



Missouri Court of Appeals

Southern District

Division One

IN THE INTEREST OF:)
C.I.G., C.M.D.G., and M.I.G.,)
Minor children under seventeen)
years of age,)
GREENE COUNTY JUVENILE OFFICE,)
Petitioner-Respondent,)
v.) Nos. SD36771, SD36772, SD36773
M.D.G.,) Filed: January 19, 2021
Respondent-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Robert M. Liston, Senior Judge

AFFIRMED

M.D.G. (Father) appeals from judgments terminating his parental rights to three sons: C.I.G.; C.M.D.G.; and M.I.G. (hereinafter referred to collectively as the Children).¹ The trial court terminated Father's parental rights as to each child on the statutory grounds

¹ The parental rights of the Children's mother were also terminated and are not at issue in this appeal.

of neglect and failure to rectify potentially harmful conditions. *See* § 211.447.5(2); § 211.447.5(3).² The court also found that termination of Father’s parental rights was in each child’s best interest. *See* § 211.447.6.

On the third, final day of trial, Father’s counsel filed a motion for a continuance, and the trial court overruled that motion. On appeal, Father presents two points concerning the trial court’s ruling on the motion for continuance. Father contends the trial court abused its discretion by failing to grant a continuance because: (1) he was denied “meaningful access to the courts”; and (2) he was denied his “right to effective counsel” due to “the requirement to conduct the trial without his client present in person and because of counsel’s inability to have met with [Father] prior to trial due to the unique issues revolving around the COVID 19 pandemic and counsel’s lack of access to the Greene County Jail[.]” Finding no merit in either of these points, we affirm.

Factual and Procedural Background

The Children were born between 2014 and 2018.³ In July 2018, before the youngest child, M.I.G., was born, his two older brothers came into the protective custody of the Children’s Division (Division). Officers responding to a hotline call found C.I.G. and C.M.D.G. living with Father in a car in filthy conditions. In October 2018, a few days after M.I.G. was born, he also came into protective custody of the Division. Removal of the Children was due to Father’s history of unstable housing, substance-abuse issues and criminal history.

² All statutory references are to RSMo Cum. Supp. (2018). All rule references are to Missouri Court Rules (2020).

³ From oldest to youngest, the Children were born in the following order: C.M.D.G. (August 2014); C.I.G. (December 2016); and M.I.G. (October 2018).

Thereafter, petitions were filed to terminate Father's parental rights to each of the Children. Trial in the matter was held on three separate days: December 2, 2019; March 4, 2020; and May 6, 2020. With respect to the first day of trial on December 2, 2019, Father failed to appear. He failed to maintain contact with the Division and with his counsel, who had been representing him for several months. Father's counsel nevertheless participated in the proceedings on Father's behalf, cross-examining five witnesses and making timely objections to certain questions asked of those witnesses on direct. The parties later learned that, on that first day of trial, Father was in the Greene County Jail due to a probation violation in one of his burglary cases.

In February 2020, Father's counsel filed a timely application for writ of habeas corpus ad testificandum requesting that Father be transported from the jail to appear in person the second day of trial, set for the following month. The trial court granted that request.

On March 4, 2020, the second day of trial, Father appeared in person and with his counsel, who cross-examined two more witnesses. Later in March 2020, due to the COVID-19 pandemic, our Supreme Court entered an order suspending certain in-person hearings, including the chapter 211 proceedings in this case. The Court encouraged judges to utilize all available technologies, such as video and teleconferencing.

On May 6, 2020, the third day of trial, Father appeared by "Polycom," a video-conferencing system, from the Greene County Jail. Although Father's counsel applied for another writ of habeas corpus ad testificandum for Father to appear in person, Father was not allowed to do so following Supreme Court order. Father's counsel also appeared for that third day of trial and was physically present in the courtroom. The trial court

questioned Father about his Polycom connection, and Father said that he could see “okay” and hear the proceedings “[j]ust fine.”

Before the proceedings began, Father’s counsel moved to continue the case for two reasons: (1) Father was unable to participate in person; and (2) Father’s counsel was unable to visit Father in jail due to the COVID-19 restrictions. Father’s counsel proposed, however, that if the court would “lend me the courtroom,” he would be able to consult with Father via Polycom, thereby addressing “one of the issues[.]” The trial court agreed to provide the courtroom for private consultation, and also invited Father and his counsel to speak up if either were having any technical problems:

THE COURT: We’ve had to use Polycom before, and we’ve used the method of clearing the courtroom so that you can have a private conversation with him before, and that has worked sufficiently for counsel involved. I assume it will work all right with you. If you wind up having a problem, put it on the record.

[Father’s counsel]: I will, Your Honor. Thank you.

THE COURT: Don’t be afraid to say something.

The court then overruled the motion for continuance. Thereafter, Father’s counsel cross-examined one final witness and presented Father’s testimony. Prior to Father’s testimony, Father’s counsel requested that he and Father consult privately via Polycom. The court granted that request, clearing the courtroom to facilitate the private consultation.

At least three times during the proceedings, the court stopped the testimony to make sure Father could hear what was being said.⁴ After each interruption in the testimony,

⁴ The trial court learned from the clerk that, in the room where Father was participating via Polycom, there were four stations in which other courtrooms were calling and talking to other defendants.

Father assured the court that he could hear the testimony and was still participating in the proceedings. The court also made sure Father could take notes. As Father wrapped up his testimony, the court asked Father if he needed to again talk privately with his lawyer. Neither Father nor his counsel indicated to the court that they needed another private consultation or that Father could not fully participate in the proceedings due to technical problems.

Thereafter, the trial court entered judgments terminating Father's parental rights to each of the Children. This appeal followed.⁵

Discussion and Decision

Father's two points contend the trial court erred by failing to grant the continuance requested by Father's counsel on the third day of trial, May 6, 2020. "Overruling a motion for continuance is within the sound discretion of the trial court." *Matter of A.L.R.*, 511 S.W.3d 408, 414 (Mo. banc 2017). Our review is for abuse of discretion. *In re G.G.B.*, 394 S.W.3d 457, 464 (Mo. App. 2013). "Judicial discretion is abused when a court's ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *In re A.S.*, 38 S.W.3d 478, 486 (Mo. App. 2001); *In Interest of A.R.T.*, 496 S.W.3d 610, 618 (Mo. App. 2016). The trial court's judgment is presumed valid, and the burden is on

⁵ The trial court made extensive findings as to the grounds for termination and the Children's best interest. The grounds for termination included, *inter alia*, neglect, based on a repeated, continuous failure by Father, although physically or financially able, to provide each child with adequate food, clothing, shelter, or other care and control necessary for each child's physical, mental or emotional health and development. See § 211.447.5(2)(d). In concluding that termination of Father's parental rights was in each child's best interest, the trial court found against Father on five of the seven factors. See § 211.447.7. Because Father does not challenge any of these findings and conclusions, we review only that part of the record relevant to the ruling challenged on appeal.

the appellant to demonstrate that it is incorrect. *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2010).

Point 1

Point 1 contends the trial court abused its discretion in failing to grant the requested continuance because Father was denied “meaningful access to the courts[.]” According to Father, this occurred because “the court denied [Father] access to counsel, the ability to assist counsel, and the ability to meaningfully participate in the trial due to difficulties in [Father] testifying and hearing the evidence presented and such failure was so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” We disagree.

It is well settled that a prisoner is not entitled to perfect access to the courts; an incarcerated person is entitled to “meaningful access.” *Call v. Heard*, 925 S.W.2d 840, 846 (Mo. banc. 1996). Father’s initial argument that he was denied “meaningful access to the courts” because he was unable to participate in person was rejected by our Supreme Court in *In Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017):

Father argues that an incarcerated parent has a right to attend a termination hearing. This is incorrect. There is no constitutional right to appear in person at a civil trial. *Call v. Heard*, 925 S.W.2d 840, 846 (Mo. banc 1996). There is also no statutory right. Although § 491.230.2(1) allows an incarcerated parent to seek a writ of habeas corpus ad testificandum to appear and attend a trial on termination of the person’s parental rights, an incarcerated parent does not have an unequivocal right to such writ upon request. Issuing the writ is within the discretion of the circuit court.

J.P.B., 509 S.W.3d at 97. In addition, our Supreme Court held that “a parent’s inability to assist counsel at trial does not render counsel’s assistance ineffective.” *Id.*; see *In re W.J.S.M.*, 231 S.W.3d 278, 283-84 (Mo. App. 2007). Nevertheless, trial judges should make reasonable and practical efforts to accommodate the needs of prisoners for

alternatives to live testimony. *Call*, 925 S.W.2d at 846. The right of access is satisfied by the presence of sufficient alternatives to a personal appearance when the prisoner makes a timely request. *Id.* at 846-47; see *In re M.A.F. ex rel. Brandon*, 232 S.W.3d 640, 641-42 (Mo. App. 2007).

Here, in light of Father’s incarceration and the COVID-19 pandemic, the trial court made reasonable, practical and sufficient accommodations for Father to appear at trial via Polycom. See, e.g., *J.P.B.*, 509 S.W.3d at 88 (circuit court denied the father’s request to appear in person, but allowed him to participate via videoconference). Further, contrary to Father’s argument, the court also made reasonable accommodations for Father’s access to counsel, his ability to assist counsel, and his ability to meaningfully participate in the trial. The trial court: (1) made sure Father could take notes; (2) arranged to “lend” the courtroom to Father and his counsel to consult privately; (3) offered additional time to privately consult if needed; and (4) occasionally stopped the proceedings to make sure Father was still able to participate. Moreover, the court encouraged Father and his counsel to speak up if either was experiencing any technical problems.

On appeal, Father argues that he was unable to meaningfully participate due to difficulties in “testifying and hearing the evidence” by pointing to multiple “indiscernible” statements in the record. There is no indication in the transcript that Father raised these difficulties with the trial court at a time when the problem might have been addressed. Because Father did not bring these instances to the trial court’s attention, this Court will not convict a trial court of error on an issue that it had no chance to decide. *J.C.M. v. J.K.M.*, 573 S.W.3d 672, 682 (Mo. App. 2019).

In the argument portion of Father's brief, he also claims the case must be remanded for another trial because he was "denied a clear record of his testimony upon which to appeal." Rule 81.12(f), however, provides a process for correcting omissions in a transcript and imposes a duty on an appellant to use it. An incomplete record on appeal warrants reversal only if "the appellant can demonstrate that (1) due diligence was employed in an attempt to correct the shortcomings and (2) the incomplete nature of the record prejudiced him." *St. Louis Cty. v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 122 (Mo. banc 2013). Here, Father has failed to make either showing.

In sum, Father has failed in his burden to show that the trial court's decision to overrule his motion for continuance was "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *A.S.*, 38 S.W.3d at 486. Therefore, the trial court did not abuse its discretion by overruling the motion for continuance. Point 1 is denied.

Point 2

Point 2 contends the trial court abused its discretion in failing to grant the requested continuance because "the court violated [Father's] right to effective counsel[.]" According to Father, his counsel was ineffective due to: (1) "the requirement to conduct the trial without his client present in person"; and (2) "counsel's inability to have met with [Father] prior to trial due to the unique issue revolving around the COVID 19 pandemic and counsel's lack of access to the Greene County Jail[.]" Based on this premise of ineffective assistance, Father contends the court's decision to overrule the motion for continuance was so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Again, we disagree.

“[P]ursuant to § 211.462.2, a natural parent has a statutory right to counsel in a termination of parental rights proceeding and, therefore, an implied right to effective assistance of counsel.” *J.P.B.*, 509 S.W.3d at 97. “The test is whether the attorney was effective in providing his client with a meaningful hearing based on the record.” *W.J.S.M.*, 231 S.W.3d at 283-84; *J.P.B.*, 509 S.W.3d at 97. If a parent’s attorney does not present the parent’s side of the story, then that parent does not receive effective assistance of counsel. *In re K.A.F.*, 592 S.W.3d 382, 383-84 (Mo. App. 2019); *see, e.g., In Interest of J.M.B.*, 939 S.W.2d 53, 56 (Mo. App. 1997) (mother’s counsel did little beyond appearing for the hearing); *In Interest of J.C., Jr.*, 781 S.W.2d 226, 228-29 (Mo. App. 1989) (assigned attorney was effectively absent during the proceedings; “right to counsel means nothing if the attorney does not advocate for his client and provide his client with a meaningful and adversarial hearing”).

We reject Father’s first argument that his counsel was ineffective due to “the requirement to conduct the trial without his client present in person” because, as mentioned previously, “a parent’s inability to assist counsel at trial does not render counsel’s assistance ineffective.” *J.P.B.*, 509 S.W.3d at 97; *see W.J.S.M.*, 231 S.W.3d at 283-84. As noted above, the *J.P.B.* court rejected arguments that the father there received ineffective assistance due to his inability to: (1) “give real-time feedback to his counsel as testimony was being presented”; and (2) “communicate confidentially with counsel during trial[.]” *J.P.B.*, 509 S.W.3d at 97.

We are similarly unpersuaded by Father’s second argument that his counsel was ineffective due to his counsel’s inability to have met with Father prior to trial. The record demonstrates that Father and his counsel were able to meet via Polycom during trial, and

that Father's counsel was effective in providing Father with a meaningful hearing. Father's counsel, *inter alia*: (1) filed two applications for writ of habeas corpus ad testificandum for the hearings scheduled for March 4, 2020 and for May 6, 2020, respectively; (2) filed and argued the underlying motion for continuance; (3) cross-examined eight witnesses; (4) made timely objections to questions asked those witnesses on direct examination; (5) presented evidence on Father's behalf; (6) requested and arranged to privately consult with Father via Polycom; and (7) presented Father's testimony to show Father's side of the story. *See K.A.F.*, 592 S.W.3d at 384 (father's counsel was effective in filing multiple writs of habeas corpus ad testificandum; participating in negotiations pre-trial; actively participating at trial; objecting to certain questioning; and presenting father's testimony to reveal his reasons for contesting termination). Because Father has failed to show he received ineffective assistance of counsel, he cannot show his counsel's performance had any bearing on the trial court's ruling on his motion for a continuance.

Thus, Father has failed again in his burden to show that the trial court's decision to overrule his motion for continuance was "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *A.S.*, 38 S.W.3d at 486. Therefore, the trial court did not abuse its discretion by overruling the motion for continuance. Point 2 is denied.

The judgment of the trial court is affirmed.

JEFFREY W. BATES, C.J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, P.J. – CONCUR

WILLIAM W. FRANCIS, JR., J. – CONCUR