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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-610

Filed 04 April 2023

Lincoln County, No. 20 JT 43

IN THE MATTER OF: J.D.C.

Appeal by respondent-father from order entered 14 April 2022 by Judge Micah J. Sanderson in Lincoln County District Court. Heard in the Court of Appeals 7 March 2023.

J. Fielding Yelverton for petitioner-appellee Lincoln County Department of Social Services.

Stephen M. Schoeberle for guardian ad litem.

Leslie Rawls for respondent-appellant father.

ZACHARY, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights. Respondent-Father argues that the trial court abused its discretion by (1) overruling Respondent-Father's objection to the courtroom presence of a non-participating Lincoln County Department of Social Services ("DSS") attorney, and (2) failing to inquire into a possible imputed conflict of interest of the DSS attorney who

tried this matter. After careful review, we affirm.

Background

Respondent-Father has two minor children, “Joanne” and “Jacob,”¹ born in 2019 and 2017, respectively. On 27 November 2019, Joanne and Jacob’s mother executed two Memoranda of Judgment, wherein she agreed that Respondent-Father would have primary custody of both children and that she would have visitation with the children in Respondent-Father’s discretion.

On 8 June 2020, DSS received a report alleging Jacob’s abuse and death in Respondent-Father’s home. Respondent-Father was later arrested and charged with first-degree murder in Jacob’s death.

After DSS removed Joanne from Respondent-Father’s home, DSS employees “noticed bruising and scratches on [Joanne]’s lower back.” Consequently, the same day, DSS filed a petition alleging that Joanne was an abused, neglected, and dependent juvenile. The trial court entered an order granting DSS nonsecure custody of Joanne later that day.

At some point during the nonsecure custody hearing on 8 and 9 June 2020, Respondent-Father disclosed to the trial court that he had previously consulted with Scott Hudson, DSS’s primary child protective services attorney, when Mr. Hudson was in private practice and not yet employed by DSS. Consequently, the trial court

¹ We use the pseudonyms adopted by the parties for ease of reading and to protect the juveniles’ identities.

ordered that another attorney replace Mr. Hudson as counsel for DSS in this matter; thereafter, J. Fielding Yelverton represented DSS for the remainder of Respondent-Father's case.²

In an order entered on 8 March 2021, and again in an amended order entered on 12 March 2021, the trial court adjudicated Joanne as an abused, neglected, and dependent juvenile, and ordered that she remain in DSS custody, with placement in DSS's discretion.

On 16 April 2021, DSS filed a petition to terminate Respondent-Father's parental rights. The matter came on for hearing on 4 January, 11 January, and 8 February 2022 in Lincoln County District Court. Ms. Yelverton appeared for DSS.

At the start of the hearing, Respondent-Father's counsel informed the court that a petition concerning Respondent-Father's competency had been filed in Respondent-Father's related criminal case. The trial court then conferred with Respondent-Father and his counsel concerning Respondent-Father's ability to understand the proceedings and effectively communicate. The court next heard from Ms. Yelverton:

[THE COURT:] How would you describe [Respondent-Father]?

MS. YELVERTON: Your Honor, it was one of the first, if not the first, reviews of non-secure custody after [DSS] took custody of [Joanne]. Mr. Hudson, being the primary child

² Although the record on appeal does not contain a transcript or a narration of the 8 and 9 June 2020 hearing, these facts are undisputed by the parties on appeal.

protective services attorney for [DSS], was in court for that matter that day. [Respondent-Father] admitted to the Court that he had consulted with Mr. Hudson when Mr. Hudson was a private attorney. I believe, just for -- in terms of the records, [Respondent-Father] is nodding today as I speak. He indicated that he had consulted Mr. Hudson on matters involving the same facts involved in the case and told the Court -- I believe Judge Shuford was on the bench that day, if I'm recalling correctly, and he felt that that created a conflict for Mr. Hudson and requested that another attorney represent [DSS]. I then stepped in to take on the case and I represent [DSS]. So my understanding that day was that [Respondent-Father] did a -- as he just exhibited today, did an excellent job of presenting his thoughts clearly and logically and it made perfect sense to me, which is why I'm still representing [DSS] on this matter.

The trial court found that Respondent-Father "unequivocally underst[ood] these proceedings," concluded that he was competent, and continued with the termination hearing.

On the second day of the hearing, the trial court and Respondent-Father's counsel had the following interaction regarding Mr. Hudson, upon which Respondent-Father now bases his appeal:

[RESPONDENT-FATHER'S COUNSEL]: Your Honor, my client has indicated to me that he objects to the presence in the courtroom today of Mr. Scott Hudson for [DSS] because he was his attorney in a prior matter involving, I believe, these children.

THE COURT: That's fine.

[RESPONDENT-FATHER'S COUNSEL]: And we ask that he -- that Mr. Hudson be removed from the courtroom.

THE COURT: His objection will be noted and also be overruled.

On 14 April 2022, the trial court entered an order terminating Respondent-Father's parental rights. Respondent-Father timely appealed.

Discussion

On appeal, Respondent-Father argues that the trial court abused its discretion by (1) overruling Respondent-Father's objection to Mr. Hudson's presence in the courtroom, and (2) failing to inquire into Ms. Yelverton's alleged imputed conflict of interest, to which Respondent-Father contends the trial court was purportedly alerted based on his objection concerning Mr. Hudson.

I. Standard of Review

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge" *Worley v. Moore*, 370 N.C. 358, 363, 807 S.E.2d 133, 138 (2017) (citation omitted); *see also Ferguson v. DDP Pharm., Inc.*, 174 N.C. App. 532, 535, 621 S.E.2d 323, 326 (2005) ("[A]bsent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel is discretionary with the trial judge and is not generally reviewable on appeal." (citation and internal quotation marks omitted)). "The movant seeking to disqualify his former counsel must meet a particularly high burden of proof." *Worley*, 370 N.C. at 364, 807 S.E.2d at 138. "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the

result of a reasoned decision.” *Ferguson*, 174 N.C. App. at 535, 621 S.E.2d at 326 (citation and internal quotation marks omitted).

II. Analysis

Respondent-Father first contends that because he had met with Mr. Hudson regarding a related legal matter prior to Mr. Hudson’s employment with DSS, Mr. Hudson’s presence in the courtroom during the termination hearing constituted a conflict of interest. Moreover, Respondent-Father maintains that Mr. Hudson’s conflict of interest was imputed to Ms. Yelverton as DSS’s counsel, pursuant to Rule 1.10(a) of the North Carolina Revised Rules of Professional Conduct; in that Respondent-Father’s objection to Mr. Hudson’s presence gave the court notice of the potential conflict, Respondent-Father contends, the trial court erred “by failing to inquire into the conflict or conduct an evidentiary hearing.” We disagree.

A. Objection to Attorney’s Presence in Courtroom

“In general, the trial court possesses broad discretionary powers to conduct a fair and just trial.” *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (citation and internal quotation marks omitted), *cert. denied*, 558 U.S. 999, 175 L. Ed. 2d 362 (2009). “In the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the courts are within the trial judge’s discretion.” *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985). “The power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of

proper decorum and the effective administration of justice.” *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 422 (1988) (citation omitted).

Furthermore, a “trial court judge has the inherent authority to remove any person other than a defendant from the courtroom when that person’s conduct disrupts the conduct of the trial.” *State v. Perdomo*, 276 N.C. App. 136, 143, 854 S.E.2d 596, 602 (2021) (citation and internal quotation marks omitted), *disc. review denied*, 380 N.C. 678, 868 S.E.2d 859 (2022); *see also* N.C. Gen. Stat. § 15A-1033 (2021). The trial court may also “impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present.” N.C. Gen. Stat. § 15A-1034(a).

Here, during the nonsecure custody hearing at the inception of this case, Respondent-Father raised his objection to Mr. Hudson’s participation as DSS’s counsel, asserting that he had previously consulted with Mr. Hudson about a related legal matter when Mr. Hudson was in private practice. The trial court removed Mr. Hudson from Respondent-Father’s case, and DSS was thereafter represented by Ms. Yelverton. Respondent-Father never raised any objection regarding Ms. Yelverton’s representation, evincing his apparent satisfaction with the court’s resolution of the potential conflict.

During the termination of parental rights hearing, upon noticing that Mr. Hudson was in the courtroom, Respondent-Father objected to his presence as a “conflict of interest” and requested that Mr. Hudson be removed from the courtroom.

The trial court overruled Respondent-Father's objection. On appeal, Respondent-Father argues that in so ruling, the trial court abused its discretion.

The trial court did not abuse its discretion by overruling Respondent-Father's objection to Mr. Hudson's presence in the courtroom during Respondent-Father's termination hearing. Although Respondent-Father asserts that Mr. Hudson's presence constituted a conflict of interest, he cites no authority to support his argument that the mere courtroom presence of a party's former attorney is equivalent to that attorney representing an adverse party. Respondent-Father did not argue below—nor does he assert on appeal—that Mr. Hudson was participating in the hearing; rather, his objection was based entirely on Mr. Hudson's physical presence in the courtroom. Moreover, Respondent-Father did not assert that Mr. Hudson was behaving in a manner that “disrupt[ed] the conduct of the” hearing, *Perdomo*, 276 N.C. App. at 143, 854 S.E.2d at 602 (citation omitted), or interfered with “the orderliness of courtroom proceedings or the safety of persons present[.]” N.C. Gen. Stat. § 15A-1034(a). Accordingly, the trial court did not abuse its “broad discretionary powers to conduct a fair and just trial.” *Garcell*, 363 N.C. at 44, 678 S.E.2d at 639 (citation and internal quotation marks omitted). Respondent-Father's argument, therefore, lacks merit.

B. Inquiry Into Potential Imputed Conflict

“[W]hen a trial court is made aware of a possible conflict of interest, the trial court must take control of the situation.” *State v. Mims*, 180 N.C. App. 403, 409, 637

S.E.2d 244, 248 (2006) (citation and internal quotation marks omitted), *appeal withdrawn*, 361 N.C. 365, 646 S.E.2d 536 (2007). However, a party's failure to obtain a ruling from the trial court regarding a conflict of interest may result in a waiver of the issue on appeal. *See, e.g., State v. Perry*, 262 N.C. App. 132, 137–38, 821 S.E.2d 617, 621 (2018) (concluding that the defendant failed to preserve his motion to disqualify the district attorney's office due to an imputed conflict, because the defendant failed to obtain the requisite ruling from the trial court on his motion), *disc. review denied*, 372 N.C. 107, 824 S.E.2d 411 (2019); *see also* N.C.R. App. P. 10(a)(1) (requiring a party to “have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context[,]” and to “obtain a ruling upon the party's request, objection, or motion” in order to preserve the issue for appellate review).

In the instant case, assuming, *arguendo*, that Mr. Hudson did have a conflict of interest, “the trial court [took] control of the situation” upon being “made aware” of the problem, replacing him with Ms. Yelverton as DSS's counsel of record and thereby eliminating the alleged conflict. *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (citation and internal quotation marks omitted).

Furthermore, even if Mr. Hudson's conflict could properly be imputed to Ms. Yelverton, an examination of the record reveals that the trial court was never “made aware” of any conflict regarding Ms. Yelverton. *Id.* The record is devoid of any

objection by Respondent-Father to Ms. Yelverton's representation of DSS throughout his case. Indeed, Respondent-Father raised no objection to Ms. Yelverton's appearance for DSS when Ms. Yelverton recounted for the court the circumstances under which she came to replace Mr. Hudson as DSS's counsel in this matter.

Only now, on appeal, does Respondent-Father take issue with Ms. Yelverton's representation, arguing that Mr. Hudson's alleged conflict was imputed to her. However, because Respondent-Father never argued this issue before the trial court, the court never had the opportunity to provide Respondent-Father with "a ruling upon [his] . . . objection" regarding the imputed conflict. N.C.R. App. P. 10(a)(1). Consequently, Respondent-Father has waived appellate review of this issue. *See id.*; *see also Perry*, 262 N.C. App. at 137–38, 821 S.E.2d at 621. Accordingly, as in *Perry*, Respondent-Father has failed to preserve for appeal the issue of an imputed conflict.

Conclusion

Respondent-Father fails to cite any authority—and we are aware of none—that supports his assertion that courtroom attendance by a party's former attorney constitutes that attorney's representation of an adverse party. Moreover, the record does not reflect that Mr. Hudson participated in Respondent-Father's case, or that he acted in a disruptive or threatening manner during the termination hearing. Therefore, we conclude that the trial court did not abuse its discretion by overruling Respondent-Father's objection regarding Mr. Hudson's alleged conflict of interest based on his presence in the courtroom.

Furthermore, “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount[.]” *In re W.I.M.*, 374 N.C. 922, 927, 845 S.E.2d 77, 81 (2020) (citation and internal quotation marks omitted). In that Respondent-Father failed to object below to Ms. Yelverton’s representation of DSS, his argument concerning an imputed conflict of interest is not properly before this Court.

Accordingly, we affirm the trial court’s order terminating Respondent-Father’s parental rights.

AFFIRMED.

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).