Filed 2/7/18 In re Skyler L. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re SKYLER L., et al., Persons Coming Under the Juvenile Court Law.	B281844 (Los Angeles County Super. Ct. No. DK18933 Ventura County Super. Ct. Nos. J069326, J069327, J071348)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. O.F., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Natalie Stone, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Father O.F. appeals from the jurisdictional findings and dispositional orders of the juvenile court with respect to his three children, Skyler L., Chanel L., and Genesis L. We conclude that the juvenile court erred in conducting the jurisdictional and dispositional hearing in his absence without a waiver of his right to be present, but that the error was harmless under the circumstances of this case. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles Department of Children and Family Services filed a juvenile dependency petition concerning Skyler L., Chanel L., and Genesis L. in August 2016. DCFS alleged that the children came within the jurisdiction of the juvenile court under Welfare and Institutions Code[1] section 300, subdivision (b) because their parents' substance abuse problems and untreated mental and emotional problems rendered them incapable of providing regular care to the children and placed the children at risk of serious physical harm.

Father was present at the initial dependency hearing, at which both parents denied the allegations of the petition and the children were released to them. The court set the adjudication of the petition for September 21, 2016. Father was present in court, but the court continued the trial to November 2, 2016, because DCFS's jurisdiction report lacked sufficient information to permit the court to proceed.

On November 2, 2016, DCFS filed an ex parte application for a change of orders to detain the children from Father.

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

Neither the ex parte application nor the detention report prepared by DCFS are included in the record provided on appeal, but statements made by counsel at the hearing indicate that Father had undergone an involuntary psychiatric hold pursuant to section 5150. Father was present in court for this hearing. The juvenile court detained the children from Father and released them to their mother, Stephanie T. The court ordered reunification services for Father and then said, "And, obviously, for the trial date we are going to need more complete information about the [section] 5150 [psychiatric] hold and then the treating physician's recommendations and Father's compliance." The court continued the trial date to December 12, 2016.

Father was not present in court on December 12, 2016, but was represented by counsel. The court stated that "[a]ccording to the last minute [information report] that I received, Father had been incarcerated." County Counsel advised the court that he understood that Father had been released from jail but was subsequently arrested on another charge and was now in police custody.

Father's counsel asked for a continuance so he could be present in court. She volunteered to waive her hearsay objections under section 355 so that the children's aunt and grandmother would not have to return to court for the new adjudication date. No party objected to counsel's request. The court said, "I don't like continuing a case this long. It's been pending almost four months. But I'm going to continue it. This is the last time. [¶] If something happens again with respect to Father getting picked up on a different charge and us not being able to bring him in, at that point the children's interest in resolution of the case is going to trump his right to be present. [¶] So we'll continue the trial.

I'll continue the case to February 7, 2017." The court said it would order Father to be transported to court for the hearing if he was still incarcerated at the time.

Father again was not present at the February 7, 2017 hearing. County Counsel informed Father's counsel on the morning of the hearing that Father was in court for a jury trial that day in Ventura County. She told the court that she was ready to proceed but requested a continuance so that Father could be present for the adjudication.

County counsel expressed no view and submitted on the continuance request, but the attorneys for Mother and the children opposed the request for a continuance. Mother's counsel argued that the court had previously said it would not grant any further continuances and that the case had been pending more than six months. The children's counsel said, "[I]t looks like this case should be transferring to another county. And I think we should do that forthwith so the children can get the services."

The court ruled, "The court will deny the request for a continuance. At the last hearing, I had to order a continuance because the father had been jailed. And this case has been continued multiple times due to events in the case. Detention from Father and—the best interest of the child is what governs whether a continuance is warranted. And at some point, the father's right to be present has to give way to what is in the best interest of the children. [¶] Here, a case should never be continued for more than six months. And here, the case would be better served by being transferred to Ventura County, where Mother and the children live. But I can't transfer the case until we adjudicate it and do disposition. [¶] So there is just a great prejudice to the children to continue it any further. So for that

reason, I'm denying your request for a continuance, and we will proceed with trial."

The court declared the children dependents of the juvenile court under section 300, subdivision (b), finding that they were placed at risk of serious physical harm by each parent's drug use and by Father's failure to take prescribed psychotropic medication to treat his mental and emotional problems. The court placed the children with mother, ordered various services for the parents, granted Father monitored visitation, and transferred the case to Ventura County. Father appeals.

DISCUSSION

"Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. . . . [N]o petition to adjudge the child of a prisoner a dependent child of the court pursuant to subdivision (a), (b), (c), (d), (e), (f), (i), or (j) of Section 300 of the Welfare and Institutions Code may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent, or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding." (Pen. Code, § 2625, subd. (d).) This provision has been interpreted by the California Supreme Court as requiring

both the prisoner and the prisoner's attorney to be present. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622.)

Here, Father was not present at the adjudication hearing because he was incarcerated. He had not waived his right to be present at the hearing, and his counsel requested a continuance so that he could be transported and attend the hearing. The juvenile court erred when it proceeded with the adjudication hearing without Father's presence or his waiver of that right. (See *In re Jesusa V.*, *supra*, 32 Cal.4th at p. 624.)

The erroneous denial of a prisoner's statutory right to personally attend the adjudication hearing on a dependency petition is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*In re Jesusa V.*, *supra*, 32 Cal.4th at p. 625.) Under the circumstances of this case the error was harmless because Father cannot establish a reasonable probability that the outcome of the hearing would have been different if he had been present. A child may be declared a dependent if the actions of either parent bring the child within the statutory definitions of dependency. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1212.) Here, the court sustained allegations involving both parents. Mother has not appealed the finding against her, and Father does not contend that the court erred when it sustained the allegation concerning Mother's drug use.

Father contends that he was prejudiced because he was unable to testify that the children were never harmed in his care and that the allegations against him were related to the maternal relatives' animosity toward him; he was also unable to testify to his regimen of child care and why his parenting posed no risk of neglect or abuse of the children. Even if he had been present to

give this testimony and the court credited it in full, the children would still properly have been declared dependent children on the basis of the sustained allegation that Mother's drug use placed them at risk of serious physical harm.

Moreover, Father has not identified any error in the court's dispositional orders. He does not argue that the children's placement was improper or that the dispositional order would have been different if he had been transported to the courtroom for the hearing. As an incarcerated parent, he could not provide care to the children, and he has offered no evidence that he had made or could make suitable arrangements for the care of the children during the period of his incarceration. Accordingly, Father has not established a reasonable probability that the dispositional orders of the court would have been any different had he been present at the hearing.

Father finally contends that he was prejudiced by his exclusion from the hearing because the removal order constituted a finding of parental unfitness that could, in the future, provide a partial basis for the termination of his parental rights. "California's dependency scheme no longer uses the term "'parental unfitness,'" but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child." (*In re Z.K.* (2011) 201 Cal.App.4th 51, 65.) The dependency matter is ongoing and the question of detriment is regularly revisited. "[A]t each hearing, there [i]s a statutory presumption that the child should be returned to the custody of the parent. (§§ 366.21, subds. (e), (f), 366.22, subd. (a).) Only if, over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child is the section 366.26

stage even reached." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.) From the Ventura County Superior Court minute orders dated March 6, 2017, April 18, 2017, July 10, 2017, and December 26, 2017, of which we take judicial notice, we are aware that Father has been present for subsequent court hearings. The further proceedings in this matter afford Father the opportunity to litigate the issue of detriment and present any relevant evidence on the subject. Father has not demonstrated any prejudice.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.