STATE OF MICHIGAN

COURT OF APPEALS

In re M. FOSTER, Minor.

UNPUBLISHED
January 6, 2022

No. 356976
Delta Circuit Court
Family Division
LC No. 20-000547-NA

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

On appeal from the trial court's order of disposition, respondent challenges the trial court's order of adjudication assuming jurisdiction over his son, MF. For the reasons stated in this opinion, we affirm.

I. BACKGROUND

Shortly after MF's birth, the Department of Health and Human Services (DHHS) filed a petition in September 2020 requesting that MF be removed from his parents' care. According to the petition, MF's mother used drugs during her pregnancy and tested positive for drugs when she gave birth to MF. The mother was also facing felony drug charges and scheduled to be sentenced the next month.[1] As for respondent, the petition alleged that he had a child removed from his care in 2009 because of allegations of physical abuse. Respondent was planning on living with the child's mother until her sentencing, and he declined to tell the caseworker where he would go after that. The trial court authorized the petition and ordered that respondent have supervised parenting time but conditioned his parenting time on clean drug screens.

In late September 2020, DHHS filed an amended petition alleging that respondent had a felony drug conviction in 2016 and recently had two positive drug screens. In October 2020, the trial court again ordered that respondent's parenting time be conditioned on clean drug screens.

[1] MF's mother pleaded no-contest to the petition and has not filed an appeal. Accordingly, the term "respondent" as used in this report refers only to MF's father.

DHHS then filed a second amended petition, alleging that respondent had another positive drug screen and was recently arrested on two counts of delivery or manufacture of cocaine.

At the adjudication trial in February 2021, the trial court read to the jury the allegations in the petitions, but the results of respondent's drug screens were not admitted into evidence and there was no testimony about the results of the screens. A detective with the Delta County Sheriff's Office testified the basis for respondent's recent arrest and that during his interview, respondent stated he was a "crack dealer" and produced several baggies of crack cocaine. The video of respondent's interview was also played to the jury. Further, a Child Protective Services (CPS) worker testified that respondent told her that he had a prior drug felony involving the delivery of ecstasy. The jury found that MF's home or environment, by reason of neglect or criminality on the part of respondent, was an unfit place for MF to live in, and the trial court entered an order of adjudication assuming jurisdiction over the child.

At a dispositional hearing in April 2021, MF's mother told the trial court that she and respondent "signed [a] guardianship" over MF to respondent's sister. The prosecutor stated that he was not presented with any information about a guardianship. Respondent's counsel stated that respondent told her he was interested in a guardianship and inquired about how to proceed. The trial court stated that it was going to proceed with the hearing and that the parties could file a motion regarding a juvenile guardianship and schedule a hearing on the matter. This appeal followed.

II. DISCUSSION

Respondent first argues that the trial court erred by ordering him to complete drug screens before the adjudication. We agree with respondent, but conclude that reversal is not required because he does establish outcome-determinative prejudice from this unpreserved error.[2]

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). In the adjudicative phase, the trial court determines whether it "can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). Jurisdiction is established by accepting a parent's plea or conducting a trial regarding the allegations in the petition. *In re Deng*, 314 Mich App 615, 623-624; 887 NW2d 445 (2016). "After the parent has been found unfit, the trial court assumes jurisdiction over the child and the dispositional phase of proceedings begins." *Id*. at 624. "The purpose of the dispositional phase is

[2] Respondent admits that he failed to preserve this issue by raising it before the trial court. Unpreserved issues are reviewed for "plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citation omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . ." *In re Sanders*, 495 Mich at 406, quoting MCR 3.973(A) (ellipsis in original; quotation marks, citation, and emphasis omitted).

The court's authority to enter orders affecting adults in juvenile proceedings is found in MCL 712A.6, which provides:

> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A and chapter 10C of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082 and 600.1099b to 600.1099m, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. *However, those orders must be incidental to the jurisdiction of the court over the juvenile or juveniles*. [Emphasis added.]

Accordingly, the trial court plainly erred by ordering respondent to submit to drug screens before the adjudication. The trial court did not have the authority under MCL 712A.6 to issue such orders until it obtained jurisdiction over MF. See MCL 712A.6. See also *In re Sanders*, 495 Mich at 420 ("[T]he state must adjudicate a parent's fitness *before* interfering with his or her parental rights.") (emphasis in original).

