[Cite as *In re D.S.*, 2020-Ohio-4794.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

IN THE MATTER OF:	:	
	:	
D.S., IV,	:	Case No. 20CA905
	:	
Adjudicated Neglected and	:	
Dependent Child.	:	DECISION AND JUDGMENT
	:	ENTRY

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for Appellant.

Elisabeth M. Howard, Waverly, Ohio, for Appellee.

Smith, P. J.

{¶1} D.S. appeals the trial court's judgment that granted Pike County Children Services Board ("the agency") permanent custody of his four-year-old biological child, D.S., IV. D.S. raises one assignment of error.

> Appellant's counsel was ineffective when he failed to request a continuance to allow Appellant to appear for the permanent custody hearing.

I. FACTS AND PROCEDURAL HISTORY

{¶2} On August 13, 2019, the agency sought and received emergency temporary custody of the child. On that same date, the agency also filed a complaint that alleged the child is an abused, neglected, and dependent child. The agency asked the court to award it temporary custody of the

child. The complaint alleged that the agency had received a report that the mother was using illegal substances and was being evicted from her home. Agency caseworkers responded to the mother's home, and the mother tested positive for methamphetamines. The caseworkers also noted that the child "was filthy" and that "the home reeked of cat pee." The complaint further averred that the mother had three other children permanently removed from her custody and that D.S. reportedly was in jail for violating probation.

{¶3} On October 10, 2019, the agency filed an amended complaint that asked the court to award it permanent custody of the child.

{¶4} On October 10, 2019, the trial court adjudicated the child neglected and dependent and set the matter for a dispositional hearing to be held on November 7, 2019. The court continued the child in the agency's temporary custody pending the dispositional hearing. The court further ordered that the parents not be granted any parenting time with the child.

{¶5} The court later granted the agency's request to continue the hearing to January 9, 2020. The court granted the agency another continuance and reset the matter for a hearing to be held on February 20, 2020.

{¶6} At the permanent custody hearing, the court noted that counsel for both parents were present but that the parents were not present. The

court asked D.S.'s counsel whether counsel has had any contact with D.S. Counsel responded that he had not had any contact with his client since the adjudicatory hearing. The trial court then proceeded with the permanent custody hearing.

{¶7} Caseworker Bobbie Jo Dietzel testified that the agency placed the minor child in the same foster home as one of his older siblings and that the child has lived in this foster home since his removal. Dietzel stated that the child "has adjusted greatly" while living in the foster home—his speech has improved, he started potty training, and he is able to communicate his needs. She explained that the child is "very well loved" and enjoys the company of the other children who live in the home.

{¶8} Dietzel stated the agency confirmed that the mother had five other children removed from her care. Dietzel related that the agency has been unable to make contact with the mother and last spoke with the mother in November 2019.

¶9} Dietzel testified that she is uncertain when she last had contact with D.S. but that she believes it was at the adjudicatory hearing. Dietzel explained that D.S. had been enrolled in "Hughes Re-Entry" but believes that D.S. left the program before completing it. She further reported that D.S. "has an active warrant * * * for a probation violation."

{¶10} Dietzel stated that she has "huge concerns" about the parents' ability to care for the child. She related that neither one has appropriate housing and that D.S. is not complying with the terms of his probation. Dietzel additionally explained that she has concerns about the parents' substance abuse issues and their failures to successfully complete a treatment program. Dietzel also testified that the parents have been unable to care for any of their other children.

{¶11} The court asked Dietzel about the parents' visitations with the children. Dietzel explained that once the agency filed its permanent custody motion, the agency decided that it would not schedule visits. She also pointed out that the court's adjudicatory decision specifically stated that the parents would not have any visitation with the child.

{¶12} Dietzel informed the court that the mother last saw the child in August 2019. She testified that D.S. has not had any visits with the child since the agency obtained emergency temporary custody of the child, primarily because D.S. had either been in jail, a treatment facility, or "MIA."

{¶13} On April 11, 2020, the trial court granted the agency permanent custody of the child. The court initially noted that although both parents were properly served, neither appeared for the permanent custody hearing.

{¶14} The court found that the child cannot be placed with either parent within a reasonable time and should not be placed with either parent. The court stated that the parents "have failed to care for the minor child in any way," "have an active substance abuse issue," and "were homeless at the time of the hearing." The court additionally noted that D.S. had an active warrant for his arrest at the time of the permanent custody hearing.

{¶15} The court next determined that placing the child in the agency's permanent custody would serve the child's best interest. The court found that the child "has a strong bond with his foster parents." The court indicated that the child is too young to express his wishes but observed that the guardian ad litem recommended that the court grant the agency permanent custody of the child. The court further noted that the child has been in the agency's continuous temporary custody since August 12, 2019. The court found that the child needs a legally secure placement and that attaining this type of placement "is impossible without an award of permanent custody to [the agency]." The court also determined that R.C. 2151.41(E)(11) applies, because the parents previously had their parental rights terminated with respect to the child's older sibling.

{¶16 The court additionally found that the agency was not required to use reasonable efforts to reunify the family given the prior parental-rights termination involving the child's older sibling.

{¶17} Consequently, the court granted the agency permanent custody of the children. This appeal followed.

II. ANALYSIS

{¶18} In his sole assignment of error, D.S. asserts that trial counsel performed ineffectively by failing to ask the court to continue the permanent custody hearing until D.S.'s presence could be secured.

{¶19} The right to counsel, guaranteed in permanent custody proceedings by R.C. 2151.352 and by Juv.R. 4, includes the right to the effective assistance of counsel. *In re Wingo*, 143 Ohio App.3d 652, 666, 758 N.E.2d 780 (4th Dist.2001), citing *In re Heston,* 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *e.g., In re J.P.B.*, 4th Dist. Washington No. 12CA34, 2013-Ohio-787, 2013 WL 839932, ¶ 23; *In re K.M.D.*, 4th Dist. Ross No. 11CA3289, 2012-Ohio-755, ¶ 60; *In re A.C.H.,* 4th Dist. Gallia No. 11CA2, 2011-Ohio-5595, ¶ 50. " 'Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the

permanent, involuntary termination of parental custody.' " *Wingo* at 666, quoting *Heston* at 827.

{¶20} A parent who seeks to overturn a permanent custody decision on the basis of ineffective assistance of counsel must establish "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Madison*, --- Ohio St.3d ---, 2020-Ohio-3735, --- N.E.3d ---, ¶ 20, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984); *accord State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85.

{¶21} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, a party challenging counsel's effectiveness "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v.*

Taylor, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith,* 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a party challenging counsel's effectiveness bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland,* 466 U.S. at 687; *e.g., Obermiller* at ¶ 84; *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin,* 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶22} To establish prejudice, the party must demonstrate that a reasonable probability exists that " 'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.' " *Hinton v. Alabama,* 571 U.S. 263, 275 (2014), quoting *Strickland,* 466 U.S. at 694; *e.g., State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the challenger to affirmatively establish prejudice. *E.g., State v. Clark,* 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker,* 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002). As we have repeatedly recognized, speculation is insufficient to demonstrate

the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Jenkins,* 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons,* 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley,* 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard,* 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

{¶23} "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

{¶24} In the case at bar, even if we agreed with D.S. that trial counsel performed deficiently by failing to request a continuance, D.S. cannot show that the result of the permanent custody proceeding would have been different if counsel had asked the court to continue the hearing until D.S.'s appearance could be secured.

{¶25 We first note that trial courts have discretion when determining whether to continue a permanent custody hearing. "The determination whether to grant a continuance is entrusted to the broad discretion of the trial court." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 147, citing *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus; *accord State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 92. " '[A]buse of discretion' [means] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.' " *State v. Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. "An abuse of discretion includes a situation in which a trial court did not engage in a ' "sound reasoning process." ' " *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶26} A trial court that is considering a motion to continue should "[w]eigh[] against any potential prejudice to a defendant * * * concerns such as a court's right to control its own docket against the public's interest in the

prompt and efficient dispatch of justice." *Unger*, 67 Ohio St.2d at 67. A court also should consider:

> the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id. at 67–68; *accord State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 147; *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 45. Additionally, with respect to the continuance of juvenile court hearings, Juv.R. 23 provides that "[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties."

{¶27} In the case at bar, D.S. cannot establish that even if counsel had requested the court to continue the hearing, the trial court would have granted the request. As we noted above, a trial court has discretion when considering a motion to continue. D.S. has not presented any argument to demonstrate that the trial court would have granted D.S. a continuance if trial counsel had requested it.

{¶28} Furthermore, even if we presume that the trial court would have granted D.S. a continuance had trial counsel requested it, D.S. cannot show that the result of the permanent custody proceeding would have been

different. D.S. does not set forth any evidence or testimony that he would have presented if the court had granted him a continuance that would have caused the trial court to reach a different decision. D.S. has not argued that if trial counsel had requested a continuance—and if the trial court had granted it—he would have presented evidence showing that despite his troubles, the child could be placed with him within a reasonable time and that placing the child in the agency's permanent custody is not in the child's best interest. Instead, he summarily asserts that trial counsel's failure to ask for a continuance "clearly" was to D.S.'s "detriment" and that he "was clearly prejudiced." D.S.'s conclusory allegations are not sufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. *State v. Buckingham*, 2nd Dist. Montgomery No. 19205, 2003-Ohio-44, 2003 WL 77118, ¶ 17 ("[c]onclusory assertions are insufficient to demonstrate ineffective assistance of counsel under *Strickland*."); *State v. Siders*, 4th Dist. Gallia No. 07CA10, 2008-Ohio-2712, 2008 WL 2313299, ¶ 20 (same).

{¶29} We additionally note that D.S. has not challenged the propriety of the trial court's findings that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent, and that placing the child in the agency's permanent custody is in the child's best

interest. Even so, we believe that the record contains more than ample evidence to support the trial court's decision.

{¶30} Neither parent appeared for the permanent custody hearing, and D.S. had not been in contact with his counsel since the adjudicatory hearing. The caseworker stated that the agency continued to have "huge concerns" with the parents' ability to care for the child. She explained that the parents have not successfully addressed their substance abuse issues and do not have stable housing. The caseworker further related that another child had been permanently removed from the parents' custody and that D.S. had an active arrest warrant. She also advised the court that the child is doing well in the foster home and reaching appropriate developmental milestones. In short, the evidence presented at the permanent custody hearing clearly and convincingly supports the trial court's decision.

III. CONCLUSION

{¶31} Accordingly, based upon the foregoing reasons, we overrule D.S.'s sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court-Juvenile Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J., and Hess, J., concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.