Filed 6/17/16 In re J.T. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re J.T., et al., Persons Coming Under the Juvenile Court Law.	B264253 (Los Angeles County Super. Ct. No. DK05992)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. SAMANTHA P., Defendant and Appellant.	

APPEAL from an Order of the Superior Court of Los Angeles County, Teresa Sullivan, Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Samantha P. (Mother) has two sons, both of whom the juvenile court found were within its jurisdiction under the dependency provisions of the Welfare and Institutions Code. Mother does not contest the juvenile court's jurisdictional findings nor the portion of its dispositional order removing the children from her custody. Rather, she presents a single, narrow issue for our consideration: did the juvenile court abuse its discretion by including in its dispositional order a requirement that she submit to testing for marijuana use.

I. BACKGROUND

Mother's two sons are J.T. (born in 2006) and J.L. (born in 2010). Jonathan L. (Father L.) is J.L.'s presumed father and Christian T. is J.T.'s presumed father.

The Department of Children and Family Services (the Department) filed an initial petition in October 2014 alleging J.T. and J.L. were dependents of the court under Welfare and Institutions Code section 300, subdivisions (a) and (b).[1] The petition alleged Mother and Father L. engaged in violent altercations in the presence of the children. It made specific reference to an altercation on June 29, 2014, during which Mother tried to wrest J.L. away from Father L. and both parents hit each other with their fists; police arrested Mother for battery as a result of this incident. The petition also referenced a more recent incident on October 13, 2014, during which Father L. pushed Mother to the ground and dragged her, causing lacerations to her arms and legs.[2]

A Department detention report filed with the petition detailed the history of the Department's interactions with Mother, interactions that began shortly after it received a referral concerning the June 29, 2014, altercation referenced in the petition. After the family came to its attention, the Department discovered there had been additional past

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[1] Statutory references that follow are to the Welfare and Institutions Code.

[2] A law enforcement report concerning this incident described Mother as having a strong odor of alcohol on her breath and slurring her speech when officers arrived on the scene.

episodes of domestic violence between Mother and Father L. For instance, according to a law enforcement report in August 2012, the parents had an altercation that started while they were driving together. During this incident, they eventually got out of the car and hit one another; Mother was arrested for battery. And earlier in May 2012, there was an incident in which Father L. threw a lit cigarette at Mother, who responded by letting the air out of Father L.'s tires. Father L. pushed Mother, she hit him on the head with a beer bottle, and Father L. dragged Mother down the street.

The Department's detention report also included details concerning Mother's use of marijuana. In an interview with a social worker, Mother disclosed that she was then working in a medical marijuana store and she said she "has a medical marijuana recommendation." According to the social worker's interview summary, Mother said she "suffers from depression and should probably see a therapist, and now utilizes marijuana to treat anxiety and tension." Mother asserted she kept the marijuana stored out of J.L.'s reach and used it only at night when J.L. was with his father. At the Department's request, Mother agreed to take a drug test on July 2, 2014, and the results were positive for cannabinoid. In September 2014, the social worker provided Mother with information for a therapist in the hope she would pursue treatment other than marijuana for her anxiety. Mother, however, told the social worker that she did not want services (for marijuana use or otherwise), that she was too busy to go to classes or therapy, that she felt marijuana was an appropriate treatment, and that she would "do programs" if a court ordered her to do so but not otherwise. However, in a later interview on October 15, 2014 (which was still before the Department filed the petition in this matter), Mother said she was willing to drug test and she told the social worker she had quit her job at the medical marijuana dispensary because she felt having such a job was not good for the children.

At a detention hearing on the initial petition, the juvenile court ordered the children detained, J.T. with his maternal great aunt and J.L. with his paternal grandfather. The juvenile court also ordered both parents to submit to weekly random and on-demand drug testing, and the court ordered referrals for various services.

In advance of the jurisdiction and disposition hearing on the petition, the Department prepared and submitted additional reports concerning the parents. As relevant to the issue we shall decide, Mother confirmed in another interview with a social worker that she had a medical marijuana prescription, explaining this time it was not just for anxiety but also for chronic back pain she attributed to an epidural she received when giving birth. Mother told the social worker she used marijuana "once a day right before bed." Although Mother claimed she had limited her use of marijuana since the start of dependency proceedings, the Department opined it would "be beneficial for [Mother] to participate in counseling services to find better coping mechanisms to deal with her anxiety, as it is clearly compromising her ability to effectively and safely parent her children." The Department accordingly recommended the juvenile court order her to submit to weekly and random on-demand drug testing, and to complete a drug treatment program if there were any missed or positive tests.

At the jurisdiction and disposition hearing, Mother pled no contest to the jurisdictional allegations against her, which by that time had been amended and presented in a First Amended Petition. As amended, count b-1 alleged: "The children [J.T.] and [J.L.'s] mother . . . and the mother's former male companion, [Father L.], father of the child [J.L.], have a history of engaging in physical altercations with each other. On 6/29/14 and 8/25/12, the mother was arrested for battery. Further, on 01/03/2011, [Father L.] was convicted of misdemeanor Spousal Battery for an incident that involved the mother. Such conduct by the parents places the children at a substantial risk of physical harm."

The juvenile court found count b-1 true (as well as another count not material to our decision), and the Department reiterated its recommendation that Mother be ordered to submit to random and on-demand drug testing, as well as a drug treatment program if any tests were missed or "dirty." The Department argued testing was warranted in light of Mother's positive tests for marijuana both before and during the juvenile court proceedings, including two positive tests in July and November 2014, and two "no-

shows" in October and November 2014. Counsel for the Department recognized Mother may have a medical marijuana recommendation, but counsel stated the Department could not support marijuana use while Mother was attempting to reunify with the children.

Mother objected to the request for drug testing. Citing *In re Drake M.* (2012) 211 Cal.App.4th 754, she argued there was nothing in the record to indicate use of medical marijuana led to the jurisdictional findings of dependency.

The juvenile court ordered drug testing for Mother, stating its rationale for doing so on the record: "While I appreciate counsel's argument, in this case—as in all cases—the ability of a parent to properly participate in the case plan and supervise their children if they're under the influence of any drugs or alcohol is a concern to this Court. [¶] Since marijuana is not a substance that can legally be prescribed by any doctor, and since there are no studies to indicate what levels are levels that impair judgment, the Court does order that there be no marijuana smoking while you're in reunification." Mother's attorney asked the court to provide a "buffer period" when beginning drug testing because the tests might well be positive at the outset based on prior use. The juvenile court agreed, and incorporated language in Mother's case plan to require that her marijuana testing levels need only decrease (i.e., not be zero at the start of testing). Under the terms of the case plan, if Mother's levels did not decrease, or if she missed drug testing appointments, she would be required to complete a drug treatment program.

II. DISCUSSION

Mother argues her marijuana use is "legal," and she asserts there was no nexus between her marijuana use and the sustained grounds for dependency jurisdiction over the children. She accordingly urges us to reverse the juvenile court's decision to require drug testing. We reject the argument and hold the drug testing order was not an abuse of the juvenile court's discretion. The court reasonably believed reducing and ultimately ceasing Mother's marijuana use would facilitate reunification, and testing for marijuana use was an appropriate means of monitoring her usage.

A. Standard of Review

"'The juvenile court has broad discretion to determine what would best serve and protect the child's interests and to fashion a dispositional order accordingly. On appeal, this determination cannot be reversed absent a clear abuse of discretion.' [Citation.]" (*In re A.E.* (2008) 168 Cal.App.4th 1, 4; see also *In re Nolan W.* (2009) 45 Cal.4th 1217, 1229 [Legislature has given juvenile courts broad, albeit not unfettered, discretion to fashion reunification orders designed to address problems that have led to a dependency proceeding].)

B. Analysis

Section 362, the statutory provision governing the authority of juvenile courts to fashion dispositional orders, vests discretion in the juvenile court to "make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of [a dependent] child." (§ 362, subd. (a).) Subdivision (d) of section 362 further provides, in pertinent part: "The juvenile court may direct any reasonable orders to the parents or guardians of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out this section . . . . The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." In discussing section 362's grant of authority to make dispositional orders, prior decisions have explained a dependency court may include a testing order in a reunification plan—even where the court has not sustained an allegation of substance abuse in the dependency petition—when "testing will facilitate . . . compliance with the remainder of the reunification plan." (See, e.g., *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008 (*Christopher H.*); see also *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018 [requiring child's mother to be drug and alcohol free before she could visit with her children was reasonable to protect their well-being].)

In *Christopher H.*, the Department of Social Services filed a petition alleging in one count that the child's father had alcohol-related problems that negatively affected his ability to care for Christopher. (*Christopher H., supra,* 50 Cal.App.4th at p. 1005.) There were also two additional counts in the petition alleged against the father, and at the jurisdictional hearing, the court sustained those counts but found not proven the allegation that his alcohol problems placed Christopher at risk. (*Ibid*.) Although it did not sustain the alcohol-related count for jurisdictional purposes, the court ordered the father to undergo a substance abuse evaluation, to participate in any recommended treatment, and to submit to random drug or alcohol testing. (*Ibid*.)

The father argued on appeal that the drug and alcohol testing order was inappropriate because the court had not sustained the alcohol-related allegation. (*Christopher H., supra,* 50 Cal.App.4th at p. 1006.) The Court of Appeal rejected the argument and affirmed the disposition order. (*Id.* at pp. 1006-1008.) The Court of Appeal explained a juvenile court aware of "other deficiencies that impede the parent's ability to reunify with his child . . . may address them" consistent with section 362. (*Id.* at p. 1006, 1008.) Because the father had convictions for driving under the influence and a positive drug test, the Court of Appeal held the juvenile court had a sufficient basis to exercise its "broad discretion" and "reasonably conclude[] [the father's] substance abuse was an obstacle to reunification that had to be addressed in the reunification plan." (*Id.* at p. 1008.)

We adhere to *Christopher H.* and reject any suggestion reversal is warranted because there is no sustained jurisdictional finding concerning marijuana use or abuse here. Nor do we accept Mother's contention that the trial court could not reasonably conclude Mother's marijuana use would be an obstacle to reunification. Mother tested positive for marijuana use during the dependency proceedings and she admitted she used the substance "*once a day*," asserting it was for her "anxiety and tension" and chronic back pain she suffered after the birth of her children four and eight years prior. Under the circumstances, the juvenile court here appropriately came to the same conclusion as the

court in *Christopher H.*: "[r]andom drug or alcohol testing will facilitate [Mother's] compliance with the remainder of the reunification plan," which she had not fully completed at that time.[3] (*Christopher H., supra*, 50 Cal.App.4th at p. 1008.) That is especially true, as the juvenile court explained, because there were no studies or other evidence before the court "to indicate what levels [of marijuana use] are levels that impair judgment."

The juvenile court could also reasonably believe, as the Department opined in its jurisdictional report, a drug testing order did have some connection to the problems that led to the dependency, namely, Mother's inability to control the domestic violence with Father L. The information in Department reports provided a sufficient basis to infer Mother's ability to safely care for her children and her recurring domestic violence issues with Father L. were in some part attributable to the anxiety, tension, and depression from which she said she suffered. It was apparent that her chosen means of treating those issues—use of marijuana—was not working well. Indeed, even Mother acknowledged she should "probably see a therapist," notwithstanding her decision to use marijuana. The juvenile court could reasonably conclude ordering mother to participate in counseling and wean herself off marijuana during the reunification period would be a more promising means of addressing her identified problems and, hopefully, avoiding additional confrontations with Father L. And as the juvenile court observed, there was no method whereby Mother's marijuana use could be measured, other than by testing, to ensure that she was properly participating in her reunification plan.

Finally, as to Mother's argument that the dispositional order was an abuse of discretion in part because her marijuana use was "legal," that is, at best, an overgeneralization. (*City of Riverside v. Inland Empire Patients Health & Wellness*

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[3] Thus, while it is true that the mere use of marijuana by a parent does not automatically support a jurisdictional finding of risk to minor children (see, e.g., *In re Drake M., supra*, 211 Cal.App.4th at p. 764; *In re David M.* (2005) 134 Cal.App.4th 822, 829-830), here the court was fashioning a dispositional order and concerned with Mother's marijuana use because it could inhibit efforts to reunify with her sons.

Center, Inc. (2013) 56 Cal.4th 729, 738-739 ["The federal Controlled Substances Act (CSA; 21 U.S.C. § 801 et seq.) prohibits, except for certain research purposes, the possession, distribution, and manufacture of marijuana].) Even assuming for argument's sake Mother's view of the law were correct, the juvenile court still had a sound basis to believe she should avoid consumption of a "legal" but psychoactive substance because it would hinder reunification. (See *Sara M. v. Superior Court*, *supra*, 36 Cal.4th at p. 1018 [reasonable to require mother to be alcohol free before visitation with children].)

We accordingly conclude the dispositional order requiring drug testing was not an abuse of the juvenile court's broad discretion.

DISPOSITION

The juvenile court's dispositional order is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.*

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