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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.A., a Person Coming Under the
Juvenile Court Law.

B240894
(Los Angeles County
Super. Ct. No. CK90530)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Stephen C. Marpet, Juvenile Court Referee. Reversed and vacated.

Nancy O. Flores, under appointment by Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

* * * * *

In this case, we reverse the juvenile court’s jurisdictional order finding C.A. to be a dependent under Welfare and Institutions Code section 300, subdivision (b).¹ There was no evidence that C.A. suffered, or was at substantial risk of, suffering serious physical harm as a result of his father’s (C.A.’s) conduct even though his father *once* drank too much, left C.A. unattended, and drove under the influence of alcohol. Although driving under the influence in some cases might be sufficient to sustain jurisdiction; in this case, all of the evidence showed that the conduct was not likely to recur and that father posed no ongoing risk to C.A. Because there was no support for jurisdiction, the juvenile court’s dispositional order also must be vacated. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 71.)

FACTS AND PROCEDURE

On October 28, 2011, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition alleging the following two counts: (1) Father “is a current abuser of alcohol, which renders the father incapable of providing regular care of the child. On 10/2[4]/2011, the father was under the influence of alcohol while the child was in the father’s care and supervision. On 10/2[4]/2011, the father was arrested for Driving Under the Influence of Alcohol. The father’s alcohol abuse endangers the child’s physical health and safety, placing the child at risk of physical harm and damage.” (2) “On 10/2[4]/2011, . . . father . . . placed the seven month old child in a detrimental and endangering situation by leaving the child home without adult supervision for an extended period of time.” Mother was not named in the petition.

The detention report indicated that father was stopped for reckless driving, was arrested, and at the time of arrest stated he left C.A. home asleep. After she was notified of these events, mother immediately returned home from work and C.A. was released to her custody. Mother was shocked by father’s aberrant behavior. Mother reported that father drank only occasionally.

¹ All statutory citations are to the Welfare and Institutions Code.

Father was remorseful. He admitted having drunk vodka and “black[ing] out.” Father stated he “made a huge mistake” and felt “really bad.” Father agreed to live with his mother and have monitored visits with C.A., and he moved out of his family home the next day. Two months later, father reiterated his remorse, stating, “My son is more important than anything. I made a mistake and it will never happen again.”

In December 2011, DCFS recommended father return to the family home. DCFS stated that if any safety concerns developed, DCFS would alert the juvenile court. Father’s monitored visits were progressing well; he was “appropriate” with C.A. and a “good father.” Father changed C.A., fed him, played with him, and put him to bed. On December 5, 2011, the court permitted father to return to the family home on the condition father continue to comply with all court orders including random drug testing.

In December 2011, DCFS concluded that father’s October 24 “actions may be an isolated incident and the Department does not feel he is a risk to his child. Therefore the Department is recommending Family Maintenance Services to the family in order to ensure that [father] is participating in random drug testing, AA meetings and complying with his criminal court case [based on the DUI]. [Father] has demonstrated remorse and accepted fault for his actions as they placed himself and his child in danger. [Father] appears to have learned his lesson as to the gravity of the situation It is apparent [father] loves his child and will put his child’s needs first”

But the next month, DCFS changed its position. On January 26, 2012, DCFS reported that as a result of father’s October 24 conduct, father was convicted of driving under the influence and placed on probation. Father was ordered to complete a nine-month alcohol education and counseling program and his license was suspended. Father enrolled in that class on January 17 – three weeks after his December 27, 2011 conviction – but DCFS thought he should have enrolled sooner. Father tested negatively for alcohol and controlled substances in December and January, but missed one test in December. In March, father missed one test because he arrived late to the testing facility and he tested negatively once. DCFS concluded that father was “in compliance with the Court orders,”

but recommended continued court supervision because father had “no excuse” for arriving late for the drug test “other than waiting for mother”

In April 2012, the court held a jurisdictional hearing, sustained the allegations in the petition, and assumed jurisdiction over C.A. The court found father posed a continued risk to C.A. explaining, “I’m concerned to make sure there’s oversight and father continues to comply and test regularly through the Department” The court removed custody from father but allowed father to continue to reside in the family home and to have unmonitored contact with C.A.² The court ordered father to submit to weekly drug and alcohol testing.

DISCUSSION

Section 300, subdivision (b) permits a court to take jurisdiction over a child if the “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or 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. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.”

We review a juvenile court’s jurisdictional order for substantial evidence. (*In re A.S.* (2011) 202 Cal.App.4th 237, 244.) “The term “substantial evidence” means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value.’ [Citation.] ‘It is the trial court’s role to assess the credibility of the various witnesses, to weigh the

² DCFS opposed removing C.A. from father’s care and custody.

evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citations.]’ [Citation.]” (*Ibid.*)

1. Count 1

Neither father’s alleged substance abuse nor his single incident of driving under the influence supported the juvenile court’s jurisdictional findings.

A. Alleged Substance Abuse

The gravamen of count 1 is that father’s current abuse of alcohol rendered him incapable of providing care for C.A. The court sustained the finding that father’s alcohol abuse endangers C.A.’s safety.

The record lacks substantial evidence to support this allegation. There was no evidence that father abused alcohol. The only evidence in the record was that father occasionally drank alcohol. Mother had known father for eight years and knew him to drink only occasionally. Father reported that he had no substance abuse history, and no evidence contradicted father’s statements. DCFS concluded father “does not appear to have a problem with alcohol as he has never demonstrated any signs of losing control in the past.” Because there was *no* evidence father suffered from substance abuse, the trial court erred in taking jurisdiction based on that allegation.

B. Driving Under the Influence

Count 1 also alleged father was arrested for driving under the influence of alcohol. That allegation was insufficient to support jurisdiction in this case.

Driving under the influence of alcohol on a single occasion, without anything more, is insufficient to warrant jurisdiction in this case because there was no evidence father had a substance abuse problem, no evidence the misconduct was likely to recur, and no evidence C.A. suffered any physical harm from father’s conduct. In *In re J.N.* (2010) 181 Cal.App.4th 1010, the court reversed a jurisdictional order over three children who were involved in an automobile accident as a result of father’s driving under the influence of alcohol. (*Id.* at p. 1014.) The court found that although the incident was the

result of an egregious lack of judgment, there was no showing that the children were at risk of harm at the time of the jurisdictional hearing. (*Id.* at pp. 1023-1024.) The court recognized that although a “single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk,” it was not sufficient in that case because there was no evidence from which to infer the behavior would recur. (*Id.* at p. 1026.)

Similarly here, there was no evidence from which to infer the behavior would recur. Father took responsibility for his conduct and expressed remorse. He enrolled in a substance abuse program and consistently tested negatively for alcohol. He had not engaged in similar conduct either prior to or subsequent to October 24, 2011. Even DCFS concluded that father did not impose any immediate safety concerns, concluding that father could return to the family home. No evidence in the record supported the inference that father posed a continued risk to C.A.

DCFS correctly points out that appellate courts have held a juvenile court may sustain a petition under section 300, subdivision (b) based on prior “serious physical harm” such as when a father raped his daughter and dislocated her shoulder. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1428, 1434-1435; see also *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1260 [holding that evidence a child “*has suffered*” physical harm or abuse is sufficient to support jurisdiction].)³ But we need not determine whether past serious physical harm is sufficient to support jurisdiction because here there was no allegation C.A. suffered serious physical harm and no evidence that C.A. suffered any harm from father’s misconduct.

2. Count 2

The crux of count 2 is that father left seven-month-old C.A. home alone, unattended. As we explain, this allegation does not support jurisdiction.

³ In *In re J.N.*, the court disagreed with the holding that past serious physical harm is sufficient to support jurisdiction. (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1023.)

Father's conduct in leaving seven-month-old C.A. unattended was inexcusable. Nevertheless, there was no evidence of a risk father would repeat this conduct. Father had never left C.A. unattended in the past. He was a loving father and expressed great remorse for his single lapse in judgment. DCFS concluded that father "may have had a lapse in judgment due to drinking excessively and left his child at home but his actions are said to be uncharacteristic of him as he has never done this before." DCFS further concluded that father's "actions may be an isolated incident and the Department does not feel he is a risk to his child." No evidence supported an inference that C.A. was likely to suffer harm from father's leaving him unattended. The trial court therefore erred in assuming jurisdiction based on this count.

3. DCFS's Remaining Arguments Lack Merit

In an addendum report dated January 26, 2012, DCFS expressed concern that father missed one drug test and enrolled in a drug and alcohol program on January 17, 2012, three weeks after he had been ordered to attend that program. In an April 2012 addendum report, DCFS reported that father missed another test because he arrived late to the testing facility. As a result of these events, DCFS concluded that father was "not taking the allegations or the need to comply with the Court orders seriously." We disagree. Although father's compliance was not perfect, he substantially complied with the court orders and consistently demonstrated his love for C.A. and desire to avoid any conduct that would harm C.A. More importantly, father's missed tests and three-week delay in registering for a class do not support the inference that he posed an ongoing threat to C.A.

Finally, DCFS points out several irrelevant facts to argue that substantial evidence supported jurisdiction. For example, in one interview father stated he drank beer and vodka and in another, he stated he drank vodka. That inconsistency however does not show father posed an ongoing risk to C.A. or that he minimized his conduct, as DCFS argues. Father never denied that he drank, drove drunk, and endangered C.A. Father acknowledged these events, took responsibility, promised they would not recur, and consistently tested negatively for alcohol. The specific substance consumed is irrelevant.

DCFS states that father told DCFS that he informed officers C.A. was home alone when pulled over and that the police report indicates the information was conveyed when father was booked instead of when he was arrested. Such evidence is not probative of father's risk to C.A. It cannot reasonably be disputed that father acknowledged his mistake, expressed great remorse and never repeated his conduct. Slight inconsistencies in interviews do not support an inference that father continued to pose a risk to C.A.

Because there was insufficient evidence to support jurisdiction under section 300, subdivision (b), we reverse the juvenile court's jurisdictional and vacate the dispositional order.

DISPOSITION

The juvenile court's jurisdictional order is reversed and its dispositional order is vacated.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.