

# ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-28

ANTOINETTE HENDERSON,  
APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES,  
APPELLEE

**Opinion Delivered** June 2, 2010

APPEAL FROM THE MISSISSIPPI  
COUNTY CIRCUIT COURT  
[NO. JV-08-35]

HONORABLE RALPH WILSON, JR.,  
JUDGE,

AFFIRMED

---

**KAREN R. BAKER, Judge**

Appellant Antoinette Henderson challenges the trial court's termination of her parental rights. She alleges that the trial court abused its discretion in denying her motion to continue the case. The continuance would have effectively stayed the dependency-neglect proceedings pending resolution of her criminal charges that stemmed from the same facts initiating the dependency-neglect proceedings. She asserts that the continuance was necessary to protect her constitutional right against self-incrimination and her right to the effective assistance of counsel; furthermore, the continuance would in no way have offended the purpose of the juvenile code in that the juveniles' permanence was not in a state of flux because of placements with their respective fathers and that a delay in proceedings would not have injured the public interest. The constitutional arguments were not raised in the earlier adjudication hearings

prior to the court's findings of Ms. Henderson's involvement in the death of her child by failure to protect, which was the basis of the pending criminal charges. We find no error and affirm.

The Arkansas Department of Human Services (DHS) obtained an emergency order on June 18, 2008, which resulted in the removal of juveniles AV and IV, ages four and one, from the custody of their mother, Ms. Henderson. DHS alleged in the supporting petition that the juveniles' sibling, three-year-old EV, had died after apparent trauma to her abdomen and chest, and that due to the juveniles' mother being detained by law enforcement, there was no legal caretaker available for the juveniles.

On September 11, 2008, the Mississippi County Circuit Court adjudicated the juveniles dependent-neglected. The court's findings included two particularly relevant factual determinations: (1) that a deceased sibling had been physically abused by appellant's live-in boyfriend who was the putative father of the deceased child, and (2) that the abuse occurred after appellant left the deceased sibling unsupervised in the abusive father's care in direct contravention of a safety plan that DHS had previously implemented. Separate and apart from the adjudication proceeding, appellant was criminally charged with endangering the welfare of a minor and with homicide. The court presiding over the dependency-neglect proceeding would not consider reunification services to appellant until her criminal charges had been resolved. The court also granted DHS's December 16, 2008 petition seeking the removal of appellant's fourth child, HV, who was born six months after the initiation of the case. On

February 12, 2009, and set forth in an order filed March 12, 2009, the court found HV to be dependent-neglected. The trial court specifically found that appellant had endangered the lives of the other siblings in this case, and that appellant had neglected and failed to protect EV from serious physical abuse that caused the death of EV. Appellant never appealed these findings or asserted constitutional rights at these earlier proceedings.

Each of the three children, while placed temporarily in foster care, had a goal of reunification with each respective father, and that goal was achieved within six months. By April 2009, the goal remained permanent relative placement with all three fathers participating in the case. While DHS and the attorney ad litem attempted to terminate the parental rights of all three fathers, the trial court denied the joint petition and found all three fathers to be in substantial compliance with the court's orders and the case plan. The court's findings allowed the fathers to move one step closer to obtaining custody of the children and to provide the children with permanency outside of the foster care and adoption system.

On March 20, 2009, DHS and the attorney ad litem filed a joint petition for termination of parental rights of appellant, alleging that appellant was involved in EV's death, and that she had subjected EV to chronic abuse and/or extreme or repeated cruelty. The petition further alleged that there was little likelihood that reunification services to appellant would result in a successful reunification. By agreement, the hearing on the joint petition for termination was continued several times. The court eventually heard the petition on October 12, 2009.

At the termination hearing, appellant moved for a continuance, asserting that her criminal charges involving the same allegations on which the termination petition was based were still pending, and that she had no choice but to decline to testify at the hearing, thereby exercising her Fifth Amendment rights. DHS responded that the juvenile code's goal of permanency for the juveniles superseded appellant's "need to have her criminal charges resolved," and the trial court denied appellant's motion for the "reason set forth by [DHS]." The hearing proceeded with appellant refusing to testify in her defense, and the court terminated her rights to her three children.

Her sole point of reversal is stated as follows: The trial court abused its discretion in denying her motion to stay the proceedings pending resolution of her criminal charges, which operated to deny her a defense and penalized her for asserting her Fifth Amendment right against self-incrimination, where the juveniles' permanence was not in a state of flux, and thus, a delay in proceedings would not have injured the public interest or run counter to the purpose of the juvenile code.

There exists an intricate balance of protecting the constitutional rights of parents and protecting the parental rights of individuals who are simultaneously accused of a crime that gives rise to a petition for termination of those parental rights. It is undeniably improper to penalize one for the exercise of a constitutional right. *Brooks v. Tennessee*, 406 U.S. 605 (1972). DHS responds to appellant's arguments by noting that these arguments provide no relief for appellant because appellant failed to raise them at the adjudication hearing. DHS argues that

appellant's involvement in the death of her child had already been decided at the initial dependency-neglect hearing and that she did not appeal that decision; therefore, there was no reason to even revisit the issue at the termination proceeding. This issue is relevant to our analysis of whether the trial court abused its discretion in denying the continuance of the termination proceeding.

The question to us is whether the trial court abused its discretion in refusing to grant a continuance of the termination proceeding when appellant asserted that continuing the proceeding would violate her constitutional rights, each child was placed with each respective father in furtherance of and in compliance with the reunification plan, and that delay would not have injured the public interests or offended the principles of the juvenile code.

The denial of a motion for continuance is within the discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. See *Gonzales v. State*, 303 Ark. 537, 798 S.W.2d 101 (1990); *Smith v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 395, 401, 219 S.W.3d 705, 708 (2005). The appellant bears the burden of showing that the trial court's denial of a continuance was an abuse of discretion, and, in order to show an abuse of discretion, the appellant must show that she was prejudiced by the denial. See *David v. State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

To find an abuse of discretion in the trial court's denial of Ms. Henderson's request for a continuance, we must say that the trial court's decision to deny was done improvidently and without due consideration comparing the protection of appellant's constitutional right against

self-incrimination and effective representation with the protection of her parental rights. See *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003).

Under the facts presented here, we cannot reach that conclusion. Appellant never challenged the previous findings of the court that she had endangered the lives of her children. She never challenged the previous finding that one child died of injuries sustained after appellant had left the child in the unsupervised care of an individual in direct contravention of a previously crafted safety plan for the family. Prior to those findings being made, appellant never asserted her Fifth or Sixth Amendment constitutional rights. After those findings were made, appellant never appealed those findings. We cannot say that appellant has proved that she was prejudiced by the denial of the continuance because she failed to assert those rights at the earlier proceedings. Because those findings were already established, the trial court did not act improvidently or without due consideration when it denied appellant's request for a continuance.

Accordingly, we affirm.

PITTMAN and HART, JJ., agree.