Filed 9/26/12 In re P.A. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re P. A., A Person Coming Under the Juvenile Court Law.	B240511 (Los Angeles County Super. Ct. No. CK85002)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JAMES A., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Anthony Trendacosta, Commissioner. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel and Peter Ferrera, Deputy County Counsel for Plaintiff and Respondent.

Appellant James A. contends he received insufficient notice of a hearing under Welfare and Institutions Code section 366.26.[1] We conclude that he has shown no prejudice from the defective notice as he never complied with the case plan, failed to visit his child, and did not attend previous hearings for which he received proper notice. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

P. A. was born to K. W. (Mother) in 2010. James A. (Father) is the presumed father of P. A. Shortly after P.'s birth, the Los Angeles County Department of Children and Family Services (DCFS) received a referral indicating that Mother appeared to be mentally incapable of caring for P. DCFS took P. into temporary custody after learning that Mother had left P. with a friend without making arrangements for her care. In an effort to locate Father, DCFS contacted P.'s paternal grandmother, but she did not respond to DCFS's phone messages.

On November 4, 2010, DCFS filed a petition under section 300 on behalf of P., alleging that Mother and Father had failed make adequate provision for her care. Father's whereabouts were identified as unknown. Mother and Father appeared at the detention hearing and were appointed counsel. Father stated that his address was Apartment No. 74 at 13020 Doty Avenue in Hawthorne. He also provided a phone number. The juvenile court ordered the child detained.

On November 12, 2010, DCFS reported that it had been unable to contact Father through the original phone number he had supplied, which did not appear to belong to him. Father also had not responded to messages that DCFS left at an alternative number that he had provided. DCFS further stated that it had obtained

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[1] All statutory references are to the Welfare & Institutions Code.

information that Mother and Father were living together in Apartment No. 51 at 13805 Doty Avenue in Hawthorne.

On December 3, 2010, DCFS filed a first amended petition, which added new allegations that P. was at a risk of harm because Mother and Father were users of marijuana. On December 8, 2010, the juvenile court conducted a hearing to receive an adjudicational and dispositional report. The DCFS report listed the two Hawthorne addresses previously associated with Father as addresses for him. According to the report, Mother and Father maintained that they had not neglected P., but admitted that they used marijuana. Mother and Father appeared at the hearing and denied the allegations in the first amended petition. The juvenile court granted them monitored visitation and directed DCFS to refer them for drug testing. The court also told Mother and Father that it was important for them to attend the next hearing.

The jurisdictional and dispositional hearing occurred on January 24, 2011. Neither Mother nor Father appeared at the hearing. After sustaining the amended petition (with modifications not pertinent here), the juvenile court directed DCFS to provide Mother and Father with reunification services. Mother and Father were directed to participate in parenting classes and drug counseling with random testing.

In connection with the six-month review on August 8, 2011, DCFS reported that Mother and Father had not complied with the case plan. Father was not enrolled in parenting classes and drug counseling, and had not submitted to random drug testing. In addition, he had attended only 13 of 49 scheduled visits with P. The report was sent to a new Hawthorne address that Father provided to DCFS in

July 2011 as his mailing address, that is, Apartment No. 62 at 13020 Doty Avenue.[2]

Neither Mother nor Father appeared at the six-month review. The juvenile court continued the review for a contested hearing on September 15, 2011, which Mother and Father also did not attend. At the contested hearing, Father's counsel informed that juvenile court that he had mailed notice of the hearing to Father at his last known address. DCFS reported that since August 8, 2011, neither parent had complied with the case plan, visited P., or contacted the social worker responsible for P. The juvenile court terminated reunification services for Mother and Father and ordered a hearing under section 366.26, which was initially set for January 13, 2012. The court also set a permanent plan hearing for March 15, 2012.

Notice of the section 366.26 hearing was mailed to Father at one of the Hawthorne addresses listed in the December 2010 report, that is, Apartment No. 51 at 13805 Doty Avenue. In addition, notice was mailed to another Hawthorne address never previously associated with him, namely, Apartment No. 62 at 13805 Doty Avenue. Neither Mother nor Father appeared at the hearing on January 13, 2012, and no objection was asserted by Father's counsel regarding the adequacy of notice to Father. DCFS reported that for over a year P. had been living in the prospective adoptive parents' home, where she appeared to be doing well. DCFS further stated that since July 2011, Mother and Father had neither visited P. nor contacted DCFS. After finding that the parents had received proper notice, the juvenile court continued the section 336.26 hearing to March 15, 2012, the date set for the permanent plan hearing, to permit the completion of a home study.

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[2] In connection with the report, DCFS also submitted "[d]ue [d]iligence" declarations stating that it had identified other potential addresses for Father, including the two addresses previously described in the DCFS reports.

Notice of the March 15, 2012 hearing was mailed to Father at the two Hawthorne addresses listed in the December 2010 report, that is, Apartment No. 74 at 13020 Doty Avenue, and Apartment No. 51 at 13805 Doty Avenue. In connection with the hearing, DCFS reported that the home study had been completed, and recommended that Mother's and Father's parental rights be terminated. DCFS also reported that neither Mother nor Father had visited P. since the last hearing.

