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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1000**

In the Matter of the Welfare of the Child of:
L. M. W. and H. E. P., Parents

**Filed March 5, 2018
Affirmed
Bratvold, Judge**

Redwood County District Court
File No. 64-JV-17-30

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota (for
appellant mother)

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent
Southwest Health and Human Services)

Amy Bohnen, Sleepy Eye, Minnesota (guardian ad litem)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey,
Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Appellant L.M.W. (mother) challenges the district court's decision terminating her
parental rights to her infant and denying her motion for new trial. The district court
determined that mother did not overcome the presumption of palpable unfitness as a result
of a prior order involuntarily terminating her parental rights to two other children. Mother

argues that she received ineffective assistance of counsel, therefore, she is entitled to a new trial. We affirm.

FACTS

H.M.P. was born to mother and H.E.P. (father) in December 2016. By court order dated December 20, 2016, the agency assumed custody of H.M.P., who was placed out of home. In March 2017, respondent Southwest Health and Human Services (the agency) filed two petitions, one to adjudicate H.M.P. as a child in need of protection or services (CHIPS) under Minn. Stat. § 260C.007, subd. 9 (2016), and the other to terminate mother’s parental rights to H.M.P. for palpable unfitness under Minn. Stat. § 260C.301, subd. 1(b)(4) (2016).¹ The petition cited the mother’s prior involuntary termination of parental rights (TPR).

Previous termination decision

In March 2015, the district court terminated mother’s parental rights to two children, one born in June 2007 and the other born in October 2011. The district court’s order found that mother is “palpably unfit to be a party to the parent-child relationship” under Minn. Stat. § 260C.301, subd. 1(b)(4) (2014). The previous termination proceedings focused on three issues: mother’s mental health, chemical dependency, and housing instability. The district court made the following findings in support of its palpable unfitness determination: “Mother has a history of mental illness including depressive disorder,

¹ The agency also petitioned to terminate the parental rights of father, and to transfer legal custody of the child. Father admitted the petition and agreed to a voluntary transfer of legal and physical custody of the child. Father’s parental rights are not at issue in this appeal.

bipolar disorder, alcohol abuse, cannabis abuse, and history of post-traumatic stress disorder,” mother had previously been placed in a 72-hour mental- health hold and hospitalized for suicidal statements, mother did not maintain her home in a sanitary condition, and mother had been arrested for driving while impaired (DWI). The counselor who conducted mother’s parenting assessment recommended she should enter and complete an outpatient chemical dependency treatment program. The district court also found that, at the time of her termination trial, mother “had not entered chemical dependency treatment because she dispute[d] the accuracy of the assessor’s report.”

Recent termination trial and order on appeal

The district court received both the March 2015 termination order and parenting assessment as exhibits during mother’s one-hour termination trial on May 30, 2017. The guardian ad litem submitted a written recommendation to terminate mother’s parental rights, but did not testify. Next, a child protection social worker testified that, because “there is no record to indicate that [mother] had corrected any of the issues that were of concern from that [earlier] TPR which was fairly recent history,” she recommended that mother’s parental rights be terminated. The social worker also testified about the chronological summary, which indicated “some sporadic phone calls” from mother.

Mother testified on three issues raised by the agency in support of termination—that mother has “a consistent pattern of specific conduct” that directly relates to the parent and child relationship. These issues are as follows: her mental health, chemical dependency, and housing instability. Regarding her mental health, mother explained that she has suffered two traumatic brain injuries and has been diagnosed with post-traumatic stress

disorder (PTSD), which she described as “in remission” because she has not had symptoms “in years.” Mother testified that she takes medication for “minimal bi-polar” disorder and anxiety. She also testified that she relies on some individuals to support her, including “confidential people” from Southwestern Mental Health, people at Christian Recovery Ministries, and people in a Sunday School group. Mother further testified that she would cope with PTSD symptoms or a panic attack with taking a “bubble bath with some candlelight,” drinking “a cup of coffee,” or “going outside and just breath[ing] type [of] thing.”

