

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

In re E.M.

Court of Appeals No. L-14-1220

Trial Court No. 14240615

**DECISION AND JUDGMENT**

Decided: April 9, 2015

\* \* \* \* \*

Dan Nathan, for appellant.

Bradley W. King, for appellee.

\* \* \* \* \*

**SINGER, J.**

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, Juvenile Division, determining minor child, E.M., was an abused child. For the following reasons, the judgment of the trial court is reversed.

{¶ 2} Appellant sets forth one assignment of error:

I. The trial court erred in holding that when a mother exposes her viable fetus to an illegal substance, that child, when born, is per se an abused child.

{¶ 3} Appellant is the biological mother of E.M., born in late May 2014.

Appellant has admitted using heroin while pregnant with E.M. In late April 2014, the month prior to E.M.'s birth, appellant went to the hospital to detox, and was prescribed Subutex. E.M. was born with Subutex in her system. Neither E.M. nor appellant was found to have heroin in their system. Following E.M.'s birth, E.M. was placed in the care of her maternal grandparents.

{¶ 4} On May 30, 2014, appellee, Lucas County Children Services, filed a complaint in dependency, neglect and abuse with respect to E.M. A hearing was held on July 24, 2014. The magistrate filed her decision on August 5, 2014, finding E.M. was abused and neglected. Appellant filed objections to the magistrate's decision on August 13, 2014, asserting that only a finding of dependency was proper.

{¶ 5} The trial court, in its judgment entry filed September 22, 2014, amended the magistrate's decision to reflect a holding that E.M. was abused and dependent, and reversed the magistrate's finding that E.M. was neglected. The trial court stated in relevant part:

Mother's use of heroin, particularly during the final weeks of her pregnancy, constitutes a physical injury that threatens to harm the child's

health and welfare. This holding is not intended to determine the month of viability of a fetus; however, in the case at bar the heroin use occurred approximately five (5) weeks prior to birth, at which time the fetus was viable. This Court holds that when a mother exposes her viable fetus to all illegal substance [heroin], when born, that child is considered an abused child.

The trial court cited to *In re Baby Boy Blackshear*, 90 Ohio St.3d 197, 736 N.E.2d 462 (2000), as well as *In re Ruiz*, 27 Ohio Misc.2d 31, 500 N.E.2d 935 (C.P.1986). Appellant appealed the trial court's abuse finding.

{¶ 6} An abused child is defined, in R.C. 2151.031(D), as a child who "[b]ecause of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare." A child is defined as "a person who is under eighteen years of age \* \* \*" and a person is defined as "an individual." R.C. 2151.011(B)(6) and (34).

{¶ 7} A trial court's determination that a child is abused, neglected or dependent must be supported by clear and convincing evidence. R.C. 2151.35(A). Clear and convincing evidence requires proof which "produce[s] in the mind of the trier of facts 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. An appellate court should not reverse a trial court's adjudication when competent and credible evidence

supports the trial court's findings of fact and conclusions of law. *In re Alexander C.*, 164 Ohio App.3d 540, 2005-Ohio-6134, 843 N.E.2d 211, ¶ 7 (6th Dist.).

{¶ 8} In the case of *In re Ruiz*, after the baby was born, he tested positive for cocaine and heroin and exhibited symptoms of drug withdrawal including irritability, jitteriness, diarrhea and initial feeding difficulty. *Id.* at 32. The birth mother admitted using heroin at least in the two weeks prior to delivery of the baby. *Id.* The Wood County Court of Common Pleas, Juvenile Division, noted that “R.C. 2151.011(B)(1) defines ‘child’ as ‘a person who is under the age of eighteen years \* \* \*.’” *Id.* The court held “a viable fetus is a child under the existing child abuse statute, and harm to it may be considered abuse under R.C. 2151.031.” *Id.* at 35. The court then concluded the birth mother's use of heroin close in time to the birth of the baby created a substantial risk to the health of the child, such that the child was abused. *Id.*

{¶ 9} Over a decade later, *In re Baby Boy Blackshear*, 90 Ohio St.3d 197, 736 N.E.2d 462, was decided. In that case, the newborn child, Lorenzo, acted jittery shortly after birth and was tested for drugs. *Id.* at 197. Lorenzo tested positive for cocaine as did his mother. *Id.* A complaint was filed alleging Lorenzo was an abused, neglected and/or dependent child. *Id.* Following an evidentiary hearing, the magistrate issued a decision finding Lorenzo was an abused child, reasoning that “[a]n unborn fetus is considered a person under Ohio's criminal code. \* \* \* Consequently an unborn fetus is a “child” under R.C. 2151.031. Therefore harm which occurred prior to birth may constitute abuse.” *Id.* Over mother's objection, the trial court approved and adopted the magistrate's decision.

*Id.* Mother appealed; the Fifth District Court of Appeals affirmed. *Id.* The Supreme Court of Ohio accepted mother's discretionary appeal. *Id.* at 198. Mother argued since an unborn fetus was not a child under the statutory definition, the statute defining who is an abused child did not apply. *Id.* at 198-199. The court, however, clarified that "the issue is not whether a fetus is a child but rather whether the plain language of R.C. 2151.031(D) applies to Lorenzo and the facts of this case." *Id.* at 199. The court articulated that "a child born alive who tests positive at birth for addiction to cocaine suffers from abuse and continued abuse no matter when the original abuse occurred." *Id.* at fn. 2. In a split decision, the court affirmed the appellate court holding that "[w]hen a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of R.C. 2151.031(D), per se an abused child." *Id.* at syllabus.

{¶ 10} Here, appellant asserts the trial court erred by determining that when a mother exposes her viable fetus to an illegal substance, the child, when born, is per se an abused child. Appellant argues there is no evidence that E.M. was harmed or potentially harmed by E.M.'s exposure to heroin or Subutex. Appellant further contends the trial court followed the holding in *Ruiz* without full consideration of the evolution of Supreme Court jurisprudence after the *Ruiz* decision and without regard to intent of the Ohio legislature. Appellant argues the trial court went beyond the *Ruiz* holding and created a new, inappropriate per se category of abused child. Appellant observed the court in *State v. Gray*, 62 Ohio St.3d 514, 584 N.E.2d 710 (1992), syllabus, held "[a] parent may not be

prosecuted for child endangerment under R.C. 2919.22(A) for substance abuse occurring before the birth of the child.” The *Gray* court also determined “the child did not become a ‘child’ within the contemplation of the statute until she was born.” *Id.* at 516. With respect to the *Blackshear* case, appellant noted the concurring justices emphasized the limited scope of the majority’s holding, that “the law announced today is limited to factual scenarios akin to the case at bar, where a newborn tests positive for an illegal drug, as the result of prenatal maternal substance abuse.” *Blackshear*, 90 Ohio St.3d at 201, 736 N.E.2d 462. Appellant further observed the dissent indicated the majority presumed a newborn suffers an injury which harms or threatens to harm the newborn when drugs are in the baby’s system at birth. *Id.* at 202 (Cook, J., dissenting). Appellant submits the dissent recognized the lack of medical evidence and “would remand this cause for a determination of whether Lorenzo’s exposure to cocaine either harmed or threatened to harm him, as the plain language of R.C. 2151.031(D) requires.” *Id.* at 203. Appellant asserts four of the seven justices deciding *Blackshear* would disagree with trial court’s decision finding that E.M. was an abused child. Appellant maintains the trial court went further than the Ohio Supreme Court did in *Blackshear*.

{¶ 11} Appellee acknowledges since E.M. was not born positive for heroin, the *Blackshear* per se rule does not apply, but argues that does not mean E.M. was not an abused child under the statute. Appellee contends that E.M. being exposed to heroin in utero and testing positive at birth for a heroin treatment drug is not a birth free and clear

of injury. Appellee asserts appellant's behavior harmed and threatened to harm the welfare of the child, therefore the trial court's decision should be upheld.

{¶ 12} Here, the record shows appellant admitted using heroin during her pregnancy with E.M., and appellant tested positive for heroin approximately five weeks before E.M. was born. However, when E.M. was born, E.M. did not show any signs of drug withdrawal, nor did she test positive for any illegal drugs. Thus, unlike the newborns in *Ruiz* and *Blackshear*, who tested positive at birth for the illegal drugs to which they were exposed in utero due to their mothers' ongoing drug use, and who experienced symptoms of withdrawal from the drugs, there is no evidence in the record that E.M.'s health or welfare was harmed or threatened with harm as a result of appellant's illegal drug use while pregnant with E.M. Moreover, there is no evidence in the record concerning the effects of Subutex or that the Subutex in E.M.'s system when she was born harmed or threatened to harm E.M.'s health or welfare. Without evidence that E.M.'s health or welfare was in any way harmed or threatened with harm, a finding by clear and convincing evidence that E.M. is an abused child, as defined in R.C. 2151.031(D), is unwarranted. In addition, the trial court's finding that E.M. was an abused child based upon appellant's heroin use "approximately five (5) weeks prior to birth, at which time the fetus was viable" unduly expands the narrow holding fashioned by the *Blackshear* court. Accordingly, appellant's assignment of error is found well-taken.

{¶ 13} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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.

Arlene Singer, J.

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

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JUDGE

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