SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3439-14T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

B.R.,

Defendant-Appellant,

and

D.B.,

Defendant.

IN THE MATTER OF D.B.,

Minor.

Argued April 6, 2017 – Decided May 11, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FN-06-171-14.

Jared I. Mancinelli, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Mancinelli, on the briefs).

Jennifer A. Lochel, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General of counsel; James D. Harris, on the briefs).

Danielle Ruiz, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Ruiz, on the brief).

PER CURIAM

Defendant B.R. appeals from a December 2, 2014 order after a finding she abused or neglected her son, Dave.[1] We affirm.

On the night of on June 10, 2014, in Vineland, while B.R. and Dave slept in a back bedroom, D.B., Dave's father, allowed two individuals to enter the house, so he could sell them drugs. Once inside the home, one of the individuals followed D.B. into the kitchen where marijuana was stored and attempted to rob him. D.B. told the police he tried to grab the individual's gun, and during the struggle, shots were fired. One of the shots hit a family friend in the heel, as he attempted to run from the living room to the back bedroom where Dave and B.R. were sleeping. Police found a bullet hit the bathroom door, and another bullet had gone

[1] Pseudonyms are used to protect the identity of the child.

through a window in Dave's bedroom and hit a neighbor's car parked outside.

The Vineland police arrested D.B. No charges were filed against B.R., but the police called the Division of Child Protection and Permanency (the Division). The police informed the Division Dave and B.R. left the police station with D.B.'s mother. An address for D.B.'s mother was provided to the Division caseworker; however, when she arrived at the address provided, no one was there.

The caseworker went to the police station to interview D.B. D.B., who initially refused to provide the caseworker with B.R.'s contact information because he did not want B.R. and his son to suffer because of something he did. D.B. told the caseworker B.R. and Dave lived with him in his house, but he sometimes went to his mother's house if he and B.R. were fighting. D.B. admitted selling drugs out of the house. When asked if Dave was present during any transaction, D.B. responded "not like beside me." D.B. also admitted smoking marijuana every day, but he denied caring for Dave while under the influence.

D.B. reported B.R. knew he was "hustling," but she told him to stop. Despite B.R.'s insistence, D.B. had continued to sell drugs but was "willing to take the weight for all of this," and "[B.R] had nothing to do with any of this." At the end of

conversation, D.B. gave the caseworker information for his sister who knew how to reach B.R.

The caseworker called the number and spoke with B.R. who agreed to meet the caseworker. When the caseworker arrived, B.R. told her she had been sleeping in a bedroom with Dave when she heard gunshots. B.R. rolled off the bed with Dave, placing him beside her on the floor. B.R. admitted knowing D.B. was selling drugs out of the home. She also acknowledged she left Dave with D.B. while she attended classes four days a week from 4 p.m. to 10 p.m. B.R. had been in a relationship with D.B. for five years. She denied any substance abuse.

The caseworker informed B.R. she would be performing an emergency removal of Dave because the drug transactions out of the house placed Dave in immediate danger. B.R. provided information for her mother, so Dave could go there. The Division filed a complaint seeking custody of Dave on June 13, 2014, and an order to show cause hearing was held. While the Division originally sought custody of Dave in its complaint, at the hearing, the Division requested care and supervision of the child and custody to remain with B.R. pursuant to a safety protection plan. B.R.'s mother and her husband were to supervise all contact between B.R. and Dave. The Division asked B.R. to submit to a drug screening test.

On July 21, 2014, the safety plan was lifted based upon B.R.'s compliance with Division services. B.R. was living with her mother and Dave at the mother's home. Both B.R. and D.B. were ordered to complete substance abuse evaluations, continue parenting classes, and sign releases of information to the Division. Legal and physical custody of Dave remained with B.R.

The fact-finding hearing took place on December 2, 2014. The Division submitted its Investigation Summary, as stipulated by B.R.'s counsel without objection or redactions. Defense counsel did not call any witnesses nor did she present any arguments. The Division argued both parents admitted drugs were sold from the home, and thus, there was a substantial risk of harm to Dave.

After reviewing the Investigation Summary, the trial judge found, absent a finding of actual harm, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk thereof." The judge found both B.R. and D.B. failed to exercise a minimum degree of care because they both admitted drugs were being sold out of the home. Additionally, the judge noted

> gunshots being fired at the home is not something that would not be anticipated as possibly happening. The Court finds that by selling drugs from the home, while the child was in the care of [D.B.], those four nights a week, . . . placed the child at imminent risk of harm.

The disposition order continued care and supervision with the Division and custody of Dave with B.R., who was also ordered to attend a psychiatric evaluation.

The litigation was terminated on February 9, 2015. B.R. was compliant with all Division recommended services, and the Division kept the case open to provide B.R. with continued services. Pursuant to the court's order, Dave remained in B.R.'s custody as the "conditions have been remediated." This appeal followed.

On appeal, B.R. argues she was denied effective assistance of counsel because her lawyer did not prepare a defense, introduce evidence or present opposition to the Division's case. She also argues the Division's evidence did not establish abuse and neglect within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b), and the child faced no future danger from her. On December 9, 2015, B.R. was granted leave to supplement the record to include certifications addressing ineffective assistance of counsel claims.

This court "ha[s] a strictly limited standard of review from the fact-findings of the Family Part judge." N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577 (App. Div. 2010) (citing Cesare v. Cesare, 154 N.J. 394, 412-13 (1998)). "[A]ppellate courts 'defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a

feel of the case that can never be realized by a review of the cold record.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact-finding." Cesare, supra, 154 N.J. at 413. We afford deference to a trial court's findings "unless it is determined that they went so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007).

We turn to B.R.'s argument the Division failed to establish she abused or neglected Dave within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b). She asserts the limited evidence in the record did not establish she knew D.B. would be selling marijuana in the home the night she slept in the back bedroom with Dave, and there is no evidence she acted recklessly in disregard of imminent danger. Additionally, B.R. argues the court failed to consider the subsequent steps she took to remedy the situation starting with the moment the Division made the emergency removal. We disagree.

Pursuant to N.J.S.A. 9:6-8.46(b), a fact-finding hearing is required to determine, by a preponderance of the evidence, if a child has been abused or neglected. The Division must "demonstrate

by a preponderance of the competent, material and relevant evidence the probability of present or future harm." N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004) (citation omitted), certif. denied, 182 N.J. 426 (2005). Title Nine defines an "abused or neglected child" as one

> 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 or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.
>
> [N.J.S.A. 9:6-8.21(c)(4)(b).]

The standard in deciding whether a guardian has failed to exercise a minimum degree of care is one of gross negligence. G.S. v. Dep't of Human Servs., 157 N.J. 161, 178-79 (1999). The failure to exercise such a degree of care is "analyzed in light of the dangers and risks associated with the situation." N.J. Dep't of Children & Families v. R.R., 436 N.J. Super. 53, 58 (App. Div. 2014) (citing G.S., supra, 157 N.J. at 181-82). Additionally, the court must consider whether "an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences." G.S., supra,

157 N.J. at 179. Ultimately, the court must determine whether a parent "has acted with reckless disregard for the safety of others." Ibid. (citing Fielder v. Stonack, 141 N.J. 101, 123 (1995); McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 306 (1970)).

When there is an absence of actual harm, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 23 (2013) (citing N.J.S.A. 9:6-8.21(c)(4)(b)). The court does not need to wait until the child is actually harmed before taking action. In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999) (citing N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 616 (1986)).

Here, there is sufficient evidence to support the court's finding of abuse or neglect because B.R. knew D.B. was selling drugs out of the home where they lived with Dave. Not only was B.R. aware D.B. was selling drugs, she knew D.B. was smoking marijuana daily and left Dave alone with him while she attended school four nights a week. Whether she knew he would engage in drug transactions resulting in a shooting that particular night is irrelevant because the risk was ubiquitous.

An "ordinary reasonable person" would understand having a child stay in a home where drugs are being sold and stored places that child in a "situation [that] poses dangerous risks." See

G.S., supra, 157 N.J. at 179. B.R.'s awareness and inaction demonstrated indifference to the serious danger and placed Dave in substantial risk of harm. One does not need to be able to predict the future to appreciate inherent risks.

B.R. argues the court should have considered her immediate compliance with the Division and the steps she took after the Division's referral to alleviate the risk of harm. The Court in New Jersey Department of Children & Families v. E.D.-O., instructed the statute is focused on the "parent's conduct at the time of the incident to determine if a parent created an imminent risk of harm to the child." 223 N.J. 166, 189 (2015). Here, while B.R.'s steps to alleviate the risk of harm to Dave are laudable, they do not overcome her inaction prior to the Division's intervention.

Lastly, B.R. argues her counsel was ineffective because she did not present any witnesses or arguments in her defense, and the order finding abuse or neglect should be vacated because the trial court conducted the fact-finding hearing "on the papers." B.R. does not identify any witness or evidence her counsel did not utilize that would have changed the outcome of the proceeding.

In New Jersey Division of Youth & Family Services v. B.R., 192 N.J. 301 (2007), the Supreme Court adopted the test developed in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by our Supreme Court in State v.

Fritz, 105 N.J. 42 (1987), for guardianship cases, to determine whether counsel was ineffective.[2]

We have adopted the Strickland standard for findings of abuse or neglect cases. See N.J. Div. of Youth & Family Servs. v. M.D., 417 N.J. Super. 583, 613-14 (App. Div. 2011); N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 643 (App. Div. 2010). The defendant bears the burden of demonstrating a constitutional violation, as the court will presume counsel acted competently. United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657, 667 (1984).

The B.R. Court instructed what type of evidence and certifications defendants should provide for ineffective assistance of counsel claims. B.R., supra, 192 N.J. at 311. The

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[2] To prevail on an ineffective assistance of counsel claim the defendant must establish the following:

> (1) counsel's performance must be objectively deficient - i.e., it must fall outside the broad range of professionally acceptable performance; and (2) counsel's deficient performance must prejudice the defense - i.e., there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
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> [B.R., supra, 192 N.J. at 307 (citing Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697; Fritz, supra, 105 N.J. at 58).]

Court stated the appellate counsel "must provide a detailed exposition of how the trial lawyer fell short and a statement regarding why the result would have been different had the lawyer's performance not been deficient." Ibid. Such an exposition would include an evidentiary proffer. Ibid. If a defendant claimed trial counsel was ineffective for failing to produce expert or lay witnesses, the "appellant will be required to supply certifications from such witnesses regarding the substance of the omitted evidence along with arguments regarding its relevance." Ibid.

B.R.'s certification does not rise to the level of the "detailed exposition" required in B.R. In her certification, B.R. details her attorney failed to discuss any defenses or witnesses but does not provide specifics of what testimony could have been presented or what type of arguments counsel should have made. See B.R., supra, 192 N.J. at 311. The only witness testimony proffered by B.R. was her mother's testimony about B.R.'s efforts to remove Dave from D.B.'s home after the incident. As previously stated, the critical issue here is the substantial risk of harm on the day of the incident, not after the Division had already intervened.

B.R. provided a certification from T. Gary Marshall, Deputy Public Defender from the Office of Parental Representation. Based upon his review of the record, he opined "[e]vidence or argument

also could have demonstrated that measures taken by the mother even before the time of incident, including expressions of disapproval, were able to dispel the element of recklessness required to sustain a Title [Nine] violation." He opined B.R.'s trial counsel "fell significantly below the reasonably acceptable professional standards," and "these deficiencies had a reasonable probability of permitting a trial court to reach an erroneous result." B.R. argues the expert certification she provided establishes other documents could have been presented in evidence, but neither B.R. nor the expert certification identifies what those documents are.

B.R. also argues counsel failed to research relevant case law, and the State was then able to establish a Title Nine finding without proving the frequency or dangerousness of the circumstances of drug sales. Ultimately, B.R. has not presented any evidence or argument disputing the core facts of this case, which are B.R. allowed her son to live in a home and in the care of someone she knew was smoking marijuana daily and selling drugs out of the home. B.R. has not established "that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

We have recently cautioned against the practice of conducting fact-finding hearings "on the papers," N.J. Div. of Child

Protection & Permanency v. S.W. and R.W., 448 N.J. Super. 180, 183 (App. Div. 2017), stating,

> [w]here there are contested facts in a Title Nine fact-finding hearing, forgoing testimony in favor of the submission of documents serves neither the defendant, who may be deprived an opportunity to present a meaningful defense, nor the Division, which may be limited in admitting all available proofs of a defendant's culpability.

We instructed before a court allows a fact-finding hearing to continue "on the papers," the judge must make sure the defendant has been informed of his or her right to a hearing, right to testify and call witnesses, the right to confront witnesses, and the right for a judge to make credibility findings. Id. at 192. In S.W. and R.W., we said defendant's trial counsel was ineffective for failing to ensure defendant understood his right to a hearing and did not make a knowing and voluntary waiver, id. at 193, and the evidence in the record was insufficient to find defendant abused or neglected his children. Ibid. B.R. argues her defense suffered the same irregularities because her trial counsel did not present arguments or witnesses, inform the court of any relevant case law, and failed to communicate with B.R. She argues this matter should be reversed because the hearing was conducted "on the papers."

In New Jersey Division of Child Protection and Permanency v. J.D., we also cautioned trial judges to avoid deciding contested trials "on the papers." 447 N.J. Super. 337, 353 (App. Div. 2016). We emphasized the importance of credibility determinations in contested cases, which require first-hand observations of witnesses, and noted how without live testimony, the trial judge's ability to make detailed factual findings may be "potentially impair[ed]." Ibid. Despite our disfavor of the procedure used, we found sufficient undisputed evidence in the record supported the trial court's finding defendant abused or neglected his child. Ibid.

As in J.D., the undisputed evidence establishes B.R. abused or neglected her child, and despite the use of a disfavored procedure, a thorough review of the record supports the trial court's determination.

Affirmed.