Regarding chemical dependency, mother testified that she has been in chemical dependency treatment unnecessarily for ten years. She disagreed with the results of her chemical assessment, which indicated that she is “an addict,” and testified that she had not sought or received chemical treatment since her parental rights were terminated in 2015. Mother claimed to have been wrongly convicted of DWI because she blew “all zeros.” She also testified that she did not enter treatment because the facility “won’t let me in, because I seldom drink and I don’t do drugs.”

Regarding housing, mother testified that she had recently rented a two-bedroom house and hoped to possibly buy it on a contract for deed. She testified that she has “everything” she needs to care for H.M.P. and will be able to support the child with her monthly income of \$1,050, which includes social security benefits and wages from part-time employment.

At the end of testimony, both sides waived closing argument.

On June 13, 2017, the district court issued an order terminating mother's rights to H.M.P. The district court found that mother "has done nothing to address the significant mental health, chemical use or housing stability issues that plagued her during" the earlier termination proceeding. The district court also determined that mother has an "unfortunate pattern of housing instability" and that mother's testimony regarding "her alcohol [use] and need for treatment [is] simply not credible." Additionally, the district court found mother's "testimony as to her mental health needs and chemical use needs to be unbelievable." The district court concluded that mother "presented no evidence of improved parenting skills that would justify a finding contrary to the assumed fact" that mother is palpably unfit to parent. The district court concluded that mother did not rebut this presumption and that clear and convincing evidence supported the petition to terminate her parental rights to H.M.P.

Appeal and motion for new trial

Mother appealed the termination order. Mother also filed a motion for new trial in the district court with assistance of her appellate counsel. This appeal was stayed pending resolution of mother's motion for new trial, which did "not challenge the sufficiency of the record to establish the basis for termination of her parental rights," but argued that her trial counsel provided ineffective assistance. Mother did not request an evidentiary hearing but submitted two affidavits, one signed by mother and the other signed by her appellate counsel.

In her affidavit, mother said, "I had little contact with my attorney in relation to his representation." She explained that she "was never asked" about possible witnesses or for

access to medical records. Mother claimed that her medical records would show that her “general health is good” and that her mental health issues are “under control.” Mother acknowledged that she “will continue to work hard to address” her mental health and is “developing a support network” for assistance. She also recognized that she “may need to go to the emergency room in some situations.” Additionally, mother described her efforts to achieve sobriety, which included attending a Christian recovery program for alcoholics and drug addicts. She stated, “It has been several years since I have had an alcoholic beverage, other than a celebratory sip on one occasion. I remain sober through today and take pride in my sobriety.” Mother also described her search for a “more permanent [housing] situation.” She explained that at the time of the termination trial, she thought she had “secured a two-bedroom apartment” where she could stay long term; but that “proved not to be the case.” She stated that she is “now looking at subsidized housing as a better long term solution” for her and H.M.P. if her parental rights “are restored.”

In his affidavit, mother’s appellate counsel stated that he had obtained mother’s medical records, copies of which he filed with an affidavit. The medical records largely pre-date the March 2015 termination order. The attorney also attested that he had spoken with at least two “collateral witnesses” who could testify as to mother’s ability to parent. No affidavits by the proposed witnesses were submitted, but the attorney’s affidavit said one witness described mother as a “very caring, spiritual, uplifting person” who is “working hard on herself and her issues.” His affidavit also said that the witness “would have no trouble leaving her children with mother if they were young enough to need care.” The attorney’s affidavit described the second witness’s proposed testimony as having

content similar to the first witness’s testimony; the second witness would also confirm that mother could continue to live with her “for the foreseeable future.”

On October 2, 2017, the district court held a hearing on mother’s motion for new trial. A transcript of the hearing was not submitted to this court. But at oral argument to this court, the parties indicated that no additional evidence or oral testimony was offered at the hearing. The district court issued an order denying mother’s motion, explaining that “[t]rial counsel’s performance did not fall below an objective standard of reasonableness” and that mother failed to establish that her trial counsel failed to meet his obligation to represent her.

D E C I S I O N

Minnesota statutes create a rebuttable presumption of palpable unfitness “upon a showing that the parent’s parental rights to one or more other children were involuntarily terminated.” Minn. Stat. § 260C.301, subd. 1(b)(4); *see also In re Welfare of R.D.L.*, 853 N.W.2d 127, 137 (Minn. 2014) (quotations omitted). The statutory presumption shifts the burden of production to the parent who “needs to produce only enough evidence to support a finding that the parent is suitable to be entrusted with the care of the children.” *See In re Welfare of J.A.K.*, _N.W.2d_, 2018 WL 577744, at *3 (Minn. App. Jan. 26, 2018) (quotations omitted).

In her brief to this court, mother explained that she “does not challenge the sufficiency of the existing record to establish the basis for termination of her parental rights. . . . Instead, mother challenges the effectiveness of her trial counsel.” Mother contends that she is entitled to a new trial because she was deprived of her statutory right

to effective assistance of counsel. Mother argues that if her trial counsel had offered medical records and testimony from “family, friends, employers, or others,” the evidence likely would have impacted the outcome of the trial because she could have rebutted the statutory presumption of palpable unfitness.

Before pressing her ineffective assistance claims, mother argues that she faced “an uphill struggle” because her parental rights had previously been involuntarily terminated. Mother correctly notes that in this type of case, the agency need not offer any services to support the continuation of the parent-child relationship. Minn. Stat. § 260.012(a)(2) (2016). Mother also points out that the March 2015 order terminating her parental rights provided “a guideline to counsel” for developing her response to the current termination petition.

In every termination of parental rights case, a parent has “the right to effective assistance of counsel.” Minn. Stat. § 260C.163, subd. 3(a) (2016). There is a body of criminal caselaw discussing ineffective assistance of counsel and we have relied on these cases for guidance in civil cases in addressing a statutory right to counsel. *See generally In re Alleged Mental Illness of Cordie*, 372 N.W.2d 24, 28-29 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985).

Under the *Strickland* test, to demonstrate ineffective assistance of counsel, the moving party must establish that (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984). A “reasonable

probability” means “a probability sufficient to undermine confidence in the outcome” of the case. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. We “need not address both the performance and prejudice prongs if one is determinative.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). We review an ineffective-assistance-of-counsel claim de novo because it raises mixed questions of law and fact. *Id.*

Typically, the moving party requests an evidentiary hearing when seeking relief for ineffective assistance of counsel. *See Swaney v. State*, 882 N.W.2d 207, 217-18 (Minn. 2016). An evidentiary hearing is appropriate if the motion “allege[s] facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong [*Strickland* test].” *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). An evidentiary hearing on ineffective assistance of counsel is not warranted if the motion alleges facts that, if proven, would not satisfy the prongs of *Strickland*. *See Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007). The moving party has the burden of proof. *See Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

“[T]here is a strong presumption that counsel’s performance fell within a wide range of reasonable assistance.” *Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006) (quotations omitted). And we “give trial counsel wide latitude to determine the best strategy for the client.” *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013) (citation omitted). If the trial attorney made strategic choices after a thorough investigation of the facts and law, then those choices are “virtually unchallengeable.” *Id.* at 508 (quotation omitted). If the trial attorney conducted a limited investigation of the facts and law, then his decisions may be reasonable “to the extent that reasonable professional judgments support the limitations on

investigation.” *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003) (quotation omitted). Generally, we give considerable deference to an attorney’s judgments, but “a failure to investigate a potential defense may constitute ineffective assistance if it results not from counsel’s considered choice but rather from inattention or neglect.” *Swaney*, 882 N.W.2d at 218.

Here, mother did not request an evidentiary hearing, nor did her affidavit evidence rebut the strong presumption of reasonableness that we apply to trial counsel’s assistance. In fact, a close reading of mother’s evidence submitted with her new-trial motion leads us to conclude that we cannot determine whether her attorney’s performance was objectively unreasonable, for three reasons.

First, the record does not indicate whether trial counsel contacted mother’s healthcare providers and then decided not to obtain or offer medical records at trial. *See, e.g., Swaney*, 882 N.W.2d at 2018-19 (holding no ineffective assistance of counsel despite trial counsel’s failure to obtain prison phone records because appellant did not satisfy his “burden of proving that a reasonable probability exists that, had the records been obtained, the result of the trial would have been different”). The district court reviewed the medical records attached to mother’s appellate counsel’s affidavit and stated that “the voluminous medical records . . . relate largely to the period before the [earlier] TPR was final” and “concerned her prenatal, pregnancy and birthing records.” The district court noted that the medical records describe “the significant mental health concerns – psychotic disorders, major depressive disorder, substance use disorder, anxiety, PTSD, and other – throughout mother’s life.” Also, the district court concluded that the medical records “contain

numerous references to both alcohol and drugs (primarily marijuana),” which contradicted mother’s trial testimony about her sobriety. In short, trial counsel’s failure to offer mother’s medical records *may* have been a strategic decision, which does not support mother’s claim of ineffective assistance.

Second, the record does not indicate whether trial counsel contacted and interviewed mother’s friends or acquaintances and determined that their testimony would not sufficiently advance mother’s case. *See, e.g., Swaney*, 882 N.W.2d at 219-20 (holding no ineffective assistance of counsel because trial counsel’s investigation of potential witnesses was reasonable under the circumstances). Moreover, the district court said that “the positive affidavits from [mother’s] friends attesting to their willingness to allow their children to be supervised by mother would not have been enough to ‘affirmatively and actively’ demonstrate her ability to successfully parent the child.” Here, trial counsel’s failure to call collateral witnesses at trial *may* have been a strategic decision, which does not support mother’s claim of ineffective assistance.

Third, while mother’s affidavit described “little contact” with her attorney, the record does not indicate that mother contacted trial counsel and he refused to respond, or that mother scheduled meetings with trial counsel and he would not attend. *See, e.g., State v. Caldwell*, 803 N.W.2d 373, 387 (Minn. 2001) (holding no ineffective assistance of counsel based on the claim that trial counsel “consulted with [defendant] only three times”). On this record, we can draw no conclusion about trial counsel’s contact with mother.

Moreover, our review of mother's trial testimony on direct examination shows that mother addressed the issues raised by the previous termination order, and that her affidavit did not materially add to her testimony. The district court correctly noted that mother's trial counsel "specifically identified the issues to be addressed (mental health, chemical health, and housing stability) and directed appropriate questions to mother on these issues." The district court explained that mother had done "very little" since the March 2015 termination order and noted that the "fanciful" portions of her testimony "cannot be placed on the attorney."

We are troubled by the short, one-hour trial that occurred before mother's parental rights were terminated. Without any evidence supporting mother's ineffective-assistance-of-counsel claim, however, her assertions are unsupported and vague. We cannot make a determination that the lack of medical records or testimony from collateral witnesses resulted from ineffective assistance of counsel because we have insufficient information from an undeveloped record.

Mother argues that, in evaluating her ineffective assistance claim, this court should recognize that trial counsel was required to "do much more than in a typical termination matter" because her termination proceeding included a presumption of palpable unfitness. Moreover, mother argues that termination proceedings typically "arise in a setting where the client most often faces significant challenges," such as little or poor education, financial difficulties, drug or alcohol use, mental health issues, and criminal histories, therefore, trial counsel is "thrust into the role of assisting in meeting the legal obligation of the client" to

overcome this burden. We reject this claim as without legal authority. The standard for effective assistance of counsel remains one of objective reasonableness.

We cannot conclude on this record that mother sustained her burden to prove that her trial counsel's decisions and actions were objectively unreasonable. Because mother did not demonstrate that her trial counsel's performance fell below an objective standard of reasonableness, we decline to consider the second prong of the *Strickland* test, *see Rhodes*, 657 N.W.2d at 842, and conclude that the district court did not abuse its discretion by denying her motion for new trial.

Affirmed.