2016 IL App (4th) 150755-U

NOS. 4-15-0755, 4-15-0756 cons.

FILED
March 2, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: K.A., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Mason County
v. (No. 4-15-0755)	)	No. 11JA3
BYRON ALLEN,	)	
Respondent-Appellant.	)	
	)	
In re: B.A., a Minor,	)	No. 11JA5
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner-Appellee,	)	
v. (No. 4-15-0756)	)	
BYRON ALLEN,	)	Honorable
Respondent-Appellant.	)	Alan D. Tucker,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment terminating respondent's parental rights, finding respondent was unfit and he was not denied the effective assistance of counsel.

¶ 2 In June 2011, the State filed petitions for adjudication of wardship with respect to K.A. and B.A., the minor children of respondent, Byron Allen. In November 2011, the trial court made the minors wards of the court and placed custody and guardianship with the Department of Children and Family Services (DCFS). In November 2014, the State filed petitions to terminate respondent's parental rights. In August 2015, the court found respondent unfit. In September 2015, the court found it in the minors' best interest that respondent's parental

rights be terminated.

¶ 3 On appeal, respondent argues the trial court erred in finding him unfit and he received ineffective assistance of counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2011, the State filed petitions for adjudication of wardship with respect to B.A., born in March 2002, and K.A., born in October 2003, the minor children of respondent and Bobby Jo Allen. The petitions alleged the minors were neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-3(1)(b) (West 2010)) in that they resided in an injurious environment because their mother failed to protect them from being hit with rocks by her paramour, Jonathon Lugo, while he was shooting a slingshot. The petition also alleged the minors were neglected pursuant to section 2-3(1)(d) of the Juvenile Court Act (705 ILCS 405/2-3(1)(d) (West 2010)) because they, being under the age of 14 years, were locked outside of their residence and thereafter their mother left them in the care of a family member, who was under the influence of alcohol, wherein they walked away from that location unsupervised and without shoes in temperatures exceeding 90 degrees. The trial court entered a temporary custody order, finding probable cause to believe the minors were neglected.

¶ 6 In September 2011, the trial court found the minors neglected. At an October 2011 hearing, David Coleman appeared at respondent's request and stated respondent did not have an attorney and was unable to attend. The court appointed Jerry Hooker, who also represented Lugo, and continued the matter so Hooker could determine if there was a conflict in the representation. In its November 2011 dispositional order, the court found the minors' mother unfit to care for, protect, train, educate, supervise, or discipline the minors and placement with her would be contrary to the health, safety, and best interest of the minors. The court's order also

found respondent unfit. The court indicated respondent had been notified by publication on August 19, 2011, but had never appeared. The court adjudged the minors neglected, made them wards of the court, and placed custody and guardianship with DCFS.

¶ 7 A May 2012 permanency report indicated respondent was incarcerated in Texas, with a release date of November 2012. The trial court's permanency order indicated respondent had been defaulted, found unfit, and had never appeared. A November 2012 permanency report indicated respondent had been released from custody in Texas and went to a halfway house in Peoria, Illinois. The caseworker met with him and was able to "get half of an integrated assessment completed." The caseworker indicated respondent was not happy about the proposed services and felt he should not have to complete them because the children were not taken from his custody.

¶ 8 A May 2013 permanency review report indicated a caseworker had spoken with respondent about starting services. He was unable to meet with the worker due to being incarcerated. The report indicated respondent was incarcerated in Louisiana on four counts of burglary and had an outstanding warrant in Tazewell County, Illinois. The trial court's May 2013 permanency order found respondent had not made reasonable and substantial progress toward the return of the minors.

¶ 9 An August 2013 permanency report indicated respondent's whereabouts were unknown. It also stated respondent had been incarcerated in Louisiana and a diligent search had been completed. An April 2014 permanency report indicated respondent had no contact with the caseworker since the last court date. At the April 2014 permanency hearing, the trial court appointed Denise Barr to represent respondent.

¶ 10 A July 2014 permanency report indicated respondent had not had any contact with

the caseworker since prior to the April 2014 court date. He had not had any contact with the children since they entered foster care. The report indicated a diligent search had been completed to locate him, without success.

¶ 11 In July 2014, the State filed a petition to terminate respondent's parental rights. The petition alleged respondent was unfit because he failed to (1) make reasonable efforts to correct the conditions that were the basis for the minors' removal (750 ILCS 50/1(D)(m)(i) (West 2014)) and (2) maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare (750 ILCS 50/1(D)(b) (West 2014)).

¶ 12 In September 2014, the trial court conducted the unfitness hearing. After hearing testimony, the court took the matter under advisement. Thereafter, the court entered an order indicating it did not have jurisdiction over respondent. The court gave the State leave to refile a new petition to terminate respondent's parental rights.

¶ 13 In November 2014, the State filed petitions to terminate respondent's parental rights. The petitions alleged respondent was unfit because (1) he was guilty of depravity in that he had 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 (750 ILCS 50/1(D)(i) (West 2014)), (2) he failed to maintain a reasonable degree of interest, concern, or responsibility as to the minors' welfare (750 ILCS 50/1(D)(b) (West 2014)), and (3) the minors were in the guardianship of DCFS, respondent was incarcerated at the time the petition was filed, he has been repeatedly incarcerated as a result of criminal convictions, and his repeated incarceration prevented him from discharging his parental responsibilities (750 ILCS 50/1(D)(s) (West 2014)). The State also filed amended petitions for adjudication of wardship, setting forth the same two allegations of neglect as in the June 2011 petitions.

¶ 14 In August 2015, the trial court conducted the unfitness hearing. Initially, the State asked the court to take judicial notice of respondent's convictions. Respondent had been convicted of felony theft in Peoria County (case No. 04-CF-1172) and ultimately received a sentence of 27 months in prison. He was convicted of residential burglary in Peoria County (case No. 07-CF-1492) and sentenced to five years in prison. He was convicted of two counts of burglary in Louisiana (case No. 13-FELN-029183) and sentenced to six years in prison. He was convicted of felony theft in Peoria County (case No. 14-CF-322) and sentenced to four years in prison. The court took judicial notice of defendant's convictions.

¶ 15 Jennifer Hall testified she was the minors' caseworker from June 2013 to October 2014. Hall did not have any contact with respondent until November 2013, after he had been released from custody in Louisiana. She scheduled a meeting in January 2014, but respondent did not appear. During her stint as caseworker, Hall stated respondent did not have any contact with the children, did not provide financial support to them, and did not provide birthday cards to them. He attempted to arrange a visitation with B.A, but his son refused to attend. Hall mailed a service plan, but respondent failed to complete the integrated assessment necessary to determine the appropriate services. In April 2014, Hall learned respondent had been arrested. Although they had phone contact and defendant sent a letter, he did not try to complete the integrated assessment while in custody. Respondent also refused to sign consent forms.

¶ 16 Cince Bowns, a DCFS supervisor, testified respondent was in custody on federal charges when the children were taken into protective custody in 2011. While he was in custody, respondent did not provide support for the children.

¶ 17 Called as a witness by respondent, Sandra Puhlman, a case manager with Camelot Care Center, testified she received the case in May 2015. She stated respondent signed consent

forms and sent cards or letters to both children. On cross-examination, Puhlman stated respondent had not completed any goals in his service plan. Respondent stated he did not want to engage in counseling or parenting classes while in prison because "he felt that they were not going to help him."

¶ 18 Respondent elected not to testify. Following closing arguments, the trial court found respondent unfit on all three grounds. In September 2015, the court conducted the best-interest hearing. The best-interest report indicated K.A. resided in a specialized foster home. She relates to and has developed a bond with her foster mother. B.A. also resided in a specialized foster home. His foster mother addresses his needs and he "continues to thrive in the home."

¶ 19 Respondent testified he made attempts to contact his children during the course of their cases. He believed it would be in their best interest to remain a part of their lives. He stated his projected release date is May 2016. Following arguments, the trial court found it in the minors' best interest that respondent's parental rights be terminated. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. Unfitness Findings

¶ 22 Respondent argues the trial court's findings of unfitness were against the manifest weight of the evidence. We disagree.

¶ 23 In a proceeding to terminate a respondent's parental rights, the State must prove unfitness by clear and convincing evidence. *In re Donald A.G.*, 221 Ill. 2d 234, 244, 850 N.E.2d 172, 177 (2006). " 'A determination of parental unfitness involves factual findings and credibility assessments that the trial court is in the best position to make.' " *In re Richard H.*, 376 Ill. App. 3d 162, 165, 875 N.E.2d 1198, 1201 (2007) (quoting *In re Tiffany M.*, 353 Ill. App. 3d

883, 889-90, 819 N.E.2d 813, 819 (2004)). A reviewing court accords great deference to a trial court's finding of parental unfitness, and such a finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re A.F.*, 2012 IL App (2d) 111079, ¶ 40, 969 N.E.2d 877. "A decision regarding parental fitness is against the manifest weight of the evidence where the opposite conclusion is clearly the proper result." *In re D.D.*, 196 Ill. 2d 405, 417, 752 N.E.2d 1112, 1119 (2001).

¶ 24 In the case *sub judice*, the trial court found respondent unfit based on (1) depravity; (2) failure to maintain a reasonable degree of interest, concern, or responsibility; and (3) repeated incarceration. In his brief on appeal, respondent does not argue the court erred in finding him unfit due to his repeated incarceration. "Evidence of a single statutory ground is sufficient to uphold a finding of parental unfitness." *In re T.Y.*, 334 Ill. App. 3d 894, 905, 778 N.E.2d 1212, 1220 (2002). Respondent's omission concedes he is unfit on the unchallenged ground and makes it unnecessary to address the remaining grounds. *In re D.L.*, 326 Ill. App. 3d 262, 268, 760 N.E.2d 542, 547 (2001).

