STATE OF MICHIGAN

COURT OF APPEALS

In re MIMS, Minors.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Petitioner-Appellee,

v

RAFIEL MIMS,

Respondent-Appellant.

UNPUBLISHED
September 23, 2021

No. 356751
Genesee Circuit Court
Family Division
LC No. 19-136281-NA

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Respondent appeals as of right an order terminating his parental rights to his minor children, IM, SM, and EM.[1] The trial court terminated respondent's rights under MCL 712A.19b(3)(b)(*i*) (parent's act caused sexual abuse, and reasonable likelihood of future injury or abuse) and (j) (reasonable likelihood of harm to child).[2] On appeal, despite how he words the question presented, respondent does not challenge the trial court's finding of statutory grounds to terminate his parental rights or the trial court's finding that termination was in his children's best interests. Rather, respondent argues that the trial court erred by declining to adjourn his

[1] This appeal concerns only respondent's parental rights to IM, SM, and EM. Respondent does not appeal the trial court's order terminating his parental rights to three of his other children: MM, AW, and TE. As such, we will not address respondent's parental rights to MM, AW, and TE. Additionally, all references to "the children" will refer to the three children at issue on appeal: IM, SM, and EM.

[2] In his statement of the question presented on appeal, respondent contends that the trial court also terminated his parental rights under MCL 712A.19b(3)(g) and (k). Respondent is mistaken, the trial court did not terminate his parental rights on those grounds.

termination hearing pending the outcome of his criminal trial. Respondent reasons that, by declining to adjourn, the trial court deprived him of his Fifth Amendment privilege against self-incrimination. We disagree and affirm the trial court's order terminating respondent's parental rights.

I. BACKGROUND

Respondent took MM, who at the time was 15 years old, to a hotel room in February 2019. While in the hotel room, respondent showed MM a pornographic video, touched her buttocks, and forced MM to touch his genitals. The Flint Police Department and Children's Protective Services (CPS) investigated the matter. The police investigation led to criminal charges against respondent and the CPS investigation led to the termination proceedings at issue in this case. From the beginning of the termination proceedings, respondent repeatedly asked for adjournments to allow his criminal proceedings to conclude before the trial court even took jurisdiction over the children. The trial court agreed for a time and granted multiple adjournments, but eventually concluded in February 2021—18 months after the petition to terminate respondent's parental rights was filed—that it could not continue to delay the termination proceedings. The trial court denied respondent's motion for another adjournment and entered an order of adjudication, taking jurisdiction over the children.

The trial court terminated respondent's parental rights to the children at the same hearing. As discussed earlier, the trial court found statutory grounds to terminate respondent's parental rights to the children under MCL 712A.19b(3)(b)(*i*) and MCL 712A.19b(3)(j). Citing MCL 712A.19b(3)(b)(*i*), the trial court found that respondent had sexually abused MM, and that there was a reasonable likelihood that his other children could suffer from abuse in the foreseeable future if placed in respondent's home. Also, citing MCL 712A.19b(3)(j), the trial court found that there was a reasonable likelihood that the children would suffer either physical or emotional harm should they remain in his care and custody. Next, considering the severe emotional effects on the children and the risk that respondent would sexually abuse one of his other children, the trial court found by a preponderance of the evidence that termination would be in the children's best interests. This appeal followed.

II. ANALYSIS

We review for an abuse of discretion a trial court's ruling on a motion to adjourn. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). Additionally, constitutional questions are reviewed de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Finally, whether a party has been deprived of his privilege against self-incrimination or deprived of due process is a question this Court reviews de novo. See *In re Blakeman*, 326 Mich App 318, 331; 926 NW2d 326 (2018).

As an initial matter, we note that respondent does not challenge the trial court's order terminating his parental rights to IM, SM, and EM on the merits. Rather, respondent's argument on appeal is limited to a procedural dispute; he argues that the trial court should have adjourned

the termination proceedings until his criminal proceedings concluded and that this error unfairly prejudiced him during the termination proceedings. Consequently, we will not address the trial court's termination order on the merits because any such argument has been abandoned. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015).

"If the child is not in placement, the trial must be held within 6 months after the authorization of the petition unless adjourned for good cause under MCR 3.923(G)." MCR 3.972(A); *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). None of respondent's children were "in placement," because all were living with their respective mothers. See *In re Utrera*, 281 Mich App at 10; MCR 3.903(C)(10). As a result, MCR 3.972(A) required the adjudication trial to occur within six months of the date the petition was filed "unless adjourned for good cause under MCR 3.923(G)." *In re Utrera*, 281 Mich App at 10; MCR 3.972(A). "Pursuant to MCR 3.923(G), '[a]djournments of trials or hearings in child protective proceedings should be granted only (1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary.' " *In re Utrera*, 281 Mich App at 10 (alteration in original). "Good cause" means "a legally sufficient or substantial reason." *Id*. at 11, citing *In re F*G, 264 Mich App 413, 419; 691 NW2d 465 (2004).

Considering the best interests of the children in light of respondent's interests, the trial court reasonably decided against granting a further adjournment of respondent's termination hearing. As the trial court noted, it had been 18 months since the Department of Health and Human Services filed its petition, and the trial court had already granted four adjournments. Although all of respondent's children remained with their respective mothers and not in foster care, his children needed closure. For 18 months, the trial court did not advance respondent's termination proceedings despite the serious allegations against him; during this time the children necessarily did not obtain any closure regarding the status of respondent's parental rights. Given the significant interest of respondent's children in this case, the trial court did not abuse its discretion in denying respondent's request for a further adjournment. See *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

Respondent, however, argues that the trial court's failure to grant his request to adjourn violated the United States Constitution's Fifth Amendment protection against self-incrimination. "The rights recognized by the Fifth Amendment of the United States Constitution include the guarantee that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .' " *In re Blakeman*, 326 Mich App at 332, quoting US Const, Am V (alterations in original). "This provision applies to the states through operation of the Fourteenth Amendment and appears verbatim in the Michigan Constitution." *Id*. (citations omitted); US Const, Am XIV; Const 1963, art 1, § 17. The Fifth Amendment clearly applies in criminal trials, but "it also protects an individual from official questioning in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 677; 806 NW2d 353 (2011) (quotation marks and citation omitted). Accordingly, at a child protective proceeding, a respondent may decline to give

incriminating testimony and should face no penalty for doing so. See, e.g., *In re Blakeman*, 326 Mich App at 333-335; *In re Stricklin*, 148 Mich App 659, 663-666; 384 NW2d 833 (1986).[3]

In arguing the trial court violated his privilege against self-incrimination, respondent asserts that by holding the termination proceedings first, he could not testify on his own behalf because the government could use any statements respondent made against himself in his criminal proceedings. By not testifying, respondent reasons, he faced an increased risk of having his parental rights terminated. Consequently, respondent argues that the trial court essentially penalized him for invoking his right to remain silent because his choice to remain silent increased the chances that the trial court would terminate his parental rights.

In *In re Stricklin*, parents charged with sexually abusing their children raised the exact argument respondent does here. *In re Stricklin*, 148 Mich App at 662-663. Like the trial court here, the trial court in *In re Stricklin* declined to adjourn the respondents' child protective proceedings pending the outcome of their criminal trials. *Id*. at 662. And like respondent here, the *In re Stricklin* respondents argued this compelled them to testify in the child protective proceedings. *Id*. at 664. They also asserted that the trial court effectively imposed a penalty on them for failing to testify because failing to testify increased the risk that they would lose their parental rights. *Id*.

This Court disagreed. See *id*. at 666. First, even if this did operate as a compulsion for the respondents to testify, it would have compelled them to provide nonincriminating testimony—not incriminating testimony:

> [A]ccepting appellants' premise that the increased risk of loss of parental rights was the penalty imposed upon them for their refusal to testify, it must be concluded that the testimony sought through such compulsion would have been nonincriminating. The compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment. [*Id*. at 665].

Second, to the extent the respondents were penalized by failing to testify, such penalty had not been created by the trial court:

> Any adverse consequences resulting from appellants' failure to testify cannot be said to have been created by the state. Any penalty resulting from appellants' failure to testify was no more than the "penalty" that any party suffers when he decides not to testify in his own defense. Appellants retained the unfettered discretion to testify or not to testify; had they chosen to testify, it would have been

[3] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted). Additionally, this Court reaffirmed *In re Stricklin* in 2018 and, therefore, we choose to follow it here. See *In re Blakeman*, 326 Mich App at 333 n 3 ("We acknowledge that Court of Appeals decisions before November 1, 1990, are not binding. MCR 7.215(J)(1). However, *In re Stricklin* has not been overruled or modified, and we see no reason to depart from it now.").

> because their testimony would have increased their chances of retaining their parental rights, and not because of a penalty imposed by the state upon their refusal to testify. The choice not to testify was no more than appellants' tactical decision as to the best course to follow through the probate and criminal proceedings. [*Id*. at 665-666 (footnotes omitted).]

Respondent argues this Court's reasoning in *In re Stricklin* was in error. The *In re Stricklin* Court concluded that the respondents' potential testimony would not have been incriminating if it could have assisted them in the termination proceedings. *Id*. Indeed, as in this case, the *In re Stricklin* respondents were accused of engaging in sexual acts with their minor children. *Id*. at 662. The only testimony the respondents could have offered in that case that would have helped them would have been to deny that they sexually assaulted their children; testimony that appears nonincriminating on its face. That is the exact issue presented here. Respondent's proposed testimony would have asserted that he did not sexually assault MM or show her pornography. That testimony, if true, would not be incriminating and, therefore, should not adversely affect respondent in his criminal case.

Nevertheless, respondent argues that even nonincriminating testimony can later be characterized as incriminating. Thus, even if respondent offered nonincriminating testimony, reducing his likelihood of losing his parental rights, that same testimony could later be characterized as incriminating at his criminal trial. Simply put, respondent asserts that nonincriminating testimony in a child protective proceeding could become incriminating in a future criminal proceeding.

While this may be true in some circumstances, it is not here. The relevant question in the termination proceedings and respondent's criminal proceedings was the same: did respondent sexually assault MM? Accordingly, nonincriminating testimony for the purposes of respondent's termination hearing would necessarily be nonincriminating for the purposes of his criminal trial, and vice-versa. To avoid an adverse outcome in either proceeding, respondent would have to offer evidence showing that he did not sexually assault MM.

And even if respondent's argument was correct, respondent disregards part of this Court's reasoning in *In re Stricklin*. In concluding the respondents' Fifth Amendment privilege was not implicated, this Court did not rely only on whether any testimony compelled from the respondents would have been nonincriminating. See *In re Stricklin*, 148 Mich App at 665. As discussed earlier, the *In re Stricklin* Court also found the respondents' alleged "penalty" had not been created by the trial court; they themselves had created it. *Id*. at 665-666. The respondents retained "unfettered discretion to testify or not to testify," and they made the "tactical decision" to select the latter. See *id*. The government had no control over the consequences of their decision. See *id*. Respondent offers no reason why this same reasoning should not apply in this case with equal force. Just like the respondents in *In re Stricklin*, respondent made the tactical decision not to testify at his termination hearing. The consequences of that decision are of his own making.

Next, respondent argues, even if *In re Stricklin* should remain good law, this Court should carve out an exception under the circumstances of this case. Respondent cites the following circumstances: (a) delaying the termination proceedings pending the outcome of his criminal trial would cause no harm to his children, because the children remained in the custody of their mothers

throughout these proceedings; and (b) delaying the termination proceedings would significantly benefit respondent in terms of due process. In effect, respondent contends a trial court should be required to grant an adjournment under these circumstances. Again, we disagree.

As a threshold matter, we disagree with respondent's assertion that delaying the termination proceedings pending the outcome of his criminal trial would have posed no harm to his children. As already mentioned, even though respondent's children were under the care and custody of their respective mothers, they still had an interest in obtaining closure. Continuing to deny them closure would harm them. See *In re Olive/Metts Minors*, 297 Mich App at 41-42. Additionally, termination proceedings should normally begin in a timely manner, and the trial court already delayed the adjudication trial for 18 months before it finally decided to deny another adjournment. Children deserve stability and certainty in their lives; the children waited long enough for the trial court to take jurisdiction over them and terminate respondent's parental rights. The fortunate fact that the children had a stable home environment during these proceedings does not outweigh their interest in certainty and stability, and it certainly does not establish that the trial court's decision to deny respondent's motion for adjournment fell outside the range of principled outcomes.

In sum, the trial court did not err in declining to grant respondent's request for adjournment. The trial court reasonably concluded that any gains from adjourning the termination hearing were outweighed by the children's interest in obtaining finality and closure. And holding respondent's termination hearing before his criminal trial did not violate respondent's Fifth Amendment privilege against self-incrimination or his due-process rights.

III. CONCLUSION

For the reasons stated in this opinion, we affirm the trial court's order terminating respondent's parental rights to IM, SM, and EM.

/s/ Jane M. Beckering
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle