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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1223

Filed: 5 July 2017

Davidson County, Nos. 14 JT 26-29

IN THE MATTER OF K.E.J., A.K.J.J., M.O.P., R.A.A.P.

Appeal by respondents from orders entered 31 August 2016 by Judge Carlton Terry in District Court, Davidson County. Heard in the Court of Appeals 15 June 2017.

*Assistant Davidson County Attorney Christopher M. Watford for petitioner-appellee Davidson County Department of Social Services.*

*Edward Eldred, for respondent-appellant-mother.*

*Mark Hayes, for respondent-appellant-father.*

*Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.*

STROUD, Judge.

Respondent-mother appeals from orders terminating her parental rights to her four children. Respondent-father, the father of two of the children, also appeals from orders terminating his parental rights. We affirm the order as to respondent-father because the trial court did not enter any order regarding withdrawal of his counsel,

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nor did his counsel withdraw or seek to withdraw from representation. We affirm the order as to respondent-mother because she has failed to show ineffective assistance of counsel based upon her own failure to appear at the hearing.

I. Background

In late February of 2014, the Davidson County Department of Social Services (“DSS”) filed petitions alleging that Katie, Andy, Mitch, and Robin were neglected and dependent juveniles.<sup>1</sup> DSS alleged that respondent-mother, who was the custodial parent of all four children, had a prior history with DSS dating back to 2007. DSS claimed that respondent had “a consistent history of . . . poor parenting activities that have affected her inability to care for her children.” The issues noted by DSS related to respondent-mother included substance abuse; mental health concerns, including respondent-mother’s suicide attempt; improper physical discipline; unstable housing; leaving the children unsupervised; neglecting the children’s basic needs, including mental health and medical care; and domestic violence against one of the children. Respondent-father, the father of Mitch and Robin, was in jail at the time the petitions were filed and had outstanding warrants for assault with a deadly weapon, false imprisonment, and assault on a female. DSS obtained non-secure custody of the juveniles.

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<sup>1</sup> Pseudonyms are used to protect the identities of the children.

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In June of 2014, the district court adjudicated the children neglected and dependent; the disposition ordered the permanent plan of reunification. By September of 2015, the permanent plan had been changed to termination of respondents' parental rights and adoption. On 9 October 2015, DSS filed petitions to terminate respondents' parental rights. On 31 August 2016, the district court entered orders terminating respondents' parental rights due to neglect and willfully leaving the children outside of the home without making reasonable progress. Respondents appeal.

II. Respondent-Father's Appeal

Respondent-father's sole argument on appeal is that the district court erred in allowing his "attorney to withdraw and then conducting the hearing without an attorney to represent" him. (Original in all caps.) But respondent-father's issue as stated is simply not accurate, since his attorney did not withdraw from representation, nor did she fail to represent him at the hearing. The trial court did not enter any order regarding withdrawal which we can review on appeal. The record shows that respondent-father's attorney merely "stepp[ed] out" due to another matter near the end of the dispositional portion of the hearing. At the time respondent-father's attorney left the hearing, the witness on the stand was being questioned regarding Andy, a child that was not respondent-father's child. The evidence regarding respondent-father's children had been completed. Furthermore, it is clear

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from the transcript that the district court was aware respondent-father's attorney would need to step out and had ensured her departure was at a time that would not adversely affect her client's interests. In fact, just before she left, the trial court noted that "you don't have a client here. You've been able [to] represent your client's interest pretty well." Respondent's attorney also informed the trial court that she had no further evidence to present regarding best interests.

Respondent-father's attorney never sought to withdraw from representing respondent-father and the trial court did not enter any order regarding withdrawal from representation. Respondent-father has not cited any authority to support his argument that what happened here was even a withdrawal from representation. He has cited only cases addressing review of actual orders allowing withdrawal of counsel, which are not relevant to this case, and has he demonstrated any prejudice whatsoever due to counsel's slightly early departure. Under these circumstances, we conclude that counsel's absence at the final moments of the hearing and during evidence regarding only respondent-mother's child was not a withdrawal from representation in any sense nor did it harm any procedural safeguards, the fairness of the proceedings, or any of respondent-father's fundamental rights. Accordingly, respondent-father's argument is entirely without merit.

III. Respondent-Mother's Appeal

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Respondent-mother's only argument on appeal is that she received ineffective assistance of counsel at the termination hearing which she herself did not attend. "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

Respondent-mother seeks to compare this case to *In re S.N.W.*, where this Court determined there may have been ineffective assistance of counsel because it was unclear if the attorney had adequately attempted to communicate with his client about the hearing and there was no information "regarding how many phone calls trial counsel may have made, whether he sent any written communication to Respondent, or whether he sought help in contacting Respondent through another party, such as DSS[.]" 204 N.C. App. 556, 559-61, 698 S.E.2d 76, 78-79 (2010). But even *S.N.W.* notes that "a finding of ineffective assistance of counsel will generally not be made where the purported shortcomings of counsel were caused by the party." *Id.* at 561, 698 S.E.2d at 79.

At the beginning of the hearing, respondent-mother's attorney moved for a continuance due to her lack of contact with respondent-mother; the trial court denied continuance. But in moving for the continuance she noted she had called respondent-mother on two phone numbers "numerous times" and was once able to reach

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respondent-mother's mother who said respondent-mother would call her back, though respondent-mother did not do so; she had also sent her mail, most of which was returned; and respondent-mother had failed to attend the three TPR court dates, including the present one, though the case worker stated respondent-mother was aware of the current court date. In addition, the social worker also testified about her repeated efforts to contact respondent-mother. Even when she was able to talk to respondent-mother, she nearly always failed to maintain contact or follow up on whatever the social worker had contacted her about – mental health services, medication management, substance abuse treatment, verification of employment, or visitation with the children. Thus, here, unlike in *S.N.W.*, *see id.*, 204 N.C. App. 556, 698 S.E.2d 76, the transcript shows that both her counsel and the social worker diligently attempted to contact respondent-mother via the phone and mail. Respondent-mother's counsel bears no responsibility for her client's failure to communicate with her or to respond to her communications. Thus, any "purported shortcomings of counsel were caused by" respondent-mother. *Id.* at 561, 698 S.E.2d at 79. This argument is overruled.

IV. Conclusion

For the foregoing reasons, we affirm.

Affirmed.

Chief Judge McGEE and Judge ARROWOOD concur.

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Report per Rule 30(e).