2016 IL App (4th) 160448-U

NO. 4-16-0448

FILED
November 10, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: S.M., a Minor,	)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	McLean County
v.	)	No. 15JA75
LAVERA D. MARSHALL,	)	
Respondent-Appellant.	)	Honorable
	)	Kevin P. Fitzgerald,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: In this parental termination proceeding, the appellate court rejected respondent's claim that she was deprived of the effective assistance of counsel.

¶ 2 In April 2016, the State filed a petition to terminate the parental rights of respondent, Lavera D. Marshall, as to her son, S.M. (born July 28, 2015). Following a May 2016 fitness hearing, the trial court found respondent unfit in that she was depraved pursuant to section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2014)). At a best-interest hearing conducted immediately thereafter, the court terminated respondent's parental rights.

¶ 3 Respondent appeals, arguing that she was deprived of the effective assistance of counsel because trial counsel failed to present any evidence to rebut the State's *prima facie* case of depravity. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Events Preceding the State's Motion To Terminate Parental Rights

¶ 6 1. *The State's Amended Wardship Petition and Shelter-Care Hearing*

¶ 7 In August 2015, the State filed an amended petition for adjudication of wardship, alleging that S.M.'s environment was injurious to his welfare under section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2014)) in that respondent (1) remained an unfit parent in Cook County case No. 13-JA-506 (formerly McLean County case No. 12-JA-37) and (2) had unresolved anger-management issues. (The record shows that McLean County case No. 12-JA-37 was opened in 2012 and subsequently transferred to Cook County.) In August 2015, the Department of Children and Family Services (DCFS) filed a shelter-care report, revealing that S.M. was born in jail while respondent awaited adjudication of an aggravated assault charge (McLean County case No. 15-CF-813). DCFS also confirmed its involvement in case No. 13-JA-506, which involved respondent's two other children, I.M. (age 7), whom DCFS placed in traditional foster care, and L.M. (age 2), whom DCFS placed with a relative (I.M. and L.M. reside in Chicago). DCFS reported that in case No. 13-JA-506, respondent (1) had unresolved anger-management issues and (2) failed to comply with mental-health treatment and individual counseling. At a shelter-care hearing held shortly thereafter, the trial court found that an immediate and urgent necessity required S.M.'s placement in shelter care.

¶ 8 2. *The Adjudicatory Hearing*

¶ 9 At an October 2015 adjudicatory hearing, the State presented the following evidence. (Because respondent's appeal does not challenge the trial court's adjudicatory finding, we provide only a brief summary of the evidence presented to provide context.)

¶ 10 Nancy Cooley, a DCFS investigator, testified about respondent's demeanor during (1) DCFS' investigation concerning S.M. and (2) the August 2015 shelter-care hearing. When Cooley spoke with respondent about her lack of progress in case No. 13-JA-506, respondent became loud, emotional, argumentative, and angry, and she did not understand why DCFS was attempting to take S.M. into protective custody. At one point, respondent spoke by speakerphone, with Chicago DCFS caseworkers and "yelled" in a "very angry" tone that "she had done more on her service plan than what the caseworkers were portraying" and, thereafter, "hung up on them." At the August 2015 shelter-care hearing, Cooley observed that after the trial court granted DCFS temporary custody of S.M., respondent "was very upset and stormed out of the courtroom, and [respondent's] attorney had to go after [respondent] and coax her into the [court]room." Respondent then accused the court of being biased.

¶ 11 Edward Shumaker, a Bloomington police sergeant, testified that in June 2015, he drove to an apartment complex to arrest respondent for aggravated battery. Upon exiting his squad car, Shumaker observed respondent refusing to comply with a probation officer's orders. As Shumaker approached, respondent walked into an apartment despite Shumaker's repeated commands to stop. Shumaker followed, and upon arresting respondent, she became angry. Respondent yelled at Shumaker in an angry tone, " 'Your white cracker mother should have died before having your cracker ass.' " (The record shows that the State's aggravated battery charge alleged defendant spat in the face of a store clerk.)

¶ 12 Correctional officers Jennifer Reuter, Scott Kerr, Amanda Reeves, and Jayson Lynch testified about respondent's demeanor during incidents that occurred in July 2015, when respondent was incarcerated in the McLean County jail. The officers explained respondent's unprovoked (1) racial epithets; (2) threats of bodily harm to their person, which included death; and

(3) disruptive behavior while in and out of her isolated cell. During Kerr's testimony, respondent interrupted the proceedings and declared that she was not going to stay quiet while the testifying officers lied. Respondent later claimed that she was going to "have the last laugh" when she regained custody of her children.

¶ 13 Respondent testified in the State's case in chief, admitting that (1) she did not have custody of I.M., L.M., or S.M.; (2) she pleaded guilty to aggravated battery in case No. 15-CF-813; and (3) case No. 13-JA-506, which involved I.M. and L.M., remained pending. Respondent noted scheduling conflicts, her grandmother's death, and her incarceration presented challenges to completing the client-service-plan goals in case No. 13-JA-506, but she was working toward regaining custody of her children by completing those services. Respondent wanted to have all her children returned to her care. Respondent admitted that when she believes she is not being heard, she gets irritated and frustrated.

¶ 14 Thereafter, the trial court found that S.M. was a neglected minor under both of the State's allegations, which claimed S.M. was in an environment injurious to his welfare (705 ILCS 405/2-3(1)(b) (West 2104)). Following a December 2015 dispositional hearing, the court adjudicated S.M. a ward of the court and maintained DCFS as his guardian.

¶ 15 B. The State's Petition To Terminate Respondent's Parental Rights

¶ 16 In April 2016, the State filed a petition to terminate respondent's parental rights, alleging that respondent was unfit within the meaning of section 1(D)(i) of the Adoption Act in that she was depraved because respondent had been convicted of at least three felonies, with at least one of those convictions occurring within five years of the filing of the State's termination petition (750 ILCS 50/1(D)(i) (West 2014)). (The State's termination petition also sought to terminate the parental rights of any putative and unknown fathers, which is not at issue in this ap-

peal.)

¶ 17 1. *The Fitness Hearing*

¶ 18 At the May 2016 fitness hearing, the State offered and the trial court admitted certified copies of convictions in the following cases: (1) October 2015 conviction for aggravated battery, a Class 3 felony, in McLean County case No. 15-CF-813, in which respondent was sentenced to 56 days in jail; (2) August 2012 conviction for retail theft, a Class IV felony, in McLean County case No. 12-CF-340, in which respondent was sentenced to 3 years in prison; (3) March 2009 conviction for retail theft, a Class IV felony, in McLean County case No. 09-CF-213, in which respondent was sentenced to 1 year in prison; (4) September 2011 conviction for battery, a Class A misdemeanor, in McLean County case No. 11-CM-1331, in which respondent was sentenced to 12 days in jail; and (5) January 2009 conviction for retail theft, a Class A misdemeanor, in McLean County case No. 08-CM-2468, in which respondent was sentenced to 18 months' conditional discharge.

¶ 19 Nathan Funte, a caseworker employed by Children's Home and Aid (a DCFS contractor), testified that in January 2016, he assumed management of respondent's case. Funte noted that in reviewing respondent's case file, respondent had consistent anger-management issues but had not completed an anger-management class.

¶ 20 At the State's request, the trial court took judicial notice of the following pertinent filings without objection: (1) the August 2015 amended petition for adjudication of wardship; (2) the court's shelter-care, adjudicatory, and dispositional orders; (3) the State's April 2016 petition to terminate respondent's parental rights; and (4) an April 2016 permanency review order.

¶ 21 The trial court's April 2016 permanency review order provided the following summary:

"[Respondent] was arrested for domestic battery in Cook County on [March 22, 2016]. She has not been cooperative with her felony probation and a [petition to revoke probation] was filed on January 26, 2016, which remains pending. [Respondent] has not participated in a [domestic violence] assessment. [Respondent] has not participated in anger management classes or individual therapy as ordered in [case No.] 15-CF-813. [Respondent] has continued to use [cannabis] and was assessed as needing intensive outpatient drug treatment, which [respondent] will not be allowed to begin until starting and showing acceptable progress in individual therapy. [Respondent] has continued to display an inability to control her temper, even when visiting [S.M.]. [Respondent] remains unemployed [and] has missed numerous visits [during] this reporting period."

¶ 22 Respondent did not present any evidence.

¶ 23 Following argument, the trial court made the following finding:

"With respect to [respondent], there is a rebuttable presumption created of depravity when there are at least three felony convictions and one of which [occurred] within the last five years. There was certainly evidence presented to establish that presumption. There has been no evidence to rebut the presumption.

[The court] agrees that the evidence with respect to anger management isn't alleged, but [the court] assume[s] that the State

presented that as to absence of any rehabilitation by [respondent] with respect to depravity. So the court finds that [the depravity allegation] has been proven by clear and convincing evidence [a]nd finds [respondent] unfit as alleged."

¶ 24 2. *The Best-Interest Hearing*

¶ 25 a. The State's Evidence

¶ 26 At a best-interest hearing conducted immediately thereafter, Funte testified that he had visited the foster home where DCFS placed S.M. on five different occasions and had not observed anything that caused him concern. Funte noted that the foster family had signed a permanency commitment, pledging to adopt S.M. should that option arise. Funte estimated that even if respondent began complying with her client-service-plan goals, it would take at least a year before respondent could obtain a favorable fitness finding. Funte recommended that the trial court provide S.M. permanency by terminating respondent's parental rights.

¶ 27 During cross-examination, Funte acknowledged that in March 2016, two months after being assigned to respondent's case, he referred respondent for anger-management counseling. Funte noted that (1) previous caseworkers in the instant case and (2) respondent's caseworkers in case No. 13-JA-506 had also referred respondent to anger management counseling, but respondent "never engaged."

¶ 28 S.M.'s foster mother, Kim Nix, testified that she and John Nix, her husband, were both 50 years old and the biological parents of six children, who have since reached adulthood. Kim and John are parents to three adopted children, ages 6, 8, and 12, and were foster parents to two other children, a 7-year-old boy and a 12-year-old girl. S.M. was the Nix's third foster child. Kim confirmed that she and John intended to adopt the two foster children. Altogether, the

Nixes were caring for three boys and three girls.

¶ 29 In a letter Kim and John wrote to the trial court, they explained that S.M. has been a part of their family since he was two days old, and S.M. "wants for nothing." John works as a maintenance supervisor at a large apartment complex and owns a construction business that he maintains part-time. Kim works as a stay-at-home mother, and with John's income, they have a five-bedroom home with a large yard. The Nixes characterized their home as a loving, nurturing environment that "provides stability and consistency to all the children." S.M. enjoys a bond with the other children and the Nixes adult children provide "a huge support system" when the Nixes need additional assistance. The Nixes revealed that if anything should happen to them, they have made plans to have their adult children care for their adopted siblings.

¶ 30 b. Respondent's Evidence

¶ 31 Respondent testified that "at times," she has anger-management issues that need to be addressed, but she could not recall being referred for anger-management counseling anytime during her case. Respondent stated that she asked for an anger-management referral but did not receive one, despite her desire to complete that training as well as her other client-service-plan goals. Respondent felt that her twice-a-week visits with S.M. were going well, but she acknowledged that lately, she had not seen S.M. due to her incarceration. Respondent disagreed that her incarceration stopped her from parenting S.M., rationalizing that although she was not physically present in S.M.'s life during her incarceration, she could still nurture, love, and support her children while incarcerated. Respondent informed the trial court that she was financially "broke" because she spends "every dollar" on her children. Respondent urged the court to maintain her parental rights because she felt she did not get a fair chance.

¶ 32 Respondent confirmed that in addition to the criminal convictions the trial court

earlier admitted, in 2009 she pleaded guilty to (1) manufacture and delivery of cocaine and (2) manufacture and delivery of cannabis, for which a Livingston County court sentenced defendant to prison for four and two years, respectively. Respondent confirmed that in March 2016, police arrested her in Cook County, and the State later charged respondent with domestic battery.

¶ 33 c. The Trial Court's Best-Interest Finding

¶ 34 Following argument, the trial court found that the State had shown by more than a preponderance of the evidence that it was in S.M.'s best interest to terminate respondent's parental rights.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Respondent argues that she was deprived of the effective assistance of counsel because counsel failed to present any evidence to rebut the State's *prima facie* case of depravity. We disagree.

¶ 38 A. Depravity

¶ 39 Section 1(D)(i) of the Adoption Act provides as follows:

> "There is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least [three] felonies *** and at least one of these convictions took place within [five] years of the filing of the petition or motion seeking termination of parental rights." 750 ILCS 50/1(D)(i) (West 2014).

¶ 40 The supreme court has long defined depravity as "an inherent deficiency of moral sense and rectitude." (Internal quotation marks omitted.) *Stalder v. Stone*, 412 Ill. 488, 498, 107 N.E.2d 696, 701 (1952); see *In re Donald A.G.*, 221 Ill. 2d 234, 240-41, 850 N.E.2d 172, 175

(2006) (reaffirming this definition). "[T]o establish unfitness, clear and convincing evidence of depravity must be shown to exist at the time of the petition, and the acts constituting depravity *** must be of sufficient duration an of sufficient repetition to establish a deficiency in moral sense and either an inability or an unwillingness to conform to accepted morality." (Internal quotation marks omitted.) *In re J.A.*, 316 Ill. App. 3d 553, 561, 736 N.E.2d 678, 685 (2000).

¶ 41 B. The Operation of a Rebuttable Presumption

¶ 42 In *J.A.*, 316 Ill. App. 3d at 562-63, 736 N.E.2d at 686, the appellate court provided the following explanation regarding the operation of a rebuttal presumption:

> "A rebuttable presumption creates 'a *prima facie* case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption.' [Citation.] However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. [Citation.] The burden of proof does not shift but remains with the party who initially had the benefit of the presumption. [Citation.] The only effect of the rebuttable presumption is to create the necessity of evidence to meet the *prima facie* case created thereby, and which, if no proof to the contrary is offered, will prevail. [Citation.]"

"The statutory ground of depravity requires the trier of fact to closely scrutinize the character and credibility of the parent and the reviewing court will give such a determination deferential treat-

ment." *J.A.*, 316 Ill. App. 3d at 563, 736 N.E.2d at 687.

¶ 43 C. Ineffective Assistance of Counsel

¶ 44 In *In re M.F.*, 326 Ill. App. 3d 1110, 1119, 762 N.E.2d 701, 709 (2002), this court set forth the following burden a respondent must satisfy to prevail on a claim of ineffective assistance of counsel in a parental termination proceeding:

> "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 her counsel's representation fell below an objective standard of reasonableness and there is a 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.]"

¶ 45 D. Respondent's Ineffective-Assistance-of-Counsel Claim

¶ 46 In support of her ineffective-assistance-of-counsel claim, respondent asserts that counsel could have solicited testimony regarding the (1) absence of a timely anger-management referral, (2) progress respondent made on her client-service-plan goals, and (3) pertinent circumstances underlying her felony convictions. We disagree.

¶ 47 The essential component to rebutting a presumption of depravity is a parent's abil-

ity to demonstrate the she has been rehabilitated. See *In re Shanna W.*, 343 Ill. App. 3d 1155, 1167, 799 N.E.2d 843, 852 (2003) (respondent could not rebut presumption of depravity because no evidence was presented to show rehabilitation). Evidence that a respondent leads a law-abiding life and complies with DCFS services may constitute sufficient evidence of a lack of depravity. See *In re Gwynne P.*, 346 Ill. App. 3d 584, 599, 805 N.E.2d 329, 341 (2004) (respondent rebutted presumption of depravity by maintaining sobriety, completing drug-treatment program, maintaining employment for seven months, completing parenting classes, and attending all visits with her child).

¶ 48 With regard to her anger-management assertion, respondent directs our attention to Funte's cross-examination testimony at the best-interest hearing. Respondent claims that trial counsel should have cross-examined Funte at the fitness hearing to show that Funte's March 2016 anger-management referral occurred nearly seven months after the State's August 2015 amended petition for adjudication of wardship, which did not provide her sufficient opportunity to complete that service. However, we note that at the adjudicatory hearing, the trial court considered evidence from the State that was consistent with Funte's cross-examination testimony at the best-interest hearing, which showed that respondent failed to comply with previous anger-management referrals made by the former caseworker in the instant case, as well as anger-management referrals made by caseworkers in case No. 13-JA-506. We reject respondent's assertion that trial counsel's strategic decision not to solicit testimony regarding the timing of a subsequent anger-management referral deprived her of the substantial evidence necessary to rebut the presumption of depravity established by the State.

¶ 49 We also find unavailing respondent's assertion that counsel's representation fell below an objective standard of reasonableness because counsel failed to solicit testimony regard-

ing the progress she made on her client-service-plan goals. We note that in her brief to this court, respondent does not provide specific examples of her rehabilitation. Instead, respondent posits that she could have testified at the fitness hearing (as she did at the best-interest hearing) that she (1) completed a parenting class, (2) loved S.M., and (3) was not "going to get into any more trouble." We conclude, however, that (1) completing a parenting class, without successfully demonstrating the techniques taught during consistent attendance at visitation sessions with S.M., and (2) bald assertions regarding respondent's future acts given her demonstrated unwillingness or inability to conform her behavior by complying with DCFS' planned goals, are insufficient to rebut a presumption of depravity.

¶ 50 Similarly, respondent's assertion that counsel was ineffective because he failed to solicit her testimony regarding the "circumstances surrounding" the five convictions admitted by the State is without merit because respondent continued to engage in conduct that demonstrated either an inability or an unwillingness to conform to accepted morality. As noted by the trial court at the May 2016 fitness hearing, respondent (1) was arrested for domestic battery in March 2016; (2) had a pending petition to revoke her probation because of her conduct; (3) failed to participate in a domestic-violence assessment, anger-management counseling, or individual therapy; (4) was unable to participate in intensive outpatient drug treatment because of her continued drug use; and (5) demonstrated an inability to control her temper, even when visiting S.M.

¶ 51 We choose to resolve respondent's ineffective-assistance-of-counsel claim by reaching only the prejudice prong of the *Strickland* test, for lack of prejudice renders irrelevant the issue of counsel's performance. See *People v. Brock*, 2012 IL App (4th) 100945, ¶ 11, 976 N.E.2d 631 (failure to satisfy both deficient performance and prejudice prongs precludes a finding of ineffective assistance of counsel).

¶ 52 As we have previously noted, rebutting a presumption of depravity merely disposes of the presumption, and the issue of respondent's depravity is then determined on the basis of the evidence adduced during the fitness hearing as if no presumption had ever existed. Even if we were to agree with respondent that her counsel's failure to solicit the aforementioned testimony fell below an objective standard of reasonableness, respondent does not provide a credible basis to conclude that she was prejudiced by that omission—that is, respondent does not articulate that but for counsel's unprofessional errors, the trial court would have found that respondent was not depraved as the State alleged. Given our review of the evidence presented at the May 2016 fitness hearing, we are confident that no reasonable probability arose sufficient for us to call into question the trial court's fitness finding. Accordingly, we reject respondent's argument that that she was deprived of the effective assistance of counsel.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the trial court's fitness and best-interest findings.

¶ 55 Affirmed.