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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-507

Filed 2 January 2024

Haywood County, No. 21 JA 35

IN THE MATTER OF: C.L.S.

Appeal by respondent-father from orders entered 3 June 2022 by Judge Kristina L. Earwood and 5 December 2022 by Judge Kaleb D. Wingate in Haywood County District Court. Heard in the Court of Appeals 19 December 2023.

Rachael J. Hawes for petitioner-appellee Haywood County Health and Human Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Mark M. Rothrock, for guardian ad litem.

Peter Wood for respondent-appellant father.

PER CURIAM.

Respondent appeals from the trial court's orders entered 3 June 2022 and 5 December 2022, which eliminated reunification as a permanent plan and granted guardianship of C.L.S. ("Cynthia")¹ to her maternal grandmother.

On 12 May 2021, Haywood County Health and Human Services ("HHS")

¹ A pseudonym.

obtained nonsecure custody of Cynthia and filed a petition alleging she was an abused, neglected, and dependent juvenile. The following month, on 10 June 2021, the trial court entered an order adjudicating Cynthia as a neglected juvenile.

On 3 June 2022, following a hearing on the matter, the trial court entered an order eliminating reunification as a permanent plan. The court found that the parents had not corrected the conditions that led to the removal of Cynthia and that it was “highly unlikely” Cynthia could be safely returned to the home of either parent within the next six months. The court found that although respondent completed some activities in his case plan, his progress was “neither adequate nor substantial” and that he could not “in any way serve as the stable, healthy, and appropriate caretaker that the juvenile requires.”

Six months later, on 5 December 2022, the trial court entered an order awarding guardianship of Cynthia to her maternal grandmother and relieving HHS of further efforts in the case.

The next month, on 5 January 2023, Respondent filed written notice of appeal from *both* the 3 June 2022 and the 5 December 2022 orders.

We conclude that respondent’s notice of appeal was untimely as to the 3 June 2022 order eliminating reunification as a permanent plan. Specifically, to appeal an order eliminating reunification, our General Statutes provide that:

1. [the parent h]as preserved the right to appeal the order in writing within 30 days after entry and service of the order.

2. A termination of parental rights petition or motion has not been filed within 65 days of entry and service of the order.
3. A notice of appeal of the order eliminating reunification is filed within 30 days after the expiration of the 65 days.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2021).

While respondent complied with the first requirement by timely preserving his right to appeal, his written notice of appeal was filed approximately four months after the time provided for in the statute. Therefore, respondent's notice of appeal was insufficient to confer jurisdiction on our Court.

Respondent, though, has filed a petition for writ of *certiorari* seeking review of the 3 June 2022 order, acknowledging that his notice of appeal was untimely. Indeed, our rules allow for discretionary review by this Court “when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1).

In a recent opinion, our Supreme Court reaffirmed the two-part test for determining whether North Carolina appellate courts should issue a writ of *certiorari*. See *Cryan v. Nat’l Council of Young Men’s Christian Ass’ns of U.S.*, 384 N.C. 569, 570, 887 S.E.2d 848, 849 (2023). Specifically, appellate courts must assess “(1) the likelihood that the case has merit or that error was committed [] and (2) whether there are extraordinary circumstances that justify issuing the writ.” *Id.* As discussed below, neither of these circumstances are present. Thus, in our discretion,

we deny respondent’s petition. *See id.* at 573, 887 S.E.2d at 851 (“[T]he decision to issue a writ of certiorari rests in the sound discretion of the presiding court.” (citing *State v. Ricks*, 378 N.C. 737, 740, 862 S.E.2d 835, 838 (2021))).

Respondent argues that the trial court violated his Fifth Amendment right against self-incrimination.

In addition to protecting an individual “against being involuntarily called as a witness against himself in a criminal prosecution,” the Fifth Amendment also privileges an individual “not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might *incriminate* him in future *criminal* proceedings.”

Debnam v. N. Carolina Dep’t of Correction, 334 N.C. 380, 385, 432 S.E.2d 324, 328 (1993) (alterations in the original) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

Here, when respondent was called as a witness, respondent’s counsel immediately objected, invoked respondent’s constitutional right against self-incrimination, and stated that respondent was “currently under indictment in criminal cases.” The trial court overruled the objection. When respondent was then asked on the witness stand whether he had told his stepbrother to lie to a police officer about child pornography, respondent asserted his Fifth Amendment right by stating, “plead the [Fifth].” The following exchanges then took place:

Petitioner’s counsel: Your Honor, this is a civil proceeding. I respectfully ask . . . that this Court make the inference of guilt in the civil proceeding due to [respondent]

exercising his [Fifth] Amendment rights.

Respondent's counsel: Your Honor, this is sworn testimony under oath that could clearly affect his civil liberties in . . . his criminal case. He has every right to plead the [Fifth]."

Petitioner's counsel: He does, Your Honor. And this Court also has the right because it's a civil proceeding to allow him to take that [Fifth] Amendment right, to continue to exercise it, but to accept that as an inference of guilt in the civil proceeding. Not in the criminal proceeding; in the civil proceeding. And there's case law that's been in existence for well over 30 years at this point to that extent. I can print them off. I'm more than happy to distribute them.

Trial Court: Do[es] [respondent-mother's counsel] want to weigh in?

Respondent-mother's counsel: Oh, I think [petitioner's counsel] is right. I mean, may not necessarily be inference of guilt as much as it infers that the answer – I mean, it infers that the answer is yes to – in a civil proceeding to that question. So I think Your Honor can infer since he took the [Fifth] on that as for the purpose of . . . you know, clear, cogent, and convincing evidence that he did tell his brother not to do that. Not necessarily guilt about everything that we're getting ready to ask, but as to each question, when he pleads the [Fifth], I think your Honor can take the weight –

Trial Court: Infer that the answer would incriminate himself –

Respondent-mother's counsel: – be something incriminating, exactly.

Respondent: I am so confused.

Unidentified Speaker: [Indiscernible.]

Respondent: I'm confused.

Trial Court: All right. The Court will infer that based on his answer, and we'll go by a question-by-question basis.

Petitioner's counsel: Yes, ma'am, Your Honor.

Petitioner's counsel: [Respondent], tell me about this fantasy incest role-play group you belong to.

Respondent's counsel: Objection.

Trial Court: Overruled. You can answer, sir.

Respondent then proceeded to answer a series of incriminating questions relating to pending criminal charges. Further, when respondent was later asked what his explanation was for “the 500 videos of child pornography located on [his] phone[,]” respondent's attorney again objected. However, the trial court overruled the objection, stating, “You can answer.” Respondent then answered the question.

Although the latter objections did not state that they were based on respondent's right against self-incrimination, the basis may be inferred from context and the previous objections which specifically included the Fifth Amendment grounds. *See State v. McLymore*, 380 N.C. 185, 193, 868 S.E.2d 67, 74 (2022) (“If a party's objection puts the trial court and opposing party on notice as to what action is being challenged and why the challenged action is thought to be erroneous—or if the what and the why are apparent from the context—the specificity requirement has been satisfied.” (cleaned up)).

Further, when respondent stated he was confused on multiple occasions as to the ruling regarding his Fifth Amendment invocation, the trial court did not provide any clarification. Consequently, it is unclear whether respondent clearly understood his right to invoke his Fifth Amendment right after his initial invocation and the ensuing discourse. However, trial courts have substantial discretion whether to advise a witness of their right not to answer incriminating questions. *See State v. Poindexter*, 69 N.C. App. 691, 694, 318 S.E.2d 329, 331 (1984).

Thus, by responding to the objections with the statement, “You can answer[,]” there is a legitimate question as to whether the trial court violated respondent’s Fifth Amendment right against self-incrimination by indicating that respondent was required to answer. However, even assuming *arguendo* that a Fifth Amendment violation occurred, respondent must have been prejudiced by the violation. *See Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) (“Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case where the appellate court can declare a belief that it was harmless beyond a reasonable doubt.” (cleaned up)).

Here, because the privilege was invoked in a civil case, “the finder of fact in a civil cause may use a witness’ invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him.” *In re Estate of Trogon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991) (citation omitted). Thus, even if respondent had not answered the various

incriminating questions under his Fifth Amendment privilege, an inference could be made that each response would have otherwise been “unfavorable to him.” *See id.* Additionally, as the appellee points out, there was substantial evidence presented at the hearing—independent of respondent’s testimony—that supported the trial court’s determination in its 3 June 2022 order. Accordingly, even if the trial court violated respondent’s constitutional right, respondent was not prejudiced. Thus, he fails to show “that error was committed[.]” *See Cryan*, 384 N.C. at 570, 887 S.E.2d at 849.

With respect to determining whether an extraordinary circumstance exists, “[t]here is no fixed list of [such circumstances] that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or ‘wide-reaching issues of justice and liberty at stake.’” *Id.* at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)). Again, in our discretion, we believe no such circumstance is present here. *See id.*

Respondent did timely appeal the 5 December 2022 guardianship order. However, he has not raised any arguments as to the guardianship order in his brief. He has, therefore, abandoned any challenges to that order. *See* N.C.R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”); N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Accordingly, we affirm this order awarding guardianship to the maternal grandmother.

IN RE: C.L.S.

Opinion of the Court

AFFIRMED IN PART; DISMISSED IN PART.

Panel consisting of Judges DILLON, ARROWOOD, and GRIFFIN.

Report per Rule 30(e).