STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Maxwell Kenneth Unger and Tyler Benjamin Unger, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MARK STEVEN UNGER,

Respondent-Appellant.

UNPUBLISHED
October 9, 2007

No. 276234
Oakland Circuit Court
Family Division
LC No. 03-686416-NA

Before: Wilder, P.J., and Borello and Beckering, JJ.

PER CURIAM.

Respondent-appellant, Mark Steven Unger (Unger) appeals as of right from the trial court's order terminating his parental rights under MCL 712A.19b(3)(g), (h), (j) and (n)(i). We affirm.

I

This dispute is before us for the third time. In *In re MU*, 264 Mich App 270; 690 NW2d 495 (2004), we held that the trial court erred in determining that a finding of criminality relating to the death of the children's mother and respondent's wife, in the absence of a criminal charge or conviction, violated respondent's due process rights, and by thereby excluding evidence of the circumstances surrounding the death of the children's mother and respondent's wife. Then, in *In the Matter of Max Unger & Tyler Unger, Minors*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket no. 264134), this Court affirmed in part and modified in part the trial court's grant of the petitioner's request for disclosure of records of substance abuse treatment provided to Unger, and remanded.

On June 21, 2006, Unger was convicted of premeditated first-degree murder of his wife and on July 18, 2006, was sentenced to life imprisonment without possibility of parole. On September 18, 2006, Unger agreed to plead no contest to the amended petition. The trial court accepted the plea, finding it was knowingly and voluntarily made. On December 7, 2006, a best

interests[1] hearing was held. At this hearing, Unger's counsel indicated that he had spoken with Unger, that Unger had also spoken with the attorney representing Unger's mother in her grandparent visitation suit, and that based on these conversations, and after being advised of all his rights, Unger had decided to withdraw his request for a best interests hearing. Petitioner's counsel indicated that the maternal grandparents, who had custody of the minor children during the three-year pendency of the litigation, would consider the paternal grandmother's request for visitation, and make a family decision about it. Mr. Stern, the maternal grandfather, confirmed this representation by petitioner's counsel. Then, under oath, Unger stated that he understood that he was entitled to a best interest hearing, but nevertheless waived that right and wished to be returned to prison. On January 2, 2007, the trial court entered the order terminating Unger's parental rights.

II

A

Unger asserts that the trial court erred when it found that the statutory grounds to terminate parental rights existed, because his plea on the supplemental petition was defective. We disagree.

"The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights." MCR 3.977(J). The review for clear error applies to both the trial court's decision that a ground for termination of parental rights was proven by clear and convincing evidence and the court's ruling regarding the child's best interests. *In re JK*, 468 Mich. 202, 209; 661 NW2d 216 (2003). The trial court's determination to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake had been made on consideration of all the evidence. *Id.* at 209-210. In applying the clearly erroneous standard, this court should recognize the special opportunity the trial court has in assessing the credibility of witnesses. *In re Miller,* 433 Mich, 331, 337; 445 NW2d 161 (1989).

A trial court may terminate a parent's parental rights to a child if the court finds that the petitioner has proven one of the statutory grounds for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo Minors,* 462 Mich. 341, 350; 612 NW2d 407 (2000). So long as the petitioner establishes a single ground for termination, termination is justified. *Id*. "If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is *clearly* not in the child's best interests." MCL 712A.19b(5)(emphasis added); see also *Trejo, supra* at 350.

Unger first argues that the petition was defective because he was deprived of liberty without due process of law when the trial court failed to advise him on the record of the actual and immediate consequences of pleading to statutory grounds of a permanent wardship petition.

[1] A best interests hearing is a hearing to determine whether termination of the parental rights at issue is in the best interests of the child or children.

This issue is unpreserved. For unpreserved issues, this Court reviews for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

MCR 3.971(B) provides, in relevant part:

> Before accepting a plea of admission or a plea of no contest, the court must advise the respondent on the record or in a writing that is made part of the file:
>
> * * *
>
> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

Here, Unger was the subject of a petition and three amended petitions to terminate his parental rights. Unger was therefore informed, in writing, several times that the petitioner sought to terminate his parental rights. At the time of Unger's plea, the trial court specifically asked Unger whether he understood that once the court takes jurisdiction, the court will make a placement decision regarding the minor children, his parental rights can be terminated, and his plea can be considered in a final petition to terminate his parental rights. Unger responded affirmatively. Accordingly, the trial court did not fail to advise Unger on the record of the actual and immediate consequences of pleading no contest, and did not deprive Unger of liberty without due process of law. We find no plain error affecting Unger's substantial rights.

B

Next, Unger argues for the first time in this Court that he was deprived of his constitutional right to counsel at the time he made his plea and "during the best interests phase." We disagree.

This argument is not properly presented because defendant did not raise it in his statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In addition, the issue of ineffective assistance of counsel must be raised in a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Where a claimant fails to move in the trial court for a new trial or an evidentiary hearing with regard to the ineffective assistance claim, appellate review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). Here, since there was not a *Ginther* hearing in the trial court, this Court's review is limited to the existing record. *Id.; People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The standard of appellate review of an effective assistance of counsel claim in a termination of parental rights case is comparable to that applied in criminal cases. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the

lower court are reviewed for clear error, and questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.[2] It is too well established to require citation of authority that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide effective assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, ____ US ____; 127 S Ct 1933, 1939; ____ L Ed 2d ____ (2007). In addition, these provisions have been interpreted or at least assumed to apply to proceedings by the government to terminate a parent's parental rights, and our court rules require that the court appoint counsel to represent indigent parents in such proceedings. *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). Also, the right to due process indirectly guarantees assistance of counsel in child protective proceedings. *In re CR, supra* at 197.

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the claimant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and claimant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the claimant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The claimant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). The claimant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra* at 255.

[2] Interestingly, article 1, section 20 goes on to provide that an accused also has a right "to have an appeal as a matter of right, except as provided by law *an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . .*" Const 1963, art 1, § 20 (emphasis added).

Unger claims that he was deprived of his right to counsel because his counsel did not have a written plea form. We disagree. Unger's argument is of no moment because Unger was not present to sign a plea form, having voluntarily chosen to participate by telephone. In addition, Unger only wanted to plead no contest to certain allegations, and the petitioners had to decide which allegations they were willing to strike during the course of the plea negotiations, so no written plea form could have been prepared in advance. Also, MCR 3.971 does not require that a written plea form be executed.

Unger next argues that he was deprived of his right to counsel because his counsel failed to provide him with a "clean copy" of the petition. We disagree. Unger's questions and responses during the plea colloquy demonstrate that he was well aware of the allegations he was admitting and of the allegations he was not admitting.

Next, Unger argues that he was deprived of his right to counsel because his counsel failed to object to the judge taking judicial notice of certain records from a substance abuse rehabilitation facility. However, Unger's counsel did object to a portion of the rehabilitation records. We will not second-guess strategy decisions. *Garza, supra* at 255.

Next, Unger argues that he was deprived of his right to counsel during the best interests phase. Again, we disagree. Unger voluntarily waived the best interests hearing. Moreover, Unger not only consulted with his appointed attorney before waiving the best interests hearing, but also with his mother's retained counsel.

Unger argues that his counsel did not challenge the admission of social and legal files, although he knew there was damaging information in them. However, Unger fails to identify what "files" his counsel should have objected to, or what objection should have been made. Because we cannot evaluate Unger's claim without knowing what objection Unger thinks should have been made, this issue is not preserved.

Unger argues that he was deprived of his right to counsel because his counsel did not call him to the stand. However, not calling Unger to the stand was trial strategy. Unger was appealing his murder conviction at the time, and had asserted his privilege against self-incrimination in this case. Calling Unger to the stand, only to have him reassert his privilege against self incrimination would have been futile. And the decision whether to call witnesses is a matter of trial strategy. *Garza, supra* at 255.

Unger argues that his waiver of his right to a best interests hearing was not voluntary. We disagree. When he waived that right, Unger specifically stated that he was aware he could have a hearing if he desired, and that he had made a decision not to have it.

With respect to all of Unger's ineffective assistance claims, Unger fails to set forth how different action by his attorney would have resulted in a different outcome. *Garza, supra* at 255. Unger was convicted of murdering his wife (the children's mother) and sentenced to life in prison without the possibility of parole. We are thoroughly unconvinced that if Unger's counsel had acted differently, the outcome of these proceedings would have been different.

Next, Unger argues that he was deprived of his parental rights without due process of law, because there was no best interest hearing. This issue is unpreserved because it was not

raised below and is not contained in the statement of questions presented. In addition, Unger was not deprived of his rights without due process, because he voluntarily waived his constitutional right to a best interests hearing. See, e.g., *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000)..

Limiting our review to the record, Unger has not established any basis for relief due to alleged ineffective assistance of counsel, and has failed to show any prejudice that would affect the decision to terminate his parental rights. *Pickens, supra*; *People v Hoag*, 460 Mich 1; 594 NW2d 57 (1999); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988), see also *In re Vasquez*, 199 Mich App 44, 48-49; 501 NW2d 231 (1993). Unger freely and voluntarily agreed to plead no contest to the amended petition, and voluntarily agreed to waive the best interests hearing.

C

Finally, Unger argues that the statutory grounds for termination were not proven by clear and convincing evidence, as the trial court failed to produce a proper record of the basis for termination. Again, we disagree.

Unger failed to raise this issue below. Therefore, it is unpreserved. For unpreserved issues, this Court reviews for plain error affecting substantial rights. *Veltman, supra* at 690.

MCR 3.977(H) provides in relevant part:

> (1) The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. . . .
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> ***
>
> (3) An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order.

MCR 3.971(C) governs pleas, and provides, in relevant part:

> (2) The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. . . .

In *In re Toler*, 193 Mich App 474, 476-477; 484 NW2d 672 (1992), we held that under the predecessor rule, MCR 5.974(G), the trial court need not announce a statutory basis for termination if it relies on the parties' agreement following a respondent's consent to termination. In addition, we read MCR 3.977(H) to require findings only when the matter is contested.

The allegations to which Unger pled no contest are clear from the record, and the proofs for such allegations are also established in the record. Unger's conviction for first-degree premeditated murder was established by a certified copy of the judgment of sentence, indicating that the sentence was life in prison without parole. That judgment also proved he was unemployed due to incarceration. In addition, the records from the substance abuse treatment facility showed Unger's history of substance abuse, such as his opiate and cannabis dependencies. In sum, there were no contested facts in light of Unger's agreement that jurisdictional and statutory grounds for termination were established by the allegations remaining in the amended petition, given the proven conviction, the testimony from prior hearings, and the substance abuse treatment records. Accordingly, we find no merit to Unger's contentions.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering