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11/02/2026 11:53 AM CST

being within statutory limits and having been an exercise of the district court's subjective discretion. As in those cases, I would simply find that the court abused its discretion in this case. See *id.*

Despite the unfavorable reaction to prior attempts by this court to recognize the constraints of the standard of review in considering sentences, I find that the district court's sentence was significantly more severe than warranted by the record and the circumstances of King's background and involvement in the underlying homicide and that it was an abuse of discretion. Therefore, the sentence should be reversed and the matter remanded for a new sentencing hearing before a different district court judge.

In re Interest of Marcos S.A. and Andres S., children under 18 years of age. State of Nebraska, appellee, v. Marcos A., appellant.

807 N.W.2d 794

Filed December 20, 2011. No. A-11-335.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
4. **Due Process.** Parties whose rights are to be affected are entitled to be heard.
5. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
6. **Due Process: Notice.** To satisfy procedural due process requirements, notice must be reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.

7. **Courts: Jurisdiction: Notice.** A court has no authority or jurisdiction to act on its own motion without notice to the parties and an opportunity to be heard.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Rex J. Moats, of Moats Law Firm, P.C., L.L.O., and Douglas D. Dexter for appellant.

Donald W. Kleine, Douglas County Attorney, and Jordan Boler for appellee.

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Marcos A. appeals from an order of the separate juvenile court of Douglas County determining permanent custody of Marcos S.A. (Marcos Jr.) and Andres S., terminating the jurisdiction of the juvenile court, and terminating the responsibility of the Nebraska Department of Health and Human Services (DHHS).

BACKGROUND

Marcos and Jennifer S. are the unmarried parents of the minor children Marcos Jr., born in December 2006, and Andres, born in August 2009. Marcos was arrested in February 2009 for robbery. He is currently serving an 8- to 10-year sentence and will be eligible for parole on February 14, 2013. Upon his release, he will be deported to Mexico. The record indicates that Marcos and Jennifer lived together on and off until Marcos' arrest and that Marcos Jr. remained in Jennifer's care until she was arrested on March 27, 2009. That same day, the Douglas County Attorney's office filed a petition in the juvenile court alleging that Marcos Jr. was without proper parental care by the fault or habits of his parents, due to their incarceration, and that thus, he was a child within the juvenile

court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

On May 6, 2009, Marcos Jr. was adjudicated as a minor child within this statute. During the hearing, Jennifer admitted to several counts included in the petition, including that Marcos Jr. was a child under 18 years of age living in Douglas County; that she was incarcerated, making her unable to provide proper care for him; that she failed to provide him with safe, stable, and appropriate housing; and that as a result, Marcos Jr. was a child at risk for harm. Marcos admitted that Marcos Jr. was a child under 18 years of age living in Douglas County; that Marcos was currently incarcerated, making him unable to provide proper care for Marcos Jr.; and that as a result, Marcos Jr. was a child at risk for harm. The court found that based on the admission pleas entered by both parents, Marcos Jr. should remain in the temporary custody of DHHS.

Jennifer was released from custody prior to June 5, 2009. DHHS' court report bearing that date referred to Jennifer's having visitation with Marcos Jr. at "a neutral location" and stated that Marcos Jr. is not currently visiting with Marcos due to his incarceration.

When Andres was born in August 2009, the Douglas County Attorney's office filed a supplemental petition alleging that Andres was "at risk for harm" because Jennifer "has failed to provide proper parental care, support and/or supervision" for him. Prior to the December 2 review and permanency planning hearing, the supplemental petition was dismissed and Andres remained in Jennifer's care. At the December 2 hearing, a court report prepared by a DHHS caseworker, Mark Wolford, was presented. This report indicated that Jennifer was having visits with Marcos Jr. four times a week and had completed or was in the process of completing the following court-ordered recommendations: attending a domestic violence class, continuing participation in individual therapy and semisupervised visitations, submitting to three urinalysis tests per week, and attending a parenting class. Jennifer's counsel added that she made incredible progress in following the court's recommendations.

On January 25, 2010, Jennifer asked her cousin to care for Andres while she attended a district court sentencing for previous criminal infractions. Jennifer was not prepared to be away from Andres for longer than a few hours. At that hearing, Jennifer was sentenced to 9 months' incarceration and was taken into custody immediately. At this time, Marcos was still incarcerated. Andres was placed in the same agency-based foster home as Marcos Jr. on January 25. On January 27, DHHS filed an affidavit and filed a supplemental petition, alleging that Andres lacked proper parental care by Jennifer's fault or habits in that she was incarcerated. The juvenile court took jurisdiction over Andres under § 43-247(3)(a) on March 3.

On March 8, 2010, Marcos' counsel filed a motion to review the placement from the children's foster home to a "relative foster placement." On April 8, a review and permanency planning hearing was held and the motion was denied by the court. The State offered several exhibits, including a court report written by Wolford, the caseworker for this matter, noting that until Jennifer's incarceration, she cared for Andres and was having semisupervised visits with Marcos Jr. four times a week. During that time, Jennifer worked with a family support worker, learning new parenting styles and learning to take a more active role in parenting.

The hearing proceeded to an adjudication, during which Marcos admitted to three counts included in the second supplemental petition: that Andres was a child under 18 years of age, that he was living in Douglas County, and that due to the fact that Marcos was currently incarcerated, Andres was at risk for harm. Based on these admissions, the court found Andres came within the meaning of § 43-247(3)(a) by a preponderance of the evidence insofar as Marcos was concerned.

The court's August 30, 2010, order scheduled a review and permanency hearing for December 8. Meanwhile, in October, the children began the transition to living with Jennifer upon the recommendation of DHHS. The court's November 22 order continued the December 8 hearing to January 7, 2011. On November 24, 2010, the children were placed in the home with Jennifer while legal custody remained with DHHS.

The case plan presented by DHHS at the January 7, 2011, hearing recommended that the children remain in the temporary custody of DHHS for appropriate care and placement to exclude the home of Marcos and include the home of Jennifer. The document, written by Wolford on January 4, 2011, indicated that Jennifer is happy to have her children home and that DHHS reports no safety concerns regarding her ability to care for them. However, he recommended that DHHS maintain legal custody. The guardian ad litem agreed with DHHS' recommendation, including that the permanency plan of reunification be achieved by April 22 due to Jennifer's positive parenting practices during visits.

DHHS' report noted that Marcos was currently incarcerated. Further, Marcos' attorney stated in June 2010 that Marcos was allowed visits with his children in jail, but his visitation status had been restricted due to his behavior. These restrictions limited visitation hours to only 2 days a week and required Marcos to be in full restraints, including shackles, during all visits. Both the State and the case manager stated concerns in approving visits at the jail due to the negative effect it could have on the children. The court ordered that no visitations between Marcos and the children would take place.

Jennifer's counsel indicated at the review and permanency planning hearing that she intended to file for custody on Jennifer's behalf in the district court. She did not make an oral motion for a custody determination at the hearing that day. The juvenile court judge indicated that she would be willing to have the matter transferred to her court "if that is what the parties choose to do." The judge stated, "I would think, given the circumstances of [Marcos], that that would not be a challenging issue, addressing custody." The county attorney agreed that placing the children in the custody of Jennifer should be secured before closing the case. The guardian ad litem agreed that Jennifer was making progress and encouraged her to keep working with Marcos Jr.'s daycare to improve his behavior. At this point, the juvenile court judge stated that, but for custody, there would be no reason to continue jurisdiction in this matter, and Wolford agreed. Jennifer's counsel stated, "Your Honor, we would love to have the children placed with Jennifer . . . .

We feel that she has done a great job and she'll continue to be a good parent."

The court did not receive any motion from the county attorney, DHHS, or the children's guardian ad litem regarding a custody determination on January 7, 2011. The court determined that based upon the evidence provided, the fact that Marcos is currently incarcerated, and the expectation that upon completion of his incarceration, Marcos will be deported, it was appropriate to place the children in the legal custody of Jennifer. Despite objections from Marcos' counsel, the court relieved DHHS of its legal duty at that time and terminated the jurisdiction of the juvenile court.

ASSIGNMENTS OF ERROR

Marcos alleges that (1) the juvenile court lacked jurisdiction to issue an order determining permanent custody of Marcos Jr. and Andres because procedures for determining permanent child custody under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2010) were not followed and (2) the juvenile court violated Marcos' right to due process of law under the U.S. and Nebraska Constitutions in issuing an order determining permanent custody of Marcos Jr. and Andres in the absence of notice to Marcos that the juvenile court might take such action.

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008). Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

ANALYSIS

[3,4] This court recognizes that the parent-child relationship is afforded due process protection. *In re Interest of Antonio O. & Gisela O.*, 18 Neb. App. 449, 784 N.W.2d 457 (2010). "'"For more than a century the central meaning of procedural

due process has been clear: 'Parties whose rights are to be affected are entitled to be heard. . . .' . . .'" *Id.* at 458, 784 N.W.2d at 465. See, also, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972).

[5,6] When a person has a right to be heard,

> "'[p]rocedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.'"

In re Interest of Mainor T. & Estela T., 267 Neb. 232, 247-48, 674 N.W.2d 442, 457 (2004). To satisfy procedural due process requirements, notice must be reasonably calculated to inform the person concerning the subject and issues involved in the proceeding. See *In re Interest of Antonio O. & Gisela O., supra*.

Marcos' appeal is primarily predicated upon the notice, or lack thereof, that a custody decision was to be made at a review and permanency hearing in the juvenile court of Douglas County. This case was originally brought by the State under § 43-247(3)(a) on March 27, 2009. Between June 2009 and January 2011, Marcos, Jennifer, the Douglas County Attorney's office, the children's guardian ad litem, and DHHS participated in seven review and permanency planning hearings. At each of these hearings, the court heard about the progress of the case and noted the reunification dates suggested by DHHS. DHHS case plans included recommendations for reunification by September 2010, November 2010, and April 2011. At no point was Marcos notified of a potential reunification date in January 2011 or that the issue of custody was to be heard at the January 7, 2011, review and permanency planning hearing.

Jennifer's counsel indicated at the January 7, 2011, review and permanency planning hearing that she intended to file for custody on Jennifer's behalf in the district court. The juvenile

court judge stated that she would be willing to have the custody matter transferred to her court "if that is what the parties choose to do." The judge stated, "I would think, given the circumstances of [Marcos], that that would not be a challenging issue, addressing custody." The county attorney agreed that placing the children in the custody of Jennifer should be secured before closing the case. The guardian ad litem agreed that Jennifer was making progress and encouraged her to keep working with Marcos Jr.'s daycare to improve his behavior.

At that time, the juvenile court asked Wolford to confirm that, but for the issue of custody, there was no reason to continue the jurisdiction of the juvenile court. Upon his confirmation, the judge stated, "This [c]ourt can place custody with an individual." Jennifer's counsel added, "Your Honor, we would love to have the children placed with Jennifer . . . . We feel that she has done a great job and she'll continue to be a good parent." The court immediately stated the determination that the children would be placed in the legal custody of Jennifer and relieved DHHS of its responsibility.

In 2008, the Legislature modified the jurisdiction of juvenile courts and county courts sitting as juvenile courts so that these courts could exercise jurisdiction over custody matters when the court already had jurisdiction over the juvenile for another purpose. See *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009). Because the juvenile court had jurisdiction in this case pursuant to § 43-247(3)(a), the juvenile court could exercise jurisdiction over custody matters in this case. However, the issue in this case is not whether the court had jurisdiction, but, rather, the notice and the opportunity to be heard on the issue of custody.

[7] The State alleges that the statement in court was considered a motion for a custody determination during the proceedings and that therefore, the court was correct in finding that permanent custody be with Jennifer. The State also alleges, in the alternative, that if the statement was not a valid motion for custody, "the court can make a custody determination on its own accord." Brief for appellee at 15. Following Marcos' due process objection, the juvenile court judge stated that her

decision was based on the evidence heard at the proceedings from spring 2009 through that hearing on that day. However, the Nebraska Supreme Court has consistently held that the court has no authority or jurisdiction to act on its own motion without notice to the parties and an opportunity to be heard. *Francis v. Francis*, 195 Neb. 417, 238 N.W.2d 468 (1976).

In the instant case, the parties were certainly on notice that custody would become an issue at the close of the case in juvenile court, as is the nature of such a case. However, the parties were given no indication that the juvenile court would take up the issue of legal custody, which could lead to the end of its jurisdiction, at the review and permanency planning hearing on January 7, 2011.

Procedural due process includes notice to the person whose right is affected by the proceeding and a reasonable opportunity to confront or cross-examine adverse witnesses and present evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Marcos' rights as a father were certainly affected by the decision to award custody to Jennifer. He was not on notice that the custody determination would be made at that particular hearing, nor did the juvenile court provide him the opportunity to be heard on the issue once it was raised. While we recognize that Marcos is not in a position to maintain custody at this time, he still has the right, as the father of Marcos Jr. and Andres, to present evidence and arguments on the question of his children's custody, including the fitness of Jennifer, as well as to establish his right to parenting time and his role as a parent.

The record shows that the guardian ad litem, the Douglas County Attorney's office, and DHHS were all prepared to continue the case as scheduled with a goal of reunification in April 2011, and Jennifer's counsel indicated she intended to file for custody on Jennifer's behalf in the district court. If the court had not immediately ruled on its own motion and allowed Jennifer to move for custody as planned, Marcos would have been given notice and an opportunity to be heard on the subject of custody and parenting time at a hearing on that motion. Though Marcos' parental rights were not officially terminated, there was no plan in place for visitation, parenting time, or

a procedure for determining what time Marcos will be able to spend with his children when his circumstances inevitably change. Because the judge ordered earlier in the same hearing that Marcos receive no visitation with his children, the order granting custody to Jennifer essentially deprived Marcos of all parental rights without notice or the opportunity to be heard on that issue. This was an unacceptable violation of Marcos' right to procedural due process and an abuse of discretion by the juvenile court.

CONCLUSION

We find it was an abuse of discretion for the court to award legal custody to Jennifer, relieve DHHS of its legal duty, and terminate the jurisdiction of the juvenile court without providing Marcos notice and the opportunity to be heard on a motion for custody. The decision of the juvenile court is reversed, and the cause is remanded for further proceedings in accordance with this decision.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RONALD D. SHERMAN, APPELLANT, V. BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

808 N.W.2d 365

Filed December 27, 2011. No. A-10-945.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** Neb. Rev. Stat. § 60-498.01 (Reissue 2010) provides that the Department of Motor Vehicles acquires jurisdiction to administratively revoke the driving privileges of a motorist arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010) upon receipt of a proper sworn report of the arresting officer.
2. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Proof.** The Department of Motor Vehicles makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence.** In an administrative license revocation proceeding, if the sworn report