STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of COCHRAN, Minor.

UNPUBLISHED
July 22, 2014

No. 319813
Kent Circuit Court
Family Division
LC No. 12-052645-NA

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Respondent-father Christopher Harris appeals by right from the December 10, 2013 trial court order that terminated his parental rights to the minor child, AC (DOB 7/25/2009). Because respondent has not established error requiring reversal, we affirm.

I. FACTS

Three-year-old AC was removed from her mother's[1] care on August 17, 2012 amid Child Protective Services allegations that mother had parented the child while under the influence of drugs and alcohol and had engaged in emotional and physical altercations with AC's maternal grandparents, with whom mother and the child resided, in front of AC. At the time, respondent had been incarcerated since just after the child turned one year old. The trial court authorized the removal and petition, and recommended that AC remain in the care of her maternal grandparents.

On October 3, 2012, the court held an adjudication hearing. Mother and respondent both admitted to allegations in an amended petition. Respondent admitted allegations regarding himself concerning his current incarceration for operating while intoxicated, third offense, MCL 257.625(9)(c), receiving or concealing a stolen motor vehicle, MCL 750.535(7), possession of burglary tools, MCL 750.116, and breaking and entering a building with intent, MCL 750.110, with an earliest possible release date of March 3, 2014.[2] The court found that respondent's plea was knowing and voluntary.

[1] AC's mother voluntarily relinquished her parental rights and is not subject to this appeal.

[2] A search of Michigan's Offender Tracking Information System reveals that respondent was paroled on April 30, 2014.

The trial court then took testimony from Cheryl LeSane, a child services worker involved in AC's case. She testified that she was unaware of any relationship between respondent and the child. She stated that the parent-agency treatment plan provided for respondent to receive substance abuse services and parenting classes while in prison. Respondent presented documentation indicating that he had completed both phase one and phase two substance abuse treatment while imprisoned. At the completion of the hearing, the court found that statutory grounds to take jurisdiction over the child under MCL 712A.2(b) had been established by a preponderance of the evidence by reason of neglect, cruelty, drunkenness, criminality, or depravity.

On December 3, 2013, over 14 months after the trial court took jurisdiction over AC, a termination hearing was held. Mother voluntarily relinquished her parental rights.

Rebecca VanEtten testified that she had been the child's foster care case manager since May 2013. She stated that respondent's barriers for reunification with the child were "emotional stability behavior, parenting skills, substance abuse, and communication and interpersonal skills." VanEtten first met with respondent and his attorney in June 2013. She discussed the requirements of the parent-agency agreement and respondent's incarceration:

> Yes, we had discussed the reason for his incarceration, as far as his past charges, and what he felt he had done to relieve the issues of why he was currently incarcerated. [Respondent] reported that he had resolved those issues, he had taken several courses, including the Assaultive Offenders program, Phase I and II substance abuse programs, as well as a parenting skills class, and he had felt that he had addressed his needs adequately and that he was prepared and did not feel the need to participate in the rest of the parent agency agreement.

Despite respondent's indication that he was unwilling to complete the plan, VanEtten instructed respondent to take any other classes that might become available in prison. She testified that she sent respondent homework "materials regarding communication, parenting skills, and emotional stability, and stress management" and included self-addressed stamped envelopes for respondent to return the completed materials. She testified that respondent never completed and returned the required work, but acknowledged that respondent had returned some work to his former caseworker in October 2012 and January 2013.

VanEtten stated that respondent declined to participate in all aspects of the plan because "he is not trusting of working with the agency and working with this worker." She testified that respondent admitted that he received the mailed materials but refused to complete them. When VanEtten requested that all communication between respondent and the child go through the agency, respondent ceased all communication with AC. She expressed her feeling that respondent had been focused on the legality of the proceedings instead of improving his parenting skills and relationship with the child. VanEtten articulated further concerns about respondent's relationship with the child, noting that he had not communicated with AC since at least May 2013 and had been incarcerated for the majority of the child's life.

VanEtten rated respondent's substance abuse progress as partial due to his completion of prison substance abuse programs. However, she declined to rate his progress substantial

because, by virtue of his incarceration, he could not demonstrate his ability to maintain sobriety in open society. She stated that respondent attends 12-step meetings in prison, but "has relayed to me that he doesn't feel as if they're effective."

VanEtten testified that respondent's emotional stability was "poor based on his inability to address the fact that his choices and his decisions and behaviors prior to [the child] coming into care has actually led to her current placement" and his "inability to focus on why the agency is involved and what he should be doing in order to work towards reunification." She further stated that respondent declined to seek work opportunities in prison or take advantage of career or vocational training. VanEtten concluded by testifying that it was in the child's best interests that respondent's parental rights be terminated and requested that AC remain placed with her maternal grandparents.

