

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: J. S.

C. A. No. 10CA009908

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 09JC27024

DECISION AND JOURNAL ENTRY

Dated: March 7, 2011

WHITMORE, Judge.

{¶1} Appellant, Kevin K., has appealed from a judgment of the Lorain County Court of Common Pleas, Juvenile Division, that terminated his parental rights to his minor child, J.S., and placed him in the permanent custody of Lorain County Children Services (“LCCS”). This Court affirms.

I

{¶2} J.S., born July 26, 2007, was removed from the home of Rosemary S. (“Mother”) and her then boyfriend on August 3, 2009, upon allegations of dependency and neglect. The father of J.S., Kevin K. (“Father”), had no prior relationship with his son, was incarcerated at the time of the child’s removal from Mother’s home, and paternity was not established until after this case began.

{¶3} LCCS had been involved with Mother off and on for five years. Mother has four children, all of whom have been removed from her care over time. In addition to J.S. and his

involvement in this case, Mother's oldest child was placed in the legal custody of a relative four years earlier, and the remaining two are the subjects of custody actions as well.

{¶4} Mother has had longstanding problems with homelessness, substance abuse, and mental health issues. The men with whom Mother has had relationships have criminal records and problems with substance abuse. There was concern that those relationships placed Mother and her children in danger. Except for visiting with her children, Mother made no progress on her case plan and the same problems continued.

{¶5} LCCS moved for permanent custody of J.S. on June 3, 2010. Neither parent was present at the hearing. Nevertheless, the caseworker and the guardian ad litem both recommended that permanent custody should be granted to the agency. In addition, Mother's attorney and the caseworker both indicated that Mother had concluded that she was not in a position to take care of her children. The caseworker testified that J.S. was in need of a legally secure, permanent placement and neither parent could provide that. There was also evidence that no suitable relatives were available for placement, that J.S. was doing well in his foster home, and that the foster parents were interested in adopting him. The trial court found that J.S. could not or should not be placed with either parent, and that permanent custody was in the best interest of the child.

{¶6} Mother has not appealed. Father has appealed and has assigned a single assignment of error for review.

II

Assignment of Error

“APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.”

{¶7} Father has argued that he was denied the effective assistance of trial counsel because his attorney failed to request a continuance of the permanent custody hearing when Father did not appear on the day of the hearing and, as a result, that Father was prejudiced by being unable to participate in the hearing.

{¶8} “The established test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent termination of parental rights.” *In re C.M.*, 9th Dist. Nos. 23606, 23608, & 23629, 2007-Ohio-3999, at ¶27, citing *In re Heston* (1998), 129 Ohio App. 3d 825, 827. This two-part test requires a demonstration that counsel’s performance fell below an objective standard of reasonable representation and that the client has suffered prejudice. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668. Proof of both parts of the test is necessary to establish the claim. *Bradley*, 42 Ohio St.3d at 142. In applying the test, the reviewing court should recognize that counsel is strongly presumed to have rendered adequate assistance. *Id.*

{¶9} Regarding the first part of the test, the adequacy of counsel’s performance must be viewed in light of the totality of the circumstances surrounding the trial court proceedings at the time of counsel’s conduct. *Strickland*, 466 U.S. at 690. Consequently, in considering whether counsel’s performance fell below an objective standard of reasonable representation, we review the circumstances surrounding the trial court proceedings at the time of the permanent custody hearing.

{¶10} On the day scheduled for the permanent custody hearing, when it became apparent that neither of the parents would be attending, the trial judge verified with counsel that both parents had been properly served with notice of the hearing. The record independently

reflects that the parents were properly served. The judge also ascertained that Father had not provided his attorney with an active telephone number and had not responded to his attorney's letters. At the time of the hearing, Father's attorney had not seen or heard from his client for three months.

{¶11} During the trial court proceedings, the caseworker, the guardian ad litem, and Father's attorney all had difficulty contacting Father. The address Father provided to the court in connection with his application for appointed counsel resulted in several returned notices and filings. The caseworker testified that the agency's last known address for Father was an abandoned building, and the guardian ad litem reported that Father was homeless.

{¶12} Father was incarcerated at the start of the case, and was incarcerated once again during the proceedings. Paternity was not established until after this matter was initiated, and there is no indication that Father had ever been involved in J.S.'s life. Nine months before the permanent custody hearing, Father attended his only visit with his son and LCCS provided Father with a case plan. The caseworker later indicated that Father had not been cooperative with the agency and had not established a bond with J.S. The guardian ad litem did not believe Father was capable of providing for his son and keeping him safe. She noted that Father did not visit his son and had been in and out of jail.

{¶13} Because efforts to serve Father with notice of the permanent custody motion and hearing by certified and regular mail had failed, LCCS requested personal service on Father. See R.C. 2151.29 and Civ.R. 4.1. Ultimately, Father was personally served with notice of the permanent custody motion and hearing while he was scheduled to be in a local courtroom for a hearing in another matter. In addition to having received such notice, Father attended three days of hearings in the trial court, and there is, therefore, no reason to believe he did not understand

what was at stake. Following service of the permanent custody motion on Father, he failed to participate in the proceedings in any way for the last three months of the case, including a failure to attend the permanent custody hearing. During that time, he failed to contact his attorney, and his attorney's efforts to reach him were unsuccessful.

{¶14} After the trial judge verified that Father had been properly served, that he had not responded to his attorney's efforts to reach him, and that he had not provided his attorney with any other means to reach him, the trial judge stated that the proceedings would go forward without the parents "and that the Court would not consider any continuances at this time."

{¶15} On appeal, Father has not challenged service of notice, nor has he offered any excuse or justification for his absence from the hearing. Rather, his argument rests entirely on a general due process right to be present at a hearing challenging his parental rights and his attorney's failure to request a continuance because he was absent. In support of his argument, Father has pointed to the determination by Ohio courts that parents "'must be afforded every procedural and substantive protection the law allows'" in proceedings challenging their parental rights. See *In re Hayes* (1997), 79 Ohio St. 46, 48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. See, also, *Santosky v. Kramer* (1982), 455 U.S. 745, 753-54 (requiring states to provide parents with "fundamentally fair procedures" in termination proceedings). Father relies on this entitlement to procedural and substantive protections in claiming that he has the right to be present at the permanent custody hearing.

{¶16} Father's right to be present and to participate at the permanent custody hearing was sufficiently protected by the setting of a hearing and proper notice of that hearing. Father was represented by counsel throughout the proceedings, but failed to inform his counsel or the

trial court of any reason why he could not attend the hearing. Father's unexplained absence from the hearing is not a failure of due process.

{¶17} This Court has previously recognized that although a parent has a right to be present at the permanent custody hearing, that right is not absolute. See, e.g., *In re J.W.*, 9th Dist. No. 24924, 2009-Ohio-6957, at ¶20. While Ohio courts acknowledge that great care must be taken to ensure that due process is used in parental termination proceedings, they also recognize that a parent facing the termination of parental rights has a corresponding duty to “exhibit cooperation and [] communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding.” *In re Q.G.*, 8th Dist. No. 88322, 2007-Ohio-1312, at ¶12. This Court has similarly concluded that “the reasonableness of trial counsel’s performance must be examined in light of the limitations that the father’s own behavior placed on counsel’s ability to represent him.” *In re N.H.*, 9th Dist. No. 24355, 2008-Ohio-6617, at ¶ 28, citing *Strickland*, 466 U.S. at 691.

{¶18} In this case, the totality of the circumstances and the limitations Father placed on trial counsel’s performance do not support a conclusion that trial counsel’s performance fell below an objective standard of reasonable representation when he failed to move for a continuance of the permanent custody hearing. Father had been informed of the possibility that the trial court might terminate his parental rights, and he was personally served with notice of the permanent custody hearing. He nevertheless failed to communicate with his appointed counsel, did not keep the court or his counsel informed of a current address, and did not provide other means to communicate with him. He did not engage in case planning activities or visit regularly or recently with his child. He did not ask his attorney to request a continuance or even provide a reason for his absence on the day of the hearing. Finally, the trial court indicated that it would

not grant a continuance. Upon these facts, Father has not demonstrated that trial counsel's performance fell below an objective standard of reasonable representation when he did not request a continuance on the day of the permanent custody hearing. See *Bradley*, 42 Ohio St.3d 136, at paragraph two of the syllabus.

{¶19} Moreover, Father has not demonstrated prejudice. He has not shown that the result would have been different had trial counsel requested a continuance, except to say that he would have then had an opportunity to be present. As we have previously concluded, Father did have an opportunity to be present at the hearing that took place, and he has offered no reason for his absence from that hearing. Father has made no argument demonstrating that prejudice accrued as a result of his absence from the hearing. He does not cite, for example, any specific evidence that he could have contributed or point to anything that might have made a difference in the outcome. Absent that, this Court cannot conclude that there is a reasonable probability that the result of the hearing would have been different. Consequently, Father has not established that his counsel's actions constituted ineffective assistance. Father's sole assignment of error is overruled.

III

{¶20} Father's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

BARBARA A. WEBBER, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney for Appellee.