[Cite as *In re P.W.*, 2012-Ohio-3556.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re P.W.

Court of Appeals No. L-12-1060

Trial Court No. JC 10-204027

DECISION AND JUDGMENT

Decided: August 8, 2012

* * * * *

Adam H. Houser, for appellant.

Dianne L. Keeler, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, M.B., is a father who appeals a March 1, 2012 judgment of the Juvenile Division of the Lucas County Court of Common Pleas that awarded permanent custody of his minor daughter, P.W., to Lucas County Children Services ("LCCS").

C.W. is the mother of P.W., but is not a party to this appeal. Father and mother opposed LCCS' motion for permanent custody in the trial court.

Facts and Procedural Background

{¶ 2} Beginning in February 2010, LCCS received a referral expressing concerns regarding domestic violence between father and his then girlfriend, Mi.D. Specifically, on February 2, 2010, father was charged with violating a protection order against Mi.D. On March 3, 2010, father committed a physical injury to Mi.D., and on March 6, 2010, father left P.W. with mother for several days because he was wanted by law enforcement for assaults on Mi.D. At the time, father had legal custody of P.W. On March 14, 2010, father was charged with abduction of Mi.D. and threatening her with a knife, at which time he was incarcerated. P.W. reported observing father choke Mi.D. At a shelter care hearing held on April 14, 2010, interim temporary custody of P.W. was awarded to mother, and protective supervision was awarded to LCCS. Mother consented to a finding of dependency and neglect as to P.W. on May 19, 2010.

{¶ 3} On April 29, 2011, mother was incarcerated for violating orders of the Lucas County Family Drug Court program ("drug court"). Mother was incarcerated twice within a two-week period, and mother failed to find an appropriate relative to care for P.W. and C.C., mother's minor son.[1] Due to mother's drug use, she was discharged from her housing. Furthermore, placement with father was deemed not appropriate at the time

[1] Neither C.C. nor his father, J.W., are subjects of this appeal.

because he failed to complete case plan services. Following a shelter care hearing and a finding that P.W. and C.C. were dependent and neglected, temporary custody of both children was awarded to LCCS.

{¶ 4} Motions for permanent custody of P.W. and C.C. were eventually filed by LCCS on October 26, 2011, and a motion to consolidate P.W. and C.C.'s cases was filed on October 31, 2011. A hearing on LCCS's motion for permanent custody was held on February 1, 2012. On March 1, 2012, the trial court issued a judgment entry awarding permanent custody of P.W. and C.C. to LCCS. Pursuant to R.C. 2151.414(B)(1)(a),[2] the trial court found by clear and convincing evidence that P.W. "cannot and should not be reunified with either parent within a reasonable period of time[.]" In support of its determination, the trial court found that R.C. 2151.414(E)(1) and (4) applied to father and mother, and that R.C. 2151.414(E)(13) additionally applied to father. The trial court then

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[2] R.C. 2151.414(B)(1) provides:

> Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:
>
> (a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, * * * and *the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.*

considered all of the factors enumerated in R.C. 2151.414(D), and found that an award of permanent custody to LCCS is in P.W.'s best interest.

{¶ 5} This appeal by father followed.

Assignments of Error

1. The Trial's [sic] Court Decision to Terminate the Parental Rights of Appellant fell against the Manifest Weight of the Evidence.

2. The Appellant received Ineffective Assistance of Counsel at the Trial Level.

II. Analysis

{¶ 6} Pursuant to R.C. 2151.353(A)(4), the trial court may make any of the following orders if a child is adjudicated to be abused, neglected, or dependent:

> (4) Commit the child to the permanent custody of a public children services agency or private child placing agency, if the court determines in accordance with division (E) of section 2151.414 of the Revised Code that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D)(1) of section 2151.414 of the Revised Code that the permanent commitment is in the best interest of the child. If the court grants permanent custody under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding.

{¶ 7} In its March 1, 2012 judgment, the trial court granted LCCS's motion for permanent custody of P.W. The court concluded, pursuant to R.C. 2151.414(B)(1)(a), that the "child cannot be placed with one of the child's parents within a reasonable period of time and should not be placed with either parent." R.C. 2151.414(E) sets forth the factors a trial court is to consider in determining whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. The existence of one factor alone will support a finding that the child cannot be reunified with the parent within a reasonable time. *See In re: William S.*, 75 Ohio St.3d 95, 661 N.E.2d 738 (1996). The trial court further determined that pursuant to R.C. 2151.414(D), an award of permanent custody to LCCS was in the best interests of P.W.

{¶ 8} Under his first assignment of error, father argues that a finding of parental unsuitability under R.C. 2151.414(E) was not supported by clear and convincing evidence under subparagraphs (1), (4), or (13) of the statute.

Mother

{¶ 9} Mother was provided several case plan services by LCCS, including assistance in obtaining stable, independent housing, and engaging in substance abuse treatment. Following a substance abuse assessment, intensive outpatient treatment and mental health counseling were also recommended.

