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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.O. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.C.,

Defendant and Appellant.

E054089

(Super.Ct.Nos. J225411, J25412 &
J233822)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Brent D. Riggs, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County
Counsel, for Plaintiff and Respondent.

No appearance for Minors.

Appellant E.C. (Mother) appeals the termination of her parental rights under Welfare and Institutions Code section 366.26¹ as to her three minor children, A.C. (born 1998), E.O. (born 2005), and L.Z. (born 2009) (collectively “the children”). Mother contends the order terminating her parental rights should be reversed because there is insufficient evidence to support the juvenile court’s jurisdiction over the children. Mother claims she can challenge the court’s jurisdictional findings in this appeal, because ineffective assistance of counsel prevented her from making her claims at an earlier time.²

FACTUAL AND PROCEDURAL HISTORY

On January 22, 2009, the two older children, A.C. and E.O., were placed in a confidential foster home after police raided Mother’s apartment and found over 200 balloons filled with heroin, multiple baggies of methamphetamine, cocaine, marijuana, \$2,000 in cash, and other evidence of illegal drug trafficking. Mother was arrested for possession of controlled substances with the intent to sell, conspiracy, and child cruelty. Police stated the drugs were located throughout the apartment in places easily accessible

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² “[M]ost of the time the proper way to raise an ineffective assistance claim is by writ of habeas corpus, not appeal.” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413.) However, there is “an exception in cases where ‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction [citation].” (*Eileen A.*, at p. 1254.) Here, Mother’s appeal is appropriate, because she argues the record shows there is no satisfactory explanation for her attorney’s failure to challenge the juvenile court’s jurisdictional findings.

to the children. Although Mother denied involvement in the sale of drugs, balloons of heroin were in her purse, on the nightstands in her room, and in the open on the floor. At the time of her arrest, an INS hold was placed on Mother due to her status as an undocumented alien. Mother told the social worker she was not in contact with and did not know the whereabouts of either child's father.

On January 26, 2009, the San Bernardino County Department of Children and Family Services (CFS) filed a petition pursuant to section 300, subdivision (b), failure to protect, and subdivision (g), no provision for support. On the same day, Mother posted bail and was immediately deported to Mexico. As a result, Mother did not appear at the detention hearing on January 27, 2009, when the court found there was a prima facie case for removal.

The social worker was able to locate and speak with Mother in Mexico by telephone to notify her of the upcoming jurisdiction/disposition hearing. She said she was staying with friends in Tijuana but was unable to provide the social worker with the address. Mother also contacted the Mexican counterpart of CFS to assist in her desire to reunite with the children in Mexico.

At the jurisdiction/disposition hearing on March 19, 2009, Mother was not present. The court dismissed, without prejudice, the allegation that Mother had a history of substance abuse. However, the court found true the other allegations pertaining to her arrest, and the presence of controlled substances being packaged for sale in the home where she lived with the children. Reunification services and supervised visitation were ordered for Mother.

On July 28, 2009, the social worker reported Mother had returned to the United States, but had an outstanding warrant for the criminal charges filed against her, which had not been cleared, so the children could not be returned to her. At this time, a maternal aunt in Mexico was willing to provide care for the children. Mother indicated she wanted the children placed in Mexico with the maternal aunt. Mother was visiting the children regularly and visitation progressed to unsupervised day visits and then overnight visits. During visits, Mother was appropriate and the children appeared to have a strong bond with her. Mother tested negative for drug use and completed a parenting class. As a result, the court authorized the social worker to obtain Mexican passports for the children. Mother's plan was not to respond to the warrant against her and to return to Mexico as soon as the children were able to be placed there with the maternal aunt. The social worker said she was working with the Mexican Consulate in order to place the children with the maternal aunt in Mexico. However, the process was wrought with complications and was delayed for various reasons. The process was expected to take several months.

The third child, L.Z., was born August 2009. At the time of L.Z.'s birth, CFS did not file a petition to remove him, and so he remained in Mother's custody.

On September 21, 2009, for the first time, Mother was present in court at the six-month review hearing, and counsel was appointed to represent her. The court concluded Mother's progress toward alleviating or mitigating the causes necessitating placement was "substantial." Reunification services and visitation were continued. The same findings and orders were made at the 12-month review hearing on March 22, 2010.

On July 12, 2010, CFS filed a new petition seeking to remove L.Z. from Mother's custody. The new petition was filed pursuant to section 300, subdivision (b), failure to protect; subdivision (g), no provision for support; and subdivision (j), abuse of siblings. Mother had been under police surveillance and was rearrested and detained on new drug charges on June 29, 2010. When arrested this second time, she was driving a stolen vehicle without a license, and was charged with possession and transportation of drugs for sale. Police found \$1,812 and about 30 balloons of heroin in her possession. At her residence, police found an additional 6.2 grams of heroin and packaging materials in the bottom drawer of a kitchen cabinet.

On July 7, 2010, the social worker located L.Z., who had been left with a babysitter. Although the babysitter expressed a willingness to continue caring for the child, "she was not able to be cleared." In addition, the babysitter requested assistance with getting medical treatment as the child appeared to have an ear infection. Mother did not have medical insurance, and the babysitter did not have written consent to obtain medical care. No information was available about the child's father or other relatives who could care for him, so he was placed in a foster home. The court found a prima facie case for removal at a detention hearing on July 13, 2010.

On July 22, 2010, the court held an 18-month review hearing as to the two older children, A.C. and E.O. Mother was present in custody. As a result of Mother's new arrest and other factors, the court terminated reunification services and found there was no probability of return to Mother's custody. However, the court concluded it was not in the best interest of the children to consider termination of parental rights at this time.

On September 8, 2010, the social worker reported Mother had been sentenced to three years in state prison and had been moved to a facility in Chowchilla. On September 14, 2010, the court found the allegations in the new petition to be true, declared L.Z. a dependent child, and denied reunification services to Mother because the length of her incarceration exceeded the time allowed for reunification (§ 361.5, subd. (e)(1)). In addition, the court set a permanency hearing pursuant to section 366.26 to consider the termination of Mother's parental rights to L.Z. As to the two older children, A.C. and E.O., the court held a review hearing on January 24, 2011, and decided to set a section 366.26 permanency hearing.

On May 24, 2011, the court held a section 366.26 hearing as to all three children. At the hearing, Mother testified the children were her "life." She said she had good relationships with them, and had taken good care of them when they were with her. She was opposed to the children being adopted and asked for another chance to prove she could take care of her children. Mother's counsel argued parental rights should not be terminated because of Mother's positive relationship with the children and her desire to regain custody in the future. The court terminated parental rights, concluded adoption was an appropriate permanent plan, and found the children were likely to be adopted.

DISCUSSION

Mother believes the record shows she received ineffective assistance of counsel, because she was not present or represented by an attorney at the jurisdiction hearing, and when counsel was later appointed, he simply entered denials and then failed to challenge the court's jurisdictional findings. According to Mother, CFS failed to prove and plead

facts establishing jurisdiction as to A.C. and E.O. under subdivisions (b) and (g) of section 300 and as to L.Z. under subdivisions (b), (g), and (j) of section 300. Although she concedes her jurisdictional challenge is untimely, Mother contends we should review her claims on the merits and not apply the “waiver rule” as set forth in *In re Meranda P.* (1997) 56 Cal.App.4th 1143 (*Meranda P.*). Instead, Mother argues we should apply an exception to the waiver rule discussed in the case entitled *In re S.D.* (2002) 99 Cal.App.4th 1068 (*S.D.*), because the facts at issue here are analogous to those reviewed in *S.D.*

In *Meranda P.*, the mother appealed from an order terminating her parental rights arguing she was denied effective assistance of counsel throughout the proceeding. The mother had not filed an appeal or extraordinary writ challenging any of the court’s prior orders. (*Meranda P., supra*, 56 Cal.App.4th at pp. 1146, 1151.) In affirming the juvenile court’s order terminating the mother’s rights, the appellate court enforced the rule that “an appellate court . . . may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order” (*Id.* at p. 1151.) In reaching its decision, the appellate court acknowledged “the critical role” of counsel in “ensuring an accurate and just decision,” but declined “to carve out an exception” for the parent’s claim of ineffectiveness as long as the surrounding facts and circumstances revealed no violation of due process. (*Id.* at pp. 1151, 1155.)

In reaching its decision to enforce the waiver rule, the appellate court in *Meranda P.* relied in part on the significant due process protections, such as notice and independent judicial review at various stages of the proceeding, which are already built into the

dependency system to reduce the risk of an erroneous termination of parental rights. The court also noted the parent's rights to some extent must be balanced against other competing interests. These other competing interests include the state's interest in expediency and finality, and the child's interest in securing a stable and nurturing home. (*Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1151-1155.) In other words, enforcement of the waiver rule will not offend due process in the ordinary case, because a number of due process protections are already in place to protect parental rights.

On the other hand, *Meranda P.* “did not create an *absolute* bar to review of ineffective assistance, right to counsel, or other claims tardily presented on a .26 hearing appeal.” (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) The particular facts of each case must be reviewed to determine whether an exception to the waiver rule should be made. An exception is warranted where the parent can show “some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole.” (*Ibid.*) Any such defect “must go beyond mere errors that might have been held reversible had they been properly and timely reviewed.” (*Id.* at p. 209.) When the claimed error involves ineffective assistance of counsel, a parent must also show prejudice. “Neither the absence nor the blunder of appointed counsel alone entitles the parent to obtain the appellate relief he or she seeks.” (*Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1152-1153.) Prejudice is established where the record shows it is reasonably probable the result of the proceeding would have been more favorable in the absence of counsel's ineffective performance. (*Id.* at pp. 1151-1154; see *Janee J.*, at p. 209.)

Although Mother contends the facts here are akin to those at issue in *S.D.*, *supra*, 99 Cal.App.4th 1068, the record does not support her argument. The facts of *S.D.* are easily distinguished. In *S.D.*, the appellate court considered the merits of the mother's ineffective assistance of counsel claim without applying the waiver rule and then concluded it was appropriate to reverse the order terminating parental rights. In short, the waiver rule was not applied, because the appellate court found the mother's counsel made an error of fundamental proportions by failing to challenge jurisdiction, and this failure adversely affected the remainder of the proceeding. (*Id.* at p. 1082.)

The petition in *S.D.* was filed under section 300, subdivision (b), failure to protect, and subdivision (g), no provision for support. (*S.D.*, *supra*, 99 Cal.App.4th at p. 1074.) The child was taken into custody while staying with an adult babysitter in a hotel room while the parents went out to dinner. The hotel called police while the parents were out, after discovering the credit card number they used to rent the room did not belong to them. (*Id.* at pp. 1071-1072.) The child was taken into custody, because police discovered the adult babysitter had an outstanding warrant. (*Id.* at p. 1072.) At the jurisdiction hearing, the allegations of general neglect under subdivision (b) were dismissed, because there was a lack of evidence to show the parents' conduct put the child at a substantial risk of harm. (*S.D.*, at p. 1074.)

Without the section 300, subdivision (b) allegations, the only basis for jurisdiction in *S.D.* was subdivision (g), no provision for support. (*S.D.*, *supra*, 99 Cal.App.4th at p. 1074.) The mother's counsel conceded subdivision (g) was applicable, because the mother was incarcerated. (*S.D.*, at p. 1074.) However, the relevant part of subdivision

(g) only allowed the court to establish jurisdiction if “the child’s parent has been incarcerated or institutionalized and cannot arrange for the care of the child” (*S.D.*, at p. 1076, italics omitted.) The record clearly showed the subdivision (g) allegation was untrue, because the mother was able to arrange care of the child. She had two sisters who were immediately willing and able to assume custody of the child, and the child was released to one of the sisters after the detention hearing. (*S.D.*, at pp. 1071-1073.) Later, the court did place the child in foster care when the sister missed her plane and was late for the jurisdictional hearing. (*Id.* at p. 1073.) At the 12-month reviewing hearing, the court terminated the mother’s reunification services, because her release date was beyond the statutory limit for services. (*Id.* at p. 1075.) The child was then returned to the sister, and the agency recommended her as a prospective adoptive placement. At the section 366.26 hearing, the court terminated the mother’s parental rights and selected adoption as the permanent plan. (*S.D.*, at p. 1076.)

In reaching its decision to reverse the order terminating the mother’s parental rights, the appellate court in *S.D.* concluded the mother’s counsel erroneously conceded jurisdiction, the key legal issue in the case: “Simply put, [the mother’s] counsel gave away her case, despite the fact that both the law and the facts seemed to support her position. None of the protections offered to her during the later phases of the case could ameliorate that initial error. And [the mother] was utterly dependent upon the skill of subsequent counsel to recognize, and finally expose the error on appeal. In the absence of strong countervailing considerations, which are not present here, we will not perpetuate the error by indulging in the fiction that [the mother] intended to waive it.”

(*S.D.*, *supra*, 99 Cal.App.4th at p. 1082.) In other words, the waiver rule did not apply, because counsel's error affected the fundamental fairness of the proceeding.

Here, Mother believes the facts of her case are analogous to those in *S.D.*, because the social worker's reports say she was a good parent and was meeting her children's needs until she was arrested. According to Mother, there is a lack of evidence to show she was unable to supervise or adequately protect her children while she and the other adults in her home were packaging narcotics for sale. Mother also cites a lack of evidence to show she was using any of the narcotics she was packaging.³ With respect to the youngest child, L.Z., Mother refers to evidence he was in the care of a babysitter when she was arrested for the second time. She also believes there was no basis for jurisdiction over L.Z. under subdivision (g) of section 300, no provision for support, because she could have arranged for his continued care by the babysitter while she was incarcerated.

³ In pertinent part, the social worker's report prepared in anticipation of the initial jurisdiction/disposition hearing on March 19, 2009, stated: "A record check indicates that the mother of the children has had no prior arrest record for any kind of violation of the law and she has also not had any previous child abuse reports filed against her. [¶] School staff . . . and the foster mother have attested that the children seem to be secure and stable children, even under the difficult circumstances of having been removed from the mother's care. . . . It appears that the children's physical and emotional needs were being met by the mother and that they were being adequately disciplined as well." At this point in time, the social worker also questioned whether Mother was a willing participant in the drug trafficking operation found in her home. As noted above, other parts of the record also indicate the children had a strong bond with Mother and her interactions with them during visitation were appropriate. Mother did not have a positive drug test.

Unlike *S.D.*, the record in this case does not show counsel was remiss in challenging the court's jurisdiction at any point in the proceeding. Nor does the record show counsel's failure to contest the juvenile court's jurisdiction had any effect whatsoever on the outcome or the fundamental fairness of the proceeding. Despite the positive comments the social worker initially made about Mother in her reports, the evidence in the case overwhelmingly favored the court's finding of jurisdiction as to all three children. Unlike *S.D.*, the petition included allegations against Mother which, if found true, were sufficient to establish jurisdiction over the children under subdivision (b) of section 300. The allegations were supported by substantial evidence included in the social worker's Jurisdiction/Disposition Report filed February 18, 2009. The social worker's report was based on details included in the police report of Mother's arrest and the contemporaneous search of Mother's apartment. As outlined more fully above, the police report revealed the existence of a large scale, illegal, drug packaging operation occurring in Mother's apartment where she lived with the children. From the evidence, the court was certainly entitled to infer Mother's conduct put the children at a substantial risk of physical and emotional harm. Of particular concern was the size of the operation, the amount of drugs located in the apartment, and the location of the drugs throughout the apartment in places easily accessible to children.

Based on the evidence provided to the court by the social worker, we reject Mother's contention the court's inference of a substantial risk of harm to the children was mere speculation unsupported by proof, because there is no evidence the adults present would not have taken steps to protect the children from having access to inherently

dangerous drugs. A juvenile court is justified in concluding a child is at a substantial risk of physical and emotional harm when placed in an environment that not only allows easy access to dangerous illegal drugs, with no apparent means of preventing ingestion by the child, but also encourages a belief that illegal drug use is appropriate and/or necessary. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 825.) Therefore, the juvenile court's finding of jurisdiction was appropriate under section 300, subdivision (b), as to all three children and, unlike *S.D.*, was not based simply on subdivision (g) as a result of Mother's incarceration. In short, the record shows no viable basis for attacking the juvenile court's jurisdiction as to any of the children under subdivision (b) of section 300, and an attorney is not ineffective for failing to pursue arguments that do not have merit.⁴ (*People v. Maury* (2003) 30 Cal.4th 342, 409, fn. 14, 414-418.)

Based on the foregoing, it is our view the waiver rule precludes Mother from raising representational issues at the jurisdictional phase of the proceedings involving her three children. Mother's argument that we should follow *S.D.* and apply the exception to

⁴ As to the youngest child, L.Z., we also reject Mother's contention counsel was ineffective for failing to challenge the allegation under subdivision (g) of section 300, that Mother left him in the care of a friend who was not able to provide medical care, so arrangements for the child's care during her incarceration were inadequate. First, the social worker's report states the friend was "not able to be cleared" to provide the child with continuing care. Second, even if counsel was able to successfully challenge this allegation with proof that the friend could have been authorized to seek and obtain medical treatment for L.Z. and to continue to provide him with adequate care during Mother's incarceration, it would not have affected the outcome of the proceeding. For the reasons outlined above, jurisdiction over L.Z. was proper under subdivision (b) of section 300. As a result, there is also nothing to indicate Mother would be able to establish prejudice or deficient performance by counsel in failing to challenge this allegation.

the waiver rule is unconvincing and unsupported under the facts and circumstances of the case. We will affirm the juvenile court's order terminating Mother's parental rights, because she has raised no other issues concerning the validity of the juvenile court's findings and orders made at the section 366.26 hearing.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.