IN THE COURT OF APPEALS OF IOWA

FILED
SEP 24 1991
CLERK SUPREME COURT

No. 1-87 / 90-1399

IN THE INTEREST OF A.R.S., A Child,

N.S., Mother,

Appellant.

Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Juvenile Referee.

Mother appeals the termination of her parental rights. **REVERSED AND REMANDED.**

John J. Gajdel of Watson and Gajdel, Des Moines, and Wayne M. Reisetter, Des Moines, for appellant mother.

Bonnie J. Campbell, Attorney General, Gordon E. Allen, Deputy Attorney General, and Kathrine S. Miller-Todd, Assistant Attorney General, for appellee State.

Michael Mayer, Des Moines, guardian ad litem for the child.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Appellant N.S., the birth mother of a female child A.R.S. born January 27, 1990, appealed a trial court order terminating her parental rights to the child. The father R.H., who is not married to the mother, has not appealed.

The mother contended (1) the State failed to show by clear and convincing evidence her parental rights should be terminated, (2) Iowa Code section 232.116(1)(c), under which her parental rights were terminated, is unconstitutional, and (3) she was denied effective assistance of trial counsel. We determined her claim of ineffective assistance of trial counsel could not be addressed on the record before us. We remanded to the trial court to address the mother's claim she had not been afforded effective assistance of legal counsel. On remand, the trial court took evidence and determined the mother had effective representation. The case has now been returned to us.

We first address the mother's claim she did not receive effective legal assistance. The mother was entitled to effective legal assistance. The mother was furnished an attorney as directed by Iowa Code section 232.89. Due process requires an attorney appointed under a statutory directive to provide effective assistance. See In re D.W., 385 N.W.2d 570, 579 (Iowa 1986); Patchette v. State, 374 N.W.2d 397, 398 (Iowa 1985); In re Voeltz, 271 N.W.2d 719,

722 (Iowa 1978). In assessing the issue, we apply the same standards adopted for counsel appointed in a criminal proceeding. D.W., 385 N.W.2d at 579; see e.g. Strickland v. Washington, 466 U.S. 668, 687-98, 104 S. Ct. 2052, 2064-70, 80 L. Ed. 2d 674, 693 (1984); State v. Losee, 354 N.W.2d 239, 243-44 (Iowa 1984); State v. Neal, 353 N.W.2d 83, 86-87 (Iowa 1984).

A history of the mother's legal representation is helpful in assessing this issue. The mother had four older children who were the subject of a child in need of assistance action. The mother was represented. Carmen, the attorney the mother claims was ineffective, took over representation of the mother during the pendency of the child in need of assistance proceeding for the four older children. The State then filed a petition to terminate the parental rights to these four children. Carmen represented the mother at the termination hearing. The mother was pregnant with this child. Carmen counseled the mother to agree to termination of her parental rights to the four children so that this child would not be included in a proceeding with the other children. The mother agreed to the termination. Her parental rights were terminated. The basis for the child in need of assistance proceeding and the subsequent termination petition for the four older children was the mother's serious substance abuse problems and sexual abuse of the children by the mother's

boyfriends. The mother was offered a series of services, but the problems were not corrected. This child was determined to be a child in need of assistance shortly after her birth. Carmen served as the mother's attorney from the beginning. Carmen represented the mother at a hearing where the mother was successful in retaining custody of the child, subject to supervision.

On June 20, 1990, the State filed a petition for temporary removal of the child. On June 27, 1990, after the mother waived a hearing on temporary removal, the child was removed from her mother's care. Carmen apparently was in Europe at the time and not available to her client. There is no evidence of another attorney covering for Carmen in her absence. On July 20, 1990, the mother requested a hearing on temporary removal. On July 24, 1990, the State filed the petition to terminate parental rights. On July 27, 1990, Carmen filed the first of two applications to withdraw. Carmen testified she felt the State was correct in petitioning to terminate parental rights. She testified she felt another attorney should look at the case. She felt what she knew about her client would get in the way of her representation. A hearing on Carmen's application to withdraw was set for August 2, 1990. Carmen forgot to calendar the hearing. She did not appear. The application was not granted. On August 3, 1990, Carmen filed a second application to withdraw. She

withdrew this application on August 9, 1990, five days before the scheduled hearing. She testified at this point her client did not want her to withdraw. The hearing on the State's petition to terminate parental rights was scheduled for August 14, 1990. The hearing proceeded as scheduled on the 14th. Carmen represented the mother. During trial, Carmen subpoenaed the child's medical records. On the second day of trial, the mother decided to commit herself to an in-patient substance abuse program. With Carmen's help, she committed herself that evening. Carmen appeared on the third day of trial without her client. The court was advised of the mother's voluntary commitment. Carmen did not request a continuance. On August 17, 1990, the trial court entered an order terminating parental rights. The time from the removal of the child from the mother's home to the entry of an order terminating parental rights was less than sixty days. On August 30, 1990, Carmen withdrew from representation.

On remand, the trial court considered the mother's claim Carmen was not effective because (1) she did not follow through on her application to withdraw as counsel, (2) she did not obtain copies of the child's medical records before the trial, (3) she failed to call witnesses her client wished called, and (4) she failed to seek a continuance before trial and after the commencement of the trial.

The trial court dismissed the claims, concluding (1) the mother had not shown her attorney was inadequately prepared, (2) her attorney only attempted to withdraw to allow someone fresh to take a look at the record, and (3) there were not grounds available for a continuance. The trial court also found the mother did have the advantage of the medical records, and the medical records were not helpful to her. We agree with the trial court's conclusion the medical records were not helpful to the mother.

The next question is whether trial counsel was adequately prepared. The trial court found she was. At the hearing on remand, the mother testified she had asked Carmen to call several witnesses. Carmen testified they were not called because they would not be helpful to the mother or because the mother had not given her their names. Carmen also testified she did not have the funds for an investigator. No request for funds for an investigation was made. Carmen's trial preparation was minimal. The mother has not, however, shown that with additional preparation favorable evidence would have been introduced.

A third question is whether the trial counsel should have requested a continuance to allow another attorney to represent the mother, and later to request a continuance when the mother entered in-patient treatment. Carmen did not introduce evidence of the nature of the mother's

commitment or the type of program she had entered. The State had introduced evidence no program would accept the mother. Carmen was asked on remand about introducing evidence relative to the mother's commitment:

* * *

> Q. There was a gentlemen that was involved in her admission at that time; is that correct? A. Yes.
>
> Q. Did you ask this gentlemen to come into court and testify as to what program she was in or what she was doing or how long she'd be there or anything to that effect? A. I remember talking to them the evening she was admitted.
>
> Q. Okay. You don't remember one way or the other whether you asked them to come in and testify or not? A. My recollection is that I attempted to get someone there, but no one was available in terms of scheduling.
>
> Q. You didn't subpoena anybody, did you? A. No, I did not.

Carmen did not ask for a continuance after the client was admitted to treatment. Carmen was asked on remand about requesting a continuance:

> Q. What did you have to lose as far as trial strategy by requesting a continuance. A. The Court would have been frustrated with the proceeding drawing out further.
>
> Q. Okay. But that would have meant that a continuance would have been granted? A. Yes.
>
> Q. If the Court would have turned down your request, you basically would have been in the same spot you were in when you didn't ask for one; is that right? A. That's correct.
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> * * *
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> Q. With regard to this asking of a continuance, were there any other reasons why you needed the continuance? A. No.
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> * * *
>
> Q. So other than to buy time for Nancy, you had no other reason for asking for a continuance; is that correct? A. That's correct.

The mother had serious substance abuse problems. There

were numerous reasons to be concerned about her ability to parent. She had not successfully completed out-patient treatment programs. She did, however, clearly love her child. She had been cooperative with the department in a number of ways. She had not sought in-patient treatment before. The mother's substance abuse problem was the primary reason for her inability to parent. Given the short time from removal of the child to the mother's commitment to in-patient treatment, it was clearly reasonable to see whether the mother would benefit from the treatment program and correct her substance abuse problem.

Carmen was ineffective in not requesting a continuance and bringing in, by way of subpoena if necessary, a witness or witnesses from the center to provide evidence of the nature, duration and success rate of the program.

We recognize the need to resolve problems of inadequate parents quickly. However, parental rights are constitutionally protected. Due process requires a parent facing the loss of his or her parental rights should have adequate time to prepare for trial. There was less than a sixty-day time period between the child's removal from the home and the trial court's order terminating parental rights. A continuance could have been granted, and the case still could be disposed of within the time standards for case processing. See Iowa Rules of Court, State and Federal, 1991, 497-98 (West Publishing Co. ed. 1990). Time

standards for case processing set sixty days as the time from filing to hearing and five months from filing to disposition. Id. The standards, however, are to be utilized as guidelines, and are not mandatory. Id.

We are concerned about Carmen's own admission she felt she was not objective in representing the mother. Had Carmen appeared at the hearing on her application to withdraw and explained her position, including her inability to represent the mother objectively, there is a strong probability she would have been allowed to withdraw and the trial court would have granted adequate time for new counsel to prepare.

In J.P.B., 419 N.W.2d 387, 390 (Iowa 1988), the court discussed the lawyer's role is not to determine the client's interest but to advocate the client's interest. The court pointed to the Iowa Code of Professional Responsibility for Lawyers DR-101, and the fact that representing a client zealously requires a lawyer shall not intentionally fail to seek the lawful objectives of a client. Id. at 391. The attorney is an advocate for the parent. See generally In re J.V., 464 N.W.2d 887, 892-93 (Iowa App. 1990), for discussion of the position of an advocate.

Carmen did not adequately represent her client. The real question is, did the mother suffer prejudice by the representation? Were the issues the mother claims should

have been advanced issues lacking merit? See Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985).

Over objection at hearing on remand, evidence was introduced that in-patient treatment was successful. The mother has been substance free and gainfully employed for six months. An in-patient substance abuse program is a reasonable service to make available to a substance-abusing parent where out-patient services have not been successful, if the parent agrees to the commitment.

The mother has shown she received ineffective assistance of counsel. We reverse the order terminating parental rights. The child remains a child in need of assistance. It appearing from the record the mother's problems are being corrected, we remand to the trial court to determine whether, with reasonable efforts, the child can be returned to her mother's custody.

REVERSED AND REMANDED.