

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA 09-1405

JOHN BARBER

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HEALTH & HUMAN SERVICES

APPELLEE

Opinion Delivered MAY 5, 2010

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT
[NO. JV-2008-249]

HONORABLE MARK HEWETT,
JUDGE

AFFIRMED; MOTION GRANTED

JOHN B. ROBBINS, Judge

On October 19, 2009, the Sebastian County Circuit Court entered an order terminating appellant John Barber's parental rights to his son, D.B., who was born on September 5, 2007. Mr. Barber has timely appealed from the termination order.

Mr. Barber's counsel has filed a motion to withdraw and a no-merit brief pursuant to *Linker-Flores v. Arkansas Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004), and Arkansas Supreme Court Rule 6-9(i). The brief explains that the termination decision was the only adverse ruling arising from the termination hearing, and that there can be no meritorious appeal challenging the termination order. The clerk of this court mailed a copy of his counsel's motion and brief to Mr. Barber, informing him of his right to file a list of pro se points for reversal. Mr. Barber has filed a list of pro se points, but none of his points

demonstrate error. The attorney ad litem for D.B. has filed a brief requesting that the order of termination be affirmed. Because we agree that the appeal is wholly without merit, we affirm the termination order and grant appellant's counsel's motion to withdraw.

This case originated on April 3, 2008, when appellee Arkansas Department of Human Services (DHS) took an emergency hold of D.B. after the Fort Smith Police discovered a large quantity of methamphetamine and drug paraphernalia at the home occupied by Mr. Barber and D.B.'s mother. D.B.'s mother was arrested on drug charges that night, while Mr. Barber fled the scene. In addition to finding evidence of drug dealing, the DHS worker called to the scene found the home to be filthy, and numerous weapons were found in plain view and accessible. The trial court entered an order of emergency custody placing D.B. with DHS, and on October 10, 2008, D.B. was found by the trial court to be dependent/neglected.

The original goal of the case was reunification. However, in a March 10, 2009, review order, the trial court changed the goal to termination of parental rights and adoption. The trial court noted that D.B.'s mother had consented in writing to voluntarily terminate her parental rights, and that Mr. Barber was serving a fifteen-year prison sentence. DHS filed a petition to terminate parental rights on March 20, 2009, and a termination hearing was held on August 24, 2009.

At the termination hearing it was stipulated that D.B.'s mother had agreed to relinquish her parental rights, and she is not a party to this appeal. A judgment was

introduced showing that, on June 4, 2008, Mr. Barber pleaded guilty to multiple drug offenses, including maintaining a drug premises and possession of methamphetamine with intent to deliver, and was sentenced to a total of fifteen years in prison. Mr. Barber was serving his prison sentence and had not seen D.B., who was then almost two years old, since D.B. was eight months old.

Mr. Barber testified at the termination hearing and said that he loved his son and wanted to retain his parental rights. Mr. Barber stated that he completed every program that was available while he was in prison, including anger management, parenting classes, and two alcohol-treatment programs. Mr. Barber acknowledged prior drug-related offenses and said he has been addicted to methamphetamine since he was in his early teens. He also admitted to going to prison for sexual abuse. However, Mr. Barber described himself as a changed man and said he will be eligible for parole in a year. He stated that, given about three months to become stable after his prison release, he will not have a problem taking care of D.B.

Officer Wayne Barnett gave testimony about the drug raid that was executed at Mr. Barber's home on April 3, 2008. Officer Barnett stated that the police had made controlled drug buys from Mr. Barber and went to his house to arrest him. After the police knocked for several minutes with no answer, they forced entry and found evidence of an illicit methamphetamine business. Mr. Barber and D.B.'s mother arrived with D.B. while the search was being conducted, and Mr. Barber fled on foot. Officer Barnett found numerous

weapons, such as knives and swords, within reach of a small child. He said that the house was filthy and unsafe for small children.

DHS worker Robbie McKay also testified. Ms. McKay stated that D.B. presently lives with his aunt and uncle, who hope to adopt him. Ms. McKay testified that given Mr. Barber's criminal history, there would be a risk of harm in the event D.B. were ever placed back in his care. Ms. McKay recommended termination of his parental rights and thought it was in D.B.'s best interest to be adopted by his aunt and uncle.

An order forever terminating parental rights must be based on clear and convincing evidence that termination is in the child's best interest. Ark. Code Ann. § 9-27-341(b)(3)(A) (Repl. 2009). Factors to consider in determining best interest are the likelihood of adoption and potential harm caused by returning the child to the custody of the parent. *Id.* Additionally, DHS must prove at least one statutory ground for termination by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b)(3)(B) (Repl. 2009). The purpose of terminating a parent's rights to his or her child is to provide permanency in the child's life where returning the juvenile to the family home is contrary to the child's health, safety, or welfare, and where it appears that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341(a)(3) (Repl. 2009). We do not reverse a termination order unless the trial court's findings were clearly erroneous. *Meriweather v. Arkansas Dep't of Health & Human Servs.*, 98 Ark. App. 328, 255 S.W.3d 505 (2007).

In the present case the trial court found termination of Mr. Barber's parental rights to be in D.B.'s best interest. The trial court specifically found that D.B. is readily adoptable by his aunt and uncle, and that there would be a substantial risk of danger if D.B. were placed with his father. The trial court further found that DHS met its burden of proof as to Ark. Code Ann. § 9-27-341(b)(3)(B)(viii), which provides as a ground for termination that, "[t]he parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life."

In Mr. Barber's counsel's brief, she asserts that the trial court's findings were not clearly erroneous and that there can be no meritorious argument challenging the sufficiency of the evidence to terminate Mr. Barber's parental rights. We agree. The evidence demonstrated that D.B. is likely to be adopted and that, even if he could be returned to his father's custody, his welfare and safety would be placed in jeopardy. Moreover, as the trial court found, Mr. Barber has been sentenced to a fifteen-year prison term, which is a substantial period of the life of D.B., who was only two years old when termination was ordered. While there is the possibility of parole, appellant's counsel correctly asserts that it is the sentence, as opposed to parole eligibility, that controls in determining whether this statutory ground has been satisfied. *See Fields v. Arkansas Dep't of Human Servs.*, 104 Ark. App. 37, 289 S.W.3d 134 (2008); *Jones v. Arkansas Dep't of Human Servs.*, 70 Ark. App. 397, 19 S.W.3d 58 (2000).

Having concluded that appellant's counsel has complied with the requirements for no-merit briefs, we now turn to Mr. Barber's list of pro se points. Although all are listed under the same point, Mr. Barber essentially raises four issues.

Mr. Barber first contends that termination of his parental rights was contrary to the evidence. He asserts that he completed every program available while in prison, which shows that he is trying to be a good parent. He further asserts that he is up for parole soon and most likely will be released. However, as we previously indicated in response to appellant's counsel's no-merit brief, there were sufficient statutory grounds and the trial court did not clearly err in protecting D.B.'s best interests by terminating Mr. Barber's parental rights.

Mr. Barber next complains that he asked his counsel without success to provide a record of the proceedings so he could better understand what was said and done at the trial level. However, Mr. Barber did receive a copy of his counsel's no-merit brief in compliance with Rule 6-9(i)(3). This brief contained a satisfactory abstract and addendum such that Mr. Barber was apprised of the proceedings below and given a meaningful opportunity to raise his pro se points.

Mr. Barber's third point is an allegation that Officer Burnett lacks credibility and that he lied during the termination hearing. This point is not persuasive because it is the trial court, and not the appeals court, that determines the credibility of the witnesses. *See Lee v. Arkansas Dep't of Human Servs.*, 102 Ark. App. 337, 285 S.W.3d 277 (2008).

Cite as 2010 Ark. App. 381

In Mr. Barber's remaining point, he contends that he is currently working on an appeal from his convictions because the officers arbitrarily entered his home without a warrant. However, Mr. Barber pleaded guilty to each of the offenses, and absent exceptions not apparent here, a criminal defendant may not appeal from a guilty plea. See *Wickham v. State*, 2009 Ark. 357, 324 S.W.3d 344.

Based on our review of the record and the briefs presented to this court, we conclude that there has been full compliance with Rule 6-9(i) and that the appeal is without merit. Appellant's counsel's motion to be relieved is granted and the termination order is affirmed.

Affirmed.

KINARD and MARSHALL, JJ., agree.