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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re J.P. and T.P., Persons Coming Under
the Juvenile Court Law.

DEL NORTE COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

J.P.,

Defendant and Appellant.

A137162

(Del Norte County
Super. Ct. No. JVSQ126128,
JVSQ126129)

J.P. (Father), father of seven-year-old J.P. and six-year-old T.P., appeals from the juvenile court's orders removing the children from their parents' care and placing them with a relative.¹ Father contends: (1) there was insufficient evidence to support the finding that the previous disposition was ineffective in protecting the children; (2) the juvenile court judge who presided over the jurisdictional hearing engaged in judicial misconduct; and (3) the juvenile court erred in accepting the parties' stipulation at the dispositional hearing and issuing an order pursuant to the stipulation. We reject the contentions and affirm the orders.

¹F.O. (Mother) does not appeal from the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Original petition

On July 31, 2012, the Del Norte County Department of Health and Human Services (the Department) filed a petition on behalf of J.P. and T.P. alleging the children were being exposed to a “drug culture that pervades the[ir] parents’ daily activity.” According to the petition, law enforcement executed a search warrant on the parents’ home and found methamphetamine, marijuana, and drug paraphernalia in places that were accessible to the children. The parents had substance abuse issues that impaired their ability to care for the children. Father tested positive for methamphetamines, and Mother used marijuana and refused to drug test. The parents had previously received various services, but the services had not been effective in mitigating the issues that placed the children at risk.

According to a detention report filed August 1, 2012, Mother was an enrolled member of the Kalispell Tribe (the Tribe). The report set forth the parents’ criminal history, which included arrests and convictions for drug-related offenses. The children and their parents lived with Father’s mother (Grandmother) in a house Grandmother owned. The Department believed the children were at risk of abuse or neglect in the home and recommended that they be detained and placed into a “Tribally approved home or licensed foster care.” The Tribe intervened and appeared in the action and confirmed the children were members of the Tribe. At an August 1, 2012 detention hearing, the Department withdrew its recommendation to detain the children. The juvenile court ordered the children to remain with their parents and scheduled a jurisdiction hearing.

In a jurisdiction report dated August 23, 2012, the Department noted there were 10 prior child welfare referrals for the parents dating back to April 2008. One case closed in November 2009 after the family was able to stabilize, and Father was awarded sole custody of the children. There were several inconclusive or unfounded referrals in 2010 and 2011. A substantiated referral was made in February 2012—which led to the filing of the original petition—after the Del Norte County Sheriff’s Office executed a search warrant on the parents’ home based on information that methamphetamine sales and the

sale of a gun were taking place there. There were two adults and three small children present during the methamphetamine sale. The sheriff's office knew from prior investigations and informant contacts that Father and his brother, who also lived in the home, were methamphetamine users and dealers. When deputies executed the warrant, they detained Father and others and found methamphetamine and drug paraphernalia, including torn clear plastic baggies that appeared to have been used as rinse bags, a bong, syringes, a digital scale with crystalline residue, and a scanner.

The parents told the Department they were "not at fault for the Task Force coming into their home." Father said he " 'did not have a drug problem' " and " 'did not see any need to work with the Department.' " He said he had " 'completed all his classes before ([in a] prior court case) and did not see why this was happening when it was my brother not me.' " Both parents said they " 'didn't even know that [others] were using [drugs] in the garage.' " Father then said that he drinks, " 'smokes marijuana and occasionally eats or snorts methamphetamine.' " When asked about services, he stated, " 'why should I have to go sit in a group and tell them I used (meth) and do homework, come on, homework?' " On July 18, 2012, when asked if he would be clean if tested for drugs, Father responded, " 'yes, clean, but not for weed.' " He explained, " 'It's this house, I can't get clean because of this house.' " On August 15, 2012, Father said he would not be clean if drug tested because he would have marijuana in his system. He did not show up for a drug test that day. When a social worker made an unannounced visit to the home, the house was dirty with food on the floor and a pile of garbage next to the fire place. The children were running around and jumping on the couch, and Father was making a "lack luster attempt" to calm them down. The Department believed the parents were "capable of providing a safe home for their children" if they engaged in services, and recommended that the children remain in their care.

The parents submitted on the report at the August 23, 2012 jurisdictional hearing. The court found jurisdiction, ordered the children to remain in their parents' care, and ordered family maintenance services.

In a disposition report dated September 21, 2012, the Department stated it was concerned that the parents had not been compliant with a drug treatment program. Father was engaged in services but was “struggling with providing random drug testing.” The Department was also concerned that there was “still possible drug activity in the home, not necessarily with the parents but others in the home, and that the parents are unwilling to recognize or remedy the situation for their children’s safety.” Father appeared to be taking good care of the children and assured the Department that he isolated himself and his family from others in the home. At the dispositional hearing, the court ordered the children to remain in their parents’ care with family maintenance services.

Supplemental petition

On October 4, 2012, the Department filed a supplemental petition alleging the children continued to be exposed to drugs, both parents tested positive for marijuana and methamphetamines, the children were absent from school, and services had not mitigated the Department’s concerns. In an October 5, 2012 detention report, the Department recommended that the children be removed and placed in a “relative foster home.” On September 21, 2012, Mother admitted she would be “dirty for methamphetamines” if tested that day. On September 24, 2012, when the Department drove the parents to a center to be tested for drugs, Mother said she would be “dirty” and Father stated he would be “clean.” Both parents tested positive for methamphetamines, amphetamines and marijuana.

A Department social worker conducted a home visit on September 24, 2012, and noticed the children were sick. The Department was concerned about the children’s “excessive absences” from school. J.P. was absent 6 out of 23 days in September and tardy three times. T.P. was absent 7 out of 16 days and tardy once. The Department believed the attendance issues were “a direct result of the parents’ ongoing drug use and unwillingness to meet the children’s needs.”

The Department further reported that Mother was not engaged in services. Father was attending group sessions but continued to use drugs “while going through the motions of [attending] the . . . sessions.” He was struggling with “fully completing his

treatment plan . . . as he [was] not compliant with attending 12-step meetings outside of his group.” He stated, “I don’t understand[.] I thought you were here to help us out.” He said the children missed school because they were sick. The Department was concerned that Father “ha[d] routinely been untruthful with the Department and his Drug and Alcohol counselor.”

Both parents denied the allegations at an October 5, 2012 detention hearing on the supplemental petition. The juvenile court stated that a prima facie case had been made, and found detention was appropriate. The parents stated they had serious concerns about the proposed foster home, which was not an Indian home. Mother’s sister was willing to care for the children but the Department reported she was disqualified because her significant other had recently been convicted of driving under the influence. The juvenile court ordered that the children remain in the non-Indian home and ordered the Department to work on finding an acceptable alternate placement. The court detained the children and removed them from their parents’ care. On October 12, 2012, the parties reached an agreement that they would work on placing the children with Mother’s sister.

In an October 29, 2012 jurisdiction report, the Department stated, “both [Father] and [Mother] have been given many opportunities during their voluntary plan and their court ordered family maintenance to engage in services but have continued to actively use drugs [Father] and [Mother] are unwilling to utilize services to make a behavior change for the betterment of their children and make the necessary lifestyle changes.” The Department was concerned about the children’s school attendance and the fact that the parents had not sought medical treatment as they should. Even after acknowledging to the social worker that the children had been sick for some time and needed to be treated, the parents waited another full day to take them into the clinic. When the foster mother took J.P. to urgent care, J.P. had lice “so bad that her scalp was bleeding.” The Department believed the parents’ choices had “significantly impacted the children in regards to school, medical attention and being exposed to the drug culture.”

At an October 31, 2012 jurisdictional hearing, the juvenile court stated it had read and reviewed the report, then received the report in evidence, without objection. Social

worker Crystal Nielsen testified that the parents did not provide her with any documentation as to why the children missed school on September 4, why T.P. was absent on September 10 and 19, and why both children had unexcused absences on September 17. She testified that Father's positive oral swab drug test meant he had ingested drugs within eight hours of taking the test. She believed the children had been in his care during that eight hour period, although she did not confirm that he was.

During Nielson's testimony, the juvenile court interrupted the proceedings to announce that it had presided over Grandmother's preliminary hearing, had heard testimony that at least 12 documented methamphetamine sales had taken place in the home, and that it had held Grandmother to answer on two counts, including felony child endangerment. The court stated that the information from the preliminary hearing entailed "pretty much the same thing" set forth in the detention report, but added that it "got the amplified version" at the preliminary hearing. The court further stated that the testimony it heard was "pretty disturbing" and that it could not "erase what [it] had heard yesterday under oath, under vigorous cross-examination."

Father's counsel stated he was at a disadvantage because he did not know what occurred at the preliminary hearing. Counsel then proceeded to cross-examine Nielson, stating, "Well, I'll go with what I do know, and that's the report." Thereafter, Nielson testified that Father was compliant with his services and had completed parenting classes and chemical dependency issues.

Mother testified that the children were ill on the days they missed school. She did not recall the specific illnesses they had on some of the days. She did not recall what happened on September 17, when the children had unexcused absences. She believed the children missed their first day of school because they were sick.

Father testified the children missed their first day of school because they had not gotten their immunization records in time, and because they were "a little bit sick." On the other days, they had colds or T.P. had an earache. Father believed they had unexcused absences on just one day, "probably" because he "just . . . didn't call it in." When he took the children into the clinic, he was told the children were "like really sick."

There was some fluid in T.P.'s ear, and J.P. was "coughing pretty bad and it was hurting her chest," and Father "was almost thinking it was . . . pneumonia." Father said he waited "so long" to take them to the clinic because he thought they had "a common cold."

Father testified he used to use marijuana every weekend but had not used it for 27 days. The last time he used methamphetamine was before his positive drug test, "that last weekend [in] September," when he had a "one-time relapse." That weekend, the children were with Grandmother in a trailer, where she stayed for most of the week. Grandmother no longer lived in the house with Father and the children and stayed at the house only "a couple nights per week."

Father further testified that the children should live with Mother's sister because he needed more time to engage in services. He testified, "If I'm going to find sobriety, I need to find it all the way, not just halfway. I need to be more focused on me right now and then have my kids there. [¶] What if I do something stupid and relapse? What—you know what I mean? I'm only hurting them." He testified that his "big concern" was "where the children are placed," i.e., not with an Indian relative. The Department's attorney objected that the issue of placement, was "more of a disposition issue." The court agreed. Father's counsel clarified that he was also objecting to the factual allegations that Father had exposed the children to drugs, or that his methamphetamine use affected his ability to parent.

Wendy Thomas, support services director for the Tribe, testified that children in the Tribe are raised "communally" and tend to "lose identity with their tribe" when placed with non-relatives. Thomas believed there was a possibility of emotional harm to the children if they were returned to their parents' care, and that it would be "detrimental to the children" if Father relapsed and the children "had to be pulled again." She recommended that the children be placed with their aunt, and that the family be given 30 days to prove they could "actively be involved in services." She believed that 30 days—and not 60 days—was an appropriate time period because "the children obviously

want to go home” and a shorter time period would allow them to be home before Christmas.

After all of the witnesses had testified, the juvenile court stated it “want[ed] to hear some argument.” The court stated, “I mean, the factual allegations I don’t have any problems with in terms of—and again I heard this preliminary hearing yesterday, and it was rather disturbing to see the amount of narcotics activity in and out of that house. And I know the kids were there, and nobody can pretend they weren’t, so let’s forget about that part. Let’s focus on where we go from here.” The court further stated, “The place where those children were living is a virtual narcotics den [¶] And I don’t know that it still is. I don’t care. But those kids were there and that’s not good. And under any culture, . . . that’s a bad way to raise kids, and it’s a bad place for them to be around even if they weren’t using it.” The court continued, “even if they are not using it and it’s not even available to them, . . . the kids are going to grow up getting the idea that it’s cool to have a thousand strangers come in, do these quick transactions and leave.”

The Tribe’s attorney stated that the Tribe had been concerned about the family even before law enforcement became involved in February 2012. The Tribe agreed the children should not be returned to their parents because there was “clear and convincing evidence that it’s likely [the children] would be placed in emotional harm . . . if they were to return today.” The Tribe asked that the children be placed with a relative “today.” Mother’s counsel argued there was insufficient evidence for a finding regarding the children’s absences from school, as there were documented medical reasons for their absences.

Father’s counsel argued that the condition of the home at the time the supplemental petition was filed was not the same as it was in February 2012. He argued there was no allegation or evidence that drug activity was going on in the home at the time the supplemental petition was filed. Instead, “[t]he allegation is that [Father is] using drugs in such a way that it would expose the child[ren] to harm.” Counsel argued that the Department had failed to meet its burden to show that the school absences affected the best interests of the children. Counsel argued the petition should not be

sustained, and indicated that Father was willing to agree to a voluntary placement with a relative.

The juvenile court found all of the allegations in the supplemental petition to be true by a “preponderance of the evidence.” The court stated, “I have grave reservations about the weight and credibility of the testimony of the parents. I did not find their explanation satisfactory.”

The Department filed a disposition report on November 8, 2012, recommending that the children be declared dependents of the court and that reunification services be provided to the parents. The Department was concerned about “the frequent discord in the family’s home.” The parents were working on their case plan but stated that the family home “create[d] a trigger for them in regards to their continued drug use.” The Department wished to see “a continued effort with recovery from substance abuse,” and was concerned that the housing situation was “not conducive to a safe and healthy environment for the children or the parents.” The parents hoped to obtain new housing, continue with recovery, and “hav[e] ‘clean time under their belts.’ ” The children wished to return to their parents’ care. The Department concluded that the children would be at risk of neglect and abuse if they were placed in their parents’ home because “there continues to be an element of the drug culture within the house.” The Department was working to complete a “tribal specified placement.”

At a November 9, 2012 dispositional hearing that took place before a different judge, the parties stipulated that the testimony from the jurisdictional hearing was sufficient to support the necessary findings for the court to make the dispositional findings. The parties agreed the petition should be sustained, as amended, and the court accepted the parties’ stipulation.

DISCUSSION

Sufficiency of the evidence

Father contends the juvenile court erred in sustaining the supplemental petition because there was insufficient evidence to support the finding that the previous disposition was ineffective in protecting the children. We disagree.

A supplemental petition is filed when the previous disposition has not been effective in protecting a child who has been declared a dependent under Welfare and Institutions Code section 300.² (§ 387, subd. (b).) A proceeding on a section 387 petition involves a bifurcated hearing. In the first phase, the juvenile court follows the procedures relating to a jurisdictional hearing on a section 300 petition. (*In re Jonique W.* (1994) 26 Cal.App.4th 685, 691.) At the end of the jurisdictional phase of the section 387 hearing, the juvenile court is required to determine by a preponderance of evidence whether the factual allegations of the supplemental petition are true and whether the previous disposition has not been effective. (*Ibid.*) The Department must prove the jurisdictional facts by a preponderance of legally admissible evidence. (*Ibid.*) On appeal, the relevant inquiry is whether substantial evidence supports the juvenile court's finding that the previous disposition was not effective in protecting the child. (§ 387; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1200.)

Once the jurisdictional facts are found to be true, a dispositional phase follows to determine the modified placement. (*In re Jonique W.*, *supra*, 26 Cal.App.4th at p. 691.) In determining the disposition on the section 387 supplemental petition, the procedures related to dispositional hearings on original section 300 petitions apply. (*Ibid.*) To remove the child from parental custody, the court must find by clear and convincing evidence that there is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor and there are no reasonable means to protect the minor's physical health without removing him from the parent's physical custody. (§§ 361, subd. (c)(1), 387 subd. (a).)

Here, there was substantial evidence supporting the juvenile court's finding that the previous disposition was not effective in protecting the children. Despite receiving numerous services over the course of several years, the parents still tested positive for methamphetamines, amphetamines and marijuana in September 2012, and Father admitted he had relapsed. Father also admitted he was having difficulty maintaining his

²All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

sobriety and said he needed more time to engage in services to make sure he did not relapse again. He did not think he was ready to have the children in his care and asked that they be placed with their aunt. Further, the children were frequently ill, and even when their symptoms were quite severe, the parents delayed in seeking medical care for them. When the foster mother took J.P. into urgent care, J.P. was found to have lice “so bad that her scalp was bleeding.” The children were not regularly attending school, and there was evidence to support a finding that not all of their absences and tardies could be attributed to their illnesses.

Father points out that he testified he never used drugs when his children were in his care. However, the juvenile court, which found problems with the parents’ credibility, was free to discredit that testimony; in fact, the court specifically noted that Father’s testimony to that effect was “not persuasive” and “vague.” Father also argues that his failure to ensure that the children attend school was insufficient to show the previous disposition was ineffective. He relies on *In re Janet T.* (2001) 93 Cal.App.4th 377, but the case is inapposite. There, the Court of Appeal concluded that the mother’s failure to ensure her children’s school attendance was insufficient to show the children were at risk of *physical* harm. (*Id.* at p. 388.) Here, the court found that the parents placed the children at risk of *emotional*—not physical—harm.³ Finally, Father asserts the court violated his statutory and due process right to cross-examine and confront witnesses when it relied on evidence that was presented at the preliminary hearing. Even assuming the claim is not forfeited for Father’s failure to object below, we would reject the claim because Father cannot show he was prejudiced. There was ample evidence presented at the jurisdictional hearing—which was unrelated to the February 2012 drugs raid that led to their initial detention—to support the jurisdictional findings, e.g., Father’s relapse, the

³The following statement in *In re Janet T.*, *supra*, 93 Cal.App.4th at page 388, suggests that the failure to ensure a child’s school attendance could support a finding of emotional harm: “It is . . . no doubt true failing to go to school regularly is very detrimental to the children. Failing to attend school regularly not only deprives the children of an education, but also of the social interaction and ‘peer relationships necessary for normal growth and development.’ ”

children's school attendance, and the parents' failure to seek prompt medical attention. In light of Father's extensive child welfare history, his history of drug use, his relapse, his admission that he was not ready to care for the children, and the children's issues with attending school regularly and on time, the juvenile court could reasonably find that the previous disposition of leaving the children in their parents' care had not been effective.

Judicial misconduct

Father contends the juvenile court judge who presided over the jurisdictional hearing, Judge Leonard J. La Casse (Judge La Casse), engaged in judicial misconduct by refusing to recuse himself despite having presided over Grandmother's preliminary hearing. Father did not seek disqualification below, and therefore forfeited the claim. (E.g., *Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199–200 [claims of judicial misconduct must be raised in the trial court to be preserved for appellate review].) In any event, the claim is without merit.

The grounds for judicial disqualification are: (1) the judge has “personal knowledge of disputed evidentiary facts concerning the proceeding” (Code Civ. Proc., § 170.1, subd. (a)(1)(A)); (2) the judge “believes there is substantial doubt as to his or her capacity to be impartial” (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(ii)); and (3) “[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) A judge “has a duty to decide any proceeding in which he or she is not disqualified.” (Code Civ. Proc., § 170.) “ ‘Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.’ ” (*People v. Carter* (2005) 36 Cal.4th 1215, 1243, quoting *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

Here, although Judge La Casse presided over Grandmother's preliminary hearing, he noted that the evidence presented at that hearing was “pretty much the same thing” he had read in the detention report, albeit the “amplified version.” The drug sales that occurred in the home and the circumstances under which the children were initially

detained were discussed in great detail in the Department’s reports and in the criminal reports, and the parties were therefore well aware of those facts.⁴ Judge La Casse and the parties were also aware that the drug raid that led to the filing of the original petition had taken place in February 2012, and that the parties were before the court on a supplemental petition that was filed months after that incident, and on different grounds from those on which the original petition was filed. Thus, even though Judge La Casse may have become aware of additional facts relating to the February 2012 incident when he presided over the preliminary hearing, it is questionable whether he had “personal knowledge of disputed evidentiary facts concerning the proceeding” (Code Civ. Proc., § 170.1, subd. (a)(1)(A)).

Moreover, although Judge La Casse stated he could not “erase” from his mind what he had heard at the preliminary hearing, he never expressed “substantial doubt” as to whether he could be impartial in deciding the issues before him at the jurisdictional hearing (see Code Civ. Proc., § 170.1, subd. (a)(6)(A)(ii)), and there is nothing in the record indicating he was biased against Father, such that he could not be impartial.⁵ We also believe that a person aware of the circumstances would not have “reasonably entertain[ed] a doubt” regarding Judge La Casse’s ability to be impartial at the jurisdictional hearing. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) Accordingly, we

⁴Before the preliminary hearing and the jurisdictional hearing took place, Judge La Casse had presided over the August 23, 2012 jurisdictional hearing on the original petition as well as the readiness conference on October 26, 2012, and was therefore already familiar with the facts relating to the methamphetamine sales that had taken place in the family home.

⁵Father cites several cases in which the judge was found to have been biased, e.g., *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495 [gender bias], disapproved on another ground by *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4; *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295 [same]; *People v. Enriquez* (2008) 160 Cal.App.4th 230, 244 [“unabashed animosity” toward Proposition 36]). In contrast, here, there was no information—and Father fails to argue—that the judge was biased against any particular class of people or that Father belonged to such class of people.

conclude Judge La Casse did not commit judicial misconduct by failing to recuse himself.⁶

Dispositional order

Father contends the juvenile court erred in accepting the parties' stipulation at the dispositional hearing and issuing an order pursuant to the stipulation. Even assuming Father has preserved this issue for appeal, we would reject the contention on the merits.

As noted, the parties stipulated at the dispositional hearing on the supplemental petition that the testimony from the jurisdictional hearing was sufficient to support the necessary findings for the court to make the dispositional findings. Relying on criminal cases standing for the proposition that trial courts have a duty to approve or disapprove a plea bargain without simply "rubberstamp[ing]" agreements, Father asserts the juvenile court violated his due process rights to confront witnesses by allowing the parties to rely on testimony given at another hearing, before another judge. The use of former testimony, however, does not necessarily infringe upon the right to confrontation so long as there has been due cross-examination. (*In re Kerry O.* (1989) 210 Cal.App.3d 326, 332.) Here, the parties presented evidence and testimony at the jurisdictional hearing, and were permitted to cross-examine all of the witnesses. A disposition report was prepared for the dispositional hearing, and none of the parties requested that the social worker testify. (*See In re Corey A.* (1991) 227 Cal.App.3d 339, 347–348 [a parent's due process rights to confront the social worker who prepared the disposition report are satisfied as long as the social worker is available upon request or by service of process to testify].) Under the circumstances, and based on the fact that there was ample evidence presented at the jurisdictional hearing upon which the court could reasonably make the

⁶Father asserts that to the extent his attorney should have objected to Judge La Casse presiding over the case, counsel was ineffective. In light of our conclusion that Judge La Casse had no duty to recuse himself, we conclude Father cannot show he was provided with ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [party must show his attorney's performance was deficient *and* that it is "reasonably probable" the outcome would have been better but for counsel's deficient performance].)

dispositional findings, the court did not err in accepting the parties' stipulation and issuing orders accordingly.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.