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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.J., a Person Coming Under the Juvenile Court Law.	B257332 (Los Angeles County Super. Ct. No. DK05371)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Annabelle G. Cortez, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Richard D. Weiss, Acting County Counsel, Dawyn R. Harrison, Assistant County Counsel and Navid Nakhjavani, Deputy County Counsel for Plaintiff and Respondent.

Marvin J. (father) appeals the juvenile court's jurisdictional findings and disposition order with respect to his three-year-old son, M.J. We conclude that substantial evidence supports the findings and order, and so affirm.

FACTUAL AND PROCEDURAL SUMMARY

M.J. began living with his father after the death of his mother in August 2013. Father also had custody of M.J.'s older half brother, J.D.[1]

In February 2014, 10-year-old J.D. came to the attention of child protective services in Riverside County when his mother was arrested for violating the terms of her probation by using methamphetamine. J.D. was released to father's custody.

On February 20, 2014, the Los Angeles County Department of Children and Family Services (DCFS) received a referral that M.J. was the victim of general neglect. The reporting party indicated that father had been arrested on January 17, 2014, for drug transportation and possession with intent to sell. Father had spent two weeks in jail, during which time M.J.'s paternal aunt, Keisha J., cared for both boys.

DCFS made several attempts to contact father, but initially was unsuccessful. On March 6, 2014, DCFS spoke with Keisha J., who stated that she was housesitting for father. She reported that father took good care of his children and was protective of them, and that she had no knowledge that father sold or was otherwise involved with drugs.

DCFS met and interviewed father on March 21, 2014. Father denied being a drug user or seller. He explained that J.D.'s mother had agreed to have J.D. reside with him due to her substance abuse issues. Father also stated that he assumed custody of M.J. in August 2013, when the child's mother passed away. Father denied any domestic violence or physical discipline of the children, and also denied any mental health or medical issues. M.J. appeared healthy and was dressed appropriately. The children were

[1] J.D. is not a subject of this appeal.

current with their medical and dental care. Father agreed to submit to an on-demand drug test, the results of which were negative.

On March 31, 2014, DCFS visited father's home, which appeared clean, organized, and adequate for the care of the minor. The social worker did not observe any drugs, drug paraphernalia, guns, weapons or safety threats. The social worker also spoke with father's girlfriend, who indicated that father was caring, loving and protective of his children, never neglectful or abusive, and did not engage in criminal activity. Similarly, J.D.'s mother stated that she and father had agreed that father would have custody of J.D. while she entered an inpatient program. When she was arrested for a probation violation in February 2014, she asked that father be contacted and that J.D. be released to him.

On April 29, 2014, DCFS spoke with Detective Dorado of the Riverside Police Department, one of the officers who arrested father in January. The detective stated that the department had obtained a search warrant and surveilled father. The officers had witnessed three individuals separately approach father's car, exchange an unknown object and walk away. A search of father and his car uncovered a plastic bag containing 14.5 grams of a cocaine base on his person, $250 cash, and two cell phones.

DCFS also learned of father's extensive criminal history, which included drug-related convictions. Specifically, father was twice convicted of possession of a controlled substance in 1989. In 1994, he was convicted of possession of cocaine base for sale and sentenced to four years in state prison. After his release in 1998, father was again convicted of possession of cocaine base for sale, and was sentenced to five years in state prison. In 2006, he was convicted of transporting or selling a controlled substance and sentenced to nine years in state prison.

On June 5, 2014, DCFS filed a Welfare and Institutions Code[2] section 300 petition on behalf of M.J. The petition, as subsequently sustained by the juvenile court, alleged as follows: "On 1/17/2014, the child['s] . . . father . . . possessed cocaine on his person and was arrested for Possess/Purchase Cocaine Base for Sale. The father has a criminal

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2 Unless otherwise specified, further statutory references are to this code.

history of convictions of Possess Narcotic Control[led] Substance, Possess/Purchase Cocaine Base for Sale, Transport/Sell Narcotic Control Substance with Prior Control[led] Substance Conviction and Use/Under the Influence of a Control[led] Substance. Father's possession of cocaine for sale, criminal history and conduct endangers the child's physical health and safety, and places the child at risk of physical harm and damage." The Department's detention report had concluded that "[t]his family can be categorized as being at 'high risk" because, inter alia, during the six-month period in which father had custody of M.J., the maternal grandmother reported being assaulted in father's home where drug use was occurring, and Father was arrested for possession of cocaine base for sale and spent two weeks in jail.

At the June 5, 2014 detention hearing, the juvenile court found father to be M.J.'s presumed father, and found a prima facie case to detain M.J.; he was placed in DCFS's custody. The court ordered DCFS to provide father with reunification services and monitored visits two to three times per week for two to three hours per visit. An adjudication/disposition hearing was set for June 20, 2014.

In a subsequent interview on June 11, 2014, DCFS asked father about the criminal charges he faced. Father remarked that it was all a mistake and he was not guilty of any wrongdoing. He stated, "I never had cocaine on my person. That is not true. This was all made up by M[.J.]'s grandmother." Father believed that the child's maternal grandmother had told the Riverside Police that he was a drug dealer, and the police started building a case against him. At the time of his arrest on the pending charges, he was driving down the street in his car; his brother-in-law was in the passenger seat. There were no drugs in the car. Father acknowledged his history of selling drugs, but denied using them.

Father was cooperative and was willing to accept services. He wanted M.J. home with him, saying that keeping him in foster care was hurting the child. After M.J.'s detention and prior to the June 20 hearing, father visited M.J. twice at DCFS's offices. Father hugged, kissed and displayed appropriate affection towards the child. At the end of the visit, M.J. kicked, screamed and cried, stating, "Daddy I want to go with you."

Prior to the adjudication/disposition hearing, Shields for Families provided a letter indicating father had enrolled in a 12-week anger management class and a 12-week parenting class.

At the contested June 20, 2014 hearing, counsel for DCFS argued that, based on father's lengthy criminal history and ongoing criminal activity, there was a demonstrated risk of harm to M.J. The child's counsel joined in the argument, asking the juvenile court to sustain the petition. Regarding disposition, however, the minor's counsel contended that "the Department has not met its burden of clear and convincing evidence of substantial detriment to the minor." Minor's counsel also noted that all of father's drug tests were negative, that he was cooperating with DCFS, that he enrolled in parenting and other classes, and that the paternal aunt was willing to move into father's home to assist father in caring for the child. Minor's counsel requested that the minor be released to father on the condition that he continue to cooperate with DCFS and accept family preservation services, including unannounced home visits.

Father's counsel argued that the petition should be dismissed, as M.J. had never been harmed in father's care and DCFS failed to show a nexus between father's activities and a risk of harm to the child. As to disposition, father's counsel also noted that the paternal aunt lived in father's home and could assist him in caring for M.J. Thus, there was no need to remove the child from father's custody.

DCFS objected to return of M.J. to the home. It argued that father was not taking responsibility for his actions, and that the paternal aunt's presence in the home did not remove the risk of harm to the child.

The juvenile court sustained the petition, noting father's long history of arrest and conviction for selling controlled substances, as well as his pending criminal proceeding on a similar charge. The court declared M.J. a dependent of the court, found there were no reasonable means to protect his well-being without removal from father's custody, and ordered the child removed. Family reunification services to address case-related issues were ordered.

Father timely filed a notice of appeal.

DISCUSSION

On appeal, father contends the juvenile court lacked substantial evidence to support the jurisdictional findings under section 300, subdivision (b). He also argues that the court's removal order was not supported by substantial evidence. We consider each contention below.

1. *Jurisdictional findings*

Section 300, subdivision (b) provides in pertinent part that a child may be declared a dependent of the court when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness." (§ 300, subd. (b).) "Thus, '[t]he three elements for jurisdiction under section 300, subdivision (b) are: "'(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the [child], or a "substantial risk" of such harm or illness.'" [Citations.]' (*In re B.T.* (2011) 193 Cal.App.4th 685, 691–692.)" (*In re John M.* (2012) 212 Cal.App.4th 1117, 1124.)

"We review the dependency court's jurisdictional findings for substantial evidence, and review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings." (*In re John M.* (2013) 217 Cal.App.4th 410, 418.)

