

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

In re E.C., A.G., J.B.

Court of Appeals No. WD-12-033

Trial Court Nos. 2010 JC 1086  
2010 JC 1087  
2010 JC 1088

**DECISION AND JUDGMENT**

Decided: February 21, 2013

\* \* \* \* \*

Chad D. Huber, for appellant.

Paul A. Dobson, Wood County Prosecuting Attorney, and  
Charles S. Bergman, Assistant Prosecuting Attorney, for appellee.

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**PIETRYKOWSKI, J.**

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, Juvenile Division, which terminated the parental rights of appellant R.D. and granted permanent custody of her three children, E.C., A.G. and J.B., to appellee, the

Wood County Department of Job and Family Services.<sup>1</sup> Appellant now challenges that judgment through the following assignments of error:

A. Appellant's due process rights were violated when the trial court failed to convey appellant for the permanent custody hearing.

B. Appellant was provided ineffective assistance of counsel at trial, as falling below the objective standard of reasonableness, and resulting in substantial prejudice to appellant.

{¶ 2} Appellant is the natural mother of E.C., A.G. and J.B. In July 2009, appellant agreed to a voluntary case plan with appellee after the agency received reports that the children were neglected. Although appellant participated in parenting classes and followed through with the mental health, drug and alcohol assessments, and despite appellee's providing financial assistance to her, appellant and her children eventually became homeless. For a time, she stayed at a domestic violence shelter, but was terminated for intimidating other residents. In June 2010, appellant was arrested and charged with obstructing justice and driving under suspension. She was then homeless, unemployed, had exhausted her ability to receive cash assistance and was without transportation. As a result of that arrest, appellant requested that her children be placed in foster care and emergency temporary custody of all three children was awarded to appellee. Appellee filed separate dependency and neglect complaints regarding all three

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<sup>1</sup> Despite proper service, no known or unknown fathers of the children ever appeared in the proceedings below. Their parental rights were also terminated and they are not parties to this appeal.

children and filed an amended case plan with a goal of reunification. Those cases were subsequently dismissed, and on September 23, 2010, appellee filed three new cases of dependency, one for each of the children. Those are the cases that are the subject of this appeal.

{¶ 3} At the initial hearing on the new complaints, appellant appeared with counsel and stipulated to a finding of dependency. The court then found that reasonable efforts had been made to avoid the removal of the children from their home and that it was in the best interest of the children that appellee maintain temporary custody of them. Under the case plan that was approved by the lower court, appellant was required to maintain stable housing and employment in order to meet the children's basic needs, to abide by a regular visitation schedule with the children, and to refrain from completing any acts that could result in her incarceration.

{¶ 4} On November 24, 2010, appellant was arrested and charged with illegal possession of drug documents when she stole a booklet of prescription forms from a doctor and tried to fill a prescription for Percocet. She subsequently entered a guilty plea to that offense, a fifth degree felony. Following a dispositional hearing on December 21, 2010, at which appellant appeared with counsel, temporary custody of all three children was continued. An amended case plan which was filed on December 22, 2010, and subsequently approved by the court, noted appellant's arrest and added the requirements that appellant attend a mental health/drug and alcohol assessment, that she refrain from the use of illegal substances, that she submit to random toxicology screens, and that she

follow all recommendations given following her mental health/drug and alcohol assessment. The amended plan also noted that E.C. had recently been diagnosed with autism and tuberous sclerosis, a serious medical condition, and has severe behavioral problems.

{¶ 5} A semi-annual administrative review, dated January 21, 2011, was filed with the court and noted that appellant had made some progress with the plan, in that she had attended a mental health/drug and alcohol assessment and, as recommended, had begun seeing a therapist. The review further noted, however, that one of appellant's drug screens was positive for pain medication, that she had moved six times in the past six months, and that she was again homeless and unemployed, and unable to provide for her children's basic needs.

