

No. 1-10-3839

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In the Interest of DeShawn A., a Minor)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
)	Cook County.
Petitioner-Appellee,)	
)	
v.)	No. 10 JD 2770
)	
DeSHAWN A.,)	Honorable
)	Patricia Mendoza,
Respondent-Appellant.))	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Respondent's claim of error regarding father's due process rights rejected; no plain error to excuse forfeiture of claim that respondent was denied due process when the court allowed notice of juvenile proceeding to father by publication; judgment affirmed.

¶ 2 Following a hearing in the circuit court of Cook County, respondent Deshawn A. was adjudicated delinquent of possession of a controlled substance and sentenced to one year of probation. On appeal, he contends that he and his father were denied due process when the trial court conducted a juvenile delinquency hearing without proper notice to the father.

¶ 3 On June 22, 2010, the State filed a petition for adjudication of wardship alleging that on June 11, 2010, respondent committed the offense of possession of a controlled substance. In the petition, respondent's mother was listed as Tinisha Ruffin, along with her address, and respondent's father was listed as "unknown" with no address provided for him.

¶ 4 On July 2, 2010, respondent appeared before the court with his custodial parent, Ruffin, and counsel. Respondent informed the court that he and his father have the same name, and that he lives in Chicago, but he did not know his address. When asked if he has contact with his father, he answered, "[u]hn-uhn." Respondent indicated that the last time he saw his father in person, was "[l]ike last month." The court then granted the State leave to publish notice of the proceeding to the father, and this was accomplished on August 4, 2010.

¶ 5 At the adjudicatory hearing on October 7, 2010, Chicago police officer Andrew McGlynn testified that at 10:15 a.m. on June 11, 2010, he was investigating the abandoned two-flat, brick building at 3938 West Grenshaw Street in Chicago when he observed respondent on the side of the building, "[m]aking a movement to place something in the crack of the building wall, the mortar." Although he could not identify that item, he did see an object, and had a clear unobstructed view of respondent, who placed the object in the wall, then looked at him and began to walk away. Officer McGlynn stated that he then went to the area where he saw respondent place the object, while two other officers approached respondent. Officer McGlynn recovered a clear plastic bag containing nine zip-lock bags of suspect heroin from the "same crack" in the wall in which he had seen respondent place an item. He also noted that no one but respondent was in the area. The parties stipulated that the recovered material tested positive for heroin.

¶ 6 Chicago police officer Quinn testified that at the time in question, he was with Officers McGlynn and Fitzgerald patrolling the area of Pulaski Road and Grenshaw Street when he saw

respondent near 3938 West Grenshaw Street. When they pulled up, respondent crossed the street. Officer Quinn approached respondent and conducted a protective pat-down search, but did not find anything.

¶ 7 Respondent testified that at the time in question he went to his friend's house on West Grenshaw Street and was sitting on the porch waiting for his friend, Tion Boyd, when the officers drove up, "hopped out" of their vehicle and "grabbed" and searched him. Respondent further testified that one of the officers went behind the abandoned building across the street, and "got something," which he told the officer did not belong to him. Respondent denied being near the abandoned building that morning, possessing any narcotics or placing anything in the cracks of the bricks of that building.

¶ 8 Respondent further testified that he did not know the exact address of his friend Boyd's home, but that his friend lived on Greenshaw Street with his father. He later testified that his friend Boyd resided at 4054 West Arthington Street in Chicago, and stated that he "guess[ed]" that his friend no longer lived on Greenshaw Street.

¶ 9 Following closing arguments, the court indicated that it was "stuck on" the possession issue and requested case law on it. After reviewing the case law provided by the parties, the court stated:

"[o]riginally I was stuck on the definition of whether the minor was in possession of the controlled substance. I have reviewed the case law. The State is correct. We don't need to prove – the State does not need to prove actual possession. Constructive possession is sufficient."

The court then found respondent guilty of possession of a controlled substance. In doing so, the court noted that the State need only prove that respondent knew the drugs were present and

exercised control over them to establish constructive possession, and that given the case law and the facts presented, the State had met its burden of proving constructive possession beyond a reasonable doubt.

¶ 10 Following that determination, a social investigation began on October 12, 2010, and resulted in the probation officer locating the respondent's father and meeting with him on October 22, 2010. The investigation revealed that the father had seven children from current and previous relationships, but respondent was the only child he had with respondent's mother. The investigation further revealed that the father claimed to be working hard to develop a positive fatherly relationship with the minor over the last three years, but that the father repeatedly missed respondent's birthdays, did not spend holidays with him, would tell him that he would spend time with him on a certain day, then would fail to show up, and come on another day as if nothing happened. On November 19, 2010, the father appeared for respondent's sentencing proceeding and the court ordered respondent to serve one year of probation.

