STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0467

In the Matter of the Welfare of the Child of:
H. E. A. and D. D. C., Jr., Parents.

Filed August 28, 2023
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69VI-JV-22-35

Bill L. Thompson, Law Office of Bill L. Thompson, Duluth, Minnesota (for appellant-father D.D.C., Jr.)

Kimberly J. Maki, St. Louis County Attorney, Jessica Foschi, Assistant County Attorney, Virginia, Minnesota (for respondent St. Louis County Public Health and Human Services)

Sara Henkel, Virginia, Minnesota (guardian ad litem)

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant-father challenges the termination of his parental rights to one child, arguing that his due-process rights were violated because (1) the district court conducted the trial by default and (2) he received ineffective assistance of counsel. We affirm.

FACTS

Respondent St. Louis County Public Health and Human Services (the county) became involved with H.E.A. (mother) in October 2020 because she was using heroin while pregnant. The child was born in May 2021, and tested positive for methamphetamine. In June, mother voluntarily placed the child in foster care and the county subsequently commenced a proceeding to adjudicate the child as needing protection or services. Three months later, the county learned that appellant D.D.C., Jr. was the alleged father; DNA testing confirmed this in December. Mother informed D.D.C. (father) that he was the father, but the county's multiple attempts to reach him were unsuccessful.[1]

In February 2022, the county filed a termination-of-parental-rights (TPR) petition. The petition alleges that father has "not responded to attempts of contact, leaving the [county] unable to develop and work a case plan with him to see if he would be a willing, safe and stable parent for [the child]." In May, the county located father in the St. Louis County jail and served him with the petition.[2]

[1] Father has a lengthy and extensive history with child-protective services regarding at least five other children. This history includes multiple reports of maltreatment: hitting his children with belts, choking them, ordering them to fight one another, exposing them to illegal drugs, driving while impaired with children in the vehicle, leaving them unattended and without food for days at a time, withholding prescription medication, and pervasive verbal abuse.

[2] Father has been in the custody of the Minnesota Department of Corrections throughout this proceeding.

Father appeared in person for two hearings: on October 13 and December 12, 2022.[3] At the December 12 hearing, the district court appointed an attorney to represent father and scheduled the trial for January 26, 2023. Mother voluntarily terminated her parental rights on January 17. In its order terminating mother's parental rights, the district court noted that father "has not signed a recognition of parentage at this time and has not filed for any custodial rights."

Father did not appear for trial on January 26. Trial was continued to February 9, and father again did not appear. His attorney, the county attorney, the guardian ad litem (GAL), a social worker, and his mother were present. The district court began by inquiring about father's absence and the lack of a transport order. Father's attorney stated that he had attempted without success to contact father through prison staff, and that father had not reached out to him despite having his contact information. Father's mother said she spoke to father that morning, that "he was asking to be here, and he said no one reached out to him," and that her calls to father's attorney went unanswered. Father's attorney repeated that he had received no messages from father. The social worker also indicated that she had not heard from father. And the GAL stated that when she last spoke with father, he told her that he would not attend the trial.

The county asked the district court to proceed by default. Noting father's prior failures to appear, his "minimal to no progress on his case plan, minimal contact with the parties and proceedings, minimal to no contact with the child, illegal behavior(s) resulting

[3] There are no transcripts from these hearings.

[in] incarceration, and lack of stability that would allow the child herein to return to his care in the reasonably foreseeable future," the court granted the county's request.

The county presented testimony from the social worker and the GAL regarding efforts to reunite the family and the status of the child, who had been in out-of-home placement for more than 530 days. The social worker recounted her unsuccessful attempts to work with father on a case plan and his near-complete lack of communication with her, despite asking for and receiving her direct contact information. On one of the few occasions the two spoke, father told her that he would "think about" participating in his case plan but that he "did not have any concerns" or feel like he needed to complete it. She also testified that, to her knowledge, father had neither met nor communicated with the child. The GAL testified that when she spoke with father in early January, she advised him that he should attend his trial and he replied "that he was not planning to attend because he would have to quarantine ten days before and ten days after the trial."

After considering this testimony and other record evidence, the district court found that clear and convincing evidence supports four statutory grounds for termination and that termination is in the child's best interests. The court issued a written order but stayed it for 30 days to allow father the opportunity to voluntarily terminate his parental rights.

Father chose not to do so and did not submit a posttrial motion. Instead, he opted to advise the court in a letter that he wished to appeal the termination, asserting that he "was never contacted not once by the public defender appointed to me, nor did he arrange for me to appear in court." He also stated that his prison case worker advised him on the

day of trial that his attorney did not arrange for him to appear in court. The district court filed the stayed TPR order on March 8, 2023.

Father appeals.

DECISION

Parental rights may be terminated only for "grave and weighty reasons." *In re Child of E.V.*, 634 N.W.2d 443, 446 (Minn. App. 2001) (quotation omitted). We will affirm a district court's decision to terminate parental rights "when at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the best interest of the child, provided that the county has made reasonable efforts to reunite the family." *In re Welfare of Child. of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (citation omitted). We review the district court's findings of fact for clear error and its determination that there is a statutory basis for termination for abuse of discretion. *In re Welfare of Child. of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012).

Father does not challenge the district court's determinations that there are four statutory bases for termination as set out in Minn. Stat. § 260C.301, subd. 1(b) (2022), and that termination of his parental rights is in the child's best interests. Instead, he argues for the first time on appeal that he is entitled to a new trial because his due-process rights were violated. We generally consider only those issues that were presented to and considered by the district court. *In re Welfare of Child. of Coats*, 633 N.W.2d 505, 512 (Minn. 2001) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)); *see In re Welfare of Child. of D.F.*, 752 N.W.2d 88, 97 (Minn. App. 2008) (concluding a parent waived arguments not made in district court). While we may consider issues raised for the first time on appeal

when we rely on reasoning that "is neither novel nor questionable," we exercise that authority "only sparingly." *Coats*, 633 N.W.2d at 512 (quotation omitted).

Even if father had presented his due-process arguments to the district court, his appeal would fail on its merits. "Due process requires reasonable notice, a timely opportunity for a hearing, the right to counsel, the opportunity to present evidence, the right to an impartial decision-maker, and the right to a reasonable decision based solely on the record." *D.F.*, 752 N.W.2d at 97. What amount of process is due turns on the unique circumstances of each case, but "prejudice as a result of the alleged violation is an essential component of the due process analysis." *In re Welfare of Child of B.J.-M.*, 744 N.W.2d 669, 673 (Minn. 2008). Whether a parent's due-process rights have been violated in a TPR proceeding is a question of law that we review de novo. *D.F.*, 752 N.W.2d at 97.

I. Father is not entitled to relief because the district court proceeded by default.

Father first asserts that the district court should not have proceeded with the trial in his absence because no transport order was requested and his mother told the court that he "was asking to be here." The record and the lack of resulting prejudice defeat father's request for relief on this basis.

The district court inquired about the lack of a transport order at the outset of the February 9 trial. Father's mother stated that he wanted to be there but no one had contacted him. This statement was directly contradicted by father's attorney, who explained that he was unable to reach father despite leaving multiple messages. It was also contradicted by the GAL, who told the court that she spoke with father prior to trial, informed him that he should attend, and he told her that he was not going to request transport because he did not

want to quarantine. We note also that father was present for two pretrial hearings, including the hearing at which his January 26 trial date was set, and that the district court continued that trial to February 9 "specifically to allow [father] to request transportation and to appear in person." In short, the record suggests that when father wanted to appear in court, he did.

Minn. R. Juv. Prot. P. 18.01 expressly permits a district court to "receive evidence in support of [a TPR] petition" when a parent fails to appear for trial. A judgment entered after a default proceeding "will be held void for want of due process only where the circumstances surrounding the trial are such as to make it a sham and a pretense rather than a real judicial proceeding." *Coats*, 633 N.W.2d at 512 (quotation omitted). When a district court hears testimony and considers other evidence supporting the TPR petition and bases its termination decision on the statutory factors and best interests of the child—not merely on the parent's failure to appear—the proceeding is a "real judicial proceeding," not a "sham or a hoax." *In re Welfare of Child of L.W.*, 644 N.W.2d 796, 797 (Minn. 2002) (quoting *Coats*, 633 N.W.2d at 512). That is exactly what happened here.

As noted above, the district court heard testimony from the social worker and GAL regarding father's lack of cooperation and apparent inability to safely care for the child and how termination would serve the child's best interests. The TPR order makes it clear that the district court based its determination on the statutory factors and the child's best interests, not merely father's failure to appear. Father does not challenge the court's findings in support of termination. And he does not argue—let alone demonstrate—that the outcome of the proceeding would have been different if he had been present for the

trial. On this record, we discern no due-process violation or prejudice occasioned by the district court's decision to proceed by default.

II. Father is not entitled to relief based on ineffective assistance of counsel.

Father next contends that his attorney was ineffective because he did not (1) request a transport order, (2) object to proceeding by default, (3) cross-examine witnesses, and (4) present any evidence on father's behalf. None of these contentions are persuasive.

A parent has a statutory right "to effective assistance of counsel in connection with a proceeding in juvenile court." Minn. Stat. § 260C.163, subd. 3(a) (2022). We have applied the test from *Strickland v. Washington*, 466 U.S. 668, 694 (1984), for constitutional ineffectiveness in several noncriminal contexts, including TPR cases. *See In re Welfare of the Child. of M.A.K.*, No. A16-0309, 2016 WL 3462103, at *9 (Minn. App. June 27, 2016) (citing *In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. App. 1987) (applying *Strickland* in juvenile-delinquency context);[4] *Beaulieu v. Minn. Dep't of Hum. Servs.*, 798 N.W.2d 542, 550 (Minn. App. 2011) (stating that *Strickland* applies in civil-commitment context), *aff'd on other grounds*, 825 N.W.2d 716 (Minn. 2013)). The county does not object to evaluating father's argument under *Strickland*. Accordingly, we assume without deciding that the *Strickland* analysis applies.

Under *Strickland*, father must establish that (1) his "counsel was not reasonably effective" and (2) "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *L.B.*, 404 N.W.2d at 345

[4] *M.A.K.* is a nonprecedential opinion cited for its persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

(quoting *Strickland*, 466 U.S. at 694). An attorney provides objectively reasonable representation by "exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Hokanson*, 821 N.W.2d 340, 358 (Minn. 2012) (quotation omitted). There is "a strong presumption that counsel's performance was reasonable," and we generally do not "review matters of trial strategy or the particular tactics used by counsel." *Id.* "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).

Father's ineffective-assistance claim fails on both prongs. Nothing in the record supports father's assertion that his attorney failed to request a transport order due to an unprofessional error. To the contrary, the record indicates that father was not brought to court for the trial as a result of his failure to respond to his attorney's efforts to represent him, his continued pattern of near-complete disengagement with the child-protection and TPR proceedings and his child, and his stated intent not to appear at trial. Likewise, father provides no legal authority for his assertion that his attorney should have objected to proceeding by default, cross-examined witnesses, or otherwise presented evidence on father's behalf. These are matters of trial strategy that we generally do not consider. *See Hokanson*, 821 N.W.2d at 358; *see also* Minn. R. Juv. Prot. P. 18.01 (providing that if a parent fails to appear for trial, "the court may receive evidence *in support of the petition*" (emphasis added)). Moreover, father makes no factual assertions nor any legal argument that he has been prejudiced by his attorney's alleged errors.

In sum, because father's due-process arguments fail and he does not otherwise challenge the order terminating his parental rights, we affirm.

Affirmed.