SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4597-16T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

G.K.,

Defendant-Appellant,

and

B.R.,

Defendant.

IN THE MATTER OF E.K. and J.K.,

Minors.

Submitted March 5, 2018 – Decided April 3, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Salem County, Docket No. FN-17-0022-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Beth Anne Hahn, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Cassandra E. Rhodes, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Cory H. Cassar, Designated Counsel, on the brief).

PER CURIAM

Defendant G.K.[1] appeals from a February 10, 2016 order[2] of the Family Part finding he abused or neglected his daughters while caring for them under the influence of drugs. We reverse, concluding the trial court's factual findings are not supported by the record.

I.

We derive the salient facts from the limited record developed at the February 10, 2016 fact-finding hearing.[3] Defendant and

[1] We use initials to protect the privacy of those involved. See R. 1:38-3(d)(12).

[2] The order became appealable as of right after the trial court entered a final order on May 18, 2017, terminating the protective services litigation pursuant to the filing of a guardianship complaint.

[3] The evidence adduced at the hearing pertained solely to then-three-year-old J.K. But see N.J.S.A. 9:6-8.46 ("proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of . . . the parent").

B.R.[4] are the biological parents of E.K., born in December 2006, and J.K., born in July 2012.[5] The Division of Child Protection and Permanency presented the testimony of one witness, an intake supervisor who responded to the family home on September 18, 2015. B.R. testified at the hearing, but defendant did not testify, nor present any witnesses. Six photographs of J.K., taken on September 18, 2015, were introduced into evidence. A September 22, 2015 order directing defendant and B.R. to submit to drug screening, on that date, and B.R.'s positive test results[6] were also admitted into evidence. Because defendant did not comply with the order, the court deemed his screening as positive. Although marked for identification at the hearing, and referenced by the Division supervisor, the Division's unspecified "report" was not introduced into evidence.

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[4] B.R. does not appeal from the February 10, 2016 order that determined she also abused or neglected E.K. and J.K.

[5] The children's dates of birth are not contained in the fact-finding record, but are set forth in the verified complaint for custody, which is part of the record on appeal. We have, therefore, taken judicial notice of this pedigree information. See N.J.R.E. 202(b) (referencing N.J.R.E. 201(b)(4)).

[6] B.R. tested positive for amphetamine and benzodiazepine drugs, but she testified at the hearing that she had a prescription for these drugs.

The Division first became involved with the family in July 2015, pursuant to an anonymous referral. The Division supervisor did not testify about the substance of the referral, or whether services were offered or provided, but the children were permitted to remain in the home. Defendant was the primary caretaker at that time. Sometime afterward, the Division lost contact with the family, but eventually determined defendant had been charged with possession of drugs and loitering on August 12, 2015.[7]

By September 18, 2015, the Division located the family. Sometime in the afternoon on that date, the supervisor and a co-worker visited the home where the family was staying, and spoke with the parents. Based on his training "relate[d] to substance abuse," the supervisor opined, "both parents appeared to be under the influence." He noted defendant's speech was slurred; "his pupils were very small[;] . . . it was a bright, sunny day . . . noon in July;" and his coordination seemed "somewhat impaired" (emphasis added). Specifically, defendant "was moving very slowly . . . whether he [would] be taking a sip of his coffee or trying to smoke his cigarette." Having met defendant for the first time, the supervisor was unaware whether defendant's "slow speech" was characteristic of impairment. Defendant admitted to the

[7] The disposition of these charges is not contained in the record.

supervisor he had smoked marijuana more than two months prior to the visit, but "denied he was using any substances." He also denied having any prior drug charges or convictions.

As to B.R., the supervisor testified she slurred her speech, and her pupils were "quite large." B.R. had a sore in the corner of her mouth and her teeth were decayed, suggesting, in the supervisor's opinion, current or past drug use. B.R. worked overnight hours, leaving J.K. in defendant's care.

Neither defendant nor B.R. provided an explanation as to why their speech was slurred, or why defendant was moving slowly. Fearing eviction, the parents refused to disclose to the caseworker with whom they were staying. However, the supervisor did not ascertain whether anyone else resided in the residence. There is no indication in the record regarding the condition of the home or how long the family was residing there.

E.K. was in school when the Division visited, but J.K. was at home. The supervisor described J.K.'s appearance as

> very dirty, not only just her skin, [but] her clothes were dirty, her hair as well. Her hair appeared that it needed to be brushed. And also because she was sitting on [B.R.]'s lap, [he] could see the bottom of her feet, and [he] noticed that her feet were nearly black.

The supervisor testified that J.K.'s appearance contradicted the parents' claim they had bathed her the previous day. It is unknown how long the child remained in that condition.

When shown a photograph of J.K., "it brought [the supervisor's] memory back, [of] the multiple bug bites that were all over J.K. as well." On cross-examination, defendant's attorney postured that the bites were from mosquitos, but the record is not conclusive as to their cause. However, the supervisor confirmed the bites were not infected and did not require medical attention.

Based on his observations and interviews, the supervisor contacted the local police department. The supervisor was present during the responding officer's questioning of the parents. Although defendant denied drug use during the supervisor's earlier questioning, defendant admitted to the officer that he ingested "some Adderall that day." The supervisor did not recall, nor did his report indicate, if defendant was asked whether he had a prescription for Adderall. Nor is there any evidence in the record as to whether defendant had previously used drugs while caring for J.K. Defendant admitted to the officer he had "drug charges out of Camden." The officer, who did not testify at the fact-finding hearing, did not charge nor issue any citations to defendant or B.R. See e.g. N.J.S.A 2C:35-10(b). Neither defendant nor B.R.

were tested for drugs on that date, nor any time before September 22, 2015.

At the conclusion of the officer's interviews, the Division executed an emergency Dodd removal[8] of defendant's two children pursuant to N.J.S.A. 9:6-8.28. When gathering J.K's clothing, the parents "could [not] find anything rather than maybe two shirts and a pair of pants that they put in a diaper bag. . . . [T]hey were unable to locate any shoes [for J.K.]." The record is silent as to whether the supervisor asked the parents as to why, or how long, J.K. had little clothing and no shoes. The record does not reveal whether the parents gave the Division workers clothing for E.K. However, E.K. stayed with relatives during the week so that she could attend school, and visited her parents on the weekends.

Following B.R.'s brief testimony, the trial judge rendered an oral decision finding J.K. was abused or neglected pursuant to N.J.S.A. 9:6-8.21(c)(4)(a) "in that there was inadequate providing of food, clothing and shelter and . . . supervision, which exposed the child to the infliction of harm, [and] the lack of care." The court also found, pursuant to subparagraph (b) that J.K. was

[8] A Dodd removal is an emergent removal of a minor without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82 known as the Dodd Act. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

"subjected unreasonably to the allowance of infliction of harm by all the scrapes, bruising, bare feet, filth, [and] numerous bug bites on [the] child's leg." The court concluded the parents' conduct "exceeded the degree of gross negligence" pursuant to N.J.S.A. 9:6-8.21(c)(4).

In so ruling, the trial judge found the Division's witness was credible, experienced, and "trained in the detection of someone who is under the influence." The judge noted the supervisor's observations of the parents on the day of the removal were similar to his own observations of the parents in court that date. Although defendant did not testify, the judge observed "his movements are slow, his eyes have a redness about them that I can notice from [twenty] feet away, or [fifteen] feet as he sits in front of me." The judge similarly found B.R. appeared to be intoxicated. When both parents offered to take a drug test while the judge was rendering his decision, he stressed that his observations of their appearances were not findings of intoxication. Rather, he based his decision on the supervisor's "judgment that they were intoxicated and that is probably principally his observations."

On appeal, defendant contends there was insufficient evidence to support the trial court's finding he abused or neglected his daughters. In particular, he claims the court erred in finding

he was "actually impaired," or impaired to the level that J.K. was placed in "imminent risk of substantial harm." According to the Division, defendant and B.R. were the sole caretakers of J.K. on the date of removal,[9] and their impairment created an imminent risk to J.K.'s safety and well-being. The law guardian argues further that the family's transience and defendant's positive drug screenings, after the date of removal, indicate his "substance abuse on September 18, 2015 was not anomalous."

II.

Ordinarily, we defer to a trial judge's factual findings, as long as they are supported by substantial credible evidence. N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010); N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007). However, we will not hesitate to set aside a ruling that is "so wide of the mark that a mistake must have been made." P.W.R., 205 N.J. at 38. "Where the issue to be decided is an 'alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' we expand the scope of our review." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citations omitted).

[9] Because of the Division's argument, we have referenced testimony concerning B.R. even though she did not appeal the court's order.

We also accord no deference to the trial court's legal conclusions, which we review de novo. State v. Smith, 212 N.J. 365, 387 (2012). Particularly relevant here, a trial court's finding that parental conduct amounts to gross negligence does not deserve deference because such a determination is a "conclusion of law." Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 308 (2011).

In a Title 9 action, the Division must prove by a preponderance of "competent, material, and relevant evidence" that a child is abused or neglected. N.J.S.A. 9:6-8.46(b). Title 9 cases are fact-sensitive, and the court should "base its findings on the totality of circumstances." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011).

In pertinent part, an "abused or neglected child" under Title 9 is defined as:

> 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 (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . .
>
> [N.J.S.A. 9:6-8.21(c)(4)(a) and (b).]

The statute does not require that a child experience actual harm. N.J. Dep't of Children & Families v. E.D.-O., 223 N.J. 166, 178 (2015) (citing N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 23 (2013)). Instead, a court may find a child has been abused and neglected if his or her physical, mental, or emotional condition has been "impaired or is in imminent danger of becoming impaired." N.J.S.A. 9:6-8.21(c)(4).

Our Supreme Court has instructed that the abuse and neglect standard is satisfied when the Division demonstrates at a hearing by a preponderance of the evidence that a parent has failed to exercise a minimum degree of care. See, e.g., G.S. v. Dep't of Human Servs., 157 N.J. 161, 181 (1999) (citation omitted). A "minimum degree of care" encompasses conduct that was grossly or wantonly negligent, but not necessarily intentional. Id. at 178. Wanton negligence is conduct that was engaged in with the parent's knowledge that injury is likely to result. Ibid. Mere negligence does not trigger the statute. T.B., 207 N.J. at 306-07; G.S., 157 N.J. at 172-73.

Whether a parent has failed to exercise a minimum degree of care "is fact-sensitive and must be resolved on a case-by-case basis." E.D.-O., 223 N.J. at 192. The Court has warned that in undertaking this analysis, trial and appellate courts "must avoid

resort to categorical conclusions." Id. at 180 (citing T.B., 207 N.J. at 309).

While we continue to recognize the societal concern that parents should not care for children while under the influence of illicit drugs, we have avoided a categorical approach in cases involving the combination of drugs and parenting. For example, in V.T., we recognized "not all instances of drug ingestion by a parent will serve to substantiate a finding of abuse or neglect." V.T., 423 N.J. Super. at 332. Indeed, "Title 9 is not intended to extend to all parents who imbibe illegal substances at any time. The Division would be quickly overwhelmed if law enforcement was required to report every individual under the influence who had children." Id. at 331.

In V.T., proof of a parent's drug use by itself was not enough to sustain a finding of abuse or neglect, where a father used drugs prior to his visits with an eleven-year-old child. Ibid. We held that a father's use of cocaine and marijuana and failure to complete drug treatment did not "inherently create[] a substantial risk of harm" to the child. Id. at 330. We noted there was no expert proof showing how the father's drug use posed a risk of harm to the child. Id. at 331.

Similarly, we reversed a finding of abuse and neglect based solely on a mother's use of marijuana, on one occasion, while the

child was in her care. N.J. Div. of Child Prot. & Permanency v. R.W., 438 N.J. Super. 462, 468-70 (App. Div. 2014). We noted the absence of detailed proof regarding the "circumstances of her ingestion," whether "the baby was solely in her mother's care when she was intoxicated," and "the magnitude, duration, or impact" of the intoxication. Id. at 470.

Applying these principles, we are persuaded that the Division's proofs fell short under the circumstances presented in this case. Initially, while we have long held lay witness testimony may be sufficient evidence of alcohol intoxication, State v. Guerrido, 60 N.J. Super. 505, 509-11 (App. Div. 1960), pursuant to N.J.R.E. 701, the Court has determined "expert testimony remains the preferred method of proof of marijuana intoxication[,]" pursuant to N.J.R.E. 702. State v. Bealor, 187 N.J. 574, 592 (2006). In Bealor, the Court recognized law enforcement officers are required, as part of their basic training, to receive specialized training "in detecting drug-induced intoxication." Id. at 592-93. The Court further found officers can be qualified readily in municipal courts to testify as to marijuana intoxication prosecutions for driving while intoxicated. Id. at 592 (citations omitted). Thus the Court concluded "expert testimony remains the preferred method of proof of marijuana intoxication." Id. at 592.

Here, the supervisor was not qualified, with an appropriate foundation, as an expert in drug recognition or intoxication by illicit drugs. Nor was the extent of his training "as it relates to substance abuse" developed in the record. He candidly admitted he did not know whether prescription drugs might cause "very large pupils." Further, the supervisor's testimony concerning the size of the parents' pupils as indicative of drug use, i.e., defendant's pupils appeared "very small . . . [on a] bright sunny day" while B.R.'s pupils appeared "quite large[,]" seems conflicting and the distinction is unexplained.

Moreover, the supervisor's observations of defendant, and defendant's admission he ingested Adderall, did not establish "the magnitude, duration, and impact" of defendant's purported impairment. R.W., 438 N.J. Super. at 470. At best, those observations support a finding that defendant ingested Adderall at some point on the day of the incident. Indeed, there is no evidence in the record as to whether this was defendant's one-time use; when during the day he ingested the drug and how long it was in his system; or whether he was unable to meet J.K.'s basic needs on that day. Contrary to the law guardian's position, defendant's positive drug test results, after the date of the incident, are not sufficient evidence that his ingestion of illicit drugs was pervasive as of the date of the incident. Cf. E.D.-O., 223 N.J.

at 170 (recognizing that the evaluation of a parent's conduct for abuse or neglect focuses on the events up through the time of the incident).

Nor was J.K. in defendant's sole care and custody on the date of the incident. R.W., 438 N.J. Super. at 470. Although the supervisor opined that B.R. appeared to be under the influence, there is no evidence in the record that she admitted to using drugs on that date or in the preceding days leading to the incident.

Further, this is not a case in which the Division's initial involvement with the family resulted in a plan for services, such as drug treatment, and defendant's continued use was evidenced by positive tests or lack of attendance in a program. We are not suggesting, however, that if those circumstances were present here, defendant's conduct would necessarily be deemed gross negligence. See V.T., 423 N.J. Super. at 332. But the absence of such corroborative proof only further weakens the Division's position.

The Division did not present sufficient evidence to describe the parents' level of drug use, or connect their level of use with their impairment. While the court properly admitted the supervisor's lay observations of the parents in the record, his conclusion that they were under the influence should have been

presented through competent expert testimony. See Bealor, 187 N.J. at 592; N.J.R.E. 702.

We therefore cannot conclude on the record before us that the proofs of defendant's conduct and condition amounted to gross negligence as a matter of law. T.B., 207 N.J. at 308. Instead, we find insufficient evidence for the trial court's determination that defendant placed J.K. in harm's way by "expos[ing] her to that type of an environment where she [is] going to have to suffer bug bites . . . [in light] of [the] vectors of dangerous diseases including the Zika virus now." See E.D.-O., 223 N.J. at 183 ("the standard is not whether some potential for harm exists") (quoting N.J. Div. of Youth & Family Servs. v. J.L., 410 N.J. Super. 159, 168 (App. Div. 2009)). Although then-three-year-old J.K. was dirty and bug bitten, the bites were not infected nor did she require medical treatment. While J.K.'s condition could support a finding of negligence, it does not support gross negligence where, as here, there is no evidence in the record that the parents failed to take any steps to prevent the bug bites. Were we to find a three-year-old's dirty condition was sufficient evidence of child abuse or neglect, the Division would be "quickly overwhelmed." See, e.g., V.T., 423 N.J. Super. at 331.

Nor are we convinced that J.K.'s minimal wardrobe, including the lack of footwear, in this particular case, warrants the trial

court's finding of gross negligence. The supervisor did not testify as to how long J.K. was without shoes or whether there were any hazards in the house or yard that she could have stepped in. The court, nevertheless, concluded, "The weather is changing and the child is barefooted. This is not acceptable in the [twenty-first] century. There are all manner of hazards that a child can be expected to walk on, glass, chemicals, anything. Human projections from the mouth or otherwise, dog excrement."

In light of the trial judge's findings, it appears he impermissibly, "fill[ed] in missing information on [his] own" of harm, and the potential for harm, to J.K. A.L., 213 N.J. at 28. While "filling in missing information [is] an understandable response by judges who regularly witness the evils inflicted on children by their parents' drug use, judges must engage in a fact-sensitive analysis turning on 'particularized evidence.'" R.W., 438 N.J. Super. at 470 (quoting A.L., 213 N.J. at 28).

In sum, the Division failed to present sufficient, credible evidence that the children were in imminent danger or at a significant risk of harm as a result of defendant's failure to exercise a minimum degree of care. We emphasize that our decision should not be understood to condone defendant's use of illicit drugs. However, because the evidence the Division presented was insufficient to establish abuse or neglect pursuant to N.J.S.A.

9:6-8.21(c)(4)(b), we are constrained to reverse the trial court's decision, and order the Division to remove the September 18, 2015 incident from defendant's existing entry in the Central Registry.

Reversed.