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2014 IL App (3d) 130147-U

Order filed October 27, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

<i>In re</i> J.R.,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
a Minor)	Bureau County, Illinois,
)	
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	Appeal No. 3-13-0147
)	Circuit No. 12-JA-4
v.)	
)	
Lacy L.,)	
)	Honorable
Respondent-Appellant).)	Cornelius J. Hollerich,
)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Cause is remanded for hearing on respondent's claims of ineffective assistance of trial counsel.

¶ 2 On September 12, 2012, respondent, Lacy L., gave birth to J.R., while in the custody of the Department of Corrections (DOC). The Department of Children and Family Services (DCFS) took custody of the child soon thereafter, and was granted temporary custody.

Following an adjudicatory hearing, the child was found to have been neglected. After a dispositional hearing, DCFS was granted custody and guardianship of the child. Respondent appeals. Respondent contends, among other arguments, that her trial counsel was ineffective. We remand for a hearing on ineffectiveness.

¶ 3

FACTS

¶ 4 On September 12, 2012, respondent gave birth to J.R. At the time, respondent was in the custody of the DOC. Because of respondent's incarceration, as well as her past history of substance abuse and DCFS indications with her other children, DCFS took immediate protective custody of the child.

¶ 5 A shelter care hearing was held on September 17, 2012. The court received evidence of respondent's incarceration, the biological father's status as a registered sex offender, and both parents' failure to successfully complete DCFS service plans regarding other children. Citing that evidence, the court granted temporary custody of J.R. to the DCFS guardianship administrator with the right to place. Respondent filed an affidavit stating that she was not present at the shelter care hearing, and requested a rehearing. See 705 ILCS 405/2-10 (West 2010). The court subsequently voided the original temporary custody order. Having learned that respondent intended that J.R. live with his father, Eric R., DCFS took immediate action to once again take protective custody of the child. A second shelter care hearing ensued (at which counsel for respondent was present, though respondent herself was not), and the court again granted temporary custody to DCFS.

¶ 6 On January 3, 2013, an adjudicatory hearing was held to determine whether J.R. was neglected. The State called Kate Yerley, an investigator for DCFS, and Kim Wirth, respondent's and Eric's caseworker for the Youth Service Bureau (YSB). Yerley testified that respondent and

Eric had two prior children together, and that they had nine indicated reports with DCFS from 2005 through 2010. She also testified that neither respondent nor Eric had successfully completed the service plans related to those reports.

¶ 7 Wirth confirmed that there were two previous children, nine DCFS reports, and a failure to complete the service plans. She testified that respondent had a history of repeated failed attempts to correct the issues that had led to her two other children being placed in DCFS care. Respondent also had "a significant history of substance abuse, anger management, domestic violence toward Eric ***, and some mental health issues that have not been addressed." Wirth further testified that Eric was a registered sex offender, and that YSB did not have any report regarding whether he was at risk for reoffending.

¶ 8 On cross-examination, Wirth testified that one of the issues with Eric was his failure to complete a sex offender treatment program. However, she told the court that Eric's completion of such a program would have no bearing on her assessment of his risk with children:

"He still has other issues that have not been addressed from his previous service plans and in a relationship with someone who does use drugs and the effects that it causes on children and a family."

¶ 9 The court found that there was anticipatory neglect. The court based its ruling on respondent's incarceration, respondent's substance abuse problems, and both parents' failure to cooperate fully with DCFS. In delivering the ruling, the court also discussed Eric specifically:

"[Eric] has not successfully completed sex offender treatment. If he has done anything in that regard, it doesn't appear that the evidence of that has been submitted to anyone. It appears that this was an issue or a concern at the time the child was born."

The matter was then set for a dispositional hearing to be held on February 5, 2013.

¶ 10 At the dispositional hearing, the State called Wirth, whose testimony was substantially the same as that at the adjudicatory hearing. After testifying that placing the child with respondent would not be reasonable, Wirth testified that it was not in the child's best interest to be placed with Eric either:

"Eric *** is a registered sex offender and we do not have a letter from the counselor as to indicate *** the risk of reoffending on Eric ***. Also, he needs to participate in individual counseling to address addictions and relationships, how they affect families and his role that he has played in having *** children removed from his care and also not returned to his care."

Wirth testified that on the day of the dispositional hearing she received confirmation that Eric had completed sex offender treatment, but that she did not know anything about the program he participated in or whether he was at risk of reoffending. Because the risk of reoffending was not addressed, Wirth said, the mere confirmation of completion did not satisfy the requirement of Eric's service plan.

¶ 11 Wirth was then briefly questioned by Eric's counsel regarding the underlying offense that gave rise to Eric's sex offender status. Wirth testified that to her knowledge Eric was 20 years old at the time of the offense and the victim was 14 years old. Wirth did not know if the offense involved a family member.

¶ 12 Eric testified that the offense that gave rise to his sex offender status occurred in 2003 when he was 20 years old and the victim was 14 years old. The offense was a felony, and Eric testified that it was consensual. Eric testified that he did not intend to commit a similar offense.

He told the court that his counselor told him that he was at a low risk for reoffending. His counseling lasted for 50 sessions over the course of one year.

¶ 13 At the conclusion of the hearing, the court ruled that J.R. would remain in the guardianship of DCFS. In making the ruling, the court commented repeatedly on Eric's unenthusiastic demeanor in court. The court also referenced Eric's risk assessment: "[Eric] *** said that *** the person who did the assessment said he was low risk. But as [Eric's counsel] pointed out, there isn't a document that's been presented to show that."

¶ 14 On March 8, 2013, respondent sent a letter to the clerk of the juvenile court. In the letter, respondent asserted that she had spoken to counsel and requested that he file a motion to reconsider on the dispositional hearing and file an appeal in the case. She alleged that she had set up an appointment for a telephone call with counsel, but that counsel never made the telephone call. The letter ended as follows:

"Therefore I would like to file a motion to reconsider on the dispositional hearing (if my lawyer has not). DCFS has voluntarily unfounded the allegation for which [protective custody] was taken. Also I would like to verify that the appeal for 2012-JA-4 has been filed."

No motion to reconsider was filed, but the matter was appealed.

¶ 15 ANALYSIS

¶ 16 On appeal, respondent argues that she received ineffective assistance of counsel on two separate grounds. First, respondent contends that counsel was ineffective for not introducing into evidence—at both the adjudicatory hearing and the dispositional hearing—a letter from a Dr. Michael S. Shear and for failing to call Dr. Shear as a witness. Respondent claims that the letter and Dr. Shear himself would have provided information regarding Eric's sex offender

treatment and his risk assessment. Next, respondent contends that counsel was ineffective for failing to file a motion to reconsider because DCFS had "voluntarily unfounded" the basis for one of her reports.

¶ 17 While parties to juvenile custody proceedings do not hold a constitutional right to counsel, a statutory right is granted under the Juvenile Court Act of 1987 (Act). See 705 ILCS 405/1-5 (West 2010). "Illinois courts apply the standard utilized in criminal cases to gauge the effectiveness of counsel in juvenile proceedings." *In re S.G.*, 347 Ill. App. 3d 476 (2004) (collecting cases). To succeed upon a claim that counsel provided ineffective assistance, a criminal defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's poor performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319 (2011).

¶ 18 In *People v. Bew*, 228 Ill. 2d 122 (2008), our supreme court recognized the difficulties inherent in bringing an ineffective assistance of counsel claim on direct appeal. Relying on the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003), the Illinois Supreme Court pointed out that when such a claim is brought on direct appeal, the appellate court " 'must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.' " *Bew*, 228 Ill. 2d at 134 (quoting *Massaro*, 538 U.S. at 504-05). A claim of ineffective assistance of counsel, the *Bew* court reasoned, is better suited for collateral review, where a defendant has a full opportunity to present evidence and prove facts in support of the claim. *Bew*, 228 Ill. 2d

122. Finding the record insufficient to support the defendant's ineffectiveness argument, the court rejected the claim while noting that it could still be raised on collateral review. *Id.*

¶ 19 Here, as in *Bew*, the record is insufficient to support either of respondent's ineffectiveness claims. Trial counsel's decisions concerning which witnesses to call and what evidence to present are a matter of trial strategy, and generally immune to ineffectiveness claims except where the "trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). We cannot say that counsel was deficient for failing to introduce the letter from Dr. Spears or for failing to call Dr. Spears himself to testify without knowing the contents of the letter or of Dr. Spears' expected testimony. Further, nothing appears on the record that discloses counsel's possible strategy for not introducing this evidence. Outside of some brief questioning at the dispositional hearing, the record also lacks any detailed explanation of Eric's offense to which Dr. Spears' letter and testimony would relate.

¶ 20 Likewise, nothing appears on the record relating to respondent's claim that "DCFS [had] voluntarily unfounded the allegation for which [protective custody] was taken." Respondent's contention of ineffective assistance for failure to present this claim in a motion to reconsider turns on whether the motion would have been meritorious. *People v. Brannon*, 2013 IL App (2d) 111084. Respondent's vague allegation, without any factual support on the record, makes it impossible for this court to find that the motion to reconsider would have had any merit.

¶ 21 In a criminal setting, the finding that ineffective assistance of counsel could not be established by the record could end our analysis, as it did for the court in *Bew*. But while a criminal defendant may raise a claim of ineffectiveness of counsel in a postconviction petition (see 725 ILCS 5/122-1 *et seq.* (West 2010)), this avenue is not available for cases arising under

the Act (705 ILCS 405/1-1 (West 2010)). We therefore retain jurisdiction while remanding the cause for a full hearing on respondent's ineffective assistance of counsel claim. See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) (granting reviewing courts in civil cases the power to remand); *Jones v. Board of Fire & Police Commissioners*, 127 Ill. App. 3d 793, 797 (1984) ("a reviewing court in Illinois is not divested of jurisdiction until the parties' rights of appeal have been exhausted"). Remand provides respondent with the opportunity to prove facts relating to her ineffectiveness claim, and provides the State with a full opportunity to present evidence contesting the claim. *In re Ch.W.*, 399 Ill. App. 3d 825 (2010). Of course, should the trial court agree with respondent on the ineffectiveness issue, we presume it will take any further action appropriate under the circumstances. We withhold judgment as to respondent's other contentions pending remand.

¶ 22

CONCLUSION

¶ 23

The cause is remanded for further proceedings.

¶ 24

Cause is remanded with instructions.