

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

In re K.D.

Court of Appeals No. L-12-1305

Trial Court No. JC 11218991

DECISION AND JUDGMENT

Decided: March 22, 2013

* * * * *

Stephen D. Long, for appellants.

Angela Y. Russell, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellants, the mother and legal custodian of K.D., appeal the judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating parental rights and granting permanent custody to a children services agency.

{¶ 2} On October 25, 2011, Toledo police found appellant C.D. in a hotel room along with a crack pipe and two syringes. Also present in the room was C.D.'s three-

year-old daughter, K.D. Police arrested C.D. for possession of drug paraphernalia and child endangerment.

{¶ 3} On November 2, 2011, appellee, Lucas County Children Services, filed a complaint alleging that K.D. was a dependent and neglected child. At an emergency shelter care hearing held the same day, a magistrate granted temporary custody of K.D. to appellee. The court appointed a guardian ad litem for K.D. and ordered DNA testing for K.D.'s putative father, appellant T.K.

{¶ 4} On November 29, 2011, appellee filed an amended complaint, listing a John Doe as K.D.'s father and appellant T.K. as the child's "legal custodian." DNA testing subsequently demonstrated conclusively that appellant T.K. was not K.D.'s father. The complaint enumerates in detail a decade long list of drug abuse and domestic violence encounters for both appellants. The complaint also stated that appellants had previously lost permanent custody of a child. Appellee's amended complaint sought termination of appellants' parental rights with permanent custody to appellee.

{¶ 5} On January 24, 2012, appellant T.K.'s parents moved to intervene in the proceeding and sought placement of K.D. with them. The court granted the motion to intervene. At an adjudicatory hearing, the court accepted appellants' consent that K.D. be adjudicated neglected and dependent and a joint stipulation of facts. The court took under advisement interveners' motion for placement, pending an approved home study from Michigan.

{¶ 6} At a subsequent dispositional hearing, following a colloquy with the court, appellants agreed to an award of permanent custody to appellee. The court accepted the

agreement, took testimony and evidence and concluded that, pursuant to R.C. 2151.414(B)(1)(a) and 2151.414(E)(11) and (16), there was clear and convincing evidence the K.D. was not abandoned and cannot within a reasonable period of time, or should not, be placed with either parent. The court terminated appellants' parental rights and granted permanent custody to appellee, approving a goal of adoption.

{¶ 7} From this judgment, appellants now bring this appeal. Appointed counsel for appellants has filed a brief pursuant to *Anders v. California*, 386 U.S.738, 87 S.Ct. 1396, 18 L.Ed. 2d 493(1967), and seeks leave to withdraw as counsel.

{¶ 8} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id.* The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.* Although *Anders* is normally reserved

for appointed counsel in criminal matters, we have held that it is also applicable for counsel appointed in termination of parental rights cases. *Morris v. Lucas Cty. Children Services Bd.*, 49 Ohio App.3d 86, 87, 550 N.E.2d 980 (6th Dist.1989).

{¶ 9} Here, appointed counsel has met the requirements set forth in *Anders*.

Counsel also informed appellants of their right to file their own additional assignments of error and appellate briefs. Appellants have each filed a “Motion for Appeal” which we construe as their briefs. Accordingly, this court shall proceed examining the potential assignments of error set forth by counsel and appellants and the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 10} Appointed counsel posits two potential assignments of error:

1. Appellants were denied effective assistance of counsel.
2. Appellants’ respective stipulations to the finding of dependency and neglect and agreement to permanent custody were not knowingly and voluntarily entered.

{¶ 11} Appellants, in their briefs, also both complain of poor legal counsel and of deceit and duplicity from appellee’s agents.

{¶ 12} To successfully assert a claim of ineffective assistance of counsel, a party must demonstrate that counsel’s performance was deficient and that this deficiency operated to the prejudice of the represented. Unless the party demonstrates both elements, it cannot be shown that the outcome of the proceeding was unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 13} In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the appellant's. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id.* Appellant must show that there exists a reasonable probability that a different result would have been returned but for counsel's deficiencies. *See id.* at 694.

{¶ 14} The record is devoid of evidence that appellants' respective counsel's performance was in any way deficient. Moreover, the trial court properly found on the evidence presented that that appellants had previously had their parental rights terminated for another child. That finding alone is sufficient to sustain a conclusion that K.D. "cannot be placed with either parent within a reasonable period of time or should not be placed with the parents." R.C. 2151.414(E)(11). Consequently, they fail to show prejudice. Accordingly, appellate counsel's first potential assignment of error and what we construe to be both of appellants' assertion of ineffective counsel are without merit.

{¶ 15} With respect to appellants' complaints of misdealing from appellee's agents, they offer no support in the record for these assertions, nor has our independent examination of the record revealed any. Accordingly, this assertion of error is without merit.

{¶ 16} Concerning appellate counsel's second potential assignment of error, we have carefully examined the waiver colloquies at both the adjudicatory and dispositional hearings. We find no suggestion that the waivers entered were unwilling or uninformed. The trial court went to great length to explain exactly what rights were implicated in

appellants' waivers and to assure that such waivers were entered voluntarily. Moreover, both parties were represented by counsel. There is nothing in the record to support error with respect to these agreements. Accordingly, appellate counsel's second potential assignment is without merit.

{¶ 17} Upon this record, we concur with appellate counsel that appellants' appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.