

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0897-ME

K.O.

APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE STEPHANIE J. PERLOW, JUDGE
ACTION NO. 22-J-00138-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; R.O., A MINOR
CHILD; AND S.O.

APPELLEES

OPINION
VACATING

** ** * * * * *

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

GOODWINE, JUDGE: K.O. (“Father”) appeals from the June 16, 2023 disposition order of the Calloway Circuit Court, Family Division. Father also appeals the July 18, 2023 order denying his motion to vacate the court’s finding of neglect against him. After careful review, we vacate.

BACKGROUND

Father and S.O. (“Mother”) are the biological parents of an eight-year-old child, R.O. (“Child”). This matter began when Tim Fortner (“Fortner”), a school resource officer (“SRO”) in Calloway County, Kentucky, filed a domestic abuse form, or JC-3, regarding Child. While assisting with the elementary school drop-off line, Fortner smelled marijuana when he approached Father’s vehicle. As he helped Child out of the vehicle, Fortner observed what he believed was Father attempting to hide something beside his seat. Fortner did not question Father to identify what, if anything, he was hiding. Fortner had smelled marijuana on Child on more than one occasion at school. He also described Child as having “behavior issues.”

Based on the JC-3, the Cabinet for Health and Family Services (“Cabinet”) initiated a dependency, neglect, and abuse (“DNA”) action against Father. The Cabinet social worker, Brittany Taylor (“Taylor”), did not speak to Child’s teachers or therapist about Fortner’s concerns. Based on the petition, the family court ordered Father, Mother, and Child to submit to drug screens.

A sample of Child’s hair was tested for environmental exposure to substances. His hair tested positive for native THC and its metabolite, carboxy-THC. Mother’s test was negative for all substances. Father’s fingernails tested positive for amphetamines, oxycodone, and cannabinoids. As to the

amphetamines, Father tested positive for D-methamphetamine but not for its metabolite, amphetamine. It is uncontested he has a prescription for oxycodone.

At adjudication, the family court heard testimony from Fortner; Rose Rios (“Rios”), a chemist with United States Drug Testing Laboratories, the lab which completed the drug tests; Taylor; Dr. Lewis Jackson (“Jackson”); Father; and Mother. The family court found, by a preponderance of evidence, Child was neglected under KRS¹ 600.020(1)(a)2., 3., and 4.² The court removed Child from Father’s custody and mandated any visitation by Father to be supervised by Mother. Thereafter, the court entered a dispositional order. Father moved to vacate the court’s finding of neglect. The court denied the motion.

This appeal followed. Additional facts will be developed as necessary in the analysis below.

STANDARD OF REVIEW

Courts must be mindful of a parent’s fundamental right to raise his or her children. *M.C. v. Cabinet for Health and Family Services*, 614 S.W.3d 915, 921 (Ky. 2021) (footnote omitted). Although the Commonwealth has a compelling interest in protecting its children, intervention must be done “with utmost caution.”

¹ Kentucky Revised Statutes.

² The family court checked only the boxes for KRS 600.020(1)(a)3. and 4. on form AOC-DNA-4, but also found KRS 600.020(1)(a)2. in its attached written findings.

Id. (footnote omitted). The best interests of the child are paramount in these decisions. *Id.* (footnote omitted). The best interests of the children of the Commonwealth are served by “maintaining the biological family unit” and removal of children from their biological parents should only occur “when absolutely necessary[.]” KRS 600.010(2)(a)-(c).

In DNA actions, the Cabinet has the burden to prove by a preponderance of the evidence that the child was neglected. *M.C.*, 614 S.W.3d at 921 (footnote omitted).

A family court’s findings of fact in a DNA action shall not be set aside unless clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. If the family court’s findings of fact were supported by substantial evidence, and it applied the correct law, its decision will not be disturbed absent an abuse of discretion. An abuse of discretion occurs when the family court’s decision is unreasonable or unfair.

Id. (internal quotation marks and footnotes omitted).

ANALYSIS

On appeal, Father argues the family court’s decision was impermissibly based on speculation and conjecture. Therein, he argues the family court erred by relying on the unreliable testimony of Fortner and Taylor.

