STATE OF MICHIGAN

COURT OF APPEALS

In re L. J. WOLF, Minor.

UNPUBLISHED
November 19, 2020

No. 352831
Monroe Circuit Court
Family Division
LC No. 18-024540-NA

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondent mother appeals as of right the order terminating her parental rights to her minor child, LJ, under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist 182 days after entry of initial dispositional order), (g) (failure to provide proper care and custody), (j) (reasonable likelihood that child will be harmed if returned to parent), and (h) (parent imprisoned for such a period that child will be deprived of a normal home for more than two years).[1] For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

In June 2018, petitioner, the Department of Health and Human Services, filed a petition alleging that respondent's father and his wife had been granted a guardianship of LJ in January 2018, but respondent's father had been ordered to cease contact with LJ due to allegations that he had sexually abused respondent, and his wife abandoned LJ with her stepson. The petition alleged that respondent did not have stable housing or a legal source of income, and that she tested positive for marijuana and crack cocaine on two occasions in May 2018. Respondent waived a probable cause determination, and LJ was placed in foster care. The trial court terminated the guardianship of respondent's father and his wife.

[1] The parental rights of the father were terminated by the same order under MCL 712A.19b(3)(a)(*ii*) (parent has abandoned child and not sought custody for 91 days), and (g) (failure to provide proper care and custody). The father is not a party to this appeal.

The trial court held an adjudication at which respondent agreed that she was voluntarily waiving her trial rights by entering into a plea agreement. The trial court asked respondent, "Do you understand that your plea would cause the court to take jurisdiction over the minor, and you would be required to participate in services?" Respondent answered, "Yes." Before the trial court entered an initial dispositional order, respondent was charged in the state of Indiana with possessing cocaine, marijuana, mushrooms, and pills with intent to deliver. She was sentenced to 4½ to 6 years' imprisonment. LJ was transferred from her initial foster family to respondent's great aunt.

Petitioner filed a permanent custody petition in August 2019. At the termination hearing, the trial court found that respondent had not rectified her substance abuse or lack of suitable housing, and that there was no reasonable expectation she would do so in a reasonable time because she would not be released from prison until January 2023 at the earliest. The trial court found that it was in LJ's best interests to terminate respondent's parental rights because LJ's behavior and mental health issues had improved dramatically since her placement. The trial court entered an order terminating respondent's parental rights. Respondent now appeals.

II. PLEA

On appeal, respondent first argues the trial court committed a plain error warranting reversal when it elicited testimony from respondent without informing her that her testimony would convert her no-contest plea to an admission that she had lacked suitable housing since 2017.

To preserve a challenge to the validity of a plea, a respondent must "move to withdraw their plea[] in the trial court or otherwise object to the advice of rights that they were provided." *In re Pederson Minors*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 349881); slip op at 8. Respondent did not move the trial court to withdraw her plea or object to the advice of rights. She did not argue in the trial court that the allegations, even if true, were legally insufficient to justify the court taking jurisdiction over LJ. Therefore, these issues are not preserved for review.

"Both this Court and our Supreme Court have applied the plain-error standard set forth in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), to unpreserved claims of error arising out of child protective proceedings." *Pederson*, __ Mich App at __; slip op at 8. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error . . . seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763-764 (quotations marks and citation omitted; alteration in original).

At the opening of the adjudication in this case, petitioner's counsel reported that the parties had reached a plea agreement—respondent would admit that she tested positive for THC and crack cocaine on May 15, 2018, and May 31, 2018, if the allegation was amended to state that she had a valid medical marijuana card since 2017. Respondent would also admit to the allegations that she "has not had stable housing for herself or the minor child since September 2017," and that the court had statutory grounds to take jurisdiction over LJ under MCL 712A.2(b)(1) and (2).

Respondent's counsel stated that respondent whispered to him that she believed she was pleading no contest rather than admitting to allegations 1 to 6. The trial court explained that the allegations 1 to 6 included respondent's name and LJ's name. Respondent interrupted, "Okay, I see." The trial court did not explain that allegation 6 provided that the trial court had jurisdiction over LJ pursuant to MCL 712A.2(b), but the plea agreement signed by respondent and her attorney plainly stated: "Respondent Mother, and his/her attorney (if applicable) hereby agree that Respondent shall admit to the general allegations regarding subject matter jurisdiction (namely, allegations 1 through 6) and to allegations of abuse and neglect contained in the Petition dated 6/19/18 . . . ." The second page of the agreement consisted of an advice of rights quoting MCR 3.971(B)(3).

Following the trial court asking respondent's counsel why respondent was pleading no contest to the allegation that she had lacked stable housing since September 2017, counsel answered, "Lack of recollection." To provide a factual basis for the no-contest plea, petitioner's counsel asked the court to take judicial notice of the guardianship case file. In response, the trial court stated, "I don't think that in the guardianship file there's an actual document that shows what [respondent's] residences were. I know that there was testimony taken about it, but it's not something I can ascertain without getting a transcript . . . ." The trial court told respondent and her counsel, "I could say what I recollect, and you can tell me whether that's acceptable or not." Respondent's counsel agreed. The trial court began, "[T]here was testimony in the guardianship file that [petitioner] had asked [respondent] to agree to a safety plan in which [LJ] would be in the care of an individual, a female as I recall, who was some . . . friend of [respondent's]?" Respondent began to correct the trial court. The trial court asked respondent, "Would you rather just . . . explain in your own words? Because I don't think this no-contest plea is working very well." Respondent answered, "I can." Respondent explained that she had been evicted from her apartment in Grand Blanc on August 30, 2017, and moved with LJ to her mother's house in September 2017. Then, respondent explained, LJ lived with respondent's father from October 21, 2017 to November 11, 2017 because her mother had been evicted. A petition was filed against respondent in December 2017 in Genesee County because she was homeless, at which time she decided to take LJ to her former stepfather in Oklahoma. Then, respondent explained, her father petitioned the court for a guardianship, which was granted on January 5, 2018.

The trial court asked respondent, "[D]o you believe that the court should accept what you just stated as a basis for your plea to not having stable housing for yourself? Because the purported reason for your no-contest plea was [that] you didn't have sufficient recollection. But it sounds like you do recollect?" Respondent answered, "Yes." The trial court asked, "Alright, is counsel satisfied with that?" Respondent's counsel answered, "I am." The trial court entered an order taking jurisdiction over LJ under MCL 712A.2(b)(1) and (2), finding that respondent had failed to provide support, education, and medical, surgical, or other necessary care for health or morals, and that the home environment was unfit by reason of neglect, cruelty, drunkenness, criminality, or depravity on respondent's part.

MCR 3.971(D) provides:

> (1) Voluntary Plea. The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

> (2) Accurate Plea. 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. *If the plea is no contest, the court shall not question the respondent,* but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate. (emphasis added).

Here, the trial court plainly erred by impermissibly questioning respondent to establish a factual basis for her no-contest plea as to the housing allegation. However, we note that the trial court did so because petitioner did not have a witness or any documentary evidence at the hearing to establish a factual basis for respondent's no-contest plea regarding the housing allegation. While respondent's counsel agreed to this procedure, there is no authority providing that counsel may waive a respondent's right to the establishment of a factual basis for a no-contest plea when the respondent has plainly expressed a wish to plead no contest rather than to admit an allegation.

Having concluded the trial court committed plain error, our inquiry focuses on whether respondent suffered prejudice as a result of the error. *Carines*, 460 Mich at 763-764. On this record we cannot conclude that respondent was prejudiced.

Respondent, after receiving a full advice of rights under MCR 3.971(B)(3), admitted that there were grounds for the trial court to take jurisdiction over LJ. Respondent and her attorney then signed a written plea agreement stating the same. Importantly, the record following adjudication contained undisputed evidence that respondent continually lacked stable or suitable housing. This fact is magnified by respondent being imprisoned in the State of Indiana before the trial court entered an initial dispositional order. Respondent's own testimony at the termination hearing revealed that she became homeless in August 2017, and when she was able to find somewhere to live, the conditions were not suitable for LJ. For example, in 2018, prior to her incarceration, she lived with a friend in Flint but CPS had found the home unsuitable due to the presence of numerous marijuana plants.

We cannot conclude from this record that the trial court's error affected the outcome of the trial court proceedings. *Carines*, 460 Mich at 763. The evidence presented during the proceedings established that respondent failed to attain suitable housing for her and LJ. Accordingly, in the absence of evidence that the trial court's initial questioning of respondent during her no contest plea "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence," *Id*. at 763-764, respondent is not entitled to relief on this issue.[2]

[2] Additionally, respondent argues that neither the drug-use allegation nor the housing allegation was independently sufficient to establish that respondent had neglected LJ. The legal sufficiency of the allegations to establish statutory grounds for jurisdiction is a separate issue from whether

III. BEST INTERESTS

Respondent next argues that the trial court clearly erred by assigning inadequate weight to several best interest factors that weighed against terminating her parental rights.

This court reviews a trial court's findings regarding a child's best interests for clear error. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009) (quotation marks and citation omitted); MCR 3.997(K). A finding is clearly erroneous if this Court "is left with the definite and firm conviction that a mistake has been made." *Williams*, 286 Mich App at 271. This Court defers to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "The trial court should weigh all the evidence available to determine the children's best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

> [T]he court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id*. at 713-714.]

The trial court must "explicitly address whether termination is appropriate in light of the children's placement with relatives." *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

On this issue, respondent argues that the trial court uniformly praised respondent's great aunt while failing to consider that the great aunt had not yet obtained a foster care license, that she had moved frequently for work in the past, or that she was 65 years old and lacked a clear plan for LJ's care in the event of her death. However, this argument ignores the foster care worker's testimony that the great aunt's foster care license would be approved "anytime" after the receipt of one document from a "support person." Respondent's argument also ignores the great aunt's testimony that she had frequently moved for work in the past, but that she had been at her current home for three years and did not intend to move for the rest of her life.

Respondent additionally argues that the trial court erroneously found that the great aunt would allow LJ contact with respondent in the future, even though the great aunt's testimony did not support that finding. This argument is a misstatement of the record as the great aunt plainly

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respondent's plea was valid. As such, this Court need not review the issue because respondent has not raised it in the questions presented section of her brief. MCR 7.212(C)(5).

testified that she wished respondent well and would be willing to let respondent have contact with LJ, provided that such contact would be safe for LJ.

Respondent's arguments also ignore the trial court's numerous, well-supported findings in favor of terminating respondent's parental rights and placing LJ with the great aunt. The trial court found that LJ was "thriving" emotionally and socially compared to when the great aunt initially took custody. LJ was attending therapy and learned to respect others' boundaries, to follow a hygiene routine and a sleep schedule, and she had stopped acting out sexually. LJ indicated she wanted to continue attending her school and did not want to move. Based on these findings, the trial court concluded that "the advantages of the foster home with her great-aunt are numerous . . . . [LJ] doesn't have to do things like sleep in a car or worry about where a meal is or think about stealing to survive." She was happy with her room and her toys, and the myriad of activities she participated in on a regular basis. The fact that the great aunt is older than respondent and did not have a settled plan for LJ's care in the event of her death did not outweigh the numerous factors that strongly weighed in favor of terminating respondent's parental rights and placing LJ with the great aunt.

Respondent also argues that the trial court erroneously downplayed her bond with LJ. The trial court found that LJ was bonded to respondent, but not as a child is normally bonded to a primary caregiver. Such a finding was well supported by the testimony of multiple witnesses. LJ's first foster mother testified that LJ "did not look forward" to visits with respondent and rarely talked about respondent at home. The foster mother testified, "[F]rom day one, when [LJ] came to my home, [the great aunt was] the only person she begged to go to. At night, when she cried, she begged for [the great aunt]." While LJ was in the foster mother's care, a clinician diagnosed her with reactive attachment disorder and posttraumatic stress disorder. The foster mother opined that these issues improved dramatically once LJ was placed with the great aunt. Two foster care workers corroborated the foster mother's testimony on those points.

Lastly, respondent argues that the trial court used the fact that she had been a domestic violence victim against her. Contrary to respondent's argument, the trial court did not place any particular emphasis on respondent's violent relationship with her ex-boyfriend. Rather, the trial court noted in passing, at the end of a lengthy best interests analysis, that respondent had a history of domestic violence. Respondent plainly testified that she kept LJ in an environment in which domestic violence occurred for two years. That fact was relevant to LJ's best interests. Therefore, the trial court did not clearly err in determining that termination of respondent's parental rights was in LJ's best interests. Accordingly, respondent is not entitled to relief.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello