

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DANIELLE RENEE
CARPENTER, TIFFANY LATRICE
CARPENTER, and AUVIENNA MICHELLE
CARPENTER, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

UNPUBLISHED
August 11, 2005

v

LEOLA LATRICE CARPENTER,

Respondent-Appellant.

No. 257669
Wayne Circuit Court
Family Division
LC No. 03-423442-NA

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(g) and (j). We affirm.

This termination proceeding arose out of the death of one of respondent's seven-month-old twins. At the adjudication hearing, respondent entered a no-contest plea to jurisdiction because she was facing criminal charges. The factual basis for jurisdiction was then established by the court taking judicial notice of the death certificate indicating blunt force trauma to the head as the cause of death, and the circuit court's order binding respondent over for trial. It was also noted that respondent was incarcerated and unable to care for the children.

Seventeen days later, on December 29, 2003, respondent was evaluated and deemed incompetent to stand trial in her criminal matter. At the May 18, 2004 initial disposition in this proceeding, evidence showing that respondent was incompetent to stand trial and was residing at the Center for Forensic Psychiatry, and reports from a psychiatrist, a social worker, and two psychologists at the Center were admitted. The evidence clearly showed that respondent was unable to care for herself or her children and had been placed under the full guardianship of her mother. The psychiatrist testified that if respondent's cognitive and memory deficits were the result of a prior automobile accident, as respondent asserted, then respondent had most likely already reached the highest level of improvement in her cognitive functioning. The psychiatrist also stated that the prognosis for improvement in respondent's mood disorder was guarded, but that most persons deemed incompetent to stand trial were returned to competency within fifteen

months. Evidence in the neuropsychologist's report indicated a possibility that respondent was malingering or feigning her memory loss to some extent.

Respondent first argues that counsel was ineffective in failing to move to withdraw her no-contest plea after her lack of competence became apparent, and that the matter should now be remanded for a determination whether she was competent to enter the plea and whether she should be allowed to withdraw. She further asserts that the court erred in accepting her plea and in finding that it had jurisdiction in these proceedings when it was subsequently determined that respondent was incompetent to stand trial in the pending criminal matter. We find no reversible error.

Whether respondent's plea was knowing and voluntary, and whether the trial court deprived her of her right to trial by relying upon an incompetent plea, is a question of due process. This Court reviews constitutional issues de novo. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). Respondent did not raise this issue in the trial court and, therefore, did not preserve it for review. Unpreserved constitutional issues are reviewed for plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish a claim of ineffective assistance of counsel, respondent is required to show that her attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment, and that her attorney's performance was prejudicial, i.e., that it affected the outcome of the proceedings. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

We will assume that respondent was incompetent to enter a no-contest plea at the adjudication trial in this proceeding on December 12, 2003. We conclude, nevertheless, that the trial court did not reversibly err in proceeding with the initial disposition and in failing to reconsider respondent's plea when respondent's apparent lack of competence became known.

We first observe that a finding of incompetence in a child protective proceeding has different ramifications than in a criminal matter. While a finding of incompetence in a criminal case necessitates the suspension of the proceedings, child protective proceedings are not automatically suspended in such circumstances, as respondent concedes. Here it was undisputed that respondent was incarcerated and could not care for the children. Further, the same evidence that supported a finding of incompetence sufficient to vacate the no-contest plea established respondent was not able to provide proper care and custody for the children. While respondent is correct that the rules governing the adjudication and disposition determinations are different, in the instant case, the outcome was not affected.

The Forensic Center for Psychiatry Admission Summaries admitted into evidence at the May 18, 2004 initial disposition, as well as Dr. Dodd-Kimmey's testimony and the Letters of Guardianship, clearly showed that respondent was not only incompetent to stand trial in her criminal matter, but was wholly incapable of caring for herself or her children. Vacating respondent's no-contest plea and proceeding with a trial would have been a needless and futile exercise because the December 29, 2003 Evaluation and the subsequent Forensic Center for Psychiatry's Admission Summaries supporting respondent's incapacity to enter a knowing and voluntary plea were more than sufficient to show that she was unable to parent the children, and thus establish jurisdiction over the children in a trial. MCL 712A.2(b)(1) & (2). While the evidence also showed that most persons incompetent to stand trial are restored to competency

within fifteen months, that standard of competence is far lower than the level of competence required to adequately parent children.

In addition, the evidence to which the parties stipulated, namely that Ajenee died of a blow to the head and the order binding respondent over for trial in that homicide, showed by a preponderance of the evidence that the children were without proper custody, and that there was criminality in the home. MCL 712A.2(b)(1) & (2). Had respondent elected to go to trial instead of entering a no-contest plea, this evidence would have established jurisdiction by a preponderance of the evidence.

Thus, the trial court's failure to reconsider the validity of respondent's no-contest plea after respondent was declared incompetent did not affect respondent's substantial right to trial and the rights that accompany a trial. *Carines, supra*.

For the same reason, respondent was not deprived of effective assistance of counsel when counsel failed to move to withdraw her plea after her incompetence became apparent. Had counsel made a motion to withdraw respondent's no-contest plea for reasons of incompetence, and had the trial court had granted that motion on the evidence showing her incompetence, jurisdiction would nevertheless have been established. Counsel's failure to move to withdraw respondent's plea did not prejudice the outcome of the adjudication and, therefore, did not constitute ineffective assistance of counsel.

Respondent further argues that the statutory grounds for termination were not established by clear and convincing evidence and that termination was clearly against the children's best interests. We disagree. The trial court did not clearly err in determining that the statutory grounds for termination of parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Respondent asserts that termination was premature and that there was not clear and convincing evidence that she would be unable to safely parent the children within a reasonable time, particularly in light of the evidence that most persons were restored to competency within fifteen months. However, the level of competence to stand trial is much lower than the level of competence required to appropriately and safely parent children. Respondent continually asserted that her cognitive difficulties, which rendered her unable to make reasonable and rational decisions, were the result of a motor vehicle accident, in which case the psychiatrist testified that respondent had already improved cognitively as much as could be expected. Also, the prognosis for improvement in respondent's mood disorder was guarded, and many months of medication management and therapy would be required before respondent could potentially care for her children. Since the children had already been in foster care for ten months, the trial court correctly concluded that respondent would not be restored to the level of competency required to provide proper care of the children within a reasonable time, and that the children would be at risk of harm if returned to respondent.

Further, the evidence did not show that termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). No evidence was presented showing that termination would be contrary to the children's best interests, and the children were too young to express considered opinions regarding their placement. The evidence was clear and convincing that respondent would not be able to provide proper care or custody for the children within a reasonable time,

and that the children would likely suffer harm if returned to her. Therefore, the trial court did not err in terminating respondent's parental rights.

Affirmed.

/s/ Helene N. White

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder