STATE OF MICHIGAN

COURT OF APPEALS

In re A. FAYE, Minor.

UNPUBLISHED
December 28, 2021

No. 357228
Genesee Circuit Court
Family Division
LC No. 19-135707-NA

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Respondent-father appeals as of right the March 10, 2021 order authorizing a supplemental petition formally removing his minor child from his care and custody and requesting the termination of his parental rights.[1] We affirm.

I. BACKGROUND

This case arose after mother "displayed a trend of continued maltreatment, as evidence[d] by her continued substance abuse resulting in improper supervision and physical neglect," and respondent-father, who was incarcerated in San Luis Obispo County, California, awaiting trial on murder charges, failed to provide "financial and/or material support for his child."

A petition was filed on March 10, 2021, requesting that the trial court terminate the parental rights of both parents. Regarding respondent-father specifically, the petition alleged that he failed to provide any financial or material support for the child, had not visited the child, and had not provided for her care or supervision since her birth.

A preliminary hearing was held the same day, and respondent-father was present via video conference. The court asked if the parties would waive the reading of the petition, and respondent-father responded, "Well I'd like to hear it again. I haven't read it in the last twenty-four hours; so

[1] At the time relevant, the child's mother was also subject to these child-protective proceedings, and was attempting to benefit from reunification services. Accordingly, the mother is not participating in this appeal.

I'd like you to read it out to me." The trial court began to read the petition, and partway through, respondent-father interrupted and said, "I'm pretty well aware of [mother's] failings; I'd like to kind of jump forward and see what I can do to become a respondent or what I can do for Autumn currently. I realize that [mother]'s no longer in the picture." Respondent-father waived the reading of the remainder of the petition and explained, "I'm pretty well aware of what it says. I have that paperwork."

The caseworker testified that respondent-father had been incarcerated the entire time the child had been in care and that she had made efforts to reach him and provide him with the paperwork from the proceedings. Further, she stated that while respondent-father indicated that he was close with his mother and sister, she had not heard anything from those relatives regarding the minor's care. Respondent-father interjected, "My mother and sister, they're unable to provide for [the child] financially or physically because they're just too taken back with their own jobs and mine." Respondent-father explained that he was an automotive technician with his own business and would be able to provide for the child once he was released. Respondent-father stated that his trial was currently set for June 29, 2021, but he expected it would be rescheduled again because of restrictions on jury trials related to the COVID-19 pandemic.

The court concluded that it was contrary to the child's welfare to remain in respondent-father's care and custody because he was unable to provide care or appropriate placement. The trial court authorized the petition, finding that respondent-father was currently incarcerated unable to care for child and had not provided any relative to care for the child. This appeal followed.

II. ANALYSIS

Respondent-father argues that the trial court erred in authorizing the supplemental petition after the preliminary hearing because he lacked proper notice for that and previous hearings. We disagree.

"Generally, whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). However, unpreserved issues of constitutional error are reviewed for plain error affecting substantial rights, as are unpreserved claims of nonconstitutional error. *Id.*; *In re Pederson*, 331 Mich App 445, 463; 951 NW2d 704 (2020).[2] "The factual findings by the trial court are reviewed for clear error, and any issue regarding the

[2] During the preliminary hearing, respondent-father's counsel requested that the trial court decline to authorize the petition on the ground that it was based on respondent-father's incarceration alone. The trial court authorized the petition, concluding that respondent-father was currently incarcerated and had not provided care or custody, including by nominating a relative for that purpose, for the child. Thus, respondent-father's challenge to the authorization of the petition is preserved. *In re TK*, 306 Mich App at 703. However, respondent-father failed to raise issues related to notice, reasonable efforts, and due process in the trial court, and therefore those claims are unpreserved. *Id.*

interpretation and application of the relevant . . . statutory provisions is reviewed de novo." *In re Beers*, 325 Mich App 653, 680; 926 NW2d 832 (2018).

"In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, DHS policies and procedures, and various federal laws . . . ." *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009). "Due process is flexible and calls for such procedural protections as the particular situation demands." *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) (quotation marks, citation, and alteration brackets omitted).

MCR 3.920(D)(2)(b) states, "When a child is placed outside the home, notice of the preliminary hearing . . . must be given to the parent of the child as soon as the hearing is scheduled. The notice may be in person, in writing, on the record, or by telephone." MCR 3.920(H) further provides that "[t]he appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record." Additionally, MCR 3.965(B)(1) provides as follows:

> The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

Respondent-father has failed to establish that the service of process related to his preliminary examination did not comply with the foregoing provisions. The preliminary hearing on the supplemental petition was held on March 10, 2021, and respondent-father was present via videoconferencing technology from his place of incarceration in California. By appearing at the hearing and failing to raise any objections to service, respondent-father waived any defects in service. MCR 3.920(H).

Moreover, the lower-court record contains a proof of service dated January 20, 2021, stating that notice of the hearing was mailed to respondent-father, and e-mail correspondence showing that the notice of hearing and petition were provided to personnel at the sheriff's office overseeing his custody in California. Most importantly respondent-father indicated at the March hearing that he received copies of all of the petitions and was aware of the allegations contained therein. On this record, respondent-father has failed to establish any error in the service of process related to his preliminary examination.

Respondent-father also argues that he was not provided proper notice for previous hearings, but only specifies a single hearing for which he believes he did not receive proper notice. "This Court will not search the record for factual support for a party's claim." *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). See also *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . .").

The specific hearing for which respondent-father argues he lacked proper notice was the preliminary hearing held February 20, 2019. However, the outcome of that preliminary hearing has no bearing on the instant proceedings. The subject child was returned to her mother's care on May 3, 2019, and respondent-father was dismissed from the petition on August 22, 2019. The child was again removed from her mother's care, and a second preliminary hearing was held on March 10, 2021, at which the trial court authorized a supplemental petition that implicated respondent-father. If the trial court elects to exercise jurisdiction over respondent-father in the future, that adjudication will relate to the supplemental petition, on which a separate preliminary hearing was held, not the previous petition from which respondent-father was dismissed. Accordingly, respondent-father has not shown that any defect in notifying him of the February 2019 preliminary hearing amounted to plain error or affected his substantial rights.

III. AUTHORIZATION OF PETITION

Respondent-father argues that termination may not be based on a parent's incarceration alone and that courts must instead assess whether the incarcerated parent could care for the children at issue even so, either personally upon release or through relatives.

Child protective proceedings are initiated when the DHHS files a petition containing "a request for court action to protect a child." MCR 3.961(A). The petition must contain specific information, including the type of relief requested and the "essential facts" regarding the offense against the child under the Juvenile Code. MCR 3.961(B)(3) and (6). A request for the termination of parental rights at the initial disposition must be specifically stated in the petition. MCR 3.961(B)(6). Additionally, MCR 3.961(C)(2) states, "If a nonrespondent parent is being added as an additional respondent in a case in which a petition has been authorized under MCR 3.962 or MCR 3.965, and adjudicated by plea . . . , the allegations against the second respondent shall be filed in a supplemental petition."

"After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of the petition." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). "Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial." MCR 3.965(B)(12). "The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b)." MCR 3.965(B)(12).

We conclude that the trial court did not err by finding that one or more of the allegations in the petition were true. While respondent-father is correct that incarceration alone is not a ground for termination of parental rights, *In re Mason*, 486 Mich 142, 146; 782 NW2d 747 (2010), respondent-father's parental rights have not been terminated, and the authorization of the petition was based on factors related to—but distinct from—his incarceration. The petition alleged that respondent-father abandoned the subject child by failing to provide financial and material support for her, failing to visit her, and neglecting to provide for her care or supervision. The evidence presented at the preliminary hearing, including the caseworker's testimony and respondent-father's own statements, was sufficient to find probable cause that one or more allegations in the petition were true and fell within MCL 712A.2(b).

IV. REASONABLE EFFORTS

Respondent-father argues that the trial court erred in finding that reasonable efforts were made to prevent the removal of the child, and protests that petitioner failed to prove him with any direct services intended to promote reunification. We disagree.

A court deciding whether to place a child into foster care must consider, among other things, whether, "[c]onsistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child." MCR 3.965(C)(2)(d). See also MCL 712A.13a(9)(d); MCR 3.965(C)(4). In its order following the preliminary hearing, the trial court concluded that, consistent with the circumstances, reasonable efforts, including attempted relative placement, were undertaken to prevent, or eliminate the need for, removal of the child from the home. Given the circumstances of the case, particularly respondent-father's incarceration, it is unclear what efforts could have been undertaken to prevent the child's removal beyond attempting to place the child with relatives and rehabilitating the child's mother so that she could resume custody.

Further, respondent-father's argument that petitioner should have provided services to him directly conflates reasonable efforts to prevent *removal* with reasonable efforts to facilitate *reunification*, and respondent-father cites no legal authority to support his position that reunification services should have been provided before removal. See *In re Sanders*, 495 Mich 394, 420; 852 NW2d 524 (2014) ("the state must adjudicate a parent's fitness before interfering with his or her parental rights"). We do agree that as the legal father he should have been notified of the mother's obvious struggles with parenting and potentially services rendered to him prior to the February petition filed against mother might have caused him to visit or support the minor prior to his incarceration. We note he does not claim that he was unaware of the child's existence nor claim he, an automotive mechanic lacked the ability to support the child. Setting aside the obvious logistical obstacles involved, providing direct services to respondent-father might have helped make him a better parent upon his release from incarceration in California, but would not have prevented removal at the time relevant because his incarceration which services could not have changed the objective fact that while he was incarcerated the child was without a caretaker. On this record, we are satisfied that the court made findings, consistent with the circumstances, showing that reasonable efforts to prevent removal had been made.

Finally, respondent-father objects that in the proceedings below he was designated a mere putative, rather than legal, father to the subject child. In fact, the record indicates that he was listed as the child's legal father in most of the court documents below because of his marriage to the child's mother. Respondent-father appears to have been referred to as a putative father on only the supplemental petition. This mistake was corrected on the record at the preliminary hearing, and the order that followed reflects respondent-father's status of legal father. Accordingly, while it appears that the trial court and attorneys briefly and mistakenly referred to respondent-father as a putative, rather than legal, father, the errors was corrected on the record, and in any event had no impact on respondent-father's substantial rights.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien