

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1018-15T2

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.R.B.,

Defendant-Appellant.

IN THE MATTER OF J.R.B., Jr.
and M.B.,

Minors.

Submitted May 23, 2017 — Decided June 30, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Family Part,
Docket No. FN-09-0351-13.

Joseph E. Krakora, Public Defender, attorney
for appellant (Mary Potter, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Andrea M. Silkowitz,
Assistant Attorney General, of counsel; Joyce
Calefati Booth, Deputy Attorney General, on
the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Melissa R. Vance, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant J.R.B. appeals from an August 7, 2013 order finding that he abused or neglected his two minor children when he was arrested and incarcerated on a charge of distributing narcotics. We reverse because there was insufficient evidence to establish that defendant's alleged actions placed his children at substantial risk of harm.

I.

The claims of abuse or neglect against J.R.B. (Jerry)¹ arose from his arrest on April 1, 2013. Jerry and M.L. (Martha) lived together with their two children, J.R.B., Jr. (Junior), a son born in November 2009, and M.B. (Margaret), a daughter born in February 2013. In early 2013, Martha, the children, and Jerry were sharing an apartment with another adult couple, C.P. (Carol) and J.Z. (Jay).

On April 1, 2013, Jerry and Martha went to New York City, leaving Junior and Margaret in the care of Carol and Jay. At that

¹ To protect privacy interests and for ease of reading, we use fictitious names for the parties, their children, and the roommates. See R. 1:38-3(b)(12).

time, Junior was three years old and Margaret was approximately five weeks old.

While in New York City, Jerry and Martha were arrested by agents of the Federal Bureau of Investigation (FBI) and charged with distribution of narcotics. Both Jerry and Martha were incarcerated in New York City. They informed the FBI agents that their children were at their apartment in Jersey City. Accordingly, an FBI agent contacted the Jersey City Police Department (JCPD) and requested a welfare check on the children.

Late in the evening of April 1, 2013, two JCPD officers and an FBI agent went to the apartment. The officers were greeted by Jay, who informed them that he and Carol were looking after both children. After entering the apartment, the officers observed two pit bulls and noted the smell of animal waste. The officers also saw that the apartment was extremely cluttered, unkempt, and dirty.

The officers found both children in the apartment and they observed that the children appeared to be in good health. Nevertheless, the officers decided to take the children for evaluations at the Jersey City Medical Center (JCMC). Subsequent medical exams revealed that both children were physically healthy, but Junior was hyperactive and he did not respond to oral communications.

The officers also contacted the Division of Child Protection and Permanency (Division), and a Division worker came to the JCMC. After learning that the parents were incarcerated, and after the worker was unable to contact the roommates or any identified relative, the Division conducted an emergent removal of the children. Thereafter, the Family Part approved that removal and granted the Division temporary custody of the children.

On April 5, 2013, a Division worker met with and interviewed Jerry. Jerry had been released from jail, but he was under "house arrest" at his mother's home in New York. Jerry informed the Division worker that he, Martha, and their children lived in an apartment with Carol and Jay. He explained that Jay was a close friend of Martha and he had known him for at least five years.

Under questioning by the Division worker, Jerry admitted that he had previously sold drugs "on occasion." He also stated that he had no criminal record, but he acknowledged that on April 1, 2013, he had been arrested and charged with selling drugs. Jerry also informed the Division worker that for the past five to six years, he had used crystal methamphetamine approximately once a week. He denied, however, that he ever used drugs in the presence of the children or had drugs in the home.

The Division worker also interviewed Martha, who was being held at the Metropolitan Correctional Center in New York. Martha

denied ever selling or using drugs. She also denied ever seeing Jerry use drugs in her presence. While acknowledging that she suspected Jerry used drugs, she stated that she never saw Jerry high on drugs while he was caring for the children.

Martha also explained that the home was unkempt because they had moved into the apartment two months before, and she was recovering from a caesarean section during the delivery of Margaret. Martha also stated that Carol and Jay had known both children since the children were born.

