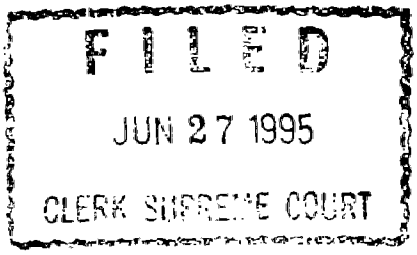
IN THE COURT OF APPEALS OF IOWA

No. 5-252 / 94-1052



**IN THE INTEREST OF S.K.
and P.K., Minor Children,**

D.S., Mother,

Appellant.

Appeal from the Iowa District Court for Muscatine County, James A. Weaver, District Associate Judge.

Mother appeals the district court's order terminating her parental rights over her minor children. **AFFIRMED.**

Kenneth Hoopes of Keele Law Offices, West Liberty, for appellant.

Thomas J. Miller, Attorney General, Richard E. Ramsay, Assistant Attorney General, and Christine Dalton, Assistant County Attorney, for appellee-State.

Mark J. Neary of Muscatine Legal Services, Muscatine, guardian ad litem for minor children.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

SACKETT, J.

The juvenile court terminated Deborah's parental rights to her daughters, Priscilla, born August 31, 1985, and Samantha, born December 2, 1988. Deborah appeals contending the State did not make reasonable efforts to preserve her family, there is not clear and convincing evidence her daughters cannot be returned to her care, and there is not clear and convincing evidence supporting the termination. The children's guardian ad litem requests the juvenile court be affirmed. He advances there is clear and convincing evidence supporting the termination, and the State made reasonable efforts to reunite the family. The State contends the termination is supported by overwhelming evidence, and Deborah has been given services and treatment to correct her problems. We affirm.

Appellate review of termination proceedings is de novo. *In re W.G.*, 349 N.W.2d 487, 491 (Iowa 1984), *cert. denied sub nom. J.G. v. Tauke*, 469 U.S. 1222, 105 S. Ct. 1212, 84 L. Ed. 2d 353 (1985). We give weight to the findings of fact of the juvenile court, especially when considering the credibility of witnesses, but we are not bound by those determinations. *In re W.G.*, 349 N.W.2d at 491-92. Of primary concern in termination proceedings is the interest of the children. *See* Iowa R. App. P. 14(f)(15); *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981).

Deborah, born in 1965, has a ninth grade education and was struggling with problems in a marriage to Jack, a sixty-five year old Korean veteran, and her own

substance abuse in the summer of 1992, when she sent Priscilla and Samantha to live with their maternal grandmother, Frances. In August, Frances contacted the Department of Human Services for assistance with the children. In November 1992, Frances became the girls' guardian and custodian.

In January 1993, Priscilla told her grandmother Jack had sexually abused her. The Department of Human Services determined the sexual abuse of Priscilla and Samantha was founded against both Jack and Deborah. Jack because he sexually abused the girls, and Deborah because she did nothing about it. The children were found to be children in need of assistance under Iowa Code sections 232.2(6)(d) and 232.2(6)(c)(2) (1993). The court also found Frances had health problems and was no longer in a position to care for the children. The children were placed in the custody of the Department of Human Services and put in family foster care.

There were hearings in December 1993 and in the spring and early summer of 1994. The children remained in foster care. The court found Deborah had not participated significantly in the services that were delineated in the Case Permanency Plan prepared by the State. There was a recommendation parental rights be terminated. A petition for termination of parental rights was filed. Deborah's parental rights were terminated on July 27, 1994. This appeal by Deborah follows.

The children have different fathers. Neither father has been involved with the children's care. Neither father challenges the termination of his parental rights.

Deborah has a history of depression and has been treated with medications. She has carried suicidal thoughts. One of five children, she claims to have been abused physically by her parents. Deborah has limited education, having been expelled from school after she set her teacher's desk on fire. She was in foster care in the Annie Whittenmeyer Home from age fourteen to seventeen. Deborah has had a tubal ligation. She has spondylolisthesis, a history of asthma, migraines, and is overweight. A brother died of a drug overdose. Frances, too, has sought treatment for depression. There is family strife between Deborah and a sister. Deborah also uses alcohol which has inflamed a bleeding ulcer. She also has used marijuana and cocaine. Deborah's father is mentally retarded.

When Frances obtained guardianship of the girls in late 1992, reports from Lutheran Social Service indicated Priscilla was motivated to achieve, had low self-esteem but was doing well in school. The report further indicated she was performing over her peers, and generally displayed good problem-solving skills and was able to connect behavior to consequence. Priscilla was said to be a child who needed positive parenting and consistent behavior management.

The same report indicated Samantha was a happy and active child who often was not focused and required consistent redirection and supervision. The report said Samantha became angry when disciplined and had tantrums where she bit, kicked, and ran and hid. She was found to be making progress in preschool and was a loving

child who required considerable attention and needed positive parenting and consistent behavior management.

Deborah first contends she was not offered reasonable services.

The case plan, in part, provided:

Deborah shall:	Deborah has done:
1. Maintain supervised visitation with Priscilla and Samantha.	Deborah has been faithful in her visitation, as has Frances. There is considerable family love as well as frustration.
2. Work with Lutheran Social Services on:	
a. Parenting skills;	Between June 2, 1993 and July 8, 1993, Deborah had three parenting skills sessions with Chris Ewald B.A., Foster Care Worker; between July 12, 1993 and November 17, 1993, there were twelve more sessions, apparently with the same worker.
b. Her chemical dependency;	Deborah was admitted to an outpatient treatment program on June 7, 1993, and discharged because she did not comply on July 1, 1993. The prognosis was slim for recovery. A report delineated the need for a simple program at her level of intelligence. (There is no evidence this was provided.) On April 22, 1994, the University of Iowa Hospitals and Clinics diagnosed Deborah with a history of alcohol abuse, now abstinent.

	c. Her dependency on people;	Deborah has not been able to establish her own credit.
	d. Her denial the children were abused.	
	e. Her own domestic abuse;	Deborah no longer lives with her husband and has filed for divorce; although they have some contact.
	f. Her problem with lying.	
3.	Complete a substance abuse evaluation and follow recommendations;	Deborah was in two treatment programs.
4.	Have no contact with husband;	Deborah no longer lives with him.
5.	Obtain a psychological evaluation;	The evaluation was done and found Deborah to have alcohol dependence, borderline intellectual functioning, and congenital spinal bifida.
6.	Receive individual counseling;	Deborah was treated through the University Hospitals in Iowa City and is receiving medication for depression and is following through with Iowa Psychiatry.
7.	Decrease her dependency on others and build her self-esteem.	

Deborah was offered services. She has cooperated in a number of respects, particularly in counseling on parenting and maintaining contact with her children. Deborah has never challenged the case plan nor has she, prior to this time, asked for additional services. A most serious problem Deborah has had has been substance

abuse. The report from University Hospitals would indicate in the spring of 1994 Deborah had the problem under control but she has not completed two treatment programs. Deborah no longer lives with her husband and has filed for dissolution.[1] The extensive individual counseling afforded Deborah did not, from the State's perspective, solve Deborah's problems. While a different substance abuse program may have better served Deborah's needs, this is her first challenge to the type of services offered. A challenge to the failure to exert reasonable efforts to reunite this family should have come earlier. *See In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993).

Deborah next contends there is not clear and convincing evidence her daughters would suffer harm if returned to her care and she has cooperated and made changes by controlling substance abuse and distancing herself from her husband. We agree, there is considerable evidence Deborah has cooperated and made changes.

The juvenile court found Deborah attended family therapy and was a willing participant but her ability to derive benefits is quite limited. The juvenile court found she was not in individual therapy, refused to believe her children were abused by their stepfather, and she continues to have a relationship with him. The juvenile court also found she has a mental health disorder, learning disability, and substance abuse and

---

[1] Deborah never challenged the requirement and we, therefore, assume she agreed she should separate from her husband.

dependency, and she is not honest about her circumstances. We give credence to the credibility assessments made by the juvenile court.

On July 12, 1993, both girls were placed in the same foster home. By February 18, 1994, the girls were moved to a new foster home; this involved a change of schools for Priscilla. There Priscilla began acting out sexually with the foster parents' mentally disabled son. In the spring of 1994, Frances was told the State would seek termination of parental rights. Priscilla and Samantha learned of this. By May 1994, Priscilla began talking about missing her mother and exhibiting unusual behavior. There followed inpatient treatment in a pediatric psychiatric unit for Priscilla. She was vomiting after meals, and there was the possibility of bulimia. Priscilla was found to have emotional problems. She was discharged with prescription drugs. At the same time, it was recommended Samantha needed psychotherapy.

As of August 29, 1994, Deborah continued to receive weekly counseling sessions and supervised visits in alternating weeks.

The record is bare as to what the future plans are for the children's placement if the termination is affirmed. Priscilla and Samantha exhibited emotional problems when they learned the State planned to sever parental rights. There is emotional bonding between the girls and their mother and grandmother. Priscilla and Samantha are older children with problems and will be a challenge to adoptive parents, if they are placed for adoption.

The State and guardian ad litem have advocated termination of parental rights. We have to trust, in doing so, they recognize their continual responsibility to assure these children do not just remain adrift in the foster care system. Priscilla and Samantha have already had two foster placements.

We affirm.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 5-225 / 94-1052

FILED
MAY 30 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs

STANLEY D. YOUNG,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas McDonald, District Associate Judge.

Young challenges his conviction, following a jury trial, of fourth-degree theft.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

Linda Del Gallo, State Appellate Defender, James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

SACKETT, J.

Defendant-appellant Stanley D. Young appeals the judgment and sentence entered on his conviction of fourth-degree theft, in violation of Iowa Code section 714.1 (1993). He contends there was not sufficient evidence to support the conviction and the trial court should have sustained his judgment of acquittal. Defendant further contends his trial counsel was not effective because she failed to file a notice of alibi witnesses. We affirm in part, reverse in part, and remand for a new trial.

Defendant was charged with theft following a shoplifting incident at a Kwik Shop. Defendant contends the wrong person was arrested and charged and he was home sleeping at the time of the alleged incident which was from 3:03 to 3:05 in the morning.

Defendant was identified as the perpetrator from a photo array given to the convenience store clerk one week after the incident. As a result of the photo identification, defendant was arrested. The clerk also identified defendant at trial as the shoplifter. Also, several frames of surveillance tape were admitted as evidence.

Defendant denied involvement. He claimed he owned no clothing similar to that worn by the alleged perpetrator on the surveillance tape. He testified he was in bed with his girlfriend when the incident happened and his mother would verify this fact. Defendant also testified he did not remember being in the Kwik Shop in question.

In determining the sufficiency of evidence to support a guilty verdict, we consider the evidence in the light most favorable to the State. *State v. Klindt*, 389 N.W.2d 670, 676 (Iowa 1986); *State v. Blair*, 347 N.W.2d 416, 418 (Iowa 1984). Substantial evidence means evidence that would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Origer*, 418 N.W.2d 368, 369 (Iowa App. 1987). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. *Blair*, 347 N.W.2d at 421. We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

We agree with the State that the evidence is sufficient to support the charge. We affirm on this issue.

Defendant next claims his trial counsel was not effective and he was denied a fair trial because his trial counsel failed to give the proper notice of an alibi defense.

In order to prevail on his claim of ineffective assistance of counsel, defendant must show, by a preponderance of the evidence, that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). Defendant must establish both of these requirements by a preponderance of the evidence. *Taylor v.*

State, 352 N.W.2d 683, 685 (Iowa 1984). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

At a pretrial conference on April 6, 1994, defendant was ordered to provide the names of his witnesses. No notice of an alibi witness or witnesses was filed before trial. At trial, the defense counsel notified the court she wanted to call defendant's mother to the stand. The State objected contending there was not notice of the alibi witness. Defendant then stated on the record he had told his trial counsel his alibi witnesses were his mother and his girlfriend and he told his counsel in time for counsel to file a notice of alibi witness.

An offer of proof was made showing defendant's mother would have testified that when she got home from work about 2 a.m. on the morning in question, defendant was in bed. No offer of proof was made as to the testimony of the girlfriend, who defendant had alleged was in bed with him.

The State advances no reason why this was not ineffective assistance of counsel. Rather, the State contends defendant cannot show prejudice or a different result would have occurred if defendant's mother had testified. The State's contention is defendant's mother's testimony only shows he was in bed at 2 a.m. and the theft happened at 3 a.m., and there was time for him to get out of bed and rob the store.

We find defendant has shown the required prejudice. The case against defendant was not strong. He was not identified until the clerk picked him from a

photo array a week after the incident. After the photo identification, the convenience store clerk identified him at trial. There is no other evidence either placing defendant at the scene or showing defendant in possession of the items taken. No immediate arrest was made. The videotape did not clearly identify defendant.

Defendant testified his mother and girlfriend would testify in support of his alibi. They were not able to do so because of the lack of notice of the alibi defense. The fact they did not testify not only deprived defendant of the benefit of their testimony but, also, reflected on his credibility after he told the jury they would testify and they did not.

While we agree with the State the fact defendant's mother said he was in bed at two o'clock in the morning is not positive evidence he was in bed at three, it still is evidence that would have been helpful to defendant's cause both to support his testimony his mother would testify and that he was not out roaming at two o'clock in the morning.

We reverse and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.