We also agree with respondent that the trial court erred by conditioning his parenting time on clean drug screens. MCL 712A.13a(13) governs parenting time after the child's removal from a parent's custody and provides:

> (13) If a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the juvenile. Parenting time between the juvenile and his or her parent shall not be less than 1 time every 7 days unless the court determines either that exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being. If the court determines that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time.

The language of MCL 712A.13a(13) is unambiguous in its requirements that "the court *shall* permit the juvenile's parent to have regular and frequent parenting time" and that parenting time "*shall* not be less than 1 time every 7 days . . . ." (Emphasis added). The "[u]se of the word 'shall' connotes a mandatory duty imposed by law." *Sharp v Huron Valley Bd of Ed*, 112 Mich App 18, 20; 314 NW2d 785 (1981). MCL 712A.13a(13) sets forth two exceptions to this otherwise mandatory schedule. The first is not relevant here as it addresses exigent circumstances. The second and relevant exception allows the court to vary from the mandatory schedule only if "the court determines that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being . . . ." MCL 712A.13a(13). The record does not indicate if respondent's parenting time was actually suspended because of the failed drug screens. But

regardless, contrary to the trial court's orders, the statute is unambiguous that a court cannot suspend parenting time before a termination petition is filed without a finding of harm. It is clear that the court's parenting-time orders were intended to compel respondent to produce negative drug screens. However, conditioning parenting time on this basis is improper absent a demonstrable danger to the child as a result of visitation, even if supervised. Suspension of parenting time may not be used as a sanction to compel compliance with behavioral requirements.

That said, reversal of the adjudication in this case is not warranted. As an initial matter, we agree with respondent that the allegations of his failed drug tests should be stricken from the petitions because the drug test results were obtained from his compliance with the trial court's unauthorized orders. And because the underlying orders and allegations are void, it follows that the jury should not have been read the allegations relating to the positive drug screens at the adjudication trial.[3] However, respondents fails to demonstrate outcome-determinative prejudice from this error. See *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). See also MCR 2.613(A).

Setting aside the allegations of respondent's positive drug screens, there was ample evidence to support the jury's verdict. MCL 712A.2(b)(2) provides, in relevant part, that a trial court has jurisdiction over a child "[w]hose home or environment, by reason of neglect [or] criminality . . . on the part of a parent . . . is an unfit place for the juvenile to live in. . . ." As noted, the detective testified about a control buy in which a confidential informant purchased crack cocaine from defendant. The detective also testified that respondent said that he was a "crack dealer," and the jury was shown a video of the police interview during which respondent produced several baggies of crack cocaine he had hidden. Further, the CPS worker testified that respondent admitted to a prior drug felony involving ecstasy. Based on this evidence, it is unlikely that the jury would have reached a different result had it not heard the allegations of the positive drug screens. Moreover, the jury was instructed to decide the case based on the evidence and evidence of the drug screens was not admitted at the trial. See *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011) ("Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors."). For these reasons, respondent cannot establish meaningful prejudice from the jury hearing allegations of his positive drug screens. We affirm the trial's court order of adjudication.

A.

Respondent also argues that the trial court erred by failing to consider a juvenile guardianship at the dispositional hearing. We disagree.[4]

[3] This is not to say that the reading of the petition was erroneous in and of itself. MCR 3.972(B)(2) provides that "[t]he court shall read the allegations contained in the petition, unless waived," and respondent did not waive a reading of the petitions. But, as respondent argues, the reading of the allegations regarding the drug tests was a derivative error to the improper court orders.

[4] We review the interpretation and application of statutes and court rules de novo. *In re Ferranti*, 504 Mich at 14.

Respondent provides no authority to support the conclusion that the trial court was required to consider a juvenile guardianship at the dispositional hearing. Further, MCL 712A.18 and MCR 3.973, which govern dispositional orders and hearings respectively, do not require the court to consider a juvenile guardianship. Rather, it is at the permanency planning hearing that "the court shall determine whether and, if applicable, when . . . [t]he child may be placed in a legal guardianship." MCL 712A.19a(4)(c). Therefore, respondent has failed to show that the trial court erred by failing to consider a juvenile guardianship at the dispositional hearing.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause