STATE OF MICHIGAN

COURT OF APPEALS

In re MARTINEZ/CRUZ, Minors.

UNPUBLISHED
April 2, 2020

No. 349400
Ottawa Circuit Court
Family Division
LC No. 16-082727-NA

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to her minor children under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(j). For the reasons stated in this opinion, we vacate the trial court's order of termination and order of adjudication, and we remand this matter to the trial court for further proceedings.

I. BASIC FACTS

Respondent's substance abuse has subjected her children to ongoing instability. In 2012, she was charged with child endangerment for driving while intoxicated with the children in her vehicle. At the time, one child was approximately 2 years old and the other was less than six months old. Both were removed from respondent's care, and respondent participated in and appeared to have benefited from the services she had been provided with. The children were, therefore, returned to her care. However, in June 2016, the Department of Health and Human Services (DHHS) submitted a petition, alleging that respondent had been driving dangerously without a license while the children were in the vehicle. A gun and drug paraphernalia were located in the vehicle. Less than one month later, respondent was arrested after she admitted to using marijuana while driving with one of the children in her vehicle. In January 2018, the DHHS filed another petition, alleging that in December 2017, respondent had tested positive for methamphetamine and amphetamines, that she had refused a drug screen in January 2018, and that she had been incarcerated for violating her felony controlled-substance probation.

On March 2, 2018, respondent entered a no-contest plea to the allegations in the petition. Prior to accepting her plea, the trial court advised her of the rights she was waiving by pleading no-contest, of the differences between a no-contest plea and a guilty plea, and of some of the consequences of her plea. Yet, it is undisputed that the court failed to advise her that one of the

consequences of her of plea was that the plea could "later be used as evidence in a proceeding to terminate parental [her] rights . . . ." See MCR 3.971(B)(4). On the basis of respondent's plea, the court entered an order of adjudication and took jurisdiction over the children. Subsequently, following a termination hearing, the court entered an order terminating respondent's parental rights after finding statutory grounds to terminate her parental rights under MCL 712A.19b(3)(c)(*i*) and (g) and that termination of respondent's parental rights was in the children's best interests.

II. INVALID PLEA

A. STANDARD OF REVIEW

Respondent argues that her parental rights were terminated based on an invalid plea because before accepting her plea, the trial court did not properly advise her "of the consequences of her plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." See MCR 3.971(B)(4). Respondent did not preserve this claim by timely raising it at the trial court level. Accordingly, we review her claim for plain error. See *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019) ("[A]djudication errors raised after the trial court has terminated parental rights are reviewed for plain error."). Under the plain error standard of review, "respondents must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected their substantial rights. And the error must have 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[ ] . . . .' " *Id.*

B. ANALYSIS

In this case, the trial court orally and in writing advised respondent of *most* of what is required by MCR 3.971, but it completely failed to advise her, as required by MCR 3.971(B)(4), that her plea could "later be used as evidence in a proceeding to terminate [her] parental rights . . . ." By failing to properly advise respondent of the consequences of her plea as mandated by MCR 3.971(B)(4), the trial court committed plain error. See *Ferranti*, 504 Mich at 30 ("Due process and our court rules require a trial court to advise respondents-parents of the rights that they will waive by their plea and the consequences that may flow from it. The court erred by failing to advise these respondents of the consequences of their pleas and the rights they were giving up; those errors were plain."). As a result, respondent's jurisdictional plea was invalid.

On appeal, the DHHS concedes plain error occurred, but argues that respondent's substantial rights were not affected because respondent's jurisdictional plea was not used as evidence in the subsequent termination hearing. Essentially, the DHHS asserts that because legally admissible evidence was used as the evidentiary basis for the court's termination decision, respondent's substantial rights were not affected by the plain error in the jurisdictional plea-taking process. The petitioner in *Ferranti* raised a similar argument, contending that the plain error in that case did not deprive the respondent-parents of their substantial rights because the DHHS would have been able to prove the allegations in the petition if the case proceeded to an adjudication trial. *Ferranti*, 504 Mich at 30. Our Supreme Court, however, rejected that contention, explaining:

> [T]he constitutional deficiencies here are not forgiven by what might have transpired at trial. The respondents' pleas were not knowingly, understandingly, and voluntarily made.
>
> The respondents were deprived of their fundamental right to direct the care, custody, and control over JF based on those invalid pleas. And the invalid pleas relieved the Department of its burden to prove that the respondents were unfit at a jury trial, with all of its due-process protections. These constitutional deprivations *affected the very framework within which respondents' case proceeded*. There was error, it was plain, and it affected the respondents' substantial rights. [*Id*. (emphasis added).]

Likewise, in this case, the invalid plea affected "the very framework within which" respondent's case proceeded. It was only on the basis of respondent's invalid plea—which relieved the DHHS of its burden to prove respondent's unfitness at a jury trial—that the court was able to take jurisdiction over the children. Because the framework of the proceedings was invalid, the plain error in this case affected respondent's substantial rights.

In addition, the plain error seriously affected the fairness, integrity, or public reputation of judicial proceedings. In *Ferranti*, our Supreme Court determined that the constitutional error in the jurisdictional plea-taking process seriously affect the fairness, integrity, or public reputation of judicial proceedings, reasoning:

> The trial court did not advise the respondents that they were waiving any of the important rights identified in MCR 3.971(B)(3). And it failed to advise the respondents of the consequences of entering their pleas. MCR 3.971(B)(4). This failure resulted in the respondents' constitutionally defective pleas and undermined the foundation of the rest of the proceedings. The defective pleas allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child. Due process requires more: either a plea hearing that comports with due process and the court rule or, if respondents choose, a trial. [*Id*. at 31.]

Similarly, in this case, the trial court failed to advise respondent of the consequences of entering a plea. MCR 3.971(B)(4). And, although respondent was advised that she was waiving the important constitutional rights identified in MCR 3.971(B)(3), respondent was still deprived of her due-process right to either (1) "a plea hearing that comports with due process and the court rule" or (2) a trial to adjudicate her parental fitness. See *Ferranti*, 504 Mich at 31. Because the plea hearing in this case did not comport with due process and the court rule, and because no trial was held, respondent's defective plea permitted the state to interfere with her fundamental right to parent her child without due process, thereby undermining the foundation of all subsequent proceedings in the case. Consequently, we conclude that the plain error in this case seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Ferranti*, 504 Mich at 31.

In sum, the plain error in this case "gave the trial court the dispositional authority to terminate [respondent's] parental rights." *Id*. at 36. It affected respondent's fundamental rights, as well as the fairness, integrity, or public reputation of judicial proceedings. We therefore vacate the termination and adjudication orders, and remand to the trial court for further proceedings consistent with this opinion.[1]

Vacated and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[1] Because of our ruling with respect to the trial court's assumption of jurisdiction, we need not address respondent's remaining argument on appeal, as it is now moot.

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MARKEY, P.J. (*dissenting*).

Although I agree with the majority that the trial court plainly erred by failing to inform respondent that her plea could "later be used as evidence in a proceeding to terminate [her] parental rights," MCR 3.971(B)(4), I strongly disagree that the error affected respondent's substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Accordingly, I dissent.

The Department of Health and Human Services (DHHS), following an investigation, may petition a court to take jurisdiction over a child. *In re Ferranti*, 504 Mich at 15, citing MCR 3.961(A). The petition must contain essential facts that if proven would permit the court to assume and exercise jurisdiction over the child. MCR 3.961(B)(3); MCL 712A.2(b); *In re Ferranti*, 504 Mich at 15. If a petition is authorized, the adjudication phase of the proceedings takes place, and the "question at adjudication is whether the court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15.

A court can take and exercise jurisdiction if a respondent "make[s] a plea of admission or of no contest to the original allegations in [a] petition." MCR 3.971(A); see also *In re Ferranti*, 504 Mich at 15. "The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest." MCR 3.971(D)(2).

I note that until the Michigan Supreme Court decided *In re Ferranti*, a jurisdictional challenge such as the one respondent poses here would have been dismissed on appeal as an impermissible collateral attack on the adjudication determination because respondent did not

immediately appeal the jurisdictional ruling, and termination was not sought at the initial dispositional hearing. *In re Ferranti*, 504 Mich at 7-8, 18-19. Our Supreme Court explained:

> This Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. With that procedural (mis)understanding, we held that a posttermination appeal of a defect in the adjudicative phase is prohibited because it is a collateral attack. This foundational assumption was wrong; *Hatcher* was wrongly decided, and we overrule it. [*In re Ferranti*, 504 Mich at 7-8.]

Now, under similar procedural circumstances, the proper approach is not to dismiss the appeal but to examine the appellate challenge under the plain-error test. *Id*. at 29 ("adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error"). Under plain-error review, a respondent is required to establish that "(1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected . . . substantial rights." *Id*. Also, it must be shown that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings. *Id*. *In re Ferranti* has opened the door to jurisdictional challenges long after the adjudicative phase of the proceedings has passed, allowing a respondent to essentially agree to the exercise of jurisdiction by entering a plea, engage in proceedings for many months, participate in a termination hearing, and then raise a jurisdictional challenge that this Court must be address.

"Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing . . . of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B)(4). In this case, the trial court plainly erred by failing to inform respondent in a manner consistent with the requirements of MCR 3.971(B)(4). I cannot conclude, however, that respondent's substantial rights were affected or that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings.

First, in reviewing respondent's brief on appeal, I am struck by the complete absence of any claim that she would not have entered her no-contest plea had the court informed her of the consequences of her plea under MCR 3.971(B)(4). How can respondent be prejudiced if the court's failure to comply with MCR 3.971(B)(4) made no difference in her decision-making regarding a plea? Second, there is no indication that the trial court used respondent's no-contest plea against her when ruling to terminate her parental rights. Third, respondent engages in no analysis on the issues of prejudice and whether the plain error seriously affected the integrity, fairness, or public reputation of the child protective proceedings: She simply states in conclusory fashion that those elements were established "[f]or the same reasons expressed in *In re Ferranti*." See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted). Moreover, *In re Ferranti* is easily distinguishable because there the trial

court not only failed to inform the respondent of the consequences of the plea, the court also failed to inform the respondent of all the rights that were being waived, MCR 3.971(B)(3). Here, the trial court fully satisfied MCR 3.971(B)(3) regarding the waiver of rights; the court's only failure was that it did not tell respondent that the plea could be used against her at a termination hearing. Respondent entirely fails to explain why this distinction is irrelevant for purposes of applying *In re Ferranti* to her case.

Finally, this Court in *In re Pederson*, __ Mich App __, __; __ NW2d __ (2020); slip op at 10-13, essentially addressed the same error and circumstances as presented in the instant case and, relying on some of the reasons I set forth in the preceding paragraph, held that the respondents simply could not establish the requisite prejudice or that the plain error seriously affected the integrity, fairness, or public reputation of the judicial proceedings. The evidence in this case overwhelmingly established that respondent had an extensive history of severe drug and alcohol abuse, criminal activity, and participation in conduct that endangered the lives of her children. Also, she failed to secure housing appropriate for the children, failed to obtain reliable transportation, and began a relationship with a criminal sex offender. The trial court did not clearly err by finding that the statutory grounds were proven by clear and convincing evidence or by finding that there was a preponderance of evidence that termination was in the children's best interests. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

I would affirm the trial court's order terminating respondent's parental rights. Accordingly, I respectfully dissent.

/s/ Jane E. Markey