2017 IL App (5th) 160346-U

NOS. 5-16-0346, 5-16-0347, & 5-16-0348 (cons.)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re M.B., S.B., and R.B., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Saline County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	Nos. 15-JA-1, 15-JA-2, &
	)	15-JA-3
Rodney E.B.,	)	
	)	Honorable Todd D. Lambert,
Respondent-Appellant).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order terminating respondent's parental rights is affirmed where respondent was not denied due process and counsel's conduct did not amount to ineffective assistance.

¶ 2 Respondent, Rodney E.B., appeals from the trial court's order terminating his parental rights and appointing a guardian with the power to consent to adoption. On appeal, respondent alleges he was denied his due process rights and denied effective assistance of counsel during the termination proceedings. We affirm.

¶ 3 BACKGROUND

¶ 4 The facts necessary to reach our decision follow. Respondent is the legal father of three minor children: S.B. born on March 14, 2004, R.B. born on April 6, 2005, and M.B. born on August 28, 2006. Latisha Reidelberger, the biological mother of the minor children, is deceased. Before we advance to our discussion, we note that the three cases concerning the minor children have been consolidated for purposes of this appeal.

¶ 5 The State filed a petition for adjudication of wardship on April 21, 2015, which asserted the minors' mother, Latisha Reidelberger, was murdered in the home she shared with her minor children, and that respondent was subsequently charged with three counts of first-degree murder and three counts of intentional homicide of an unborn child for the murder of Reidelberger and her unborn child. The petition further asserted respondent was currently in the custody of the Saline County Sheriff at the Saline County Detention Center. The petition then alleged the minor children were neglected because "[w]hen the minor's mother and her unborn child were murdered, the minor was present in the home, creating a substantial risk of physical harm to the minor."

¶ 6 A shelter care hearing was held later on April 21, 2015, where the State indicated it was seeking to have the Department of Children and Family Services (DCFS) appointed as temporary custodian and guardian of the minor children. After hearing testimony from Donna Hesterly, a child protective investigator for DCFS, the court placed the minor children with DCFS. DCFS was given the right to place the children in an appropriate home. The court subsequently appointed Lowell Tison as respondent's attorney, and the case was set for trial.

¶ 7 An adjudication hearing was held on May 19, 2015. The court determined the State proved by a preponderance of the evidence that the minor children were dependent by reason of the following facts: the mother of the minor children was murdered in the home she shared with the children; respondent was charged with said murder; and respondent was currently in custody for said murder. The minor children's case was assigned to Caritas Family Solutions.

¶ 8 The State filed a motion for termination of parental rights and for appointment of guardian with power to consent to adoption on April 28, 2016, which alleged respondent was an unfit person to have custody of the minor children for one or more of the following reasons as outlined in the Illinois Adoption Act:

> "a. Abandonment Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare. [750 ILCS 50/1D(b)]
>
> b. Failure to protect the child from conditions within his/her environment injurious to the child's welfare. [750 ILCS 50/1D(g)]
>
> c. Failure by a parent to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependent minor under section 2-4 of that Act. [750 ILCS 50/1D(m)(i)]." 750 ILCS 50/1D (West 2012).

¶ 9 A fitness hearing regarding the State's petition for termination of respondent's parental rights was held on July 19, 2016. After hearing testimony from two caseworkers employed by Caritas Family Solutions who were assigned to the children's case, the court

determined respondent was unfit after concluding the three allegations contained in the State's petition were proven by clear and convincing evidence. The case was then set for a best-interest hearing on August 9, 2016. At the best-interest hearing, after hearing testimony from the current caseworker assigned to the children's case, the court concluded it was in the best interests of the minor children that respondent's parental rights be terminated.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 I. Due Process Claim

¶ 13 Respondent's first contention on appeal alleges he was denied his right to due process in the termination proceedings. Specifically, respondent contends he was denied his fundamental due process right to the care, custody, and control of his minor children because he was not permitted to visit or communicate with his minor children while he was incarcerated. Respondent further contends he was denied due process because he was not provided with the services recommended to him while detained, "thereby setting [respondent] up to lose."

¶ 14 Under the fourteenth amendment of the United States Constitution, an individual cannot be deprived of life, liberty, or property without due process of law. U.S. Const., amend. XIV, § 1; *In re Charles A.*, 367 Ill. App. 3d 800, 802, 856 N.E.2d 569, 572 (2006). It is well settled that a parent has a fundamental liberty interest in maintaining custody of his or her child. *In re Charles A.*, 367 Ill. App. 3d at 802, 856 N.E.2d at 572. Therefore, the procedures employed in terminating parental rights must comply with the

requirements of the due process clause. *In re Charles A.*, 367 Ill. App. 3d at 802-03, 856 N.E.2d at 572.

¶ 15 In determining whether a parental rights termination proceeding satisfies the constitutional requirements of due process, we must consider the factors set forth by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *In re Charles A.*, 367 Ill. App. 3d at 803, 856 N.E.2d at 572. These factors include: (1) the private interest affected by the proceeding, (2) the risk of an erroneous deprivation of that interest through the procedures used and the probative value, if any, of additional procedural safeguards, and (3) the State's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would require. *Mathews*, 424 U.S. at 335; *In re Charles A.*, 367 Ill. App. 3d at 803, 856 N.E.2d at 572.

¶ 16 We first address respondent's argument that he was denied due process because he was not allowed to communicate with his children while he was imprisoned. Regarding the first *Mathews* factor, we acknowledge respondent has a significant liberty interest in maintaining his parental relationship with his children. As we discuss above, Illinois courts recognize that parents have a fundamental liberty interest in the care, custody, and control of their children, which is protected by the due process clause of the fourteenth amendment. U.S. Const., amend. XIV, § 1; *In re A.M.*, 402 Ill. App. 3d 720, 723, 932 N.E.2d 82, 85 (2010).

¶ 17 Regarding the second and third *Mathews* factors, we find the risk that respondent was erroneously deprived of his fundamental right to the care, custody, and control of his

children was minimal when balanced against the State's interest in preserving the best interests of the children. *In re A.W.*, 397 Ill. App. 3d 868, 873, 921 N.E.2d 1275, 1279 (2010). As discussed above, respondent was charged with the murder of the children's mother and her unborn child. Thereafter, the State sought termination of respondent's parental rights while those charges were pending, and no visitation was ordered. The record indicates the court listened to the testimony of the caseworkers assigned to this case and appropriately weighed respondent's interest against the State's interest in preserving the best interests of the children, ultimately finding it to be in the children's best interest that respondent's parental rights be terminated. Further, numerous hearings were held prior to the court's decision to terminate respondent's parental rights, and respondent was represented by counsel at each hearing after counsel was appointed. The fact that respondent was not allowed communication with his minor children while he was incarcerated pending murder charges in the death of the children's mother and her unborn child was not a violation of respondent's right to due process.

¶ 18 Respondent next argues he was denied due process because he was not afforded the substance abuse and mental health counseling services recommended to him while he was imprisoned, "assuring the termination of his parental rights." Although respondent lays out the *Mathews* factors and states that termination proceedings must comply with due process requirements, respondent cites no relevant authority in support of this proposition. We decline to consider this issue.

¶ 19 In sum, we deem it important to stress that although respondent has an interest in maintaining his parental relationship with his children, the children themselves have an

important interest in their own well-being, as well as a stable environment. *In re Charles A.*, 367 Ill. App. 3d at 803, 856 N.E.2d at 573. Moreover, the primary concern of a termination proceeding is protecting the best interests of the children involved. Here, the court appropriately weighed respondent's interest against the State's interest in preserving the best interests of the children, and found in favor of the State. In light of the foregoing, we find the *Mathews* balancing test does not support respondent's claim that his due process rights were violated. Accordingly, we reject respondent's argument.

¶ 20 II. Ineffective Assistance Claim

¶ 21 Respondent's next contention on appeal alleges he received ineffective assistance of counsel. In a termination of parental rights proceeding, parents are entitled to effective assistance of counsel. *In re M.F.*, 326 Ill. App. 3d 1110, 1119, 762 N.E.2d 701, 709 (2002). Illinois courts apply the standard utilized in criminal cases to gauge the effectiveness of counsel in juvenile proceedings. *In re S.G.*, 347 Ill. App. 3d 476, 479, 807 N.E.2d 1246, 1248 (2004). Accordingly, our review of ineffective assistance of counsel claims in juvenile proceedings is guided by the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d at 1246 (1984). *In re S.G.*, 347 Ill. App. 3d at 479, 807 N.E.2d at 1248.

¶ 22 In order to succeed on a claim of ineffective assistance of counsel under the two-prong standard set forth in *Strickland*, a defendant must both show that (1) counsel's representation fell below an objective standard of reasonableness (deficient performance prong), and (2) a reasonable probability exists that, but for counsel's error, the result of

the proceeding would have been different (prejudice prong). *In re S.G.*, 347 Ill. App. 3d at 479, 807 N.E.2d at 1248; *People v. Watson*, 2012 IL App (2d) 091328, ¶ 23, 965 N.E.2d 474.

¶ 23 To establish deficiency under the first prong of the *Strickland* test, one must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361, 736 N.E.2d 1092, 1106 (2000). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *People v. Crutchfield*, 2015 IL App (5th) 120371, ¶ 34, 35 N.E.3d 218. Accordingly, matters of trial strategy are generally immune from ineffective assistance of counsel claims and will not support such claims unless counsel's strategy was so unsound that counsel failed to conduct any meaningful adversarial testing of the State's case. *Crutchfield*, 2015 IL App (5th) 120371, ¶ 34, 35 N.E.3d 218.

¶ 24 Regarding the second prong of the *Strickland* test, a reasonable probability is one that is sufficient to undermine confidence in the trial's outcome. *People v. Lefler*, 294 Ill. App. 3d 305, 311-12, 689 N.E.2d 1209, 1214 (1998). The prejudice prong precludes relief based solely upon an attorney's substandard performance. *Lefler*, 294 Ill. App. 3d at 312, 689 N.E.2d at 1214. Our task as a reviewing court is to measure an inferior performance against its potential effect on the outcome. *Lefler*, 294 Ill. App. 3d at 312, 689 N.E.2d at 1214. Accordingly, even where counsel's mistakes are egregious, we examine them in the context of all the case's evidence to determine whether they create a reasonable probability of a different result. *Lefler*, 294 Ill. App. 3d at 312, 689 N.E.2d at 1214. Further, both prongs of the *Strickland* test must be satisfied in order to succeed on

a claim of ineffective assistance of counsel. *Watson*, 2012 IL App (2d) 091328, ¶ 23, 965 N.E.2d 474. The failure to establish either prong under the *Strickland* standard will be fatal to the claim. *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1106.

¶ 25 In the instant case, respondent alleges his counsel was ineffective for several reasons: counsel presented no evidence or witness at any hearing; counsel made no effort to lift the no contact order; counsel did not file necessary motions; and counsel failed to obtains services for respondent while in custody.

¶ 26 After careful review of the record in its entirety, we find respondent's arguments cannot support a claim for ineffective assistance. Respondent ignores the well-settled principle that decisions regarding which witnesses to call and what evidence to present are matters of trial strategy that ultimately rest with trial counsel. *People v. West*, 187 Ill. 2d 418, 432, 719 N.E.2d 664, 673 (1999). These types of decisions have long been viewed as matters of trial strategy which are generally immune from claims of ineffective assistance of counsel. *West*, 187 Ill. 2d at 432, 719 N.E.2d at 673. As we discuss above, the only exception to this rule is where counsel's chosen trial strategy is so unsound that counsel completely fails to conduct any meaningful adversarial testing. *West*, 187 Ill. 2d at 433, 719 N.E.2d at 673.

¶ 27 Here, the record indicates counsel provided argument or cross-examination at several hearings throughout the termination proceedings, and challenged the State regarding respondent's services and visitation. For example, during his cross-examination of the caseworker assigned to the children's case at the fitness hearing, counsel elicited testimony which indicated respondent was not afforded the opportunity

to communicate with his children or obtain services while in jail. Thereafter, counsel cross-examined the caseworker at the best-interest hearing regarding S.B.'s attempts to contact respondent. Contrary to respondent's argument, counsel introduced evidence and argument on respondent's behalf.

¶ 28 Moreover, the fact that counsel did not present any witnesses is not in itself indicative of ineffective assistance. *In re M.F.*, 326 Ill. App. 3d at 1119, 762 N.E.2d at 709. "The lack of presentation of evidence can be attributed to trial strategy and any error in such strategy alone does not establish ineffective representation." *In re M.F.*, 326 Ill. App. 3d at 1119, 762 N.E.2d at 709. We further note that respondent has not indicated what evidence or testimony counsel should have introduced, or what motions counsel should have filed. In light of the foregoing, we cannot conclude counsel's conduct amounted to ineffective assistance. Accordingly, we reject respondent's argument.

¶ 29 We note that pursuant to Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) our decision in this case was to be filed on or before January 6, 2017, absent good cause shown. Respondent was *pro se*. On August 30, 2016, respondent filed a motion for appointment of counsel and was appointed counsel thereon. Respondent then filed two extensions of time to file his brief, which we granted. As a result of the final extension, respondent's brief was not due, and was not filed, until November 28, 2016. Petitioner's brief was filed on December 19, 2016, and respondent's reply brief was filed on December 27, 2016. The cases were consolidated for oral argument and were heard on

January 26, 2017. As a result, we find that good cause exists for issuing our decision after January 6, 2017.

¶ 30 CONCLUSION

¶ 31 For the aforementioned reasons, we affirm the trial court's order terminating respondent's parental rights.

¶ 32 Affirmed.