Filed 10/22/15 In re June P. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JUNE P., a Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. BRITTANY F., Defendant and Appellant.	B261307 (Los Angeles County Super. Ct. No. DK06363)

APPEAL from orders of the Superior Court of Los Angeles County, Philip Soto, Judge. Reversed in part, affirmed in part, and modified.

Law Office of Lee Blumen and Lee Blumen, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court asserted jurisdiction over two-year old June P. under Welfare and Institutions Code section 300, subdivisions (a) and (b) based on domestic violence between her mother, appellant Brittany F. (Mother), and father, Michael P. (Father), and drug abuse on the part of both Mother and Father.[1] Mother contends substantial evidence did not support that Mother was at fault for the domestic violence or had a substance abuse problem, or that her actions in any way placed June at risk of harm, requiring her removal from Mother's custody. We agree and reverse the court's jurisdictional and dispositional findings as they pertain to Mother.[2]

FACTUAL AND PROCEDURAL BACKGROUND

In May 2013, approximately two months after June's birth, Mother and the maternal grandmother called police officers to report that Father was violating a protective order. They reported he was "loiter[ing]" around the grandmother's residence, demanding to see Mother, who was residing there with June. On separate occasions, he kicked the front door, broke a window, and exposed his buttocks. He also called Mother and the grandmother multiple times daily on their cell phones, cursing and calling them names. After Father's arrest on May 8, he claimed Mother had threatened to kill June. While investigating that allegation, police officers discovered the grandmother's home was filled with piles of belongings, rendering it unsuitable for an infant, and notified the Department of Children and Family Services (DCFS) of Father's allegation and the conditions in the family's home.

---

1 Undesignated statutory references are to the Welfare and Institutions Code.

2 Father is not a party to this appeal.

Investigating the officers' report, the caseworker found no signs that June had been neglected or abused, but found the maternal grandmother's home to be "filled with piles of trash in the manner of a hoarder." In addition, on May 8, 2013, Mother tested positive for marijuana. The allegation that June was in danger of physical harm from Mother was closed as "unfounded," but an allegation of general neglect was "substantiated" due to the condition of the home and Mother's positive drug test.[3] Mother agreed to a voluntary family maintenance program, which included participation in counseling, and to move in with her brother and sister-in-law until she could find permanent housing for herself and June. The caseworker closed the referral.

In February 2014, a new caseworker attempted to locate the family, and found that Mother and June had moved from the uncle's home six months earlier. Mother's probation officer reported that Mother had not been in contact with him.[4] On February 18, the caseworker visited the maternal grandmother's home and found her caring for June while Mother was at school. Mother had provided a letter giving the grandmother permission to obtain medical care for the child. The child appeared happy and bonded to her grandmother. There was no evidence of abuse. There were diapers and other baby supplies in the home, and ample food in the refrigerator. Although the residence was messy, it was sanitary and free from odor. The caseworker concluded Mother had made "an appropriate plan with grandmother." On February 19, the caseworker spoke to Mother, who reported she

---

[3] DCFS also investigated whether Father's actions had resulted in emotional abuse, and closed that investigation as "unfounded."

[4] Mother was on probation for burglary.

had had no contact with Father and no plans ever to see him again.[5] Mother agreed to schedule a visit. However, the caseworker did not hear from Mother. The caseworker attempted to make contact multiple times in March, April, May and June by calling, writing and visiting the grandmother's home, but was unable to do so.[6]

On July 15, 2014, DCFS filed a section 300 petition, alleging under subdivision (a) (serious physical harm) and (b) (failure to protect) that "[Mother and Father] have a history of domestic violence and engaging in violent altercations. On prior occasions [Father] threatened to kill [Mother and June] if [Mother] left [him]. Such violent conduct by the father against the mother endangers the child's physical health and safety and places the child at risk of physical harm, damage and danger." The petition alleged as further grounds for jurisdiction under subdivision (b) that: (1) Mother "has a history of substance abuse including methamphetamine, marijuana and alcohol" and "had a positive toxicology screen for marijuana on 05/08/2013, while the child was in [her] care and supervision" which "endangers the child's physical health and safety and places the child at risk of physical harm, damage and danger"; and (2) Father "has a history of substance abuse including[] methamphetamine, marijuana and alcohol, which renders [Father] unable to provide regular care of the child[,] . . . endangers

---

[5] Father was incarcerated as a result of his harassment of Mother and the maternal grandmother and his violation of the restraining order. When the caseworker attempted to contact him in July 2014, he was still incarcerated.

[6] During this period, the caseworker learned June was being taken for regular medical checkups, was up to date on all immunizations, and was in good health.

the child's physical health and safety and places the child at risk of physical harm, damage and danger."[7]

The July 2014 report stated that detention was necessary "based on the inability to locate mother and child in order to ascertain the physical and emotional safety of that child as well as mother's non-compliance with case plan goals and safety plan." It further stated: "Because mother has not followed through on [the voluntary family maintenance plan] the Department cannot ascertain the safety of mother and/or child at this time." At the July 15, 2014 detention hearing, at which neither parent was present, the court issued a protective custody warrant for June and an arrest warrant for Mother.

The caseworker prepared a jurisdiction/disposition report on August 26, 2014. There had still been no contact with Mother. The caseworker was unable to interview Father face-to-face, but spoke to him telephonically on July 28.[8] He reported Mother was "'not doing so good'" and "'using again.'" In a second interview on August 22, Father stated that although he had not seen Mother or June

---

[7] Apart from Mother's single positive test for marijuana in May 2013, the basis for the allegations of drug abuse is unclear. There were no witness statements suggesting substance abuse was a problem for either parent. The 2013 police reports do not indicate either parent was under the influence when officers investigated the domestic violence incidents, and the officers did not report that drugs or paraphernalia were found at the grandmother's house or on Father's person when he was arrested. According to the detention report, Mother had a minor criminal history, including a 2010 arrest for "disorderly conduct: intox[ication] drug/alcoh[ol]," but nothing else in her record pertained to drugs or drug-related crimes. Father's criminal record included multiple arrests (in 2007, 2008, 2010, 2011 and 2013) for possession of "marijuana/hash" and for drug or alcohol related disorderly conduct, but there is no indication he had ever been arrested in possession of more serious drugs. In any event, there is no evidence the caseworker accessed Father's criminal history prior to preparing the detention report or the section 300 petition.

[8] Father was reportedly working at that time, having been released since the caseworker's last attempt to contact him.

for "several months" and was forbidden from approaching them by the restraining order, he "kn[e]w [Mother] uses meth, marijuana and alcohol." He described two incidents of domestic violence that occurred when they were together: the first was "just words"; during the second, he grabbed Mother's wrist. The paternal grandmother said she had seen Mother at a store with June "high as a kite," but provided no date for this encounter.

On September 10, 2014, after learning of the order of detention for June and the warrant for her arrest, Mother contacted DCFS. June was detained on September 11, 2014.[9]

In an interview prior to the jurisdictional hearing, Mother denied ever using drugs or alcohol, including in May 2013 when she tested positive for marijuana.[10] She reported that Father had committed acts of domestic violence when they were together, including threatening her and June's life and "sock[ing]" Mother when she was pregnant. In addition, he had broken multiple windows at the grandmother's home. On October 2, 2014, the court instructed DCFS to set up an on-demand drug and alcohol testing schedule for both parents. In November 2014, the caseworker reported Mother had been referred for services, including random drug testing, but had not appeared for any of the tests (scheduled on October 10, 15 and 29).[11] Mother said she missed one test because she had been briefly

---

[9] June was placed with the paternal grandmother for a few weeks, until the grandmother's sudden illness and death. June was in foster care at the time of the jurisdictional/dispositional hearing.

[10] Mother reported Father drank "a lot" and occasionally smoked marijuana. She had never observed him use methamphetamine, but heard he had used it long before they met.

[11] Father, who had a medical marijuana card, tested positive for marijuana. Father's probation officer stated the probation department was primarily concerned with Father's alcohol consumption, and reported that in probation department testing, Father's results had been negative for all inebriating substances except marijuana.

incarcerated for an outstanding warrant, and another because she lost her identification when the maternal grandmother's purse was stolen. She continued to deny using drugs or alcohol.

The parties presented no additional evidence at the November 17, 2014 jurisdictional hearing. The court heard argument from Mother's counsel, who urged the court to dismiss the petition with respect to Mother. He pointed out that Mother had taken the correct steps with respect to Father's domestic violence by calling the police to enforce the restraining order. He further contended there was no evidence of drug use on her part other than the May 2013 test indicating the presence of marijuana, and no indication June had ever been abused or neglected. Father's counsel also asked that the petition be dismissed, pointing out that the domestic violence incidents were in the past, the couple was no longer together, and all Father's tests had been clean, except for marijuana for which he had a prescription. Without hearing from counsel for DCFS or June's counsel, the court issued its ruling, sustaining all the allegations of the petition.

Turning to disposition, the court found by clear and convincing evidence that there were no reasonable means to protect June without removing her from her parents' custody. It ordered Mother and Father to participate in individual counseling to address parenting and domestic violence, and to undergo eight random drug tests. If any test was missed or dirty, the parent was to participate in a drug treatment program. June remained detained in foster care. The parents were allowed monitored visitation only. Mother appealed.

DISCUSSION

Mother contends substantial evidence does not support the juvenile court's jurisdictional and dispositional findings as they relate to her. On this record, we agree.[12]

In order to assert jurisdiction over a minor, the juvenile court must find that he or she falls within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) DCFS bears the burden of proving that the minor comes under the juvenile court's jurisdiction. (*Ibid.*) The finding that the minor is a person described by section 300 must be made under the preponderance of the evidence standard. (§ 355, subd. (a).) On appeal, "'we 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.'" (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022, quoting *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1378.) "'Substantial evidence is evidence that is reasonable, credible, and of solid value.'" (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1022.) The juvenile court's findings must be based on the facts before it, not suspicion, speculation or conjecture. (*People v. Reyes* (1974) 12 Cal.3d 486, 500; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424.)

Here, the court found jurisdiction appropriate under section 300, subdivisions (a) and (b). A child is within the jurisdiction of the juvenile court under subdivision (a) if he or she "'has suffered, or there is a substantial risk that

---

[12] As the court's jurisdictional and dispositional findings were the basis for removing June from Mother's custody and limiting Mother to monitored visitation, we reject respondent's suggestion that the appeal is moot or nonjusticiable because the jurisdictional allegations are not contested to the extent they pertain to Father alone.

[he or she] will suffer, serious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian.'" Subdivision (b) permits the court to adjudge a child a dependent of the juvenile court where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, . . . by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." A true finding under subdivision (b) requires proof of: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Where, as here, there is no evidence the child has suffered serious physical harm or neglect of any type, the agency is required to show that he or she is "at 'substantial *risk*' of 'suffer[ing] serious physical harm' inflicted nonaccidentally" by the offending parent (to support subdivision (a) of section 300), or "at 'substantial *risk*' of 'suffer[ing] serious physical harm'" caused by the offending parent's failure to protect him or her (to support subdivision (b)). (*In re Jonathan B.* (2015) 235 Cal.App.4th 115, 119.) The basic question to be addressed in connection with a true finding under subdivision (a) of 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, italics added.) The same is true for subdivision (b). (See, e.g., *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396 ["The third element [of a true finding under 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 . . . ."].)

One factual basis to support the court's finding of a substantial risk to June at the time of the November 2014 jurisdictional hearing was Mother and Father's "history of domestic violence" and of "engaging in violent altercations." Courts

have held that "domestic violence in the same household where children are living" can be considered "a failure to protect [them] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194; accord, *In re T.V.* (2013) 217 Cal.App.4th 126, 135.) As respondent acknowledges, however, the jurisdictional findings based on domestic violence were dependent entirely on Father's actions a year and a half earlier. He was the instigator of the violence, and it was undisputed that Mother had done everything in her power to protect herself and June. Prior to May 2013, she separated from Father and when he violated the protective order, called authorities, causing him to be arrested and incarcerated. She repeatedly stated she had no intention of reestablishing a relationship with him, and nothing in the record suggests otherwise. Accordingly, the past incidents of domestic violence did not support a finding that Mother represented a risk of harm to June.[13] (See *In re Jonathan B., supra,* 235 Cal.App.4th at pp. 119-120 [jurisdictional finding against mother reversed where she and father had been living apart for ten months, she immediately called police and obtained a restraining order when he assaulted her during a custody exchange, and sole prior incident of domestic violence occurred five years earlier]; *In re Jesus M.* (2015) 235 Cal.App.4th 104, 113 [incidents of domestic violence occurring three years earlier could not support

---

[13] It is unclear whether DCFS and/or the court intended to suggest that Mother's actions in connection with the domestic violence created a risk of harm to June because the domestic violence allegations of the petition were drafted ambiguously and sustained as written. The first sentence -- "The child June [P.'s] mother, Brittany [F.] and the child's father, Michael [P.] have a history of domestic violence and engaging in violent altercations" -- could be read as suggesting Mother was at fault. To avoid confusion, the domestic violence allegations should be amended to strike Mother's name from the first sentence, as set forth in the disposition below.

subdivision (b) of section 300 finding where there was no evidence of current violent behavior and parents had long been separated].)

The other factual basis relied on by the court to support jurisdiction, and the sole finding to support that Mother posed a risk of harm to June, was Mother's alleged drug use. The only evidence that could be described as "reasonable, credible and of solid value" supporting that Mother used an illicit substance was the May 2013 drug test, positive for marijuana. A parent's occasional marijuana usage, without more, cannot support a jurisdictional finding. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453; *In re David M.* (2005) 134 Cal.App.4th 822, 829-830; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1344-1346.)

Respondent contends that Mother's three missed tests in October 2014 supported the court's finding that she "has a history of substance abuse, including methamphetamine, marijuana and alcohol . . . ." A missed drug test without excuse may be considered "dirty." (See *Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1343; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.) But in the absence of evidence that Mother used an illicit substance other than marijuana, it cannot reasonably be inferred that the tests would have been positive for any other substance. (Compare *Western Digital Corp. v. Superior Court* (1998) 60 Cal.App.4th 1471, 1487 [factual finding may be supported by inference, "'but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. [Citation.]'"] with *In re Christopher R., supra*, 225 Cal.App.4th at p. 1217 [juvenile court could properly consider missed drug test to support jurisdictional finding that mother abused cocaine, where mother tested positive for cocaine when child was born].)

Respondent points out that in her August 2014 interview, the paternal grandmother stated she had seen Mother "high." The grandmother did not say when the observation occurred, and could provide no information concerning what substance Mother might have consumed. Even were we to assume Mother had been under the influence of a "hard" drug on that occasion, an isolated incidence of drug usage at an unspecified time in the past cannot support a jurisdictional finding where there is no evidence the child was ever abused or neglected. (*In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003.)

Respondent's contention that Mother's "conviction" for "disorderly conduct: intox[ication] drug/alcoh[ol]" supports the court's finding is mistaken. The record shows a five-year old arrest, not a conviction, and no indication what substance was involved. Mother's record is otherwise free of any substance-related arrests or convictions.

Finally, respondent seeks to rely on Father's July and August 2014 statements to the caseworker that he "kn[e]w" Mother was "using again." These statements were made shortly after Father's release from incarceration, during which time he could have had no contact with Mother. There was nothing in the record to suggest he had seen Mother since his July 2014 release. Indeed, Father expressly denied having seen Mother for "several months" -- and was prohibited by the restraining order from being anywhere near her. Hence, Father's statement could not reasonably be relied on as the sole basis to support the finding that Mother had a substance abuse problem that endangered June's safety or placed her at risk of physical harm.[14]

---

[14] While we do not judge credibility, we note that DCFS had determined Father's earlier claim that Mother threatened to kill the child to be unsubstantiated.

Moreover, even were we to conclude that any of the evidence put forward by respondent supported a finding that Mother used drugs more than once, the agency must do more to meet its burden of proof under section 300, subdivision (b) than provide evidence of periodic use -- there must be evidence of substance abuse creating a specific, nonspeculative, substantial risk of serious physical harm to the child. (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 725; *In re Drake M.* (2012) 211 Cal.App.4th 754, 764-765; *Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1344-1346; *In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003.)[15] Here, it was undisputed that June was well cared for, happy and healthy. In addition, she was appropriately immunized and regularly taken to medical appointments. When necessity required Mother to leave her, she made appropriate provisions for her care. In the absence of evidence that Mother failed to adequately supervise or protect June, the jurisdictional finding that Mother's "substance abuse" and "positive toxicology screen for marijuana" endangered the child's safety or placed her at risk of physical harm must be reversed. The

---

[15] In *Drake M.*, the court held that a finding of substance abuse must be based on either a professional diagnosis or evidence that the parent has exhibited significant impairment manifested by "'failure to fulfill major role obligations at work, school, or home"; "'recurrent substance use in situations in which it is physically hazardous'"; "'recurrent substance-related legal problems'"; or "'continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.'" (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766, quoting American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000), p. 199.) The court in *Rebecca C.* stated more concisely, "a finding that a parent has a substance abuse problem justifying the intervention of the dependency court" is supported by "a medical diagnosis of substance abuse" or "evidence of life-impacting effects of drug use." (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726.) Whichever definition is used, the evidence did not support the finding of substance abuse on Mother's part.

dispositional finding that June should be detained from Mother to protect her from harm must also be reversed.[16]

As appellate courts have repeatedly stated: "'Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness.'" (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 399, italics deleted, quoting *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 823; accord, *In re John M.* (2013) 217 Cal.App.4th 410, 418; *In re Noe F.* (2013) 213 Cal.App.4th 358, 366; *In re David H.* (2008) 165 Cal.App.4th 1626, 1642; *In re Janet T.* (2001) 93 Cal.App.4th 377, 391.) DCFS was understandably concerned when Mother failed to comply with the voluntary family maintenance plan and keep in contact with the caseworkers. But a parent's failure to cooperate with DCFS or to complete a voluntary family maintenance program does not provide grounds for assertion of jurisdiction over a child under section 300. The allegations substantiated by DCFS in May 2013 -- the disorderly condition of the family's home and Mother's positive test for marijuana -- would not have supported assertion of jurisdiction over June at the time, and in the absence of substantial evidence that Mother had a substance abuse problem or that June had been abused or neglected, did not form a proper basis for jurisdiction 18 months later.

---

[16] As stated in *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1501, by the time an appellate court reverses a dependency order, the record on which it relied may be "ancient history." Evidence may have been uncovered since the November 2014 jurisdictional/dispositional hearing that substantiates DCFS's suspicions and the juvenile court's findings. After remand, DCFS is not precluded from filing an amended or supplemental petition.

DISPOSITION

The jurisdictional finding that Mother's "history of substance abuse" and "positive toxicology screen for marijuana" endangered June's "physical health and safety" and placed her "at risk of physical harm, damage and danger" (b-1 of the petition) is reversed. The jurisdictional order is modified by striking the words "mother, Brittany [F.]" from the first sentence of the domestic violence findings (a-1 and b-3) of the petition. In all other respects, the jurisdictional order is affirmed. The dispositional order is reversed with respect to Mother. In all other respects the dispositional order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.