

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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UNPUBLISHED  
March 15, 2011

In the Matter of ARZOLA-  
FERRIS/FERRIS/ARZOLA, Minors.

No. 299796  
Kent Circuit Court  
Family Division  
LC Nos. 08-052571-NA  
08-052572-NA  
08-052573-NA  
08-052574-NA  
08-052575-NA

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Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Respondent, the mother of the five involved minor children, appeals as of right from a trial court order terminating her parental rights. On the third day of a termination hearing, respondent, who recently had been sentenced to a prison term on federal drug charges, voluntarily relinquished her parental rights to the children. We affirm.

In July 2008, petitioner, the Department of Human Services (DHS), removed respondent's children from her custody because the younger three children had tested positive for cocaine at birth, her then nine-year-old son tested positive for cocaine at the time of the children's removal, and her oldest child had bruises the child attributed to respondent's boyfriend having struck her with a belt. The two eldest children were placed with their father while the younger three entered foster care. Respondent tested positive for cocaine several times throughout the child protective proceedings. Although respondent was ordered not to have contact with the boyfriend who had abused her daughter, a foster care worker saw his car at or near respondent's home several times. Nonetheless, respondent continuously denied that she had contact with the boyfriend. In July 2009, respondent was arrested on federal charges of conspiracy to distribute and possession with intent to distribute 50 grams or more of crack cocaine. Respondent pleaded guilty of these charges. After the first two days of a termination hearing, a federal district court sentenced respondent to 97 months in a federal prison, and on the next day of the termination hearing, she voluntarily relinquished her parental rights.

Respondent first suggests that the trial court violated her due process rights at the permanency planning hearing when the court interviewed her two oldest children in chambers, with a court reporter present, before deciding whether to order the DHS to pursue termination of respondent's parental rights to the two oldest children. Following the interview, the trial court

ordered the DHS to file a permanent custody petition solely with respect to her three youngest children, because the court found that termination of respondent's parental rights to the two oldest children was not in their best interests. Given respondent's failure to object to the in camera interviews of her children, we review this unpreserved, constitutional error only to ascertain whether any plain error affected respondent's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

In *HRC*, 286 Mich App at 445, 449-450, the trial court, after finding the statutory grounds for termination established by clear and convincing evidence, conducted in camera interviews of four children, absent a court reporter or any other documentation of the interviews. This Court held in pertinent part as follows:

A trial court presiding over a juvenile matter must abide by the relevant substantive and procedural requirements of the juvenile code. . . . [N]othing in the juvenile code, the caselaw, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests. Accordingly, we hold that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved. [*Id.* at 454.]

The Court concluded that the trial court's plain error affected the respondents' substantial rights; "the use of *unrecorded*, in camera interviews in termination proceedings violates parents' due process rights." *Id.* at 455 (emphasis added).

Here, unlike in *HRC*, 286 Mich App at 453-454, the trial court's in camera interview of the two oldest children took place in the presence of a court reporter and before the filing of a permanent custody petition. After the interviews, the trial court ordered the DHS to file a permanent custody petition regarding respondent's youngest three children, but found that termination of her parental rights to the two children interviewed was not in their best interests. The trial court noted that the parties could order a transcript of the in camera interviews. However, the interviews do not appear in the transcript with the rest of the permanency planning hearing or elsewhere in the record, and respondent has not supplied the transcript to this Court, which had to make a request for the transcript of the in camera interviews. Generally, a party's failure to supply this Court with the transcript of a challenged proceeding precludes appellate review, but we opt to briefly address the contents of the transcript now that we have it in our possession. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

Although the trial court plainly erred by conducting in camera interviews of the older children, we detect no resultant impact on respondent's substantial rights. A court reporter transcribed the interviews. The transcripts reflect that the children advised the court that they enjoyed living with their father, hoped to see more of their younger sisters, and did not want to live with respondent. In respondent's custody, they had experienced beatings with a switch inflicted by respondent's boyfriend and discovered "white powder" in their home. Nothing that the older children said had relevance to the best interests of their younger sisters. Moreover, after the interviews concluded, at the close of the permanency planning hearing, the trial court found that termination of respondent's parental rights would *not* serve the best interests of the two older children. In summary, the record of the trial court's conversations with the children

convinces us that the conversations did not undermine respondent's due process rights, or prejudice her in any substantial respect.

