2018 IL App (2d) 180544-U
No. 2-18-0544
Order filed December 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In the Interest of Jordan V., a minor,	)	Appeal from the Circuit Court of Stephenson County.
	)	No. 17-AD-06
(Dennis C. and Maribel Harvey, Petitioners-Appellees, v. Reese Smith, Respondent-Appellant).	)	Honorable David M. Olson, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The respondent has failed to establish ineffective assistance of counsel in proceedings that resulted in the termination of his parental rights.

¶ 2 In 2017, the petitioners, Dennis and Maribel Harvey, filed a petition for adoption of the minor, Jordan V., (born January 2, 2015). On June 18, 2018, the trial court found the respondent father, Reese Smith, an unfit parent (750 ILCS 50/1(D)(p) (West 2016)) and terminated his parental rights to the minor. [1] The respondent appeals, arguing that he received ineffective assistance of counsel at the fitness hearing. We affirm.

[1] The parental rights of the minor's mother were also terminated. She is not a party to this appeal.

¶ 3 BACKGROUND

¶ 4 On July 6, 2017, the petitioners filed a petition for adoption of the minor. The petitioners alleged that the parental rights of the minor's parents should be terminated under various sections of section 50/1(D) of the Adoption Act. The petitioners requested that the court appoint a guardian *ad litem* (GAL) for the minor, order an appropriate investigation, and grant them temporary custody of the minor. On that same date, a GAL was appointed to represent the minor and the trial court entered an order for a social investigation.

¶ 5 On September 8, 2017, the respondent sent a letter to the trial court. He requested that temporary custody of the minor be placed with his parents. He did not consent to the adoption of his son and requested that the matter be postponed until he could appear and represent himself. He was incarcerated in Connecticut. He noted that, in a parentage action for child support, he had petitioned for visitation time with the minor. Also in that parentage action, he attended every court date and did everything requested of him, including keeping job diaries. He was unable to find employment because he had outstanding warrants in Connecticut. He stated that he turned himself in to the authorities in Connecticut so that he could clear his warrants and be better able to find a job and support his son. He acknowledged that he had not seen the minor during the first year of the minor's life but explained that this was because the minor's mother did not inform him of the minor's birth and she "kept [the minor] from [him]." He sent a subsequent letter requesting the appointment of a public defender. At a status hearing on November 20, 2017, the trial court acknowledged that it had read the letters and it appointed a public defender to represent the respondent.

¶ 6 On January 24, 2018, the petitioners filed an amended petition for adoption. In that petition, the petitioners alleged that the respondent was unfit because he abandoned the minor (750 ILCS 50/1(D)(a) (West 2016)); failed to maintain a reasonable degree of interest, concern,

or responsibility as to the minor's welfare (750 ILCS 50/1(D)(b) (West 2016)); deserted the minor (750 ILCS 50/1(D)(c) (West 2016)); manifested an intent to forgo parental rights by a failure to visit with the child, communicate with the child, or maintain contact with or plan for the future of the child, for a period of 12 months or more (750 ILCS 50/1(D)(n)(1) (West 2016)); and had repeatedly failed to provide financial support, food, clothing, or shelter for the child (750 ILCS 50/1(D)(o) (West 2016)).

¶ 7 The petitioners served the respondent with a request to admit. On April 11, 2018, the respondent's attorney filed responses to the petitioners' request to admit. The respondent admitted that he was adjudicated the minor's biological father on July 28, 2016. He admitted that since January 2, 2015, he did not have custody of the minor and did not provide for his physical care, did not provide child support, and had not taken him to any medical appointments. He admitted that since July 28, 2016, he had not had custody of the minor. Also since that date, he had not provided food, shelter, education, or for the minor's mental health. The respondent denied that he had not visited the minor, provided gifts, or provided emotional support since July 28, 2016. The responses were signed only by the respondent's attorney.

¶ 8 On May 14, 2018, a hearing was held on the adoption petition. Maribel testified that she ran a homeless shelter named Doors Open Wide (DOW) for young mothers. The record indicates that the shelter was also Maribel's home. In November 2014, the minor's mother, Gabby, came to the shelter, where she stayed until April 2016. The minor was born on January 2, 2015. Maribel was present at his birth. Gabby left with the minor in April 2016 but she kept in contact with Maribel. At Gabby's request, Maribel picked up the minor from day care three to four times a week while Gabby was at work. Gabby would pick up the minor from DOW after work.

¶ 9 In April 2017, Maribel, as the emergency contact for the minor, received a phone call from the minor's daycare center because Gabby had not come to pick him up. Maribel had one of her employees pick up the minor. Later that evening, Maribel learned that Gabby was in the hospital. Gabby was then 23 years old. Someone from the hospital had called because Gabby wanted to make sure that the minor was with Maribel. When Gabby was released from the hospital, Maribel picked her up and she stayed at the shelter for four days. During that time, Gabby told Maribel that she no longer wanted to be a parent or care for the minor. After four days, Gabby left the shelter. Maribel was still caring for the minor. Gabby came back once in April to pick up her things, and she came one other time in July.

¶ 10 Maribel testified that in April 2017, she knew the name of the minor's father but had never met him. Starting in January 2018, the respondent occasionally sent letters to the minor at DOW. At first she received two letters per week and then it went to one letter per week. The letters did not suggest how the minor should be cared for, express any wishes as to his religion or education, or contain inquiries about the minor's health.

¶ 11 Maribel further testified that she never took any efforts to interfere with the respondent contacting the minor. Since April 2017, she and her husband solely provided for all of the minor's care and medical needs. They took the minor on vacation with them. The minor calls them "MeMa Momma" and "PaPa Daddy." Since April 2017, the respondent had not provided financial support, visited, communicated about the minor's school plans, provided clothes or medical care, or provided any emotional support for the minor.

¶ 12 On cross-examination Maribel testified that she was originally getting two letters per week from the respondent for the minor. Eventually, it went down to one letter per week. She read some of the letters, but not all of them. For the most part, the letters were about the respondent—what music he liked and that he would take the minor to the park one day, but that

he could not do that currently because he was on a timeout. She did not read the letters to the minor. The respondent's parents came to church one Sunday and spoke to her husband. They accused her husband of taking their grandchild away from a mentally ill mother.

¶ 13 Maribel's husband, Dennis, testified that on one Sunday, after he and Maribel filed for adoption, the respondent's parents came to the church they attend. They did not inquire about the minor's well-being, they just expressed dissatisfaction with the adoption proceedings. He gave them his contact information and told them they could schedule a time to come by the house and visit the minor. However, they never called him.

¶ 14 Elizabeth Smith testified that she was the respondent's mother. The respondent was incarcerated in Connecticut but was due to be released no later than January 2019. After that, the respondent would be living at home and there was room for the minor as well. She and the respondent's father lived in a three-bedroom house. There were shoes and toys and clothes at her house for the minor—things that the respondent had purchased. Gabby had brought the minor to their home to visit twice in 2016. The respondent and the minor played and interacted well together. Elizabeth testified that she wanted to be part of the minor's life. After the respondent left in March 2017, she often tried to contact Gabby and the minor but was unsuccessful. When she and her husband went to the petitioners' church, she gave them her contact information and indicated that she would like to see the minor, but the petitioners never called her.

¶ 15 On cross-examination, Elizabeth testified that the respondent had been in prison in Connecticut since March 2017. He was imprisoned for failing to appear on domestic violence charges involving strangulation. The respondent was due to be released from prison but needed to wait until there was an opening at a halfway house. They moved from Connecticut to Illinois in 2013. The respondent went back to face his charges in 2017.

¶ 16 Lenny Smith testified that he was the respondent's father. He was there when the minor came to his house twice in 2016. He had also driven the respondent to visit the minor at the Cherryvale Mall on three occasions and at the laundromat once. On all those occasions, the respondent interacted well with the minor and played appropriately with him. Gabby had also picked up the respondent from the house in her own car on a couple of occasions and the minor was also in the car. They went to the petitioners' church to introduce themselves and inform the petitioners that they would like to have a relationship with their grandson. However, the petitioners never contacted them.

¶ 17 Following the May 14, 2018, fitness hearing, the trial court filed a disclosure of *ex parte* contact with the court. The trial court described receiving a letter from the respondent. The trial court read the first line of the letter, determined that it involved an active case, and read no further. A copy of the letter was provided to each counsel of record. In that letter, the respondent set out what would have been his testimony in support of his fitness during the May 2018 hearing.

¶ 18 On June 18, 2018, the trial court rendered its ruling as to fitness. The trial court found that the petitioners had failed to prove that the respondent was unfit on the basis of abandonment (750 ILCS 50/1(D)(a) (West 2016)), desertion (750 ILCS 50/1(D)(c) (West 2016)), or failure to provide adequate food, clothing, or shelter (750 ILCS 50/1(D)(o) (West 2016)). However, the trial court found that the evidence proved that the respondent was unfit on two other grounds, failure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare (750 ILCS 50/1(D)(b) (West 2016)) and manifesting an intent to forgo parental rights by failing to visit with the child, communicate with the child, or maintain contact with the child for a period of 12 months or more (750 ILCS 50/1(D)(n)(1) (West 2016)).

¶ 19 Regarding the failure to maintain a reasonable degree of interest, concern, and responsibility, the trial court found that the respondent's efforts in this regard were insufficient. The trial court noted that the respondent did not see the minor until he was already one year old. Thereafter, in 2016, the respondent only saw the minor on eight occasions and did not provide any monetary support, other than a few items of clothing.

¶ 20 Regarding the manifestation of intent to forgo parental rights, the trial court noted that, for the first year and a half of the minor's life, the respondent did not visit the child, plan for the child or provide support for the child. The trial court noted that there was contact in 2016, but that it was sporadic and infrequent. The trial court acknowledged that the respondent had filed a motion for visitation in the child support action that was commenced by the Illinois Department of Healthcare and Family Services. However, before that motion was acted upon, the respondent turned himself into the authorities in Connecticut and had been incarcerated there since March 2017. Thus, since March 2017, the respondent had not visited or planned for the minor's welfare. The trial court acknowledged that the respondent had sent some letters to DOW, but found that those letters did not adequately express a reasonable degree of interest or concern for the minor. Accordingly, the trial court declared the respondent unfit on the basis of sections 50/1(D)(b) and 50/1(D)(n)(1) of the Adoption Act.

¶ 21 A best interest hearing followed the trial court's fitness ruling. Maribel testified that the minor had lived continuously at DOW except for a period of time from April 2016 to July 2017. The minor was currently three years old and referred to her and her husband as mama and daddy. She and her husband provided for all of the minor's needs. He was a part of their family, attended church with them, and went on vacation with them. Following argument, the trial court found that it was in the best interest of the minor that the respondent's parental rights be

terminated. A written order consistent with these findings was entered on June 19, 2018. Thereafter, the respondent filed a timely notice of appeal.

¶ 22 ANALYSIS

¶ 23 On appeal, the respondent argues that he received ineffective assistance of counsel. The respondent contends that the only evidence that the trial court used to terminate his parental rights were his answers to the request to admit. The respondent argues that his attorney was ineffective in failing to present evidence from the respondent via affidavit, deposition, or by a telephonic or video court appearance. Had this been done, the respondent asserts that he would have testified that, during most of her pregnancy, Gabby lived with him at his parents' home. She left their home in November 2014 and from that point until March 2016, he did not know where Gabby was located or whether she had given birth. Gabby did not respond to his texts or phone calls and he was unsuccessful in locating her. He first found out he had a son in March 2016, when the parentage suit was filed. At that time, he asked Gabby why she did not respond to his texts and phone calls. She told him that DOW's rules prohibited her from contacting him.

¶ 24 The respondent contends that he would have further testified that, between March 2016 and November 2016, he would visit with Gabby and the minor as much as he could. He did as much as he could to provide for them, but it was difficult because he did not have a job. He would fail potential employers' background checks due to two outstanding arrest warrants in Connecticut. In November 2016, Gabby stopped allowing him to visit, so he filed a motion in the parentage suit seeking court-ordered visitation. In that action, he was ordered to submit job diaries and to participate in mediation. During mediation, he decided that the best option to allow him to support his son would be to clear his arrest warrants in Connecticut. He told the mediator that he would be leaving Illinois to do so. When he left in March 2017, Gabby and the minor were living in Freeport. Gabby was working and the minor was attending daycare. He

did not know until July 2017 that Gabby had surrendered custody of the minor to the petitioners. He then wrote to the trial court to request that his parents be appointed as the minor's guardians and for the appointment of counsel to represent him. On appeal, the respondent argues that, had he been able to present the foregoing testimony in some form, the trial court's fitness ruling would have been different.

¶ 25 At the outset, we note that the foregoing allegations concerning the testimony or evidence that the respondent would have presented on his own behalf is supported in his appellant brief by an offer of proof included in the respondent's appendix. The offer of proof includes, in relevant part, an affidavit from the respondent, amended responses to the petitioners' request to admit, and a letter from the correctional facility in Connecticut indicating that telephone deposition of an inmate could be arranged. However, the information in the offer of proof is not part of the record on appeal. It is well settled that the record on appeal cannot be supplemented by simply attaching documents to the appendix of a brief. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001). We cannot consider improperly appended documents not included in the record on appeal. *Id.* Accordingly, we will not consider the information presented in the offer of proof. However, we will consider the allegations presented in the body of the appellant's brief.

¶ 26 In a termination of parental rights proceeding, parents are entitled to effective assistance of counsel. *In re R.G.*, 165 Ill. App. 3d 112, 127 (1988); see also 705 ILCS 405-1-5(1) (West 2016) (indigent parents have the right to be represented by an attorney in a juvenile proceeding). A claim of ineffective assistance of counsel in the context of a proceeding for the termination of parental rights is analyzed by applying the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re A.J.*, 323 Ill. App. 3d 607, 611 (2001). To prevail on a claim of ineffective assistance of counsel, the respondent parent must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that,

but for the deficient performance, the result of the proceeding would have been different. *Id.* A failure to satisfy either prong of th*e Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 27 In the present case, even if counsel's performance was deficient in failing to present evidence from the respondent via affidavit, deposition, or video or telephonic court appearance, we would still reject the respondent's claim of ineffective assistance of counsel because respondent has failed to establish that he was prejudiced. The allegations that the respondent argues he could have presented by affidavit, deposition, or testimony were also stated in the September 8, 2017, letter that the respondent sent to the trial court and presented by his parents' testimony at the fitness hearing. Specifically, in his September 2017 letter, the respondent explained that he was kept from the minor for the first year of the minor's life and explained that he went to Connecticut to clear his warrants so that he could be better able to find a job and support the minor. At a status hearing on November 20, 2017, the trial court acknowledged that it had received and read the letter.

¶ 28 Further, the respondent's parents testified that the respondent was unemployed and living with them in 2016. They also testified that there were clothes and toys at their home for the minor and that these items had been provided by the respondent. His parents further testified that the respondent did visit with the minor at their home, at the mall, and at the laundromat. During those visits, the respondent interacted well with the minor. This testimony showed that the respondent did visit with the minor and provide as much as he could for the minor. Accordingly, any deposition or video/telephonic court appearance by the respondent would not have provided any new information. Thus, any failure of counsel to present such affidavit, deposition, or testimony was not prejudicial.

¶ 29 We acknowledge that, in finding the respondent unfit, the trial court stated that the respondent did not initiate contact or provide for the minor during the first year of the minor's life. We further acknowledge the respondent's contention on appeal that he had tried to contact Gabby and the minor but was unsuccessful. However, we cannot say that any misapprehension as to the reason for his being absent during the minor's first year was prejudicial because the trial court's fitness finding was based on other time periods as well. The trial court noted that between March and November 2016 there were only a handful of visits and the respondent did not provide any financial support for the minor. The trial court acknowledged that the respondent had filed a motion for parenting time in the support action, but also noted that before the motion was ever acted on, the respondent left Illinois and had been incarcerated in Connecticut ever since. Since then, the trial court found that the respondent had failed to visit or make any plans for the minor. The trial court acknowledged that the respondent wrote letters, but found that the letters did not reflect a reasonable degree of interest or concern for the minor. Accordingly, as the trial court's fitness determination was based on more than the minor's first year of life, we cannot say that the respondent was prejudiced by the lack of any direct evidence from him concerning the circumstances following the minor's birth.

¶ 30 The respondent also argues that counsel was ineffective because the responses to the petitioners' request to admit were not verified by the respondent as required by Supreme Court Rule 216 (eff. July 1, 2014). We agree that denials must be supported by a sworn statement from the party. *Id.* However, this also does not establish ineffective assistance of counsel because the respondent was not prejudiced by the fact that only his attorney signed the responses to the request to admit. Neither the petitioners nor the trial court challenged the denials in his responses to the request to admit based on the lack of the respondent's verified signature.

¶ 31 Finally, the respondent notes that the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2016)) is not applicable to cases involving termination of parental rights. Because of this, other reviewing courts, in termination of parental rights cases, have remanded claims based on ineffective assistance for development of the necessary factual record, while retaining jurisdiction. The defendant cites to *In re A.H.*, 2017 IL App (4th) 160769-U, ¶ 218, and *In re Ch.W.*, 399 Ill. App. 3d 825, 830 (2010), in support of his request for us to remand the case for a hearing on his claim of ineffective assistance. However, in this case, unlike the cited cases, the respondent's arguments on appeal do not warrant remand because the information he argues should have been presented by appellate counsel was presented to the trial court through his September 2017 letter and the testimony of his parents at the fitness hearing.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed.

¶ 34 Affirmed.