

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

APP-06-03

Decided January 9, 2009

BEFORE: HARPER, KRONK, and NOLAN, Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge, who is joined by Appellate Judge Harper.

Appellant appealed under Tribal Code Section 30.512 the trial court's May 11, 2006 Order Terminating Parental Rights. In his brief and at oral argument, Appellant argued that the lower court's decision should be overturned based on alleged conflicts between court and law enforcement personnel involved in the matter, pretrial procedural error and ineffective counsel. This Court holds that the trial court's decision was not clearly erroneous and therefore upholds the decision of the trial court.

DISCUSSION

I. Factual and Procedural Background

The present matter is an appeal from the trial court's Order Terminating Parental Rights. The original petition in this matter to terminate Appellant's parental rights to ^{AL} was filed on March 4, 2005 by the Anishnabek Community and Family Services (ACFS). The original petition sought the jurisdiction of the Sault Ste. Marie Tribe of Chippewa Indians tribal court pursuant to Tribal Code Section 30.309 and placement of the minor child with her mother. An amended petition was filed on September 13, 2005 alleging an additional ground for jurisdiction. The child remained with the mother.

The petition alleged that on or about February 25, 2005, Appellant threatened the mother of the child, while the child was in the mother's arms. Appellant knocked the mother and child to the ground. The petition noted that this was not the first assault committed on the mother by the Appellant. A previous assault had taken place while the mother was pregnant with the minor child. After being incarcerated in the Mackinaw County jail on charges resulting from the assault on the child's mother, the petition alleged that Appellant, despite a no contact order, contacted the mother and threatened that he was going to go to the child's day care and "get his baby." The petition further alleged that Appellant is diagnosed as having schizophrenia and substance abuse disorders, but was not taking his prescribed medication.

A petition seeking termination of Appellant's parental rights was filed on November 1, 2005 pursuant to Tribal Code Section 30.504(3). The petition alleged the facts that originally brought the child into care, and alleged that Appellant had plead guilty to child abuse charges in trial court and was subsequently sentenced to 365 days in jail. Additionally, the petition alleged that Appellant had been convicted on charges of fleeing and eluding a police officer, aggravated stalking and was sentenced to a minimum of 23 months in state prison.

Based on the above petitions, Judge Farrell Elliot issued an order terminating the parental rights of Appellant to AL on May 11, 2006. Appellant now appeals Judge Elliott's May 11, 2006 Order.

In his Notice of Appeal, Appellant appealed the trial court's decision on the basis of Tribal Code Section 30.512, and stated the appeal was based on "Inncorrect [sic] Order of Judgment. Ineffective assistance of counsel. Unconstitutionally specially appointing Judge Farrell E. Elliott [sic] I request all transcripts of 4-28-06 trial of AL." Notice of Appeal (June 28, 2006). Furthermore, Appellant requested that "the decision of the Trial Court reversed, and this matter re-tried." *Id.* In his brief on appeal and at oral argument, Appellant amended his arguments to allege that he was ineffectively assisted by counsel at trial on the Petition to Terminate Parental Rights, there were sufficient conflicts of interest to require the tribal court to address the alleged conflicts and institute a special handling of the child welfare matter, and that reversible error occurred because of the trial court's failure to hold the termination hearing in a timely manner. In his brief and at oral argument, Appellant dropped his allegations that the trial court erred in conducting a trial on a petition where the minor child's name was incorrectly spelled and also that reversible error occurred because of the appointment of Judge Farrell E. Elliot to preside over the termination trial.

Accordingly, this Court will consider the former three arguments raised by Appellant in his brief on appeal and at oral argument. Appellant raised the issue of alleged conflicts at the trial court level, and this issue has therefore been preserved on appeal under Tribal Code Section 82.125(1), (2). It does not appear that Appellant raised the issue of pretrial procedural error at the trial court level, and, therefore the issue would normally not be preserved on appeal. However, Appellant argued at oral argument that "a miscarriage of justice would result" should the Court not consider this argument, and, therefore the Court will address the argument below on the basis of Tribal Code Section 82.125(1). Finally, ineffectiveness of counsel was not raised below, however, it is argued that the ineffectiveness of Appellant's counsel was not apparent until after the trial court rendered its decision and also that "a miscarriage of justice would result" should the Court fail to consider this argument. Accordingly, the Court will also consider the effectiveness of Appellant's counsel below. Tribal Code Section 82.125(1). Each of these arguments will be addressed below in turn.

This Court has jurisdiction to determine the present matter under Tribal Code Sections 82.109 and 82.111(1). Tribal Code Section 82.109 grants this Court exclusive jurisdiction to review the decisions of the trial court. Furthermore, Tribal Code Section

82.111(1) states that “[a]n appeal is properly before the Court of Appeals if it concerns ... a final judgment or order of the Tribal Court. ...”