{¶ 10} In regard to maintaining independent housing, mother moved seven times while LCCS had protective supervision of the children. From April 2011 through November 2011, mother did not inform the caseworker of her whereabouts. At the time

of the permanent custody hearing, mother still did not have stable housing. In fact, from April 2011 through the time of the hearing, mother was living with a male friend named M.D., and was pregnant with his child. Mother testified that she had not sought prenatal care, did not know how many months pregnant she was, and was required to take methadone throughout her pregnancy due to withdrawal issues. Furthermore, the caseworker knew nothing of M.D. because mother had not provided any of his information to LCCS. Mother testified that M.D. has four of his own children. Three of these children are grown, but M.D. does not have custody of a minor child, instead she lives with her grandmother.

{¶ 11} To facilitate mother's participation in intensive outpatient treatment, P.W. and C.C. were placed in protective daycare during the day from Monday through Friday while mother participated in a program through Unison. However, in January 2011, mother became noncompliant and entered drug court. In April 2011, mother was unsuccessfully discharged from drug court. Mother was also incarcerated on two separate occasions, and unsuccessfully discharged from an inpatient program at Compass during her participation in drug court. Further, mother admitted to using prescription drugs and heroin from the time the children entered the temporary custody of LCCS until October 2011, when she began taking methadone due to her pregnancy. Additionally, mother was unsuccessfully discharged from her individual mental health counseling for non-attendance.

{¶ 12} Mother also admitted that she consciously did not participate in case plan services from October 2011 because she believed her stepfather's home in California would be approved for her children to move there. However, even though the home was approved by the state of California, it was not approved by LCCS because of concerns over the stepfather's age and dishonesty.

{¶ 13} It is undisputed that mother's drug use made her unable to provide an adequate home for P.W. at the time of the hearing and for a period of more than a year after the hearing. Furthermore, it is not disputed that a return of custody to mother is not in the best interest of P.W.

Father

{¶ 14} Beginning in March 2010, father was incarcerated for various assaults and protection order violations against Mi.D. Testimony reflects that father had no contact with the caseworker from the time P.W. was in the temporary custody of mother until August 2010 when he was incarcerated and the caseworker went to visit father in jail. Father indicated to the caseworker that it was his intention to participate in case plan services upon his release. However, father went to Florida with Mi.D. following his release, and did not contact the caseworker or visit P.W. until February 2011. While father was in Florida, he was charged with two domestic violence related offenses against Mi.D. One of the charges was dismissed, while the other was continued to January 2011. Rather than resolving the remaining case in Florida, father returned to Ohio.

{¶ 15} At a meeting on February 9, 2011, the caseworker requested that father participate in substance abuse treatment, domestic violence counseling and parenting classes, and that he maintain independent housing. Father did not initially complete a domestic violence assessment at Crossroads, and was re-referred by LCCS. Beginning in April 2011, father began domestic violence counseling at Crossroads. However, father only completed five to seven of the 26 sessions before he was incarcerated for new incidents of domestic violence against Mi.D. in August 2011. Father remained incarcerated throughout the remainder of this case.

{¶ 16} Testimony from the guardian ad litem revealed that at the time of the hearing, father was being held in jail awaiting trial on two, domestic violence related, fifth degree felony charges in Lucas County. If convicted of those charges, father could receive up to a 17-month sentence. Furthermore, testimony reflects that even if father is not convicted of those crimes, at minimum, it would still take at least six to twelve months for father to complete case plan services.

{¶ 17} Regarding substance abuse treatment, father initially completed an assessment but was not given any recommendations. However, during the course of the case, the caseworker received an anonymous call that father was drinking heavily on a daily basis. Father admitted that he was drinking, citing depression over his inability to find a job. The caseworker recommended a second substance abuse assessment be completed. This was not completed prior to father's incarceration in August 2011.

{¶ 18} Father visited with P.W. on a weekly basis from May 10, 2011 through August 16, 2011, missing two visits during that time. Father was also not able to maintain independent housing. He lived with several friends prior to his incarceration in August 2011.

Trial Court's Findings Supported by Clear and Convincing Evidence

Standard of Review

{¶ 19} In a proceeding for the termination of parental rights, the trial court's findings must be supported by clear and convincing evidence. R.C. 2151.414(E). Clear and convincing evidence is that which is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is more than a preponderance of the evidence, but does not require proof beyond a reasonable doubt. *Id.*

{¶ 20} "A trial court's determination in a permanent custody case will not be reversed on appeal unless it is against the manifest weight of the evidence." *In re A.H.,* 6th Dist. No. L-11-1057, 2011-Ohio-4857, ¶ 11, citing *In re Andy-Jones,* 10th Dist. Nos. 03AP-1167 and 03AP-1231, 2004-Ohio-3312, ¶ 28. We recognize that, as the trier of fact, the trial court is in the best position to weigh the evidence and evaluate the testimony. *Id.* citing *In re Brown,* 98 Ohio App.3d 337, 342, 648 N.E.2d 576 (3d Dist.1994). Thus, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being

against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

R.C. 2151.414(E)(1)

{¶ 21} In his first assignment of error, father contests the trial court's finding under R.C. 2151.414(E)(1)[3] that he continuously and repeatedly failed to remedy the conditions that caused P.W.'s removal from his home.

{¶ 22} Here, the court found that P.W. was removed from the home due to concerns regarding domestic violence charges. The record supports the trial court's finding that father had been incarcerated periodically throughout the case. Furthermore, at the time of the permanent custody hearing, father remained incarcerated pending trial on two felony charges related to domestic violence. And, even if father were to be found not guilty of those charges, father still had outstanding domestic violence related charges in Florida. Significantly, father committed these pending offenses while case plan services were pending.

[3] (1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶ 23} Additionally, the trial court found that following one of his incarcerations, father left the jurisdiction and had no contact with P.W. or the caseworker for several months. While father argues that completion of a domestic violence assessment and five to seven of 26 classes demonstrates improvement, father was jailed for subsequent domestic violence offenses following completion of those classes.

{¶ 24} We find that competent, credible evidence exists in the record, sufficient to produce a firm belief or conviction supporting the trial court's determination that father failed to substantially remedy the conditions that caused P.W. to be placed outside the home within the meaning of R.C. 2151.414(E)(1).

R.C. 2151.414(E)(4)

{¶ 25} Father also contests the trial court's finding under R.C. 2151.414(E)(4) that he has demonstrated a lack of commitment toward P.W. by failing to regularly support, visit, or communicate with P.W. R.C. 2151.414(E)(4) provides, "(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child[.]"

{¶ 26} The trial court found that father demonstrated a lack of commitment to P.W. by continuing to participate in domestic violence offenses which led to repeated incarcerations. The trial court also determined that father's lack of regular visitation with P.W. evinced his lack of commitment to provide a permanent home for her. The record demonstrates that father was incarcerated for six to seven months during the pendency of

this case. Furthermore, father remained incarcerated, and at the time of the hearing, faced further incarceration on recent domestic violence charges. Also, father admitted to leaving the jurisdiction and to having no contact with P.W. and the caseworker for several months. Thus, we find that the trial court's determination pursuant to R.C. 2151.414(E)(4) is supported by clear and convincing evidence.

R.C. 2151.414(E)(13)

{¶ 27} R.C. 2151.414(E)(13) provides, "(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child." A plethora of evidence in the record supports this finding by the trial court. As previously discussed, father was incarcerated for numerous domestic violence related charges during the pendency of P.W.'s case. The record demonstrates that father was incarcerated for 40 days when P.W. was initially taken from him, then father was incarcerated in Florida, and father was incarcerated for five months leading up to the permanent custody hearing. Father was unable to visit with P.W. during those periods of incarceration. Therefore, we find that the trial court's determination pursuant to R.C. 2151.414(E)(13) is supported by clear and convincing evidence.

{¶ 28} Accordingly, father's first assignment of error is not well-taken.

Father was not prejudiced by his trial attorney's failure to request a continuance

{¶ 29} In his second assignment of error, father contends that he received ineffective assistance of counsel during the trial because his attorney failed to make a

motion for a continuance on the date of the permanent custody trial. Father claims that he was prejudiced by his attorney's performance because, "If the continuance would have been granted the [a]ppellant would have been able to complete his case plan services and would have had a fair trial at the later date." Based solely on this reasoning, father concludes that he was deprived of a fair trial. We disagree.

{¶ 30} To demonstrate ineffective assistance of counsel, an appellant must satisfy both prongs of a two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show trial counsel engaged in a substantial violation of an essential duty to his client, *and* secondly must show the trial counsel's ineffectiveness resulted in prejudice. *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989), citations omitted. Prejudice is demonstrated when there is a reasonable probability that the result would have been different but for the alleged deficiencies of counsel. *Id.* at paragraph three of the syllabus. A court need not address both *Strickland* prongs if the appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, ¶ 10.

{¶ 31} Addressing the second prong of *Strickland*, the record reflects that during his testimony, father requested additional time to complete case plan services. Father's attorney specifically asked, "So are you requesting the Court grant you additional time in order for you to [complete services]?" Father responded, "Yes. Yes." However, father also testified that in the worst case scenario, he could be incarcerated for a period of 17

months with credit for time served from August 2011, if he were convicted at trial, which could still be months away.

{¶ 32} Furthermore, the trial court heard testimony regarding father's case plan services upon his release from custody. The guardian ad litem testified that it would at minimum, take father six months to a year to complete case plan services, and even if father were to resolve his criminal case in a shorter time, father would not be a possible placement for P.W. Thus, we cannot conclude that father was prejudiced by his counsel not asking for a continuance.

{¶ 33} Accordingly, we find father's second assignment of error not well-taken.

III. Conclusion

{¶ 34} Wherefore, we find that substantial justice was done. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE