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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re K.D., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.P.,

Defendant and Appellant.

B277022

(Los Angeles County
Super. Ct. No. DK01128)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Reversed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Keith Davis, Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother appeals from a judgment declaring her then two-year-old daughter, K.D., a dependent child as described in Welfare and Institutions Code section 300, subdivision (b).¹ Mother came to the attention of child protective services after she was arrested attempting to smuggle methamphetamine into a state prison while K.D. was present. Notwithstanding this incident, the undisputed evidence showed mother had no criminal history, no child welfare history, and no substance abuse history prior to the offense. She admitted the offense, committed herself not to repeat it, was gainfully employed, and had stable housing. On this record, we conclude the evidence of mother's one-time offense was insufficient to find a *current* substantial risk of serious physical harm to K.D. at the time of the adjudication hearing. We reverse.

FACTS² AND PROCEDURAL BACKGROUND

1. *Family Background*

K.D. was born in November 2012. The family consists of mother and father, who are not married, and K.D. Mother was at all times a resident of Los Angeles County. Father lived in Texas when child protective services filed the dependency petition. He returned to California to assume custody of K.D.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise designated.

² Consistent with our standard of review, we state the record in the light most favorable to the juvenile court's judgment. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

2. *Detention and Dependency Petition*

On March 28, 2015, the Kings County Human Services Agency (the Agency) received a referral alleging that mother had been arrested for conspiracy to introduce a controlled substance into the Corcoran State Prison during a visit. K.D. was present with mother at the visit and during her arrest.

A social worker for the Agency met with mother that evening. He reported that mother was “cooperative and she admitted to the allegations” regarding the criminal offense. Mother told the social worker that she lived in Long Beach and had been visiting her ex-boyfriend, who was incarcerated in the state prison. She denied having any substance abuse issues and pleaded with the social worker not to take her child. Mother reported that K.D. had never resided with father; however, father had regular contact with K.D. from the child’s birth until November 2014, when father moved to Texas. The social worker detained K.D. and explained to mother that she would be asked to participate in services to regain custody of her child. Mother indicated that she understood and expressed her intention to regain custody.

On April 1, 2015, the Agency filed a dependency petition on behalf of K.D. in the Kings County juvenile court. The petition alleged, pursuant to section 300, subdivision (b): “The child, [K.D.], has suffered, or there is substantial risk that the child will suffer, serious physical harm or illness, as a result of the [mother’s] willful or negligent failure to provide the child with a safe environment, as [mother] engaged in illegal activities.” The petition went on to allege mother had “attempted to smuggle methamphetamine into Corcoran State Prison, with her child, [K.D.], present,” and listed the criminal charges filed against mother.

The court determined the Agency had presented a prima facie case for dependency jurisdiction, and detained K.D. in the Agency's custody, pending a full hearing on jurisdiction and disposition. The court granted the Agency discretion to release K.D. to father after it completed a placement evaluation.

3. *Jurisdiction Report*

On April 16, 2015, the Agency filed a report in support of its recommendation to assert dependency jurisdiction. The report indicated that mother had no prior criminal arrests or convictions, and no prior child welfare referrals.³ The Agency did not interview mother as part of its assessment, but did obtain mother's agreement to submit to drug testing. Mother tested negative for all controlled substances.

The Agency interviewed father, who had returned to California from his home in Texas after learning of K.D.'s detention. Father met mother in 2011 and they were a couple for approximately one year before mother became pregnant. He was present throughout the pregnancy and after K.D.'s birth, until he moved to Texas. He maintained contact with K.D. and provided financial support to mother and child. He returned from Texas at least one weekend a month to spend time with his daughter.

Father reported he was "shocked and surprised" to learn of mother's arrest. He did not believe mother had ever been involved with drugs, and he had only seen her drink alcohol on a few occasions. He was aware that mother had an ex-boyfriend who was in prison, but he did not know the details behind the man's incarceration.

³ There were two prior child welfare referrals pertaining to mother when she was a minor. Both referrals were investigated in 2005 and deemed unfounded.

Father told the Agency that he had taken an indefinite leave of absence from his job in Texas and he was willing to move back to California if it would help him gain custody of K.D. Father had a home in Los Angeles County.

As for K.D., the Agency reported she was a “healthy child and currently does not have any medical problems.” She had “met all developmental milestones thus far and does not have any developmental problems.” The foster care provider likewise reported there were no “emotional or behavioral problems with [K.D.]” In general, the Agency found K.D. “is an overall well adjusted, healthy and happy child,” and “she is bonded to both parents.”

The Agency recounted two of the parents’ visits with K.D. in its jurisdiction report. In the first visit, K.D. was reportedly “happy to see her parents,” and she was “observed to continually laugh loudly and began talking and singing to her parents.” The parents brought K.D. an Easter basket and “the family played, interacted and was engaged in each other’s company.” At the end of the visit, K.D. “became upset and did not want to leave.” When the parents walked her to the gate to release her to the foster care provider, K.D. “became very upset and refused to release [mother].” Mother soothed K.D. and eventually placed her back with the care provider.

In the second visit, K.D. was again “very happy to see the parents.” She ran around and kicked a ball with the parents; later, mother spent time grooming K.D.’s hair. The parents took turns holding her, engaged in talk, and sang songs to K.D. The social worker reported that “[t]he parents appeared loving and appropriate.” Mother became “emotional” when the visit ended, but father remained calm and ensured that the visit concluded appropriately.

On April 14, 2015, after completing a safety assessment of father's home in Los Angeles County, the Agency released K.D. to father's custody.

The Agency recommended that the juvenile court take jurisdiction of the matter and transfer the case to Los Angeles County for disposition. In support of the recommendation, the Agency maintained that K.D.'s "safety and well being cannot be ensured in the [mother's] care," citing the arrest and mother's admission that she "deliberately and purposefully brought the child to the prison with the intent of smuggling illegal narcotics for her significant other." In view of that evidence, the Agency stated, "[t]here are concerns regarding [mother's] decision making and ability to ensure the child's safety and care from criminal and dangerous activity."

4. *Jurisdiction Finding and Transfer Order*

On April 21, 2015, the Kings County juvenile court held a hearing on jurisdiction and disposition. Mother waived her right to be represented by an attorney and submitted on the petition and Agency's report without admitting the petition's allegation. The court found the petition's allegation true, and declared K.D. a dependent child as described in section 300, subdivision (b). Without ruling on disposition, the court transferred the matter to Los Angeles County, where K.D. reportedly resided with father.

5. *Subsequent Proceedings, Disposition and Exit Orders*

After receiving the transfer order, the court ordered the Los Angeles County Department of Children and Family Services (the Department) to file a status review report and set the matter for a review hearing.

Between April 2015 and March 2016, the matter was transferred back to Kings County and then retransferred to Los Angeles County due to confusion about the residence of father and K.D. Upon return to Los Angeles County, the Department continued to monitor and report on the status of the family in advance of a disposition hearing, ultimately scheduled for June 16, 2016. The reports indicated that K.D. and father continued to reside in Los Angeles County with the paternal grandmother. The home was appropriate and father had obtained local employment. K.D. attended daycare and was described by her teachers as one of the best students.

Mother resided with the maternal grandmother in a two-bedroom apartment in Los Angeles County. She was employed as a customer service attendant at Goodwill and as a part-time waitress. Mother visited K.D. at least twice per week; the visits were appropriate. Mother indicated she wanted joint custody of K.D. and wanted the monitored-visit restriction lifted.

On June 8, 2016, mother sat for an interview with a Department social worker. Mother again admitted that she had attempted to sneak illegal drugs into prison for her ex-boyfriend. A friend of her ex-boyfriend made the request, and mother agreed to do it for money. She reported that the conviction had been reduced to a misdemeanor and she was serving three years probation. She was not required to report to a probation officer, and was told she could request termination of probation after one year if she had no additional offenses.

Mother reported she was 28 years old and K.D. was her only child. She was born and raised in Los Angeles County, and had considerable family support, especially from her mother. She graduated high school and attended Long Beach Community College. She never had a substance abuse issue and did not use drugs.

In its disposition report, the Department noted that mother had never attempted to enroll in parenting education classes, though mother maintained she would have enrolled had she been ordered to do so. The Department also reported that its social worker detected the smell of cigarette smoke during one of K.D.'s monitored visits at the maternal grandmother's home. The Department recommended that the court terminate its jurisdiction and enter a family law order granting the parents joint legal custody and father sole physical custody, with monitored visits for mother.

On June 16, 2016, the Los Angeles County juvenile court held a hearing on disposition. The court found by clear and convincing evidence that returning K.D. to mother's custody posed a substantial danger to the child's health and safety and that no reasonable means existed to protect K.D. without removing her from mother's physical custody.⁴ (See § 361, subd. (c).) The court ordered K.D. to be placed with father, her previously noncustodial parent. (See § 361.2, subd. (a).) Finally, the court terminated its jurisdiction and entered a juvenile court exit order granting father sole legal and physical custody. (See § 362.4.)

⁴ In delivering its disposition finding, the juvenile court also stated that jurisdiction had been established under section 300, subdivisions (a) through (j). The record leaves little doubt that this was a misstatement on the court's part at the hearing, and all written orders—including the order issued after the disposition hearing—reflect that jurisdiction was found under only section 300, subdivision (b). In any event, the dependency petition did not allege any basis for jurisdiction other than subdivision (b), and there was no evidence to support a jurisdiction finding under any subdivision of section 300.

DISCUSSION

Mother contends the evidence adduced in support of jurisdiction was insufficient to find a current substantial risk that K.D. would suffer serious physical harm as a result of parental neglect. We agree, and conclude the evidence of mother's one-time criminal offense was insufficient to adjudicate K.D. a dependent child under section 300, subdivision (b).

Section 300, subdivision (b) authorizes juvenile court jurisdiction where the evidence shows that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child" The final sentence of section 300, subdivision (b) states, "The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

"The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) "Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300." (§ 355, subd. (a).) "On appeal, the 'substantial evidence' test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.]" (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.)

"[W]e must uphold the court's [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings." [Citation.] Substantial evidence is evidence that is reasonable, credible, and

of solid value.” (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.)

There is consensus among the appellate courts that a juvenile court cannot exercise dependency jurisdiction under section 300, subdivision (b) absent some evidence that the child faces a *current* risk of substantial physical harm due to parental neglect. (See *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397 [“the purpose of section 300, subdivision (b) is to protect the child from a substantial risk of *future* serious physical harm and that risk is determined as of the time of the jurisdictional hearing”]; see also *In re Carlos T.* (2009) 174 Cal.App.4th 795, 803 [finding of current risk is required for jurisdiction under subdivision (b)], but see *In re J.K.*, *supra*, 174 Cal.App.4th at p. 1435, fn. 5 [initial exercise of jurisdiction may be based upon either a prior incident of serious harm or risk of serious harm].)

The logic underpinning this view is straightforward and compelling: if dependency jurisdiction could be based solely upon past abuse or neglect without a current risk of harm, a juvenile court could take jurisdiction but would be required to immediately terminate the dependency under the final sentence of section 300, subdivision (b), which states: “The child shall continue to be a dependent child pursuant to this subdivision *only so long as is necessary* to protect the child from risk of suffering serious physical harm or illness.” (§ 300, subd. (b), *italics added*; *In re J.N.*, *supra*, 181 Cal.App.4th at p. 1023 [disagreeing with *In re J.K.*, at p. 1435].) Like the majority of courts, we presume the Legislature did not intend such an absurd result when it enacted section 300, subdivision (b), and preserved its final sentence through numerous statutory amendments. (See *In re J.N.*, at p. 1024 [examining statutory history]; cf. *In re*

Adam D. (2010) 183 Cal.App.4th 1250, 1261-1262, fn. 7 [observing last sentence of § 300, subd. (b) is not operative where “the juvenile court did not declare [the minor] a dependent child”].)

Because a current risk of harm is required, “previous acts of neglect, standing alone, do not [suffice to] establish” jurisdiction; rather, “there must be some reason beyond mere speculation to believe they will reoccur.” (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565; *In re Rocco M., supra*, 1 Cal.App.4th at p. 824 [“the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; ‘[t]here must be some reason to believe the acts may continue in the future.’”].) Stated differently, section 300, subdivision (b) “effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).” (*In re Savannah M., supra*, 131 Cal.App.4th at p. 1396; *In re J.N., supra*, 181 Cal.App.4th at p. 1023.)

Applying these principles, the *In re J.N.* court articulated a non-exhaustive list of factors for juvenile courts to consider in evaluating risk based upon a single episode of endangering conduct: “[A] juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of

a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.” (*In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1025–1026.)

In *In re J.N.*, the father drove while intoxicated with his wife (who also was intoxicated) and their three children in the car. He hit another car, and then crashed into a light pole while fleeing from the earlier accident. (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1014.) Two of the children were injured in the accident; one child’s injuries were serious. The father gave the responding officer false information about the collisions, he did not have a driver’s license, and he was agitated and uncooperative during his arrest. (*Id.* at p. 1016.) However, the parents had no history of legal issues involving their children, said they rarely drank alcohol, and recognized that they had used poor judgment on the night of the accident. (*Id.* at pp. 1017–1018.) The trial court adjudicated the children dependents under section 300, subdivision (b). (*In re J.N.*, at p. 1021.) The Court of Appeal reversed, stating, “In this case, the question is whether evidence of a single episode of parental conduct was sufficient to bring the three children within the juvenile court’s jurisdiction.” (*Id.* at p. 1022.) The court acknowledged “the evidence showed that the parents’ actions with regard to the drinking and driving incident had placed all their children at substantial risk of serious physical harm and was a cause of serious physical harm to” one child. (*Ibid.*) Nevertheless, “[d]espite the profound seriousness of the parents’ endangering conduct on the one occasion in this case,” the court determined “there was no evidence from which to infer there is a substantial risk such behavior will recur.” (*Id.* at p. 1026.) Instead, “[t]he evidence consistently indicated that the children were healthy, well adjusted, well cared for, bonded with each

other, and developing appropriately. . . . Significantly, both parents were remorseful, loving, and indicated that they were willing to learn from their mistakes.” (*Ibid.*) Thus, the *In re J.N.* court concluded that despite the parents’ serious lapse in judgment and endangering conduct, there was insufficient evidence to show the children were at current risk of harm when the juvenile court made its section 300, subdivision (b) finding.

The nature and circumstances of mother’s misconduct in this case were far less egregious than that displayed by the parents in *In re J.N.* K.D. did not suffer physical injury from mother’s endangering activity, and mother did not attempt to mislead authorities about what she had done.

Like *In re J.N.*, the evidence in this case contains factors which militate against the jurisdictional finding. There was nothing in the Agency’s jurisdiction report to establish, or from which to infer, a substantial risk that the misconduct would recur. The Agency’s report confirmed K.D. was a “healthy child,” with “[no] medical problems”; she had “met all developmental milestones”; and she was “an overall well adjusted, healthy and happy child,” who was “bonded to both parents.” Mother was cooperative with the Agency social worker, admitted her criminal wrongdoing, and stated her firm commitment to learn from the mistake so as not to endanger K.D. in the future. The Agency reported mother had no prior criminal arrests or convictions, no prior child welfare referrals, mother denied having a substance abuse history, and she tested negative for controlled substances.

The evidence also showed K.D. and mother had a stable support system that, having been alerted to this episode of poor judgment, could be expected to intervene to prevent future endangering activity. Father reported that he was surprised to learn of mother’s arrest, and immediately returned to California from Texas to take custody of K.D. after her detention. He had

been financially supporting mother and K.D. from Texas, and, having returned to California, demonstrated a clear intention to take a more significant role in K.D.'s physical and developmental care. Indeed, the two visits detailed in the Agency's jurisdiction report showed the parents' willingness and ability to work together, notwithstanding their past challenges, to provide a stable, safe and loving environment for K.D. Given mother's acceptance of responsibility and father's proactive response to K.D.'s detention, we see no reasonable basis to infer that the underlying circumstances of mother's offense would be repeated.

All told, there was no evidence presented in the Agency's report to suggest the endangering conduct that led to K.D.'s detention was likely to recur. The evidence did not support a finding that K.D. was a dependent child within the juvenile court's jurisdiction under section 300, subdivision (b).⁵

⁵ Because there was insufficient evidence to support the juvenile court's jurisdiction, all subsequent orders are necessarily vacated. To the extent the parents are unable to resolve existing custody disputes, such disputes must be addressed to the family court.

DISPOSITION

The judgment declaring K.D. a dependent child is reversed.

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JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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