II. Standard of Review

This Court will review the trial court’s determination under the “clearly erroneous” standard of review. Because this is an appeal from an order terminating parental rights, the clearly erroneous standard of review applies. Tribal Code Section 30.512 (“The clearly erroneous standard shall be used in reviewing the findings of the Tribal Court on appeal from an order terminating parental rights.”). “In applying the clearly erroneous standard of review, the Court will determine whether it is left with a ‘definite and firm conviction’ that the trial court made an error in its findings of fact.” *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (Aug. 4, 2008).

Appellee asserts in its brief on appeal that this Court should apply the Michigan Court of Appeals standard of “clear error” in this case. Brief for Appellee, APP-06-03, 2 (Aug. 5, 2008). However, such a consideration of Michigan law is inappropriate here given there is tribal law that exactly addresses the applicable standard of review. Moreover, in civil matters, such as this matter, the Court shall only apply the laws of the State of Michigan if there is no tribal or federal law that applies. Tribal Code Section 81.105.¹

III. Conflicts of Interest

In his brief on appeal and at oral argument, Appellant asserted that sufficient conflicts of interested existed in this matter to require the trial court to address the issue and institute special handling of the case. Specifically, “[t]he basis for said request was Appellant’s ... allegations of apparent bias and prejudice due to the relationship between ^{HL’s} mother, and the following people: Sault Tribe Law Enforcement Officer, Ray Severance; Vicki Gardner, Clerk of the Tribal Court; James Bias, prosecuting attorney; and Elizabeth Bias, James Bias’ ex-wife and attorney for ^{AL’s}” Brief for Appellant, APP-06-03, 6 (July 18, 2008). Appellant alleged that because of ^{HL} relationship with these individuals he had apparently been adversely impacted during the pre-trial and trial proceedings in this matter. Appellant argues that these potential conflicts “required the Tribal Court’s attention” and therefore the trial court committed reversible error.

However, Appellant fails to support his allegation. There is no assertion, either during this appeal or in the record below, as to how these alleged conflicts adversely impacted Appellant. Moreover, Appellant fails to supply this Court any legal basis to support his conclusion that the trial court committed reversible error by failing to consider the alleged conflicts. Ours is a relatively small reservation community, where community members know each other well. It is therefore unremarkable that ^{H.L.} would know several of the law enforcement and court personnel involved in the

¹ The Court notes that Appellee restates almost exactly the same standard of review argument at four points in its brief on appeal. In the future, only one statement of the applicable standard of review is necessary.

present matter. Therefore, without explanation of how the Appellant has been adversely affected or legal justification for how the trial court's failure to consider the conflicts allegation requires reversal, this Court cannot overturn the trial court's Order Terminating Parental Rights merely because H.L. knew individuals who participated in the lower court proceedings.

IV. Pretrial Procedural Error

Next, Appellant alleged that the trial court committed reversible error by its failure to hold the termination hearing in a timely manner. Tribal Code Section 30.508(2) provides that a hearing on a petition for the termination of parental rights must be held within 42 days after the filing of the supplemental petition. The tribal court may only extend such hearing for an additional 21 days. Tribal Code Section 30.508(2). Appellant therefore argues that "when the Court [trial court] rescheduled the hearing after the parties stipulated to adjourn in December, 2005, the date of 22 March, 2006, was far in excess of the permissible time within which the hearing was *required* to be held." Brief of Appellant, APP-06-03, 8 (July 18, 2008) (emphasis in original). Accordingly, because the dispositional hearing on the petition to terminate Appellant's parental rights was held substantially after the maximum 63 day deadline from the time of filing, Appellant asserts that the trial court committed reversible error.

At oral argument, counsel for Appellant elaborated on this argument, explaining that although the argument necessarily implicated procedural rights that these rights infringed on Appellant's fundamental right to be a parent to the minor child. Accordingly, because violation of Appellant's procedural rights led to the termination of such a fundamental right as the right to be a parent, Appellant implores this Court to reverse the decision of the trial court. Appellant failed to provide any legal support for this argument.

Alternatively, counsel for Appellee at oral argument presented the Court with copies of the Court of Appeals of Michigan decision in *Department of Social Services v. Jackson*, 501 N.W. 2d 182, 199 Mich. App. 22 (June 24, 1993). *Jackson* involved the appeal of a mother from the termination of her parental rights. In relevant part, the court in *Jackson* addresses the argument that the lower court erred by granting two continuances of the termination hearing in violation of the applicable time limitations because petitioner's experts were unavailable. Like the applicable tribal code provision in the present case, under MCR 5.974(F)(1)(b), "[t]he hearing on a supplemental petition for termination of parental rights under this subrule must be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the time period for an additional 21 days." Appellant in *Jackson* therefore argued that the lower court should be reversed because it violated the applicable code provision by holding the hearing after the 63 days had expired. However, the court held that "[t]he trial court may extend the time for a hearing beyond the additional twenty-one days." *Id.* at 185 (citation omitted). The court explained that failure to follow the time requirements of the applicable code would not lead to the reversal of a termination order because the code did not provide for any sanctions if such time limitations were violated.

Additionally, neither the Michigan Supreme Court nor legislature had sought fit to implement such limitations. Additionally, the court explained that “Respondent’s circumstances did not change between the original trial date and the actual hearing date. The delay afforded respondent an opportunity to improve her compliance with the court’s order and thus benefited, rather than prejudiced her.” *Id.*

Appellee acknowledged that this Court normally should not consider Michigan case law until after it has been shown that there is no tribal or federal case law applicable. *See* Tribal Code Section 81.105. However, Appellee argued that the Court should consider the Michigan case law on this point, as Tribal Code Section 30.508(2), which is the basis of Appellant’s argument, and MCR 5.974(F)(1)(b), which was the basis of appellant’s argument in *Jackson*, are nearly identical. A brief review of Tribal Code Section 30.508(2) and MCR 5.974(F)(1)(b) confirms that this is true. Accordingly, the Court believes it is helpful to take into consideration how another court has interpreted a nearly identical provision under similar circumstances.

Although *Jackson* is not binding on this Court, the Court does find the Michigan Court of Appeals reasoning in the case persuasive on the present issue. Like in *Jackson*, the tribal Board of Directors has not provided any sanctions for violation of Tribal Code Section 30.508(2). Additionally, Appellant’s circumstances did not change between the time the termination petition was filed and the termination hearing was held, as he was incarcerated during that time. If anything, this additional time provided Appellant opportunity to take advantage of services offered while he was incarcerated to put him in a better position for the termination hearing. Appellant’s failure to take advantage of this opportunity does not now justify the trial court’s decision being reversed. Accordingly, Appellant’s argument that the lower court’s order terminating his parental rights should be reversed because of pretrial procedural error is rejected.

V. Ineffectiveness of Counsel

Finally, Appellant argues that the trial court’s termination order should be reversed because he received ineffective counsel during the trial on the petition to terminate his parental rights. Appellant argues that because his attorney for the trial was appointed only 25 days before the trial she was unable to prepare an adequate defense. Specifically, Appellant stated that “[t]wenty-five (25) days to prepare for trial with such serious consequences is insufficient. Certainly, given sufficient time to prepare, *MS.F* would have raised the issues of timeliness of the proceedings and the conflicts which were brought to the Tribal Court’s attention and required the Tribal Court’s focus.” Brief of Appellant, APP-06-03, 5 (July 18, 2008). Accordingly, Appellant’s argument is that the ineffectiveness of counsel is proven by the fact that she did not raise the conflicts argument or alleged pretrial procedural error, both discussed above, during the termination hearing. Again, Appellant failed to supply the Court any legal support for this assertion.

For Appellant to succeed on this argument, this Court must determine that either the failure of the trial court to consider the alleged conflicts present in this case or the

pretrial procedural error requires that the trial court's decision be reversed. As explained above, the Court has determined that neither of these arguments justify reversing the lower court's order terminating Appellant's parental rights. There can therefore be no argument for ineffective counsel on the basis of either of these assertions, as Appellant was not harmed by trial counsel's failure to raise the arguments at trial. Additionally, counsel for Appellant conceded at oral argument in front of this Court that Appellant probably would have had his parental rights terminated even if these arguments had been raised at trial below. Given counsel for Appellant even concedes that Appellant has likely not been injured by failure to raise these arguments, the Court concludes that the trial court's order terminating Appellant's parental rights on the basis of ineffective counsel is rejected.

CONCLUSION AND ORDER

This Court reviewed the trial court's decision to determine whether the trial court's actions were clearly erroneous. Tribal Code Section 82.124(1). The trial court's decision will only be overturned if this Court reaches a definite and firm conviction that the trial court erred. This Court cannot reach such a conclusion, as the trial court's Order Terminating Parental Rights is supported on the facts presented on the record below and Appellant's arguments that the Order should be reversed because of alleged conflicts, pretrial procedural error and ineffective counsel are unpersuasive. Therefore, this Court denies Appellant his requested relief and it is ORDERED that:

- 1) The trial court's Order Terminating Parental Rights is affirmed.