2016 IL App (2d) 150500-U
No. 2-15-0500
Order filed March 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re IVYANA M., a Minor	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
	)	No. 13-JA-127
	)	
(The People of the State of Illinois, Petitioner-Appellee v. Korvell M., Respondent-Appellant.)	)	Honorable
	)	Linda S. Abrahamson,
	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order terminating respondent's parental rights was affirmed. Respondent forfeited any argument concerning the adjudication of neglect. Respondent was not prejudiced when the trial court discharged appointed counsel without requiring compliance with Supreme Court Rule 13. Respondent did not receive ineffective assistance of counsel when counsel failed to request a continuance at the hearing to terminate his parental rights.

¶ 2 Respondent, Korvell M.,[1] appeals from the trial court's order terminating his parental rights to his minor daughter, Ivyana M. Respondent was initially represented by appointed

[1] In their briefs, the parties spell respondent's name "Korvel." We use the spelling that appears in the pleadings and that respondent gave to the trial court during his first appearance in

counsel, but the trial court *sua sponte* discharged his counsel in the middle of the second permanency review hearing. The court did not require counsel to comply with the withdrawal provisions of the Illinois Supreme Court Rules, as mandated by section 1-5(1) of the Juvenile Court Act of 1987 (705 ILCS 405/1-5(1) (West 2014)). The State concedes that the trial court erred, but argues that the error was harmless. We agree with the State. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 20, 2013, the State filed a neglect petition with respect to Ivyana. On December 27, 2013, the court appointed counsel to represent respondent. Respondent then waived his right to a shelter care hearing and consented to temporary guardianship and custody being placed with the Department of Children and Family Services (DCFS). On January 24, 2014, respondent stipulated that Ivyana was neglected based on an injurious environment pursuant to section 2-3(1)(b) of the Juvenile Court Act (Act) (705 ILCS 405/2-3(1)(b) (West 2012)). The basis for the stipulation was that respondent's substance abuse placed Ivyana at risk and her mother, Jazman G.,[2] failed to protect the minor. On February 14, 2014, the court adjudicated Ivyana neglected. After the dispositional hearing on May 9, 2014, the court made Ivyana a ward of the court and continued guardianship and custody with DCFS.

¶ 5 The record reflects that respondent attended every hearing and status call up to and including the dispositional hearing. Respondent then failed to appear at either of the two permanency review hearings.

---

these proceedings.

[2] Jazman signed a consent to adoption on March 27, 2015, and she is not a party to this appeal.

¶ 6 The court held the first permanency review hearing on September 26, 2014; respondent did not attend, although his attorney was present. Yanitza Carmona DeSalgado, the caseworker from OMNI Youth Services, testified that Ivyana had been placed with respondent's mother since the inception of the case. Respondent had not engaged in any services and had not contacted the caseworker. DeSalgado also testified that respondent did not have stable housing. The court found that respondent had failed to make reasonable efforts or reasonable progress toward Ivyana returning home.

¶ 7 The court held a second permanency review hearing on January 9, 2015. Again, respondent failed to attend. On direct examination, DeSalgado testified that respondent visited Ivyana but that his visits were inconsistent. She also testified that respondent's required services included parenting classes, substance abuse treatment, individual therapy, and domestic violence classes. Respondent had not engaged in any services, although DeSalgado had informed him that referrals for services were approved. DeSalgado also testified that respondent did not have a home or an apartment, and he continually moved between Chicago and Aurora, Illinois.

¶ 8 After the State finished its direct examination, respondent's counsel informed the court that she had no cross-examination questions for DeSalgado. Then, the court *sua sponte* asked counsel: "Do you want off of this case?" The court remarked that respondent "doesn't appear to be involved or he's certainly not present and wasn't present in September." Respondent's counsel informed the court that she had not been able to contact respondent, and the court again asked counsel: "Do you want off?" Counsel replied: "If that's acceptable to the Court." The court then discharged respondent's counsel.

¶ 9 The hearing proceeded in counsel's absence. Jazman's attorney and DCFS each conducted a very brief cross-examination of DeSalgado that focused on Jazman. CASA also

asked a few questions to ascertain whether Ivyana's development was "on target." The State then called Alyssa Cardenas, Jazman's caseworker, to testify about Jazman's separate DCFS matter, in which Jazman is the minor at issue. The court found that respondent had made "absolutely" no progress or effort, noting that his whereabouts were unknown, he had not engaged in any services, and he had only occasional visitation with Ivyana.[3] In the order entered at the end of the hearing, the court changed the permanency goal from return home to substitute care pending termination of parental rights. The written order incorrectly reflected that the mother's counsel had been discharged. The matter was continued to February 27, 2015, for a pretrial conference and for a possible termination hearing on March 27, 2015.

¶ 10 The pre-trial conference was held on February 27, 2015. Respondent did not receive notice of the hearing and did not attend. The matter was continued for the State to file a petition to terminate parental rights.

¶ 11 On March 4, 2015, the State filed a petition for termination of respondent's parental rights, and issued summons to respondent and Jazman. The State alleged, among other things, that respondent was unfit in that he failed to make reasonable efforts to correct the conditions which were the basis of Ivyana's removal, that he failed to make reasonable progress toward Ivyana's return, and that he failed to maintain a reasonable degree of interest, concern, or responsibility as to Ivyana's welfare.

¶ 12 On March 27, 2015, respondent appeared for the hearing on the petition to terminate his parental rights. The court immediately reappointed the same counsel who had been discharged at the second permanency review hearing. The court then continued the matter to allow counsel

[3] The court made identical findings as to Jazman.

to prepare for the hearing. The court also admonished respondent to appear promptly at 9:00 a.m. on April 17, 2015, for the hearing.

¶ 13 Respondent failed to appear on time for the termination hearing. Defense counsel informed the court that she had "not affirmatively heard from" respondent, although she did "reach out" to him the day before. The State called DeSalgado to testify. DeSalgado testified that since she was assigned as the caseworker in May 2014, she had only had two face-to-face conversations with respondent, one phone call, and a few text messages. The text messages all occurred in the week preceding the termination hearing. Throughout the pendency of the proceedings, DeSalgado left messages with the foster mother, the Court Appointed Special Advocate (CASA) and Jazman, instructing respondent to contact her. Respondent never contacted her. DeSalgado personally met with respondent in November 2014 to discuss the services included in his service plan, and she gave him referrals. Although he expressed an interest in following through with the plan, respondent failed to engage in any services. DeSalgado also testified that respondent visited Ivyana once or twice a month and that "there are no concerns regarding his parenting for Ivyana[.]" Nevertheless, respondent was not willing to work out a schedule with the foster mother, who was respondent's own mother, to consistently visit Ivyana.

¶ 14 The court found that the State proved by clear and convincing evidence that respondent was unfit in that he failed to make reasonable efforts to correct the conditions which were the basis of Ivyana's removal (750 ILCS 50/1(D)(m) (West 2014)) and failed to maintain a reasonable degree of interest, concern, or responsibility as to Ivyana's welfare (750 ILCS 50/1(D)(b) (West 2014)). Specifically, the court found that respondent had not made efforts to engage in any services.

¶ 15 The matter then proceeded immediately to a best interests hearing. After hearing testimony from DeSalgado, the court found that the State proved by a preponderance of the evidence that it was in Ivyana's best interests to have respondent's parental rights terminated.

¶ 16 After the hearing ended, the case was recalled because respondent had been waiting outside the courtroom for over an hour. The termination hearing began at 9:27 a.m. and respondent said that he had arrived sometime between 10:20 and 10:30 a.m. The court informed respondent that both stages of the termination hearing had concluded by that time and that his parental rights had been terminated. It then admonished him of his appeal rights. Respondent timely appealed, and the trial court appointed appellate counsel.

¶ 17 II. ANALYSIS

¶ 18 Before discussing the arguments respondent raises in his appeal, we address the timeliness of our decision. This is an accelerated appeal under Illinois Supreme Court Rule 311(a) (eff. Feb. 26, 2010). Pursuant to Rule 311(a)(5), we are required to issue our decision within 150 days after the filing of the notice of appeal, except for good cause shown. Respondent filed his notice of appeal on May 7, 2015, making the deadline to issue our decision October 5, 2015. Respondent's original counsel on appeal filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *In re Alexa J.*, 345 Ill. App. 3d 985 (2003), claiming that an appeal would be "wholly frivolous." We denied counsel's motion to withdraw. Due to deficiencies in counsel's submissions to this court, we remanded the matter to the chief judge of the circuit court of Kane County to appoint new appellate counsel. Accordingly, we revised the briefing schedule to allow respondent's new counsel to supplement the record on appeal and submit appeal briefs. Because this case was not ready for disposition until February 24, 2016, we find good cause for issuing our decision after the 150-day deadline.

¶ 19 Turning to the merits, respondent first argues that the neglect adjudication was against the manifest weight of the evidence because his factual stipulation was insufficient. The State argues that respondent cannot now challenge the neglect adjudication in this appeal. Respondent's counsel concedes that the State is correct. We agree.

¶ 20 A respondent can challenge a neglect adjudication in two ways: (1) by filing a petition for leave to appeal from that interlocutory order pursuant to Supreme Court Rule 306(a)(5) (eff. July 1, 2014); or (2) by appealing the dispositional order, which is a final and appealable order.[4] See *In re Leona W.*, 228 Ill. 2d 439, 456 (2008). "Appealing a dispositional order is the proper vehicle for challenging a finding of abuse or neglect." *Leona W.*, 228 Ill. 2d at 456; see also Ill. S. Ct. R. 662, Committee Comments (adopted Oct. 1, 1975) ("If the dispositional hearing and order follow closely the adjudicatory hearing and order, judicial efficiency dictates that an appeal should be taken after disposition."). Here, respondent did not seek to appeal the interlocutory adjudicatory order nor did he appeal the dispositional order. Thus, respondent has forfeited any issues related to those orders. *Leona W.*, 228 Ill. 2d at 457; see also *In re Janira T.*, 368 Ill. App. 3d 883, 891 (2006) ("[R]espondent never filed a notice of appeal from either the trial court's adjudicatory order or its dispositional order. We therefore lack appellate jurisdiction over respondent's appeal of the *** adjudicatory order and dismiss that portion of the appeal.").

¶ 21 Respondent next argues that the trial court denied him of his statutory right to counsel when it *sua sponte* discharged his appointed counsel during the middle of the second permanency review hearing. Specifically, respondent contends that the court erred when it

[4] Supreme Court Rule 662(a) (eff. Oct. 1, 1975) also allows an appeal to be taken from the neglect adjudication if an order of disposition has not been entered within 90 days of the adjudication. Here, however, no such delay occurred. Hence, Rule 662(a) is inapplicable.

discharged counsel without requiring compliance with Supreme Court Rule 13, as mandated by the Act. Respondent further argues that he was prejudiced by the trial court's error, because he was deprived of the opportunity to participate and examine witnesses who were still testifying and the trial court changed the permanency goal at the end of the hearing.

¶ 22 Although respondent did not raise this issue before the trial court, forfeiture is a limitation on the parties and not on the reviewing court. *In re Darius G.*, 406 Ill. App. 3d 727, 732 (2010). Moreover, the State concedes error as to this issue, but argues that the error was harmless because the trial court reappointed the same counsel for respondent at the termination hearing where his parental rights were terminated.

¶ 23 Under section 1-5(1) of the Act, a respondent parent has the right to be represented by counsel. 705 ILCS 405/1-5(1) (West 2014). Upon request, the court shall appoint counsel for an indigent respondent. 705 ILCS 405/1-5(1) (West 2014). The statute provides that appointed counsel must appear at all stages of the proceedings, and the appointment shall continue through the permanency review hearings and termination of parental rights proceedings "subject to withdrawal or substitution pursuant to Supreme Court Rules or the Code of Civil Procedure." 705 ILCS 405/1-5(1) (West 2014). The statute further provides that, after the dispositional hearing, the trial court "may require appointed counsel *** to withdraw his or her appearance upon failure of the party for whom counsel was appointed under this Section to attend any subsequent proceedings." 705 ILCS 405/1-5(1) (West 2014).

¶ 24 Supreme Court Rule 13 (eff. July 1, 2013) governs the withdrawal of attorneys. It specifies the procedures that an attorney must follow before the trial court will grant his or her leave to withdraw an appearance for a party. Ill. S. Ct. R. 13(c). Counsel must, among other

things, submit a written motion to withdraw and provide notice to the represented party by personal service or certified mail. Ill. S. Ct. R. 13(c).

¶ 25 Section 1-5(1)'s mandate that "withdrawal or substitution" proceed in accordance with applicable Supreme Court Rules does not differentiate between situations where counsel seeks leave to withdraw versus where the court requires counsel to withdraw. Moreover, the plain language of section 1-5(1) only grants the court discretionary power to require appointed counsel "*to withdraw* his or her appearance upon failure of the party for whom counsel was appointed *** to attend any subsequent proceedings." (Emphasis added) 705 ILCS 405/5-1(1). Nothing in the provision suggests that the trial court can allow appointed counsel to bypass Supreme Court Rule 13 by simply discharging the attorney. To hold otherwise would require us to read an exception into the Act that is not there.

¶ 26 Here, as the State concedes, the record contains no indication that the court required respondent's counsel to comply with the requirements of Supreme Court Rule 13. Counsel did not file a written motion to withdraw, nor did counsel provide notice by mail or personal service to respondent that she was withdrawing.

¶ 27 The State contends, however, that any error in discharging respondent's counsel without requiring compliance with Supreme Court Rule 13 was harmless and does not require reversal. The State claims that respondent was only unrepresented for a "relatively short three month period" and that the court "cured" any error that occurred by reappointing the same attorney for respondent before the termination hearing began.

¶ 28 Respondent argues that he was prejudiced because the court changed the permanency goal from return home to substitute care pending termination of his parental rights and that he was without representation for the three months that followed the goal change. Respondent also

contends that he was prevented from participating in the review hearing and examining witnesses who were still testifying. He claims that had he received notice that he was without counsel, he could have contacted counsel to find out why she was discharged and why the permanency goal was changed.

¶ 29 Respondent falls short, though, of demonstrating that he was prejudiced by the trial court's error. The fact that the permanency goal was changed to substitute care pending termination of parental rights does not demonstrate prejudice in and of itself. It was, as the State points out, respondent's own actions or failure to act that resulted in the trial court changing the permanency goal. Indeed, as of the date of the second permanency review hearing, respondent had failed to comply with or make any efforts to engage in the services that were outlined in his service plan, although respondent was aware that referrals for services were approved. Additionally, respondent failed to keep in contact with DCFS, OMNI Youth Services, his appointed attorney, or the court. DeSalgado, the OMNI Youth Services caseworker, testified that she left messages with the foster mother (respondent's own mother), CASA, and Ivyana's mother instructing respondent to contact her, but he never did. Moreover, respondent failed to appear at either permanency review hearing. Hence, the permanency goal was changed because respondent failed to make any efforts or progress toward Ivyana's return.

¶ 30 We are mindful that parents have a fundamental liberty interest in the care, custody, and control of their children. *In re A.M.*, 402 Ill. App. 3d 720, 723 (2010). Termination proceedings implicate these fundamental liberty interests and "dire consequences can result if the State succeeds" in a termination proceeding. *J.P.*, 316 Ill. App. 3d at 658. Here, however, respondent was fully represented by counsel at the termination of parental rights hearing.

¶ 31 We next address respondent's final contention that his trial counsel was ineffective for failing to request a continuance at the beginning of the termination hearing due to respondent's absence.

¶ 32 Respondent also asks this court in his reply brief to now consider the issue of counsel's failure to timely challenge the adjudication of neglect due to respondent's insufficient factual stipulation as part of his ineffective assistance of counsel argument. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2005) provides that arguments may not be raised for the first time in a reply brief. Thus, respondent waived this argument by not including it in his opening appellate brief. Ill. S. Ct. R. 341(h)(7).

¶ 33 A respondent's right to counsel in termination proceedings derives from the Act, and a respondent is entitled to effective assistance of counsel. *In re C.C.*, 368 Ill. App. 3d 744, 748 (2006). To establish ineffective assistance of counsel in a termination proceeding, it must be shown that (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for the error, the result of the proceeding would have been different. *Darius G.*, 406 Ill. App. 3d at 731. Failure to establish the prejudice prong renders irrelevant the issue of counsel's performance. *C.C.*, 368 Ill. App. 3d at 748.

¶ 34 Here, respondent does not attempt to articulate how he was prejudiced by counsel's failure to request a continuance at the termination hearing. Counsel had been granted a continuance previously, and the court admonished respondent to appear on time at the hearing. He failed to do so, and he had not attempted to respond to counsel's attempts to contact him before the hearing. Moreover, respondent presents no argument as to how a continuance and his presence at the hearing would have altered the outcome. Indeed, he effectively concedes that the result of the termination hearing "may well have been no different."

¶ 35 As to the unfitness portion of the hearing, respondent does not attempt to dispute DeSalgado's testimony that he never engaged in any services; that he failed to keep in contact with the caseworker, DCFS, or the court; that he inconsistently visited Ivyana; and that he did not have stable housing throughout the pendency of the proceedings. Nor does respondent contend that the result of best interests portion of the hearing would have been different had counsel requested a continuance. His counsel fully participated in the hearing in his absence, even eliciting testimony from DeSalgado on cross-examination that she had never seen respondent physically act out.

¶ 36 Nevertheless, respondent contends that had counsel requested the continuance, the trial court's possible denial of that request "may have resulted in appellate relief." We decline to speculate as to how the trial court would have ruled or as to what relief respondent thinks an appellate court may have provided on appeal. We only note that although a parent has the right to be present at a hearing to terminate parental rights, "it is not mandatory that [respondent] be present, and the trial court is not obligated to wait until [respondent] chooses to appear." *In re C.L.T.*, 302 Ill. App. 3d 770, 778 (1999). Here, respondent was given notice on the record as to the time and date of the hearing to terminate his parental rights, yet he failed to appear on time or offer an explanation for his tardiness. See *C.L.T.*, 302 Ill. App. 3d at 779.

¶ 37 Because respondent has failed to demonstrate that he was prejudiced by counsel's failure to request a continuance at the termination hearing, his ineffective assistance of counsel claim fails.

¶ 38 Notwithstanding our ultimate conclusion that we affirm the order terminating respondent's parental rights, we want to address our concerns with respect to the trial court discharging respondent's appointed counsel in the middle of a permanency review hearing. As

mentioned above, it is clear in this context that with or without counsel to assist him during the entire permanency review hearing, respondent's position failed. He had done nothing to address, let alone cure, the issues which had precipitated the removal of the child in the first instance. We take this opportunity, however, to emphasize that although respondent was not prejudiced, the trial court allowing counsel to withdraw mid-hearing without an iota of compliance with Supreme Court Rule 13 is a serious error, the gravity of which cannot be overemphasized.

¶ 39 The Act provides that the parent, respondent here, has the right to counsel, and that "counsel appointed for the minor and any indigent party shall appear at all stages of the trial court proceedings, and such appointment shall continue through the permanency hearings and termination of parental rights proceedings subject to withdrawal or substitution pursuant to Supreme Court Rules or the Code of Civil Procedure." 705 ILCS 405/5-1(1) (West 2014). Here, there was no withdrawal in accord with Supreme Court Rule 13: there was no written motion, no notice of the motion, no service on respondent and, importantly, no notice to respondent that he should retain other counsel. Counsel was allowed to "withdraw" and leave the permanency review mid-hearing.

¶ 40 Even the caveat that following the dispositional hearing, "the court may require appointed counsel to withdraw his or her appearance upon the failure of the party for whom counsel was appointed under this section to attend any subsequent proceedings" (705 ILCS 405/5-1(1) (West 2014)), the attorney is still obligated to comply with Supreme Court Rule 13, and the court is to allow the withdrawal only upon a finding of compliance. The reason for compliance with these notice requirements is obvious. The client, the respondent in a proceeding which may result in the termination of his parental rights, is made aware that he no longer has an

advocate in court. Even the most non-compliant clients are afforded protection from withdrawal by or discharge of their attorney without written notice.

¶ 41 Simply put, we emphasize the seriousness of this error and underscore that it should not reoccur.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 44 Affirmed.