SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0627-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

R.N.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF R.N.,

Minor.

Submitted March 29, 2017 – Decided April 17, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FG-11-6-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Mark E. Kleiman, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel;

Cynthia J. Schappell, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendant, R.N., made a voluntary directed surrender of his parental rights to his then four-year-old daughter, Rita.[1] Defendant subsequently filed a motion seeking to vacate his voluntary surrender, which the court denied. Defendant appeals from that denial. He contends he was denied due process and fundamental fairness in connection with his motion to vacate because he received ineffective assistance of counsel during the motion proceeding and because the trial court lacked a sufficient record upon which to make an informed decision on the motion under Rule 4:50-1. Defendant also contends that denial of his motion must be reversed because the trial court committed plain error in accepting his surrender.

The Division of Child Protection and Permanency (Division) and the Law Guardian argue that the trial court correctly accepted defendant's surrender and properly denied defendant's subsequent motion to vacate the surrender. They urge us to affirm the order

[1] "Rita" is a pseudonym, which we use throughout this opinion to protect the child's privacy.

denying defendant's motion. We agree with the Division and Law Guardian and affirm.

Rita was born on September 21, 2010. Her mother, Cara,[2] had four other children, who were not the children of defendant. One of those other children is in the sole custody of his biological father, did not live with Cara, and was not involved in this proceeding.

On July 25, 2014, the Division filed a Complaint for Guardianship against defendant, Cara, and the father of two of Cara's other children who lived with her. The paternity of the remaining child living with Cara had not been determined. This complaint followed a long history, over many years, of referrals, contacts, and proceedings involving the Division and this family.

The children who were the subject of the complaint had been removed by the Division and were living with approved resource families. At the time of Rita's birth, defendant was serving a State Prison sentence. Over the ensuing years, he never lived with Rita or had any contact with her.

Defendant was represented by assigned counsel in the guardianship proceeding. After many postponements, the matter came before the court for trial on December 16, 2014. Defendant

[2] "Cara" is also a fictitious name.

was transported to the courthouse and was present in court with his attorney. Because of the recent transmittal of voluminous discovery materials, Judge Peter E. Warshaw, Jr. was constrained to adjourn the trial, but was determined that the adjournment would be a short one.

During the colloquy on that date, defendant's attorney advised the court that defendant was considering a voluntary identified surrender. Counsel for the Division was making arrangements for the putative adoptive parents to come to the courthouse so they could meet with defendant the next morning. Accordingly, defendant was remanded to the county jail rather than returned to State Prison.

On the morning of December 17, 2014, defendant met with the putative adoptive parents and decided he would proceed with the surrender. He completed the necessary forms with his attorney, who explained to him all of the consequences of surrender and answered all of his questions.

The parties then convened in the courtroom, and defendant's attorney announced to the court that defendant had completed the surrender documents. This was followed by an extensive voir dire of defendant, who was under oath, conducted by his attorney and by the court. We set forth a substantial portion of that colloquy:

[Defense Counsel]: So, Your Honor, with that, I have had the opportunity to review the voluntary surrender of parental rights form with [defendant], who loves his daughter very much and has expressed to me that he wants to do what's best for [Rita]. His great preference, of course, would be to be reunified with [Rita], and circumstances frankly beyond his control have led him to this point. He left [Rita] in the care of the mother, and his various family members have been unable to complete the licensing process [to become caretakers]. I have explained to [defendant] the difference between doing what you want to do, because nobody comes into this courtroom and says, Judge, this is what I want to do. That would not be a normal affection towards one's child, but he has explained to me that he wants to do what's in his daughter's best interests. He's met [the putative adoptive parents], and with the Court's indulgence I'd like to voir dire my client on this [identified surrender of parental rights] form.

. . . .

[Defense Counsel:] [Defendant], you are the father of [Rita], correct?

[Defendant:] Yes.

[Defense Counsel:] And who is the mother of [Rita]?

[Defendant:] [Cara].

[Defense Counsel:] And you and I met yesterday and we checked off the boxes together, but you did not yet initial or sign this form, correct?

[Defendant:] Correct.

[Defense Counsel:] Okay. And you understand that this form is going to be submitted to Judge Warshaw to memorialize your voluntary decision to surrender your parental rights to the people that you met, the putative [adoptive] parents?

[Defendant:] Yes.

[Defense Counsel:] Okay. And you've completed high school, correct? You have your GED?

[Defendant:] Yes.

[Defense Counsel:] Okay. And you write, speak, understand English, correct?

[Defendant:] Yes.

. . . .

[Defense Counsel:] This is an important decision. Are you making it voluntarily and of your own free will?

[Defendant:] Yes.

[Defense Counsel:] Did anybody force, coerce, threaten or pressure you?

[Defendant:] No.

[Defense Counsel:] Did anybody offer or promise you anything? Did anybody offer you any money or give you any promises of what they would do for you to get you to do this?

[Defendant:] No.

[Defense Counsel:] Are you currently under the influence of drugs, alcohol, or prescription medication which interferes with your ability to understand my questions or provide Judge Warshaw with truthful answers?

[Defendant:] No.

[Defense Counsel:] Are you suffering from any mental or physical disability which affects your judgment?

[Defendant:] No.

[Defense Counsel:] Are you aware that you are entitled to pre-surrender counseling from the Division?

[Defendant:] Yes.

[Defense Counsel:] And you and I talked about that?

[Defendant:] Yes.

[Defense Counsel:] Okay. And you've told me that you do not want that counseling, correct?

[Defendant:] Yes.

. . . .

[Defense Counsel:] Okay. Now, you're making an identified surrender, and -- which means if those people that you met today, if they don't adopt [Rita], then your rights will be reinstated, and this litigation will be reopened, and it will be as if you did not surrender your rights. Do you understand that?

[Defendant:] Yes.

[Defense Counsel:] . . . If neither one of them can adopt [Rita], then we would be back here. Do you understand that?

[Defendant:] Yes.

[Defense Counsel:] Okay. You understand that your decision today is -- would be final? As

soon as you -- we're done here and Judge Warshaw accepts your surrender, you understand that that's final? Yes?

[Defendant:] Yes.

. . . .

[Defense Counsel:] Okay. Have you had sufficient time to think about this?

[Defendant:] Yes.

[Defense Counsel:] And do you believe that doing this is in the best interests of [Rita]?

[Defendant:] Yes.

[Defense Counsel:] Did I answer all your questions?

[Defendant:] Yes.

[Defense Counsel:] Are you satisfied with my services as your attorney?

[Defendant:] Yes.

. . . .

[Defense Counsel:] All right. . . . Do you have any questions for me?

[Defendant:] No.

[Defense Counsel:] Okay. How about for Judge Warshaw?

[Defendant:] No.

. . . .

[Defense Counsel]: . . . . Your Honor, we've gone through this form on the record once again, and as we've proceeded with each page

> [defendant] has initialed each page and signed, and I would offer this up to the court --
>
> [The Court]: Okay.
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> [Defense Counsel]: -- as a memorialization of [defendant's] decision this morning. Thank you.
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> [The Court]: Okay. [Defendant], I want to make sure that I say this to you, because I can see that you're affected by what you're doing here today, and your lawyer said to you, and you acknowledged that you're doing it because it's what you think is best for your child under all of the circumstances which you face, right?
>
> [Defendant]: Yes.
>
> [The Court]: And when a person has the courage and the integrity to make that type of decision they deserve to be commended for it. I'm going to commend you for it. It's not easy to put your own personal interests second, if you will. But here it's clear to me from what I've listened to today, what I've heard your lawyer say, that you made a choice to put your child's interests first, and when you choose to do that you should be recognized for it, and I do recognize you for it. Okay?
>
> [Defense Counsel]: Thank you, Your Honor.

After this exchange, the judge found that defendant "had [an] adequate opportunity to consult with his counsel" and made "the very significant decision" to surrender his parental rights "voluntarily and of his own free will." He found that defendant had "not been forced, threatened or coerced," and that it was

clear to him "from what [he] observed in court today that [defendant] is thinking clearly, that he understands what we are doing here, and the emotions of the situation make it clear to me that he understands the ramification[s] of what we are doing here." The judge found that defendant understood "he [had] the right to a trial in this case" and that he chose not to go to trial.

On January 2, 2015, Judge Warshaw issued an order memorializing defendant's voluntary surrender. The guardianship trial proceeded over several days in January and February 2015 against Cara and the known father of two of the other children. On March 6, 2015, Judge Warshaw rendered his decision and executed an order terminating Cara's parental rights to Rita and her other children, as well as the rights of the known father of two of the children.[3]

During the pendency of the trial, on February 7, 2015, defendant, who was still in prison, wrote a letter to Judge Warshaw stating that he wished to revoke his surrender. He said he was very emotional, felt he was taken advantage of, and was coerced into executing the surrender. After receiving the letter, on February 18, 2015, the judge scheduled a hearing to consider the

[3] Cara appealed the termination of her parental rights to Rita and her other children. We affirmed. N.J. Div. of Child Prot. & Permanency v. C.J.-P., No. A-3372-14 (App. Div. Jan. 26, 2016).

matter on March 16, 2015, the day after defendant was to be released from prison.

Defendant appeared with his trial counsel. Judge Warshaw determined that a formal motion would be required and that new counsel should be assigned. The judge issued an order directing the assignment of motion counsel and requiring the filing of the motion by July 16, 2015, or the issue would be deemed abandoned and waived. The judge also ordered a hold on the adoption of Rita until this issue was addressed. On August 10, 2015, defendant, through his newly-assigned motion counsel, filed the motion to vacate the surrender. Although late, the judge accepted it on the merits, without objection from the Division or Law Guardian.

Defendant's certification in support of the motion stated that he was "heavily medicated" at the surrender hearing, more particularly that he was "on [D]epokote and Neurontin, both of which [had] strong [e]ffects on [his] ability to think clearly." A medical discharge summary from the Department of Corrections was attached to the motion indicating that defendant suffered from mood disorder and post-traumatic stress disorder while in prison for which he was taking Depokote and Neurontin, as well as some other minor medications, such Ibuprofen, Zyrteck, cough drops, and nasal spray.

At the September 22, 2015 return date of the hearing on the motion, defendant failed to appear, although having been noticed of the hearing. His motion counsel appeared and presented arguments on his behalf. Judge Warshaw also considered the opposing written submissions and oral argument from the Division and Law Guardian.

Contrary to the assertions in defendant's certification regarding medications taken at the time of the waiver, motion counsel argued that for several days prior to that hearing, defendant had not been taking his medications and "was unable to make a knowing and voluntary surrender" because he was "in a weakened state, and . . . that duress certainly of the circumstances of whether to go to trial or not had overcome [defendant]." Motion counsel further argued that defendant was now back on his medication and "he has come to not just regret, but also see the inappropriate circumstances which lead to his identified surrender."

Judge Warshaw rejected defendant's arguments. He reviewed the transcript of defendant's waiver hearing and recalled that defendant was "fully engaged," "alert," and "responsive when he was spoken to." The judge was confident that defendant had possession of his full mental faculties and did not display any effects from prescription medication or any other substance or of

any mental illness. The judge noted that if he "had any doubt at all as to [defendant's] condition, [he] would have made further inquiry of [defendant] on [his] own initiative." The judge also noted that at the time of the surrender defendant denied being under the influence of any medication or drugs and stated that he was proceeding voluntarily and that these answers were "consistent with [the judge's] observations."

Finally, Judge Warshaw was unimpressed by defendant's certification and the medical records from the Department of Corrections. These records made no mention of when defendant had taken medication or of any effects the medication might have had on him. In essence, the judge concluded that defendant had only "made a number of . . . naked, unsupported assertions," which were "entirely inconsistent with what the transcript reflect[ed] and what [the judge] observed with [his] own two eyes as [he] watched [defendant] engage in the surrender." The judge entered an order on September 24, 2015, denying defendant's motion, and this appeal followed.

Our review of a trial court's order denying a motion to set aside a voluntary surrender of parental rights is limited. N.J. Div. of Youth & Family Servs. v. T.G., 414 N.J. Super. 423, 432 (App. Div.), certif. denied, 205 N.J. 14 (2010), cert. denied, 563 U.S. 1013, 131 S. Ct. 2925, 179 L. Ed. 2d 1255 (2011). A trial

court's factual findings are binding on appeal if "supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Enhanced deference is afforded to family court fact-findings because of their "special jurisdiction and expertise in family matters." Id. at 413. We do not overturn a family court's factual findings unless they are so wide of the mark that our intervention is necessary to correct an injustice. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007).

We accord deference to a trial court's "credibility determinations and its 'feel of the case' based upon the opportunity of the judge to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. A.R.G., 361 N.J. Super. 46, 78 (App. Div. 2003), aff'd in part and modified in part, 179 N.J. 264 (2004), certif. denied, 186 N.J. 603 (2006). "When the credibility of witnesses is an important factor, the trial court's conclusions must be given great weight and must be accepted by the appellate court unless clearly lacking in reasonable support." N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 259 (App. Div. 2005). A trial court's legal conclusions are not entitled to deference and are subject to de novo review. See N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 183 (2010).

Parents have a constitutionally protected right to maintain a relationship with their children. In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). That right is not absolute, however, and "must be balanced against the State's parens patriae responsibility to protect the welfare of children." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (quotations omitted). Once a parent completes a surrender of his or her parental rights and a guardianship judgment is entered, any request to re-establish the child's relationship with the parent requires a court to focus on the child's best interest because "the future of a child is at stake." T.G., supra, 414 N.J. Super. at 434 (quoting In re Guardianship of J.N.H., 172 N.J. 440, 474 (2002)).

Defendant first argues that he was denied due process in the surrender proceeding. He contends that the procedures employed by the trial court during his motion were inadequate to protect his parental rights under Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), and that his motion counsel was ineffective in representing him at the hearing on his motion. We do not agree.

"Due process requires adequate notice and a fair opportunity to be heard." N.J. Div. of Youth & Family Servs. v. M.Y.J.P., 360 N.J. Super. 426, 464 (App. Div.), certifs. denied, 177 N.J. 575

(2003), cert. denied, 540 U.S. 1162, 124 S. Ct. 1176, 157 L. Ed. 2d 1207 (2004).

> The protections needed to ensure due process where governmental action is to be taken depend on a careful balancing of three factors: (1) identification and specification of the private interest that will be affected by the official action; (2) assessment of the risk that there will be an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) evaluation of the governmental interest involved, including the added fiscal and administrative burdens that additional or substitute procedures would require.
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> Id. at 465 (citing Eldridge, supra, 424 U.S. at 335, 96 S. Ct. at 903, 47 L. Ed. 2d at 33).

The focus here is on the second Eldridge factor. In our view, there were no procedural defects at either the surrender hearing or the vacation hearing. Defendant received notice and an opportunity to be present at both hearings. Indeed, he was present and extensively voir dired before the judge accepted his voluntary surrender. As in T.G., defendant substantially participated in the surrender hearing, "was afforded numerous opportunities to express any pressures, concerns or duress" that he was under, and was "given the opportunity to ask questions of the court, [the Division], and the Law Guardian." See T.G., supra, 414 N.J. Super. at 438-39. As the hearing transcript makes clear,

defendant "had ample time to consult with [his] attorney, understood [his] attorney's advice, waived [his] right to trial, was aware of the effect of surrendering [his] parental rights, declined counseling, and asserted [his] actions were voluntary." Id. at 439.

In connection with the motion to vacate, the judge scrupulously protected defendant's rights by appointing new counsel, putting a hold on the adoption, and even extending the date by which he could file his motion. Defendant was given notice of the hearing but failed to attend. At the hearing, the judge considered defendant's certification and the Department of Corrections medical documentation. Defendant's motion counsel was present and made his arguments, which the judge also considered. The judge then made a reasoned analysis based upon all of the information presented.

We also find unpersuasive defendant's further argument that he was denied due process because he received ineffective assistance of motion counsel. He maintains that motion counsel failed to "competently advance the claim that [defendant] was impaired by prescription medication at the time of the surrender proceeding and was thus not in a position to knowingly and/or voluntarily relinquish his parental rights."

In actions for termination of parental rights, the right to effective assistance of counsel is protected both by statute, N.J.S.A. 30:4C-15.4(a), and the due process guarantee of our state constitution, and is guided by the same principles as applicable in the criminal context. N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306-09 (2007).

In B.R., the Court adopted the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted in State v. Fritz, 105 N.J. 42 (1987), when assessing a claim of ineffective assistance in termination of parental rights litigation. B.R., supra, 192 N.J. at 308-09.

The Court directed that "claims of ineffective assistance of counsel in termination cases be raised on direct appeal." Id. at 311. The "appeal must be filed by an attorney other than trial counsel," and "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. "In many cases, the issue will be resolvable on the appeal record alone." Ibid.

The two-prong Strickland/Fritz test requires a showing that (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 307 (citations omitted). Defendant argues that his motion counsel was deficient for failing to adequately argue his position, by arguing incorrectly that defendant had been off of his medications rather than adversely affected by being on them at the time of surrender, and by apparently failing to file a written brief. We are unpersuaded by these arguments.

Although counsel's argument as to whether defendant was on or off his medications at the time of surrender were contradictory to what was contained in defendant's certification, the judge clearly understood the thrust of the argument, as reflected in his analysis. Most significantly, defendant failed to produce any report containing an opinion by a medical expert that his medications at the time of the surrender would have adversely affected his cognitive ability. In the absence of such evidence, the judge relied upon his own observations of defendant as he testified under oath before the court and the transcript of defendant's own words. We defer to the judge's assessment of defendant's mental state and credibility because it was he who had the opportunity to observe defendant.

For this same reason, even if there were any deficiencies in motion counsel's performance, the second Strickland/Fritz prong would not be satisfied. Because there was no competent evidence to support defendant's unsubstantiated conclusory assertions, the

judge's credibility assessment was controlling. The result clearly would not have changed if motion counsel would have filed a written brief or made the arguments regarding drug usage in a manner consistent with defendant's certification. The record of the motion supported Judge Warshaw's decision to deny revocation of the surrender.

Defendant's second argument, that the judge committed plain error by accepting the surrender, lacks sufficient merit to warrant discussion. See R. 2:11-3(e)(1)(E). For the reasons discussed earlier in this opinion, the record of the surrender proceeding provided overwhelming support for the judge's decision to accept defendant's surrender.

Affirmed.