STATE OF MICHIGAN

COURT OF APPEALS

In re REVELES, Minors.

UNPUBLISHED
July 2, 2020

Nos. 351905; 351906
Shiawassee Circuit Court
Family Division
LC No. 18-014236-NA

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

In these consolidated[1] appeals, respondents appeal as of right the trial court's order terminating their parental rights to their children, HR and XR, under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide care and custody), and (j) (reasonable likelihood that children will be harmed if returned to parent). In both cases, respondents' primary and dispositive arguments are that the trial court failed to properly advise them of their rights before accepting their pleas of no contest to the court's jurisdiction. We are constrained to reverse and remand for further proceedings.

I. RELEVANT BACKGROUND

These consolidated appeals arise out of the termination of respondents' parental rights to their children, HR and XR. In May 2018, petitioner filed a petition seeking temporary wardship over HR and XR, alleging that the children were subject to physical neglect, improper supervision, and threatened harm as a result of respondents' drug addictions. Initially, the children's father could not be located. At a review and planning hearing, respondent mother was incarcerated, but her attorney advised the hearing referee that respondent mother "will probably do a no contest plea." Respondent mother was present at the next hearing, during which the trial court asked her whether she wished to enter a no contest plea to jurisdiction. Respondent mother confirmed that

[1] On December 27, 2019, this Court entered an order consolidating these two appeals. See *In re Reveles, Minors*, unpublished order of the Court of Appeals, entered December 27, 2019 (Docket Nos. 351905 and 351906).

she did intend to enter a plea, whereupon the trial court explained that it needed to advise her of the rights she was waiving:

> You are not making any admissions. Though you're not contesting that I accept the petition as true for the purpose of finding jurisdiction. There is not an effort – this will not result in the termination of your parental rights. However, once a Court takes jurisdiction, you'll be required to follow a service plan and show benefit therefrom. If you don't, then we could have a separate trial that could and would affect your – your parental rights. But this stage does not do that.
>
> But, let me be clear. It is the burden of the Department of Health and Human Services to prove by a preponderance of the evidence. That's not a very high burden. It means more likely than not. But it is their burden. That conditions exist as set forth in the petition to justify this Court take [sic] jurisdiction over you and your children.
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> You would have the right to a trial by jury. You would have the right to be represented as you are today. And they would be required to call witnesses and present evidence and prove their case to the satisfaction of all 6 members of the jury.
>
> They would, you – you would not have the obligation to do anything. But, through your attorney, you could challenge the evidence and cross-examine the witnesses. When they were done, you could call it good and see what happens or you could put on your own witnesses and evidence subject to their challenge and examinations.
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> If there was a witness that you wanted to come testify who did not want to come testify, I would issue an order requiring him, her or them to appear. And I'd probably send Deputy Loomis out to give 'em a free ride here too.
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> If you wanted to testify I'd tell the jury to consider your testimony in the same way they consider any other witness. If you chose not to testify, I would not compel you and I would tell the jury not to infer anything of responsibility because you chose to remain silent. This is not a criminal case but I do afford those rights.
>
> If the jury came back and found in favor of the Department, you would have the right to appeal to a 3 panel member of the – a 3 member panel of the Court of Appeals who would review the transcripts and arguments and see if you had a fair trial. And you'd have the right to be represented at that also.
>
> It's a long mouthful. Do you understand everything I said?

Respondent mother confirmed that she understood and stated that she wished to plead no contest. The trial court stated that it would "accept the plea as knowing and voluntary" and would use the petition as a factual basis for taking jurisdiction. It stated that it would "accept everything written therein as true for the purpose of establishing jurisdiction as if read into the record which I will not

do." On that basis, the trial court found by a preponderance of the evidence that there was a basis to assume jurisdiction over the children.

Respondent father entered his plea at a separate hearing. After determining that respondent father was the father of both children, his attorney advised the court that respondent wished to enter a plea of no contest to the petition. The trial court verified with respondent that he did wish to enter a no contest plea. In response, the trial court explained:

