IN THE COURT OF APPEALS OF TENNESSEE

FILED

November 24, 1999

Cecil Crowson, Jr.
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AT KNOXVILLE

STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES, Petitioner-Appellee, v. STEVEN CRAIG WILEY, Respondent-Appellant. IN THE MATTER OF: SIERRA WILEY SHAVONNE WILEY	)	C/A NO. 03A01-9903-JV-00091 APPEAL AS OF RIGHT FROM THE KNOX COUNTY JUVENILE COURT HONORABLE CAREY E. GARRETT, JUDGE

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OPINION

AFFIRMED AND REMANDED Susano, J.

The trial court's judgment terminated the parental rights of Steven Craig Wiley ("Father") in and to his children, Sierra Wiley (DOB: September 24, 1991) and Shavonne Wiley (DOB: August 1, 1993).[1] Father appeals, arguing that the evidence preponderates against the trial court's determination that grounds exist to terminate his parental rights. He also contends that the Department of Children's Services ("DCS")[2] failed to make reasonable efforts to facilitate the return of the children to him.

I. *Facts*

The subject children were initially brought into the custody of the State of Tennessee on May 2, 1995, because law enforcement officers discovered the children –- who were then approximately 3 years old and 18 months old, respectively –- alone at their mother's residence.[3] On May 12, 1995, Father met with DCS caseworker Jennifer Pittman ("Pittman") to discuss the proposed plan of care developed by DCS for the children. Father agreed to the plan's terms and signed it. Pursuant to the plan of care, Pittman referred Father to an

alcohol and drug treatment program and to Child and Family Services for parenting classes.

Father made two supervised visits with the children in the month that followed. Pittman observed a lack of interaction between Father and the children. She also noticed that Father appeared drowsy during the visits. She recounted that during one visit Father began reading a comic book while the children played on the floor. These visits ended in June, 1995, when Father was arrested on aggravated burglary charges. He remained incarcerated until December, 1995. During his incarceration, the children were temporarily returned to the physical custody of their mother on the condition that she enter and complete an alcohol and drug treatment program. By the end of November, 1995, however, the mother had left the program, and DCS once again assumed physical custody of the children.

On December 5, 1995, Father was released to a halfway house on a suspended sentence and enrolled in the Community Alternatives to Prison ("CAP") program. As a condition to participation in this program, Father was required to undergo random drug screens and to notify the program of any change in residence. The day after his release from jail, Father contacted Pittman to request visitation with the children. Two more visits occurred, on December 19, 1995, and January 9, 1996. During this time, Father also

legitimated Shavonne. He testified that he worked at a restaurant for approximately four months after his release from jail. He also attended three counseling sessions at Child and Family Services during this four-month period.

In March, 1996, Father was arrested for failure to comply with the requirements of the CAP program. He was incarcerated until December, 1996. A month after his arrest, the foster care review board recommended to DCS legal counsel that the rights of both parents be terminated.

In June, 1996, Father began sending the first of many sexually suggestive letters to Pittman from jail. In an effort to stop these letters, Pittman's supervisor arranged for another DCS caseworker, Giles Rudolph ("Rudolph"), to act as an intermediary between Pittman and Father. Rudolph told Father that Rudolph was now handling the case for DCS. In fact, Pittman remained the caseworker for the family. Rudolph did not make any notes of his contacts with Father; rather, he would relate the substance of any conversations to Pittman who would in turn make notations in the file.

On August 1, 1996, DCS sought a no-contact order against both parents. In its petition, DCS cited the mother's untreated drug addiction and Father's incarceration as grounds for the no-contact order. DCS asserted that there was a " danger of immediate harm to the children if further visitation

between the children and the parents is re-started at this time." The court ordered the parents to have no contact with the children until a hearing was held. Later that month, Rudolph and Pittman met with Father in jail, and Rudolph informed him that DCS was seeking to terminate his rights.[4] He also asked Father to stop writing offensive letters to Pittman.

On January 30, 1997, a hearing was held and the court ordered that Father have no contact with the children pending the further order of the court; that Father have no contact with Pittman; that any contact between Father and DCS be through Rudolph or his supervisor; and that Father

> obtain a psychological evaluation completed by Dr. Leonard Miller and arranged through this Court and...[t]hat upon completion of the evaluation, Dr. Miller shall recommend what contact, if any, should be allowed between [Father] and his children and the recommendation of Dr. Miller shall become the order of this order pending further hearing.

Father underwent the psychological evaluation in February, 1997. This evaluation, however, is not part of the record, nor does the record contain any subsequent orders entered by

the court addressing the results or recommendations of this evaluation. Father testified that he did not receive a copy of the evaluation. However, he acknowledged that his attorney had read it and had advised him that he could "have supervised visits if [he went] to an individual counseling class." Based on the apparent recommendation of Dr. Miller, Pittman made a referral to Child and Family Services for such counseling in April, 1997.

In the early months of 1997, Father completed several of the services offered by the CAP program, including the following: parts I and II of a three-part alcohol and drug treatment program; a parenting group; a job development group; a vocational assessment; and an anger management group. Despite this progress, on May 21, 1997, and June 4, 1997, Father tested positive for cocaine and was subsequently arrested for failure to comply with the CAP program. DCS filed the petition to terminate his parental rights on July 2, 1997. Father was released from jail shortly thereafter and began attending counseling sessions at Child and Family Services. He attended three sessions, but stopped attending after August 5, 1997. On September 9, 1997, Father was arrested for burglary and violation of probation. On December 1, 1997, his probation was revoked and he was sent to the penitentiary to serve the remainder of his six-year sentence. He was incarcerated at the time of the trial of this matter on June 30, 1998.

II. *Standard of Review*

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness that we must honor "unless the preponderance of the evidence is otherwise." Rule 13(d), T.R.A.P.; ***In re Drinnon,*** 776 S.W.2d 96, 97 (Tenn.Ct.App. 1988).

III. *Law*

A parent has a fundamental right to the care, custody and control of his or her child. ***Stanley v. Illinois,*** 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); ***Drinnon,*** 776 S.W.2d at 97. However, it is clear that this right is not absolute; it may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute. ***Santosky v. Kramer,*** 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982).

Following a bench trial, the court entered a judgment finding clear and convincing evidence to support its conclusion that termination of Father's parental rights was justified on five basic grounds:

> That [Father] has abandoned these children in that [Father] has willfully failed to support or make reasonable payments toward

the support of the children for four (4) consecutive months immediately preceding the filing of this petition or prior to incarceration.

That the children have been removed by order of a court for a period of six (6) months; the conditions which led to the removal of Sierra and Shavonne Wiley still persist; other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of [Father]; there is little likelihood that these conditions will be remedied at an early date so that the two girls can be returned to [Father] in the near future; and the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home.

That [Father] has failed to comply in a substantial manner with those reasonable responsibilities set out in the foster care plan(s) related to remedying the conditions which necessitate foster care placement. He has failed to rehabilitate himself from his drug addiction despite counseling offered by both the Department and the CAP program. He has not refrained from further criminal activities, nor paid child support, nor visited regularly with his children when he was allowed, nor maintained employment when out of prison.

That [Father] has failed to seek reasonable visitation with the child[ren], and if visitation has been granted, has failed to visit altogether or has engaged in only token visitation as defined in T.C.A. 36-1-102(1)(D). [Father] visited the children four times in eighteen months. The Department was granted a temporary restraining order to stop further visits until the father entered counseling. The Department arranged for this counseling, and the father subsequently attended counseling three times and then quit.

* * *

> The father has abandoned the children in that he has exhibited a wanton disregard for the welfare of the children prior to his incarceration, due to his continued criminal activities, and use of drugs, and failure to comply with the CAP program.

The statutory authority for the grounds relied upon by the trial court can be found in the Code, as follows:

T.C.A. § 36-1-113

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.
>
> * * *
>
> (c) Termination of parental or guardianship rights must be based upon:
> (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.
>
> * * *
>
> *(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:*
> *(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;*
> *(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37,*

chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

* * *

T.C.A. § 36-1-102
As used in this part, unless the context otherwise requires:
(1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;

* * *

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or

> guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child.
>
> (B) For purposes of this subdivision (1), " token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;
>
> (C) For purposes of this subdivision (1), " token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;
>
> (D) For purposes of this subdivision (1), " willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means that, for a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;
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> (E) For purposes of this subdivision (1), "
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> willfully failed to visit" means the
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> willful failure, for a period of four (4)
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> consecutive months, to visit or engage in
>
> more than token visitation....

(Emphasis added).

IV. *Grounds for Termination*

The petition to terminate in the instant case was based on multiple grounds: abandonment because of a failure to visit, *see* T.C.A. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(i) (Supp. 1998); abandonment because of a failure to support, *see* ***id.;*** abandonment because of a wanton disregard for the welfare of the children prior to his incarceration, *see* T.C.A. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(iv) (Supp. 1998); substantial noncompliance by Father with the plan of care, *see* T.C.A. § 36-1-113(g)(2) (Supp. 1998); and the existence of facts implicating the provisions of T.C.A. § 36-1-113(g)(3)(A)(Supp. 1998). We must affirm the trial court's judgment if any *one* of these bases exists in this case.

A. Substantial Noncompliance

The trial court found that there had been "substantial noncompliance" by Father with the statement of responsibilities in the children's plan of care. *See* T.C.A. § 36-1-113(g)(2) (Supp. 1998). Although the plan of care is not contained in the record, Pittman testified that the statement of responsibilities set forth the following objectives for Father: 1) undergo a drug and alcohol assessment; 2) participate in Respond, a drug and alcohol treatment program; 3) attend parenting classes; 4) refrain from criminal

activities; 5) attend couple's therapy with the children's mother; 6) pay child support; 7) make regular visitations with the children; 8) maintain stable employment; and 9) legitimate Shavonne.

The evidence is clear and convincing that Father failed to substantially comply with the responsibilities set forth in the plan of care. Father did not submit to an alcohol and drug assessment, nor did he enroll in the Respond program. While he did attend a few alcohol and drug treatment sessions while in jail, he did not complete the program. In 1997, he completed two-thirds of the alcohol and drug program offered by CAP; within a month, however, he tested positive for cocaine. Father attended parenting classes sporadically. He did not attend couple's therapy and attended only six sessions of individual counseling at Child and Family Services over the course of two years. Although he apparently attempted to set up a child support order during his brief employment in early 1997, he never paid any child support. He was not able to maintain a job for more than a few months at a time, admittedly because of his ongoing drug problems.

The evidence is also clear that he did not maintain regular visitation with the children prior to the August, 1996, no-contact order. Father argues that he visited regularly when he was not incarcerated. We disagree with this contention. During the 16 months preceding the no-contact

order, Father was incarcerated for 11 months. During the five months when he was not in jail, he visited the children a total of four times, even though he could have visited them on a weekly basis.

Father did legitimate Shavonne in December, 1995. The rest of the objectives of the plan of care, however, clearly were not satisfied. Therefore, we find clear and convincing evidence of Father's substantial noncompliance with the plan of care.

B. Remaining Grounds for Termination

The trial court also found clear and convincing evidence of the basis for termination found at T.C.A. § 36-1-113(g)(3)(A), and clear and convincing evidence of "wanton disregard for the welfare of [his] children" prior to his incarceration. *See* T.C.A. § 36-1-102(1)(A)(iv) (Supp. 1998).

The subject children have been in the care of the State since May 2, 1995. When placed in the State's care, they were approximately 3 years and 18 months old, respectively. At the time of the hearing, they were approximately ages 6 and 4. We believe that the continuation of the parent and child relationship "greatly diminishes the child[ren]'s chances of early integration into a safe, stable and permanent home." *See* T.C.A. § 36-1-113(g)(3)(A)(iii)

(Supp. 1998). Their mother's parental rights were terminated in 1997. Their father was in prison at the time of trial. If he serves his full sentence, he will be released in November, 2001. Although that sentence may be reduced for good behavior, the actual date of his parole is not certain. The proof is clear and convincing in this case that the children cannot rely upon the availability of Father to provide them "a safe, stable and permanent home." ***Id.*** There is "little likelihood" that the conditions which led to the removal of the children in the first place "will be remedied at an early date so that the child[ren] can be safely returned to [Father] in the near future." *See* T.C.A. § 36-1-113(g)(3)(A)(ii) (Supp. 1998).

Father argues that the conditions that led to the removal of the children in 1995 were caused by the mother. The evidence is clear, however, that it was the drug abuse of *both* parents that contributed to the neglect of these children which in turn led to their placement with the state. Father admitted that he was addicted to cocaine and that his need for money to support his habit led him to commit several burglaries and thefts. In fact, Father was once arrested for shoplifting in 1995 while the children were with him. After the children were brought into state custody, he was incarcerated four times before he was sent to prison in 1997 to serve the remainder of his six-year sentence. Although he had attended some drug and alcohol counseling, the evidence is clear that he failed to maintain sobriety when he was not

incarcerated. Father's recurrent drug problems, coupled with his criminal activity, is significant evidence to show that all of the conditions set forth in T.C.A. § 36-1-113(g)(3)(A) were met in this case. All of this conduct also shows Father's "wanton disregard for the welfare of [his] child[ren]" prior to his incarceration. *See* T.C.A. § 36-1-102(1)(A)(iv) (Supp. 1998).

The trial court also found grounds for termination in Father's willful failure to support and his willful failure to visit. We have serious doubts as to whether clear and convincing evidence exists to support these grounds. There is no evidence in the record to show that Father was employed or otherwise had the means to support the children for the four months prior to his incarceration. Absent a finding that Father's failure to support had some element of intent, we cannot affirm the termination of his parental rights on this ground.[5]

As to the trial court's finding of Father's "willful failure to visit" the children for the four months prior to the filing of the petition, we note that a no-contact order had been in effect since August, 1996. Thus, we cannot say that Father's lack of visitation –- which was suspended indefinitely by a court order –- constituted a "willful failure to visit."

V. “Reasonable Efforts” by DCS

Father argues that DCS failed to make “reasonable efforts” pursuant to T.C.A. § 36-1-113(h)(2)[6] to help reunite him with the children. Specifically, Father claims that DCS “ failed to actively help” him –- and in fact deliberately discouraged him from trying to -- regain custody. Also, Father claims that as a result of DCS’s misrepresentation of who was the actual caseworker for the family, he received little information concerning the status of the children and little guidance as to the necessary steps to regain custody of the children.

The children at issue have been away from Father for over four years. The record is replete with efforts by DCS during that period to improve Father’s parenting skills and to provide the necessary alcohol and drug treatment to enable Father to lead a drug-free life. What DCS could not provide, however, was a willingness on Father’s part to participate in the provided services for any meaningful period of time.

Father argues that DCS failed to make reasonable efforts when he was deliberately misled as to the identity of the family’s caseworker. DCS’s decision to have another caseworker act as intermediary between Father and Pittman was an attempt to maintain contact with Father while at the same time discouraging his offensive and inappropriate

correspondence to Pittman. DCS's decision to channel Father's communication through another caseworker in no way diminished DCS's efforts to keep Father informed about the children and to provide services to him and the family. The evidence does not preponderate against a finding that DCS met its obligation under T.C.A. § 36-1-113(h)(2)(1996).

VI. *Conclusion*

The evidence before us does not preponderate against the trial court's findings of fact supporting termination. Furthermore, the evidence is clear and convincing that termination of Father's parental rights is in the best interest of the children. There is also clear and convincing evidence of three of the five bases for termination relied upon by the trial court.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for enforcement of the judgment and the collection of costs assessed below, all pursuant to applicable law.

_____
Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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D. Michael Swiney, J.