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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT,
Plaintiff and Respondent,

v.

H.B.,
Defendant and Appellant.

A133054
(Sonoma County
Super. Ct. No. 2072-DEP)

H.B.,
Petitioner,

v.

THE SUPERIOR COURT OF SONOMA
COUNTY,

Respondent;

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT,
Real Party in Interest.

A134393
(Sonoma County
Super. Ct. No. 2072-DEP)

Defendant and petitioner H.B. (Father) is the father of K.B. (minor). The minor was detained at age five, after his mother (Mother) was arrested. The Sonoma County Human Services Department (Agency) was initially unable to locate Father, who remained unaware of the dependency proceeding until shortly after the jurisdictional and

dispositional hearing. Father was jailed one month later and remained in confinement until a few weeks before the permanency planning hearing. Although represented by appointed counsel in the dependency proceeding from the time of his arrest, Father received neither reunification services nor formal visitation. At the permanency planning hearing, Father sought an order postponing the permanent plan and granting him services and visitation or, alternatively, declining to allow minor's adoption. The juvenile court denied both requests. In this appeal and a separate petition for habeas corpus, Father contends he was denied due process and effective assistance of counsel.¹ We affirm.

I. BACKGROUND

The minor, then five years old, was the subject of a dependency petition under Welfare and Institutions Code² section 300, subdivisions (b) and (g), filed November 12, 2009. The petition alleged Mother had a history of substance abuse that periodically rendered her unable to provide adequate care and supervision. Most recently, she had been arrested for drug possession. The petition alleged Father's whereabouts were unknown.³

This was not the minor's first involvement with the dependency process. In March 2005, almost four months after his birth, he was detained for similar reasons. At that time, it was alleged Mother and Father had histories of drug abuse that impaired their ability to care for the minor. The Agency demonstrated Father had an 18-year history of drug, weapons, and property crimes, and a 2003 conviction for child neglect, suffered when he left a three-year-old child unattended in a car. In the months following this detention, Father maintained no stable home, failed to participate in reunification services, and eventually fell out of contact with the Agency. He was arrested and

¹ Because the arguments raised in the appeal (case No. 133054) and the petition (case No. A134393) are essentially identical, on the court's on motion we consolidate these two matters.

² All statutory references are to the Welfare and Institutions Code.

³ A dependency petition was also filed with respect to a half-sister of the minor, the child of Mother by a different father. That petition is not a part of this appeal.

incarcerated during the final months of the dependency proceeding, from November 2005 until its termination in July 2006, when sole custody was awarded to Mother.

Father was living in the State of Washington when the present dependency petition was filed and claims not to have received formal notice of either the detention hearing or the combined jurisdictional and dispositional hearing, which occurred on December 9, 2009. Because of a typographical error, notice of the hearings had been mailed to a nonexistent address, rather than the last known address for him maintained in Agency records. That last known address was the former home of Father's stepmother, who had moved from the address in 2008, nearly a year prior to the mailing.

In an attempt to locate Father prior to the jurisdictional/dispositional hearing, the Agency searched telephone and government database records. The search located an additional address for Father, maintained by both the Department of Child Support Services and the Department of Motor Vehicles. This turned out to be the correct address for Father's stepmother, which Father acknowledges using as his mailing address at the time. The Agency reported sending notice of the jurisdictional/dispositional hearing to this address, although both Father and his stepmother now deny receiving it.

At the jurisdictional/dispositional hearing, the juvenile court found true the jurisdictional allegations, granted reunification services to Mother, and scheduled a further hearing for June. The court found "adequate proof" the Agency had conducted a "reasonably diligent search" for Father.

Father learned of the dependency proceeding between December 15 and 21, 2009, one to two weeks after the jurisdictional/dispositional hearing.⁴ He immediately contacted the Agency. Although he was told he could not have custody of the minor, the Agency apparently undertook to arrange visitation. A month later, on January 22, 2010, Father was arrested for "several crimes," including possession of drug paraphernalia.

⁴ In documents submitted with the writ petition, Father claims he learned of the proceeding in two different ways. In a contemporaneous letter to his lawyer, he claimed he learned of the proceeding from a friend around December 15, while in a recent declaration he states he learned from his stepmother on December 21.

Between the time he contacted the Agency and his incarceration, Father was able to have one supervised visit with the minor.

Soon after Father's arrest, he was assigned counsel in the dependency proceedings. On February 17, the minor was placed in the care of Father's stepmother. At a hearing on March 4, 2010, Father's counsel told the court, "[Father has] written to the Court . . . basically asking to be involved. He's also trying to get into a residential treatment program. He's up in Glenn County Jail, so he's not able to be here, but I think he has had a visit and has been in contact with the social worker. So I'm hopeful that he'll be able to get involved and work towards being a better parent also."

At the time of the six-month review in June 2010, Mother was receiving reunification services and had successfully completed a residential drug treatment program. Although the minor continued to reside with Father's stepmother, Mother was having twice-weekly unsupervised visits with him. Counsel reported Father had been denied entry to a residential treatment program and sentenced to prison with a possible release date of June 2011.

Despite the positive reports in June, the Agency recommended termination of Mother's reunification services at the 12-month review hearing, held in December 2010. Two months after the six-month review hearing, Mother had tested positive for methamphetamine and lost contact with the Agency. Father remained incarcerated, but his attorney told the court "[Father is] obviously very happy with where [the minor] is placed and with the continued plan." The juvenile court terminated services to Mother and scheduled a permanency planning hearing. Father's stepmother was eventually found to be a willing and appropriate prospective adoptive parent for the minor.

Father was released from prison in June 2011, prior to a postponed permanency planning hearing, and filed a section 388 motion seeking reunification services and visitation with the minor. In a statement filed with the motion, Father claimed to have a "solid bond" with the minor based on having been "with [the minor] a lot in his early years," including some 50 visits in 2007 and 2008 and weekend visits from

December 2008 through Easter 2009.⁵ Father said he was looking for employment and had developed a plan for housing and caring for the minor. He was attending sobriety maintenance meetings “almost daily.” The juvenile court denied the motion, citing Father’s history of repeated incarceration and his then-current probationary status, a lack of demonstrated commitment to the minor, and his past failure to cooperate with the Agency.

In the alternative, Father requested the court grant guardianship of the minor to his stepmother as a permanent plan, rather than allow her to adopt. In testimony before the court, Father said he had written letters every two weeks to the minor while incarcerated and had visited him once since his release. He claimed to have cared for the minor “at least twice a week, sometimes more” in 2007 and 2008, until Mother disappeared with the minor. Based on that experience, he and the minor had developed a “wonderful relationship,” with the minor regarding Father as his father. Father envisioned initially working with his stepmother to help care for the minor and gradually taking more responsibility as he came to understand the minor’s needs. The court denied Father’s request for a guardianship, finding that as a result of Father’s extended absences from the minor’s life there was no existing beneficial relationship between Father and the minor. The court terminated Father’s and Mother’s parental rights and adopted as the permanent plan the minor’s adoption by Father’s stepmother.

II. DISCUSSION

Father appeals the denial of his motion for reunification services and the termination of his parental rights, contending the Agency’s failure to provide notice of the detention and jurisdictional/dispositional hearings denied him due process and his attorney’s failure to raise this issue during the proceedings constituted ineffective assistance of counsel.⁶

⁵ Father had been granted joint legal custody of the minor and physical custody every other weekend after filing an order to show cause in October 2008.

⁶ Father has made two motions for judicial notice, the first submitting documents relating to the erroneous address and the second relating to a family law proceeding

A. Lack of Notice

The law regarding notice in dependency proceedings was well summarized in *In re J.H.* (2007) 158 Cal.App.4th 174 (*J.H.*): “ ‘In juvenile dependency proceedings, due process requires parents be given notice that is reasonably calculated to advise them an action is pending and afford them an opportunity to defend.’ [Citation.] ‘The child welfare agency must act with diligence to locate a missing parent. [Citation.] Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. . . .’ [W]here a parent cannot be located notwithstanding a reasonable search effort, the failure to give actual notice will not render the proceedings invalid. [Citation.] [¶] ‘. . . If a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. . . .’ [Citation.] [¶] . . . [¶] Unless there is no attempt to serve notice on a parent, in which case the error has been held to be reversible per se [citations], errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice.” (*Id.* at pp. 182–183.) We review de novo the juvenile court’s finding of a reasonably diligent search. (*Id.* at p. 183.)

Father’s argument for a denial of due process focuses on the typographical error in the mailing of notice. That error, however, was essentially irrelevant. Because Father’s stepmother had moved from the address a year before the minor’s detention, even a correctly addressed envelope was unlikely to have reached Father.

More important, the Agency did not limit its efforts to that mailing. Through a further search of government records, the Agency located Father’s correct mailing

brought by Father following the termination of the first dependency proceeding. Because we assume for purposes of decision the initial mailing address was erroneous, the first motion is unnecessary, and we deny it on those grounds. We grant Father’s second motion and take judicial notice of the court documents generated between the termination of the first dependency proceeding and the minor’s second detention.

address, which was confirmed by two separate governmental agencies, and sent notice to this address. We agree with the juvenile court that the efforts described by the Agency, which resulted in the successful location of Father's mailing address, constituted a reasonably diligent search. The fact that Father claims not to have received the notice does not detract from the reasonableness of the Agency's search.

Father argues we should disregard the notice sent to his correct mailing address because the Agency did not submit postal receipts or other evidence of mailing. The Agency was not legally required to submit such evidence. (*J.H.*, *supra*, 158 Cal.App.4th at p. 184.) The Agency's statement that it made the mailings provided substantial evidence to support the juvenile court's implicit conclusion the mailings had been made.

In addition, we are persuaded any failure to provide notice was harmless beyond a reasonable doubt.⁷ In evaluating Father's claim, it is important to recognize he had actual notice of the dependency proceeding within a week or two after the jurisdictional/dispositional hearing. He was promptly provided visitation by the Agency and assigned counsel by the juvenile court. Yet within six weeks of the jurisdictional/dispositional hearing, he was arrested, and he remained incarcerated for most of the remainder of the proceeding. It was Father's incarceration, and not the lack of notice, that precluded him from any effective participation in the minor's dependency proceeding. Because of that incarceration, Father would not have achieved a more favorable result in the dependency proceeding even if he had received notice in time to participate in the detention and jurisdictional/dispositional hearings.

Contrary to his argument, Father would not have been able to prevent the minor's detention had he received timely notice of that initial hearing. The juvenile court's options at the detention hearing are to detain the child or release the child to a parent or guardian. (*Los Angeles County Dept. of Children & Family Services v. Superior Court*

⁷ Some cases have concluded the proper harmless error standard in dependency cases should be clear and convincing evidence. (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1515.) Without deciding the issue, we apply the more exacting standard.

(2008) 162 Cal.App.4th 1408, 1415.) The minor was removed from Mother, the only parent having custody, when she was arrested. Given Father's sporadic contact with the minor over the prior years and his long history of criminal activity and drug use, it is highly unlikely the minor would have been released to Father at the detention hearing.⁸

Nor would the consequences of the jurisdictional/dispositional hearing have been materially different if Father had been provided notice and participated. Jurisdiction must be asserted over a child under section 300 if either parent has created the circumstances triggering jurisdiction under the statute. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491–1492.) So long as one parent has created those circumstances, the other parent's conduct is irrelevant to the jurisdictional decision. (*Ibid.*) Because Mother's arrest and drug use indisputably brought the minor within subdivisions (b) and (g) of section 300, the juvenile court was required to assert jurisdiction. (*In re I.A.*, at pp. 1491–1492.) Father's participation would not have changed that result.

