

IN THE COURT OF APPEALS OF IOWA

No. 3-813 / 13-1023
Filed September 5, 2013

**IN THE INTEREST OF T.C.,
Minor Child,**

**J.C., Father,
Appellant.**

Appeal from the Iowa District Court for Polk County, Rachael E. Seymour,
District Associate Judge.

A father appeals from the termination of his parental rights. **AFFIRMED.**

Jessica Maffitt of Benzoni Law Office, P.L.C., Des Moines, for appellant
Father.

Thomas J. Miller, Attorney General, Janet L. Hoffman, Assistant Attorney
General, John Sarcone, County Attorney, and Christina Gonzalez, Assistant
County Attorney, for appellee State.

Karl Wolle of the Polk County Juvenile Public Defender, Des Moines,
attorney and guardian ad litem for minor child.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

A father appeals from the termination of his parental rights. He argues the department of human services (DHS) did not make reasonable efforts to reunify him with his child, the court erred in denying his motion to continue the termination hearing, his counsel was ineffective, the evidence does not support termination of his parental rights, and the district court should have applied one of the grounds under Iowa Code 232.116(3) (2013) to deny termination. We affirm the termination of his parental rights.

I. Facts and Proceedings

Six-year-old T.C. was removed from his parents' care on September 30, 2011, and adjudicated a child in need of assistance (CINA) the following November, after DHS was notified of drug use and incidents of domestic violence in the family residence. The family also had no electricity at the time.

T.C.'s father has an extended history of drug abuse and domestic violence. During a substance abuse evaluation in October 2011, the father reported use of methamphetamine for a period of over twenty years, with his longest period of sobriety lasted six to seven months. He reported having attended substance abuse treatment eight times.

Both parents stipulated to the CINA adjudication and disposition. Both parents were referred to drug treatment; the father failed to attend the scheduled drug screening. The father was arrested at court at the November adjudication for a violation of a no-contact order in place between the parents. The court continued placement of T.C. with relatives. The father struggled to behave appropriately when visiting T.C. He told the DHS worker during a visit about

“beating up” a friend over a conflict with the mother and that he could not afford substance abuse treatment services at the time but would be able to later that week. Ultimately, that visit ended when the father slept instead of interacting with T.C. After the October 2011 substance abuse evaluation, the father was referred to continuing care for at least six months. He did not follow through or provide drug tests.

At the December 2011 review hearing, the court confirmed the CINA disposition and continued T.C.’s placement with relatives. The court noted the father had not participated in services, was not in treatment, and had failed to provide drug screens. When asked whether further or different services should be provided, the mother requested concurrent jurisdiction for dissolution proceedings from the father. The father did not request further or different services. The father received three supervised visits a week at this time. In January 2012, a stabbing took place at his home. He missed one visit with T.C. because he was in jail. In February, DHS noted the father was interacting more with T.C. and was attending T.C.’s therapy. On March 1, 2012, he was arrested again for violating the no-contact order between him and the mother.

A review hearing was held April 12, 2012. The court found the father had not complied with any recommended substance abuse services, and both parties were violating the no-contact order. The court inquired as to the need for additional or different services. Neither parent made such a request. In May 2012 DHS noted the ongoing risk that the father would continue to be in and out of jail and unable to provide T.C. with proper care.

A permanency review hearing was held in August of 2012. The court found the father had not participated in services. The court told the parties that failure to raise a deficiency in services would prevent them from challenging the services in a termination proceeding. The court continued the prior services and moved the child's placement to other relatives. Later in August, the father was arrested for burglary in the third degree. He was arrested again in October 2012 for driving while barred, possessing drug paraphernalia, and possessing a controlled substance.

A termination hearing was scheduled for December 2012, but the court continued the proceedings as the mother had made progress towards reunification. The father remained in jail during this time. Though the court announced it could proceed with termination proceedings against the father, it stated it would continue the proceedings as to both parents as a matter of judicial economy. A termination hearing was held March 13, 2013. The court dismissed the termination petition against the mother on the State's motion but went forward with the hearing as to the father.

Shortly before the hearing, the father's counsel was told the father had an outstanding arrest warrant and had given testimony at a deposition for a criminal case in which the father was a witness. His counsel moved in limine to exclude references to the warrant. This motion was denied. His counsel also requested permission to consult with the father about his Fifth Amendment rights before the father testified; the court responded it would allow such extra time if the father felt it was necessary. The father did not request to consult his counsel and the proceedings continued. While testifying, the father admitted T.C. could not be

returned to his care and that he used marijuana and methamphetamine one week prior to the hearing.

After a thorough consideration of each basis for termination, the court terminated the father's parental rights as to T.C. under Iowa Code sections 232.116(1)(d), (e), (f), and (l) (2013). The father appeals.

II. Analysis.

We review whether a parent's rights were properly terminated de novo. *In re A.B.*, 815 N.W.2d 764, 773 (Iowa 2012). We give weight to the juvenile court's findings of fact, especially where they pertain to the credibility of witnesses, but we are not bound by those findings. *Id.* We review whether a court improperly denied a motion to continue for abuse of discretion. *State v. McGinnis*, 243 N.W.2d 583, 586 (Iowa 1976). We review claims of ineffective-assistance-of-counsel de novo. *In re A.R.S.*, 480 N.W.2d 888, 890 (Iowa 1992).

A. Reasonable efforts.

The father first argues reasonable efforts were not made toward reunification as he lacked transportation to attend drug testing and funds to pay for treatment. He states he preserved error on this issue because he "contested reasonable efforts and filed a timely notice of appeal."¹ The record belies this claim. We have repeatedly held that failure to request additional or different services will result in the waiver of this issue on appeal. *In re A.A.G.*, 708

¹ "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L.Rev. 39, 48 (Fall 2006) (footnote omitted).

N.W.2d 85, 91 (Iowa Ct. App. 2005). We will not address the father's reasonable efforts argument for the first time on appeal.

B. Motion to continue.

The father next argues the district court should have granted his motion to continue the termination trial for several reasons. He states that because T.C. was to be placed with the mother on the day the termination hearing was scheduled, he thought the State would not proceed with termination of his rights. He discovered his beliefs were incorrect immediately prior to the hearing. He also argues a continuance was necessary because his attorney was unaware of deposition testimony given by the father in an unrelated case, and the State failed to provide the father's attorney with a copy of an outstanding warrant for the father prior to the termination hearing.

The father moved to continue the hearing so counsel could investigate the basis for the warrant and explain to the father his Fifth Amendment rights. In response to the motion to continue, the court told the father's counsel, "If [the father] feels he needs additional time to address [his Fifth Amendment rights] with you, then the court will allow that." The father did not request such additional time. Immediately after this exchange, the father was called as the State's first witness. Prior to the father's testimony, the court instructed the father that he could invoke his Fifth Amendment right to remain silent as to questions regarding the warrant. When he began to give testimony that differed from testimony given during the unrelated criminal deposition, the court again admonished the father that the testimony could be used against him.

“A continuance may be allowed for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves.” Iowa R. Civ. P. 1.911. Contrary to the father’s current assertions, he was granted permission for time to consult with his attorney. He waived the opportunity.

Once examination of the father continued and the father was impeached, his counsel asked to have a five-minute recess with him about the proceeding. The court denied counsel’s request, stating the “proceeding started forty minutes late. You had plenty of time to talk to your client before the hearing started.” The father points to no authority supporting the proposition that he was entitled to such a recess and therefore his argument is waived. See Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed waiver of that issue.”).

Further, although the court made a credibility finding against the father as a result of his conflicting testimony, the facts of his continued drug use, recurring periods of incarceration, and lack of progress in treatment were not affected by his claimed inadequate trial preparation. We find the court did not abuse its discretion in denying the motion to continue. *McGinnis*, 243 N.W.2d at 586.

C. Ineffective assistance.

The father next argues he was provided with ineffective assistance of appellate counsel, who also represented the father at trial. Iowa R. Civ. P. 6.201(1)(a) (“The appellant’s trial counsel shall prepare the petition on appeal.”). “In order to establish an ineffective assistance claim, it must be shown that

(1) counsel's performance is deficient, and (2) actual prejudice resulted. We presume that counsel's conduct falls within the range of reasonable professional competency. The burden of proving ineffectiveness is on the claimant." *A.R.S.*, 480 N.W.2d at 891 (internal citations omitted). In order to establish actual prejudice, the claimant must show that but for counsel's deficient performance, the outcome would have been different. *Id.*

The father states, "The court abused its discretion in failing to grant J.C.'s motion to continue and other requests to consult with his attorney and effectively denied [the father] his right to effective assistance of counsel. [The father] was further denied his right to due process of law when appellate counsel was required to file a petition on appeal . . . without the aid of trial transcripts." The father goes on to describe troubles with preparing a brief without a transcript and problems with expedited briefing procedures. He concludes it is impossible to file an ineffective-assistance-of-counsel claim where the trial attorney and the appellate attorney are the same. He also states the expedited appellate procedures denied him his fundamental right to raise a child.

The father points to no deficient performance and no prejudice resulting from counsel's deficient performance. See *A.R.S.*, 480 N.W.2d at 891. We cannot find the father was provided with ineffective assistance of counsel under this argument. See *id.*

D. Clear and convincing evidence of termination.

The court terminated the father's rights under several sections. We need only find termination was proper under one of these sections to affirm the

termination. *In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999). Termination under Iowa Code 232.116(1)(d) is proper where:

The court finds that both of the following have occurred:

(1) The court has previously adjudicated the child to be a child in need of assistance after finding the child to have been physically or sexually abused or neglected as the result of the acts or omissions of one or both parents

(2) Subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receipt of services.

The father has spent much of the CINA proceedings in and out of jail. During the termination hearing, he admitted to using methamphetamine a week earlier. He stated the longest period of sobriety he has had was while in prison in 1997 or 1998. He was offered services; he attended one evaluation and failed to follow through with treatment. When asked why he did not comply with any of the services offered by DHS, he said he wanted T.C. to be with his mom “from the get-go.” Unresolved drug use can not only render a parent unfit to raise children, but subject a child to dangerous circumstances. *A.B.*, 815 N.W.2d at 776. Our supreme court has previously noted, “No parent should leave his small children in the care of a meth addict—the hazards are too great.” *State v. Petithory*, 702 N.W.2d 854, 859 (Iowa 2005). T.C. was adjudicated CINA due to drug abuse and violence by his parents. The father has made no progress to correct this situation. Termination under Iowa Code section 232.116(1)(d) is supported by clear and convincing evidence.

E. Factors weighing against termination

The father next argues the court should apply section 232.116(3) to save the parent-child relationship. See *In re P.L.*, 778 N.W.2d 33, 38 (Iowa 2010). He alleges a “genuine and strong bond” between him and T.C. and that T.C. has been reunited with his mother. See Iowa Code § 2332.116(3)(a), (c) (stating the court need not terminate a parent’s rights where “[a] relative has legal custody of the child” or “[t]here is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship”). The father points to a statement by T.C.’s counselor that he might be sad and take time to adjust to the termination. The father’s presence in T.C.’s life over the almost two years of these proceedings has been sporadic. While T.C.’s therapist believes he may have some sadness about the termination, and T.C. has been reunited with his mother, the evidence is overwhelming that in order for T.C. to have a safe, stable life, termination is necessary. See *In re D.W.*, 791 N.W.2d 703, 709 (Iowa 2010) (“Although it is clear that [the parent loves the child], our consideration must center on whether the child will be disadvantaged by termination, and whether the disadvantage overcomes [the parent’s] ability to provide for [the child’s] developing needs.”); see also *A.B.*, 815 N.W.2d at 778 n.8 (“[W]e concur in the juvenile court’s view that there is a bond between [the father and children], but the children’s safety, long-term nurturing and growth, and physical, mental, and emotional needs would be better served by termination of parental rights notwithstanding that bond.”). We affirm the termination of the father’s parental rights as to T.C.

AFFIRMED.