Filed 9/4/13 In re Geovanny O. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re GEOVANNY O., a Person Coming Under the Juvenile Court Law.	B247254 (Los Angeles County Super. Ct. No. CK94197)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. JOSE O., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Sherri Sobel, Juvenile Court Referee. Affirmed.

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

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel for Plaintiff and Respondent.

Appellant Jose O. (father) appeals from the juvenile court's jurisdictional and dispositional findings and orders removing his son Geovanny from his custody and denying him family reunification services under Welfare and Institutions Code section 361.5, subdivision (b)(12).[1] Father contends he was denied his statutory and due process right to receive notice of the recommendation of the Los Angeles County Department of Children and Family Services (the Department) that he be denied reunification services because of his conviction for robbery. Father, who was incarcerated throughout the proceedings below, who was absent from the jurisdictional and dispositional hearing, and who did not submit a waiver of his right to attend the hearing, further contends the juvenile court committed prejudicial error by refusing to continue the hearing so that father could be transported to the hearing. Finally, father contends the juvenile court erred by failing to consider placing Geovanny in his care pursuant to section 361.2.

The record shows that father received notice of the Department's recommendation that reunification services be denied; that through his counsel, father was given the opportunity to be heard on that issue; and that father was not prejudiced by the juvenile court's refusal to continue the jurisdictional and dispositional hearing. Father never requested custody of Geovanny under section 361.2 in the juvenile court below and he therefore forfeited consideration of that issue on appeal. For these reasons, we affirm the juvenile court's orders.

BACKGROUND

On July 2, 2012, the Department filed a section 300 petition on behalf of Geovanny (born February 2009) alleging that his mother, Cynthia (mother), had a history of drug abuse and had engaged in a physical altercation with the maternal grandmother in the child's presence. Father was in custody at the time of the detention hearing, but his precise whereabouts were unknown. The juvenile court found father to be Geovanny's presumed father and ordered the Department to make efforts to contact him. The juvenile court further found a prima facie case for detaining Geovanny with a maternal great aunt.

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

On July 23, 2012, the Department filed a first amended petition that included allegations under section 300, subdivisions (b) and (g), that father had a history of substance abuse and a criminal background that included drug related charges; that father's substance abuse rendered him incapable of providing Geovanny with regular care and supervision and placed the child at risk of harm; and that father was currently incarcerated and had failed to provide the child with the necessities of life.

In its July 23, 2012 jurisdiction/disposition report, the Department's investigator reported that father was incarcerated but that efforts to contact him had been unsuccessful. According to mother and the maternal great aunt, father's involvement with Geovanny had been minimal. Both mother and the maternal great aunt reported a history of domestic violence between father and mother that stopped only when their relationship ended, shortly after Geovanny's birth. Included in the Department's report was a list of father's arrests and convictions, including a 2011 robbery conviction for which father was serving a two-year prison term. Father's robbery conviction was the basis for the Department's recommendation that he be denied family reunification services pursuant to section 361.5, subdivision (b)(12). The report included "the [Department's] recommendation . . . that pursuant to [section] 361.5(b)(12) no reunification services be ordered for the father because the [father][2] has been convicted of a violent felony as defined in subdivision (c) of Section 667.5 of the Penal Code (as noted in the criminal history section, on 07/10/2011, the father was convicted of 211 PC--robbery)."

On July 18, 2012, father was served with a copy of the first amended petition, along with a notice of hearing on the petition. The notice of hearing advised father that the Department "may seek an order pursuant to [section] 361.5 that no reunification services be provided to the parent(s) or guardian(s)."

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[2] This sentence in the report contains a typographical error incorrectly stating that mother, rather than father, had been convicted of a violent felony. The sentence goes on to correctly state, however, that father was convicted of robbery under Penal Code section 211.

Father appeared in custody at the July 23, 2012 hearing and was appointed counsel. Father's counsel advised the court that father had a "dispositional issue" and asked that father's appearance at the contested disposition hearing be waived. When the juvenile court asked father's counsel the nature of the dispositional issue father intended to raise, counsel responded, "[r]eunification services for the father." The juvenile court then replied: "Okay. The Department is not going to be recommending them." After counsel for the Department confirmed the Department's position, the juvenile court set the matter for a contested jurisdictional and dispositional hearing. The court noted that father's appearance would be waived if his counsel had the authority to appear on his behalf.

On August 21, 2012, father received notice of a September 6, 2012 hearing on the first amended petition. The notice of hearing, like the previous notice served on July 18, 2012, advised father that the Department "may seek an order pursuant to [section] 361.5 that no reunification services be provided to the parent(s) or guardian(s)." Father signed a waiver of his right to appear at the hearing.

At the September 6, 2012 hearing, father's counsel claimed that father had waived his appearance only because he thought an agreement had been reached with the Department. Because the agreement had purportedly fallen through, father's counsel asked that father be transported to court for a full trial. The Department's counsel advised the juvenile court that the Department intended to file a second amended petition, and the court set the matter for a continued jurisdictional and dispositional hearing.

In October 2012, the Department filed a second amended petition that included an additional allegation under section 300, subdivision (b), that father's felony conviction for robbery endangered Geovanny's physical safety and emotional wellbeing. Father was served with a copy of the second amended petition, as well as notice of an October 25, 2012 hearing on that petition. The notice of hearing included the advisory statement that the Department "may seek an order pursuant to [section] 361.5 that no reunification services be provided to the parent(s) or guardian(s)."

Father waived his appearance at the continued October 25, 2012 hearing. At the hearing, father's counsel objected that father had never received notice "that the Department changed its recommendation to no [family reunification services]." Father's counsel reiterated the explanation she had given at the previous hearing held on September 6, 2012: "County counsel and I had worked out a settlement agreement and this trial was set for mother until this first amended petition was filed which -- I obviously hadn't talked to my client. We had language. We had a disposition. Obviously things have changed."

After the juvenile court agreed with father's counsel and stated its intention to continue the hearing as to father, counsel for the Department interjected: "Your Honor, if I may, I believe the notice was no [reunification services] all along . . . . [T]he no [reunification services] recommendation was in the jurisdiction/disposition report." The juvenile court replied that "the Department need[s] to let [father] know that the Department's not going to be offering reunification services here under probably two sections . . . . So I do think he has a right to get notice." The court continued the hearing as to father and proceeded with a jurisdictional hearing as to mother.

Father was served with notice of the continued jurisdictional and dispositional hearing on the second amended petition to be held on December 5, 2012. The notice of hearing again contained the advisement that the Department "may seek an order pursuant to [section] 361.5 that no reunification services be provided to the parent(s) or guardian(s)."

Although a removal order had been issued for father's appearance at the continued jurisdictional and dispositional hearing held on December 5, 2012, father did not appear at the hearing, nor did he submit a signed waiver of his right to appear. Father's counsel objected to proceeding on the grounds that father had not received notice of the recommendation to deny him reunification services and had not waived his appearance at the hearing. The Department's counsel argued that its recommendation had been included in the July 23, 2012 jurisdiction/disposition report and in the notice of hearing served on father. Geovanny's counsel joined in the Department's argument.

The juvenile court found that father had waived his appearance at the hearing, sustained the section 300, subdivision (b) allegations against father, declared Geovanny to be a dependent of the court, and ordered him removed from his parents' custody. The court ordered reunification services for mother and denied services to father under section 361.5, subdivision (b)(12).

This appeal followed.

DISCUSSION

I. Notice regarding denial of reunification services

Section 361.5, subdivision (b)(12) provides that "[r]eunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence . . . [t]hat the parent or guardian of the child has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code." Robbery in violation of Penal Code section 211 is a violent felony. (Pen. Code, § 667.5, subd. (c).)

When denial of reunification services under section 361.5 is an issue, subdivision (c) of that statute requires the juvenile court to hold a dispositional hearing on the issue and requires the Department to prepare a report as to whether reunification services should be provided: "In deciding whether to order reunification in any case in which this section applies, the court shall hold a dispositional hearing. The social worker shall prepare a report that discusses whether reunification services shall be provided." (§ 361.5, subd. (c).)

When the Department alleges that denial of reunification services under section 361.5 is appropriate, section 358, subdivision (a)(3) requires the Department to notify each parent of the content of section 361.5 and to inform the parents that if the juvenile court does not order reunification, a permanency planning hearing will be held at which parental rights may be terminated. Subdivision (a)(3) of section 358 also requires the juvenile court to continue the matter for a period not to exceed 30 days; it provides:

> "If the social worker is alleging that subdivision (b) of Section 361.5 is applicable, the court shall continue the proceedings for a period

> not to exceed 30 days. The social worker shall notify each parent of the content of subdivision (b) of section 361.5 and shall inform each parent that if the court does not order reunification a permanency planning hearing will be held, and that his or her parental rights may be terminated within the timeframes specified by law."

The statutory framework requires both notice and an opportunity to be heard before reunification services may be denied. (*In re Jessica F.* (1991) 229 Cal.App.3d 769, 782 (*Jessica F.*).) Such notice is constitutionally mandated as well. "Notice is both a constitutional and statutory imperative. In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend. [Citation.]" (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114.)

In this appeal, father challenges the sufficiency of the notice provided him under section 358. This same issue was addressed by the court in *Jessica F.*, a case in which a mother who was denied reunification services argued that she had insufficient notice of the county's recommendation that she be denied services under section 361.5, subdivision (b)(4). (*Jessica F., supra*, 229 Cal.App.3d at p. 782.) The court in *Jessica F.* first noted that the mother could not claim she had received no notice that services might be denied her because the jurisdiction and disposition reports recommended that the juvenile court "'[f]ind that 361.5(b) may apply and Reunification Services may not be ordered'" and because county counsel had specifically pointed out that recommendation during the jurisdictional hearing attended by both the mother and her counsel. (*Jessica F.*, at p. 782, fn. 15.) The court concluded that "section 361.5 only requires that mother be given notice in the social worker's report that reunification services might be denied and, further, that mother be afforded an opportunity to be heard on that issue, both of which occurred in this case." (*Id.* at p. 782.)

Here, as in *Jessica F.*, the statutory and constitutional notice requirements were satisfied. Father had both notice and the opportunity to be heard regarding the Department's recommendation that he be denied reunification services under section

361.5, subdivision (b)(12). That recommendation, and father's robbery conviction as the basis for denying him services, were included in the July 23, 2012 jurisdiction/disposition report. Both father and his counsel were present at the July 23, 2012 hearing when the juvenile court pointed out, and the Department's counsel confirmed, that "[t]he Department is not going to be recommending [reunification services]."

Father contends the July 23, 2012 jurisdiction/disposition report was not sufficient notice of the Department's recommendation to deny him reunification services because he believed an agreement had been reached with the Department regarding reunification services but the agreement was subsequently withdrawn. Even assuming that a failed agreement with the Department on reunification services negated the notice father received in the July 23, 2012 jurisdiction/disposition report, father received subsequent notice advising him of the Department's position. Father was served with notices of hearing dated July 18, 2013, August 21, 2012, September 13, 2012, and November 1, 2012, each of which advised him that the Department "may seek an order pursuant to [section] 361.5 that no reunification services be provided to the parent(s) or guardian(s)." Each of the notices further advised father that the purpose of the hearings was to adjudicate a section 300 petition, that father had the right to be present at the hearing and to be represented by counsel, that if the allegations of the petition were found to be true, the juvenile court would proceed to disposition and could remove Geovanny from his parents' custody. A copy of the section 300 petition, the first amended petition, and the second amended petition was attached to the respective notices sent to father. In addition, father was represented by his counsel at the September 6, 2012 and October 25, 2012 hearings when the issue of no reunification services was specifically discussed. The statutory and due process notice requirements were met in this case. (*Jessica F., supra*, 229 Cal.App.3d at p. 782.)

II. Continuance of the jurisdictional and dispositional hearing

Father contends the trial court committed prejudicial error by failing to further continue the December 5, 2012 hearing because father had both a statutory and due process right to be present at that hearing and his absence precluded any meaningful trial

on the issue of reunification services. We agree that father had a statutory right under Penal Code section 2625, subdivision (d), to be present at the adjudication and disposition hearing held in his absence on December 5, 2012, and that the trial court erred by proceeding without him. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622 (*Jesusa V.*).) We conclude, however, that father's absence from the hearing did not deprive him of due process, and that under the applicable harmless error standard, he suffered no prejudice. (*Id.* at pp. 602, 622, 625.)

Penal Code section 2625 governs dependency proceedings affecting the parental rights of individuals who are incarcerated. Subdivision (d) of that statute ensures that incarcerated parents have the opportunity to be present at proceedings in which their children may be removed from their custody. (*Jesusa V.*, *supra*, 32 Cal.4th at p. 623.) It provides in relevant part: "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 or 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).)

Our Supreme Court has interpreted Penal Code section 2625, subdivision (d) to require the presence of both the incarcerated parent and his or her counsel, absent the parent's waiver of the right to attend. (*Jesusa V.*, *supra*, 32 Cal.4th at pp. 621-624.) In the instant case, father was not present at the December 5, 2012 jurisdictional and dispositional hearing, and no waiver of his appearance had been submitted. The juvenile court accordingly erred by adjudicating, in father's absence, the allegations of the section

300 petition pertaining to him, in violation of Penal Code section 2625, subdivision (d).[3] (*Jesusa V., supra*, at p. 622.)

The harmless error standard applies when determining whether father was prejudiced by the juvenile court's failure to comply with Penal Code section 2625, subdivision (d). (*Jesusa V., supra*, 32 Cal.4th at pp. 625-626.) In the instant case, father was notified of the December 5, 2012 hearing. At the hearing, father was represented by his appointed counsel, who had received the social worker's reports, and who had the opportunity to present evidence or to cross-examine witnesses regarding the content of those reports. The juvenile court invited father's counsel to present argument on father's behalf, but counsel declined. The circumstances here are similar to those presented in *In re Axsana S.* (2000) 78 Cal.App.4th 262, a case in which an incarcerated father awaiting trial on murder charges was involuntarily absent from a dependency hearing at which he was denied reunification services with his daughter. The court in *Axsana*, after noting that the father had "cited no case law providing incarcerated parents a due process right to be present at dependency proceedings involving their children" (*id.* at p. 270), concluded that the incarcerated father had not been denied due process because he had the opportunity to be heard, through his appointed counsel, throughout the dependency proceedings, including the hearing at which reunification services were denied. (*Ibid.*)[4]

The *Axsana* court's conclusion that an incarcerated parent has no due process right to be present at a dependency hearing was reaffirmed by the California Supreme Court in

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[3] Because we conclude the juvenile court erred by proceeding with the jurisdictional and dispositional hearing in father's absence, in violation of Penal Code section 2625, subdivision (d), we need not address father's argument as to whether a further continuance of the hearing was required under Welfare & Institutions Code section 358 or whether the juvenile court abused its discretion by refusing to grant a further continuance to enable father to attend the hearing.

[4] *Axsana S.* was disapproved on another ground by the California Supreme Court in *Jesusa V., supra*, 32 Cal.4th at page 624, footnote 12. As discussed *infra*, the Supreme Court in *Jesusa V.* reaffirmed the *Axsana* court's conclusion that an incarcerated parent has no due process right to be present at a dependency hearing. (*Jesusa V.*, at pp. 625-626.)

Jesusa V. In *Jesusa V.*, an incarcerated father claimed that he was denied due process as the result of his involuntary absence from a hearing on his status as a presumed father and from a subsequent combined jurisdictional and dispositional hearing at which he was ordered to have no contact with the child. Although absent from the hearings, the father had appointed counsel to represent him throughout the dependency proceedings. (*Jesusa V., supra*, 32 Cal.4th at pp. 601, 625-626.) After citing with approval the *Axsana* court's due process holding, the Supreme Court in *Jesusa V.* noted that "courts have 'repeatedly held that the due process rights of a prisoner who has been prohibited from participating in a custody hearing are not violated where the prisoner was represented by counsel at the hearing and was neither denied an opportunity to present testimony in some form on his behalf nor denied the opportunity to cross-examine witnesses.' [Citations.]" (*Jesusa V.*, at p. 602.) The Supreme Court went on to conclude that the incarcerated father in the case before it had not been denied due process because he was represented by counsel. (*Id.* at pp. 602, 625-626.)

Here, as in *Jesusa V.* and *Axsana*, father was represented by his appointed counsel throughout the juvenile court proceedings below, including at the jurisdictional and dispositional hearing at issue. At the hearing, father's attorney made no offer of proof of the testimony father wanted to present in person. Father has not identified, either in the juvenile court below or in this appeal, the evidence he claims he would have offered had he been present. Given these circumstances, we conclude that "'[n]o other result was possible' even if he had been present. [Citation.]" (*Jesusa V., supra*, 32 Cal.4th at p. 626, quoting *In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1632.) Father was not denied his due process right to be heard.

III. Placement of Geovanny in father's custody

Father contends the juvenile court erred by failing to consider placing Geovanny in his custody under section 361.2. We need not consider this issue because father did not request custody in the juvenile court proceedings below. He therefore forfeited appellate consideration of the issue. "A parent's failure to raise an issue in the juvenile

court prevents him or her from presenting the issue to the appellate court. [Citation.]" (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 582.)

DISPOSITION

The orders establishing juvenile court jurisdiction over Geovanny, removing him from father's custody, and denying father reunification services are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST