

2019 IL App (2d) 190216-U

No. 2-19-0216

Order filed July 12, 2019

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> Z.M., a minor)	Appeal from the Circuit Court
)	of Winnebago County.
)	
)	No. 17-JA-0351
)	
(The People of the State of Illinois, Petitioner- Appellee, v. Willie M., Respondent- Appellant).)	Honorable Mary Linn Green, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Appellate counsel’s motion to withdraw is granted as there are no issues of arguable merit regarding (1) the notice provided to respondent father, the trial court’s findings that (2) the minor was neglected, (3) respondent father is unfit, and (4) that it is in the best interests of the minor that his parental rights be terminated. (5) There is no issue of arguable merit that the trial court erred in denying respondent’s motion to continue the best interests hearing or (6) that the trial court’s order to terminate respondent’s parental rights was against the manifest weight of the evidence.

¶ 2 Respondent, Willie M., appeals the trial court’s order terminating his parental rights with respect to his minor child, Z.M. Respondent’s appointed appellate counsel has filed a motion to withdraw pursuant to *Anders v. State of California*, 386 U.S. 738 (1967), asserting that there are

no issues of arguable merit to be raised on respondent's behalf. For the following reasons, appellate counsel's motion is granted.

¶ 3

I. BACKGROUND

¶ 4 Z.M. was born on March 31, 2017. She and her mother, S.B., were living with her maternal grandparents until November 18, 2017, when S.B. died of a heroin overdose. At the time of S.B.'s death, respondent was being held in the Winnebago County jail on pending manufacturing and delivery of narcotics charges. Because of these unfortunate circumstances, Z.M. was left in the care of her maternal grandmother, who lost custody of all of her own children, and maternal step-grandfather, who served prison time for sexual offenses against children.

¶ 5 On November 22, 2017, the State filed a six-count neglect petition, asserting that Z.M. was neglected because (1) she was born with a controlled substance in her urine, blood, or meconium; (2) she was not receiving the proper support and care necessary for her well-being as her mother died from using drugs; (3) her environment was injurious to her welfare due to her mother's substance abuse problem; (4) her environment was injurious to her welfare because her mother failed to correct conditions which led to her half-sibling being removed from her mother's care; (5) her environment was injurious to her welfare because she was left with an inappropriate caregiver; and that she was abused because (6) her mother allowed an untreated sex offender to have contact with Z.M.¹ The same day, respondent waived his right to a shelter care hearing. The trial court found that there was an urgent and immediate necessity to place guardianship and custody of Z.M. with the Department of Child and Family Services (DCFS) and gave DCFS the discretion to place Z.M. with a responsible relative.

¹ At a later date, the State dismissed counts 1, 4, 6 of the neglect petition.

¶ 6 On January 4, 2018, the State filed an amended neglect petition, requesting that the trial court terminate respondent's parental rights and appoint DCFS as legal guardian with the power to consent to adoption. The State alleged that respondent was unfit for three reasons: (1) he failed to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare; (2) he is deprived; and (3) prior to his current incarceration, he had little to no contact with Z.M. and his incarceration will prevent him from discharging his parental responsibilities. Because respondent's paternity had not yet been established,² the State also requested that the court terminate the rights of any potential father as well. On January 17, respondent, through counsel, waived the 90-day hearing and the trial court scheduled the combined adjudication and hearings on unfitness and best interests for April 2018. On February 20, 2018, after the determination that respondent was the biological father of Z.M., the State filed a second amended neglect petition, eliminating the notice to Z.M.'s potential fathers. The State later dismissed the first and third counts of respondent's unfitness, focusing exclusively on respondent's depravity as the basis for his unfitness.

¶ 7 Although the trial court scheduled the combined hearing to start on April 5, 2018, respondent's counsel informed the court that she had just received discovery documents from the State and asked for a continuance. Further, respondent requested that he be allowed to proceed *pro se* in the termination proceedings. Respondent expressed to the court that he felt that counsel was "not fighting with [him]" but rather "fighting against [him]." The court granted counsel's motion for a continuance until April 25, 2018, and urged respondent to allow counsel to continue to aid him.

² Respondent was adjudicated as Z.M.'s biological father on January 17, 2018.

¶ 8 On April 17, respondent filed several *pro se* motions, including motions to substitute counsel, to “expunge” the indicated finding of child neglect, and to remove Z.M. from her current foster home. On April 25, the trial court heard respondent’s arguments for his motion to substitute counsel. Respondent argued that “we can’t work together because we don’t agree on anything. I mean, as I said before, she only discuss lose, lose, lose for me. And I’m not ready to throw in the towel with my daughter. I want to keep her.” Respondent’s counsel then motioned the court to vacate her appointment as there was a fundamental breakdown in the attorney/client relationship. Over the State’s objection that filing the motions was a delay tactic by respondent, the trial court granted counsel’s motion and appointed another attorney to represent respondent. The case was continued for a pre-trial conference on May 1. On May 1, respondent’s new counsel appeared and set the case for the combined hearing on the State’s second amended petition.

¶ 9 The combined hearing to adjudicate neglect, determine unfitness, and decide whether it was in Z.M.’s best interests to terminate respondent’s parental rights was held over five days from July 19, 2018 to March 21, 2019. The State presented testimonial evidence from four police officers. The first testified as to S.B.’s overdose, explaining that he found two hypodermic needles in S.B.’s home, one next to a burnt metal spoon. He further testified that paramedics used NARCAN in an attempt to revive S.B., but she was pronounced dead at a hospital.

¶ 10 The second, a member of the Winnebago County Sheriff’s Department’s narcotics division, testified that, while on duty on February 22, 2016, he was involved with arresting respondent. As part of an investigation into respondent, he followed respondent from a controlled drug sale to a residence and placed respondent into custody. Upon searching

respondent, the deputy found two cell phones and \$50 in cash that was later identified as the marked bills used to purchase narcotics from respondent.

¶ 11 A third officer also testified about the controlled buy on February 22, 2016. The officer testified that a cooperating witness agreed to purchase \$30 of heroin and \$20 of crack cocaine from respondent. Respondent told the cooperating witness to meet him at a McDonald's restaurant, which was approximately 500 feet away from a church. The officer dropped the cooperating witness off at the restaurant with \$50 in marked bills and searched the cooperating witness to ensure that the witness had no drugs on him before the buy. The officer witnessed respondent pull up to the McDonald's, and the cooperating witness got inside of respondent's car for about a minute. The cooperating witness then returned to the officer's vehicle with two bags of substances that field tested positive for heroin and cocaine.

¶ 12 A final officer testified that on September 20, 2016, he was on duty as an evidence recovery officer and participated in the execution of a search warrant of respondent's home. Respondent let the officers into the home and remained secured in the home throughout the search. The officer testified that he recovered several individually packaged baggies of substances that field tested positive for both crack cocaine and heroin. Combined, the individual baggies of the crack cocaine weighed in at 5.3 grams and the baggies of heroin weighed in at 1.2 grams. The officer further testified that the police recovered 16.3 grams of a substance that field tested positive for cocaine that was not individually packaged, \$1,250 in cash along with respondent's state-issued identification card in a pair of pants, and a gram scale. Upon cross-examination, the officer testified that he did not personally witness respondent engaging in any drug sales.

¶ 13 The State introduced several documents, which the court admitted into evidence. These documents included 11 certified copies of respondent's felony convictions from Winnebago and Stephenson Counties ranging from 1979 through 2015, S.B.'s death certificate, two indicated DCFS files dealing with S.B. and her mother, an integrated assessment related to Z.M.'s maternal half-sibling, and the integrated assessment for Z.M., dated January 3, 2018.

¶ 14 The State also called Z.M.'s caseworker as a witness. She testified to the integrated assessment dated January 3, 2018. In the assessment, the caseworker testified that respondent stated his main source of income was selling drugs and "hustling." She also testified that respondent said that he was not in a position to be Z.M.'s primary caregiver due to his incarceration. Respondent did not put on any testimony or evidence on his behalf.

¶ 15 The State argued that it proved Z.M. to be neglected because it established, by a preponderance of the evidence, through S.B.'s death certificate and the first officer's testimony, that Z.M. was not receiving proper support and care and was in an injurious environment due to her mother's drug use. The State also argued that S.B.'s death left Z.M. with inappropriate caregivers as her maternal grandmother and step-grandfather were not fit to care for Z.M. based on her prior DCFS involvement and his child sex offender status.

¶ 16 Relating to respondent's unfitness, the State argued that it proved both the statutory presumption of depravity and that respondent was depraved because he had an inherent deficiency of moral sense and rectitude. The State identified the 11 certified copies of respondent's felony convictions dating back to 1979 and noted that his most recent conviction was in 2015, which was fewer than five years ago. The State also identified that respondent failed to present any evidence that would rebut the presumption of his depravity. The State then argued that even if it did not meet the presumption of depravity, it established through the

testimony of the other three officers that respondent had a deficient sense of moral rectitude. The State argued that the officers' testimony established that respondent was still selling drugs. Further, there was no evidence presented that respondent has an ability "to successfully reside in the community without committing criminal offenses" as he identified that he supports himself financially by "hustling and selling drugs."

¶ 17 Respondent's counsel argued that the State did not prove that Z.M. was neglected, but provided no reasoning as to why. Counsel further argued that respondent was not given proper notice of the expedited proceedings, citing 705 ILCS 405/1-2 (West 2018), as there was no evidence to suggest that respondent has "an incapacity to care for [Z.M.] or has an extremely poor prognosis for treatment or rehabilitation that would justify the expedited termination."

¶ 18 On November 5, 2018, the trial court found that, as to the second amended neglect petition, the State proved by a preponderance of the evidence counts 2, 3, and 5 of the neglect petition and that, by clear and convincing evidence, respondent was unfit as to count 2. For neglect, the court reiterated the testimony and evidence admitted into the record, including S.B.'s drug overdose, the maternal grandparents' histories of DCFS involvement and sex offenses, respondent's history of selling drugs since the 1970s, and his current incarceration for selling drugs within 1000 feet of a church. For unfitness, the court found that the State proved both the presumption of depravity and a deficient sense of moral rectitude.

"THE COURT: *** [T]he State presented evidence of three felony counts, with at least one being within the last five years ***. That presumption was not rebutted in any way. And according to the evidence, in 2016, the father continued the sale of drugs that field tested positive."

¶ 19 On March 21, 2019, the trial court concluded the disposition and best interest portion of the hearing. Respondent's counsel reported that respondent was ill and that he decided to not be present in court because he may have had to make "frequent trips to the washroom." His counsel requested a continuance so that respondent could testify on his own behalf. The trial court denied counsel's motion for continuance, noting that when the case began Z.M. was seven months old and that she would be two years old soon. Thus, the court found, it was in Z.M.'s best interest to proceed with the hearing.

¶ 20 The State called the caseworker, who testified that respondent and Z.M. have had weekly visitation via video conferences, but that respondent had not provided for Z.M.'s needs with clothing, food, or shelter. Z.M. has been placed for the entirety of the proceedings with S.B.'s cousin, who has provided for all of Z.M.'s needs, including a recent surgery to correct a tongue-tie. The foster family has also ensured that Z.M. has appropriate contact with respondent's family. Z.M. has bonded with her foster family, has a typical sibling relationship with the foster family's children, and seeks her foster mother out for comfort and direction.

¶ 21 The caseworker further testified that she could not place Z.M. with respondent because he is currently incarcerated. Upon his release, respondent would have to complete services, find safe and suitable housing, and get a job, all of which "take[] a long time." The caseworker testified that would not be in Z.M.'s best interests because she views her foster family as her family and does not have any sort of bond with respondent. "[I]f we were to delay permanency and wait for him to complete any sort of services, it would just be a traumatic thing for her to be returned to him ***."

¶ 22 Upon cross-examination, the caseworker testified that respondent has never missed a visit with Z.M. and that he appears to love her. Respondent's counsel did not put on any evidence on

his behalf, instead renewing his motion to continue to allow respondent to testify. The trial court again denied the motion.

¶ 23 After considering the statutory best interest factors and considering the arguments of the counsel, the trial court found that the State met its burden and proved that respondent was unfit or unable to care for, train, or discipline Z.M. and that it is in her best interests that respondent's parental rights be terminated. "By all measure, by all evidence, all of his minor's needs are being met by her foster family. It's obvious that that is where her love, attachment and security exists and where I believe it would be in her best interest to stay for the rest of her life." The court entered an order terminating respondent's parental rights. Respondent timely appealed.

¶ 24 Appellate counsel was appointed to represent respondent on April 4, 2019. On May 8, counsel moved to withdraw pursuant to *Anders*, 386 U.S. 728, and filed a memorandum in support thereof in this court. Counsel served respondent with a copy of the motion and memorandum, and we advised respondent that he had 30 days to respond. On May 15, respondent filed a motion for an extension of time to substitute counsel, asking this court to grant an extension of over 90 days to find counsel upon his release from incarceration. We granted respondent's motion in part, allowing him 30 days to file either a motion to substitute counsel or a response to counsel's *Anders* motion. Respondent filed two additional motions during the 30 days, both of which merely reiterate his desire to procure counsel upon his release from incarceration. As respondent did not file a proper motion to substitute counsel or a response to the *Anders* motion within the allotted 30-day timeframe, we will now address counsel's *Anders* motion on the merits.

¶ 25

II. ANALYSIS

¶ 26 The Juvenile Court Act of 1987 (Act) sets forth the procedures for the involuntary termination of parental rights. Generally under this procedure, the trial court must find, by a preponderance of the evidence, that the child is neglected, abused, or dependent. 705 ILCS 405/2-10(2) (West 2018). Following an adjudication of neglect, the court will then conduct an dispositional hearing to determine whether it is in the minor’s best interests to be made a ward of the court and, if so, to hear evidence regarding what disposition will best serve “the health, safety and interests of the minor and the public.” *Id.* at § 405/2-22(1). If reunification cannot occur and the State seeks to terminate parental rights, the trial court must then engage in a bifurcated process. The court must first determine, by clear and convincing evidence, the parent to be an “unfit person” pursuant to one or more grounds set out in the Adoption Act (750 ILCS 50/1(d) (West 2018)). If a court finds a parent unfit, then the court will determine, by a preponderance of the evidence, whether the termination of the parental rights is in the best interests of the minor. 705 ILCS 405/2-29(2) (West 2018); See also *In re Tyianna J.*, 2017 IL App (1st) 162306, ¶¶ 43-44.

¶ 27 However, in certain cases, such as when the parent is incapable of caring for the child and has a poor prognosis for rehabilitation, the Act permits for an expedited process to terminate parental rights. A trial court may terminate parental rights at a dispositional hearing when “all of the following conditions are met”: (i) “the original or amended petition contains a request for termination of parental rights and appointment of a guardian with power to consent to adoption”; (ii) the abuse, neglect, or dependency of the minor has been found by a preponderance of the evidence; (iii) parental unfitness has been found by clear and convincing evidence; and (iv) “the court determines in accordance with the rules of evidence for dispositional proceedings” that (A) it is in the best interests of the minor and the public for the minor to be made a ward of the court,

(B) reasonable reunification efforts are inappropriate or unsuccessful, and (C) the termination of parental rights is in the minor's best interests. 705 ILCS 405/2-21(5) (West 2018); *In re Tyianna J.*, 2017 IL App (1st) 162306, ¶ 45.

¶ 28 In the memorandum of law attached to the *Anders* motion,³ appellate counsel identifies six potential issues: (1) respondent was not given required notice that the case would be held on an expedited basis; (2) the evidence did not establish that Z.M. was neglected; (3) the evidence did not establish that respondent was an unfit person; (4) the evidence did not establish that it was within Z.M.'s best interests that respondent's parental rights be terminated; (5) the court improperly denied counsel's motion for a continuance during the best interests proceedings; and (6) the order terminating respondent's parental rights was against the manifest weight of the evidence. With respect to all issues, counsel argues that no meritorious argument could be made that the bases for the trial court's findings were against the manifest weight of the evidence, *i.e.*, that an opposite conclusion is readily apparent. *In re Joshua S.*, 2012 IL App (2d) 120197, ¶ 44. We address each contention below.

¶ 29

A. Notice

¶ 30 We begin with the first issue appellate counsel argues is non-meritorious, which is that respondent was not provided with appropriate notice of the expedited proceedings. During the adjudication portion of the hearings, trial counsel argued that the State did not prove which

³ We take this opportunity to remind appellate counsel that memoranda in support of *Anders* motions should provide authority as to why the trial court's findings are not against the manifest weight of the evidence as the appellate court is "entitled to have the issues clearly defined and to be [given] pertinent authority." See *In re Austin C.*, 353 Ill. App. 3d 942, 985-6 (2004).

subsection in the policy section of the Act the State used to decide to expedite this case. See 705 ILCS 405/1-2(1)(a)-(c) (West 2018) (identifying three reasons why the State may seek to expedite the termination of parental rights). However, that is not the state of the law. *In re Tyianna J.* held that the policy statements in section 1-2(1) of the Act “merely provide guidance” regarding when it may be appropriate for the State to seek expedited termination proceedings and do not set forth the criteria necessary for early termination of parental rights. 2017 IL App (1st) 162306, ¶ 63. Indeed, the trial court followed the established criteria and made the required findings for expedited termination cases as laid out in section 2-21(5) of the Act. 705 ILCS 405/2-21(5) (West 2018); *In re N.B.*, 2019 IL App (2d) 180797, ¶ 26. We therefore agree with appellate counsel that there is no meritorious argument to be made that respondent was not given notice of the expedited proceedings.

¶ 31

B. Adjudication of Neglect

¶ 32 The next issue appellate counsel raises involves the adjudication of Z.M. as a neglected minor. The trial court adjudicated Z.M. neglected because she was not receiving the proper care necessary for her well-being and because she was in an injurious environment due to S.B.’s drug use and being left with inappropriate caregivers. Because the trial court is in the best position to assess the credibility of the witnesses, its findings of abuse or neglect are entitled to great deference on appeal and will be disturbed only if they are against the manifest weight of the evidence. *In re M.W.*, 386 Ill. App. 3d 186, 196 (2008). Here, we see no issue with the court’s finding Z.M. to be neglected, as the evidence clearly shows that her mother, S.B. died of a heroin overdose, which left Z.M. with her maternal grandparents, neither one an appropriate caregiver given their history of DCFS involvement and prior sexual offenses against children. We again

agree with appellate counsel that respondent has no meritorious argument that the trial court's finding of neglect was against the manifest weight of the evidence.

¶ 33

C. Unfitness

¶ 34 The trial court found respondent unfit on the single ground of depravity, pursuant to section 1(D)(i) of the Adoption Act. 750 ILCS 50/1(D)(i) (West 2018). That section provides that there is rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least three felonies and at least one of those felonies occurred within five years of the filing of the motion seeking to terminate his parental rights. *Id.* The presumption can be rebutted if the parent presents evidence showing that, despite the convictions, he is not depraved. *In re A.M.*, 358 Ill. App. 3d 247, 253 (2005). Depravity is defined as “an inherent deficiency of moral sense and rectitude.” *In re Abdullah*, 85 Ill. 2d 300, 305 (1981). We will not set aside the trial court's finding that there was clear and convincing evidence of respondent's unfitness unless that finding is against the manifest weight of the evidence. *In re A.P.*, 277 Ill. App. 3d 592, 598 (1996).

¶ 35 Here, the State presented 11 copies of certified felony convictions dating back to 1979; these convictions include robbery, forgery, unlawful possession of a stolen vehicle, attempt possession with intent to deliver controlled substance, theft, obstructing justice, and possession of a controlled substance. On September 2, 2015, respondent was convicted of attempted possession with intent to deliver a controlled substance. That is well within 5 years of February 20, 2018, when the State filed its second amended neglect petition, which sought to terminate his parental rights. The State established the statutory presumption of depravity. Respondent failed to present any evidence to rebut the presumption. Therefore, we agree with appellate counsel that

no meritorious argument could be made that the basis for the trial court's finding of unfitness was against the manifest weight of the evidence.

¶ 36 D. Best Interests

¶ 37 We now examine the issue with the trial court's determination of the best interests of Z.M. Once a trial court has determined a parent to be unfit, considerations regarding parental rights yield to the best interest of the child. *In re Shru. R.*, 2014 IL App (4th) 140275, ¶ 23. The trial court must consider a number of statutory factors in the context of the child's age and developmental needs, including the physical safety and welfare of the child and the child's sense of attachments, security, familiarity, and love. 705 ILCS 405/1-3(4.05)(a-j) (West 2018). We will only reverse a trial court's finding, which must be supported by a preponderance of the evidence, that termination of parental rights is in a minor's best interests if it is against the manifest weight of the evidence. *In re Julian K.*, 2012 IL App (1st) 112841, ¶ 65.

¶ 38 Here, the trial court heard testimony from Z.M.'s caseworker that respondent had not provided clothing, food, or shelter for Z.M. for her entire life, that Z.M. has a typical sibling relationship with her foster siblings and seeks out her foster mother for comfort and direction. The court also heard testimony that it would be "traumatic" for Z.M. to be placed with respondent. Respondent, in turn, offered no evidence at the best interests stage of the combined hearing. Keeping in mind the evidence before it in light of the statutory factors, the court found that, "[b]y all measure, by all evidence, all of his minor's needs are being met by her foster family. It's obvious that that is where her love, attachment and security exists ***." We agree with appellate counsel that no meritorious argument could be made that the trial court's finding was inconsistent with the testimony presented and cannot find that it was against the manifest weight of the evidence.

¶ 39

E. Denial of Motion for Continuance

¶ 40 During the best interests portion of the combined hearing, the trial court denied trial counsel's motion for a continuance so that respondent could be present in the courtroom. The decision whether to grant a motion for a continuance depends on the particular facts and circumstances surrounding the request and is within the sound discretion of the trial court. *In re Hannah E.*, 376 Ill. App. 3d 648, 655 (2007). The trial court's denial of a motion to continue will not be set aside unless it amounts to an abuse of discretion, which occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *In re Parentage of I.I.*, 2016 IL App (1st) 160071, ¶ 29.

¶ 41 Counsel informed the trial court that respondent was ill and chose to not appear before it, as he may have had to make "frequent trips to the washroom." In denying counsel's motion for a continuance, the court found that it was in Z.M.'s best interests to proceed with the hearing, given the expedited nature of the case and that it had been going on for nearly a year-and-a-half. We find no fault with the trial court's denial of counsel's motion for a continuance and do not believe it to be arbitrary or unreasonable. We therefore agree with appellate counsel that there is no issue of arguable merit that the trial court erred in denying the motion to continue.

¶ 42

F. Judgment Terminating Parental Rights

¶ 43 The final potential issue that appellate counsel identified was that the judgment to terminate respondent's parental rights was against manifest weight of the evidence. We will not belabor the point by restating the evidence presented except to say that the trial court followed the correct procedures and the State presented evidence of respondent's unfitness and the best interests of Z.M.—while respondent failed to present any evidence on his behalf. The court's

judgment terminating respondent's parental rights was not against the manifest weight of the evidence.

¶ 44

III. CONCLUSION

¶ 45 After examining the record, the motion to withdraw, the accompanying memorandum of law, and relevant authority, we agree with appellate counsel that no meritorious issue exists that would warrant relief in this court. We therefore allow counsel's motion to withdraw in this appeal and affirm the judgment of the circuit court of Winnebago County finding defendant unfit and terminating his parental rights.

¶ 46 Affirmed.