{¶ 6} Review hearings were held in the lower court on March 24, June 7, August 25, and October 11, 2011. Each time, the court found that reasonable effort had been made to prevent the continued removal of the children from their home and ordered that temporary custody be continued. During this time period, appellant maintained employment and housing and had weekend visits with the children, but had difficulty attending weekly group therapy sessions due to a lack of transportation, even though appellee provided her with weekly gas cards. She also successfully completed a parenting program. In July 2011, however, the children began a 60-day visitation/ attempted reunification with appellant that did not go well. The visit began on July 29, but the children were removed from the home on August 22, after appellee received a

report that E.C. had been hit by a car and appellant refused treatment for him. This incident occurred a short time after Tonya Camden, the ongoing caseworker assigned to appellant's case, had stopped by appellant's house unannounced and found E.C., who was then six years old, playing alone in the front yard. Camden testified at the final hearing below that appellant was then living on a very busy street in Fostoria, Ohio, and that her home had a small front yard. She explained to appellant that E.C. could not be left alone to play in the front yard and appellant disagreed.

{¶ 7} On August 26, 2011, appellant was sentenced to a three-year term of community control in the illegal possession of drug documents case. As a condition of her community control, appellant was required to enter a community based correctional treatment facility and successfully complete an intensive drug treatment program. The court further ordered that a violation of any of the sanctions imposed could lead to a more restrictive sanction, including a prison term of 12 months.

{¶ 8} On November 30, 2011, appellee filed a motion for permanent custody of all three children. At that time, appellant had been in a correctional treatment facility since August 2011 and the children had been in foster care since June 2010. Appellee asserted that appellant's history of housing and employment instability, prior history with other county children's services agencies, including the loss of permanent custody of four other children, lack of success in completing prior and current case plan services, criminal history, current incarceration, and inability to properly supervise her children and keep them safe during unsupervised visits made it unlikely that the children could be reunified

with their mother in the foreseeable future. Appellee, therefore, asserted that it would be in the best interest of the children if permanent custody of them was granted to appellee so that they could have a stable, safe and long-term placement.

{¶ 9} Appellant was released from the correctional treatment facility on January 11, 2012, after successfully completing the program. However, in meeting with her probation officer on February 16, 2012, she voluntarily admitted to using marijuana and cocaine on or about February 10, 2010. The state then filed a petition for revocation of appellant's community control. In an entry and order of March 15, 2012, the Wood County Court of Common Pleas found that appellant had violated the terms of her community control, revoked that sanction and imposed a sentence of 12 months in prison, with 126 days credit for the time she spent in the correctional treatment facility.

{¶ 10} In February 2012, attorney Kathleen Hamm, who had represented appellant throughout these proceedings, filed a motion to withdraw as counsel for appellant. Hamm cited a breakdown in the attorney-client relationship and appellant's expressed dissatisfaction with Hamm's representation. The lower court granted the motion and appointed attorney James Sharp to represent appellant in the permanent custody proceedings. Thereafter, on May 23, 2012, attorney Sharp filed a motion to withdraw as counsel for appellant. Sharp attached to his motion a letter he had received from appellant in which she stated that she never asked him to represent her and that she did not believe that he had any interest in fighting for her. The lower court denied the motion, noting that it had already granted appellant's first request to remove appointed

counsel. The court found no basis to allow appellant to again ask for new counsel, finding that attorney Sharp was well versed in termination matters.

{¶ 11} The case proceeded to a hearing on the motion for permanent custody on May 29, 2012. Due to her incarceration, appellant did not attend the hearing. At the hearing, the state presented evidence in the form of testimony from the therapists of the children and appellant, appellant's probation officer, the case manager from the correctional treatment facility where appellant completed the drug treatment program, and the WCDJFS caseworker assigned to this case. In addition, the state submitted numerous exhibits, including the case plans, documentation of appellant's criminal history, the discharge summary from the correctional treatment facility, documentation of appellant's housing and employment history, documentation from Seneca and Hancock Counties regarding the termination of appellant's parental rights to three other children, and the report and recommendation of the guardian ad litem appointed for the children in this case.

{¶ 12} On May 31, 2012, the lower court issued a judgment entry terminating appellant's parental rights, as well as those of any known or unknown fathers, and granting permanent custody of E.C, A.G, and J.B. to appellee. In support of that determination, the lower court expressly found that the children could not be placed with either parent within a reasonable time or should not be placed with either parent. That finding was based on the court's determination that clear and convincing evidence established the existence of no less than four of the factors set forth in R.C. 2151.414(E).

