a bench trial, we must presume a trial court relies only on relevant, material, and competent evidence in arriving at its judgment. Id. at 180.

{¶31} Here, because the trial court did not state in its judgment entry that it did not consider the pertinent best interest factors, we are obliged to presume that the court was aware of the law and followed it. Appellant's contention that he does not "feel" the court considered the best interest factors is insufficient to rebut the presumption of regularity, particularly since the court made the specific finding in its judgment entry that visitation with appellant at the prison is not in the children's best interests at this time.

{¶32} Appellant's second assignment of error is overruled.

{¶33} For his third and final assigned error, appellant alleges:

{¶34} "The court errord [sic] when it denied appointment of council [sic]."

{¶35} Appellant argues that the trial court erred in not appointing counsel to represent him on his civil petition for visitation. In support he cites *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 1998-Ohio-596. In *Asberry*, the Supreme Court of Ohio first noted that there is no requirement under the federal constitution that all indigent parties in a juvenile proceeding be provided appointed counsel. Id. at 46. The *Asberry* Court then held that, pursuant to the plain language of R.C. 2151.352, indigent children, parents, custodians, or other persons in loco parentis are entitled to appointed counsel in all juvenile proceedings. Id. at 48. However, the Supreme Court's decision in *Asberry* has been superseded by statute. At the time *Asberry* was decided, R.C. 2151.352 still provided, in pertinent part: "A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code." R.C. 2151.352 (effective January 13, 1976). The statute has since been amended, effective January 1, 2002, to specify that the right to appointed counsel for indigent parties at government expense does not apply to civil custody matters filed under R.C. 2151.23(A)(2). Such matters include requests for court-ordered visitation. See, *In re M.E.H.*, 4th Dist. No. 08CA4, 2008-Ohio-3563, at ¶12. See, also, *In re Bobbi Jo S. v. Jeff W.C.*, 6th Dist. No. L-01-1252, 2002-Ohio-1226, 2002 Ohio App. LEXIS 965, *5. Because appellant's petition requested visitation, the trial court exercised jurisdiction pursuant to R.C. 2151.23(A)(2), and appellant was therefore not entitled to appointed counsel.

{¶36} Appellant's third assignment of error is overruled.

{¶37} For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.