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In re Interest of Davonest D. et al., children under 18 years of age. State of Nebraska, appellee, v. Travis B., appellant.

809 N.W.2d 819

Filed February 21, 2012. No. A-11-380.

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. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Juvenile Courts: Parental Rights: Appeal and Error.** In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling.
4. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
5. **Parties: Due Process: Words and Phrases.** The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard.
6. **Due Process.** When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against a 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 constitution or statute; and a hearing before an impartial decisionmaker.
7. **Parental Rights: Due Process.** Parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights.
8. **Parental Rights: Due Process: Appeal and Error.** If a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Judgment vacated, and cause remanded with directions.

Stacy A. Witt and Keith S. Filewicz for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Kailee Smith, Senior Certified Law Student, for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Travis B. appeals from the orders of the separate juvenile court of Douglas County which terminated his parental rights to his child, Da Shawn B. Upon our de novo review of the record, we conclude that Travis' due process rights were violated by virtue of his absence, and the absence of his attorney, from the termination hearing. We therefore vacate the juvenile court's orders, and remand with directions for a new adjudication and termination hearing.

BACKGROUND

On November 26, 2008, the Douglas County Attorney's office filed a petition in the juvenile court alleging that Davonest D., Daviarra B., and Da Shawn B. were without proper parental care by the faults or habits of their biological mother and that thus, they were children within the juvenile court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Da Shawn was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS) on the same day. Travis is the biological father of Da Shawn, and this appeal involves Da Shawn only. Da Shawn's mother is not a party to this appeal, and her involvement in the juvenile court proceedings will not be discussed further.

The record shows that Travis was convicted in federal court on drug charges and sentenced to 151 months' incarceration on June 15, 2004. His projected release date is in September 2018.

According to DHHS, a certified "alleged father letter" was sent to Travis on October 20, 2009, at the federal prison in El Reno, Oklahoma. The "alleged father letter" was documented as received on October 22, 2010, and Travis never responded to it.

On March 1, 2011, a second supplemental petition was filed, alleging that Da Shawn lacked proper parental care by reason of the faults or habits of Travis. The petition also included a motion to terminate Travis' parental rights based upon Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2010), on the ground of Da Shawn's having been abandoned by Travis for 6 months or more immediately prior to the filing of the petition; § 43-292(2), because Travis had substantially and continuously or repeatedly neglected and refused to give Da Shawn necessary parental care and protection; § 43-292(7), because Da Shawn had been in an out-of-home placement for 15 or more months of the most recent 22 months; and § 43-292(9), because Travis had subjected Da Shawn to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. Further, the petition alleged that terminating Travis' parental rights was in Da Shawn's best interests. Finally, the petition alleged that reasonable efforts under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2010) were not required because Travis subjected Da Shawn to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse. A motion for temporary custody was also filed on March 1. At the time the second supplemental petition was filed, Travis was being housed at the Saunders County jail.

On March 1, 2011, the juvenile court entered an order for immediate custody of Da Shawn with DHHS to exclude placement with Travis. The order set a hearing for March 7 to determine whether the immediate custody order should continue. A notice of hearing was filed showing hearings on the second supplemental petition set for March 7 and April 8. The juvenile court also issued a summons for Travis at the Saunders County jail which ordered Travis to be personally served with the second supplemental petition, motion for temporary custody, and order for immediate custody and to appear in court on April 8.

On March 2, 2011, the juvenile court issued a transport order directing the sheriff of Douglas County to escort Travis from the Saunders County jail to the Douglas County Separate Juvenile Court for the hearing to be had on March 7. A notice

from the sheriff's office indicated that it received the March 2 transport order; that it was executed on March 4 by taking Travis into custody and delivering him to the Douglas County Department of Corrections; and that thereafter, Travis was returned to the Saunders County jail on March 7. This notice was not received by the juvenile court until March 10.

The juvenile court appointed an attorney to represent Travis on March 2, 2011. This order also listed the date of the protective custody hearing as March 7.

On March 4, 2011, not March 7 as stated in the transport order, a protective custody hearing regarding the second supplemental petition was held with the following people present: the mother's attorney, the guardian ad litem, the deputy county attorney, and Travis' attorney. The juvenile court found that Travis had not been served with the second supplemental petition and that there were no objections to continuing the protective custody hearing. The juvenile court set the hearing on protective custody and adjudication on the second supplemental petition for April 8 and directed Travis' attorney to notify Travis of the scheduled hearing date and time. The record contains a "Service Return" dated March 4, 2011, which indicates that Travis was personally served at "Saunders County Corrections" on March 3.

On March 9, 2011, the juvenile court issued another transport order, directing the sheriff of Douglas County to escort Travis from the Saunders County jail to the Douglas County Separate Juvenile Court to appear at a hearing on April 8. A summons was also filed on March 9, directing Travis to appear for the hearing on April 8. On March 10, the juvenile court received a notice from the sheriff's office indicating that it received the transport order dated March 9, 2011, but that because Travis was a federal inmate being housed at the Saunders County jail, a writ of habeas corpus was required in order to transport him. The record does not contain any evidence that a writ was executed.

On April 8, 2011, a hearing was held on the second supplemental petition. Neither Travis nor his attorney was present. Despite their absence, the juvenile court proceeded to hear testimony and receive evidence regarding the adjudication of

Da Shawn and the motion for termination of Travis' parental rights. Testimony was presented by a foster care specialist that she was not aware of any contact between Travis and Da Shawn since she had been involved in the case, that Da Shawn did not have a relationship with Travis, that Travis had not performed any parental action or indicated any interest in parenting Da Shawn, and that in the specialist's opinion, Travis' parental rights should be terminated. The guardian ad litem for Da Shawn cross-examined the specialist very briefly, through which it was established that Travis had some contact with Da Shawn prior to Da Shawn's removal from his mother's custody, that Travis was notified of the removal, and that Travis had not been involved in the proceedings since the notification.

On April 8, 2011, the juvenile court entered an order finding the State's evidence to be "credible, reliable and probative" and that all counts in the second supplemental petition were true by clear and convincing evidence. The juvenile court further found that Da Shawn was a child within the meaning of § 43-247(3)(a) insofar as Travis was concerned; that Da Shawn was within the meaning of § 43-292(1), (2), (7), and (9); and that it was in Da Shawn's best interests that the parental rights of Travis be terminated. The juvenile court filed an amended order on April 18 correcting some clerical errors in its previous order. Travis filed this timely appeal.

ASSIGNMENTS OF ERROR

Travis assigns, consolidated and restated, (1) that the juvenile court violated his constitutional right of due process by terminating his parental rights without his or his attorney's presence at the termination proceedings, (2) that the juvenile court erred in finding that his parental rights should be terminated under § 43-292, and (3) that the juvenile court erred in finding it was in the best interests of Da Shawn to have Travis' parental rights terminated.

STANDARD OF REVIEW

[1] 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 Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010). In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling. See *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

ANALYSIS

[4-6] This court recognizes that the parent-child relationship is afforded due process protection. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). "'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 413, 482 N.W.2d at 257. See, also, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

> When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by . . . the proceeding; . . . reasonable opportunity to refute or defend against a 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 constitution or statute; and a hearing before an impartial decisionmaker.

In re Interest of L.V., 240 Neb. at 413-14, 482 N.W.2d at 257. See, also, *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[7,8] Travis' appeal is primarily predicated upon the juvenile court's proceeding with the adjudication and termination hearing without either Travis or his attorney present. The Nebraska Supreme Court has held that parental physical presence is unnecessary for a hearing to terminate parental rights, provided that the parent has been afforded procedural due process for the hearing to terminate parental rights. *In re Interest of Mainor T.*

& Estela T., supra (extended to include parent who cannot appear at adjudication hearing because of incarceration or confinement). Accord *In re Interest of L.V., supra.* However,

> "[i]f a parent has been afforded procedural due process for a hearing to terminate parental rights, allowing a parent who is incarcerated or otherwise confined in custody of a government to attend the termination hearing is within the discretion of the trial court, whose decision on appeal will be upheld in the absence of an abuse of discretion. . . ."

In re Interest of Mainor T. & Estela T., 267 Neb. at 248, 674 N.W.2d at 458, quoting *In re Interest of L.V., supra.* Thus, the issue becomes whether Travis' due process rights were otherwise protected in his physical absence.

This case is not one where Travis was affirmatively disallowed from attending the hearing. In fact, it seems the juvenile court made specific and direct efforts to enable him to attend by issuing transport orders and summons. However, not only did the juvenile court take no further action upon receipt of the sheriff's request for a writ of habeas corpus rather than a transport order, but it also proceeded with the hearing without comment on the record as to either Travis' or his attorney's absence.

We determine from our de novo review of the record that despite Travis' statutory right to counsel, neither was he represented by counsel at the adjudication and termination hearing nor had he waived this right. See, Neb. Rev. Stat. § 43-279.01 (Reissue 2008); *In re Interest of Mainor T. & Estela T., supra*. We further determine that the juvenile court otherwise failed to afford Travis due process in that (1) no procedure was utilized by the court to provide Travis with any opportunity to refute or defend against the allegations of the petition and (2) no procedures were implemented to afford Travis an opportunity to participate in the hearing, to confront or cross-examine adverse witnesses, or to present evidence in his behalf. See, *In re Interest of Mainor T. & Estela T., supra*; *In re Interest of L.V., supra*.

We conclude that such lack of procedures denied Travis due process. Having so determined, we need not reach the issue of

whether the juvenile court erred in terminating Travis' parental rights or in finding that such termination was in Da Shawn's best interests.

CONCLUSION

Our de novo review of the record demonstrates that during these proceedings, Travis was denied due process. We therefore vacate the juvenile court's adjudication and termination orders and remand the matter to the juvenile court with directions to conduct a new adjudication hearing and to provide Travis due process in the proceedings consistent with this opinion.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

DOWD GRAIN CO., INC., ET AL., APPELLANTS, V. COUNTY OF SARPY, A CORPORATE BODY POLITIC, ET AL., APPELLEES.

810 N.W.2d 182

Filed February 28, 2012. No. A-10-1238.

1. **Appeal and Error.** In order to be considered by an appellate court, alleged errors must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
3. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
4. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
5. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
6. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.