STATE OF MICHIGAN

COURT OF APPEALS

In re MALLETT, Minors.

UNPUBLISHED
June 17, 2021

No. 354733
Wayne Circuit Court
Family Division
LC No. 2018-000963-NA

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's orders terminating her parental rights to ALM, JLM, and SLM. The court terminated respondent's parental rights to ALM and JLM pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), and terminated her parental rights to SLM, a child born during the proceedings, under MCL 712A.19b(3)(g) and (j). For the reasons stated in this opinion, we vacate the trial court's orders of adjudication—and, consequently, its subsequent orders of termination—and we remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent, a legally incapacitated person, suffers from severe mental illness. She has been hospitalized on multiple occasions with acute psychosis and found to be, among other things, delusional, suicidal, and homicidal. In 2014, she gave birth to her oldest daughter, ALM. Her son, JLM, was born in 2016. Respondent was involuntarily hospitalized in 2017 for acute psychosis. At that time, she was diagnosed with paranoid schizophrenia. After this psychiatric hospitalization, respondent's mother, D. Mallett, petitioned the court and was appointed respondent's legal guardian, and the guardian of her grandchildren, ALM and JLM. At that time, respondent and her children resided with D. Mallett and D. Mallett's other children.

In April 23, 2018, respondent was arrested for disorderly intoxication. That evening, in an effort to secure respondent's release from jail, D. Mallett left JLM and ALM in the care of her fiancé, D. Tinsley, and her 17-year-old daughter. The following morning, Tinsley went to work and D. Mallett's daughter left for school. Both incorrectly assumed that D. Mallett was in the house. As a consequence, 3½-year-old ALM and nearly two-year-old JLM were left home alone and unsupervised. Later that day, a neighbor found ALM walking alone down the street. When

the neighbor attempted to return ALM to the family home, the door was open and the neighbor found JLM on the floor. The neighbor observed that a chair had been pushed up to the stove and one of the burners was ignited. During the investigation that ensued, Children's Protective Services (CPS) concluded that ALM and JLM had been left alone and unattended for at least four hours.

During the six weeks that followed, CPS continued to investigate the April 24th event and the family's considerable CPS history.[1] CPS interviewed the witnesses, consulted law enforcement, verified the guardianships, attempted to identify alternative relatives for placement, and held a family team meeting. For several weeks, ALM, JLM, and respondent remained in D. Mallett's home along with D. Mallett's own minor children. Ultimately, however, the Department of Health and Human Services (DHHS) determined that because of the family's CPS history and respondent's mental health issues, the children were at risk. Consequently, the DHHS removed ALM and JLM and, pursuant to a safety plan, the children were placed in the care of respondent's sister. Approximately three weeks later, the DHHS filed a petition requesting that the court exercise jurisdiction over JLM and ALM. Respondent and D. Mallett were both named as respondents in this petition. Following a preliminary hearing, the court authorized the petition and formally placed the children with the maternal aunt.

At an October 12, 2018 adjudication proceeding, respondent pleaded no contest to the petition and the court relied on the DHHS's investigative document for the factual basis for the plea. It was also noted during the hearing that D. Mallett's guardianship over ALM and JLM had been administratively terminated. Consequently, the trial court dismissed D. Mallett from the petition. Immediately after assuming jurisdiction, the court proceeded to disposition. Respondent was ordered to comply with a treatment plan that included participating in psychological and psychiatric evaluations and following the recommendations contained therein, attending individual therapy, completing parenting classes, maintaining suitable housing and income, and attending parenting time and court hearings.

During the months that followed, respondent failed to comply with and benefit from the treatment plan. In the summer of 2019, respondent became pregnant with her third child, SLM. During this pregnancy, respondent stopped taking her psychotropic medications. Consequently, her psychiatric condition became severely unstable, and she was hospitalized multiple times in late 2019 and early 2020. In Mach 2020, respondent gave birth to SLM. At the time, SLM tested positive for marijuana. Immediately after her birth, SLM was placed with her siblings in the home of the maternal aunt.

Petitioner ultimately filed an original petition seeking termination of respondent's parental rights to SLM, and a supplemental petition seeking termination of respondent's parental rights to ALM and JLM. The petitions alleged that respondent had not complied with her treatment plan, that the conditions that caused the removal of ALM and JLM continued to exist, that respondent

[1] Between 2000 and 2006, CPS investigated D. Mallett several times for complaints of abuse and neglect. At least two of the complaints were substantiated, and D. Mallett's children were removed from her care for a period.

could not provide proper care and custody, and that all three of the children would be at risk of harm in respondent's care.

Following a hearing in August 2020, the trial court entered orders terminating respondent's parental rights to all three children. This appeal ensued.

II. ANALYSIS

On appeal, respondent asserts that the trial court violated her right to due process by accepting her no-contest plea without ensuring that it was knowingly, understandingly, and voluntarily made. Generally, whether proceedings complied with a respondent's due-process rights is a question of constitutional law reviewed de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). However, respondent failed to raise any due-process claim in the trial court, and did not move to withdraw her plea or otherwise object to the advice of rights that she was provided. Therefore, this issue is unpreserved. See *In re Pederson*, 331 Mich App 445, 462; 951 NW2d 704 (2020). Accordingly, we review this claim for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8, 761 NW2d 253 (2008). "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." *People v Carines*, 460 Mich 750, 764, 597 NW2d 130 (1999). See also *In re VanDalen*, 293 Mich App 120, 135, 809 NW2d 412 (2011). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9. After reviewing the record, we hold that the trial court plainly erred and that its error affected respondent's substantial rights.

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). In the adjudicative phase, the trial court determines whether to take jurisdiction of the child. *Id.* The court can exercise jurisdiction if either (1) the petitioner proves allegations in the petition at a trial or (2) the respondent-parent enters a plea of admission or no contest to the allegations. *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). MCR 3.971 governs the entry of pleas in child protective proceedings. At the time of adjudication in this case, MCR 3.971(B) provided that before accepting a plea of admission or no contest, the court must advise the respondent—either on the record or in a writing that is made part of the file—of the following:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
>
> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
>
> (c) have witnesses against the respondent appear and testify under oath at the trial,

(d) cross-examine witnesses, and

(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

(4) 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.

For a plea to be valid, the Due Process Clause of the Fourteenth Amendment requires that the plea be knowingly, understandingly, and voluntarily made. *In re Ferranti*, 504 Mich at 21; *In re Pederson*, 331 Mich App at 464. At the time of respondent's dispositional hearing, MCR 3.971(C)(1) placed an affirmative duty on the trial court to ensure that pleas were made in compliance with this constitutional requirement, stating that a trial court may not accept a plea "without satisfying itself that the plea is knowingly, understandingly, and voluntarily made."[2]

Although the trial court generally complied with the requirements of MCR 3.971(B), it failed to comply with the mandate of MCL 3.971(C)(1). That is, after reviewing the plea proceedings, it is clear that there was no basis upon which the court could have reasonably concluded that respondent's no-contest plea was knowingly, understandingly, and voluntarily made.

Respondent appeared at the October 12, 2018 adjudicative proceeding by speaker phone. Also present at the hearing, in person, was Dorothy Dean (respondent's attorney), Jeffery Young (respondent's guardian ad litem), and D. Mallett, who, at that point, was still respondent's legal guardian. At the outset of the hearing, D. Mallett confirmed that respondent had received a copy of the petition. The court then addressed several unrelated matters. When it returned to respondent's matters, the court referenced an off-the-record conversation related to respondent entering a plea:

The Court: That brings us to our Trial. We are here for a trial. The Court has exhausted all forms of service, including publication. No Father has appeared. Mom has been served previously, and Ms. Dean, if you would like to, I guess come up to the table at this point.

It is my understanding in our off the record conversation that in conversations with you, the Guardian—or all Parties were present, that your client is prepared to make certain admissions on the Temporary Custody Petition?

Ms. Dean: Your Honor, she is prepared to plead no contest to the allegations in the Petition.

[2] MCR 3.971 has been amended since the trial court made its dispositional ruling, and the provisions of MCR 3.971(C)(1) are now found at MCR 3.971(D)(1).

Thereafter, the court inquired into what would satisfy the factual basis for the plea. This precipitated another brief recess to permit the DHHS to retrieve the necessary documents. When the matter resumed relative to respondent, the following record was made:

> *The Court*: We are on the record. Back on the record in the matter of the Mallett children. The Court has made findings as it relates to the Fathers, based upon the testimony as it relates to Ms. Dean's client, you have indicated that your client is prepared to enter a no contest plea?
>
> *Ms. Dean:* That is correct, your Honor.
>
> *The Court:* Thank you. And at the table we have Mom's Legal Guardian, [D.] Mallett. [D.] Mallett, are you comfortable with [respondent] entering a no contest plea regarding these allegations?
>
> *Ms. Mallett:* Yes.
>
> *The Court:* You are her Court Appointed Legal Guardian?
>
> *Ms. Mallett*: Yes.
>
> *The Court:* All right. Thank you. And Mr. Young, you are also—you are comfortable with this arrangement?
>
> *Mr. Young*: Yes.

After the court ascertained that respondent's attorney, legal guardian, and guardian ad litem endorsed the entry of a no-contest plea, the court, consistent with MCR 3.971(B), advised respondent of her trial rights. When it concluded, it became apparent that, at some point, respondent's phone connection had failed:

> *The Court:* . . . . Now mother, on the telephone, [respondent], do you understand those Rights as I've advised you today? [Respondent] on the phone? Oh, she isn't there. Is Mom on the phone? She must have hung up. Let's go off the record and get her back.
>
> (Whereupon a brief discussion was held off record.)
>
> *The Court:* All right. We are back on the record. We now have [respondent] back on the telephone. She indicated that her phone had went dead, likely when I was advising her of her Trial Rights. [Respondent], on the phone, can you hear me okay?
>
> [*Respondent*]*:* Yes.

After ensuring that respondent was present by phone, the court again advised her of her trial rights, and the following exchange transpired:

The Court: All right. My job, I'm going to advise you of your Rights. You do have the right to have a Trial with regard to the allegations in this petition. You have the Right to have that Trial heard in front of a Referee like myself or in front of a judge, with or without a Jury. You have the Right to have and Attorney represent you at your Trial. You do, in fact, have an Attorney that has been appointed to represent you. You have a Right to have your Attorney, Ms. Dean question or cross-examine any witnesses that are brought forth to testify against you.

You have the Right to call witnesses on your own behalf, and use the Court's subpoena powers to get those witnesses to come forward and testify. You have the Right to testify on your own behalf or not to testify. You can't have your failure to testify used against you. You have the Right to hold the Department of Health and Human Services to their burden of proving the allegations in this Petition by what is called a Preponderance of the Evidence, and if the court accepts your no contest plea here today, likely I will generate what is called a Parent Agency Agreement where you will likely be asked to complete and comply with certain services. You will likely be asked to maintain—

Respondent: Hello, what did you say?

The Court: I am going to—likely, if I accept your plea, I'm going to generate what is called a Parent Agency Agreement, where we will probably require you to participate in some therapeutic services, maybe complete some Parenting Classes.

And if after a reasonable period of time, usually about a year or eighteen months, if you don't complete or comply with those services, then the Department of Health and Human Services can file another Petition which would possibly request termination of your Parental Rights, and today's proceedings would be taken into account.

After the court advised respondent of her trial rights, it questioned respondent in the following manner:

The Court: . . . . Now [respondent] on the phone, has anyone forced you to enter this no contest plea today?

Respondent: No.

The Court: Has anyone promised you anything in exchange for you [sic] no contest plea today?

Respondent: No.

Then, counsel for petitioner, the children, and respondent all indicated, in response to the court's query, that they were satisfied with the advice of rights. After determining that there existed a

factual basis for the no-contest plea, the court accepted respondent's plea and immediately proceeded to disposition.

The foregoing record is insufficient to demonstrate that respondent's plea was knowingly, understandingly, and voluntarily made. The only questions the court posed to respondent were if she could hear over the speaker phone, if anyone had forced her to enter her no-contest plea, and if anyone had promised her anything in exchange for the plea. At no point did the court ask respondent if she understood the nature of the proceedings, the rights that had been read to her, or even the consequences of her no-contest plea.

Further, the trial court's limited consultation with respondent's representatives was wholly inadequate. From the initiation of these proceedings, the trial court was aware that respondent suffered from paranoid schizophrenia and this condition necessitated the appointment of her mother as her legal guardian. To add an additional layer of protection, the court at an earlier hearing appointed a guardian ad litem to ensure respondent's welfare during the proceedings. At no time during the plea process, however, did the court make any inquiries into whether respondent's attorney, her guardian, or her guardian ad litem had discussed with respondent her rights, the nature of the proceedings, or the consequences of a no-contest plea. There was no indication that respondent was assisted by her attorney, guardian, or guardian ad litem. The court simply asked if respondent's attorney, her guardian ad litem, and her guardian were "comfortable" with respondent entering a no-contest plea. On such a sparse record, there is simply no basis on which the trial court could have reasonably concluded that respondent understood her plea. Accordingly, the trial court plainly erred because it clearly did not comply with the mandates of MCR 3.971(C)(1).

This plain error affected respondent's substantial rights. Because (1) the plea proceedings did not comport with due process and the court rule and (2) no trial was held, respondent's defective plea permitted the state, without due process, to interfere with her fundamental right to parent her children. As the Supreme Court explained in *In re Ferranti*:

> The respondents were deprived of their fundamental right to direct the care, custody, and control of 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. See *Sanders*, 495 Mich at 405; 852 NW2d 524 (explaining that in an adjudication trial the respondent "is entitled to a jury . . . the rules of evidence generally apply . . . and the petitioner has the burden of [proof]"). These constitutional deprivations affected the framework within which respondents' case proceeded. There was error, it was plain, and it affected respondents' substantial rights. [*In re Ferranti*, 504 Mich at 30-31.]

The plain error in this case permitted the trial court to exercise its dispositional authority to terminate respondent's parental rights to ALM and JLM. It affected respondent's fundamental rights and cast doubt on the fairness, integrity, or public reputation of the judicial proceedings.

Although respondent's defective plea does not apply to SLM, the trial court also failed to properly exercise jurisdiction over SLM. This child was born during the lower court proceedings. Consequently, she was the subject of a separate petition. On May 6, 2020, relative to SLM,

petitioner filed an original petition for permanent custody. The August 11, 2020 hearing was a hearing on both the original petition relative to SLM and the supplemental petition relative to ALM and JLM. During closing arguments, petitioner addressed each petition separately and, with respect to SLM, first argued that there existed statutory grounds for the court to exercise jurisdiction over this child. However, when the court subsequently issued its oral ruling, it never addressed whether it could exercise jurisdiction over SLM. Instead, it considered all three children together and simply concluded that there existed clear and convincing evidence to terminate respondent's parental rights to all three children. The court erred in this regard.

It is permissible for a trial court to combine the adjudicative and dispositional hearings into one proceeding. MCR 3.973(B) and (C); MCR 3.977(E); MCL 712A.19b(4). But when a court does this, it still must determine that it has jurisdiction before moving forward with the case. *In re Sanders*, 495 Mich at 405. If jurisdiction is proper, then the court has the authority to determine what further action is necessary to ensure the child's well-being during the dispositional phase. *Id.* at 406. Here, the trial court never ruled on jurisdiction relative to SLM. Because the court never properly assumed jurisdiction over SLM, all subsequent orders related to SLM are void. *Ryan v Ryan*, 260 Mich App 315, 343; 677 NW2d 899 (2004).

In sum, we conclude that the trial court violated MCR 3.971(C)(1) by failing to satisfy itself that the respondent's plea relative to ALM and JLM was knowingly, understandingly, and voluntarily made. Further, the trial court did not properly assume jurisdiction over SLM. Therefore, the manner in which the trial court exercised jurisdiction violated respondent's due-process rights. Accordingly, we vacate respondent's plea and the subsequent adjudication and termination orders, and remand to the trial court for further proceedings consistent with this opinion.[3]

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien

[3] Because of our ruling with respect to the trial court's assumption of jurisdiction, it is unnecessary to address respondents' remaining arguments on appeal, because they are now moot.

STATE OF MICHIGAN

COURT OF APPEALS

In re MALLETT, Minors.

UNPUBLISHED
June 17, 2021

No. 354733
Wayne Circuit Court
Family Division
LC No. 2018-000963-NA

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

RIORDAN, J. (*dissenting*).

I respectfully dissent. I would conclude that the trial court did not commit plain error by the manner in which it accepted respondent's plea and that none of her remaining arguments have merit. Accordingly, I would affirm.

MCR 3.971(C)(1) provided that a trial court may not accept a plea "without satisfying itself that the plea is knowingly, understandingly, and voluntarily made." Such a requirement is imposed by due process as well. See *In re Wangler*, 498 Mich 911, 911; 870 NW2d 923 (2015). Because respondent did not argue in the trial court that the manner in which her plea was accepted violated MCR 3.971(C)(1) or due process, her argument is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In this case, I acknowledge that the trial court only inquired of respondent whether her plea was voluntary. It did not specifically inquire of respondent whether her plea was knowing and understanding. However, the trial court was initially informed by respondent's counsel that respondent was "prepared to plead no contest." In essence, counsel had "prepared" respondent to enter her plea by explaining the relevant ramifications. Thereafter, the trial court advised respondent of her rights in accordance with MCR 3.971(B) and inquired of respondent whether her plea was voluntary. The trial court was then informed by respondent's counsel that she was satisfied with the advice of rights, thus indicating that the trial court had taken the necessary steps to ensure that the plea was proper, both by itself and in conjunction with counsel herself outside of the courtroom.

These facts, taken together, establish no plain error under MCR 3.971(C)(1).[1] Specifically, while the trial court confirmed with respondent that the plea was voluntary, the trial court confirmed with respondent's counsel that the plea was knowing and understanding. That is, if respondent did not know or understand the ramifications of the plea, respondent's counsel would not have been in the position to inform the trial court that respondent was "prepared" to enter the plea and that she was "satisfied" with the advice of rights. The trial court was permitted to rely upon respondent's counsel in this manner under MCR 3.971(C)(1), which only required that the trial court "satisfy[] itself" that the plea was knowing, understanding, and voluntary, and did not specify that the trial court should do so by directly questioning the respondent. At a minimum, given these facts and the lack of an express requirement or suggestion in MCR 3.971(C)(1) that the trial court directly question the respondent,[2] any error here cannot be characterized as "clear or obvious." See *Carines*, 460 Mich at 763.

Moreover, the case on which respondent primarily relies, *In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019), is not controlling. In that case, "the court did not advise [the respondents] that they were waiving any rights. Nor did the court advise them of the consequences of their pleas, as required by our court rules." *Id.* at 9. This failure to advise, our Supreme Court held, amounted to plain error:

> 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. [*Id*. at 30.]

Further, the Court held that the plain error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" for the following reasons:

> 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

---

[1] Respondent frames her argument as also grounded in due process. However, if the trial court complied with MCR 3.971(C)(1), it necessarily follows that her due-process argument would fail as well. See *In re Wangler*, 498 Mich at 911 (addressing whether the trial court satisfied due process by assessing its compliance with MCR 3.971(C)(1)).

[2] I note that MCR 3.971(C)(2), which concerned "accurate pleas" (i.e., pleas where the statutory grounds for jurisdiction are true), provided that the trial court should confirm the plea accuracy "preferably by questioning the respondent." See also MCR 6.302(E) (providing that before accepting a criminal plea of guilty or no contest, the trial court must engage in a "colloquy with the defendant"). MCR 3.971(C)(1) included no such reference.

> to interfere with and then terminate the respondents' fundamental right to parent their child. . . . [*Id*. at 31.]

Thus, the defect *in In re Ferranti* was not the trial court's failure to confirm for itself that the respondents' plea was knowing, understanding, and voluntary as required by MCR 3.971(C)(1) and due process. Rather, the defect was the failure to render the plea knowing, understanding, and voluntary by *advising* the respondents as required by MCR 3.971(B) and due process.[3]

Accordingly, I would conclude that the trial court did not commit plain error by the manner in which it accepted respondent's plea.[4] Therefore, I would affirm.

/s/ Michael J. Riordan

[3] I acknowledge the obvious relevance of *In re Ferranti* in stating the due-process principles applicable to pleas in the adjudicatory phase. But respondent's failure to identify binding caselaw directly addressing similar circumstances as in the instant case weighs against a finding of plain error. Compare *People v Swenor*,___Mich App___;___NW2d___ (2021) (Docket No. 352786), slip op at 10 ("Regardless of the correctness of the trial court's holding that the search was invalid because police officers did not conduct it pursuant to a written policy, its decision was not plainly or obviously wrong because no binding caselaw has directly addressed whether a written policy was required.").

[4] I also would conclude that respondent's remaining arguments are meritless for generally the reasons set forth by petitioner on appeal. Further, I would not address *sua sponte* whether the trial court properly exercised jurisdiction over SLM.