> Okay. Well, I need to advise you of your rights first. A no contest plea is not an admission to anything. And in this particular case is not a direct path to termination of rights. It is – it is allowing the Court to take jurisdiction based on the failure to contest the – the allegations in the petitions. These are the rights you are waiving
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> You have the right on jurisdiction to a jury trial and to be represented. And the – the Department would call witnesses and present testimony. They would have to prove by a preponderance of the evidence that conditions existed warranting this Court taking jurisdiction. Now a preponderance of the evidence is not a very large burden of proof. It is more likely than not. It's not clear and convincing. It's not beyond a reasonable doubt. It's a fairly low burden of proof. But it is their burden of proof, not yours to prove otherwise.
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> You would not have the obligation to do anything, but you would have the opportunity to challenge their witnesses, their evidence, and present a case of your own with witnesses and evidence. If anybody you wanted to testify did not wish to appear, I would order their appearance. If you wished to testify, I would tell the jury to give it, your testimony fair consideration. If you chose not to testify, I would not compel you to and I would instruct the jury not to hold – not to consider your silence as a factor in determining the facts.
>
> If at the end of the trial the jury found in favor of the Department, you'd have the right to appeal that ruling. An appeal is not a new trial. But it is where a panel of Court of Appeals Judges review the transcripts and arguments to determine whether or not you had a fair trial.
>
> Do you understand that, sir?

Respondent father confirmed that he understood and still wished to enter the plea. The trial court then noted that it needed to tell respondent father something further:

> I said something a little cryptic. I said it's not a direct path to termination. The Department is not seeking termination. They are seeking to reunify once they have jurisdiction. However, the failure to participate in services, show benefit therefrom, could result in a separate trial for termination.
>
> Do you understand that, sir?

Respondent father stated that he understood "[a] hundred percent" and still wished to enter a plea of no contest. The trial court then stated that it would "accept the plea as knowing and voluntary"

and would "adopt the petition as if read into the record verbatim which I will not do." The trial court noted that, in addition to the contents of the petition, both parents were incarcerated at that time "[a]nd neither are available to provide a safe and proper home for the children." It therefore took jurisdiction over the children as to respondent father.

Each respondent was represented by counsel, and their counsel was present, when they entered their respective pleas. Respondents each stated that they understood the rights that they were giving up by entering no-contest pleas, and the trial court determined that the pleas were knowing and voluntary. Throughout the proceedings, respondent mother and respondent father were both sporadically incarcerated, and they failed to substantially comply with their case service plans. Petitioner did not refer respondent mother to any treatment services during her incarceration. In December of 2019, the trial court terminated respondents' parental rights.

Both respondents argue that the trial court erred by failing to advise them of all of the consequences of their pleas to establish jurisdiction over the children as required by MCR 3.971(B). Respondent mother additionally argues that the trial court clearly erred when it determined that statutory grounds existed to terminate her parental rights because she was not afforded a meaningful and adequate opportunity to participate in the proceedings.

II. STANDARD OF REVIEW

"Whether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). However, if a party fails to raise an issue or an objection at a time when the trial court can address or correct the issue or objection, it will be considered unpreserved and subject to a more deferential standard of review. *In re Ferranti*, 504 Mich 1, 25; 934 NW2d 610 (2019); *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Neither respondent mother nor respondent father moved to withdraw their pleas or otherwise objected to the advice of rights under MCR 3.971(B). Thus, the trial court did not have the opportunity to timely correct any error. Therefore, our review is for plain error affecting respondents' substantial rights. *Ferranti*, 504 Mich at 29; *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). "To avoid forfeiture under the plain-error rule, the proponent must establish that a clear or obvious error occurred and that the error affected substantial rights." *In re Beers*, 325 Mich App 653, 677; 926 NW2d 832 (2018) (citation omitted). "An error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. (citation and quotation marks omitted).

III. NO-CONTEST PLEAS

Respondents argue that plain error affecting their substantial rights occurred when the trial court failed to fully advise them of the rights they were giving up by entering no-contest pleas in accordance with MCR 3.971(B). We are constrained to agree.

Parents "have a fundamental right to direct the care, custody, and control of" their children. *Ferranti*, 504 Mich at 21. In order for a plea to constitute an effective waiver of a fundamental right, the plea must be knowing and voluntary. *Id*. "Our court rules reflect this due-process

guarantee." *Id*. At the time respondents entered their pleas,[2] MCR 3.971(B) provided, in relevant part, as follows:

> Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:
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> (1) of the allegations in the petition;
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> (2) of the right to an attorney, if respondent is without an attorney;
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> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
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> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
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> (c) have witnesses against the respondent appear and testify under oath at the trial,
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> (d) cross-examine witnesses, and
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> (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
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> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

Our Supreme Court explained that a total failure to comply with the court rule is a violation of due process that mandates reversal irrespective of harm. *Ferranti*, 504 Mich at 22, 31. However, substantial compliance combined with record evidence that the parent was actually aware of the consequences of their plea may constitute harmless error. *In re Pederson*, ___ Mich ___, ___; ___ NW2d ___ (2020) (Docket No. 349881, decided February 13, 2020), slip op at pp 8-13. Thus, the court rule is not a blind mechanism, and it need not be applied by rote where the underlying goal—ensuring that any plea is truly knowing and voluntary—has been satisfied.

Two significant and obvious failures occurred in this matter. First, we find it difficult to imagine either respondent was not actually aware of the allegations in the petition, whether by reading it or by consulting with their attorneys. However, there is no actual record evidence to that effect. Thus, MCR 3.971(B)(1) was plainly and clearly violated. We think that due process might have been satisfied if it had been unambiguously established on the record that respondents were fully aware of the contents of the petitions. However, we are a court of record. MCR

[2] Contemporaneously with its decision in *Ferranti*, on June 12, 2019, our Supreme Court amended MCR 3.971 to add further requirements. Because the court rule was not amended until after respondents entered their pleas, those requirements were not applicable to those pleas. Under the circumstances, we need not consider whether those additional requirements are retroactive.

7.210(A). We may not engage in speculation as to any facts that cannot be reasonably inferred from what is directly in the record. *People v Young*, 418 Mich 1, 21-22; 304 NW2d 805 (1983) and *People v Martzke*, 251 Mich App 282, 287-288; 651 NW2d 490 (2002) (this Court may not speculate from a limited record); cf. *Johnston v Manhattan Fire & Marine Ins Co*, 294 Mich 550, 555-556; 293 NW 747 (1940) (drawing "a reasonably fair inference from" the record). Despite our doubt that respondents were unaware of the contents of the petitions, that doubt cannot substitute for record evidence. Respondents' actual awareness of the contents of the petition cannot be reasonably inferred from the evidence in the record. Consequently, we are constrained by *Ferranti* to conclude that respondents' pleas were not knowing and therefore not voluntary on this basis.

Secondly, neither respondent was advised that their plea could later be used as evidence in a proceeding to terminate their parental rights. Thus, MCR 3.971(B)(4) was also plainly and clearly violated. We find it difficult to believe that this error was harmful, because respondents each entered pleas of no contest. Although a conviction that results from a plea of no contest may be used against the person who entered the plea, the entire purpose of a no contest plea is that such a plea is not a substantive admission to anything. *Lichon v American Universal Ins Co*, 435 Mich 408, 417-418; 459 NW2d 288 (1990); *Matter of Andino*, 163 Mich App 764, 770-773; 415 NW2d 306 (1987). In contrast to pleas of admission, we do not understand what practical evidence could later be presented based solely on respondents' decisions to forego a procedural safeguard. However, the fact remains that there is nothing in the record to show that either respondent understood that their plea could be used as evidence against them in a later proceeding. Consequently, we are constrained by *Ferranti* to conclude that respondents' pleas were also not knowing and therefore not voluntary on this basis.

We find this conclusion perplexing because neither respondent argues that they would have declined to enter their pleas, if only the trial court had read the petitions to them on the record or advised them that their pleas might be used against them. Indeed, in both cases, their respective attorneys broached the subject of entering pleas to the trial court. Furthermore, neither respondent has argued that they were unaware of the contents of the petitions or that their pleas actually *were* used against them for purposes of termination. In consideration of all of the above concerns, vacating the trial court's orders assuming jurisdiction and terminating respondents' parental rights seems like a monstrous disruption to the lives and health of the children on the hollow basis of a technical violation of a right more in theory than in substance. The court rule exists for the purpose of protecting a substantive right. *Ferranti*, 504 Mich at 21. Bright-line rules might seem easy and straightforward but defy reasonably practical implementation. *Id*. at 26. Indeed, Michigan courts have long been uninclined to sacrifice substantive rights on the altar of technical formalities. *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Welch v Hull*, 73 Mich 47, 51-53; 40 NW 797 (1888); cf. *Ross v Highway Comm'rs of Taylor Twp*, 32 Mich 301, 302-303 (1875). Nevertheless, our Supreme Court has clearly held that a technical violation of the plea procedure " 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Ferranti*, 504 Mich at 29, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Thus, we must vacate the trial court's orders despite the likely harm to the children and unlikely harm to respondents. *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 352-354; 785 NW2d 45 (2010).

IV. CONCLUSION

Because there is nothing in the record to show that respondents were actually aware of the allegations in the petition or that their pleas could be used against them at a later termination proceeding, we are constrained to conclude that MCR 3.971(B)(1) and (4) were violated and that respondents were deprived of their due process rights as a consequence. The trial court therefore lacked the dispositional authority to terminate respondents' parental rights. Therefore, we need not address any of the other issues argued by the parties. However, we note that we do not believe *Ferranti* precludes the court and petitioner from taking into consideration on remand any and all up-to-date information regarding the children and respondents. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

The trial court's orders taking jurisdiction of the children and of adjudication are vacated, and the matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan