Filed 3/10/17 In re Sergio L. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re SERGIO L. et al., Persons Coming Under the Juvenile Court Law.	B269362
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICARDO L., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK13641)

APPEAL from findings and an order of the Superior Court of Los Angeles County, Nichelle L. Blackwell, Commissioner. Affirmed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ricardo L. (father) and Consuelo R. (mother) are the parents of Sergio L. (born in July 1998) and Lani L. (born in November 2009). Father appeals from the juvenile court's jurisdictional findings and disposition order declaring the children juvenile court dependents because of father's marijuana use, and detaining the children from father. The Los Angeles County Department of Children and Family Services (DCFS) cross-appeals from the juvenile court's order striking allegations of domestic violence from the petition.[1] We find no error, and thus we affirm.

I.
Detention

On August 13, 2015, father was stopped by police officers after he failed to stop at a red light. Officers "detected the strong odor of marijuana emitting from the" car and observed five-year-old Lani in the car. Father said there were approximately three grams of marijuana in the car and that he had smoked three hours earlier. He denied having smoked in the car, but admitted that he had thrown a partially smoked marijuana blunt out of the car just prior to being stopped.[2] Officers observed that father's eyes were red and glassy and he had the odor of marijuana on his breath. Father performed poorly on a field sobriety test. The officers arrested father for driving under the influence and detained Lani. Father subsequently tested positive for cannabinoids.

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[1] Mother has not appealed from the findings or order.

[2] A "blunt" is a hollowed out cigar filled with marijuana. (<http://www.urbandictionary.com/define.php?term=blunt> [as of March 6, 2017].)

Father told a children's social worker (CSW) that he and mother were married, but separated. Father said he routinely stayed with mother due to shootings at the complex where she lived; when he was not with mother, he lived with his parents. Father said that on August 13, he took two to three "tokes" of marijuana before putting Lani in his car to drive her back to her mother's house. He admitted using marijuana approximately every other day for insomnia, but said he drug-tested regularly for his job as a truck driver and had never had a positive drug test. Father minimized his marijuana use, saying, " 'It's just marijuana, it's not like I [was] shooting myself up on my arms.' " He said he was not sure he would stop using marijuana because it did not affect his children in any way.

Mother said she and father were no longer together because of his marijuana use. She told the CSW she did "not condone father smoking marijuana, but she cannot control him." She reported that father stayed at her house on the weekends because he did not think the complex where she lived was safe. She said father was verbally abusive to her and she was afraid of him. She said father once closed a car door on her ankle and sometimes kicked open the doors of her apartment to gain entrance. She believed father did not respect her.

Sergio reported that he was a senior at Garfield High School. He lived primarily with his mother, but was currently staying with his paternal grandmother because his grandfather was in the hospital and he did not want his grandmother to be alone. Sergio denied seeing his parents abuse drugs or alcohol or engage in domestic violence. He admitted that he had once been suspended from school after arriving at school under the influence of marijuana.

Lani denied any domestic violence between her parents and said she did not know what drugs were. Lani did not know why father had been arrested.

On August 21, 2015, father tested positive for cannabinoids. He subsequently provided DCFS with a physician's statement, dated two days after his arrest, approving his marijuana use under the Compassionate Use Act, Health and Safety Code section 11362.5.

II.
Petition

On October 5, 2015, DCFS filed a juvenile dependency petition that alleged as follows:

(a-1, b-3) Mother and father have a history of engaging in violent altercations. On prior occasions, father pushed mother out of their vehicle and struck mother's ankle with the car door, injuring her. Father's violent conduct against mother endangers the children's physical health and safety.

(b-1) On August 13, 2015, father was under the influence of marijuana while driving with Lani in the car, had marijuana within Lani's reach, and was arrested for driving under the influence. Father's conduct puts both children at risk of serious physical harm.

(b-2) Father has a history of illicit drug use and is a current user of marijuana, which renders him incapable of providing regular care of the children. On August 13, 2015, father was arrested for driving under the influence, and on August 21, 2015, father tested positive for marijuana use. Mother knew of father's drug use, but allowed him unlimited access to the children. The parents' conduct put both children at risk of serious physical harm.

On October 5, 2015, the juvenile court found a prima facie case for detaining Sergio and Lani from father pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b).[3] The court granted father monitored visitation with the children and provided that after five negative drug tests, father could begin unmonitored visits with the children.

III.
Jurisdiction and Disposition

A. Reports

A dependency investigator (DI) interviewed Sergio on November 15, 2015. Sergio denied witnessing domestic violence between his parents, but said they sometimes argued or spoke poorly of one another. He regretted having used marijuana, and said he had not used it in over a year.

Lani told the DI that she had never seen father hit mother, but she had seen her parents yell and throw things at one another, and had seen father squeeze mother's arm. She said father " 'wants to hurt [mother] badly,' " and that she was "a 'tiny bit' " afraid of her father because he yelled. She wanted to visit father, but did not want him to come to her mother's house because he argued with her mother. She denied that her parents or brother abused drugs.

Mother told the DI that her relationship with father was strained and unhealthy. She said they had not lived together for more than five years, but that father sometimes forced himself into her home by kicking the door open. She reported one incident of physical violence in 2008, but said father was not now

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[3] All subsequent undesignated statutory references are to the Welfare and Institutions Code.

physically abusive. She reported that father had used marijuana for many years, but she did not think he used it when the children were with him.

During a brief telephone conversation with the DI, father minimized his arrest for driving under the influence, saying, " 'I had just smoked a little marijuana[,] it was nothing.' " Father said he worked as a truck driver and was often on the road. He did not make himself available to be interviewed.

B. Hearing

At the jurisdiction/disposition hearing on November 30, 2015, the court concluded that DCFS had not met its burden to prove domestic violence between the parents, and thus it struck paragraphs a-1 and b-3 of the petition. It also found insufficient evidence that mother knew that father drove under the influence of marijuana, and thus it struck the allegations concerning mother's failure to protect. The court stated, however, that it was "very concerned with the fact that . . . when [father] was interviewed, there appears to be a very casual or nonchalant attitude where he stated, quote, 'I had just smoked a little marijuana. It was nothing.' [¶] Well, the court doesn't find that it is nothing to smoke marijuana and then drive [with] your [five]-year-old daughter in the car." The court therefore sustained the allegations concerning father's conduct in counts b-1 and b-2 of the petition.

With regard to disposition, the court ordered the children placed with mother; ordered mother to participate in individual counseling, family preservation, and conjoint counseling with Sergio; ordered father to complete a parenting class and individual counseling to address case issues; and granted father

monitored visitation with the children, to be liberalized after father completed the parenting class and individual counseling.

IV.
Appeal and Post-Judgment Orders

On December 1, 2015, father appealed from the "jurisdictional findings and disposition orders detaining the children from father and ordering monitored visits." DCFS cross-appealed.

While these appeals were pending, DCFS filed a motion to dismiss the appeals as moot. In support, DCFS requested judicial notice of a minute order reflecting the juvenile court's termination of jurisdiction and entry of an exit order granting joint legal custody of the children to both parents, sole physical custody to mother, and monitored visitation to father. Because the juvenile court had terminated jurisdiction, we granted the request for judicial notice as to the court's August 2, 2016 minute order terminating jurisdiction, but denied the motion to dismiss.[4]

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[4] We denied the motion to allow us to reach the parties' jurisdictional challenges. Regardless, our earlier denial of the motion to dismiss the appeal is not law of the case. (*Chernett v. Jacques* (1988) 202 Cal.App.3d 69, 70.) While postjudgment evidence is generally not admissible on appeal (*In re Zeth S.* (2003) 31 Cal.4th 396, 405), it may be considered to determine whether it renders an issue moot on appeal. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 676; *In re A.S.* (2012) 205 Cal.App.4th 1332, 1339.) Accordingly, the court's minute order terminating jurisdiction is properly before us. DCFS's request for judicial notice as to Colorado's and Washington's laws concerning driving under the influence of marijuana, however, is denied.

CONTENTIONS

Father contends: (1) substantial evidence did not support the juvenile court's findings that his marijuana use put the children at risk of physical harm or illness, and (2) the juvenile court erred in ordering the children removed from father's physical custody pursuant to section 361 because they did not reside with him when the petition was initiated and because substantial evidence did not support the removal order.

DCFS contends the appeals are moot because the juvenile court has terminated jurisdiction over the children and, thus, this court cannot provide effective relief. In the alternative, DCFS urges that substantial evidence supported the marijuana use and domestic violence allegations against father, and that the removal order should be affirmed.

FATHER'S APPEAL

I.

Father's Challenge to the Jurisdictional Findings Is Not Moot

Preliminarily, we dispose of DCFS's claim that father's appeal is moot because the children are no longer under DCFS supervision. " ' "As a general rule, 'an appeal presenting only abstract or academic questions is subject to dismissal as moot.' [Citation.]" [Citation.]' " (*In re Marquis H.* (2013) 212 Cal.App.4th 718, 724.) An appeal is not moot, however, " ' " if the purported error is of such magnitude as to infect the outcome of [subsequent proceedings] *or where the alleged defect undermines the juvenile court's initial jurisdictional finding*." ' (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547; see *In re Kristin B.* (1986) 187 Cal.App.3d 596, 605.)" (*Id.* at p. 724, italics added.) In such a case, "[t]he 'refusal to address [asserted]

jurisdictional errors on appeal by declaring the case moot has the undesirable result of insulating erroneous or arbitrary rulings from review.' (*In re Joshua C.*, *supra*, at p. 1548.)" (*Ibid.*)

In the present case, father challenges the juvenile court's initial jurisdictional finding. Accordingly, his appeal is not moot.

II.

Substantial Evidence Supported the Juvenile Court's Finding of Jurisdiction

Father claims the order adjudging the children dependents of the juvenile court must be set aside because the juvenile court's jurisdictional finding is not supported by substantial evidence. The claim is without merit.

A child is within the jurisdiction of the juvenile court if he or she "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." (§ 300, subd. (b).) "The purpose of section 300 is to protect children from parental acts or omissions that place them at a substantial risk of suffering serious physical harm or illness. (§§ 300, subd. (b).) Although there must be a present risk of harm to the minor, the juvenile court may consider past events to determine whether the child is presently in need of juvenile court protection. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169.) The California Supreme Court has observed that, depending upon the circumstances, a 'past failure [can be] predictive of the future.' (*In re Jasmon O.* (1994) 8 Cal.4th 398, 424.)" (*In re A.F.* (2016) 3 Cal.App.5th 283, 289.)

"Our review of the sufficiency of the evidence is limited to whether the judgment or order is supported by substantial evidence. 'Issues of fact and credibility are questions for the trial

court and not the reviewing court. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact.' (*In re Christina T.* (1986) 184 Cal.App.3d 630, 638-639.)" (*In re A.F.*, *supra*, 3 Cal.App.5th at p. 289.)

In this case, paragraph b-1 of the petition alleged that the children were within the juvenile court's jurisdiction pursuant to section 300, subdivision (b), as follows: "On 8/13/15, [father] placed the child Lani in a detrimental and endangering situation in that the father was under the influence of marijuana while driving the child Lani. The father had three grams of marijuana inside his vehicle, within access of the child Lani. On 8/13/15, the father was arrested for Driving Under the Influence of Drugs. Such a detrimental and endangering situation established for the child by the father endangers the children's physical health and safety and places the children at risk of serious physical harm, damage, and danger."

The central facts alleged in this paragraph are undisputed. Father does not contest that on August 13, 2015, he was under the influence of marijuana while driving with Lani in his car, that he was arrested for driving under the influence, and that when he was arrested, he had three grams of marijuana inside his car.[5]

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[5] Father urges there was not substantial evidence that the marijuana was "within access of the minor [Lani]." Even if we were to agree with father's contention, it would not alter our conclusion that substantial evidence supported the juvenile court's finding of jurisdiction.

Father urges, however, that pursuant to *In re Drake M.* (2012) 211 Cal.App.4th 754 (*Drake M.*), juvenile court jurisdiction based on a parent's substance use "must necessarily include a finding that the parent at issue is a *substance abuser*" within the meaning of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). We do not agree. Although *Drake M.* held that a parent's mere substance use, *without more*, is insufficient to support juvenile court jurisdiction, it noted that "a finding of jurisdiction based on father's use of marijuana may [be] proper if the evidence show[s] that, as a result, father failed or was unable to adequately supervise or protect" his child. (*Drake M.*, at p. 768.) In that case, the court concluded that the record " 'lack[ed] any evidence of a specific, defined risk of harm' " to the child, noting that there was no evidence that father "was under the influence of marijuana while driving his vehicle" or that the child "was exposed to marijuana, drug paraphernalia or even secondhand marijuana smoke." (*Id.* at pp. 767, 768–769.) In the present case, in contrast, father smoked marijuana immediately before driving with Lani in his car, ran a red light, and was stopped by police and arrested as a result. Thus, the nexus between father's drug use and " 'a specific, defined risk of harm' " to his child, which the court found to have been absent in *Drake M.*, is manifestly present in this case.

Father also contends that the juvenile court erred in relying on a single incident of impaired driving to establish jurisdiction because "there was no evidence from which to infer there is a substantial risk such behavior will recur." We do not agree. Although past neglectful conduct, alone, is not enough to declare a child a dependent of the juvenile court, " 'evidence of

past conduct may be probative of current conditions.' " (*In re David M.* (2005) 134 Cal.App.4th 822, 831.) "In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent's current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1025–1026.)

In the present case, it is undisputed that father is a long-time marijuana user who told DCFS he did not need to stop using marijuana because his use was "not affecting his children in any way." There is no evidence on the record before us that father has participated in any programs to help him avoid impaired driving in the future, such as individual counseling or parenting or drug-use education. Moreover, as the juvenile court noted, father did not consider driving under the influence of marijuana a significant problem, telling DCFS, " 'I had just smoked a little marijuana[,] it was nothing.' " Based on this record, the juvenile court reasonably could conclude that father did not believe he put his children in danger by driving under the influence of

marijuana with them in the car and, therefore, father was likely to do so again with regard to one or both children.

We therefore conclude that paragraph b-1 of the petition is supported by substantial evidence. Having so concluded, we need not reach father's challenge to paragraph b-2. (E.g., *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 ["appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence."].)

III.
Father's Challenge to the Disposition Order Is Moot

Although we have concluded that father's appeal is not moot with regard to his challenge to the jurisdictional findings, we reach a different result with regard to father's challenge to the disposition order. As we have said, " '[w]hen no effective relief can be granted, an appeal is moot and will be dismissed.' " (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315.) 'On a case-by-case basis, the reviewing court decides whether subsequent events in a dependency case have rendered the appeal moot and whether its decision would affect the outcome of the case in a subsequent proceeding.' (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1055.)" (*In re A.B.* (2014) 225 Cal.App.4th 1358, 1364.)

Father contends the juvenile court erred in entering the disposition order removing Sergio and Lani from his custody because substantial evidence does not support the order and because the juvenile court failed to consider less drastic alternatives to removal, and because the children were not residing with him when the petition was filed. However, as we

have noted, subsequent to the orders from which father has appealed, the dependency court terminated jurisdiction. Thus, the disposition order father challenges is no longer in effect, and father has not identified any prejudice stemming from the disposition order that this court could remedy on appeal.[6] Thus, father's challenge to the disposition order is moot. (See *In re Michelle M.* (1992) 8 Cal.App.4th 326, 328–330 [court was unable to grant relief because juvenile court no longer had jurisdiction; thus, appeal was moot].)

DCFS'S APPEAL

DCFS contends that the juvenile court erred in dismissing the allegations of domestic violence from counts a-1 and b-3 of the petition because "[t]he facts in the case at bar provided more than sufficient evidence to support a jurisdictional finding based on . . . domestic violence in the home." The claim is without merit.

We generally apply the substantial evidence test when the sufficiency of the evidence is at issue on appeal. "But this test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier

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[6] Unlike in *In re Dakota J.* (2015) 242 Cal.App.4th 619, there is no potential risk of termination of parental rights in this proceeding. Importantly, father does not appeal from the August 2, 2016 order terminating jurisdiction.

of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659–660 [trial court is entitled to reject in toto the testimony of a witness, even if that testimony is uncontradicted]).

"Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant *as a matter of law*. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527–1528, italics added.)

In the present case, although there was some evidence of past domestic violence between mother and father, nothing suggested such violence was ongoing. Mother and Sergio both denied any domestic violence, and although Lani said that father " 'gets mad at my mom and . . . squeezes her arm,' " Lani said she had never seen her father hit her mother or observed any other acts of violence between her parents. On this record, therefore, the evidence did not compel a finding that the children were at substantial risk of harm as a result of domestic violence between mother and father.

DISPOSITION

The jurisdictional findings are affirmed. The challenge to the disposition order is denied as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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