At the hearing, Father's counsel objected to the adequacy of the notice because it referred to "continued adoptive planning" without mentioning the termination of parental rights. The juvenile court found that adequate notice had been provided to Father. After determining that P. was likely to be adopted, the court terminated Mother's and Father's parental rights. This appeal followed.

DISCUSSION

Father contends he did not receive adequate notice of the section 366.26 hearing. The crux of his contention is that the notices were never directed to the mailing address that he provided to DCFS in July 2011, namely, Apartment No. 62 at 13020 Doty Avenue in Hawthorne. We conclude that he has failed to demonstrate reversible error.

Generally, "[n]otice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend. [Citation.] [¶] Furthermore, notice of a selection and implementation hearing is mandated by statute. [DCFS] is required to give notice of a selection and implementation hearing to the child's parents (among others) by section 294, subdivision (a)(1). When a parent is not present at the setting hearing, notice must be given by one of the following means: certified mail, return receipt

requested at the last known address, established by a signed receipt; personal service; substituted service at the parent's usual place of residence or business, with a second copy sent to that address by first class mail; or, in certain cases not applicable here, by first class mail. (§ 294, subd. (f)(2)-(6).) [¶] If [DCFS] is unable to serve a parent in this manner, it must file a declaration showing the efforts it has made. (§ 294, subd. (f)(7).) The juvenile court may then permit service on a parent's attorney of record by certified mail, return receipt requested, if it finds [DCFS] exercised 'due diligence in attempting to locate and serve the parent' and the case is one where adoption is recommended. (§ 294, subd. (f)(7)(A).)" (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114-1115 (*Jasmine G.*).)

Father contends DCFS contravened his constitutional and statutory rights by failing to send the notices of the section 366.26 hearing to his designated mailing address.[3] He further maintains that he is not required to show prejudice arising from the inadequate notice, arguing that it is reversible per se as a structural defect or error. As explained below, it is unnecessary for us to determine whether notice was inadequate, as the error here (if any) is reversible only upon a showing of prejudice, which Father has not provided.[4]

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[3] In addition, Father argues that the error cannot be cured by reference to DCFS's "due diligence" declarations, as these were completed more than 75 days before the initial section 326.26 hearing (see § 294, subd. (f)(7)).

[4] Respondent asserts that Father has forfeited his contentions of error by failing to object to the inadequacy of notice before the trial court. We decline to find a forfeiture. As our Supreme Court has explained, appellate courts have the discretion to address a party's contention on appeal even though the party failed to raise it before the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888, fn. 7.) This discretion is properly invoked when the contention "involves an important issue of constitutional law or a substantial right," the application of the forfeiture rule is "uncertain," or the party "did not have a meaningful opportunity to object at trial." (*Ibid.*) These factors are present
(Fn. continued on next page.)

To establish that the error at issue here constituted structural error, Father looks to *Jasmine G.*, which addressed whether defective notice of a section 366.26 hearing is subject to "harmless error" analysis. In that case, the social services agency failed to give a mother notice of an impending section 366.26 hearing, even though it had an address for her and regularly contacted her. (*Jasmine G.*, *supra*, 127 Cal.App.4th at pp. 1113-1114, 1117.) A panel of justices from the Third Division of the Fourth Appellate District concluded that the error was not subject to analysis for harm, relying on the doctrine of structural error that the United States Supreme Court has elaborated in the context of criminal proceedings (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; see *People v. Stewart* (2004) 33 Cal.4th 425, 462).[5]

However, after *Jasmine G.*, our Supreme Court clarified the application of the structural error doctrine to dependency proceedings in *In re James F.* (2008) 42

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here, as Father did not attend the section 366.26 hearings, and the termination of his parental rights materially limited his opportunity to appear at a later hearing and contest the adequacy of notice.

In re Wilford J. (2005) 131 Cal.App.4th 742, upon which respondent relies, is distinguishable. There, the juvenile court held an unscheduled adjudication hearing that the father of the pertinent children did not attend. (*Id.* at p. 748.) Later, the father appeared at hearings and participated in the proceedings, but never objected to the juvenile court regarding the adequacy of the notice of the adjudication hearing. (*Id.* at p. 754.) The appellate court concluded that he had forfeited the contention on appeal because he had ample opportunity to raise it before the juvenile court. (*Ibid.*) As explained above, this is not the case here.

[5] Although most errors in criminal proceedings are subject to harmless error analysis, the United States Supreme Court has identified a small number of "structural" errors at trial -- i.e., "structural defect[s] affecting the framework within which the trial proceeds" -- that are reversible per se. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310; *People v. Stewart*, *supra*, 33 Cal.4th at p. 462.) These structural errors "include: (i) 'total deprivation of the right to counsel at trial'; (ii) trial by a 'judge who was not impartial'; (iii) 'unlawful exclusion of members of the defendant's race from the grand jury'; (iv) denial of the right to self-representation at trial; and (v) denial of the right to a public trial." (*Ibid.*, quoting *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310.)

Cal.4th 901 (*James F.*). There, the juvenile court appointed a guardian ad litem for a mentally incompetent father without conducting an appropriate hearing on the appointment. (*Id*. at pp. 906-907.) The guardian acted on behalf of the father in the subsequent proceedings, which resulted in the termination of the father's parental rights. (*Id*. at pp. 907-910.) The appellate court concluded that the error in the appointment of the guardian was structural. (*Id*. at p. 910.)

In reversing this decision, the Supreme Court identified "significant differences between criminal proceedings and dependency proceedings [that] provide reason to question whether the structural error doctrine . . . should be imported wholesale, or unthinkingly, into the quite different context of dependency cases." (*James F., supra*, 42 Cal.4th at pp. 915-916.) The rights and protections afforded parents in a dependency proceeding differ from those afforded defendants in criminal proceedings. (*Id*. at p. 915.) Furthermore, "[i]n a criminal prosecution, the contested issues normally involve historical facts (what precisely occurred, and where and when), whereas in a dependency proceeding the issues normally involve evaluations of the parents' present willingness and ability to provide appropriate care for the child and the existence and suitability of alternative placements. Finally, the ultimate consideration in a dependency proceeding is the welfare of the child [citations], a factor having no clear analogy in a criminal proceeding." (*Ibid*., italics deleted.)

In view of these differences, the court concluded that the error in the appointment of the guardian was amenable to harmless error analysis, as determining prejudice -- unlike the task often presented by structural error -- did not defy the assessment of harm or "require 'a speculative inquiry into what might have occurred in an alternate universe.'" (*James F., supra*, 42 Cal.4th at p. 915, quoting *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150.) As the court noted, the appointment of the guardian resulted in no actual prejudice to the father,

whom the record unequivocally demonstrated to be mentally incompetent. (*Id*. at p. 916.) The court thus reversed the decision of the appellate court, stating that "[i]f the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless . . . ." (*Id*. at pp. 918-919.)

In *In re A.D.* (2011) 196 Cal.App.4th 1319 (*A.D.*), a different panel of justices from the Third Division of the Fourth Appellate District re-examined *Jasmine G*. in light of *James F*. In *A.D.*, the social services agency failed to provide a mother with the statutorily mandated notice of a hearing at which the juvenile court terminated her reunification services and ordered long-term foster care as the permanent plan for her child. (196 Cal.App.4th at pp. 1323-1324.) Although the mother was aware of the hearing, she arrived at the courthouse after the hearing occurred, and the juvenile court later denied her request for relief from the rulings at the hearing. (*Id*. at p. 1324.) On appeal, the mother relied on decisions holding inadequate notice to be structural error, including *Jasmine G*. (*Id*. at pp. 1325-1326.) The appellate court declined to follow these decisions, noting that *James F*. "cautioned against using the structural error doctrine in dependency cases." (*Id*. at p. 1326.) After determining that the error in notice was amenable to harmless error analysis, the court held that the mother had failed to show prejudice from the error. (*Id*. at pp. 1327-1328.)

In view of *James F*., the purported defect in notice before us is also properly subject to assessment for prejudice because it does not defy "harmless error" analysis or "require 'a speculative inquiry into what might have occurred in an alternate universe.'" (*James F*., *supra*, 42 Cal.4th at pp. 915-917; see also *In re Angela C.* (2002) 99 Cal.App.4th 389, 393 [defect in notice of continued section 366.26 hearing was not structural error].) Furthermore, we conclude that the defect was harmless even under the stringent beyond-a-reasonable-doubt test for federal constitutional error stated in *Chapman v. California* (1967) 386 U.S. 18, 24, as the

record unequivocally shows that Father abandoned any attempt to preserve his parental rights regarding P. before the section 366.26 hearing.

Once a section 366.26 hearing is set, "the focus [in dependency proceedings] shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Thus, "[i]f there is clear and convincing evidence that the child will be adopted, and there has been a previous determination that reunification services should be ended, termination of parental rights at the section 366.26 hearing is relatively automatic. [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.) Although the juvenile court may decline to terminate parental rights if "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship (§ 366.26, subd. (c)(1)(B)(i)), this exception applies only when "the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Here, Father never complied with any element of the case plan, and he stopped his infrequent visits with P. after July 2011, long before the section 366.26 hearing began in January 2012. Furthermore, he appeared at *no* hearings after December 2010, including the August 2011 hearing, notice of which was sent to the address that he maintains was the correct address for the purportedly defective notices. The record otherwise establishes that P. is adoptable. There is thus no reasonable doubt that the purported defect in notice did not affect the outcome of the section 366.26 hearing. (*In re Angela C., supra*, 99 Cal.App.4th at p. 393 [defect in notice of continued section 366.26 hearing was harmless beyond a reasonable doubt when evidence unequivocally showed that parental rights should be terminated].) In sum, Father has failed to demonstrate reversible error.

DISPOSITION

The orders of the juvenile court are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.