Filed 4/3/18 In re J.M. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.M., a Person Coming Under Juvenile Court Law,	B284679 (Los Angeles County Super. Ct. No. DK21877)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LEE M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Kim Nguyen, Judge. Affirmed.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Principal Deputy County Counsel, for Plaintiff and Respondent.

Father, Lee M., appeals from the jurisdictional and dispositional orders of the juvenile court. He argues the court's jurisdictional finding regarding his alcohol abuse was not supported by substantial evidence. He also argues the court erred in relying on the unsupported jurisdictional finding when it ordered J.M. removed from his custody. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant's daughter J.M. (born 04/2012) came to the attention of the Department of Children and Family Services (DCFS) in February 2017 when her mother was placed on a psychiatric hold. At the time, J.M. lived with her mother and her mother's boyfriend, Dante. DCFS filed a Welfare and Institutions Code section 300[1] petition alleging that mother had mental and emotional problems and that she and Dante engaged in domestic violence.

The court held an initial detention hearing and found a prima facie case for detaining J.M. Appellant was not present at this hearing and his whereabouts were unknown. The court ordered DCFS to conduct a due diligence search to find appellant.

At a March 2017 arraignment hearing, appellant appeared and was appointed counsel. His counsel requested that J.M. be released into his custody or that DCFS be ordered to assess his home as a placement for J.M.

In an interview with a DCFS investigator, mother stated that appellant had a "problem with alcohol." An interim review report was submitted to the court by DCFS on March 30, 2017. In this report, under the heading "Moral character of the relative

[1] Subsequent undesignated statutory references are to the Welfare and Institutions Code.

and other residents in the home," there was a subheading labeled "FATHER" followed by a list of arrests, detentions, and convictions, with their dates, locations, and other related information. The list included a 2003 arrest and three convictions (in 2004, 2008, and 2014) for driving under the influence (DUI). It also included a 1996 conviction for possession of narcotics and a 2008 arrest for selling/furnishing marijuana. This information did not include appellant's name or any other identifying information. There was a delay in DCFS' receipt of appellant's official criminal record from the California Department of Justice.

Based on this information and mother's allegation, DCFS amended its section 300 petition to allege that "father has a history of substance abuse and is a current abuser of alcohol, which renders the father incapable of providing regular care and supervision of the child."[2] Before the jurisdictional and dispositional hearing, DCFS filed a last minute information for the court which included police reports indicating appellant was arrested for DUI in 2004, for robbery and possession of a controlled substance in 2010, and for battery in 2012. These dates and alleged crimes matched items on the list of arrests, detentions, and convictions, included under the subheading "FATHER" in the interim review report dated March 30, 2017.

At the combined jurisdictional and dispositional hearing, appellant's counsel objected to the inclusion of the list of arrests, detentions, and convictions listed in the interim review report, arguing that the information failed to identify appellant. The

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[2] DCFS also made an allegation that appellant had engaged in domestic violence with mother, placing the child at risk. The court did not sustain this allegation and DCFS did not appeal the court's determination.

court overruled the objection, stating: "I will give the information due weight. It does not go to admissibility but rather to weight."

Mother testified that although she remembered telling the social worker that appellant had alcohol issues, it was because she heard that from other people. She stated that, because she had never witnessed him drinking, it "threw [her] off" when she heard from others that he was an alcoholic. She did not know whether appellant had issues with alcohol. She indicated appellant was always sober when he visited with J.M. on birthdays and holidays.

Following the hearing, the court found the allegation regarding father's current alcohol abuse true, stating:

> "The court does not believe that the 2014 [DUI] conviction is stale, given [J.M.'s] young age. The court is aware that mother has only heard that father is an alcoholic, and that she's never witnessed him under the influence. Nevertheless, given the history of the conviction and arrest in the past for alcohol abuse, the court believes that at this time [DCFS] has met its burden . . . ."

Based on this jurisdictional finding and others pertaining to mother, the court made a dispositional finding that remaining in the home of parents would pose substantial risk of detriment to J.M. The court ordered J.M. removed from parental custody. This appeal followed.

DISCUSSION

Respondent argues that this appeal is not justiciable because neither appellant nor mother challenges the juvenile court's findings based on mother's conduct, which are sufficient to

maintain jurisdiction over J.M. We disagree and consider appellant's arguments.

We recognize that "[w]hen a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) Nevertheless, we have discretion to consider a challenge to a jurisdictional finding which serves as the basis for a dispositional order also challenged on appeal. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) Appellant challenges jurisdictional findings which form the basis for a dispositional order also challenged on appeal. We exercise our discretion to review the challenged jurisdictional findings on the merits.

Appellant argues the court's jurisdictional finding regarding his alcohol abuse was not supported by substantial evidence. He challenges the court's reliance on the list of arrests, detentions, and convictions contained in the interim review report. Although this evidence was hearsay not falling under any exception in section 355, subdivision (c)(1)(A)-(D), it was not used "by itself" to support jurisdiction, but corroborated by police reports identifying appellant. For this reason, we disagree.

Respondent argues that the challenged hearsay in the interim review report was sufficient to support a jurisdictional finding under section 355, subdivision (c)(1)(D) because appellant did not invoke his right to cross-examine the preparer of the report. We disagree with respondent's reading of section 355, subdivision (c)(1). That section provides:

> If a party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, *unless the petitioner establishes one or more of the following exceptions*: [¶] . . . [¶] . . . The hearsay declarant is available for cross-examination." (§ 355, subd. (c)(1)(D), italics added.)

Under this statute, when appellant's counsel timely objected to the challenged hearsay, the burden shifted to respondent to establish that an exception applied. Respondent did not establish on the record that the hearsay declarant was available for cross-examination, or that any other hearsay exception under section 355, subdivision (c)(1)(A)-(D) applied. Therefore, the hearsay evidence is not "sufficient *by itself* to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based." (§ 355, subd. (c)(1), italics added.)

Alternatively, respondent argues the challenged hearsay information was not used "by itself" to support the court's jurisdictional findings, as it was corroborated by police reports indicating that appellant was arrested for a DUI in 2004, for robbery in 2010, and for battery in 2012. We agree.

The three police reports provided in the last minute information to the court identify appellant and include information such as type of crime and date allegedly committed. This information matches the challenged hearsay information included in the interim review report. On this basis, the court was permitted to draw the reasonable inference that the list of arrests, detentions, and convictions listed under the subheading

"FATHER" in the interim review report was appellant's criminal history.

Appellant next argues that, assuming his criminal history was properly considered, it did not amount to substantial evidence to support the jurisdictional finding under section 300, subdivision (b)(1). We disagree.

In reviewing for substantial evidence, "we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Dependency jurisdiction is properly exercised where a child has suffered, or is at substantial risk of suffering, serious physical harm due to "the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).)

In this case, there was evidence that appellant had a history of repeated DUI arrest and conviction, with one arrest and three convictions. One of these convictions occurred just three years prior to the jurisdictional and dispositional hearing. To drive while impaired by alcohol is to abuse alcohol. The court reasonably inferred that appellant was an abuser of alcohol based on his history of arrest and conviction for DUI.

Where a child is of "tender years," requiring constant supervision, a finding of substance abuse is prima facie evidence of a parent's inability to provide regular care under section 300 subdivision (b)(1). (*In re Drake M., supra,* 211 Cal.App.4th at p. 767.) J.M. was four years old at the time of the combined jurisdictional and dispositional hearing. (*In re Christopher R.*

(2014) 225 Cal.App.4th 1210, 1219 [finding that children age six or younger are children of "tender years"].) Therefore, it is presumed that appellant cannot provide regular care for her under the "tender years" doctrine. (*In re Drake M.*, *supra*, at p. 767.)

Appellant only challenges the court's dispositional order insofar as it is based on the challenged jurisdictional finding. Because we find that the jurisdictional finding was well-supported, and the dispositional order is otherwise unchallenged, we affirm.

DISPOSITION

The orders are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.