2020 IL App (3d) 190623-U

Order filed February 18, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

In re F.T.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
A Minor	)	Peoria County, Illinois,
	)	
(The People of the State of Illinois,	)	
	)	Appeal No. 3-19-0623
Petitioner-Appellee,	)	Circuit No. 16-JA-227
	)	
v.	)	
	)	
Fernando T.,	)	Honorable
	)	David A. Brown,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's determination that the respondent was unfit was not against the manifest weight of the evidence.

¶ 2 Following the State's filing of a petition for adjudication of wardship, the trial court found the respondent, Fernando T., unfit to parent F.T. and that F.T.'s best interest favored terminating Fernando's parental rights. Fernando appeals.

¶ 3 FACTS

¶ 4 At the outset, we note that Fernando only challenges the trial court's fitness finding in this case. Specifically, whether he rebutted the presumption of depravity. Thus, we limit our background to only the facts relevant to that issue.

¶ 5 In September 2016, the State filed a petition for adjudication of wardship alleging that F.T. was neglected in that his environment was injurious to his welfare. 705 ILCS 405/2-3(1)(b) (West 2016). The State stated that Fernando was a registered sex offender and his criminal history included: theft (misdemeanor 1998), resisting peace officer (misdemeanor 1998), burglary (felony 1998), aggravated criminal sexual abuse victim 13-16 (felony 1999), three violations of an order of protection (misdemeanors 1999), failure to register (felony 2004), failure to register and false information (felony 2006), attempt obstruct justice (misdemeanor 2006), false information sex offender (felony 2009), domestic battery (misdemeanor 2009), mob action (felony 2011), and violation of sex offender registration (felony 2011).

¶ 6 In January 2017, the trial court entered a dispositional order finding Fernando unfit based on the content of the petition, his criminal history, and his psychological issues. The Department of Children and Family Services (DCFS) was named guardian, and Fernando was ordered to complete various services.

¶ 7 In June 2019, the State filed a petition to terminate Fernando's parental rights. Among other things, the State alleged that Fernando was unfit to parent in that he was depraved. 750 ILCS 50/1(D)(i) (West 2018). The State admitted into evidence all of Fernando's convictions through certified copies, demonstrating that he had twelve prior convictions, including three within five years of the filing of the petition to terminate parental rights. In addition to those convictions included in the initial petition for adjudication of wardship (*supra* ¶ 5), Fernando was convicted

of failure to report change of address (felony 2016), sex offender registration with false information (felony 2017), indirect criminal contempt (contempt of court 2019), and domestic battery (felony 2019). The State later removed two of the 1999 misdemeanor convictions for violating an order of protection.

¶ 8 In September 2019, the court held a fitness hearing and ruled that the State proved Fernando's depravity by clear and convincing evidence. Fernando did not present any evidence at the hearing to rebut the presumption of depravity. The best interest hearing followed, and the court found that it was in F.T.'s best interest to terminate Fernando's parental rights. Fernando appeals.

¶ 9 ANALYSIS

¶ 10 On appeal, Fernando argues that the trial court's determination that he was unfit was against the manifest weight of the evidence. The State argues that the court's decision was proper.

¶ 11 The State must prove by clear and convincing evidence that the parent is "unfit" as defined in section 1(D) of the Adoption Act. *In re Tiffany M.*, 353 Ill. App. 3d 883, 889 (2004); 750 ILCS 50/1(D) (West 2018). A trial court's fitness determination will only be reversed if the court's findings of fact were against the manifest weight of the evidence. *In re C.N.*, 196 Ill. 2d 181, 208 (2001). A finding is against the manifest weight of the evidence when an opposite conclusion is clearly evident. *In re A.W.*, 231 Ill. 2d 92, 102 (2008). A reviewing court will not overturn a court's findings merely because it would have reached a different result. *In re K.B.*, 2012 IL App (3d) 110655, ¶ 23.

¶ 12 In this case, the trial court found that Fernando was unfit on the basis that he was depraved (750 ILCS 50/1(D)(i) (West 2018)). Our supreme court has defined depravity as "an inherent deficiency of moral sense and rectitude." (Internal quotation marks omitted.) *In re Abdullah*, 85 Ill. 2d 300, 305 (1981). The Adoption Act provides that a rebuttable presumption exists that a

parent is depraved if the parent has been convicted of at least three felonies and at least one of those convictions took place within five years of the filing of the petition seeking termination of parental rights. 750 ILCS 50/1(D)(i) (West 2018). Since a showing of the requisite convictions creates a rebuttable presumption, the parent is still able to present evidence showing, that despite his convictions, he is not depraved. *In re A.M.* 358 Ill. App. 3d 247, 253 (2005). If the respondent presents evidence contradicting the presumption, the presumption is removed, and the issue is determined based on the evidence presented. *In re J.A.*, 316 Ill. App. 3d 553, 562 (2000). The burden of proving by clear and convincing evidence that the respondent is depraved remains with the State. *A.M.*, 358 Ill. App. 3d at 254.

¶ 13 Fernando concedes that he had the requisite number of criminal convictions for a finding of depravity, but argues that the evidence presented during the best interest hearing demonstrated that he was not depraved despite his convictions. His argument, in its entirety is as follows:

> "[T]he State presented evidence of ten criminal felony convictions with the most recent felony conviction occurring in 2019. *Appellant chose not to present any evidence in rebuttal during the first stage of the termination proceedings* but did testify during the Best Interest hearing. Appellant testified to the fact that services were not offered in the facility he was currently incarcerated in. He further testified that he attempted to obtain a transfer so that he could accomplish some services. In addition, Appellant testified that he was not offered visitation with his son and further did not want his son to see him while incarcerated as to protect the child's wellbeing." (Emphasis added.)

¶ 14 Hence, Fernando acknowledges that he did not submit any evidence during the fitness hearing to overcome the presumption of depravity, but asks this court to consider his testimony at

the later best interest hearing to overcome that presumption. In response, the State argues that Fernando fails to cite any authority supporting the proposition that a court of review can consider testimony divulged at a best interest hearing when determining whether a court's prior fitness finding was proper. In his reply brief, Fernando states such authority exists in *In re J.A.*, 316 Ill. App. 3d 553 (2000) because the trial court in that case "considered evidence from the father that was testified to in a separate hearing and this was affirmed on appeal."

¶ 15 We find Fernando's application of *J.A.* to his case to be flawed. Our review of *J.A.* reveals that the trial court considered the father's "testimony from the *earlier* hearing" in determining fitness (Emphasis added.) *Id.* at 559. Thus, *J.A.* does not support Fernando's position that his testimony given at a *later* hearing, namely the best interest hearing, can be used to rebut the presumption of depravity that was at issue in the *earlier* fitness hearing. See *id.*

¶ 16 The record in this case is clear that the State established a rebuttable presumption of Fernando's depravity by presenting evidence that he was convicted of at least three felonies and at least one of those convictions took place within five years of the filing of the petition seeking termination of parental rights. See 750 ILCS 50/1(D)(i) (West 2018). Fernando's failure to present rebuttable evidence of his depravity left the trial court with "nothing to consider in his favor." *In re Travarius O.*, 343 Ill. App. 3d 844, 853 (2003). Thus, the court's finding that Fernando was unfit because he was depraved was not against the manifest weight of the evidence.

¶ 17 For the foregoing reasons, we affirm the trial court's fitness determination.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.