STATE OF MICHIGAN

COURT OF APPEALS

In re S, Minors.

UNPUBLISHED
May 14, 2020

No. 352085
Bay Circuit Court
Family Division
LC No. 19-012948-NA

Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Petitioner, the Department of Health and Human Services, appeals by right the trial court's order dismissing its petition in this child protective proceeding.[1] We affirm.

I. BASIC FACTS

The seriousness of the circumstances leading to the filing of an original petition for jurisdiction cannot be understated. On December 1, 2019, the police were called to respondent's home because he had not slept in days and was acting "goofy." When the police arrived, they observed blood throughout the home and learned that respondent had hit his five-year-old child's head against a door. Respondent had locked himself in a room with the child, and the police had to kick the door down to gain entry. Inside, the child was pinned between respondent's thighs with respondent's arms wrapped around his chest. Respondent was holding a Bible and a rosary, and he was "speaking in tongues." The officers had to taser respondent several times in order to subdue him. Respondent was then transferred to a medical center for evaluation.

As a result of the incident, on December 3, 2019, respondent was criminally charged with one count of first-degree child abuse, two counts of domestic violence, third offense, and one count of resisting or obstructing a police officer. That same day, petitioner filed a petition seeking

[1] MCL 330.1748 indicates that it is important to protect the confidentiality of parties involved in cases concerning mental health treatment. Here, as respondent was involuntarily ordered to undergo mental health treatment, both inpatient and outpatient, no names of persons or places will be used in this opinion.

temporary custody over the children. The petition alleged that the children's home or environment was an unfit place for them to live because of respondent's "neglect, cruelty, drunkenness, criminality, or depravity." It asserted that it would be contrary to the children's welfare for *respondent* to remain in the home due to his "irrational thinking and behaviors which had resulted in physical harm to [his] 5-year-old [child]." The petition alleged that until respondent "could get his mental health under control, it was in the children's best interest that he be removed from the home and that any visitation be supervised."

On December 10, 2019, the court held a hearing on the petition. Respondent's lawyer advised the court that, at that time, respondent was hospitalized at a mental-health facility and criminal charges were pending. The court indicated that it was aware of the circumstances, adding that a $50,000 cash bond had been set in respondent's criminal case. The bond conditions prohibited contact between respondent and the children. However, because the cash bond also contained a provision permitting respondent's release on a personal recognizance basis for purposes of receiving mental-health treatment, prior to the December 10 hearing on the petition, respondent was released to a mental health facility. The court noted that once respondent was released from mental health, he would be transported to the county jail for arraignment on the criminal charges.

At the hearing on the petition, the trial court took limited testimony from a caseworker regarding the children's placement. The caseworker explained that the children were placed with their mother, who had erroneously been named as a respondent on the petition. The caseworker testified that the placement was adequate. The court continued placement with the children's mother, but because respondent wanted to be present for the hearing and could not because of his mental-health hospitalization, the court adjourned the hearing.

On December 12, 2019, a number of things occurred. First, petitioner filed an amended petition seeking temporary custody over the children and asking the court to remove respondent from the children's home. In addition to the prior allegations, the petition now included allegations relating to respondent's pending criminal charges. The petition identified MCL 712A.2(b)(1) and (2) as the statutory grounds for jurisdiction.

Second, the trial court conducted a mental-health hearing with respondent. At that hearing, it was determined that respondent required mental-health treatment and that the treatment would continue for a period of time. A mental health order was entered on December 12, 2019 providing that respondent would receive "assisted outpatient treatment for no longer than 180 days," with respondent to be hospitalized for up to 60 of the 180 days.

Finally, the court held the continued hearing on the now-amended petition. Respondent's lawyer indicated that respondent denied a "good portion of the things" alleged in the petition, but stated that "given the situation today we're gonna waive the probable cause portion." The trial court, however, stated that it wanted to hear "whether or not the children would be at risk at this time" before it determined whether to authorize the petition. Accordingly, petitioner called a caseworker from the DHHS to testify.

The caseworker explained that she was present during the mental-health hearing and was aware that the court had found respondent was a person in need of treatment. She indicated that it

was her understanding that he would continue receiving that treatment for a period of time, and that he was unable to take the children into his care "at the present time." The caseworker testified that until respondent's mental health could be "brought under control, the children are to remain with mom." She explained that because respondent had not been receiving treatment for his mental-health issues, a child had been injured. She added that she was aware of the pending criminal charges and the fact that there was a no-contact order with any of the children, but she did not feel that was sufficient to protect the children from the risk of harm posed by respondent. She indicated that the "substantial risk of harm" arose because "we don't know when he's going to be released."

Based on the evidence presented, the court dismissed the petition, reasoning:

> The—the fact is these children are protected. They are placed with their mother. [Respondent] isn't in—in fact, I just—and can take judicial notice of a hearing I just held in regards to his mental health. He is currently under a mental health order by this Court. He is placed on a 60/180, which means for the next 180 days [respondent] is going to be under this Court's jurisdiction in regards to his mental health. If he fails to comply with any portion of his mental health, he can be re-hospitalized.
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> In addition, he will be managed and maintained by [a medical facility] which, quite frankly, is far superior in the issues of mental health than foster care. So, they will be offering him all the services that he needs including medication management and therapy. And as I indicated, if he doesn't comply with any of those, he can be re-hospitalized very easily as far as his hearing is concerned.
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> In addition, the Court, also—while we did not arraign him, [respondent] did, in fact, sign a protective services—protective services—protective conditions bond which the Court amended to include every single member of his household including his stepson and his wife. So, [respondent], at this time, has a $50,000 case bond and a protective conditions (sic) where he cannot have any contact with any member of his family including his wife. And he cannot be within one-quarter mile of his residence.
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> So, when he is finished being at the hospital, he will he [sic] be then transported to the jail where he will—will have an arraignment and that amount could go up or down. But at this time as far as his having any contact or the safety of the children, I think that there are two orders in place at this point to protect the children from harm.
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> Now, this Court was being asked to keep the children with the parent—the mother—and so, that has not changed. The children will continue to be in the protective custody of their parent. And [respondent] has two orders in place that will prevent him from interfering or having his—at least at this time 'til matters get sorted out—from having any contact with the kids at this point. So, those bonds can be adjusted by—other judges, but they are the same facts in the criminal case that are being done here in the—in the neglect case.

> So, at this time, I don't find that the children are at a substantial risk of harm. There are sufficient orders in place to protect the children from [respondent] until the issues can get sorted out in that matter. So, at this point, I am going to deny the petition.

This appeal follows.

II. PRELIMINARY INQUIRY

A. STANDARD OF REVIEW

Petitioner argues that the trial court erred by dismissing the petition because it did not apply the correct legal standards and because its finding that the children were not at a substantial risk of harm was clearly erroneous. We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). "We review for clear error the trial court's findings of fact underlying the legal issues." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 463; 861 NW2d 303 (2014). "A finding is clearly erroneous if, after reviewing the entire record, [the Court is] definitely and firmly convinced that the trial court made a mistake." *Id*. Finally, because MCR 3.962 leaves to the court's discretion the decision to (1) dismiss a petition, (2) refer the matter to alternate services, or (3) authorize a petition on a finding of probable cause, we review for an abuse of discretion the court's ultimate decision to dismiss a petition following a preliminary inquiry. See *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008) (recognizing that a court's discretionary decisions are reviewed for an abuse of discretion); *People v Odom*, 327 Mich App 297, 303; 933 NW2d 719 (2019) (accord).

B. ANALYSIS

Petitioner argues that the trial court's decision to dismiss the petition should be reversed because the court examined the circumstances at the time of the hearing rather than at the time the petition was filed. In support, petitioner directs this Court to *In re MU*, 264 Mich App 270; 690 NW2d 495 (2004), for the proposition that during a *preliminary hearing* "the trial court must examine the child's situation at the time the petition was filed." At the outset, however, petitioner's argument is misplaced because the hearing on the petition in this case was a "preliminary inquiry," not a "preliminary hearing."[2]

Under MCL 712A.13a(2), a trial court may authorize a petition at the end of a preliminary hearing or inquiry "upon a showing of probable cause that 1 or more of the allegations in the

[2] We are aware that the transcripts indicate that a preliminary hearing was held and comments made by the court and the parties seem to support a belief that the proceeding being conducted was a preliminary hearing, not a preliminary inquiry. However, in its order dismissing the petition, the court indicated that a "preliminary inquiry has been conducted and the filing of this petition . . . is not authorized." See *Oakland Co Prosecutor v Beckwith*, 242 Mich App 579, 590-591; 619 NW2d 172 (2000) ("It is well settled that courts speak through their written orders, not their oral statements.").

petition are true and fall within the provisions of section 2(b) of this chapter." MCL 712A.2(b)(1) and (2) permit a court to take jurisdiction over a minor:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.
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> * * *
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. . . .

Under MCR 3.962(A) "[w]hen a petition is not accompanied by a request for placement of the child and the child is not in temporary custody, the court *may* conduct a preliminary inquiry to determine the appropriate action to be taken on a petition." A preliminary inquiry is an "informal review by the court to determine appropriate action on a petition." MCR 3.903(23). Here, as the petition sought the removal of *respondent*, not the children, from the home, and because the children were not in temporary custody, the court rule governing the court's decision on the petition is MCR 3.962, not MCR 3.963 (governing preliminary hearings).

MCR 3.962 provides:

> (A) **Purpose**. When a petition is not accompanied by a request for placement of the child and the child is not in temporary custody, the court may conduct a preliminary inquiry to determine the appropriate action to be taken on a petition.
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> (B) **Action by Court**. A preliminary inquiry need not be conducted on the record or in the presence of the parties. At the preliminary inquiry, the court may:
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> (1) Deny authorization of the petition.
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> (2) Refer the matter to alternative services.
>
> (3) Authorize the filing of the petition if it contains the information required by MCR 3.961(B), and there is probable cause to believe that one or more of the allegations is true. For the purpose of this subrule, probable cause may be established with such information and in such a manner as the court deems sufficient.

Critically, for purposes of a preliminary inquiry, the court rule expressly stated that probable cause "may be established with such information and in such a manner as the court deems sufficient." Under this broad language, the trial court is not necessarily constricted to merely evaluating the situation at the time the petition is filed. Instead, it may consider updated, relevant information in

any manner that "the court deems sufficient." MCR 9.632(B)(3). Therefore, we conclude that when determining what action to take on a petition following a preliminary inquiry, the trial court is not limited to the facts in existence at the time the petition was filed.

Moreover, assuming *arguendo* that the trial court could only examine the children's situation "at the time the petition was filed," reversal is still not warranted because the trial court did, in fact, examine the children's situation at the time the *amended* petition was filed. The original petition was filed on December 3, 2019, but the amended petition—which included additional allegations—was filed on December 12, 2019. At the December 12, 2019 hearing, petitioner was not requesting the court to authorize the original December 3 petition, it was asking the court to authorize the amended petition. As a result, the children's situation at the time the amended petition was filed included the events of December 12, 2019. See MCR 3.961(C)(3) (requiring a preliminary hearing or a preliminary inquiry to be held before a court can determine the appropriate action to take on the amended or supplemental petition).

Therefore, at the time the amended petition was filed, the children were placed with their mother. The DHHS had already determined the placement to be adequate and their mother was not a respondent in the child-protective proceedings. Respondent was under a 60/180 mental-health order, requiring him to receive mental-health treatment, including hospitalization for up to 60 days. Failure to comply with his treatment could lead to additional hospitalizations. Upon release from the hospital, he was to be released to the county jail to await arraignment in his criminal case. The bond in his criminal case was a $50,000 case bond, which included a no-contact order with the children or their mother.

Petitioner argues that the bond was set in the criminal case, so the trial court in the child-protective proceedings has no control over it. The bond conditions, petitioner argues, can be revoked by the court in the criminal case, which would mean that respondent would not be prohibited from contact with the children or with returning to the home. If that happens, the children would be at risk of dangerous contact with respondent. Similarly, petitioner argues that once the 60/180 order expires, the court will no longer have jurisdiction over respondent in that matter. Petitioner hypothesizes that if respondent complies with his treatment plan and his mental-health provider does not petition the court to continue the order, then respondent could be "released from treatment without further ado." At that point, he would be free to do anything without any way for the court to ensure he follows through with his after-care instructions. The court, in that potential scenario, would not have any basis to limit or supervise respondent's contact with the children.

The problem with petitioner's argument is that it relies not on the children's situation at the time the amended petition was filed, but on a speculative future. In that speculative future, the court in the criminal case—relying on the horrendous facts set forth above—decides to inexplicably revoke a no-contact order designed to protect the victim and his siblings, and respondent is able to control his mental health effectively enough to obtain release from court-supervised treatment. In that future, the children's mother is unable to prevent future abuse to her children.

Petitioner also asserts that in addition to respondent's mental-health issues, the petition alleged that he had problems with anger management, domestic violence, and parenting skills.

Petitioner asserts on appeal that those issues "could very well constitute a substantial risk of harm to these children even after Respondent is 'successfully' discharged from his mental health treatment." There was no evidence, however, indicating that those issues were unrelated to respondent's mental-health issues so as to render his mental-health treatment insufficient to address those concerns. And again, the court was not looking toward a potential future, it was looking at the children's present situation. In the children's present situation, there was not a substantial risk of harm because respondent had been effectively removed from the home, was receiving mental-health treatment that was being monitored by the court, and was facing significant criminal charges relating to his conduct.

We are cognizant that there were severe injuries to the child in this case. When the police arrived, there was blood throughout the home because respondent had smashed his child's head into a door, splitting it open. Respondent was unstable. He locked himself in a room with the child, forcing the police to kick the door down and taser him repeatedly. The child required medical treatment. Respondent required mental-health treatment. The risk of harm to the children if respondent were to return to the home without receiving appropriate treatment is palpable. The court, however, determined that the risk was not imminent because respondent was receiving mental-health treatment under a 60/180 day order and because he had a criminal case pending that included a no-contact bond. Its factual findings were, in fact supported. That a different factfinder could have evaluated the children's situation and reached a different result does not mean that the court's decision to dismiss the petition was an abuse of discretion. As an appellate court, we must avoid the temptation to second-guess the trial court's discretionary decisions when those decisions are supported by the record. If we were to adopt petitioner's argument, we would have to ignore the significant discretionary authority given to the trial court.

III. CONCLUSION

In sum, under MCR 3.962, the trial court's probable-cause determination does not limit the court to examining the children's situation as it exists at the time the petition is filed. It instead permits the court to consider information in any manner that the court deems fit. Here, examining the children's situation at the time of the hearing (which coincidently was at the time the amended petition as filed), the court found that there was not probable cause to authorize the petition. The court's findings were not clearly erroneous, so the court did not abuse its discretion by dismissing the petition under MCR 9.632(B)(1).

Affirmed.

/s/ Brock A. Swartzle
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly