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In re Interest of Taeven Z., a child under 18 years of age. State of Nebraska, appellee and cross-appellant, v. Alishia M.-Z., appellant and cross-appellee.

812 N.W.2d 313

Filed May 1, 2012. No. A-11-649.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Criminal Law: Indictments and Informations.** Nebraska criminal procedure does not require a comprehensive and particularized factual description of elements for the offense charged in the information or complaint against a defendant.
3. **Juvenile Courts: Pleadings: Affidavits.** Neb. Rev. Stat. § 43-274(1) (Reissue 2008) requires a Neb. Rev. Stat. § 43-247(3) (Reissue 2008) petition to set forth the facts verified by affidavit.
4. **Juvenile Courts: Parental Rights: Notice.** The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).
5. **Juvenile Courts: Jurisdiction.** It is the adjudication that a child is a juvenile, as characterized in Neb. Rev. Stat. § 43-247 (Reissue 2008), which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested.
6. **Trial: Witnesses.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
7. **Juvenile Courts.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety.
8. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** When establishing that a child comes within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm.
9. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.
10. ____: ____: ____. While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed in part, and in part reversed and remanded with direction.

Bruce E. Stephens, of Stephens Law Offices, P.C., L.L.O., for appellant.

Candace L. Dick, York County Attorney, and Benjamin B. Dennis for appellee.

Steven B. Fillman, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The county court, sitting as a juvenile court, adjudicated Taeven Z. based upon his mother's ingestion of a morphine pill that was not prescribed to her. The mother, Alishia M.-Z., appeals, challenging the court's jurisdiction of her child and the overruling, in part, of her motion to dismiss. The State cross-appeals, arguing that the court erred in sustaining the motion to dismiss in part and in limiting the introducible evidence only to that directly relating to the facts pled in the petition. We affirm in part, and in part reverse and remand with direction to dismiss.

BACKGROUND

Alishia is the biological mother of Taeven, born in May 2009. On May 3, 2011, the State filed a petition to adjudicate Taeven. The pertinent paragraphs of the petition are as follows:

> 4. That the juvenile is within Neb. Rev. Stat. [§] 43-247(3)(a) [(Reissue 2008)] for the reason that:
>
> he is abandoned by his . . . parent . . . ;
>
> he lacks proper parental care by reason of the fault or habits of his . . . parent . . . ;
>
> his parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; and/or

> his parent is in a situation or engages in occupation dangerous to life or limb or injurious to the health or morals of such juvenile.
>
> 5. That on April 11, 2011, . . . Alishia . . . left Taeven . . . playing outside [an apartment complex] unsupervised. Taeven's maternal grandmother . . . stated that Alishia had left and didn't say where she was going or when she would come home. At that time, [the grandmother] took Taeven into her home.
>
> At 6:00 p[.]m[.] on April 11, . . . Sarah Nunnenkamp with Department of Health & Human Services gave Alishia a urinary analysis. Alishia tested positive for Opiates (morphine), Benzodiazepines (clonazepam, oxazepam, temazepam), and Amphetamines (methamphetamine).

We digress to note that despite the allegation indicating methamphetamine use by Alishia, the State did not adduce during trial any evidence concerning the positive test result or otherwise to demonstrate methamphetamine use by Alishia.

The juvenile court held a hearing, during which two witnesses testified. Sarah Nunnenkamp testified that she was formerly employed by the Department of Health and Human Services as a child and family services specialist, but that she has been employed as a family permanency specialist with a behavioral health care company for the past 6 months. In that capacity, she was assigned to Taeven's case on April 11, 2011. She became involved based upon a referral requesting services with regard to a different child of Alishia. Nunnenkamp went to Alishia's apartment that morning and obtained Alishia's consent to submit to a drug test, but Alishia was unable to produce a urine sample. Nunnenkamp told Alishia that she would return to Alishia's apartment at approximately 3 p.m. At 3 p.m., Nunnenkamp arrived at Alishia's apartment and observed Taeven in the middle of the courtyard area for a couple of minutes with no adults around. Nunnenkamp knocked on Alishia's door, but Alishia's mother, who was in a different apartment, told Nunnenkamp that Alishia was not there and that she was supposed to be watching Taeven. Nunnenkamp testified that at a later date, Alishia's mother said that Taeven was outside by himself because she had gone to the restroom

and asked a neighbor to watch Taeven. There was no fence or barrier to prevent Taeven from going into the street—which Nunnenkamp estimated was 50 to 75 yards away—and he was about 30 feet away from a parking lot where cars would be driving. Although Nunnenkamp testified that Taeven was not in any imminent danger, the circumstances concerning the removal of Taeven's half brother caused her concern because Nunnenkamp learned that the half brother was unsupervised and that Alishia had left that child in the home of his father, who was believed to be under the influence. Nunnenkamp obtained a urine sample from Alishia, who reported being prescribed hydrocodone, Xanax, and clonazepam and taking a morphine pill from a friend the previous day to alleviate back pain.

Taeven's biological grandfather testified that on one occasion, Alishia had taken painkillers and become incapacitated. Alishia's counsel objected, stating that "[t]here's nothing in the petition that gives me any notice that that is something that's being alleged to show that my client is unfit." The State directed the court's attention to the second subparagraph of paragraph 5. The court sustained the objection, stating that "the State has held out that paragraph five was the factual basis and there's nothing in here to give them notice of that." The State then rested.

Alishia's counsel moved to dismiss, arguing that there was no showing that Taeven was in any danger or that Alishia was neglectful by leaving Taeven in his grandmother's care. The court overruled the motion as to the subparagraph of paragraph 4 which alleged that the parent was in a situation dangerous to life or limb or injurious to the health or morals of the child, stating that it "directly related to the morphine pill" and that "the taking of an illegal drug under an illegal circumstances [sic] would be sufficient for that." The court sustained the motion to dismiss as to the other subparagraphs of paragraph 4, including the allegation that the child lacked proper parental care by reason of the fault or habits of his parent. Alishia rested without adducing evidence.

In ruling, the court orally stated that it was a crime to take a morphine pill without having a prescription for it. It noted

that Alishia was taking other "rather serious medications," that she was self-medicating, and that she was doing so illegally. The court concluded that doing so was "dangerous or injurious to the health and morals of the juvenile if the parent is of a mind to do that because the parent should not be doing that." The court entered a written order finding that jurisdiction was proper, sustaining the allegations of the "amended" petition, and finding that Alishia took a morphine pill that was not prescribed to her.

Alishia timely appeals, and the State cross-appeals.

ASSIGNMENTS OF ERROR

Alishia assigns that the juvenile court (1) lacked jurisdiction because the pleading and evidence at the adjudication hearing did not justify the juvenile court's accepting jurisdiction and (2) erred in overruling her motion to dismiss at the close of the State's case.

On cross-appeal, the State assigns that the court erred by (1) granting Alishia's motion to dismiss three of the grounds set forth in paragraph 4 of the petition and (2) limiting the introducible evidence to only evidence which directly related to the facts pled in paragraph 5 of the petition.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

ANALYSIS

Cross-Appeal.

We deem it more efficient to address the State's cross-appeal before considering Alishia's assigned errors and to consider the State's claim of evidentiary error before reaching its substantive argument. But the State's assignment of evidentiary error requires that we first discuss the pleading requirements of a juvenile petition.

The governing statute prescribes a specific pleading standard for other types of juvenile cases but omits cases under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) without specifying an alternative standard. Neb. Rev. Stat. § 43-274(1) (Reissue 2008) provides:

> The county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247, may file . . . a petition in writing specifying which subdivision of section 43-247 is alleged, setting forth the facts verified by affidavit . . . . *Allegations under subdivisions (1), (2), and (4) of section 43-247 shall be made with the same specificity as a criminal complaint.* It shall be sufficient if the affidavit is based upon information and belief.

(Emphasis supplied.)

Although the State contends that the absence of subsection (3) in the italicized language "indicates the legislature did not intend petitions brought under this subdivision to be plead [sic] with higher specificity," brief for cross-appellant at 23, we come to the opposite conclusion. Subsections (1), (2), and (4) of § 43-247 relate to varying levels of criminal offenses allegedly committed by a juvenile. On the other hand, § 43-247(3) relates, respectively, in subsection (a) to juvenile nonoffenders and in subsection (b) to status offenders. See Neb. Rev. Stat. § 43-245(12) and (19) (Cum. Supp. 2010) (definitions of nonoffender and status offender).

[2] The mandate that allegations under § 43-247(1), (2), and (4) be made with the same specificity as a criminal complaint merely reconciles the pleading practice regarding juvenile offenders with that of adult criminals. And with respect to adults, it has long been held that it is generally sufficient if the information describes the crime in the language of the statute. See *Leisenberg v. State*, 60 Neb. 628, 84 N.W. 6 (1900). "Nebraska criminal procedure does not require a comprehensive and particularized factual description of elements for the offense charged in the information or complaint against a defendant." *State v. Schaaf*, 234 Neb. 144, 149, 449 N.W.2d 762, 766 (1989). We do not view the criminal pleading

requirement as calling for "higher specificity." To the contrary, pleading in the language of the statute represents a conclusory rather than a strictly fact-based form of pleading.

[3,4] Section 43-247(3) cases, on the other hand, are not comparable to adult criminal cases, and the pleading standard for such cases stems from the requirements of due process in this context. As we quoted above, § 43-274(1) requires a § 43-247(3) petition to "set[] forth the facts verified by affidavit." The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a). See *In re Interest of Christian L.*, 18 Neb. App. 276, 780 N.W.2d 39 (2010).

Our decision in *In re Interest of Christian L., supra*, shows how the failure to adequately allege facts would deprive a parent of the notice that is constitutionally required. In that case, the State's petition alleged that a child lacked proper parental care through the fault or habits of his mother and that he was at risk of harm. The only factual grounds stated in the petition were that the home was filthy and that it did not contain enough food. The court adjudicated the child upon evidence and testimony concerning the mother's mental health, an issue not raised by the petition. On appeal, this court concluded that the allegation that the child was at risk because of his mother's fault did not sufficiently encompass an assertion that a mental health condition from which she may have suffered constituted fault-based conduct on her part.

[5] This pleading requirement is not, however, a matter of the juvenile court's subject matter jurisdiction. In *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994), *disapproved, In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005), we found a lack of jurisdiction because the petition did not have any allegations claiming that the child lacked proper parental care by reason of the custodial parent's conduct and, therefore, the pleadings did not give that parent notice of any claim against him. But in *In re Interest of Devin W. et al.*, upon a petition for further review, the Nebraska Supreme Court reversed our decision where we concluded, in reliance upon *In re Interest of Kelly D.*, that the

juvenile court did not acquire jurisdiction due to the omission of allegations showing that the child lacked proper parental care by reason of the inadequacy of the father, a parent whose custody of the child might be affected. The Supreme Court stated that we "misapprehend[ed] the juvenile court's jurisdiction and the purpose of the adjudication procedure," *In re Interest of Devin W. et al.*, 270 Neb. at 653, 707 N.W.2d at 767, and reiterated that "'it is the adjudication that a child is a juvenile, as characterized in § 43-247, which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested,'" 270 Neb. at 652, 707 N.W.2d at 766. Thus, the allegations of the petition serve not to grant the juvenile court with subject matter jurisdiction over a parent, but, rather, to afford the parent notice of the basis upon which the court is being asked to assume jurisdiction. This case teaches us that notice is a requirement of due process rather than a matter of jurisdiction.

[6] Although the petition in the instant case gave adequate notice of an issue relating to ingestion of drugs, the State failed to properly preserve its claim of evidentiary error. The factual grounds set forth in the juvenile court petition in this case gave notice of two issues: Taeven's being left outside unattended and Alishia's testing positive for various drugs. As the State attempted to elicit testimony from Taeven's grandfather about Alishia's taking pills and becoming incapacitated, Alishia's counsel objected on the basis of lack of notice. Even though the State directed the court to paragraph 5 of the petition, which listed drugs for which Alishia tested positive, the court sustained the objection. In our view, the factual allegation in paragraph 5 sufficiently put Alishia on notice that her ingestion of various drugs would be at issue. However, in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). Here, the State did not make an offer of proof. And from the question posed, we cannot tell whether the child was present at any time when Alishia may have

become incapacitated. Accordingly, this error has not been properly preserved for appellate review.

The State argues that the evidence of Taeven's being left unattended in the courtyard which was approximately 30 feet away from a parking lot and approximately 50 to 75 yards from the street was sufficient to support adjudication. We disagree. The critical factor missing from the State's evidence is the duration that this occurred.

[7,8] We observe that the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child and ensure the child's safety. See *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). When establishing that a child comes within the meaning of § 43-247(3)(a), it is not necessary for the State to prove that the child has actually suffered physical harm, only that there is a definite risk of future harm. *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000).

The petition alleged that Alishia left Taeven unsupervised outside at a time when the child was not quite 2 years old, but the evidence does not establish that the event lasted long enough to show a definite risk of future harm. Alishia had arranged for her mother to watch him, and Nunnenkamp believed that he was unattended for only a few minutes. But all that Nunnenkamp's testimony establishes with any significant weight is that Taeven was unattended at the time she arrived and remained so for "[a] couple of minutes. It wasn't very long." Nunnenkamp simply had no personal knowledge as to how long Taeven had been unsupervised before she arrived. And while there was a parking lot and a street nearby in the area, Taeven was not in either and thus, there can be no inference that he was in imminent danger. We cannot say that Taeven was at a definite risk of harm or that he lacked proper parental care due to Alishia's fault or habits. Accordingly, the court did not err in sustaining Alishia's motion to dismiss the ground in paragraph 4 alleging that Taeven "lacks proper parental care by reason of the fault or habits of his . . . parent." We affirm the juvenile court's order dismissing this ground of the petition.

Alishia's Appeal.

[9,10] Alishia's two assignments of error can be considered together. She essentially argues that the juvenile court lacked jurisdiction and erred in overruling part of her motion to dismiss because the evidence was not sufficient to prove by a preponderance of the evidence that Taeven was abused or neglected. At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). While the State need not prove that the juvenile has actually suffered physical harm, at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

In *In re Interest of Carrdale H.*, 18 Neb. App. 350, 781 N.W.2d 622 (2010), the juvenile court adjudicated a child based upon the father's possession of illegal drugs, and this court reversed the adjudication order. We observed that the State failed to adduce any evidence regarding whether the father was charged with a crime, whether the father had any history of drug use in or out of the child's presence, whether the child was present when the father possessed the drugs, or whether the child was affected in any way by the father's actions. Thus, we reasoned that the State failed to prove by a preponderance of the evidence the allegation of the petition that the father's "'use of alcohol and/or controlled substances places said child at risk for harm.'" *Id.* at 353, 781 N.W.2d at 625. In *In re Interest of Carrdale H.*, we noted that in *In re Interest of Anaya, supra*, the parents' failure to submit their infant to mandatory blood testing due to their religious beliefs was not enough, by itself, to establish neglect warranting adjudication even though the parents engaged in illegal activity by refusing to submit their child to the blood test.

This court also reversed an order of adjudication in *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614

N.W.2d 790 (2000). In that case, the adjudication was based on a pattern of alcohol use by the parents. We found that "[a]lthough the evidence presented shows that [the parents] had consumed alcohol on occasions when the children were in the house, there was no evidence presented to show any impact such drinking had on the children." *Id.* at 533, 614 N.W.2d at 794. We concluded that the State failed to adduce evidence to show that the children lacked proper parental care due to the parents' alcohol consumption.

Like in *In re Interest of Carrdale H.* and *In re Interest of Brianna B. & Shelby B.*, we conclude that the State did not adduce sufficient evidence to support the adjudication. There was no evidence that Taeven was affected by Alishia's taking the unprescribed morphine pill or any other evidence to suggest that Alishia's taking the pill placed Taeven at risk for harm. While taking an unprescribed medication may be illegal, a parent's illegal activity—without more—is not sufficient to adjudicate a child. Here, there is no evidentiary nexus between the consumption of drugs, mostly pursuant to prescription, and any definite risk of future harm to Taeven. Accordingly, we reverse the juvenile court's adjudication on this ground.

CONCLUSION

Upon our de novo review of the record, we affirm the order of the juvenile court dismissing the ground of the petition alleging that Taeven lacked proper parental care by reason of the fault or habits of his parent, but we reverse its adjudication upon the ground that Alishia ingested a morphine pill that was not prescribed for her. We therefore remand the matter with direction to dismiss the petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.