Regarding the family court’s finding under KRS 600.020(1)(a)2., he claims (1) there was no evidence he used marijuana in Child’s presence; (2) the family court’s

finding that Child ingested marijuana was clearly erroneous; and (3) the Cabinet did not present evidence of Child's "behavioral issues" or prove a causal connection between those issues and marijuana exposure. As to the court's findings under KRS 600.020(1)(a)3. and 4., he argues (1) the court's findings that he used and was "high on" methamphetamine were clearly erroneous; and (2) there was insufficient evidence to support the court's finding that he had substance use disorder; and (3) he provided for the child's needs.

First, the family court did not err by relying on the testimony of Fortner and Taylor. We give due deference to the family court's opportunity to judge the credibility of witnesses. *See Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). Father argues both witnesses offered only speculative evidence. However, our review of the record shows both witnesses testified to their personal observations of Father and Child. The family court deemed both witnesses credible and relied on their testimony. This is not clearly erroneous.

In order to adjudicate a child abused or neglected, the family court must find at least one of the grounds listed in KRS 600.020(1). Herein, the court found the Cabinet had proven three grounds by a preponderance of evidence. Therefore, in order for Father to succeed on appeal, the family court's findings under KRS 600.020(1)(a)2., 3., and 4. must all be clearly erroneous.

First, the court found the Cabinet had proven Father had created a risk of physical injury for Child under KRS 600.020(1)(a)2. based on Child's positive drug screen. A child is "abused or neglected" when a parent "[c]reates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means[.]" KRS 600.020(1)(a)2. "Physical injury" is defined as "substantial physical pain or any impairment of physical condition[.]" KRS 600.020(49).

The family court found "[s]ince the metabolite is only present when the drug is ingested, this result shows that [Child] has been around someone smoking marijuana to the extent that [Child] inhaled marijuana into his system." Record ("R.") at 101. The court found Child had "behavioral problems at school" and that "[t]here was no evidence introduced to refute that the behavioral problems are from anything other than the child's exposure to and ingestion of drugs." *Id.* at 103. The court then found

[t]he evidence in this case does show the child has behavioral issues at school and that the child has ingested marijuana into his system. Therefore, the evidence establishes that the father has created a risk of physical injury as the child has had marijuana in his system while in father's care and control. Certainly marijuana impairs a person's physical condition, otherwise, driving while intoxicated by marijuana would not be illegal.

Id. at 104.

First, Father argues there was no evidence he used marijuana in Child's presence. The family court, as factfinder, is entitled to "draw reasonable inferences from the evidence[.]" *K.H. v. Cabinet for Health and Family Services*, 358 S.W.3d 29, 32 (Ky. App. 2011) (citation omitted). Evidence in the record shows the child smelled of marijuana at school, Fortner smelled marijuana when he approached Father's vehicle, and Father tested positive for marijuana. Mother tested negative for all substances. The parents did not identify any other caregiver for Child. Therefore, it was reasonable for the court to infer Father used marijuana in Child's presence.

Father further argues the family court's findings that child ingested marijuana and inhaled marijuana smoke are not supported by the evidence. Rios, the Cabinet's witness, testified that if an individual ingests the substance, he or she will test positive for the metabolite. However, she identified circumstances in which a child may test positive for the metabolite without ingesting the substance. When questioned about Child's screen, she testified his positive result indicates he was exposed to marijuana in his environment, but she could not identify the manner of exposure. Specifically, with regard to the presence of the metabolite on Child's screen, she stated

[E]specially when it comes to children, let's say the caregiver is taking these drugs . . . it can come [from the caregiver's] sweat and [their] oils if [it's] on [their] arms, if [it's] on [their] legs, whatever the case may be. . . .

That's going to have not only the metabolite but also the parent drug. So let's say a child is being handled by [the caregiver], it could transfer from their body onto [the child's] hair.

V.R. 3/29/2023 at 10:07:44-08:16. This is further confirmed by the testing lab's report regarding Child's results which Rios adopted as her own and the Cabinet entered into evidence. It states

- The presence of native THC and Carboxy-THC in hair is evidence of ingestion but with small children it can be difficult to determine if the user was the child or a drug using caregiver.
- It is my opinion that the result of this hair test is consistent with a donor³ who has been exposed to marijuana or marijuana products (delta-9-THC) in their environment during the approximately 3 months prior to the collection of the specimen.

R. at 76. Based upon the record, the family court abused its discretion in concluding Child ingested and/or inhaled marijuana smoke. The record supports only a finding that Child was exposed to marijuana in his environment.

Assuming, *arguendo*, the family court's finding that Child had ingested marijuana was supported by substantial evidence, Father also argues the Cabinet did not present evidence of Child's "behavioral issues" or prove they were caused by marijuana exposure. "[T]he Cabinet cannot sustain its burden of proof by the compounding of inferences upon inferences. A conclusion based on

³ The "donor" referenced in this report is Child.

multiple levels of inference does not rise above the level of mere speculation.”

K.H., 358 S.W.3d at 32 (citations omitted).

Here, Taylor admitted she did not discuss Child with his teachers or therapist. Both Taylor and Fortner testified vaguely to child having behavioral issues. The Cabinet did not present testimony or other evidence from a teacher, therapist, doctor, or any other witness who may have been qualified to testify regarding Child’s alleged issues. Furthermore, the Cabinet presented no evidence whatsoever regarding the possible cause of those issues. The court seems to have based its finding on the fact that Father did not prove marijuana did not cause Child’s issues. However, the Cabinet bears the burden of proof, not the parent. *C.L. v. Cabinet for Health and Family Services*, 653 S.W.3d 599, 607 (Ky. App. 2022) (citing KRS 620.100(3)). The court abused its discretion by basing its findings regarding Child’s behavioral issues and their cause on speculation without any supportive evidence in the record.

Although it is certainly concerning that Child has been exposed to marijuana, the Cabinet did not prove by a preponderance of evidence that Father created a risk of physical injury to Child. Therefore, the family court’s finding under KRS 600.020(1)(a)2. is clearly erroneous.

The court also found Child was neglected under KRS 600.020(1)(a)3. and 4. A child is abused and neglected if a parent

3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including but not limited to parental incapacity due to a substance use disorder as defined in KRS 222.005; [or]
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child[.]

KRS 600.020(1)(a). “Needs of the child” are defined to include “necessary food, clothing, health, shelter, and education[.]” KRS 600.020(41).

The family court found Father uses methamphetamine and that “[a] person who is high from methamphetamine or marijuana is incapable of meeting the immediate needs of a 6-year-old child.” R. at 104. The court acknowledged Child was “appropriately fed, clothed, and attends school,” but also found that because he has behavioral problems,

[h]e clearly is at risk of having his academics and mental health effected [sic] by his father’s substance use problem. If the father did not have a substance problem, his marijuana test results would not have been off the charts and his son’s drug test results would not have been mid to high range.

Id. at 103-04.

Father argues that the family court’s findings that he used and was high on methamphetamine are clearly erroneous. Father tested positive for methamphetamine but not its metabolite, amphetamine. Rios testified this indicated Father was exposed to the substance in his environment but that “[w]e

can rule out ingestion.” V.R. 3/29/23 at 9:31:00. She explained that this meant Father’s fingernail sample came into contact with methamphetamine, but she could not identify the manner of exposure, length of exposure, or the amount of the substance to which he was exposed. The court asked Rios if it was possible for someone to test negative for a metabolite but to actually have had some amount of it, below the confirmation cutoff, in his sample. Rios testified that while this was hypothetically possible, she did not have any data indicating Father had any amount of the metabolite in his system, and she could only testify to Father’s test results. Despite the family court’s speculative questioning, there is no evidence in the record that Father ingested or was “high on” methamphetamine. Therefore, the court’s findings are clearly erroneous.

Father further argues the family court erred in finding he has substance use disorder. As referred to in KRS 600.020(1)(a)3., KRS 222.005 defines substance use disorder as

[A] cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems. Criteria for substance use disorder are in the most current edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders[.]^[4]

⁴ DSM-5.

KRS 222.005(12). The DSM-5 identifies the following as symptoms of substance use disorder:

1. Consuming the substance in larger amounts or over longer periods than was intended.
2. Persistent desire to cut down or regulate use. The individual may have unsuccessfully attempted to stop in the past.
3. Spending a great deal of time obtaining, using, or recovering from the effects of substance use.
4. Experiencing craving, a pressing desire to use the substance.
5. Substance use impairs ability to fulfill major obligations at work, school, or home.
6. Continued use of the substance despite it causing significant social or interpersonal problems.
7. Reduction or discontinuation of recreational, social, or occupational activities because of substance use.
8. Recurrent substance use in physically unsafe environments.
9. Persistent substance use despite knowledge that it may cause or exacerbate physical or psychological problems.
10. Tolerance: individual requires increasingly higher doses of the substance to achieve the desired effect, or the usual dose has reduced effect; individuals may build tolerance to specific symptoms at different rates.
11. Withdrawal: A collection of signs and symptoms that occurs when blood and tissue levels of the substance

decrease. Individuals are likely to seek the substance to relieve symptoms.

DSM-5 Diagnostic Criteria for Diagnosing and Classifying Substance Use

Disorders, [https://www.ncbi.nlm.nih.gov/books/NBK565474/table](https://www.ncbi.nlm.nih.gov/books/NBK565474/table/nycgsubuse.tab9/)

[/nycgsubuse.tab9/](https://www.ncbi.nlm.nih.gov/books/NBK565474/table/nycgsubuse.tab9/) (last accessed Jan. 26, 2024). If two or three symptoms are present, the disorder is classified as mild; if four or five symptoms are present, the disorder is moderate; and if six or more symptoms are present, the disorder is severe. *Id.*

Here, the family court made no findings of fact regarding the DSM-5 criteria for substance use disorder but based its finding on Father's singular positive drug screen. However, a single positive drug screen does not prove any of the DSM-5 criteria for substance use disorder. Furthermore, the Cabinet presented no additional evidence to support a finding under KRS 222.005(12).⁵ Therefore, the family court's finding is clearly erroneous.

Relatedly, Father argues he provided for Child's needs. Even when a parent is found to have a substance use disorder, KRS 600.020(1)(a)3. requires the disorder to render the parent incapable of providing for the needs of the child in order for the family court to find the child neglected. *M.C.*, 614 S.W.3d at 928. Here, the record clearly shows Father provided for the needs of the child. Taylor

⁵ Such evidence may have included additional drug screens, counseling records, testimony from a counselor, and/or a substance use or psychological evaluation. *See M.C.*, 614 S.W.3d at 928.

testified she was not concerned that Father was incapable of caring for Child. She testified that he had not been incapacitated in a caregiving role. She admitted Child was properly fed, bathed, clothed, educated, supervised, sheltered, and received proper medical care. The family court also acknowledged that Father provided for Child's needs.

Because the Cabinet did not meet its burden of proving Father had substance use disorder which rendered him incapable of caring for Child, the family court abused its discretion in finding Father neglected Child under KRS 600.020(1)(a)3.

Furthermore, there is no evidence in the record to support the family court's finding under KRS 600.020(1)(a)4. that Father's substance use made him "incapable of meeting the immediate needs of a 6-year-old child." R. at 104. This Court has previously affirmed family court findings under this subsection where the record contained substantial evidence of a parent's failure or refusal to provide or care for their children. *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 211 (Ky. 2014) (parent had no contact with his child, other than phone calls, for more than two years); *see also Cabinet for Health and Family Services v. P.W.*, 582 S.W.3d 887, 896-97 (Ky. 2019) (parent failed to protect her child from domestic violence); *see also J.W. v. Cabinet for Health and Family Services*, No. 2014-CA-001913-ME, 2016 WL 675921, *2 (Ky. App. Feb. 19,

2016) (parent had been incarcerated for the entirety of the child’s life and had never seen the child or provided material support); *see also J.H. v. Cabinet for Health and Family Services*, No. 2019-CA-000789-ME, 2020 WL 504989, *4 (Ky. App. Jan. 31, 2020) (parent left his children shortly after their birth and provided only a few items of clothing and supplies during visits); *see also T.N. v. Cabinet for Health and Family Services*, No. 2017-CA-000424-ME, 2018 WL 794728, *5 (Ky. App. Feb. 9, 2018) (parent refused to pay child support despite being employed).⁶ The facts in this case are easily distinguishable. Father was an active caregiver for Child. He fed, clothed, and supervised Child. He ensured Child received an education and necessary medical care. The Cabinet expressed no concerns about his ability to meet Child’s needs. Without evidence of Father’s failure or refusal to care for Child, the family court’s finding under KRS 600.020(1)(a)4. is clearly erroneous.

CONCLUSION

Based on the foregoing, orders of the Calloway Circuit Court, Family Division are vacated, and the petition is dismissed.

ACREE, JUDGE, CONCURS.

⁶ These termination of parental rights cases are relevant to this matter insofar as they address family courts’ findings under KRS 600.020(1)(a)4. Additionally, we cite to unpublished opinions of this Court as persuasive, non-binding authority. Kentucky Rules of Appellate Procedure (“RAP”) 41(A).

JONES, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE
OPINION.

BRIEFS FOR APPELLANT:

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