

No. 1-16-0523

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i>)	Appeal from the Circuit Court
)	of Cook County.
ROBERT B. and AMIA B.,)	
)	
Minors-Respondents-Appellees)	Nos. 13 JA 000423
)	13 JA 000424
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	The Honorable
)	Demetrios Kottaras,
Robert B., Sr.,)	Judge Presiding.
)	
Respondent)	
)	
Vivian L.)	
)	
Respondent-Appellant).)	

JUSTICE HALL delivered the judgment of the court

Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order granting the State's motion for reconsideration and finding the minors neglected was affirmed. While the petitions for adjudication of wardship alleged physical injury to one of the minors as the basis for determining that the minors' environment was injurious to their welfare, the circuit court was not precluded from finding that the respondent-mother's drug use created an environment injurious to the welfare of the minors.

¶ 2 The respondent, Vivian L. (Vivian), appeals from an order of the circuit court of Cook County finding her children, Robert B. (Robert) and Amia B., (Amia), neglected minors. The sole issue on appeal is whether the circuit court erred in granting the State's motion for reconsideration and finding that the minors were neglected based on an injurious environment. We affirm the judgment of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 **I. Petitions for Adjudication of Wardship**

¶ 5 Vivian and Robert B. Sr.¹ are the parents of Robert and Amia. On May 6, 2013, the State filed a petition for adjudication of wardship alleging that Robert was a neglected minor under 18-years-of age whose environment was injurious to his welfare (705 ILCS 405/2-3(1)(b) (West 2012)). The petition further alleged that Robert was an abused minor in that his parents, a family member or a person residing in the same home as Robert: inflicted or allowed to be inflicted physical injury by other than accidental means (705 ILCS 405/2-3(2)(i) (West 2012)) and created a substantial risk of harm to him (705 ILCS 405/2-3(2)(i) (West 2012)). In support of the petition, the State alleged that on January 15, 2013, five-week-old Robert was diagnosed with bilateral clavicle fractures in different stages of healing.

¹Robert B., Sr. is not a party to this appeal.

The petition further alleged that Robert’s parents had no explanation as to how he was injured, and hospital personnel concluded that at least one of the fractures was caused by abuse. On the same date, the State filed a petition for adjudication of wardship alleging that Amia, Robert’s, 21-month old sister, was a neglected minor whose environment was injurious to her welfare. The petition further alleged that Amia was an abused minor in that a family member or person residing in the same home as Amia created a substantial risk of harm to her. Both the neglect and abuse allegations as to Amia were based on the injuries suffered by Robert.

¶ 6

II. Adjudication Hearing

¶ 7

In its opening statement, the State stated as follows:

“Judge, this is a very straight forward case. We have alleged neglect, injurious environment and abuse, substantial risk of physical injury as to both minors, Robert and Amia, with the added allegation of physical abuse as to Robert.”

After referencing the forthcoming testimony of its expert that one of Robert’s fractures was birth-related injury in the delivery process and that a second fracture was child abuse, the State continued as follows:

“And ultimately, you will receive evidence that there were concerns about mother’s marijuana use. And there are positive test results as it relates to marijuana use during her pregnancy with the minor, Robert, which in and of itself supports the findings of neglect, injurious environment and abuse, substantial risk of physical injury to both minors.”

¶ 8

The majority of the evidence and testimony at the adjudication hearing centered on the fractures sustained by Robert. Rosa Frias, the Department of Children and Family Services

(DCFS) investigator assigned to the case, testified that, as the result of a hotline call regarding the fractures sustained by Robert, DCFS initiated an investigation into the cause of Robert's injuries. Ms. Frias further testified that she reviewed records from Lawndale Christian Health Center relating to Vivian. The records relating to Vivian indicated that she received medical care late in her pregnancy with Robert and mentioned her smoking marijuana. As a result of the investigation, DCFS personnel concluded that one of Robert's fractures was the result of child abuse, and the minors were taken into protective custody.

¶ 9 Both the State and Vivian presented expert testimony relating to the cause of Robert's fractures. The State's expert, Dr. Amanda Fingarson, a child abuse pediatrician, testified that from her review of the medical records, Robert had a healing right clavicle fracture and an acute left clavicle fracture. The doctor opined that the acute left clavicle fracture was inflicted or due to physical abuse. Vivian's expert, Dr. Paul Wong, board certified in pediatrics and genetics, opined that Robert suffered from osteogenesis imperfect (OI), a genetic disorder where the body does not manufacture sufficient collagen to strengthen the tissues, resulting in problems with bone, skin, teeth and blood vessels.

¶ 10 The circuit court dismissed the petitions finding that the State had not met its burden of proof. The court summarized the testimony and the exhibits that formed the basis of its conclusion. In particular, while the court found both Dr. Fingarson and Dr. Wong competent and credible, it deferred to Dr. Wong's opinion in light of his greater expertise. The court then continued as follows:

“And just so it's clear, my findings are as to both Robert and Amia noting that Robert was the minor with the physical abuse.

MS. WARD (assistant State's Attorney): And, Judge, you're not finding NEI (neglect injurious environment) and ASRI (abuse substantial risk of physical injury) given the history of drug use?

THE COURT: Correct.

* * *

So it's clear, there are no findings not only as to physical abuse but the NEI and ASRI grounds as well."

¶ 11 The State filed a motion for reconsideration of the adjudication ruling and to re-open the proofs. *Inter alia*, the State argued that the circuit court misapplied the law when it failed to find an injurious environment based on Vivian's drug use while pregnant with Robert, her noncompliance with prenatal care and that Robert tested positive for cannabinoids at birth.

¶ 12 Following argument on the State's motion, the circuit court denied the State's motion to reconsider as to the OI issue. The court then addressed the drug use issue stating as follows:

"I want to say that the thrust of the trial, adjudication hearing, was overwhelmed by discussion of blusclera bone fractures, and the familial history of the minor. As I ruled in June, I focused on the allegations that were contained in the State's petition. Again, those dealt with the bone fractures. And I made the appropriate findings on the issue of osteogenesis imperfecta. But further read of the record, and my findings, show that I was not clear and it did not, I believe, address the issue of the drug use on the part of the mother.

A review of the evidence shows that Ms. Frias (phonetic) had testified about the lack of early prenatal care and mother's marijuana drug use.

The Mt. Sinai records reflect the diagnosis of intrauterine drug exposure, marijuana, on the part of the mother. And there was a positive for cannabinoid test result for Robert, Jr.

Lawndale Christian Health Center records, those being People's Exhibit Number 7, indicated that the mother was noncompliant with care in terms of her pregnancy. There was a positive drug screen on more than one occasion, that being for, again, cannabinoid, as reflected by the blood test results.

There were attempts by *** Lawndale Christian Health Center to reach the mother. The record reflects that she was, in fact, informed of the importance of regular prenatal care. And, again, it was reflected that mother had been noncompliant with her care. There was not updated information to contact her. And that was cured at one point.

The mother was also informed not to smoke marijuana during her pregnancy. So the documentary evidence did, in fact, show that mother tested positive for marijuana during her pregnancy. She was advised specifically not to smoke marijuana during her pregnancy. And the minor was, in fact, born testing positive for marijuana.”

¶ 13 The circuit court denied the State's motion to reconsider and reopen the proofs except as to the evidence of Vivian's drug use, ruling as follows:

“However, the State's motion is granted on its motion to reconsider my findings as it pertains to the drug use. And I will enter a finding as to NEI only, mother using and smoking marijuana during the pregnancy.”

¶ 14 Both Vivian and Robert B., Sr. filed motions for reconsideration of the order granting the State's motion. Both motions were denied. Following the dispositional hearing, the minors

were made wards of the court and placed in the guardianship of DCFS. Vivian filed a notice of appeal from the circuit's order granting, in part, the State's motion to reconsider and finding the minors neglected.

¶ 15

ANALYSIS

¶ 16

I. Standard of Review

¶ 17

Where the court's ruling on a motion to reconsider is based on the court's application of existing law, our review is *de novo*. *Compton v. County Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008).

¶ 18

II. Discussion

¶ 19

At the outset, we note that Vivian does not challenge the dispositional order, and she does not maintain that the drug use evidence the circuit court relied on was insufficient to prove the minors neglected based on an injurious environment. Vivian's argument on appeal is limited to whether the circuit court was precluded from finding the minors neglected on a factual basis not alleged in the State's petitions for wardship.

¶ 20

The adjudication proceedings are civil in nature, and petitions should comply with the general rules of civil pleadings. *In re J.B.*, 312 Ill. App. 3d 1140, 1143 (2000). A party may not succeed on a theory that is not contained in the party's complaint, and proof unsupported by proper pleading is just as defective as pleading a claim without proof. *In re J.B.*, 312 Ill. App. 3d at 1143.

¶ 21

Vivian points out that in the petitions for wardship, the State alleged only the fractures suffered by Robert as evidence of an injurious environment, not her drug use during her pregnancy with Robert. She further points out that the State could have but failed to move to conform the pleadings to the evidence presented at the hearing. See 705 ILCS 405/2-13(5)

(West 2012) (“[t]he court may allow amendment of the petition to conform with the evidence at any time prior to ruling”). The respondent relies on *In re J.B.*

¶ 22 In *In re J.B.*, the supplemental petition for adjudication of wardship alleged that the minors were neglected due to an injurious environment under section 2-3(1)(b) of the Juvenile Court Act (Act) (705 ILCS 405/2-3(1)(b) (West 1998)). Following a hearing, the trial court adjudicated the minors as neglected, but consistent with the testimony, the court chose to find neglect under section 2-3(1)(d) of the Act (705 ILCS 405/2-3(1)(d) (West 1998)). The respondent-parents appealed.

¶ 23 On appeal, the reviewing court observed that the State presented its case to the trial court as if it were trying to prove its case under section 2-3(1)(d), which was not alleged in the petition, and the trial court found the minors neglected under section 2-3(1)(d) instead of section 2-3(1)(b) as alleged in the petition. *In re J.B.*, 312 Ill. App. 3d at 1144. Because the State had failed to allege in its petition that it was proceeding under section 2-3(1)(d) as well as section 2-3(1)(b), and never sought to amend its petition to allege section 2-3(1)(d) as an additional ground for a neglect finding, the reviewing court held that the judgment must be reversed. *In re J.B.*, 312 Ill. App. 3d at 1145.

¶ 24 We find *In re J.B.*, distinguishable. In the present case, the State’s petition sought a finding that the minors were neglected only pursuant to section 2-3(1)(b) of the Act, and the circuit court found they were neglected under section 2-3(1)(b). While the factual allegations of the petitions set forth the physical injuries to Robert, the State was not limited to presenting evidence only as to those physical injuries and their cause in establishing that the minors were neglected because of an injurious environment. Section 2-13(2) of the Act provides in pertinent part that the petition “shall *** set forth (a) facts sufficient to bring the

minor under Section 2-3 or 2-4 and to inform respondents of the cause of action, including, but not limited to, a plain and concise statement of the factual allegations that form the basis for the filing of the petition.” 705 ILCS 405/2-13(2) (West 2012).

¶ 25 In this case, there is no dispute that the factual allegations of the fractures suffered by Robert were sufficient to bring the minors under section 2-3 of the Act and to necessitate the filing of the petition. In addition to the evidence relating to the cause of Robert’s fractures, the investigation conducted by DCFS revealed evidence of Vivian’s drug use and her failure to discontinue it during her pregnancy with Robert. Vivian did not object when, in its opening statement, the State informed the circuit court that it would hear evidence of her drug use. Vivian did not object to Ms. Frias’s testimony regarding her drug use during her pregnancy with Robert and did not object to the exhibits presented by the State documenting her drug use.

¶ 26 Finally, during the hearing on the State’s motion to reconsider, Vivian’s attorney argued that there was no evidence that any alleged drug use by Vivian resulted in an injurious environment and pointed out that the State’s petition was premised solely on the physical abuse allegations. The following colloquy then occurred:

“THE COURT: Now, is the State precluded from arguing it just because it is not alleged in the petition?

MS. BOCK (Vivian’s attorney): No, Judge, of course not.”

¶ 27 We are guided by this court’s analysis in *In re Sharena H.*, 366 Ill. App. 3d 405 (2006). In that case, the trial court found the minor neglected, in part, based on the respondent-mother’s involvement in an abusive relationship. On appeal, the respondent-mother claimed

that her due process rights were violated because the State's petition for adjudication of wardship did not contain allegations of domestic violence.

¶ 28 In affirming the trial court's finding of neglect, this court pointed out that the petition informed the respondent-mother that there was an allegation of neglect based on an injurious environment. The trial court merely considered domestic violence as one of the many factors that created an injurious environment for the minor. *In re Sharena H.*, 366 Ill. App. 3d at 417. We distinguished *In re J.B.*, since in that case the State proceeded at trial on a different subsection of 2-3 than the subsection set forth in its petition. Just as in *In re Sharena H.*, in the present case, the State alleged neglect based on an injurious environment, proceeded on that theory at trial, and the trial court found the minors were neglected based on an injurious environment. See *In re Sharena H.*, 366 Ill. App. 3d at 418.

¶ 29 The circuit court did not err when it found that Robert and Amia were neglected minors because Vivian's drug use during her pregnancy resulted in an environment injurious to their welfare. In the absence of error, there is no need to undertake a harmless error analysis. See *In re Sharena H.*, 366 Ill. App. 3d at 418 (this court also found that any error was harmless given the additional evidence of the respondent-mother's drug use).

¶ 30 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 31 Affirmed.