



Court of Common Pleas, Juvenile Division, which granted permanent custody of her child, H.K., to the Miami County Children's Services Board. For the following reasons, the judgment of the trial court will be affirmed.

I

{¶ 2} H.K. was born on February 5, 2007. Children's Services soon received a complaint that H.K. was being neglected by her mother, Jessica. H.K. showed significant cognitive, communication, social, and emotional delays, as well as delayed development of both fine and gross motor skills. Jessica did not consistently keep the necessary appointments in order for H.K. to receive services. By October, 2008, H.K. was living with her maternal grandmother, Kelly.

{¶ 3} Kelly was given legal custody of the child in May, 2009, at which time she also was given custody of another of Jessica's children (who is not a part of the instant appeal) due to Jessica's failure to complete reunification services. By September, 2009, Kelly contacted Children's Services because she felt that, in light of her own mental and physical health problems, H.K.'s behavior was unmanageable. She described H.K.'s problem behavior as self-abuse, a refusal to listen to directions, food hoarding, abuse of the family dog, refusal to bathe, and being extremely clingy. Due to H.K.'s behavior, other family members were unwilling to assist Kelly. There having been no change in the circumstances of either parent, Kelly voluntarily relinquished custody of H.K. to Children's Services, and H.K. was placed in foster care.

{¶ 4} On November 9, 2009, Children's Services filed a motion alleging that H.K. was a dependent child and seeking permanent custody of the child. The

complaint alleged that during the six months that Kelly had custody of H.K., Jessica failed to provide any financial support for her daughter, and she visited the child only four times. The complaint also alleged that H.K.'s father has a lengthy criminal history, including a charge of sexual contact with a minor. He has many other children, none of whom he supports, and most of them to whom his parental rights have been terminated. Although the father was granted visitation with H.K. in March, 2009, he failed to exercise those rights, and he failed to either contact Kelly or to provide any financial support for his daughter.

{¶ 5} A legal rights hearing was held on November 18, 2009. The father was present, and he requested that counsel be appointed for him. Jessica was not present.

{¶ 6} An adjudicatory hearing was scheduled for December 9, 2009, and the dispositional hearing was scheduled for January 6, 2010. The father called on the morning of the adjudicatory hearing requesting a continuance of the hearing due to illness, which the trial court granted. Jessica was not present at the adjudicatory hearing, having moved to Mississippi; she was not served with notice of the hearing until the morning of the hearing.

{¶ 7} The trial court called Jessica and spoke with her by telephone on the record. Jessica asked for an attorney and for a continuance of the adjudicatory hearing. She explained that because she was seven months pregnant and her doctor advised that she not travel so far from home, she would not be able to attend the January 6, 2010, hearing. The court advised Jessica that it must address the complaint within 90 days of filing, which would mean that the case

could not be continued.<sup>2</sup>

{¶ 8} The adjudicatory hearing was re-scheduled for January 6, 2010, to be followed on the same day, if necessary, by the previously scheduled dispositional hearing. The father was present, with counsel. Jessica was not present, but her attorney was present. Jessica's counsel had been in contact with her briefly two days before the hearing. Counsel stated that Jessica "doesn't really agree to this, but she's not going to challenge it...."

{¶ 9} The caseworker testified that during Jessica's only visit with H.K. after her placement in foster care, Jessica stated that she was in agreement with Children's Services having permanent custody of H.K. The caseworker testified that during the year prior to filing the complaint, Jessica had visited her daughter only five times, and she provided no financial support, including no recognition of the child's birthday or any holidays.