¶ 25 Even if we were to consider the repeated-incarceration ground, we would find the trial court did not err in finding respondent unfit. Section 1(D)(s) of the Adoption Act provides, as a ground for parental unfitness, as follows:

> "The child is in the temporary custody or guardianship of [DCFS], the parent is incarcerated at the time the petition or motion for termination of parental rights is filed, the parent has been repeatedly incarcerated as a result of criminal convictions, and the parent's repeated incarceration has prevented the parent from discharging his or her parental responsibilities for the child." 750

ILCS 50/1(D)(s) (West 2014).

When presented with this ground of unfitness, courts are to " 'consider the overall impact that repeated incarceration may have on the parent's ability to discharge his or her parental responsibilities ***, such as the diminished capacity to provide financial, physical, and emotional support for the child.' " *In re Gwynne P.*, 215 Ill. 2d 340, 356, 830 N.E.2d 508, 517 (2005) (quoting *D.D.*, 196 Ill. 2d at 421, 752 N.E.2d at 1121).

> "Being a parent involves more than attending a few visits and sending an occasional gift to the child. The child needs a positive, caring role model present in her life. This ground for unfitness may be utilized regardless of respondent father's efforts, compliance with DCFS tasks and satisfactory attainment of goals, or the amount of interest he has shown in his [child's] welfare." *In re M.M.J.*, 313 Ill. App. 3d 352, 355, 728 N.E.2d 1237, 1240 (2000).

¶ 26 Here, the minors were in the temporary custody and guardianship of DCFS, respondent was incarcerated at the time the petition for termination was filed, he has been repeatedly incarcerated as a result of his criminal convictions, and his repeated incarceration prevented him from discharging his parental responsibilities. The evidence indicated respondent had been incarcerated throughout most of the minors' young lives. As a result, he has not provided the financial, physical, or emotional support K.A. and B.A. need and deserve. Not only has his incarceration prevented him from discharging his parental responsibilities, it raises the inference he "will continue to be unavailable and inadequate as a parent." *M.M.J.*, 313 Ill. App. 3d at 355, 728 N.E.2d at 1240. Based on the evidence in the record, we conclude the trial court's

finding of unfitness on this ground was not against the manifest weight of the evidence.

¶ 27 B. Assistance of Counsel

¶ 28 Respondent argues he was denied the effective assistance of counsel. We disagree.

> "In a termination of parental rights proceeding, parents are entitled to effective assistance of counsel. [Citation.] The standards for determining ineffective assistance of counsel were set forth in *Strickland v. Washington*, 466 U.S. 668 *** (1984). A respondent must show [his] counsel's representation fell below an objective standard of reasonableness and there is reasonable probability the result would have been different had there not been ineffective assistance of counsel. To demonstrate prejudice, respondent must show a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" *In re M.F.*, 326 Ill. App. 3d 1110, 1119, 762 N.E.2d 701, 709 (2002).

¶ 29 Respondent argues he was denied the effective assistance of counsel while his children remained in DCFS custody. He states Jerry Hooker was appointed counsel in October 2011 and Hooker also represented the paramour of the minors' mother. This representation continued until April 2014, when the trial court appointed Denise Barr. Respondent argues he was not provided with independent counsel during these time periods and thus did not receive

the necessary advice to obtain a service plan from DCFS and utilize any available services while in prison.

¶ 30 In this case, respondent had independent counsel during the unfitness hearing. Therein, counsel cross-examined witnesses, made objections, called a witness, and presented closing argument. Counsel's performance prior to the hearing cannot be said to have impacted the findings of unfitness in this case. Nothing counsel could have said or done would lessen the fact that respondent has spent a great deal of the minors' lives within the confines of a prison cell. While respondent posits he may have completed service plan goals had counsel been more involved, it would not have changed the outcome of the unfitness hearing. Puhlman stated she personally informed respondent of his service plan goals and indicated some of those goals could be completed while he was in prison. However, respondent refused to cooperate because he felt the services were not going to help him. Thus, respondent fails to show the result of the unfitness proceeding would have been different.

¶ 31 Respondent also argues counsel at the unfitness hearing failed to present any evidence in rebuttal as to the presumption of depravity. Respondent claims he could have presented evidence to rebut the presumption and, had he done so, the result of the proceeding would have been different. Here, however, the trial court found respondent unfit on three grounds, and we have already found the court's finding of unfitness on the repeated-incarceration ground was not against the manifest weight of the evidence. Thus, regardless of counsel's representation on the depravity count, respondent still would have been found unfit. As respondent cannot establish prejudice, his claim of ineffective assistance of counsel fails.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment.

¶ 34 Affirmed.