[Cite as *In re C.D.*, 2009-Ohio-6922.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

IN RE:	:	
C.D.	:	CASE NO. CA2009-07-030
	:	O P I N I O N 12/30/2009
	:	
	:	

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 20073070

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for appellee, Brown County Department of Job and Family Services

Denise S. Barone, 385 North Street, Batavia, Ohio 45103, for appellant, G.D.

C. Nicholas Ring, 735 East State Street, Georgetown, Ohio 45121, guardian ad litem

RINGLAND, J.

{¶1} Appellant, the father of C.D., appeals a decision of the Brown County Court of Common Pleas, Juvenile Division, granting permanent custody of the child to the Brown County Department of Job and Family Services. We affirm the decision of the trial court.

{¶2} On August 20, 2007, BCDJFS filed a motion for an emergency ex parte custody order. The motion alleged that on August 17, 2007, the child's mother was arrested on

charges of possession of drugs and tampering with evidence and that the child, then four years old, was present at the time of the arrest. The motion also stated that there were no custody or visitation orders in place in relation to the father.

{¶3} The trial court granted the motion and the following day, the agency filed a complaint alleging that the child was neglected and dependent. In addition to the facts above, an agency caseworker's affidavit stated that according to witness statements at the time of the arrest, the mother threatened to kill both herself and the child. The caseworker further stated that the father had a lengthy criminal record, with convictions spanning the years from 1991 to 2005. In addition, the agency was concerned with placing the child with his father due to the extensive criminal history and because there had not been an opportunity to complete a home study.

{¶4} At a hearing on October 31, 2007, the parents stipulated to a dependency finding and the court entered an order finding the child was dependent. Temporary custody was granted to the agency and a case plan was prepared. On November 5, 2008, the agency moved for permanent custody. Hearings on the motion were held on April 13 and June 1, 2009.

{¶5} At the hearings, testimony was presented by Ruth Ellen Kidwell, the agency caseworker, regarding the history of the case and the reasons for requesting permanent custody. Dr. Karla Voyten, a licensed psychologist, also testified regarding psychological evaluations she conducted on the parents, and Dr. James Meyers testified regarding a psychological evaluation of the child. The parties also agreed to admit the deposition testimony of Dr. Bernard DeSilva, the father's treating psychiatrist. Appellant also testified on his own behalf. The guardian ad litem submitted a report and discussed his recommendation that the court grant permanent custody.

{¶6} The trial court issued a decision on June 16, 2009, granting permanent custody

of the child to BCDJFS. Appellant[1] now appeals that decision, raising the following two assignments of error for our review:

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW AND ABUSED ITS DISCRETION WHEN IT FOUND THAT THE [BCDJFS] HAD MADE REASONABLE EFFORTS TO PREVENT REMOVAL OF THE CHILD AND/OR TERMINATE THE PARENTAL RIGHTS."

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING THAT THE STATE HAD MET ITS BURDEN OF PROOF IN GRANTING PERMANENT CUSTODY OF [C.D.] TO THE STATE."

{¶9} Before a natural parent's constitutionally protected liberty interest in the care and custody of his child may be terminated, the state is required to prove by clear and convincing evidence that the statutory standards for permanent custody have been met. *Santosky v. Kramer* (1982), 455 U.S. 745, 759, 102 S.Ct. 1388. An appellate court's review of a juvenile court's decision granting permanent custody is limited to whether sufficient credible evidence exists to support the juvenile court's determination. *In re Starkey,* 150 Ohio App.3d 612, 2002-Ohio-6892, ¶16. A reviewing court will reverse a finding by the juvenile court that the evidence was clear and convincing only if there is a sufficient conflict in the evidence presented. *In re Rodgers* (2000), 138 Ohio App.3d 510, 520.

{¶10} R.C. 2151.414(B) requires the juvenile court to apply a two-part test when terminating parental rights and awarding permanent custody to a children services agency. Specifically, the court must find that: (1) the grant of permanent custody to the agency is in the best interest of the child, utilizing, in part, the factors of R.C. 2151.414(D); and, (2) any of the following apply: the child cannot be placed with either parent within a reasonable time or

1. The child's mother did not appeal the court's decision to grant permanent custody to the agency and is therefore not a party to this appeal.

should not be placed with either parent; the child is abandoned; the child is orphaned; or the child has been in the temporary custody of the agency for at least 12 months of a consecutive 22-month period. R.C. 2151.414(B)(1)(a), (b), (c) and (d); *In re Schaefer,* 111 Ohio St.3d 498, 2006-Ohio-5513, ¶31-36; *In re Ebenschweiger,* Butler App. No. CA2003-04-080, 2003-Ohio-5990, ¶9.

{¶11} In this case, the juvenile court found by clear and convincing evidence that it was in the best interest of the child to grant permanent custody to the agency, the child has been in the temporary custody of BCDJFS for more than 12 months of a consecutive 22-month period and that the child cannot be placed with either parent within a reasonable time and should not be placed with either parent.

{¶12} In his first assignment of error, appellant challenges the trial court's determination that reasonable efforts were made to prevent the removal of the child from the home. R.C. 2151.419 requires a children services agency to make reasonable efforts to prevent removal or return a child to the home. The statutory provision requiring the agency to make reasonable efforts does not apply in a hearing on a motion for permanent custody. *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶43; *In re D.B.*, Butler App. No. CA2007-05-135, 2007-Ohio-5391, ¶8.

{¶13} However, except for narrowly defined statutory exceptions, the agency must make reasonable efforts to reunify the family at various stages during the child custody proceedings prior to the termination of parental rights. *C.F.* at ¶42. If an agency has not established that reasonable efforts were made prior to a hearing on a motion for permanent custody, then it must establish reasonable efforts at that time. Id. at ¶43. In this case, the agency presented evidence regarding reasonable efforts and the court made findings that the agency made reasonable efforts on several occasions prior to the hearing on the motion for permanent custody.

{¶14} Appellant's argument in this assignment of error relating to reasonable efforts is somewhat confusing as he states that "there was insufficient evidence for the trial court to determine that the child was dependent at the time of removal." His argument appears to be that the child was not dependent because he was available to take physical custody of the child. However, as mentioned above, the parties stipulated to the dependency finding. In addition, the evidence presented at the time of the dependency hearing included a record of appellant's extensive criminal history and a statement by the agency that it had concerns in placing the child with the father without a home study. Accordingly, we find no error in the trial court's determination that the child was dependent or that reasonable efforts were made to prevent the removal of the child.

{¶15} Appellant also argues that there was insufficient evidence for the trial court to determine that the father had failed to substantially comply with the agency's case plan. However, this finding does not appear in the trial court's decision, nor has appellant cited to this finding in any part of the record. Nonetheless, appellant's argument appears to be that the father complied with most of the case plan and this, along with the "paramount rights" of parents to their children was not considered by the trial court.

{¶16} Kidwell, the agency caseworker, testified that although the father completed several aspects of the case plan, the agency still had concerns. She stated that although appellant completed the actual services (parenting classes and anger management classes) there were concerns regarding his ability to apply the skills from those services positively. In addition, the father's issues regarding his criminal activity, which included an indictment and conviction after the child was removed from the home, were an active concern. She stated that the father demonstrates problems in judgment and ability to follow court orders and this impacts his ability to insure the child is safe and not present when criminal activity occurs.

{¶17} Moreover, completion of a case plan alone does not preclude a grant of

permanent custody to a children services agency. *In re Mraz,* Brown App. Nos. CA2002-05-011, CA2002-07-014, 2002-Ohio-7278. As discussed above, the caseworker testified as to her concern regarding appellant's ability to demonstrate the skills provided by the services. In addition, his continuing criminal activity called into question his ability to insure the child's safety and stability. Dr. Voyten also testified that the father evidences personality and behavior characteristics that could potentially be harmful to children. She discussed his history of criminal behavior, his history of severe and chronic substance abuse, poor judgment, impulsivity, need to control others, and blaming others for the difficulties he caused. Accordingly, we find no error in the court's decision regarding the reasonable efforts of the agency and the case plan. Appellant's first assignment of error is overruled.

{¶18} Appellant's second assignment of error challenges the court's finding that the agency met its burden of proof in order to grant permanent custody. Specifically, appellant argues the trial court relied on racially biased and highly prejudicial evidence when it relied on Dr. Voyten's written report and testimony. Appellant argues that Dr. Voyten did not take into account the father's Cuban ethnicity and inability to understand basic English. Appellant further argues that his expert, Dr. DiSilva, presented "damning testimony" regarding Voyten's testing and appellant's understanding of English.

{¶19} Dr. Voyten testified that she gathered background information, and was aware that the father was born in Cuba and English was his second language. She stated that she had initially given him typical assessment instruments, but appellant voiced concern because English was his second language. She stated that she therefore administered the Rorschach test, which does not require extensive vocabulary skills and does not require extensive receptive vocabulary skills. She stated the test has been standardized and normed with populations which are non-English speaking and is a world-wide instrument. She stated that it is not the preferred primary assessment tool, however, it is valid and standardized,

particularly with the extra scoring system, which she used. Dr. Voyten indicated she has had extensive training in use of the Rorschach test.

{¶20} Dr. DiSilva disagreed with Voyten's use of the Rorschach and much of her methodology, conclusions and credentials. However, evaluating and assessing evidence are the primary functions of the trier of fact, not an appellate court. *In re G.N.*, 170 Ohio App.3d 76, 2007-Ohio-126, ¶24. The court specifically found problems with Dr. DiSilva's conclusions, as the psychiatrist was not aware of the father's entire criminal history, some of which involved drug charges. Moreover, the trial court noted that Dr. DiSilva reported that the father has not improved his life, but that he would do so after the child was returned to him, and the court was unwilling to take that risk. Our review of the record supports the trial court's determinations that Dr. DiSilva was not aware of the extent of appellant's criminal history, and that Dr. DiSilva stated that appellant needs to work on his history of criminal behavior and his abuse of pain medications, but he is not motivated to do so, as he does not have the child, but these are things to work on when he has the child.

{¶21} Appellant also argues that there was insufficient evidence for the trial court to determine that the child spent 12 out of 22 months in the state's custody. Appellant's entire argument in this regard is "[i]t was improper for the trial court to determine that the state had met its burden." Contrary to appellant's brief argument, the agency presented documentary evidence, in the form of court entries, and testimony by the caseworker, that the child was removed from the home and placed in agency custody on August 21, 2007 and was continually in the agency's custody when the motion for permanent custody was filed on November 5, 2008. Thus, the trial court did not err in determining that the child was in the custody of the agency for 12 months of a consecutive 22-month period.

{¶22} Finally, appellant argues that his trial counsel was ineffective for failing to effectively probe Dr. Voyten's testimony on cross-examination. Because parental rights

involve a fundamental liberty interest, procedural due process, which includes the right to effective assistance of counsel, applies to permanent custody hearings. R.C. 2151.352; Juv.R. 4; *In re Spillman*, Clinton App. No. CA2002-06-028, 2003-Ohio-713, ¶8. In determining whether counsel's performance is deficient, an appellate court must find that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668-687-688, 104 S.Ct. 2052. In demonstrating prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 694. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. Id at 689.

{¶23} In support of his argument that his trial counsel was ineffective, appellant simply claims that if counsel had effectively probed Dr. Voyten's testimony "her bias would have been more evident." An appellate court reviewing an ineffective assistance of counsel claim must not scrutinize trial counsel's strategic decision to engage, or not engage, in a particular line of questioning on cross-examination. *In re P.R.*, Butler App. No. 2008-12-297, 2009-Ohio-4135, ¶31; *State v. Revels*, Butler App. Nos. CA2001-09-223, -230, 2002-Ohio-4231, ¶28. Our review of the record shows that counsel questioned Dr. Voyten regarding the tests she administered, appellant's ability to speak English, use of the Rorschach test, and her conclusions regarding appellant's ability to parent. We cannot say that counsel was ineffective in this regard. Appellant's second assignment of error is overruled.

{¶24} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

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