2022 IL App (4th) 220109-U

NOS. 4-22-0109, 4-22-0110, 4-22-0111, 4-22-0112, 4-22-0113 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 29, 2022
Carla Bender
4th District Appellate
Court, IL

In re E.D., L.D., K.D., H.D., C.D., Minors	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Mercer County
Petitioner-Appellee,	)	Nos. 21JA1
v.	)	21JA2
Cindell C.,	)	21JA3
Respondent-Appellant).	)	21JA4
	)	21JA5
	)	
	)	Honorable
	)	Norma Kauzlarich,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, holding the trial court erred in admitting Mother's drug test results, the error was not harmless, and it resulted in there being insufficient evidence to support the neglect finding.

¶ 2 Respondent, Cindell C. (Mother), appeals the trial court's adjudicatory and dispositional orders finding her children, E.D., L.D., K.D., H.D., and C.D. (collectively, the children) neglected, making them wards of the court, and placing them under the guardianship and custody of the Illinois Department of Children and Family Services (DCFS).

¶ 3 In February 2022, Mother moved to consolidate the five cases into this one appeal, and we granted the motion. On appeal, Mother challenges the trial court's adjudicatory and dispositional orders by raising eight arguments, which we restate accordingly: (1) the trial

court erroneously based its decisions on a mistaken inference that Mother "dragged her feet" during the proceedings, (2) the trial court deprived Mother of a fair hearing by exhibiting bias against her, (3) the trial court erroneously admitted Mother's drug test results, (4) the trial court's neglect finding and written order proved insufficient, (5) the trial court's dispositional order went against the manifest weight of the evidence, (6) the adjudicatory and dispositional hearings were untimely per the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-14, 2-21(2) (West 2020)), (7) trial counsel rendered ineffective assistance of counsel, and (8) these cumulative errors necessitate reversal. We agree with Mother's third and fourth arguments. Because the trial court erred in admitting Mother's drug test results, there was insufficient evidence to support the trial court's neglect finding. We therefore reverse the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 On February 4, 2021, the State filed a petition for adjudication of neglect with respect to the five minor children born to Mother—E.D. (June 28, 2008), L.D. (June 10, 2009), K.D. (May 11, 2012), C.D. (April 2, 2013), and H.D. (April 2, 2013)—alleging the children were neglected in accordance with section 2-3(1)(b) of the Juvenile Court Act (705 ILCS 405/2-3(1)(b) (West 2020)). The State's petition alleged two counts of neglect for each child: (1) the children's environment is injurious to their welfare because Mother "has continued to use methamphetamine and tested positive for methamphetamine and [she] is the sole caretaker for the children" and (2) the children's environment is injurious to their welfare because Mother failed to comply with the safety plan put in place by DCFS. Following a contested shelter care hearing—where a DCFS investigator testified to Mother's admitted use of methamphetamine on January 16, 2021, and the agency's involvement with Mother over the past year—the trial court

found there was probable cause to believe that each of the children were neglected. It issued an order placing temporary custody and guardianship of the children with DCFS, appointed Mother counsel, and set the matter for a pretrial hearing.

¶ 6 A. Adjudicatory Phase

¶ 7 Following months of delays owing to Mother cycling through several attorneys, various judges rotating in and out due to retirement or recusal, and congested schedules, the matter came to an adjudicatory hearing on December 10, 2021. As was customary for this case, a new judge presided over this hearing. The State called as its first witness Nicole McCabe, a child protection specialist for DCFS. She testified she was assigned to Mother and the five children's case in January 2021. She noted the hotline report alleged substance abuse by Mother. McCabe noted Mother refused an instant oral drug screen. But, during McCabe's January 20 meeting with her, Mother admitted she used methamphetamine on January 16. McCabe testified that a safety plan had been in place for the children. Mother's counsel objected on hearsay grounds, arguing, "the best evidence rule would require the document itself in its entirety be submitted into evidence." The State then moved to admit the safety plan, and the trial court admitted it as State's Exhibit 1. McCabe testified Mother had not complied with the safety plan because it required three negative drug tests. Mother's "first one returned positive for very high levels of methamphetamine that were inconsistent with the use she'd reported." McCabe noted Mother did not appear for the second and third tests. When asked to explain "inconsistent," McCabe answered: "It was a very high level and she reported only a single isolated, minimal use."

¶ 8 At this point, Mother's counsel objected to the safety plan being admitted because it was not included in the State's May 27 disclosures. The court responded: "Overruled. You just requested it. You said that it was the best evidence, and so your objection is overruled,

[counsel]." McCabe noted she visited Mother's home and observed it was "sparse" and "not very clean." She testified she was familiar with Mother based on prior reports alleging abuse or neglect. She noted Mother had been receiving intact family services since summer 2020, but she had not been cooperating with DCFS. McCabe testified that the safety plan implemented an agreement whereby the children lived with Robert Hubbard. McCabe, however, noted that arrangement was not a long-term solution because Hubbard lived in a "very small home" that "was very cluttered" and "would have been a fire hazard with the number of items all over." McCabe then testified the children would have been in Mother's care when she used methamphetamine.

¶ 9 On cross-examination, McCabe noted Mother admitted she used methamphetamine in the afternoon of January 16, 2021. Mother had said she had to run an errand and used methamphetamine before returning to her home. McCabe testified the two older children, E.D. and L.D., were not living with Mother on January 16 and were not in Mother's home when she returned that afternoon. McCabe also acknowledged the other children were not in Mother's home that afternoon but in another home. Mother went there to get the children. McCabe could not say who else was in this other home at the time. McCabe testified she was not aware of another date on which Mother used methamphetamine while caring for the children because she only knew the date of use Mother voluntarily disclosed. She also noted Mother told her she did not use methamphetamine while in the presence of the younger three children. McCabe could not say whether Mother ever used drugs while she was the sole caretaker of her children. McCabe testified she had six years' experience as a certified alcohol and drug counselor and from that experience she understood Mother's drug test showed "high numbers *** for methamphetamine."

¶ 10 The State next called Dezzera Wild, a supervisor at Help at Home. She testified her duties included drug testing. Per a DCFS request, Wild collected a sample from Mother on January 20, 2021. Wild was aware of Mother's drug test results, "[m]eth and amphetamines, at a very high dose." Mother's counsel objected, arguing the State needed to "attempt to admit" the written reports, "though I may have objections." The State offered for admission three documents detailing DCFS's request for Mother's drug test and the results. Upon *voir dire* from counsel, Wild noted she collected the sample and sent it to Redwood Toxicology Laboratory (Redwood) for testing. Wild acknowledged Redwood is a different entity from Help at Home. She did not work for Redwood, and she was not familiar with its office procedures. Mother's counsel then argued the lab results were inadmissible because the State could not lay a proper foundation without a certification from Redwood that the documents are "a full and complete record of the condition, transaction, and occurrence of event." He asked the trial court to deny their admission and strike the testimony relating to the results. The State maintained it laid a proper foundation for a business record, contending counsel's arguments went to the weight to be given the documents, not to their admissibility. Mother's counsel noted the rule required a showing the lab results were Redwood's business records, not Help at Home's. The court ruled: "Considering that this is a preponderance of the evidence for an adjudicatory hearing and not a dispositional hearing, I'm overruling your objection. It will be admitted and her testimony will be and is considered."

¶ 11 Mother presented no evidence. The guardian *ad litem* (GAL) recalled McCabe to inquire about the children's fathers. McCabe testified K.D., C.D., and H.D.'s father was incarcerated. She noted she knew E.D. and L.D. each had different fathers but she did not know their identities or locations.

¶ 12 Following the conclusion of evidence and argument of counsel, the trial court ruled from the bench, finding: "Under statute 705 ILCS 405/2-18, which addresses anticipatory neglect, abuse, or dependency of children and having heard the evidence, the State has met their burden of proof on Count 1s of each of these petitions," *i.e.*, Mother's continued use of methamphetamine and her positive test created an injurious environment for the children. The court found the State did not meet its burden as to the second counts. In summary, the court stated:

> "So the Court is entering a finding of neglect due to an injurious environment and abuse due to risk of the injury. The mother's conduct exhibits a failure to exercise the care that circumstances justly demand and *** it encompasses both willful and unintentional disregard of parental duty.
>
> Been an attorney for a long time. I was a drug prosecutor for a while. Never in my life have I woken up and I think I'll try meth today. The fact that she tested positive on the first drug test and then simply didn't show up for the other two indicates to the Court exactly the potential risk of harm posed to the five children. So the children are adjudicated as neglected and we are going to give guardianship to the Department of Children & Family Services and all their abilities."

The trial court also issued a written adjudicatory order. The court found "the minor[s] [are] *** neglected as defined by 705 ILCS 405/2-3 *** in that Mother tested positive for and admitted using methamphetamine and Mother is the sole caretake of the minors."

¶ 13 B. Dispositional Phase

¶ 14 On January 20, 2022, the trial court held the dispositional hearing. No party

objected to admitting the dispositional report. The State asked the trial court to consider the report and informed the court it would present argument only.

¶ 15 The report recited the circumstances surrounding the children's removal from Mother's care. The report noted DCFS received additional hotline calls relating to Mother since February 2021. Mother had been indicated for substance misuse, sexual exploitation, and substantial risk of sexual abuse/sibling of sex abuse victim. Mother owned a five-bedroom, two-bathroom home, but she struggled to maintain it and keep it clean. Mother had not tested positive for methamphetamine in 35 scheduled drug screens from May 2021 to January 2022, though she failed to appear for many tests and tested positive for tetrahydrocannabinol four times. The report confirmed Mother "attended the majority of her visits with her children." E.D. and L.D. refused to visit with Mother, and both were seeing therapists to, in part, help them work towards therapeutic visits with Mother. Her visits with K.D., C.D., and H.D. were described as "chaotic." The report noted each of the children were doing well in their current placements—E.D. lived in a fictive kin placement; C.D. lived in a traditional foster home; and L.D., K.D., and H.D. lived in another traditional foster home. The children had bonded to their foster parents and saw each other regularly. Four of the five children received counseling. Three of the five children had said they do not want to return to Mother's care and preferred to remain in their current placements. The dispositional report recommended Mother engage in and complete the following services: a new integrated assessment, psychological assessment, substance abuse evaluation, anger management counseling, parenting capacity assessment, sex offender assessment, and follow all recommendations. The report kept the goal as return home and maintained DCFS as the children's guardian.

¶ 16 The State argued the dispositional report recommended appropriate services that

were necessary to rectify what was wrong in the home and reunify the family. The GAL likewise argued the report's recommendations were "appropriate given the circumstances of what's gotten us to this point, and as was testified to today, the services, if complied with, will give this family the best shot at *** successful reunification." The GAL acknowledged there may be a need to alter Mother's services, depending on the results of the new integrated assessment. Mother's counsel argued three of the five children (K.D., C.D., and H.D.) did not need to be wards of the court. He argued that allowing E.D. and L.D. not to visit with Mother was not aiding in family reunification. He next argued the dispositional report contained "excessive requirements" that were "not necessary." He identified anger management as unnecessary. He attacked the Center for Youth & Family Solutions' unknown timeline for Mother completing services and asked for a quick reunification.

¶ 17 The trial court rendered its decision on the record, beginning by noting how Mother tested positive for methamphetamine at a level inconsistent with a one-time use. It noted that of "42 hotline reports" relating to Mother and the children, there had been "17 indicated reports for environmental neglect, physical abuse, drug use, lack of supervision, domestic violence, and sexual abuse." Citing those numbers, the trial court labeled counsel's "assessment of excessive requirements" as "quite frankly, laughable." As for his argument against allowing E.D. and L.D. to decide if they want to visit Mother, the trial court noted it had to consider the children's best interests and opined the statutory "factors lend support to the agency's allowing these two children to go through therapy and decide, for whatever reason, especially in light of the allegations of sexual abuse that I don't know which child it is, or if it's all of them, that they don't want any contact with their mother, currently." Ultimately, the trial court noted, "[i]t is up to [Mother] if she's going to succeed in reunification, and it is totally dependent on her how

quickly that is done. *** So I'm going to adjudicate each one of the minors as neglected. It is in the best interest that the minors be made and continue to remain wards of the court. The court finds that you are unable or unwilling to care for the minors, their health, safety, welfare, and best interests of the children would be jeopardized if the children were to be placed in your custody." The trial court outlined what Mother must do and the services she must complete.

¶ 18 With that, the trial court admonished Mother of her appeal rights and set the matter for a permanency review.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Mother argues the trial court's adjudicatory and dispositional orders erroneously found the children neglected, raising eight issues. We agree with two of Mother's arguments, namely the trial court erroneously admitted Mother's drug test results and, consequently, there was insufficient evidence to prove the children neglected. We reverse the trial court's judgment.

¶ 22 The Juvenile Court Act (705 ILCS 405/1-1 *et seq.* (West 2020)) governs petitions for adjudication of wardship and outlines a "two-step process a trial court must employ in deciding whether a minor should be made a ward of the court." *In re Jay. H.*, 395 Ill. App. 3d 1063, 1068, 918 N.E.2d 284, 288 (2009). Step one requires the court to hold an adjudicatory hearing where " 'the court shall first consider only the question [of] whether the minor is abused, neglected[,] or dependent.' " *Jay. H.*, 395 Ill. App. 3d at 1068 (quoting 705 ILCS 405/2-18(1) (West 2008)). Here, the State alleged the children were neglected.

¶ 23 Neglect can look different in various cases because it is a fact-specific inquiry. *In re Arthur H.*, 212 Ill. 2d 441, 463, 819 N.E.2d 734, 747 (2004). Though "neglect" has no " 'fixed and measured meaning' " (*Arthur H.*, 212 Ill. 2d at 477 (quoting *In re N.B.*, 191 Ill. 2d

338, 346, 730 N.E.2d 1086, 1090 (2000))), it is "[g]enerally *** defined as the failure to exercise the care that circumstances justly demand." (Internal quotation marks omitted.) *Arthur H.*, 212 Ill. 2d at 463. Likewise, "injurious environment" is "an amorphous concept" in Illinois law but "has been interpreted to include the breach of a parent's duty to ensure a safe and nurturing shelter for his or her children." (Internal quotation marks omitted.) *Arthur H.*, 212 Ill. 2d at 463. Petitions alleging neglect due to an injurious environment, therefore, are "unique, and must be decided according to the circumstances of that case." *N.B.*, 191 Ill. 2d at 346; see also *Arthur H.*, 212 Ill. 2d at 463 ("[C]ases involving allegations of neglect and adjudication of wardship are *sui generis,* and must be decided on the basis of their unique circumstances."). The State bears the burden of proof in these cases, and "[i]f the State fails to prove the allegations of abuse, neglect or dependence by a preponderance of the evidence, the court must dismiss the petition." *N.B.*, 191 Ill. 2d at 343.

¶ 24 If the trial court answers the step-one question in the affirmative, *i.e.*, the minor is an abused, neglected, or dependent child, the court must move to step two—the dispositional hearing. *In re A.P.*, 2012 IL 113875, ¶ 21, 981 N.E.2d 336 (citing 705 ILCS 405/2-21(2) (West 2010)). "At the dispositional hearing, the trial court determines whether it is consistent with the health, safety and best interests of the minor and the public that the minor be made a ward of the court." *A.P.*, 2012 IL 113875, ¶ 21. Then, if the minor "is to be made a ward of the court, the court shall determine the proper disposition best serving the health, safety and interests of the minor and the public." 705 ILCS 405/2-22(1) (West 2020). On review, we will reverse a trial court's order if the findings stand against the manifest weight of the evidence or if the trial court committed an abuse of discretion by selecting an inappropriate dispositional order. *In re T.B.*, 215 Ill. App. 3d 1059, 1062, 574 N.E.2d 893, 896 (1991). "The finding of the trial court is

against the manifest weight of the evidence if a review of the record clearly demonstrates that the proper result is the one opposite that reached by the trial court." *In re M.K.*, 271 Ill. App. 3d 820, 826, 649 N.E.2d 74, 79 (1995).

¶ 25 Under the Juvenile Court Act, a petition for adjudication of abuse or neglect must allege "facts sufficient to bring the minor under Section 2-3 or 2-4 and to inform respondents of the cause of action, including, but not limited to, a plain and concise statement of the factual allegations that form the basis for the filing of the petition." 705 ILCS 405/2-13(2)(a) (West 2020). Count I of the State's petition alleged the children's "environment [was] injurious to the minor[ ]s' welfare, in that mother of said minor[s] *** has continued to use methamphetamine and tested positive for methamphetamine and the mother of said minor[s] is the sole caretaker for the children" since "[t]he father of said minors cannot be located." In simpler terms, based on the factual allegations in the State's petition, it had to prove by a preponderance of the evidence three facts to establish the children lived in an injurious environment: (1) Mother has continued to use methamphetamine, (2) Mother tested positive for methamphetamine, and (3) Mother is the children's sole caretaker. A review of the record reveals the State relied upon Mother's drug test results as evidence to prove the factual allegations of neglect. Moreover, the trial court considered and relied upon that evidence. But without Mother's drug test results, the State could not, and did not, prove the petition's first two factual allegations.

¶ 26 The State sought to admit Mother's drug test results through testimony from the Help at Home worker (Wild) who collected Mother's sample, although McCabe previously testified to Mother's drug test results. Section 2-18(4)(a) provides for the admission of drug test results when "made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a minor in an abuse, neglect or dependency proceeding *** as proof of that

condition, act, transaction, occurrence or event, *if the court finds that the document was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it,* at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." (Emphasis added.) 705 ILCS 405/2-18(4)(a) (West 2020). Mother argues the trial court erroneously admitted her drug test results because the State failed to lay a proper foundation for the records, namely that it was a certified business record. The State concedes, "the trial court erred when it allowed the drug test results to be admitted into evidence because there was no foundation for the report." However, the State maintains the error was harmless. While we accept the State's concession, we cannot agree the error was harmless.

¶ 27 "Errors in the admission of evidence may be deemed harmless where ample evidence supported the court's neglect finding." *In re J.C.*, 2012 IL App (4th) 110861, ¶ 29, 966 N.E.2d 453; see also *In re Chance H.*, 2019 IL App (1st) 180053, ¶ 53, 139 N.E.3d 88 (stating error is harmless when the erroneously admitted evidence is cumulative of properly admitted evidence). In other words, "[u]nder the harmless error standard, if the State can sustain its burden of proof with properly admitted evidence, the error in admitting improper evidence is considered harmless." *In re D.M.*, 2016 IL App (1st) 152608, ¶ 31, 51 N.E.3d 866. Without the drug test results and the testimony discussing those results, the State's only evidence that Mother used methamphetamine was her admission to McCabe on January 20, 2021, that she used methamphetamine once on January 16, 2021. But her admission of one-time use does not support, let alone prove by a preponderance of the evidence, the petition's allegations that Mother "*has continued to use* methamphetamine" and "tested positive for methamphetamine."

¶ 28 Statements from the trial court indicate it not only considered the drug test results but gave that evidence significant weight. For example, when admitting the evidence over

Mother's objection and her request to strike the testimony about the drug test results, the trial court said the results "will be admitted and her testimony will be *and is* considered." (Emphasis added.) When announcing its neglect determination, the trial court gave the following reasoning:

> "Been an attorney for a long time. I was a drug prosecutor for a while. Never in my life have I woken up and I think I'll try meth today. The fact that she tested positive on the first drug test and then simply didn't show up for the other two indicates to the Court exactly the potential risk of harm posed to the five children."

All told, the trial court said it would consider the drug test results and the testimony explaining them, and it did consider them. We pause briefly to address the trial court's improper reference to its own personal and professional experiences. "Deliberations of the court must necessarily be limited to the record before it." *People v. Steidl*, 177 Ill. 2d 239, 266, 685 N.E.2d 1335, 1347 (1997). Our supreme court stated: "While all judges come to the courtroom influenced, either consciously or unconsciously, by the experiences, associations, and prejudices developed over a lifetime, they are expected to make an effort to put those predilections aside and make determinations based only upon the evidence presented." *Steidl*, 177 Ill. 2d at 266. But looking beyond the judge's improper reliance on her personal experience, the statement indicates the trial court did not believe Mother's claim that she used methamphetamine only one time, which was the court's prerogative as the judge of credibility. But the trial court's rejection of Mother's explanation—the only admissible piece of evidence relating to Mother's drug use—necessarily suggests the court found the drug tests and concomitant testimony persuasive. Moreover, the trial court must have inferred Mother's continued use of methamphetamine from the drug test results and then her failure to appear for the next two tests. As the State now concedes, the drug test

results should not have been admitted. But without that piece of evidence, the State could not have "sustain[ed] its burden of proof with properly admitted evidence." *D.M.*, 2016 IL App (1st) 152608, ¶ 31. Consequently, the trial court's error in admitting the drug test results was not harmless. *D.M.*, 2016 IL App (1st) 152608, ¶ 31.

¶ 29 The State did not have to plead the factual allegations that Mother's continued methamphetamine use and a positive drug test caused an injurious environment for the children, but it chose to do so. And once pled, absent any amendment, the State had to prove them in order to sustain its burden of proof. We are not endorsing Mother's argument, or the trial court's misunderstanding, that the State had to prove "repeated use" of methamphetamine by Mother pursuant to sections 2-18(2)(f), (g) in the Juvenile Court Act because it did not. See 705 ILCS 405/2-18(2)(f), (g) (West 2020). Section 405/2-18(2) addresses circumstances when there is a *prima facie* showing of abuse or neglect. The State was neither alleging nor arguing for a *prima facie* case under section 2-18(2). Rather, Mother's counsel erroneously, or perhaps intentionally, injected section 2-18(2) into the proceedings. Counsel's argument at the adjudicatory hearing that the State had not satisfied section 2-18(2) was a red herring that apparently distracted the trial court, which followed the scent to a flawed analysis and erroneous conclusion, *i.e.*, "[u]nder statute 705 ILCS 405/2-18, which addresses anticipatory neglect, abuse, or dependency of children and having heard the evidence, the State has met their burden of proof on Count 1s of each one of these petitions." Even though the State did not have to meet the requirements in sections 2-18(2)(f) and (g), it still did not provide sufficient evidence to prove the factual allegations in the petition. See *M.K.*, 271 Ill. App. 3d at 826 ("The finding of the trial court is against the manifest weight of the evidence if a review of the record clearly demonstrates that the proper result is the one opposite that reached by the trial court.").

¶ 30 Reviewing this record, we cannot conclude the trial court's erroneous admission of Mother's drug test results amounted to harmless error. Particularly, we cannot say there was ample evidence to support the trial court's finding absent the drug test results. *J.C.*, 2012 IL App (4th) 110861, ¶ 29. Without the evidence of the drug test results, the only evidence the State presented relating to Mother's drug use was her admission she used methamphetamine once and, even then, not in the presence of the children and with no concomitant indication it impacted her parenting as to those children who were not then staying with her. Her admission, however, did not prove she consistently used methamphetamine or even that she tested positive for it—two of the three allegations in count I of the State's petition. Based on the properly admitted evidence, we cannot say the State met its burden and the trial court rightly found the children neglected minors. See *D.M.*, 2016 IL App (1st) 152608, ¶ 31. Since the trial court's error in admitting Mother's drug test results was not harmless, we must reverse the trial court's neglect finding and its judgment. This is truly unfortunate when viewed in light of all the other evidence available to the State and upon which alternative allegations could have been based, along with the ease with which a proper certification could have been obtained. The State's election to proceed on one drug test, and the unsupported inference to be raised by that result alone, with no effort to lay a proper foundation is baffling. The failure to support the second count with all the evidence available is inexcusable when we consider the effect our ruling will now have on the status of these children and the unnecessary prolonging of their involvement in the juvenile court process.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the trial court's judgment.

¶ 33 Reversed.