

FIRST DIVISION

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF R.D., A.D., and D.D.,)	Appeal from the
)	Court Circuit of
Minors-Respondents-Appellees,)	Cook County.
)	
(THE PEOPLE OF THE STATE OF ILLINOIS,)	15 JA 1302
)	15 JA 1303
Petitioner-Appellee,)	15 JA 1304
)	
v.)	The Honorable
)	Peter Vilkelis,
MARIA D. and LUIS D.,)	Judge Presiding.
)	
Parents-Respondents-Appellants).)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred when it based a finding of neglect on facts not alleged in the petition for adjudication of wardship.
- ¶ 2 In proceedings for adjudications of wardship, the trial court found that the State did not prove the specific factual allegations of the petitions. However, the court found that evidence of acts not alleged in the petition supported a finding that the minors suffered from neglect. We hold that when the State fails to prove the specific factual allegations of a petition for adjudication of wardship, the court shall not enter an adjudication of neglect unless the State

files a motion to amend its petition. We reverse the adjudication of neglect entered in this case, where the State never sought leave to amend its petition to allege the facts that supported the court's finding of neglect.

¶ 3

BACKGROUND

¶ 4

Maria D. and Luis D. had three children: daughters, R.D., born January 13, 2001, and A.D., born June 29, 2007, and a son, D.D., born May 2, 2002. R.D. attended the Illinois School for the Deaf, starting in August 2015. In September 2015, people at the school noticed cut marks on R.D.'s arms. Doctors at Hartgrove Hospital found multiple scars from cutting on R.D.'s arms, chest, and thighs. In a counseling session at the hospital, R.D. said that she started cutting herself after Luis and a friend of Luis sexually abused her. Hospital records showed that R.D. also accused her uncle, a boyfriend, a female acquaintance, and a foster parent of sexually abusing her. A doctor at Hartgrove Hospital wrote, "the patient at this time does not seem to be reliable." Mandated reporters notified the Department of Children and Family Services (DCFS). DCFS told Maria she must not permit Luis to return home until DCFS completed its investigation into the allegations.

¶ 5

In December 2015, before DCFS completed its investigation into the allegations of abuse, a police officer found Luis in Maria's home. DCFS took R.D., D.D., and A.D. into temporary custody on December 22, 2015. The State filed petitions for adjudications of wardship for all three minors. In the petition concerning R.D., the State alleged:

"The minor was neglected pursuant to Juvenile Court Act, section 0702 405/2-3(1) (b); she is a minor under 18 years of age whose environment is injurious to her welfare.

The facts supporting this are:

On September 16, 2015 minor made an outcry that putative father had sexually abused her and touched her inappropriately. Mother was informed of this minor's outcry and continued to allow putative father to reside in the home."

¶ 6 In the petitions for D.D. and A.D. the State alleged "the minor's sibling" made an outcry. The court granted temporary custody of the three minors to DCFS, who tried to find suitable foster homes for all three. All discovery and procedural matters took place in 2016. Hearings on the wardship petitions began on January 30, 2017, and ended, after 13 hearing dates, with closing arguments on November 16, 2017.

¶ 7 Most of the testimony at the hearings centered on R.D.'s allegations and her credibility. R.D. testified *in camera* that Luis had abused her. A few minutes later, during the same hearing, she retracted the testimony, asserting that she made it up because she was mad at Luis. Several other witnesses and records showed that R.D. made a series of conflicting accusations directed at Luis, with substantially differing facts, and R.D. also repeatedly asserted that she lied, and Luis had never abused her.

¶ 8 In February 2017, M.Z., a cousin of R.D. whose family lived in the same house with R.D.'s family for some years, alleged that Luis sexually abused M.Z. The trial court accepted into evidence a video recording of the victim sensitive interviews of M.Z. and her sister, X.Z., along with an interview of S.D., another cousin who lived with R.D.'s family at the time Luis allegedly abused M.Z. The trial court clarified that it admitted the victim sensitive interviews into evidence because they might corroborate the allegations of the State's petition.

¶ 9 Although M.Z. spoke very indistinctly through the interview, the parties agree on the substance of what she said. When she was eight or nine, she and her cousin, S.D., needed help with their homework. Their grandfather told them to ask Luis for help. M.Z. and S.D. went to

Luis's room. When S.D. left to sharpen his pencils, Luis grabbed M.Z., locked the door, and put his hand inside her clothes. The interviewer showed M.Z. a picture of a girl and asked where Luis touched her. M.Z. circled the genital area. The touching stopped when S.D. knocked on the door. M.Z. said S.D. and their grandmother both saw M.Z. crying after the encounter. M.Z. did not tell anyone about the abuse because she thought no one would believe her.

¶ 10 S.D. had no memory of any such incident. He did not recall ever seeing M.Z. crying as she left Luis's room.

¶ 11 X.Z. said that in 2016, M.Z. had nightmares, and X.Z. asked her about them. M.Z. told X.Z. she had the nightmares because Luis touched her private parts when she was three or four. M.Z. told X.Z. not to tell anyone else about it, and M.Z. did not want to discuss it further. M.Z. came back to the subject in February 2017, and said she was eight or nine when Luis abused her. X.Z. asked if she had said before that it happened when she was three or four. M.Z. got angry and answered, "No, I didn't." M.Z. said she would kill herself if X.Z. told anyone.

¶ 12 Mary Marban, an investigator for DCFS, testified that some days after she told Maria to keep Luis out of the house, she went back to check on the children. On November 2, 2015, D.D. told Marban that Luis no longer came to the house, and D.D. saw Luis only when Maria took D.D. out to eat with Luis. However, on December 8, 2015, when police found Luis in Maria's home, D.D. told Marban that Luis had moved back in to the home two months earlier, in October. According to Marban, D.D. said he lied to Marban because "his mother told him not to tell" Marban about Luis.

¶ 13 Maria Wantuck, a social worker who helped D.D. at school, testified that in 2013, she had a conversation with D.D., and D.D. told her Maria and Luis had gotten into an argument and Luis

shot a BB gun at Maria. Wantuck discussed D.D.'s allegations with Maria, and Maria admitted that the incident occurred, but she said Luis shot her accidentally.

¶ 14 Wantuck further testified that in 2015, she taught D.D.'s class about drug awareness. Wantuck testified:

"During the lesson, very unprompted, [D.D.] starts to tell a story about how his dad and his uncle had put a white powder that looks like sugar on their pinky nail, and they put it up their nose, and I can't remember if it was the father or the uncle's nose started bleeding."

The court allowed the testimony over defense counsel's objection that Wantuck had not provided a sufficient foundation.

¶ 15 Defendants presented a report from a meeting Wantuck attended. The court read into the record a portion of the report, which said:

"Also last year, father accidentally shot mother with a bee-bee gun, and the small bullet is lodged in her heart. The incident was investigated by police and DCFS, charges were not pressed, and DCFS unfounded the incident."

¶ 16 The court also admitted into evidence, over defense counsel's objections, more than a thousand pages of the hospital records for R.D., D.D., and A.D.

¶ 17 Maria testified that she did not believe R.D.'s accusations of Luis. Maria knew R.D. lied frequently. Maria testified that both R.D. and D.D. remained in psychiatric hospitals as of October 2017. No one asked Maria any other questions related to the extensive medical records.

¶ 18 The assistant state's attorney, in closing argument, mostly tried to persuade the court to believe R.D.'s statements that Luis abused her, and not to believe R.D.'s retractions. The assistant state's attorney noted that Maria persuaded D.D. to lie about whether Luis lived with them after DCFS told Maria to keep Luis out of the home. The assistant state's attorney and the public guardian both argued that the incident with the BB gun and the evidence of cocaine use also gave the court grounds to grant the petition for wardship.

¶ 19 In regard to A.D., the assistant state's attorney said that the medical records "show this Court that that minor has asthma. The records also show this Court that the mom was neglectful to that minor because she doesn't bother to pick up the minor's asthma medication." The argument derived its support from two statements out of the thousand plus pages of medical records. In September 2013, a doctor wrote:

"Parent and I went over the asthma action plan

Mother forgets about the medications and their use, she has not picked up prescription refills at the pharmacy in the last 3 months."

¶ 20 In May 2014, the same doctor wrote, "Mother does not give [A.D.] her daily medications and likes the prednisolone solution for quick resolution of cough."

¶ 21 Maria's attorney argued that the medical records also showed that from 2011 through 2015, Maria took A.D. to the doctor's office more than 30 times. The doctor gave Maria two prescriptions for asthma, and despite Maria's failure to fill one prescription for some time, "[t]here's no allegations in those records that the doctor had any concerns of medical neglect for this minor." Maria's attorney mostly argued that the court should not find R.D.'s accusations of Luis credible.

¶ 22 Luis's attorney argued that the extreme inconsistencies in R.D.'s many accounts of Luis's alleged abuse made all of R.D.'s accounts not credible. Luis's attorney also argued that the court should not believe M.Z.'s accusations, especially because they arose only after M.Z. heard that R.D. accused Luis of sexual abuse.

¶ 23 The trial court delivered its ruling on December 1, 2017. After extensively recounting the evidence, the court said:

"The evidence is that [R.D.] is a troubled, disabled teenager, who engages in fantasies or will claim to have experienced events she has not but has learned of from others and then adopts those experiences as her own.

[R.D.] is a sympathetic figure, and my heart goes out to her. But she is an unreliable witness. ***

*** [R.D.] is the ideal victim.

Imagine being a deaf, delayed child in the throes of puberty with those raging hormones. It is so hard to communicate. How frustrating that must be. To expect a child like [R.D.] to provide clear, concise, precise dates, times, acts is unfair to [R.D.] and just not realistic. But our system of justice requires proof that can be relied upon. The Court finds that such proof exists here in the form of the statements of [M.Z.] and [X.Z.] *** During a time when [M.Z.]'s family lived in the same home as [Luis D. and Maria D.'s] family, [Luis] sexually molested her. Her account is credible in this Court's view, corroborated by her sister ***.

*** The Court finds that it is more likely than not that [Luis] molested [M.Z.], and that consequently, [R.D.]'s environment, as well as that of [A.D.] and young

[D.D.] was injurious to their welfare. The Court notes that two young girls who were allegedly abused by [Luis] are engaging in self-harming behavior and have threatened suicide. But there's more evidence to be considered.

The minor, [D.D.], saw his father shoot his mother with a BB gun. This resulted in her hospitalization and much distress for the minors. Records reflect the BB is lodged near her heart and cannot be removed. The parents characterized the shooting as accidentally occurring while father was cleaning the BB gun, but [D.D.] says his father came home late and an argument ensued with mother, and he then shot mother, suggesting the presence of domestic violence in the home. [D.D.] also told of seeing his father and uncle shove white powder up their noses, and one of them bleeding from his nose. *** [M]edical records[] reflect that [A.D.] suffers from asthma, and that for a period of three months, her mother had not picked up the prescriptions for her. Mother herself admitted not giving the medicine to the child, relying instead on Prednisone to resolve the symptoms instead of administering the daily medication to avoid the symptoms of asthma altogether.

* * *

This Court, therefore, finds as follows: As to [R.D.], the Court finds she is neglected based upon an injurious environment and abused based upon substantial risk of injury. The Court declines to make a finding of sexual abuse of [R.D.].

As to [A.D.], the Court finds she is neglected based upon an injurious environment, and based upon a lack of necessary care, and abused based upon a substantial probability of injury.

As to [D.D.], the Court finds he is neglected based upon an injurious environment and abused based upon a substantial risk of injury."

¶ 24 The trial court held the dispositional hearing on February 1, 2018. The State presented evidence that in October 2017, Luis tested positive for cocaine, and a subsequent test confirmed the finding. Luis tested negative on several other occasions. On the advice of counsel, Luis refused to undergo the sex offender evaluation DCFS recommended.

¶ 25 On February 1, 2018, the court found Luis and Maria unable and unfit to parent the children, and awarded custody of all three children to the DCFS guardianship administrator. Luis and Maria filed timely notices of appeal from the adjudication and dispositional orders.

¶ 26 ANALYSIS

¶ 27 Maria and Luis both argue that the trial court erred by finding the minors neglected based on facts not alleged in the petitions for adjudication of wardship. The State responds that Maria and Luis waived the issue by failing to object to the pleadings. The State alleged that Luis sexually abused R.D., and that the abuse provided grounds for finding the three minors neglected. The State did not prove the allegations of the petition. The trial court specifically "decline[d] to make a finding of sexual abuse of [R.D.]." Maria and Luis object not to the pleadings, but to the trial court's refusal to enter the only judgment supported by an assessment of whether the State proved its allegations of neglect. The trial court's own

findings show that, on the question of whether the State proved its allegations, the court should have entered a finding of no neglect.

¶ 28 The State contends that Maria and Luis waived the issue by failing to file a posttrial motion. "Although termination of parental rights proceedings involve fundamental liberty interests, they are civil in nature." *In re S.L.*, 2014 IL 115424, ¶ 17. Supreme Court Rule 366(b)(3), applicable to civil appeals, provides:

"In non-jury cases *** [n]either the filing of nor the failure to file a post-judgment motion limits the scope of review." Ill. S. Ct. R. 366(b)(3) (eff. Feb. 1, 1994).

¶ 29 Insofar as the court reached a different conclusion in *In re William H.*, 407 Ill. App. 3d 858 (2011), we must follow the Supreme Court rule and not the appellate court opinion. Thus, we find that Maria and Luis have sufficiently presented for review the issue of whether the trial court may enter a finding of neglect based entirely on facts not specifically alleged in the petition for adjudication of wardship, where the trial court expressly finds that the State failed to prove the specific factual allegations of the petition.

¶ 30 "A natural parent's right to raise his or her child is a basic fundamental liberty interest and, thus, a proceeding to involuntarily terminate a parent's rights is a drastic measure." *In re D.C.*, 209 Ill. 2d 287, 295 (2004). "In a proceeding to have a parent declared unfit, due process requires that the petition allege that the parent is unfit and set forth with particularity the specific grounds that serve as the basis for such assertion." *In re B.K.*, 121 Ill. App. 3d 662, 663 (1984). "A court may not terminate a parent's rights on grounds not charged in the petition." *In re Gwynne P.*, 215 Ill. 2d 340, 349 (2005). "Notice of the specific facts upon which removal of a child from parental custody is predicated is fundamental to due process.

[Citations.] Notice of the specific facts upon which the petition is based is necessary to enable the parties to properly meet the charges. The requirement of specific facts derives from the recognition that 'the statutory criterion of improper and ineffective parental care denotes a fairly extreme case. A dominant parental right to custody of the child pervades our law.' " *In re B.E.*, 875 N.W.2d 181, 189 (Iowa Ct. App. 2015), *quoting In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252, 255 (Cal. Ct. App. 1967). For a wardship petition to comply with due process, the petition's allegations "must put a party on notice as to what acts, omissions, or conditions are at issue." *In re Hardesty*, 563 S.E.2d 79, 82 (N.C. App. 2002).

¶ 31 The State claims that the petition permitted the court to find the minors were neglected based on the sexual abuse of M.Z., cocaine use, an incident of domestic violence, and failing to fill a prescription, because the State alleged in the petition that R.D. was "neglected pursuant to Juvenile Court Act, section 0702 405/2-3(1) (b); she is a minor under 18 years of age whose environment is injurious to her welfare." In support, the State cites *In re Sharena H.*, 366 Ill. App. 3d 405, 407 (2006).

¶ 32 In *Sharena H.*, "[t]he State's petition alleged that Sharena was neglected because she was born drug-exposed in October 2002 [and] Sharena's environment was injurious to her welfare." *Id.* at 407. The circuit court granted the State's petition, finding that Sharena began life exposed to drugs and that domestic violence also subjected her to an injurious environment. On appeal, the court affirmed the adjudication of Sharena as neglected based on drug exposure as alleged in the petition. In *dicta*, the court added that the trial court properly considered the evidence of domestic violence, without any specific factual allegations in the petition of domestic violence. The court said:

"The State's petition informed respondent that there was an allegation of neglect based on an injurious environment. The court merely considered the domestic violence as one of many factors that created an injurious environment for Sharena." *Sharena H.*, 366 Ill. App. 3d at 407.

¶ 33 We find the *dicta* in *Sharena H.* unpersuasive, at least when applied to a case in which the State failed to prove the specific factual allegations of the wardship petition. The finding of neglect based entirely on facts not pleaded violated Maria's and Luis's rights to due process. *In re B.K.*, 121 Ill. App. 3d at 663; *In re J.B.*, 312 Ill. App. 3d 1140 (2000).

¶ 34 The State points out that it could have filed a motion to amend the pleadings to conform to the evidence, and the trial court might have granted such a motion. See *In re Tyrese J.*, 376 Ill. App. 3d 689, 702-03 (2007). But the State filed no such petition. Had the State done so, Maria and Luis would have had the opportunity to argue that the proposed amendment prejudiced them, or that they needed further discovery to present fully the evidence related to the new issues. The allegations in the petition actually before the court gave Maria and Luis no notice that they might lose custody of their children on any of the bases the court relied on for its ruling.

¶ 35 The evidence related to abuse of M.Z. came to the court's attention in February 2017, more than a year after the filing of the petitions for adjudications of wardship. We apply the reasoning of *In re J.J.*, 201 Ill. 2d 236, 243–44 (2002), where the court said:

"Evidence of [misconduct] arising after the filing of the initial petition may be considered if the State files an amended or subsequent petition. An additional filing is necessary because the termination of parental rights affects a

fundamental liberty interest and, thus, must comport with the requirements of due process. [Citation.] The notice required in juvenile proceedings is the same as that constitutionally mandated in criminal or civil cases. [Citation.] 'Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." ' *In re Application of Gault*, 387 U.S. 1, 33 (1967). Due to the serious nature of termination proceedings, it would be improper to raise additional allegations against a parent for the first time at the hearing. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n. 7 (1972) ' "it is fundamental that except in emergency situations * * * due process requires that when a State seeks to terminate [a protected] interest ..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective" ' (emphasis in original)), quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Thus, another filing alleging the additional factual claims being made by the State would provide the parent with proper notice and allow the preparation of an appropriate defense." *In re J.J.*, 201 Ill. 2d 236, 243–44 (2002).

¶ 36 In *J.J.*, the State never sought leave to amend the petition for termination of parental rights. The State in *J.J.* alleged that the minor's mother drank alcohol habitually in a specified time period, and at trial the court found the mother unfit based on her habitual drunkenness in a different time period closer to the time of trial. Our supreme court reversed

the termination order without remanding the case for further proceedings because the State failed to prove the factual allegations of the petition. *J.J.*, 201 Ill. 2d at 242, 252. Similarly, the State in *J.B.*, 312 Ill. App. 3d 1140, never sought leave to amend the petition for adjudication of wardship, and the trial court found the minor neglected based on facts not alleged in the petition. The *J.B.* court, reversed the finding of neglect without remanding the case because the State failed to prove the petition's specific allegations of neglect. *J.B.*, 312 Ill. App. 3d at 1145.

¶ 37 In this case, the State sought a finding of neglect based on the alleged sexual abuse of R.D. We accept the trial court's finding that the evidence at trial did not prove the specific factual allegations of the petition. Because the evidence did not support the specific factual allegations of the petition for adjudication of wardship, and because the State never sought leave to amend the petition, following *J.J.* and *J.B.*, we reverse the judgment of the trial court.

¶ 38 CONCLUSION

¶ 39 The State's petitions for adjudications of wardship alleged specific facts, and the trial court found that the State's evidence in support of those specific factual allegations did not justify wardship. We hold that the trial court erred when it granted the petitions for wardship based on facts not specifically alleged in the petitions. Accordingly, we reverse the judgment of the trial court.

¶ 40 Reversed.