

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J. M.

DEPENDENT CHILD

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 10-CA-97

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Juvenile Division, Case No. C2009-0237

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 7, 2010

APPEARANCES:

For Appellant

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For Appellee

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Farmer, J.

{¶1} On April 13, 2009, appellee, the Licking County Department of Job and Family Services, filed a complaint for temporary custody of J.M. born March 23, 2009, alleging the child to be abused and/or dependent. Mother of the child is Erica Smith; father is appellant, Eric Mohler. A hearing before a magistrate was held on June 15, 2009. By decision filed June 16, 2009, the magistrate found the child to be a dependent child, and granted temporary custody of the child to appellee. The trial court approved and adopted the decision.

{¶2} On December 15, 2009, appellee filed a motion for permanent custody based upon the parents' failure to comply with the case plan. Hearings before a magistrate were held on April 13 and 14, 2010. By decision filed May 7, 2010, the magistrate recommended terminating the parents' parental rights and granting permanent custody of the child to appellee. Appellant filed objections. By judgment entry filed August 5, 2010, the trial court denied the objections and approved and adopted the magistrate's decision.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "APPELLANT WAS DEPRIVED [OF] HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I

{¶5} Appellant claims he was denied effective assistance of trial counsel because his counsel did not timely move to have him conveyed from prison for the permanent custody hearings.

{¶6} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶7} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶8} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶9} Appellant relies on a decision from the Second District Court of Appeals, *In re S.A.*, Clark App. No. 07-CA-110, 2008-Ohio-2225, ¶5:

{¶10} "Counsel's failure to protect Rogan's right to meaningful participation in the permanent custody hearing caused the trial to be fundamentally unfair. 'When there is no possibility for a fair trial, it is inherently prejudicial to the integrity of the trial.... [T]here is no possibility that a fair trial, one with a reliable outcome, resulted from the proceedings herein.' *Roque* [*In re*, Trumbull App. No. 2005-T-0138, 2006-Ohio-7007]

supra, at ¶13. See, also, *Strickland*, supra, at 686 ('[c]ounsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.') Thus, the second prong of *Strickland* is met. Because Rogan was denied the effective assistance of trial counsel, we sustain her Second Assignment of Error."

{¶11} On April 12, 2010, appellant's trial counsel filed for a warrant to convey appellant from prison to the permanent custody hearing scheduled for April 13, 2010. By judgment entry filed April 12, 2010, the trial court denied the request as untimely:

{¶12} "Mr. Sidner, legal counsel for the father, transmitted a facsimile copy of the request for warrant to convey and a proposed judgment entry at 4:24 p.m. o'clock, April 9, 2010, six minutes before court offices were to close. This facsimile transmission was not found until the morning of Monday, April 12, 2010. The court once again emphasizes that no original pleading has been filed.

{¶13} "The Court DENIES the request for warrant to convey which asks that this Court order that the Licking County Sheriff's Department transport Eric Mohler from the Noble Correctional Institution in Caldwell, Ohio to this court for purposes of the father attending the permanent custody hearing which is scheduled for 9 a.m. o'clock, Tuesday, April 13, 2010. The Court DENIES the request for warrant to convey because it was not timely filed. In fact, no original has yet been filed and the hearing is less than twenty-four hours from the date of the formal request."

{¶14} During the permanent custody hearing, appellant's counsel renewed the motion to convey, and requested a continuance. April 13, 2010 T. at 8. The magistrate denied the request, stating the following:

{¶15} "THE COURT: I'm going to deny the request for a continuance now because of the unusual circumstance and I - - no one really wants this case to drag out. We've got some tough issues here. And just one of the many issues is going to be the fact that this child is so firmly entrenched and bonded with his foster parents; on the other hand, there are a variety of blood relatives here interested in seeking custody. I don't see that it's going to serve anyone's interest to delay any of this. So, for that reason we're going to go forward on everything today, but we're going to do it in a way that I'm going to specify here that - - it's a little complicated but we'll sort it out as we go along." Id. at 9-10.

{¶16} Appellant's counsel then made the following statement to the magistrate:

{¶17} "MR. SIDNER: ***On behalf of my client, Eric Mohler, who's not present today, I'll present his positions and his motions to the Court. I'll put them on the record.

{¶18} "At this time he would - - he understands he's in prison right now for about eight years (inaudible) on appeal. But he would like to have Erica, the mother, have custody if she gets through her treatment. If that does not go through, he would request that Karen Brown, her mother, be considered. And the third alternative, if necessary, would have been Erica's brothers - - or brother, I'm sorry***to be considered by the Court. Thank you." Id. at 14.

{¶19} Trial counsel re-stated this position during closing argument, and argued in favor of the mother receiving custody. April 14, 2010 T. at 247-249.

{¶20} Despite the fact that the first prong of the *Bradley* test has been satisfied, we do not find that any prejudice inured to appellant or that his non-presence at the permanent custody hearing affected the outcome.

{¶21} In its judgment entry filed August 5, 2010, the trial court found the following:

{¶22} "The mother is a thirty-two year old heroin addict who used heroin throughout the time she was pregnant with [J]. In addition to her addiction, she suffers from anxiety and bi-polar disorder and at the time of the hearing, was facing multiple felony criminal charges.

{¶23} "The child's father, Eric Mohler, is also a drug addict. He is currently incarcerated in a state penal institution for the next seven or more years, having been convicted of multiple felony drug offenses. 'He will not play any role in [J]'s life. He will never be an appropriate parent for [J].' Eric Mohler is not 'available' to 'parent' this child until the year 2017. The Agency is not required to wait seven years for the father to rehabilitate himself. This Court finds that delaying permanency for [J] for seven years is not in [J]'s best interests."

{¶24} The trial court's decision was contrary to appellant's wishes as expressed by his trial counsel. However, appellant never completed the case plan and because of his criminal incarceration for the next seven or more years, there was no likelihood that he could do so within a reasonable time:

{¶25} "(E)***If the court determines, by clear and convincing evidence,***that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶26} "(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to

care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing." R.C. 2151.414(E)(12).

{¶27} The child's mother also failed to complete the case plan and faced multiple felony charges at the time of the hearing.

{¶28} The maternal grandmother filed a motion for legal custody, but when given the opportunity to care for the child in May of 2009, she declined. April 14, 2010 T. at 101. She had told appellee's kinship coordinator that "they are not going to be able to take [J], please find a good foster family for him." April 13, 2010 T. at 76. Also, she told appellee's social worker that "she owed her allegiance to her daughter." Id. at 164. In fact, she filed bankruptcy and allowed her house to be foreclosed upon in order to help her daughter financially. April 14, 2010 T. at 165.

{¶29} The maternal uncle and his wife had never seen the child and only made an appearance two weeks prior to the hearing:

{¶30} "Daniel and Joey Smith (the maternal uncle and his wife) also filed a motion for legal custody. Although it was not entirely clear from the evidence, the motion for legal custody seemed like the Smith's back-up plan. They actually appear more interested in adoption. They seem like good candidates for relative placement or adoption. They appear to be a stable young family with a comfortable income and a nice home. Ms. Smith is a special education teacher. Unfortunately, they have never laid eyes on [J]. They made no appearance in this case until less than two weeks before the permanent custody hearing. Therefore, their motion for legal custody is an inappropriate disposition at this time. On the other hand, they might be excellent

adoptive parents (after [J]'s parents are no longer a factor in his life)." Decision of Magistrate filed May 7, 2010 at ¶9.

{¶31} Given the fact that appellant had not met any of the case plan requirements and would not be available to parent for seven years, we fail to find that counsel's deficiency in timely seeking appellant's presence for the hearings to have affected the outcome of the case in any way.

{¶32} The sole assignment of error is denied.

{¶33} The judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Division is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

s/ Sheila B. Farmer

s/ William B. Hoffman

s/ John W. Wise

JUDGES

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J. M.

DEPENDENT CHILD

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JUDGMENT ENTRY

CASE NO. 10-CA-97

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, Juvenile Division is affirmed. Costs to appellant.

s/ Sheila B. Farmer

s/ William B. Hoffman

s/ John W. Wise

JUDGES