Specifically, the court found that appellant had failed continuously and repeatedly to substantially remedy the conditions that caused the children to be placed outside of their home (R.C. 2151.414(E) (1)); that appellant demonstrated a lack of commitment toward all of the children and that her ongoing actions, inactions and arrests demonstrated an underlying unwillingness to provide an adequate permanent home for the children (R.C. 2151.414(E)(4)); that appellant has had her parental rights to four separate siblings of these children terminated in three separate counties, and at least three of these terminations were involuntary (R.C. 2151.414(E)(11)); and appellant's repeated incarceration has prevented her from providing care for these children (R.C. 2151.414(E)(13)). In support of its finding that a grant of permanent custody was in the best interest of all three children, the court noted that the children's interaction with appellant over the past two years had been primarily in a supervised setting, except for an attempted 60-day extended visit that was cut short due to appellant's inability to provide for the safety of her children. The court further noted that appellant's interaction with her children had also been impacted by her repeated incarceration. The court stated that the children had been in the same foster home, had shown significant improvement since entering the home, and that the foster family was willing to adopt them. Despite multiple efforts to locate a potential relative, the court determined that no known suitable relative or non-foster placements were available for the children. Finally, the court noted that the guardian ad litem for the children had recommended that an award of permanent custody



would be in the best interest of the children. Accordingly, the court granted appellee's motion for permanent custody. Appellant now challenges that judgment on appeal.

{¶ 13} In her first assignment of error, appellant asserts that the lower court erred in failing to convey her to court for the permanent custody hearing. She contends that this error violated her right to due process.

{¶ 14} At the time of the permanent custody hearing below, appellant was incarcerated. In addition, she did not file a motion to be conveyed for the hearing. It is well-settled that a trial court has discretion to decide whether to proceed with a permanent custody hearing without having an incarcerated parent conveyed. *State ex rel. Vanderlaan v. Pollex*, 96 Ohio App.3d 235, 236, 644 N.E.2d 1073 (6th Dist.1994). Accordingly, we will not reverse that decision absent an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 15} An individual does not have an absolute right to be present in a civil case to which she is a party. *In re Sprague*, 113 Ohio App.3d 274, 276, 680 N.E.2d 1041 (12th Dist.1996); *Mancino v. Lakewood*, 36 Ohio App.3d 219, 221, 523 N.E.2d 332 (8th Dist.1987). We also note, however, that an individual has a "basic," "fundamental," and "essential" civil right to raise his or her own children. *Sprague* at 276; *In re Dylan R.*,

6th Dist. No. L-02-1267, 2003-Ohio-69, ¶ 21. As we explained in *In re Joseph P.*, 6th Dist. No. L-02-1385, 2003-Ohio-2217, ¶ 52:

Because of the competing interests involved in proceedings such as these, Ohio courts have applied a balancing test to determine whether a parent's due process rights were violated when the court proceeds with a hearing on a permanent custody motion without a parent's presence.

Specifically, a court should balance the following factors: "(1) the private interest affected, (2) the risk of erroneous deprivation and the probable value of additional safeguards, and (3) the governmental burden of additional procedural safeguards." *Sprague*, 113 Ohio App.3d at 276, 680 N.E.2d 1041, citing *Matthews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18. We previously approved of the Ninth District's reasoning in a case construing these factors. According to the Ninth District, a parent's due process rights are not violated when: (1) the parent is represented at the hearing by counsel, (2) a full record of the hearing is made, and (3) any testimony that the parent wishes to present could be presented by deposition. *In the Matter of Leo D., Deandre E., and Desandra E.* (March 15, 2002), Lucas App. No. L-01-1452, citing *In re Robert F.* (Aug. 20, 1997), Summit App. No. 18100.