Father argues the court's disposition might have been different if he had an opportunity to participate in the hearing, since he might have been able to persuade the court to grant him visitation and reunification services or even custody of the minor. Accepting this as true, Father's subsequent incarceration prevented that possibility from influencing the outcome of the dependency proceeding. He was jailed within six weeks of the jurisdictional/dispositional hearing, and he remained in prison until the scheduled permanency planning hearing.

As a result of Father's incarceration, the proceeding would have taken the same course toward the permanency planning hearing even if he had received timely notice. Father's incarceration would have terminated any custody, and the reunification services

⁸ Even in the very unlikely event Father was granted custody as a non-offending parent, as he argues, the minor would have been re-detained upon Father's arrest a few weeks later. There would have been no change in outcome of the proceeding.

available to him in prison would have been limited in scope.⁹ Because his incarceration deprived him of the opportunity to demonstrate the parenting skills and commitment necessary to assume custody, Father would have been required to make the same section 388 motion upon his release. There is no reason to think a brief period of services, visitation, or custody prior to the arrest or the limited reunification services available in prison would have changed the outcome of that motion. The factors cited by the trial court in denying Father’s motion—his history of repeated incarceration and then-current probationary status, his lack of demonstrated commitment to the minor, and his past failure to cooperate with the Agency—would not have been changed by six weeks of custody, services, or visitation. Indeed, Father’s commission of crimes justifying imprisonment within six weeks after being granted reunification services or custody would only have reinforced the impression of his unsuitability. (See *J.H.*, *supra*, 158 Cal.4th at p. 185 [termination of parental rights affirmed despite lack of notice]; *In re Daniel S.* (2004) 115 Cal.App.4th 903, 914 [failure to give proper notice harmless where mother hospitalized for mental illness throughout hearing period].)

B. Ineffective Assistance of Counsel

Father also contends he failed to receive effective assistance of counsel because his attorney never raised his lack of notice with the court.

“We address a claim of ineffective assistance of counsel in the dependency context by applying a two-part test. In the first step, we examine whether trial counsel acted in a manner expected of a reasonably competent attorney acting as a diligent advocate. If the answer is no, we move to the second step in which we examine whether, had counsel rendered competent service, the outcome of the proceeding would have been more favorable to the client.” (*In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329–1330.)

Judging from the record, counsel’s failure to raise the issue of notice was not the result of ineffective assistance. The minor was placed with Father’s stepmother soon

⁹ This assumes Father could have received reunification services in prison. As noted below, he might well have been denied services under section 361.5, subdivision (e)(1).

after his attorney was appointed. The attorney's comments at the July and December 2010 hearings demonstrate that Father, who was described as "very interested" in the proceedings, was pleased with this arrangement. At the hearing at which services to Mother were terminated, Father's counsel told the court Father was "very happy with where [the minor] is placed and with the continued plan." In other words, counsel did not raise the lack of notice because Father was satisfied with the course of the dependency proceedings. His apparent change of heart at some point in the following months does not render his counsel's prior conduct incompetent.

Even if counsel had rendered ineffective assistance, however, we would find the failure to raise the issue of notice harmless for the same reason we found the lack of notice itself to be harmless. Counsel's raising of the issue of Father's lack of notice would not have changed the outcome of the dependency proceedings. (See *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) By the time counsel was assigned to Father, the detention decision was moot, and the jurisdictional findings had already been made. Because Father was incarcerated, the issue of custody was similarly moot. Further, because the projected length of Father's sentence was longer than the likely duration of the dependency proceedings and was part of a long history of criminal and drug-related conduct, during which Father had earlier failed to comply with a reunification plan, he is very likely to have been denied reunification services under section 361.5, subdivision (e)(1). Finally, while a request for visitation rights might have been successful, a few more visits by Father with the minor during his incarceration would not have changed the circumstances that caused the court to deny his section 388 motion upon his release.¹⁰

¹⁰ Realistically, there is no reason to believe Father was denied desired visitation with the minor. From almost the beginning of his incarceration, the minor was in the care of his stepmother, who appears to have been on good terms with Father.

III. DISPOSITION

The orders of the trial court are affirmed. Father's petition for habeas corpus is denied.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.