

STATE OF MICHIGAN
COURT OF APPEALS

In re TAYLOR, Minors.

UNPUBLISHED
May 19, 2015

No. 324627
Mecosta Circuit Court
Family Division
LC No. 14-006116-NA

Before: DONOFRIO, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-father, W. Taylor, appeals as of right the trial court's order authorizing the petition of the Department of Human Services (the Department) to remove his minor children from his home and placing them with the Department for supervision. We affirm.

I. BACKGROUND FACTS

The Department filed a petition in this case after Children's Protective Services investigated concerns of bruises to Taylor's two youngest children in March and April 2014. The Department's petition alleged that the children's teachers reported seeing bruises on the children, another person reported that the children were outside without supervision and inadequately dressed for the weather, and Taylor refused to participate in services.

The trial court held a preliminary hearing on May 20, 2014. At the hearing, Children's Protective Services worker Christopher Parham testified that the middle child's teachers reported that the child was frequently bruised. The teacher advised him that the child is a post-chemotherapy patient, wears leg braces, is clumsy, and falls a lot. Parham testified that the youngest child's teacher reported seeing a bruise on the child and when he interviewed the child, he saw a bruise on the child's forehead and two bruises on his lower arm.

Parham took the children to the hospital for a medical examination. Dr. Stephen Frey performed a medical examination of the children in March 2014 and determined that the middle child's bruises could have occurred because the middle child is a post-chemotherapy patient. According to Parham, Dr. Frey did not believe that the children's bruises were caused by hands or other instruments. Laboratory testing of the middle child showed that his platelets were normal, and the hospital's social worker informed Parham that the bruises were "suspicious of abuse." Parham testified that the youngest child's teachers observed more bruises on the child in May. Parham visited Taylor's home in May and saw a laceration on the middle child's cheek.

In April 2014, Parham spoke with Gary Turner, the manager of Taylor's mobile home park. According to Parham, Turner said he had received several complaints that Taylor's children were not supervised. On one incident, the youngest child was alone in a diaper a block or two from Taylor's home, and the middle child was sitting in the middle of the street near the home, rocking and crying. There was snow on the ground but the middle child was wearing a diaper and a t-shirt at that time. Turner knocked on Taylor's door and learned that Taylor was sleeping and would not wake up.

Parham further testified that the children's mother was terminally ill. Taylor could not provide the names or locations of any family members who could assist him. The middle child had an eye removed and has cancer, and all three children had special needs. Parham spoke with Taylor and offered family services, grief counseling, and parenting classes, but Taylor informed him that he did not have any problems. However, Parham was concerned that the children's bruising was getting worse. Parham was also concerned that Taylor refused to participate in services and did not believe that he had any problems.

On cross-examination, Parham testified that he could not tell whether Taylor was abusing the children or they were bruising each other. Parham acknowledged that Dr. Frey did not believe that the children's bruises were caused by objects. Parham opined that even if the children were bruising each other, they were improperly supervised. Parham also acknowledged that when he investigated the incident of improper supervision in April 2014, he discovered that Taylor had attempted to place a covering over the door knob to prevent the children from going outside. When counsel asked if that was indicative of Taylor's attempts to supervise the children, Parham responded affirmatively.

Taylor's counsel asked Parham on cross-examination what services he expected Taylor to participate in. Parham testified an intensive in-home program, grief counseling, regular counseling, and parenting classes. Counsel asked that in light of all of Taylor's services, "isn't that a lot to all stack on your plate at once," and Parham responded that the in-home program would be his highest priority.

In closing, Taylor's counsel argued:

Your Honor, when it comes to father inflicting these injuries, there's not the evidence for that. There is evidence of three boys giving each other bruises. They are on the high side when it comes to the numbers, but at the same time, they're not consistent with father's striking a child with an object or anything like that. They're not consistent with a hand blow or anything like that from father and the kids—yes, the numbers have increased, but the kids are also going through grief, they don't have their mother anymore. And as much as some of them understand that, my client is trying to work through that with his children. Adding to the trauma by pulling them out of the house would be inappropriate at this time, your Honor.

The trial court authorized the petition and ordered the children temporarily placed under the Department's supervision.

Following the preliminary hearing, Taylor moved to dismiss the petition, contending that the Department's allegations were baseless, his actions did not constitute neglect, and the allegations were outside his control. At arguments on the motion, Taylor orally contended that he did not receive adequate representation during the preliminary hearing. The trial court noted that counsel might not present evidence at the preliminary hearing "as a matter of trial strategy . . . because they don't want to tip their hand." It found that Taylor's attorney adequately represented him at the preliminary hearing.

A jury later found that the Department proved one or more of the allegations in the petition. The trial court placed the children with the Department and ordered the Department to make reasonable efforts to reunify them with Taylor. Taylor now appeals.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Taylor contends that counsel rendered ineffective assistance at the preliminary hearing by (1) inadequately cross-examining Parham, (2) not presenting evidence, and (3) making a "weak" closing argument. We disagree.

"[T]he Due Process Clause requires assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his parental rights." *Reist v Bay Co Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976). When analyzing ineffective assistance of counsel claims in child protective proceedings, this Court applies the same standards as when analyzing ineffective assistance of counsel claims in criminal proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988); *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000).

This Court reviews for clear error the trial court's findings of fact and reviews de novo questions of law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The parent must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In this case, Taylor did not move the trial court for an evidentiary hearing, and the trial court did not hold one, so this issue is unpreserved. When the trial court has not conducted a hearing to determine whether a parent's counsel was ineffective, our review is limited to mistakes apparent from the record. See *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To prove that counsel was not effective, the parent must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the parent. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Counsel's decisions to call witnesses, how to question those witnesses, and what evidence to highlight in closing arguments are all matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). There is a strong presumption that counsel's strategic decisions were sound. *Id.* at 40.

In this case, counsel chose not to call any witnesses. Counsel instead cross-examined Parham. Our review of counsel's cross-examination shows that counsel's questions were insightful and elicited evidence favorable to Taylor, including Dr. Frey's belief that the bruises

were not caused by hands or objects. Counsel did not need to call Dr. Frey to present this evidence, which would have simply duplicated Parham's admissions. Counsel's succinct closing argument also highlighted this evidence in a light favorable to Taylor. We do not agree that counsel's closing argument was somehow "weak." There is simply no support for the proposition that a long and involved closing argument would have been more powerful than counsel's short summary of the holes in the Department's evidence and his plea for the trial court not to visit more trauma on the children by removing them from Taylor's home. In sum, we are not definitely and firmly convinced that the trial court made a mistake when it found that counsel's representation was objectively reasonable.

We affirm.

/s/ Pat M. Donofrio

/s/ Peter D. O'Connell

/s/ Amy Ronayne Krause