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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-573

No. COA22-25

Filed 16 August 2022

Surry County, No. 19 JT 62

IN THE MATTER OF:

M.M.H.

Appeal by respondent from order entered 14 September 2021 by Judge William F. Southern, III, in Surry County District Court. Heard in the Court of Appeals 8 June 2022.

Partin and Cheek, by R. Blake Cheek, for petitioner-appellee Surry County Department of Social Services.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for respondent-appellant mother.

James N. Freeman, Jr., for guardian ad litem.

DIETZ, Judge.

¶ 1 Respondent appeals the trial court's order terminating her parental rights to her five-year-old son. Respondent did not appear at the termination hearing and argues on appeal that we must remand this case for the trial court to conduct a more thorough inquiry of Respondent's communication with her counsel leading up to the hearing.

¶ 2 As explained below, this case is controlled by our Supreme Court's recent decision in *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 16. That case requires parents in this situation to satisfy both prongs of the two-part test for ineffective assistance of counsel. Here, as was the case for the parent in *Z.M.T.*, Respondent has not shown that, had she been present at the hearing, her counsel would have presented any additional evidence or taken a different course of action that might have impacted the outcome. We therefore reject Respondent's argument and affirm the trial court's order.

Facts and Procedural History

¶ 3 Respondent is the mother of Morgan,[1] born in 2017. In 2019, while Morgan was living with his biological father, law enforcement officers executed a search warrant at the father's home, recovered drugs and evidence of drug trafficking in the home, and arrested the father. Respondent was homeless at the time and indicated that she struggled with opiate use and could not provide an appropriate home for Morgan. The Surry County Department of Social Services then filed a petition alleging that Morgan was a neglected juvenile.

¶ 4 The trial court adjudicated Morgan to be a neglected juvenile and ordered that he remain in DSS custody. Through a series of review and permanency planning

[1] We use a pseudonym to protect the juvenile's identity and for ease of reading.

hearings over the next year, Respondent made progress on her case plan, and the trial court eventually moved Morgan into a trial home placement with Respondent.

¶ 5 In September 2020, Respondent tested positive for amphetamines and methamphetamine. Morgan also tested positive for amphetamines and methamphetamine and reported witnessing domestic violence between Respondent and her boyfriend. DSS terminated the trial home placement arrangement and placed Morgan in a foster home.

¶ 6 In November 2020, the trial court conducted another permanency planning hearing where it found that Respondent repeatedly tested positive for various controlled substances and missed several drug screenings, therapy sessions, and scheduled visitations with Morgan. Ultimately, in February 2021, DSS petitioned to terminate Respondent's parental rights to Morgan.

¶ 7 In May 2021, the trial court held the termination hearing. Respondent was not present but was represented by counsel. At the outset of the hearing, Respondent's counsel moved to continue the hearing, explaining that counsel last spoke with Respondent a month before the hearing, at which time Respondent instructed counsel to contest the termination of her parental rights. Respondent's counsel attempted to contact Respondent leading up to the termination hearing but had not been able to speak with her. The trial court denied the motion to continue, and the hearing took place with Respondent's counsel representing Respondent and opposing the

termination.

¶ 8 After the hearing, the trial court entered an order terminating Respondent's parental rights. Respondent timely appealed.

Analysis

¶ 9 Respondent argues that the trial court failed to conduct an appropriate inquiry of counsel before proceeding with the hearing in her absence. She contends that the court's failure to conduct this inquiry deprived her of the effective assistance of counsel.

¶ 10 Indigent parents have a statutory right to counsel in termination proceedings. N.C. Gen. Stat. § 7B-1101.1(a). As with the constitutional right to counsel afforded by the Sixth Amendment, counsel provided through this statutory right "must provide effective assistance, as the alternative would render any statutory right to counsel potentially meaningless." *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29, 32 (2020).

¶ 11 When a parent afforded this statutory right to counsel asserts that counsel was ineffective, the parent "must satisfy a two-prong test, demonstrating that (1) counsel's performance was deficient; *and* (2) such deficient performance by counsel was so severe as to deprive respondent of a fair hearing." *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 16. "To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been

a different result in the proceedings." *Id.*

¶ 12 Importantly, *In re Z.M.T.* holds that, to prevail on an ineffective assistance claim, the parent must satisfy *both* prongs of this two-part test and, if one prong is not satisfied, there is no need to address the other. *Id.*

¶ 13 *In re Z.M.T.* involved facts quite similar to this case: the parent was not present at the termination hearing and argued that her counsel was deficient for failing to communicate with her and provide the date and time of the termination hearing. Nevertheless, our Supreme Court declined to examine counsel's performance, or the trial court's inquiry into the parent's absence, because the Court determined that the parent had not satisfied the second prong of the two-part test. The Court explained that "[a]ssuming without deciding that counsel's performance was deficient, respondent-mother cannot prevail on her ineffective assistance of counsel claim because she has failed to demonstrate that she was prejudiced by any alleged deficiency in performance by counsel." *Id.* ¶ 17.

¶ 14 The same is true here. The record indicates that Respondent previously instructed her counsel to oppose the termination of her parental rights, and counsel did so at the hearing. On appeal, Respondent does not point to anything that would have changed about counsel's actions had she been present at the hearing—for example, Respondent does not argue that she intended to testify, or that she had any additional evidence that was not offered to the trial court because of her absence.

Accordingly, under *In re Z.M.T.*, Respondent has failed to satisfy the second prong of the ineffective assistance test. We therefore reject Respondent's argument and affirm the trial court's order.

Conclusion

¶ 15 We affirm the trial court's order.

AFFIRMED.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).