¶ 11 On appeal, respondent maintains that he and his father were denied due process when the trial court conducted a juvenile delinquency hearing without proper notice to his father. The State responds that the notice by publication was proper, and that the circuit court had jurisdiction to enter the adjudicatory orders against respondent. Respondent replies that he is not raising a jurisdictional question, but, rather, a due process issue.

¶ 12 Although respondent does not implicate personal jurisdiction in his due process arguments, we observe that personal jurisdiction was obtained over the father in this case when he appeared at the sentencing hearing. *In re C.L.*, 392 Ill. App. 3d 1106, 1110 (2009). That said, we note that the father has not claimed error. He has not argued that lack of notice of the petition prejudiced his parental rights in any way, and we, therefore, reject respondent's argument that reversal is required because his father's due process rights were violated when the circuit

court proceeded to hearing on the petition despite lack of proper notice to him. *In re M.W.*, 232 Ill. 2d 408, 429-30 (2009).

¶ 13 As to respondent's claim that his own due process rights were violated by the State's failure to give proper notice of the delinquency petition to his father, the State maintains that respondent forfeited this contention for review by failing to object to the alleged lack of proper notice below. Respondent acknowledges his omission, but maintains that we may review the claim for plain error. The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). The burden of persuasion remains with the appellant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 14 The Act sets forth the service requirements for a delinquency petition. 705 ILCS 405/5-525(1)(a) (West 2010). It provides, in relevant part, that upon commencement of a delinquency prosecution, the clerk of the court shall issue a summons with a copy of the petition to the minor's parent, guardian, or legal custodian and:

"[t]o each person named as a respondent in the petition, except that the summons need not be directed *** (ii) to a parent who does not reside with the minor, does not make regular child support payments to the minor, to the minor's other parent, or to the minor's legal guardian or custodian pursuant to a support order, and has not communicated with the minor on a regular basis." 705 ILCS 405/5-525(1)(a) (West 2010).

The Act further provides that if service cannot be made because the whereabouts of a respondent are unknown, service may be made by publication. 705 ILCS 405/5-525(2)(b).

¶ 15 The record shows that respondent and his mother were named in the petition for adjudication of wardship in this case. The father's name and address, however, were listed as unknown, and at the initial proceeding, when respondent was asked his father's address, he indicated that he did not know it. When asked if he was in contact with his father, he responded, "[u]hn-uhn," indicating a negative response, and stated that his last contact with him was in person the last month. This exchange does not evidence regular contact or a significant father relationship warranting service upon the father. *In re Ricardo A.*, 356 Ill. App. 3d 980, 988 (2005), overruled on other grounds by *In re Samantha V.*, 234 Ill. 2d 359 (2009).

¶ 16 In addition, the social investigation revealed that the father repeatedly missed respondent's birthdays and did not spend holidays with him, and that respondent could not rely on him to keep his word regarding promised visits. There is also no evidence that the father, who admitted having fathered seven children from previous and current relationships, paid child support for respondent. These facts thus belie any inference of a regular or significant relationship between the two (*In re Darren M.*, 368 Ill. App. 3d 24, 34 (2006)), to deem respondent's father an indispensable party to the proceedings. Under these circumstances, we find that his absence did not deprive respondent of substantial protection or assistance where his custodial mother was present throughout the proceedings, he was represented by counsel, and no judgment or order was entered against the father. *In Interest of Stokes*, 108 Ill. App. 3d 637, 640 (1982).

¶ 17 Moreover, even if notice was required, notice by publication was proper since the father's whereabouts were unknown at the time the petition was filed, and there was notice to the custodial mother. 705 ILCS 405/5-525(2)(b) (West 2010). Although respondent cites the apparent ease with which the probation officer located his father and faults the State for not exercising due diligence in locating him, the fact that neither he, his counsel, or his mother

objected when the State indicated that it would provide notice to the father by publication after respondent indicated that he had no regular contact with his father (*In re Darren M.*, 368 Ill. App. 3d at 34; *In re Ricardo A.*, 356 Ill. App. 3d at 988), and allowed the court to proceed to adjudication, (*In re C.L.*, 392 Ill. App. 3d at 1111), he cannot now complain about the lack of notice to his father (*In re Ricardo A.*, 356 Ill. App. 3d at 988). As a result, we find that he has forfeited the issue. *In re Darren M.*, 368 Ill. App. 3d at 35.

¶ 18 Respondent further argues that if his father had known of the juvenile proceeding against him, he might have hired private counsel and possibly advised him not to testify. However, respondent has not indicated how the fairness of the proceeding was undermined by the absence of his father where his custodial mother was present and he was represented by an attorney, and either of them could have counseled respondent in the manner suggested by appellate counsel. *In re M.W.*, 232 Ill. 2d at 439. For the reasons stated, we find that respondent was not denied due process by the manner which notice to his noncustodial father was provided (*In re Darren M.*, 368 Ill. App. 3d at 35), and, as a consequence, no plain error to excuse respondent's forfeiture of the issue on appeal.

¶ 19 We therefore affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.