The only other testimony at the termination hearing came from respondent. He testified that he had been incarcerated since September 8, 2010 but saw the child every day prior to being incarcerated. Respondent stated that he received a GED and plumbing certificate while imprisoned. When asked if he had a drug or alcohol problem, respondent testified that, "I've explored alcoholism in the past, and I've matured," and claimed that he would continue attending 12-step meetings when released from prison. When asked why he ceased complying with the parent-agency agreement, respondent stated:

> Because the issue that surrounded those agreements or contracts I didn't feel were legitimate. There was no decisive consideration in there. I felt like it was a trap to get involved with those contracts, and I was being forced to get into that, and it shifts the burden – the proof off of me . . . .

Respondent believed that he had made sufficient progress to avoid the termination of his parental rights and that termination was not in the child's best interests.

At the end of the hearing, the trial court found that statutory grounds for termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j) had been established by clear and convincing evidence. The court also found that termination was in the child's best interests. Accordingly, the trial court terminated respondent's parental rights and this appeal followed.

II. ADJUDICATION

A. JURISDICTION

Respondent first argues that the trial court erred by taking jurisdiction over the child. Respondent argued, below and now on appeal, that the trial court was without subject-matter jurisdiction.[3] Respondent relies on the maxim that "subject matter jurisdiction cannot be

[3] Whether a court possess subject-matter jurisdiction is a question of law that we review de novo. *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008).

conferred on the court by the consent of [the] parties." *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993). "[H]owever, [] respondent confuses the distinction between whether the court has subject matter jurisdiction and whether the court properly exercised its discretion in applying that jurisdiction." *Id*. at 438. "Michigan's Constitution vests probate courts with original subject matter jurisdiction over juvenile dependents, except as otherwise provided by law." *Id*. at 433; Const 1963, art 6, § 15. A "probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich at 437. The trial court was authorized to adjudicate child protective proceedings involving children residing in Kent County and there is no allegation that the petition to initiate the instant proceedings was frivolous. Accordingly, the trial court possessed subject-matter jurisdiction over AC's case.

With regard to the court's exercise of jurisdiction, respondent and mother pleaded to the truth of allegations in the amended petition. Taking those facts as true, the trial court then made "its own determination regarding the existence of a statutory basis for jurisdiction" over the child. *Id*. In other words, the court did not obtain jurisdiction over the child based on the "consent" of respondent and mother, but based on an independent determination, based on the facts pleaded by respondent and mother, that a basis for jurisdiction existed under MCL 712A.2(b)(2).[4] Respondent and mother pleaded to sufficient facts to allow the court to determine, by a preponderance of the evidence, that the child's environment was unfit to live in on the basis of the parties' criminality and substance abuse. MCL 712A.2(b)(2).

Respondent also appears to argue that the court erred by exercising jurisdiction over the child under the "one-parent doctrine." Our Supreme Court recently found the one-parent doctrine unconstitutional in *In re Sanders*, ___ Mich ___; ___ NW2d ___ (June 2, 2014; Docket No. 146680), slip op at 22-24. However, that opinion is irrelevant to respondent's case. In *Sanders*, the Court held that: "When the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority – and the responsibility – to protect the children's safety and well-being by seeking an adjudication against *both* parents." *Id*., slip op at 22. That is, a trial court may not take jurisdiction over a minor child with regard to both parents without an adjudication as to the parental unfitness of each parent; stated another way, an adjudication of parental unfitness with regard to one parent is insufficient to take jurisdiction over a minor child with regard to the other parent. *Id*., slip op at 22-24.

This situation did not occur in respondent's case. Indeed, respondent pleaded to many of the allegations in the amended petition. Respondent's plea, in itself, was insufficient to establish jurisdiction; the trial court was required to, and did, make its own independent determination that a statutory basis for jurisdiction existed. *Hatcher*, 443 Mich at 437. The trial court conducted a specific adjudication regarding respondent's parental unfitness and did not base its exercise of

[4] MCL 712A.2(b)(2) provides in relevant part: "Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county: . . . [w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in."

jurisdiction merely on mother's unfitness. Thus, the trial court did not rely on the one-parent doctrine and respondent is not entitled to relief under *Sanders*.[5]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that his trial counsel was ineffective for failing to raise the arguments discussed above regarding subject-matter jurisdiction and the one-parent doctrine.

> Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings. [*In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000).]

See also *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).[6]

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id*.; see *In re CR*, 250 Mich App at 198.

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[5] We note that, "Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. That is true . . . only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order." *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008) (citations omitted). Accordingly, respondent is barred from attacking the trial court's adjudication. However, given that *Sanders* was decided during the pendency of respondent's appeal, we have elected to address the issue, but do so without deciding whether a *Sanders*-related challenge may be raised as a collateral attack on appeal.

[6] As respondent did not move for a *Ginther*[6] hearing before the trial court, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

As discussed above, the trial court had subject-matter jurisdiction in this case, did not err by exercising jurisdiction over the child, and did not rely on the one-parent doctrine. Accordingly, respondent's trial counsel's failure to raise these arguments did not fall below objective standards of reasonableness, *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objective does not constitute ineffective assistance of counsel"), and did not affect the outcome of these proceedings. *In re CR*, 250 Mich App at 198. Thus, defendant is not entitled to relief.

III. TERMINATION

A. STATUTORY GROUNDS

Respondent argues that the trial court erred by finding that statutory grounds for termination of his parental rights were established by clear and convincing evidence.[7]

A trial court may terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) that termination is in the children's best interests. MCR 3.977(F); *In re CR*, 250 Mich App at 194-195. "The trial court terminated respondent's rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be

[7] "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id*.

> able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

With regard to MCL 712A.19b(3)(c)(*i*), the conditions that led to respondent's adjudication to exist were his incarceration, emotional stability, parenting skills, substance abuse, and communication and interpersonal skills. Respondent completed substance abuse and parenting classes while in prison. However, respondent failed to complete VanEtten's homework assignments regarding parenting and communication skills. When respondent became frustrated with the process, he ceased all communication with AC for the seven months prior to the termination hearing. He also believed that many of the services required by the parent-agency agreement should not apply to him and, accordingly, refused to participate. Respondent also focused on what he felt were oppressive legal and social services systems instead of attempting to improve his skills as a parent and his relationship with the child. Respondent had nearly 16 months between the adjudication and termination hearing to demonstrate significant progress toward remedying the conditions that led to the adjudication. However, his early progress regressed throughout the proceedings as he became increasingly disillusioned with the parent-agency treatment plan and the legal system. Even at the termination hearing, respondent articulated his belief that many of the plan requirements should not apply to him. See *In re Frey*, 297 Mich App 242, 247-248; 824 NW2d 569 (2012) (parent must demonstrate that he both participated in and benefited from the services provided). Considering that AC was four years old at the time of termination and that respondent had been incarcerated since the child was slightly over one year old, the trial court did not clearly err by finding that respondent was unlikely to remedy the conditions that led to adjudication within a reasonable time and, therefore, did not err by finding that statutory grounds for termination under MCL 712A.19b(3)(c)(*i*) had been established by clear and convincing evidence.

The trial court also found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(g), noting that, "due to [respondent's] incarceration, not based on his own desires, he's unable to provide for this child." As previously noted, respondent is no longer incarcerated. However, we will not reverse the trial court if it reached the right result, albeit for the wrong reason, *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000), and there is ample evidence in the record, independent of respondent's incarceration, to support the trial court's conclusion. There was little evidence that respondent provided proper care or custody for the child prior to his incarceration. Respondent testified that he saw AC every day; however, he never lived with mother and the child and provided minimal financial assistance. VanEtten identified several emotional and communication problems with respondent's parenting skills, yet he declined to complete the homework materials or comply with the parent-agency agreement because he felt that the services were unnecessary. Although there was evidence that respondent completed parenting classes in prison, VanEtten apparently felt that he did not sufficiently benefit. See *In re Frey*, 297 Mich App at 247-248. Given that respondent had over 14 months to demonstrate significant progress toward remedying his parenting skills and failed to do so, the

trial court did not clearly err by finding that statutory grounds for termination had been established under MCL 712A.19b(3)(g).

Finally, the trial court found statutory grounds to terminate under MCL 712A.19b(3)(j). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). Because the trial court did not clearly err by finding statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(c)(*i*) and (g), we need not address the trial court's third statutory ground, MCL 712A.19b(3)(j).

B. BEST INTERESTS

Respondent next argues that the trial court erred by finding that termination of his parental rights was in the child's best interests.

"[T]he preponderance of the evidence standard applies to the best-interests determination." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "In deciding whether termination is in the child's best interest, the court may consider 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." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

VanEtten testified that respondent had, at best, a "minimal" bond with AC. Respondent had been incarcerated since the child was just over one year old. Even before incarceration, respondent did not live with the child. Despite his claims that he wished to establish a better relationship with AC, respondent ceased all communication with the child once he became frustrated with the agency process. Respondent also failed to recognize and attempt to overcome the emotional and communicative barriers to reunification that the caseworker identified. The child is currently placed with her maternal grandparents, with whom she has resided for her entire life. VanEtten testified that AC was progressing and developing well in the care of her grandparents. She also indicated that the grandparents had completed all the necessary licensing requirements for foster care providers and had expressed interest in adopting the child. Given AC's minimal bond with respondent, respondent's unwillingness to participate in efforts to improve his parenting skills, and the child's need for and ability to obtain permanency, stability, and finality in the home of her maternal grandparents, the trial court did not err by finding, by a preponderance of the evidence, that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro