2016 IL App (5th) 160304-U

NO. 5-16-0304

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re H.L.M., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Saline County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 14-JA-48
	)	
Larry K.M.,	)	Honorable
	)	Todd D. Lambert,
Respondent-Appellant).	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Trial counsel's conduct at respondent's fitness hearing did not amount to ineffective assistance of counsel where said conduct was the product of sound trial strategy.

¶ 2 BACKGROUND

¶ 3 We initially observe that the relevant facts necessary to reach our decision are brief. No reply brief was filed by respondent.

¶ 4 Respondent, Larry K.M., is the legal father of H.L.M., a male minor born on January 17, 2012. Christy Lee Curry, the biological mother of H.L.M., is deceased. In

2013, the circuit court of Saline County awarded respondent's wife, Pamela Dunn, custody and guardianship of H.L.M. in a separate matter and the case was closed. Thereafter, on June 17, 2014, the court entered an order of disposition directing H.L.M. to remain in the care and custody of respondent.

¶ 5 On October 7, 2014, the State filed a four-count petition for adjudication of wardship alleging respondent neglected H.L.M. by reason of the following facts: (1) on August 28, 2013, the environment was injurious to the welfare of H.L.M. in that respondent threw a belt at H.L.M. striking his head and causing physical injury; (2) the environment was injurious to the welfare of H.L.M. in that respondent was arrested and charged with aggravated domestic battery and aggravated battery to which he later pleaded guilty stemming from the incident alleged in count I of the petition; (3) the environment was injurious to the welfare of H.L.M. in that respondent currently has a family case pending and is noncompliant in his service plan; and (4) the environment was injurious to the welfare of H.L.M. in that respondent submitted to a urine test as requested by his probation officer on September 30, 2014, and tested positive for methamphetamine, amphetamine, and THC.

¶ 6 A shelter care hearing was set for the afternoon of October 7, 2014. The following were present at the hearing: Amanda Moore as attorney for the State, Tammie Jackson as guardian *ad litem*, and Pamela Dunn as guardian of H.L.M. At the hearing, the court informed Dunn that the Department of Children and Family Services (DCFS) must be named custodian and guardian of H.L.M. before H.L.M. could be placed under the care of Dunn. Dunn did not object to DCFS being named the custodian and guardian of

H.L.M., and DCFS subsequently placed H.L.M. under the care of Dunn. An adjudication hearing was set for November 18, 2014, where the court found the State had proven counts II, III, and IV of its petition for adjudication of wardship. In reaching its decision, the court noted count I was duplicative of count II.

¶ 7 Thereafter, H.L.M. was removed from Dunn's care and placed in a traditional foster home after an incident in which H.L.M.'s daycare informed Lutheran Social Services that the minor child was missing a tooth. The incident was later determined to be unfounded after an investigation was completed, but H.L.M. remained in foster care.

¶ 8 On November 5, 2015, the State filed a motion for termination of respondent's parental rights and for appointment of guardian with power to consent to adoption. The motion asserted respondent was an unfit person to have H.L.M. because he: (1) failed to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare (750 ILCS 50/1(D)(b) (West 2010)); (2) failed to protect the child from conditions within his environment injurious to the child's welfare (750 ILCS 50/1(D)(g) (West 2010)); (3) is depraved by reason of his conviction of aggravated battery of any child in violation of the Criminal Code of 1961 (750 ILCS 50/1(D)(i)(7) (West 2010)); (4) failed to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any nine month period following the adjudication of neglected or abused minor (750 ILCS 50/1(D)(m)(i) (West 2010)); and (5) failed to make reasonable progress toward the return of the child to the parent during any nine month period following the adjudication of neglected or abused minor (750 ILCS 50/1(D)(m)(ii) (West 2010)).

¶ 9 A fitness hearing on the State's motion for termination of respondent's parental rights was held on April 19, 2016. The State presented a copy of respondent's conviction for aggravated domestic battery of H.L.M. at the hearing. Respondent's counsel did not present any evidence. The court found respondent was depraved as that term is defined in the Illinois Adoption Act based upon respondent's conviction, and set a hearing on the best interests of the child for June 14, 2016. 750 ILCS 50/1(D)(i)(7) (West 2010). At the best interest hearing, the court concluded it was in the best interests of H.L.M. to terminate respondent's parental rights and allow H.L.M.'s foster parents to adopt him.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 Respondent's argument on appeal alleges his trial counsel was ineffective because counsel did not provide evidence or argument at respondent's fitness hearing to rebut the presumption that respondent was depraved or unfit. Respondent further alleges his trial counsel was ineffective because counsel failed to ensure respondent was provided adequate services by the social agency assigned to his case. For these reasons, respondent requests that the trial court's judgment be reversed and remanded for a new proceeding.

¶ 13 It is well settled that 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). Thus, 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 1246 (1984). *In re S.G.*, 347 Ill. App. 3d at 479, 807 N.E.2d at 1248.

¶ 14 To succeed on a claim of ineffective assistance of counsel under the *Strickland* standard, one 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 the error, the result 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.

¶ 15 To establish deficiency under the first prong of the *Strickland* test, one must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361, 736 N.E.2d 1092, 1106 (2000). It is well established there is a strong presumption that an attorney'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. Matters of trial strategy are generally immune from claims of ineffective assistance of counsel 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.

¶ 16 Regarding the prejudice 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. A reviewing court's task 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 when counsel's mistakes are egregious, a reviewing court examines 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.

¶ 17 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. Therefore, the failure to establish either prong under the *Strickland* test will be fatal to the claim. *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1106.

¶ 18 I. Fitness Hearing

¶ 19 Respondent argues his counsel was ineffective because counsel failed to present any evidence at the fitness hearing to rebut the State's *prima facie* case of depravity.

¶ 20 As previously stated, the State entered respondent's conviction for aggravated battery of H.L.M. at the fitness hearing, thereby creating a rebuttable presumption respondent was depraved which could only be overcome by clear and convincing evidence. 750 ILCS 50/1(D)(i) (West 2010). Respondent's counsel did not object to the State's introduction of respondent's conviction and offered no further evidence.

Thereafter, based upon respondent's conviction, the State found respondent "is depraved as that term is defined in the Illinois Adoption Act and is therefore unfit."

¶ 21 After careful consideration, we find respondent's argument is misplaced. Respondent's argument ignores the well settled principle that trial strategy decisions, including which witnesses to call and what evidence to present, ultimately rest with trial counsel. *People v. Leeper*, 317 Ill. App. 3d 475, 482, 740 N.E.2d 32, 38 (2000). The only exception to this rule is if trial counsel's chosen strategy is so unsound that counsel completely failed to conduct any meaningful adversarial testing. *Leeper*, 317 Ill. App. 3d at 482, 740 N.E.2d at 38. 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 1110, 1119, 762 N.E.2d 701, 709 (2002). "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.

¶ 22 Here, we find counsel's chosen strategy to not call respondent or other witnesses at the fitness hearing can be justified for several reasons, including not allowing the State to cross-examine respondent at the fitness hearing regarding respondent's past conduct, which the court considers in fitness proceedings to determine whether a parent is unfit. *In re M.R.*, 393 Ill. App. 3d 609, 615, 912 N.E.2d 337, 344 (2009). Moreover, the record indicates counsel later called respondent as a witness at the best interest hearing, in all likelihood because it is where the court considers the child's interests and respondent wanted to retain his parental rights. *In re M.R.*, 393 Ill. App. 3d at 615, 912 N.E.2d at 344. At the best interest hearing, respondent testified he loved H.L.M., did not want his

parental rights terminated, or at least wished to obtain visitation rights if H.L.M. remained in foster care. In light of the foregoing, counsel's decision to not call respondent or other witnesses at the fitness hearing but to later call respondent as a witness at the best interest hearing was reasonable trial strategy which cannot sustain a claim of ineffective assistance of counsel. Because respondent has failed to establish counsel's performance was deficient under the first prong of the *Strickland* test, respondent's ineffective assistance claim must fail. *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1106.

¶ 23 II. Social Service Agency

¶ 24 Respondent next alleges his counsel was ineffective because counsel failed to ensure that Lutheran Social Services, the social service agency assigned to respondent's case, provided respondent an adequate level of assistance. Specifically, respondent asserts the caseworker assigned to his case was prejudiced against him and his wife, and that "counsel could have adduced evidence regarding the social agency's failures to provide services to [respondent] and then turned to his actions that showed intent regarding H.L.M."

¶ 25 After careful review, we find the record rebuts respondent's argument. At a permanency hearing held on January 6, 2015, respondent's counsel questioned the caseworker assigned to respondent's case regarding H.L.M.'s missing tooth incident, and undermined the caseworker's decision to not return H.L.M. to Pamela Dunn, respondent's wife, after an investigation determined the report was unfounded. At the best interest

hearing held on June 14, 2016, respondent's counsel elicited testimony from the caseworker that respondent was not offered visitation of H.L.M. during a time in which respondent was incarcerated. Thus, contrary to respondent's argument, respondent's counsel attempted to discredit the caseworker assigned to respondent's case. We further note the trial court was made aware of respondent's complaints regarding the social service agency prior to terminating respondent's parental rights. For these reasons, we cannot say counsel's conduct amounted to ineffective assistance of counsel. Accordingly, we reject respondent's argument.

¶ 26 CONCLUSION

¶ 27 In sum, we conclude respondent has failed to establish trial counsel provided him ineffective assistance. Accordingly, the judgment of the circuit court of Saline County is affirmed.

¶ 28 Affirmed.