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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUSTIN W.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D066562

(San Diego County  
Super. Ct. No. J516015C-D)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Gary M. Bubis, Judge. Petition denied; request for stay denied.

Dependency Legal Group of San Diego and John P. McCurley for Petitioner.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Lisa M. Maldonado, Deputy County Counsel, for Real Party in Interest San Diego County Health and Human Services Agency.

Justin W. seeks writ review of an order denying him reunification services under Welfare and Institutions Code section 361.5, subdivision (b)(10), in the juvenile dependency case of his minor children, T.W. and Ariel W.<sup>1</sup> Justin contends the evidence did not support the juvenile court's finding that Justin did not undertake reasonable efforts to address the issues that led to the removal of T.W. and Ariel's half sibling in a prior dependency case. We disagree and deny the petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 10, 2014, the San Diego County Health and Human Services Agency (the Agency) petitioned the juvenile court under section 300, subdivision (b), on behalf of four-year-old T.W. and two-year-old Ariel.<sup>2</sup> The Agency alleged their mother, Charlene C., had used methamphetamines/amphetamines and alcohol to excess, rendering Charlene unable to care for her children. For example, she allowed T.W. and Ariel to walk or bike on the busy highway in front of their house. She also left them at home alone without arranging for childcare. Charlene had a history of methamphetamine/amphetamine use, and she had failed to comply with voluntary drug and alcohol treatment efforts. The

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

<sup>2</sup> At the same time, the Agency petitioned the court on behalf of nine-year-old Ethan C., who is T.W. and Ariel's half-brother. Justin is not Ethan's father, however, so Ethan is not part of these writ proceedings.

Agency concluded that T.W. and Ariel had suffered, or were at substantial risk of suffering, serious physical harm or illness as a result of Charlene's failure to provide for their care. The Agency further alleged that Justin had failed and been unable to protect and supervise the children.

At the detention hearing, the court found that the Agency had made a prima facie showing under section 300, subdivision (b), and ordered that T.W. and Ariel be detained in out-of-home care. The Agency did not have contact information for Justin and was initially unable to locate him. The Agency recommended that services not be provided to Justin because his whereabouts were unknown and he had not requested services.

In advance of the jurisdiction and disposition hearing, the Agency reached Justin and was able to interview him. Justin recounted a history of drug abuse, but he claimed to have been clean since an arrest for theft three years earlier. He said he had completed one drug treatment program, at Freedom Ranch, and then participated in a sober living program. He had begun drug treatment again at another program, the McAlister Institute (McAlister), but had stopped because of transportation problems. He said he would soon be re-enrolling at McAlister. The Agency obtained a record of Justin's criminal charges and convictions. It showed, among other things, three arrests for possession of controlled substances within the past nine months, which appeared to contradict Justin's statements. Justin had also previously been involved in a juvenile dependency case involving another child, Marlee W., whose mother was Leila P. Marlee was removed from Leila and Justin's custody due to their drug use while Leila was pregnant with Marlee. Justin knew that Leila used drugs while pregnant but failed and was unable to stop her from using. In

that case, Justin was offered reunification services. At Marlee's twelve-month review hearing, however, Justin had made minimal progress with his case plan. The court terminated his reunification services.

In light of this history, as well as some uncertainties regarding paternity, the Agency maintained its recommendation that Justin should not receive services. Nonetheless, the Agency believed that Justin "could benefit from reunification services." The issues regarding Justin's paternity were later resolved, and he was found to be the presumed father of T.W. and Ariel. The Agency changed its recommendation and requested that Justin be provided services.

Two weeks later, the Agency changed its recommendations again and urged the court to deny services to Justin. The Agency had concerns that Justin had not adequately addressed his substance abuse problem and that he was inconsistent in his commitment to reunification. Despite repeated requests, Justin could not provide a completion certificate from Freedom Ranch. He could only produce a letter confirming his residency there for 228 days. Since that treatment, Justin had been arrested for possession of controlled substances three times. He had recently re-enrolled in the outpatient program at McAlister and was attending once per week. When an Agency social worker first met with Justin, she requested that Justin provide a drug test. Justin went to the testing facility but was unable to provide a sample. At the time, the Agency also believed that

Justin had tested positive for methamphetamines at McAlister.<sup>3</sup> Justin missed his intake appointment at another service provider, Incredible Families, and missed his first visit with his children there. He later began attending regularly and completed two visits.

At a contested jurisdiction and disposition hearing, the court received the Agency's reports into evidence and heard testimony from an Agency social worker and Justin. The Agency social worker, Tamara Meyer, explained the Agency's concerns regarding Justin's history of drug use and his inadequate efforts to address it. Meyer was especially concerned that Justin had failed to drug test twice after receiving requests to do so. Meyer explained that, in her experience, "when people are in the initial stages of either getting clean or continu[ing] to use, that they are not in recovery and are generally not sober." Meyer also testified that she was concerned that Justin did not try to protect T.W. and Ariel from their mother's drug use, even though he was aware of the situation.

In his testimony, Justin described his history of drug use. Justin began using methamphetamines approximately 11 or 12 years before the hearing. He was an active and heavy user for almost 10 years. During this time, he lost custody of his older child Marlee, and his services in her case were terminated. Later, T.W. and Ariel were born. Justin was clean for two temporary periods after the birth of each child, but he relapsed soon afterwards.

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<sup>3</sup> Later, McAlister informed the Agency that the positive test was in error. Justin was asked to test, but he left the facility and did not provide a sample. Justin claimed he was unaware he needed to test. McAlister also informed the Agency that Justin had admitted to using alcohol once during the program. Justin did not inform the Agency directly.

Justin resolved to stop using methamphetamines after an arrest for theft in 2012. Justin spent two months in jail and then enrolled in Freedom Ranch. He spent 226 days at Freedom Ranch. Justin was in treatment for 120 days and spent the remainder as a volunteer. When he left Freedom Ranch, he attended meetings at the Alano Club, a sober living facility.

Several months later, in October 2013, Justin relapsed and began using methamphetamines again. Justin was arrested for possession and ordered to participate in drug treatment. Justin failed to check in with his probation officer, and a warrant was issued. Justin was arrested when facial recognition technology identified him at a casino. Following that arrest, Justin still did not check in with his probation officer. He was arrested again when police stopped a car in which he was a passenger. During this time, approximately four months, Justin did not participate in formal drug treatment but did attend meetings. Following the third arrest, Justin enrolled in drug treatment at McAlister. Drug treatment is a condition of his probation. He testified that his clean date for methamphetamines is November 10, 2013.

After hearing closing arguments, the court sustained the allegations of the petition and ordered T.W. and Ariel placed in foster care. The court denied services to Justin under section 361.5, subdivision (b)(10). The court found that Justin's failure to protect T.W. and Ariel was "a result of [Justin's] long-term drug use that has not been addressed. Just going to a program, a guy using a gram and a half a day for eight years is not going to solve that problem or be a reasonable response to that problem. [¶] It takes valiant effort. It takes therapy. It takes a lot of effort. [¶] . . . [¶] He's had a rough time. He's a

long-term drug addict. That takes a lot out of you. It [affects] you emotionally and physically and all the way around. But he clearly doesn't understand what it takes to be a good responsible father. And in that regard, he has not -- I find by clear and convincing evidence he has not made a reasonable effort to treat the problem that led to the removal of the sibling."

The court denied services to Charlene as well and scheduled a selection and implementation hearing under section 366.26. Justin filed a notice of intent to file a writ petition challenging the court's order. (Cal. Rules of Court, rule 8.450.) These proceedings followed.

#### DISCUSSION

Justin contends the juvenile court erred in denying him reunification services under section 361.5, subdivision (b)(10). "There is a presumption in dependency cases that parents will receive reunification services. [Citation.] Section 361.5, subdivision (a) directs the juvenile court to order services *whenever* a child is removed from the custody of his or her parent *unless* the case is within the enumerated exceptions in section 361.5, subdivision (b)." (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 95.) These exceptions are commonly called the "bypass" provisions. One exception may be found where "the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems

that led to removal of the sibling or half sibling of that child from that parent or guardian." (§ 361.5, subd. (b)(10).)

"To apply section 361.5, subdivision (b)(10), therefore, the juvenile court must find both that (1) the parent previously failed to reunify with a sibling [or half sibling] and (2) the parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling [or half sibling]." (*In re Albert T.* (2006) 144 Cal.App.4th 207, 217 (*Albert T.*)) Here, Justin does not contest the juvenile court's finding that he failed to reunify with T.W. and Ariel's half sibling Marlee. Instead, he contends substantial evidence did not support the court's finding that he failed to make a reasonable effort to treat the problems that led to Marlee's removal. The Agency, joined by appellate counsel for T.W. and Ariel, disagrees.

"The 'reasonable effort to treat' standard 'is not synonymous with "cure." ' [Citation.] The statute provides a 'parent who has worked toward correcting his or her problems an opportunity to have that fact taken into consideration in subsequent proceedings.' " (*K.C. v. Superior Court* (2010) 182 Cal.App.4th 1388, 1393.) However, "[w]e do not read the 'reasonable effort' language in the bypass provisions to mean that *any* effort by a parent, even if clearly genuine, to address the problems leading to removal will constitute a reasonable effort and as such render these provisions inapplicable. It is certainly appropriate for the juvenile court to consider the *duration, extent and context* of the parent's efforts, as well as any other factors relating to the *quality and quantity* of those efforts, when evaluating the effort for reasonableness. And while the degree of progress is not the *focus* of the inquiry, a parent's progress, or lack of progress, both in

the short and long term, may be considered to the extent it bears on the *reasonableness* of the effort made." (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914 (*R.T.*.)

"An order denying reunification services is reviewed for substantial evidence." (*R.T.*, *supra*, 202 Cal.App.4th at p. 914.) "When the sufficiency of the evidence to support a juvenile court's finding or order is challenged on appeal, the reviewing court must determine if there is substantial evidence, contradicted or uncontradicted, that supports it. [Citations.] Under this standard of review we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses. [Citation.] We must resolve all conflicts in support of the determination and indulge all legitimate inferences to uphold the court's order." (*Albert T.*, *supra*, 144 Cal.App.4th at p. 216.) "However, substantial evidence is not synonymous with any evidence." (*Ibid.*) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id.* at p. 217; see *In re Harmony B.* (2005) 125 Cal.App.4th 831, 839-840.)

Viewed in the light most favorable to the juvenile court's findings, the evidence shows that Justin was a regular and heavy methamphetamine user for almost a decade. His drug use led to the removal of Marlee, T.W. and Ariel's half sibling, and subsequent termination of reunification services in Marlee's dependency case. After his reunification services were terminated, Justin continued to use methamphetamine. Although he had periods of sobriety when T.W. and Ariel were born, he relapsed into drug use each time. Justin experienced another period of sobriety after his arrest and imprisonment for theft.

Although Justin spent an extended period at Freedom House, his success in its program is unclear because the letter supplied by Justin specifies only the time he spent there. After leaving Freedom House, Justin went to meetings at another provider, the Alano Club. However, Justin relapsed into methamphetamine use again and was arrested for possession of controlled substances. Although Justin was offered the opportunity to participate in further formal drug treatment as a condition of his probation, he repeatedly failed to meet with his probation officer. He was arrested twice after that, once in a casino and once as a passenger in a car stopped by police. After two arrests, Justin enrolled in drug treatment through McAlister. During this period, although he knew T.W. and Ariel's mother continued to use drugs, and that T.W. and Ariel were affected, Justin did not intervene or seek to protect them.

When this dependency case began, however, Justin had stopped attending McAlister. He told the Agency he had been clean for three years, when the actual time was seven months. When the Agency asked Justin to take a drug test, he went to the facility but did not give a sample. Justin eventually re-enrolled in McAlister, which was required as part of his probation. However, Justin missed another drug test there when he left the facility after being asked to test. He admitted drinking alcohol once despite his enrollment in the program. Justin's commitment to services was also uncertain, since he missed his intake appointment and first visit at Incredible Families.

In light of this evidence, the juvenile court could reasonably find that Justin had not made a reasonable effort to treat his methamphetamine addiction and consequent inability to protect and care for his children. (See *R.T.*, *supra*, 202 Cal.App.4th at

p. 914.) Although Justin's efforts appear genuine, at least in part, the length and severity of Justin's addiction could reasonably require more intensive efforts than Justin undertook. By the time of the court's hearing, for example, Justin was attending programs at McAlister only once a week. He previously attended only twice per week. Justin's treatment efforts were also inconsistent, as evidenced by his failure to seek formal treatment after his most recent relapse and arrest for possession (even when that treatment was part of his probation) and by his failure to stay consistently enrolled in McAlister (again, even as part of his probation). His candor and commitment to treating his addiction were also called into question by his misleading statements to the Agency regarding his time sober and his repeated failure to complete requested drug tests.

Justin interprets the evidence in the light most favorable to him and argues his efforts were reasonable. We disagree for the reasons we have stated. While a reasonable court may have been able to reach a contrary finding, we cannot say the court's determination here was unreasonable. (See *Albert T.*, *supra*, 144 Cal.App.4th at p. 217.) The court's finding is therefore supported by substantial evidence.

Justin also suggests the court "may have" based its decision on an impermissible standard: that any reunification services would be fruitless. (See *Cheryl P. v. Superior Court*, *supra*, 139 Cal.App.4th at p. 97 ["Section 361.5, subdivision (b)(10) does *not* impose a 'fruitless' standard . . ."].) The juvenile court's comments at the hearing do not support Justin's contention that it relied on a "fruitless" standard. The court never used the word "fruitless" or weighed the potential success of reunification services. Instead, the court explained the context of Justin's efforts and what those efforts had achieved for

him. These factors were permissible for the court to consider. (See *R.T.*, *supra*, 202 Cal.App.4th at p. 915 ["Simply stated, although success alone is not the sole measure of reasonableness, the *measure* of success achieved is properly considered as a factor in the juvenile court's determination of whether an effort qualifies as reasonable."].) We are likewise unpersuaded by Justin's attempt to interpret the court's comments as misstating or misunderstanding the evidence.

#### DISPOSITION

The petition and request for stay are denied.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.