Respondent additionally challenges the effectiveness of her counsel. Respondent did not raise such a challenge in a motion for a new trial or evidentiary hearing, and we thus limit our review of her claims to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court's findings of fact, if any, regarding the conduct of defense counsel, while we consider de novo questions of constitutional law. *Id.*

The due process clauses of both the Michigan and the United States Constitutions guarantee indigent parents the right to counsel if their parental rights may be terminated. US Const, Am IV; Const 1963, art 1, § 17. Effective assistance of counsel claims in parental rights termination cases are analogous to effective assistance of counsel claims in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). “[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel's conduct falls within the wide range of professional assistance,” and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

Respondent first asserts that she received ineffective assistance because she had four different attorneys, her attorneys were not appointed with enough time to prepare for her hearings, and one hearing occurred without any attorney present when the court held a hearing after allowing one of respondent's counsel to withdraw. Respondent does not identify with specificity any error that these attorneys made due to their hasty appointments or lack of preparation, how any alleged error fell below an objective standard of reasonableness under prevailing professional norms, or how any errors prejudiced her. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (observing that the defendant “has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel”). Furthermore, our thorough review of the record does not reveal that any of her attorneys were unprepared. At one dispositional review hearing, respondent's retained counsel sought a same-day adjournment, and the trial court instead appointed another attorney to represent respondent at the hearing. The trial court repeatedly emphasized that while it felt angry with respondent's retained attorney, the court would not take its anger out on respondent, and the record gives rise to no hint that it did so. Irrespective that the court apparently appointed the substitute counsel shortly before the hearing,

no indication exists that respondent's appointed attorney lacked preparation or familiarity with the case; he made several relevant points in his cross-examination of a foster care worker. Consequently, appointed counsel's performance did not fall below an objective standard of reasonableness.

Later, respondent's retained counsel sought to withdraw. Respondent did not object to her withdrawal, and the trial court appointed an attorney at respondent's request. The trial court did not make any decisions affecting the case immediately after the retained attorney withdrew, rather he maintained the status quo. Although respondent did not have representation at this lone hearing, she has not pointed to any prejudice that she suffered, and we detect none.

Respondent argues that she received ineffective assistance of counsel when, after two days of a termination hearing with one attorney, another appeared as a replacement on the third scheduled day. On that day, respondent voluntarily relinquished her parental rights, admitting that she could not provide a safe and stable environment for her children, she would not be able to do so within a reasonable time, and termination of her parental rights and adoption would serve the children's best interests. When a party claims that her counsel was ineffective in the course of a plea process, we focus on whether the party entered the plea knowingly and voluntarily. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993). "The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 89-90. Our review of the record has uncovered no suggestion that respondent's plea was involuntary or unknowing, or that she did not have ample time to consult with her attorney.

Respondent also avers that her counsel was ineffective for allowing her to voluntarily relinquish her parental rights because the DHS could not have clearly and convincingly proven the grounds for termination. Respondent further contends that her incarceration alone does not constitute a ground for terminating her parental rights, and that the children's maternal grandmother was available and capable of caring for the younger children while the older children remained in the custody of their father. Respondent's admission to the amended permanent custody petition prematurely ended the DHS's presentation of evidence. The DHS sought termination of respondent's parental rights under MCL 712A.19b(3)(c)(i) and (g), not (h).<sup>1</sup> The record contained ample evidence that the grounds for adjudication continued to exist and would not be rectified within a reasonable time because respondent continued to test positive for cocaine even while on bond for a drug charge, admitted assisting her boyfriend in drug sales, and lied about her drug use and contact with the boyfriend throughout the pendency of the child

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<sup>1</sup> Subsection h authorizes termination if

[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

protective proceedings. Additionally, respondent could not give the children proper care and custody, even if she were not incarcerated, in light of her failure to benefit from her parenting classes, and the evidence that her visits with the children were chaotic, respondent did not interact well with her oldest daughter, and respondent's lies about contact with the boyfriend, who had physically abused her children. Accordingly, entirely apart from respondent's incarceration, clear and convincing evidence established the statutory grounds, and that termination of her parental rights was in all of the children's best interests. Given the abundant evidence warranting termination, her counsel did not render ineffective assistance to the extent that counsel advised respondent to voluntarily relinquish her parental rights. *Thew*, 201 Mich App at 89-90.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ William C. Whitbeck

/s/ Donald S. Owens