

[Cite as *In re M.P.*, 2010-Ohio-5538.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

M.P.

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. CT10-0030

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County Court
of Common Pleas, Juvenile Division, Case
No. 20730178

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 12, 2010

APPEARANCES:

For Appellee/
Muskingum County Children's Services

For Appellant/
Father

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Hoffman, P.J.

{¶1} Appellant Lionel Smith appeals the May 18, 2010 Entry entered by the Muskingum County Court of Common Pleas, Juvenile Division, which terminated his parental rights, privileges, and obligations with respect to his minor child, and granted permanent custody of the child to appellee Muskingum County Children Services (“MCCS”).¹

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant is the biological father of M.P. On November 1, 2007, MCCS filed a Complaint, alleging M.P. to be a neglected, abused and dependent child. MCCS became involved with the family when M.P. and her half sister, K.P., were presented at the Genesis Healthcare System Emergency Room with visible bruising and injuries. K.P. ultimately died from her injuries. Detective Jon Hill of the Zanesville Police Department invoked Juv.R. 6 with regard to M.P.² M.P. was transported to Nationwide Children’s Hospital in Columbus where she was examined by Dr. Philip Scribano, the Medical Director and Chief of the Division of Child and Family Advocacy. Dr. Scribano’s evaluation revealed M.P.’s injuries were consistent with physical abuse.

{¶3} The Muskingum County Grand Jury subsequently indicted Kristin Prince, M.P. and K.P.’s mother, and Appellant in the death of K.P. and the abuse of M.P. On

¹ MCCS has not filed a brief in this matter.

² Juv.R. 6 provides: “(A) A child may be taken into custody: * * * (3) by a law enforcement officer or duly authorized officer of the court when any of the following conditions exist: * * * (c) There are reasonable grounds to believe that a parent, guardian, custodian, or other household member of the child has abused or neglected another child in the household, and that the child is in danger of immediate or threatened physical or emotional harm; * * *”

September 29, 2009, Prince pled guilty to involuntary manslaughter in the death of K.P., and endangering children regarding the injuries to M.P. Prince was sentenced to a period of incarceration of ten years. Following Prince's guilty plea, Appellant pled guilty to one count of attempted endangering children with a serious physical harm specification and failure to report a crime or knowledge of death, both with respect to K.P., and one count of endangering children with respect to M.P. Appellant was sentenced on February 8, 2010, to an eighteen month term of imprisonment. Having been jailed since his arrest in February, 2008, Appellant was released based upon time served.

{¶4} Although a case plan had been in effect since November, 2007, Appellant did not comply with any of the requirements prior to his incarceration in February, 2008. Additionally, during Appellant's incarceration, he did not undergo any substance abuse and/or mental health counseling, despite the availability of such services. Appellant did not work on any aspect of his case plan following his release from jail.

{¶5} On November 13, 2009, MCCA filed an Amended Complaint, seeking permanent custody of M.P. The trial court conducted an adjudicatory/dispositional hearing on April 21, 2010.

{¶6} Karin Ogle, the MCCA intake assessment worker who responded to the initial call regarding M.P. and K.P., and Detective Jon Hill of the Zanesville Police Department, who was dispatched to the emergency room of Good Samaritan Hospital in response to a call regarding M.P. and K.P., testified as to their respective investigations at the commencement of the matter. Dr. Charles Jeffrey Lee, the Chief Forensic Pathologist for Licking County and the Deputy Coroner, conducted the autopsy of K.P.,

and testified as to his findings and the cause of K.P.'s death. Dr. Philip Scribano, Medical Director and Chief of the Division of Child and Family Advocacy at Nationwide Children's Hospital, testified regarding his findings relative to his examination of M.P. Dr. Scibano opined M.P.'s injuries were the results of physical abuse.

{¶7} Laine Davis, the MCCS case worker assigned to the case, testified regarding the requirements of Appellant's case plan and his failure to comply therewith. Davis testified Appellant did not take any steps toward compliance prior to his arrest in February, 2008, during his incarceration, or after his release from jail. Appellant did not have a stable income, and had advised the case worker he had moved from the home Davis had visited and she had no knowledge of the condition of his new residence. Appellant did not have a verifiable means of income. With respect to the best interest portion, Davis testified M.P. was placed with her maternal grandmother and had been in her custody throughout the entire proceedings. Davis stated M.P. is thriving in her placement with her grandmother, and the child has become a very happy, healthy, outgoing little girl. M.P. is very bonded with her grandmother and her grandmother is willing to adopt the child.

{¶8} After hearing the evidence and taking the matter under advisement, the trial court terminated Appellant's parental rights, privileges and responsibilities with respect to M.P., and awarded permanent custody of the child to MCCS.

{¶9} Appellant assigns as error:

{¶10} "I. THE TRIAL COURT'S JUDGMENT THAT THE MINOR CHILDREN'S BEST INTEREST WOULD BE SERVED BY GRANTING OF PERMANENT CUSTODY

TO MUSKINGUM COUNTY CHILDREN'S SERVICES WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶11} "II. FATHER/APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO *STRICKLAND V. WASHINGTON* (1984) , 466 U.S. 668, 80 L.ED.2D 674, 104 S.CT. 2052."

{¶12} This case comes to us on the expedited calendar and shall be considered in compliance with App.R. 11.1(C).

I

{¶13} In his first proposed assignment of error, Appellant asserts the trial court's finding it was in the best interest of M.P. to grant permanent custody to MCCS was against the manifest weight of the evidence.

{¶14} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶15} R.C. 2151.414 sets forth the guidelines a trial court must follow when deciding a motion for permanent custody. R.C. 2151.414(A)(1) mandates the trial court schedule a hearing, and provide notice, upon filing of a motion for permanent custody of a child by a public children services agency or private child placing agency that has temporary custody of the child or has placed the child in long-term foster care.

{¶16} Following the hearing, R.C. 2151.414(B) authorizes the juvenile court to grant permanent custody of the child to the public or private agency if the court determines, by clear and convincing evidence, it is in the best interest of the child to grant permanent custody to the agency, and that any of the following apply: (a) the child is not abandoned or orphaned, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents; (b) the child is abandoned; (c) the child is orphaned and there are no relatives of the child who are able to take permanent custody; or (d) the child has been in the temporary custody of one or more public children services agencies or private child placement agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶17} In determining the best interest of the child at a permanent custody hearing, R.C. 2151.414(D) mandates the trial court must consider all relevant factors, including, but not limited to, the following: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents and out-of-home providers, and any other person who may significantly affect the child; (2) the wishes of the child as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child; (3) the custodial history of the child; and (4) the child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody.

{¶18} Therefore, R.C. 2151.414(B) establishes a two-pronged analysis the trial court must apply when ruling on a motion for permanent custody. In practice, the trial court will usually determine whether one of the four circumstances delineated in R.C.

2151.414(B)(1)(a) through (d) is present before proceeding to a determination regarding the best interest of the child.

{¶19} If the child is not abandoned or orphaned, then the focus turns to whether the child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents. Under R.C. 2151.414(E), the trial court must consider all relevant evidence before making this determination. The trial court is required to enter such a finding if it determines, by clear and convincing evidence, that one or more of the factors enumerated in R.C. 2151.414(E) (1) through (16) exist with respect to each of the child's parents.

{¶20} A review of the record reveals, in addition to the role Appellant played, whether active or passive, in the abuse that resulted in the death of M.P.'s older sister, Appellant also played a role in the abuse of M.P. herself. Appellant, even after his release from jail, made no attempts to work on his case plan or obtain the services recommended. M.P. is currently living with her maternal grandmother, and the grandmother is willing to adopt the girl. M.P. is bonded with her grandmother. The child has also become more outgoing and responsive since her placement.

{¶21} Appellant's first assignment of error is overruled.

II

{¶22} In his second proposed assignment of error, Appellant contends he was deprived of his constitutional right to the effective assistance of counsel. We disagree.

{¶23} "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent,

involuntary termination of parental custody.” *In re Wingo* (2001), 143 Ohio App.3d 652, 666, 758 N.E.2d 780, quoting *In re Heston* (1998), 129 Ohio App.3d 825, 827, 719 N.E.2d 93. This Court has recognized “ineffective assistance” claims in permanent custody appeals. See, e.g., *In re Utt Children*, Stark App.No.2003CA00196, 2003-Ohio-4576.

{¶24} Our standard of review for an ineffective assistance claim is thus set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different. *Id.* Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any give case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142, 538 N.E.2d 373.

{¶25} Upon our review of the entire record of this matter, including a complete reading of the transcript of the permanent custody hearing, we find Appellant cannot establish he was prejudiced by any of trial counsel's actions or inactions.

{¶26} Appellant's second assignment of error is overruled.

{¶27} The judgment of the Muskingum County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