{¶ 16} In the present case, appellant was represented by counsel at the permanent custody hearing and a full record of that hearing was made. Appellant contends,

however, that any testimony she could have presented by way of deposition would have been inadequate in that she would not have been able to rebut the misleading testimony presented by appellee that she failed to secure stable housing, inappropriately supervised her children, and failed to adequately participate in services set forth in the case plan. We disagree. The motion for permanent custody filed by appellee set forth in detail appellee's reasons for seeking permanent custody. Those reasons included issues regarding housing, appellant's supervision of the children, appellant's failure to complete case plan services, appellant's failure to maintain consistent employment, appellant's criminal history, appellant's history of positive drug screens, the failed attempt at reunification, the fact that these children had been in foster care for 16 months, and the termination of appellant's parental rights to four additional children. Accordingly, appellant was on notice as to the issues and evidence that would be presented at the hearing below and could have adequately presented testimony on these issues by way of deposition.

{¶ 17} We further find that given the overwhelming evidence in support of the court's findings, it is unlikely that any testimony appellant could have presented by way of deposition would have mitigated against terminating her parental rights. *See In re Destiny H. K.*, 6th Dist. No. WM-08-021, 2009-Ohio-771; *In the Matter of Leo D.*, *supra*. Appellant's right to due process was not violated by the court's failure to convey her to court for the permanent custody hearing and the first assignment of error is not well-taken.

{¶ 18} In her second assignment of error, appellant asserts that she was denied the effective assistance of counsel at the hearing below.

{¶ 19} R.C. 2151.352 and Juv.R. 4(A) provide that children and their parents are entitled to an attorney for all proceedings under R.C. Chapter 2151 and have the right to appointed counsel if they are indigent. *See also In re M.L.R.*, 150 Ohio App.3d 39, 2002-Ohio-5958, 779 N.E.2d 772, ¶ 12 (8th Dist.). The right to counsel in these cases naturally includes the right to effective counsel, and the test for ineffective assistance of counsel is the same in these cases as it is in criminal cases. *In re Baby Girl Doe*, 149 Ohio App.3d 717, 2002-Ohio-4470, 778 N.E.2d 1053, ¶ 99 (6th Dist.). Accordingly, to prevail on a claim of ineffective assistance of counsel, a claimant must demonstrate (1) that her counsel's performance was deficient, and (2) that the deficient performance resulted in prejudice. *In re Anisha N.*, 6th Dist. No. L-02-1370, 2003-Ohio-2356. The court must defer to the strong presumption that counsel's performance falls within the wide range of reasonable professional performance. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 20} Appellant asserts that her trial counsel was ineffective by failing to request that she be conveyed to court for the hearing below, by failing to subpoena any witnesses

or put forth any testimony in support of appellant's position, and by failing to present any closing argument on appellant's behalf.

{¶ 21} Because we find no prejudicial error in the court's proceeding with the permanent custody hearing absent appellant, we cannot find that her trial counsel was ineffective for failing to request her presence.

{¶ 22} While the record reveals that appellant's trial counsel did not subpoena any witnesses or put forth any testimony on behalf of appellant, he did cross-examine appellee's witnesses. Through that cross-examination, he presented evidence that appellant loves her children and that she and the children are very bonded, that appellant successfully completed the drug treatment program with the correctional treatment facility, that appellant's participation in the Help Me Grow program for J.B. had been excellent, that there were many times when her drug screens tested negative, and that E.C. was not injured in the accident with the car but, rather, ran into the car with his bike. Upon a review of the record, we cannot say that counsel's representation of appellant was deficient in this regard.

{¶ 23} Finally, appellant asserts that her trial counsel was ineffective in failing to present a closing argument on her behalf. In particular, appellant points to the following response from her trial counsel after the court asked for his closing argument:

Your Honor, closing arguments are not evidence. The Court has heard all of the testimony. The Court will determine what of that testimony

and exhibits is relevant and factual and will render its decision accordingly.

I'm not going to waste the Court's time. Thank you.

{¶ 24} While appellant's trial counsel's statement appears abrupt and perhaps unconventional, we have thoroughly reviewed the record in this case and cannot find that had appellant's counsel made a closing argument, the outcome of the case would be different. The trial court's findings were well supported by clear and convincing evidence. Because appellant has not established her claim of ineffective assistance of counsel, her second assignment of error is not well-taken.

{¶ 25} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the 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.

In re E.C.  
C.A. No. WD-12-033

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

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JUDGE

<p>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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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