A fact-finding hearing was conducted on August 7, 2013. The Division presented three witnesses: two caseworkers and a JCPD police officer who had participated in the welfare check on the children. The Division also submitted documentary evidence, including a certified copy of the indictment against Jerry and Martha and the corresponding federal docket sheet. The indictment was admitted for the limited purpose of confirming that there were charges filed against Jerry and Martha. Neither Jerry nor Martha testified at the hearing and they did not call any witnesses or submit any documents.

After considering the evidence, the Family Part concluded that the Division had proven that both Jerry and Martha had abused or neglected their children. The judge made separate findings concerning Jerry and Martha.

With regard to Jerry, the court relied on his admission of using and selling drugs and reasoned "that it's more likely than not . . . that he was [engaging] in the sale of drugs on April [1, 2103]." The court then held that "the Division has met its burden of proof that on the date he was arrested for selling drugs[,] he placed his children at risk of harm due to his [] arrest." The court also found that Martha had abused or neglected the children.

Following the fact-finding hearing, the court conducted a series of compliance reviews. Jerry and Martha underwent drug treatment. Ultimately, in February 2015, the children were returned to the custody of their parents and the litigation was terminated in September 2015.

Jerry now appeals the finding of abuse or neglect. Martha did not appeal. The Division opposes Jerry's appeal and the Law Guardian, who represents the children, supports the Division's position, arguing that there was a preponderance of evidence establishing that Jerry abused or neglected his children.

The Division sought to supplement the record with documents showing the dispositions of the criminal charges against Martha and Jerry. Jerry opposed that motion and cross-moved to supplement the record with other information. We denied both motions to supplement the record.

II.

Our standard of review is well settled. We are bound by the trial court's factual findings if supported by sufficient credible evidence. N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577-78 (App. Div. 2010). We accord particular deference to the Family Part's fact-finding because of the court's special expertise in family matters, its "feel of the case[,]" and opportunity to assess credibility based on witnesses' demeanor. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008); Cesare v. Cesare, 154 N.J. 394, 412-13 (1998).

Nevertheless, "our review is less constricted when the 'focus is not on credibility but alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom.'" N.J. Div. of Youth & Family Servs. v. S.H., 439 N.J. Super. 137, 144 (App. Div.) (quoting N.J. Div. of Youth & Family Servs. v. C.S., 367 N.J. Super. 76, 112 (App. Div.), certif. denied, 180 N.J. 456, 852 (2004)), certif. denied, 222 N.J. 16 (2015). We also owe no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

N.J.S.A. 9:6-8.21(c)(4), states that an abused or neglected child includes:

[A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care . . . (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof

The Division "must prove that the child is 'abused or neglected' by a preponderance of the evidence, and only through the admission of 'competent, material and relevant evidence.'" N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 32 (2011) (quoting N.J.S.A. 9:6-8.46(b)). The statute requires a court to consider harm or risk of harm to the child, as opposed to the intent of the abuser, because "[t]he main goal of Title 9 is to protect children." G.S. v. Dep't of Human Servs., 157 N.J. 161, 176 (1999). The phrase "minimum degree of care" means conduct that is "grossly or wantonly negligent, but not necessarily intentional." Dep't of Children and Families v. T.B., 207 N.J. 294, 305 (2011). "There exists a continuum between actions that are grossly negligent and those that are merely negligent. The parent's conduct must be evaluated in context based on the risks posed by the situation." Id. at 309.

A court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 23 (2013)

(quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). "In the absence of actual harm, a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." Ibid. (citing N.J.S.A. 9:6-8.21(c)(4)(b)). "Whether a parent or guardian has failed to exercise a minimum degree of care is to be analyzed in light of the dangers and risks associated with the situation." G.S., supra, 157 N.J. at 181-82.

Jerry argues that the Family Part committed two errors by (1) applying an incorrect legal standard in finding abuse or neglect, and (2) admitting and relying on the indictment and federal docket sheet, as well as the embedded hearsay in those documents. Jerry also argues that he cannot be found to have abandoned his children or to have placed them in an unsafe home because the Family Part made no such findings.

Initially, we dispose of the last argument. The Division concedes that the Family Part did not make any findings that Jerry abandoned or placed his children in an unsafe environment. Indeed, the Division acknowledges that the finding of abuse or neglect against Jerry relates only to his alleged engagement in the distribution of narcotics.

We, therefore, focus on whether there was sufficient proof that Jerry engaged in the distribution of narcotics and whether that alleged action placed his children in substantial risk of

harm. We reverse because the Division failed to establish by a preponderance of evidence that Jerry distributed narcotics or that that alleged activity placed his children at substantial risk of harm.

On April 1, 2013, Jerry was arrested and charged with possession with intent to distribute methamphetamine, a controlled dangerous substance. On June 24, 2013, Jerry was indicted on one count of conspiracy to possess and distribute methamphetamine. Accordingly, at the time of the fact-finding hearing, Jerry had only been charged with a crime and the Division submitted no proof that he actually committed the crime.

The Family Part relied on Jerry's admission that he had previously sold drugs and that he had previously used crystal methamphetamine to conclude "that it's more likely than not" that Jerry engaged in the sale of illegal drugs on April 1, 2013. That conclusion was not supported by substantial credible evidence in the record. An indictment is not proof that a crime has been committed. State v. Orecchio, 16 N.J. 125, 133-35 (1954). Instead, "[a]n indictment is evidence only of the fact that a charge has been made; it in no [way] establishes the truth of the charge or the presence of sufficient legal proof thereof." Id. at 132.

Moreover, Jerry's admission to a Division worker that he had previously sold drugs on other occasions did not constitute sufficient evidence for the court to draw the conclusion that Jerry sold drugs on April 1, 2013. In a Title 9 proceeding, a parent or guardian's past criminal acts can be relevant and admissible, but only to determine the risk of harm to the children. N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 573. Indeed, N.J.R.E. 404(b) prohibits a fact finder from using evidence of prior criminal acts to find that a person had acted in conformity with the disposition to commit a criminal act. See Id. at 571 (App. Div. 2010) ("[T]he rule is one of 'exclusion' rather than 'inclusion' and should be used to exclude evidence of other crimes, civil wrongs, or acts when such evidence is 'offered solely to establish the forbidden inference of propensity or predisposition.'" (quoting State v. Nance, 148 N.J. 376, 386 (1997))).

We find no fault with the admission into evidence of the indictment or the federal docket sheet. N.J.S.A. 9:6-8.46(a)(3) allows admission into evidence "of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding . . . [as] proof of that condition, act, transaction, occurrence or event" if it meets the prerequisites for admission as a business record. The indictment and the docket

sheet, however, merely established that Jerry had been charged with a crime. In this case, they did not establish proof that a crime had been committed.

The Division also failed to prove by a preponderance of evidence that the children were placed at substantial risk of harm. Even if Jerry had distributed narcotics or conspired to distribute narcotics, that action, on its own, did not present a substantial risk of harm to the children. The children were not present at the time that Jerry allegedly distributed the methamphetamine. Indeed, Jerry was in New York City and the children were in the care of Jerry's adult roommates in New Jersey.

Further, despite Jerry's admission to past drug use, he also stated that he had never used drugs in front of the children or had drugs in the home. As we have previously held, "not all instances of drug ingestion by a parent will serve to substantiate a finding of abuse or neglect." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 332 (App. Div. 2011). The Division must demonstrate that the children were at substantial risk of harm. N.J.S.A. 9:6-8.21(c)(4)(b). Here, there was no showing that the children were at risk, much less a substantial risk.

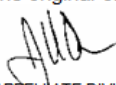
The Division argues that the children were at risk because Jerry's actions could result in his arrest. Thus, according to the Division, Jerry ran the risk of not being available to care

for his children if he was incarcerated. The problem with that argument is that the Division presented no evidence to support that contention. Here, it was undisputed that the children were in the care of Jerry's adult roommates when Jerry was arrested and incarcerated. The Division further concedes that it did not present evidence to show that Jerry abandoned the children or that the children were left with improper caregivers.

In short, the Division failed to establish by a preponderance of evidence that Jerry abused or neglected his children. There was no competent evidence to establish that Jerry had distributed narcotics or conspired to distribute narcotics. Just as importantly, there was no nexus between the alleged act of distribution and a showing of substantial risk of harm to the children. Accordingly, any designation that Jerry abused or neglected his children because of his arrest and incarceration in April 2013 must be vacated.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION