Filed 7/17/12 In re D.S. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re D.S. et al., Persons Coming Under the Juvenile Court Law.	B236066 (Los Angeles County Super. Ct. No. CK88352)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. EBONY B. et al., Defendants and Appellants.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Kim, Juvenile Court Referee. Affirmed.

Eliot Lee Grossman, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Ebony B. and Do.S. appeal from a jurisdictional order under Welfare and Institutions Code[1] section 300, in the dependency proceedings concerning their children, D.S., K.S., and Darion S.[2] We affirm.

Facts

This family came to the attention of DCFS when Darion was born, in April 2011. His brother D., who was born in June 2008, was almost three. His sister K., who was born in June 2009, was almost two.

DCFS became involved because Mother tested positive for marijuana at Darion's birth. (Darion himself did not.) The children were not detained, and the section 300 petition was not filed until June 20, 2011. In the meantime, in interviews in April and May, Mother told DCFS that she had used marijuana for the first five months of her pregnancy with Darion, that she did not know she was pregnant during that period, and that she had smoked marijuana when she was pregnant with her older children, who were fine. Father told DCFS that he smoked "a lot," in the bathroom of their one-bedroom apartment. Father, who was 28, said that he had been using for ten years, and Mother, who was 25, said that she had been using for seven years.

Both parents defended their drug use. They said that they smoked every day, that they smoked while caring for the children, and that they did not see this as a problem. They refused to participate in family maintenance, saying that marijuana use was "mandatory" and that they would not stop. They said that they used marijuana to relieve the stress of their lives and financial problems, and that marijuana allowed them to remain calm and take better care of the children.

The parents said that they had just moved to the apartment, and had not yet been able to furnish it, and had no cribs, beds, tables or chairs. The children were not allowed to play outside, due to neighborhood conditions.

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

[2] He is often incorrectly referred to as Davion.

Neither parent was employed.

Both parents agreed to drug test, and on May 2 both tested positive for marijuana. On June 15, after meeting with the social worker and a representative from a drug program, both parents again refused services and adamantly refused to stop using marijuana.

DCFS filed a section 300 petition, alleging, under subdivision (b), that the children were endangered by the parents' history of marijuana use and current use of marijuana. At the June 20, 2011 detention hearing, the children were detained, but were released to their parents, where they have remained. The court ordered the parents to submit to random drug tests and ordered DCFS to make random unannounced visits to the home a minimum of once a week.

In July, DCFS reported on attempts to schedule visits to the home. Visits were scheduled on two occasions, but the parents did not keep either appointment. There were also several unreturned phone calls.

DCFS also reported that in telephone conversations on July 13, both parents said that they had stopped smoking marijuana and were willing to participate in services. Mother said, "I don't know why DCFS is making a big deal about our smoking weed. Weed won't make you do crazy stuff. It calms you. . . . Weed ain't nothing. I'm not doing any hardcore drugs. . . . My children were never mistreated. They have never gone without. . . . My marijuana use has nothing to do with not being able to take care of my children. I'm a good mother. . . . I am also able to supervise my children, smoking weed or not. I stopped smoking weed because I want my children. . . ."

Father said that marijuana did not interfere with his ability to take care of his children, and that "I don't smoke weed anymore because I love my children more."

DCFS referred both parents to Family Dependency Drug Court, but neither parent contacted the drug court intake worker.

At the July 20 hearing, the court warned the parents that the case was a serious one and that in similar cases children were often removed from the home. The court told

DCFS to visit a minimum of twice a week and told the parents to stay in touch with the social worker.

The family was referred to family preservation services.

The social worker made, or attempted, several unannounced visits. On July 19, there was no response to her knock on the door. On July 15, she provided the parents with referrals for services and with bus tokens. On July 25, at 8:30 a.m., she was denied entry for ten or fifteen minutes, so that Mother could get dressed. She observed that there was little food in the house and that the kitchen was very dirty.

On July 20, Mother tested positive for cannabinoids. She tested negative on July 26.

In this period, Father told DCFS that he was on probation. He did not have a probation officer, but checked in at a kiosk. He did not remember why he was on probation.

DCFS reported again on August 16, 2011. The parents had had an intake interview with family preservation services on August 3, and were receiving such services, including substance abuse counseling and parenting classes. There are indications in the record that at that point they were only going to be seen four times a month. The family preservation services worker told DCFS that the parents were cooperative and that she had no concerns.

Father failed to test on August 1, 4, and 8, but tested negative on August 12 and August 15. Mother failed to test on August 8, but tested negative on August 12 and August 15.[3]

Unannounced visits took place on August 3 (when the social worker had to wait ten minutes to be admitted) and August 11. The home was clean and the parents had acquired some furniture. The social worker wrote "no safety concerns." The worker made a similar comment about an August 26 visit.

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[3] The parents argue that if they had used marijuana in the gap in testing, marijuana would have been detected in the next test, but the citation is to the argument of counsel, not to evidence.

However, at the August 11 visit, the parents informed the social worker that they would be skipping a drug treatment session because they would be preparing for a baby shower.

DCFS also reported that by August 15, the parents had missed three sessions with their drug counselor. They gave reasons which the counselor thought were valid: a medical appointment on one occasion, lack of child care on another occasion, and a meeting with the DPSS on the third.

Family preservation planned to provide funds for the parents to buy beds for the children, and a refrigerator.

The section 300 hearing took place on September 6, 2011. DCFS submitted on its reports, and after legal argument, the court struck the allegations that the parents were current users of marijuana and sustained the petition under subdivision (b) on allegations that the children were endangered by parents' history of drug use and history of caring for the children while they were under the influence of drugs. The court found, inter alia, that "there is a substantial risk of future harm based on the current situation, and the current situation is a mother and father with three very young children in their home with an extensive marijuana history and who have not demonstrated a willingness to give up marijuana."

The court ordered that the children would remain with their parents, and ordered parent education, drug rehabilitation with random testing, and individual counseling for the parents.

Discussion

The parents challenge the sufficiency of the evidence for the jurisdictional finding. On such a challenge, "the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences." (*In re Alexis E*. (2009) 171 Cal.App.4th 438, 450-451.)

The parents argue that the evidence was that they had stopped using marijuana and that there was no evidence that they would resume. They argue that evidence of past harm is not enough, and also rely on established case law which holds that "the mere use of marijuana by a parent will not support a finding of risk to minors." (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 452; *In re David M.* (2005) 134 Cal.App.4th 822, 829–830; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345–1346.)

It is certainly true that mere use is not enough to support a jurisdictional finding, and that mere evidence of past harm is not enough, either, but those legal principles do not compel reversal here.

Both parents were long-term users of marijuana, and they used the drug frequently. Until the middle of July, they defended their drug use and said that it did not stop them from being good parents, or, indeed, that it made them better parents. At no time did they say that they no longer believed that. Nor do they seem to have had much in the way of treatment or education which would inform them of the dangers of drug use when caring for children, or equip them with the skills to live without drugs. In August, they missed tests, and, as far as this record reflects, missed many sessions with their drug counselor. They certainly do not seem to have made drug treatment a priority.

Nor does this case present a situation of "mere use." The parents were heavy users of marijuana, and they used the drug when caring for small children. It is only common sense that a three-year-old, a two-year-old, and an infant cannot be safe unless their caretaker is alert.

All of that is substantial evidence that the parents were at risk of relapse, and that the children were at risk of harm.

The parents contend that there is no evidence that they smoked marijuana in the presence of their children, and seem to contend that the juvenile court erroneously found to the contrary, so that its order must be reversed.

The evidence was that the parents smoked every day, in the one-bedroom apartment they shared with their three children who were not allowed to play outside because the neighborhood was dangerous. Whether or not that is use "in the children's

presence," is perhaps debatable, but from the evidence concerning the size of the apartment, the frequency of the parents' use, the juvenile court could conclude that the children had been exposed to second hand smoke or were at risk of such exposure, if the parents' use resumed. At any rate, the juvenile court's order was not based on that factor alone, and even without that factor, there would be substantial evidence for the jurisdictional order.

As DCFS argues, the legislature has told us that the purpose of the dependency law is to provide maximum safety and protection for children who are currently being abused or neglected, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of abuse or neglect, and that "The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.)

There is substantial evidence for the juvenile court's order here.

Disposition

The jurisdictional order is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.