{¶ 10} The magistrate found H.K. to be a dependant child and, after a brief

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<sup>2</sup>The trial court may have been under the mistaken belief that there are no exceptions to the statutory requirement that the dispositional hearing on a complaint of dependency, abuse, or neglect must be held within 90 days of the filing of the complaint. R.C. 2151.28(A)(2) requires that an adjudicatory hearing be held on a complaint for dependency, abuse, or neglect within 30 days of the filing of the complaint. R.C. 2151.28(B)(3) requires that a dispositional hearing be held no later than 90 days after the filing of the complaint. [Also, R.C. 2151.35(B)(1) used to set the same 90-day limit, but the statute was repealed in late 2009, during the pendency of this case.] However, these time restrictions can be waived by the parent. *In re Brown*, Darke App. No. 1676, 2006-Ohio-3189, ¶11, citing *In re Kutzli* (1991), 71 Ohio App.3d 843, 845-46; *In re Burton*, Mercer App. No. 10-04-01, 2004-Ohio-4021, ¶16.

Regardless, Appellant did not argue that trial counsel should have requested a continuance of the adjudicatory and dispositional hearing on the neglect complaint, and there is nothing in the record suggesting a continuance would have been granted, or, if so, whether it would have made a difference. To the contrary, counsel indicated his client told him she did not want to fight the allegations.

recess, proceeded to the dispositional hearing. Children's Services recommended permanent custody. The caseworker explained that H.K.'s foster parents are experienced with children who have been diagnosed as developmentally delayed, and H.K. is in a foster-to-adopt placement. The Guardian ad Litem recommended that H.K. remain with her foster family and that Children's Services be given permanent custody. The magistrate granted permanent custody of the child to Children's Services.

{¶ 11} Jessica filed objections to the magistrate's decision, which the trial court overruled, affirming the decision of magistrate. Jessica appeals.

## II

{¶ 12} Jessica's First Assignment of Error:

{¶ 13} "WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE JUDGMENT TO BE RENDERED UPON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶ 14} Jessica argues that the trial court erred in granting permanent custody of H.K. to Children's Services when Jessica was not represented by competent and effective trial counsel. For the following reasons, we disagree.

{¶ 15} An indigent parent is entitled to be represented by appointed counsel when the State seeks to terminate her parental rights. *In re P.M.*, Montgomery App. No. 22677, 2008-Ohio-6041, ¶14, citing *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, paragraph two of the syllabus. This right to counsel includes the right to the effective assistance of counsel. *Id.* at ¶15. "[T]he test for ineffective assistance of counsel used in criminal cases is equally applicable in actions

seeking to force the permanent, involuntary termination of parental” rights. *Id.*, citing *In re Heston* (1998), 129 Ohio App.3d 825, 827.

{¶ 16} In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness. *Id.* “Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel’s perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel.” *In re W.T.*, Montgomery App. No. 23427, 2009-Ohio-5409, ¶50, quoting *State v. Mitchell*, Montgomery App. No. 21957, 2008-Ohio-493, ¶31.

{¶ 17} Specifically, Jessica insists that her trial counsel was ineffective as evidenced by his failure to cross-examine the State’s witnesses. However, “[t]rial counsel’s decision to cross-examine a witness and the extent of such cross-examination are tactical matters. *State v. Flors* (1987), 38 Ohio App.3d 133, 139, \* \* \* . Thus, decisions regarding cross-examination are within trial counsel’s discretion and cannot form the basis for a claim of ineffective assistance of counsel. *Id.*’ *State v. Shells*, Montgomery App. No. 20801, 2005-Ohio-5787.” *State v. Allen*, Montgomery App. No. 22835, 2009-Ohio-3505.

{¶ 18} Counsel did have a conversation with Jessica prior to the adjudicatory

hearing, during which Jessica indicated her intention to counsel not to contest the issue of permanent custody. In the objection to the magistrate's decision, counsel explained that Jessica provided "no factual basis whatsoever for challenging CSB's witnesses, [and counsel] had no evidence to present or witnesses to call on [Jessica's] behalf." There is no information in the record, nor does Jessica argue in her brief, what sort of cross-examination could have been helpful to her case.

{¶ 19} Jessica also maintains that counsel failed to fully discuss and make her understand the seriousness of not opposing the motion. Obviously, neither this court nor the trial court was privy to the private conversation between Jessica and her attorney, and any such conversations are not part of the record. However, counsel did advise the trial court that he believed that Jessica understood the nature of the proceedings and what was happening with regard to custody of H.K. Moreover, in light of the fact that Jessica has been involved with the court in regard to custody of at least one other child, we do not find her claim now that she did not understand the seriousness of the proceedings in regard to this child to be worthy of much weight. Jessica has not shown that counsel was ineffective under either prong of *Strickland*.

{¶ 20} Jessica's first assignment of error is overruled.

### III

{¶ 21} Jessica's Second Assignment of Error:

{¶ 22} "WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER DURESS AND/OR COERCION OF THE DEFENDANT-APPELLANT."

{¶ 23} In her second assignment of error, Jessica asserts that the trial court

erred in granting permanent custody of H.K. to Children's Services because it should have been clear to the trial court that "she was confused and appeared to lack the education to make the serious decisions necessary to protect herself" and her child. However, as Children's Services points out, Jessica did not raise this issue in her objections to the magistrate's decision, and she has therefore waived the issue on appeal. See, e.g., *In re M.G.*, Miami App. No. 07-CA-6, 2007-Ohio-3589, ¶17. Nevertheless, we have reviewed the entire record and find no error in the trial court's decision to grant permanent custody of H.K. to Children's Services.

{¶ 24} Jessica points to no evidence whatsoever of either coercion or duress. Although Jessica alleges that she was called several times by the court and that it was clear that she was confused, the record supports neither contention.

Instead, the record indicates a single telephone call during the December 9, 2009, hearing. There is no evidence of confusion during that conversation. To the contrary, Jessica affirmatively stated her understanding as the trial court clearly explained the complaint and her rights to her.

{¶ 25} After going through the facts as alleged in the complaint, the court concluded by asking, "[d]o you have any questions about what the complaint says?"

Jessica replied, "No. I just don't agree with it." Thus, Jessica understood the complaint and was able to express her disagreement with the facts as presented in the complaint.

{¶ 26} The court then explained, "You do have the right to a full hearing on these issues which would include the right to present evidence that you feel

supports your position, the right to cross-examine witnesses called against you, challenge evidence brought against you, and have the Court subpoena witnesses to attend on your behalf. You have the right to have the proceedings recorded and I'm recording today to protect that right." Jessica acknowledged her understanding. The court explained that Children's Services had the burden of proof and again reminded Jessica that she had the right to an attorney. The court concluded, "Do you have any questions about what I've gone over in terms of your rights today?" Jessica responded in the negative.

{¶ 27} When the court asked Jessica whether she wanted an attorney, Jessica stated that she wanted to be represented by counsel. Jessica was able to clearly express her concern that "I'm not allowed to travel at all until after the middle of February \* \* \* [b]ecause I'm currently seven months pregnant \* \* \* and right now they're saying it's not safe to travel that far." The court explained what exactly Jessica needed to do in order to obtain counsel. Jessica followed the court's instructions for obtaining court appointed counsel, and she talked to her attorney on at least one occasion prior to the January 6, 2010, hearing.

{¶ 28} Moreover, at the January 6, 2010, hearing, Jessica's counsel expressed his opinion that Jessica understood the nature of the proceedings and the importance of her active participation. Again, we note that Jessica was unfortunately quite familiar with the type of proceedings in which she was involved, having recently lost custody of another child.

{¶ 29} Accordingly, even had the issue not been waived on appeal by Jessica's failure to raise the matter in her objections below, our review of the record

reveals no evidence of coercion, duress, or confusion on Jessica's part. Jessica's second assignment of error is overruled.

IV

{¶ 30} Having overruled both of Jessica's assignments of error, the judgment of the trial court is Affirmed.

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FAIN, J. and DONOVAN, J., concur.

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