Here, DCFS argued that father's lengthy criminal history as well as his ongoing criminal activity as evidenced in the police report of his January 2014 arrest, demonstrate a risk to the child. "I'd argue that [it] is still a risk for a very young child for the father to

engage in drug sales." Father countered that M.J. had lived with him since birth, had never been harmed by him, but rather was by all indications a loving, caring, protective parent to his children. Father's arrest in Riverside, rather than any mistreatment of M.J., was the event which precipitated DCFS's involvement with the family. However, M.J. was not present when father was arrested, and was taken care of by his paternal aunt, Keisha J., who resides in the home. Father thus contended there was no nexus between any alleged action or inaction on the part of father and any harm or risk of harm to the child.

The juvenile court found that father's criminal history of drug sales, together with the pending charges in Riverside County activities, put M.J. at substantial risk of serious harm. The record on appeal fully supports that finding. Father had a history of engaging in dangerous criminal activity by selling cocaine and cocaine base over a long period of time, from 1994 until 2006, when he was convicted of selling/transporting a controlled substance and sentenced to nine years in state prison. From the fact of his January 2014 arrest, when 14.5 grams of cocaine base was found on his person, the juvenile court reasonably concluded that rather than cease his criminal activities after M.J. came to live with him in August 2013, father continued in his illegal and dangerous lifestyle. We conclude the juvenile court properly asserted jurisdiction over M.J.

2. Removal order

Father maintains that the juvenile court lacked substantial evidence to support the order removing M.J. from father's home.

The juvenile court has broad discretion at the disposition hearing to decide what will best serve the child's interests and to fashion an order accordingly. (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) A decision of the juvenile court at disposition should not be reversed absent a clear abuse of discretion. (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1005.)

Section 361 concerns disposition following a finding of jurisdiction. Subdivision (c)(1) of that section provides in relevant part: "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence. . . . [that t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).)

A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136; see also *In re Cole C.* (2009) 174 Cal.App.4th 900, 917 [juvenile court may consider both the parent's past conduct and present circumstances].)

Here, the juvenile court found that father's ongoing criminal activities placed M.J. at risk of harm and that the child's well-being could not be ensured without his removal. In reaching this conclusion, the court took into consideration the child's young age as well as the factors described above which supported the court's jurisdiction in the first instance. And although father had enrolled in anger management and parenting classes, he had done so just days prior to the jurisdiction and disposition hearing. In making its ruling, the court found that continuance in the home of [father] is contrary to [M.J.'s] welfare. [¶] "Substantial danger exists, and there are no reasonable means to protect him

without removing him." Under these circumstances, father has failed to establish that the trial court abused its discretion in refusing to issue a home of parent order.

DISPOSITION

The juvenile court's findings and orders are affirmed.

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GOODMAN, J.*

I concur:

TURNER, P. J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Mosk, J., Dissenting

I dissent

Father has had the child in his home since the mother died. At all times, the child appeared healthy and appropriately dressed and was age appropriate. It was reported he was up to date on medical and dental care. There was no evidence of physical discipline. The home was clean, organized and contained all the basic necessities. There were no drugs, drug paraphernalia, or weapons reported in the house. The child was "protective of his father and reported that he has a happy life, is well cared for, and stated that his father is good to him (buys him toys, food, clothing's [*sic*], and takes him to the movies)."

A witness reported that father "is a good father who is caring, loving and protective of his children." Father's on-demand drug test was negative for drugs and alcohol. Father was "cooperative" with the Department of Children and Family Services and "willing to accept services."

There was no evidence that the child had suffered "serious physical harm or illness" (Welf. & Inst. Code, § 300, subd. (b)) or that there was at risk of suffering physical harm. The juvenile court sustained the petition under Welfare and Institutions Code section 300, subdivision (b) because of father's criminal history that consists of convictions for possession for sale of drugs.

The juvenile court lacked substantial evidence to support its jurisdiction and disposition orders. Having a criminal record and engaging in criminal activity is not sufficient to remove a child from a parent. "There is no 'Go to jail, lose your child' rule in California. [Citation.]" (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077; see *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672-673; see also *In re Christopher M.* (2014) 228 Cal.App.4th 1310.)

Accordingly, I would reverse the orders.

MOSK, J.