Circuit Court for Cecil County
Case No. C-07-17-000176

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2031

September Term, 2017

IN RE: F.G., JR.

Kehoe,
Berger,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 22, 2018

This is an appeal from the judgment of the Circuit Court for Cecil County, sitting as a juvenile court, which (1) granted the petition of the Cecil County Department of Social Services (the "Department"), (2) found F. G., Jr. to be a Child in Need of Assistance ("CINA"), and (3) committed him to the care of the Department. The appellant is L.M., F. G.'s natural mother. The appellees are the Department and F. G.

Appellant raises one issue: whether the circuit court erred in admitting evidence of the child's hair follicle test that showed that F. G. had been exposed to cocaine.

For the reasons that follow, we find no error and affirm.

BACKGROUND

The Shelter Care Hearing

On October 10, 2017, the juvenile court held a hearing prompted by the Department's allegations in a shelter care petition that fourteen-month-old F. G. had been seen in the care of his father in Cecil County, contrary to appellant's reports that F. G. was visiting family in New York for several months and then transported to Florida to live with his maternal aunt while appellant was incarcerated. The Department asserted that it was required to conduct routine safety checks on F. G. because a sibling had been removed from the home following allegations of abuse but that the family's assigned social worker had not seen F. G. since May 2017. The Department argued that shelter care was warranted based on its lack of in-person contact with F. G. for several months, together with reports from the Maryland State Police gang enforcement unit that F. G.'s father was using illegal substances, and that neighbors had heard F. G. crying for extended periods of time on numerous occasions. F. G.'s attorney agreed with the Department's recommendation.

Ms. Amanda Woods, a child protective services assessor assigned to investigate allegations of abuse and neglect, testified that at the time she prepared her October 6, 2017 report for the shelter care hearing, she did not know where F. G. was located. She stated that appellant had conveyed contact information for F. G.'s aunt to her on the morning of the hearing, and that she had received verbal confirmation from the aunt that F. G. was in Florida. According to Ms. Woods, F. G.'s aunt stated that appellant had brought him to Florida, and that F. G. was "fine" but had not seen a pediatrician. On cross-examination, Ms. Woods testified that, in a previous conversation, appellant informed her that F. G.'s father had taken him to Florida.

Appellant was present at the hearing and was represented by counsel. She denied that representatives of the Department had asked to see F. G. during the summer when he was in New York, and that she would have made him available if she had been asked. She testified further that, although she was not allowed to leave Maryland, she took F. G. to Florida to stay with her sister. Appellant's counsel argued that F. G. was in Florida with his aunt, that the Department had presented no evidence that he was unsafe or in imminent danger there, and that shelter care was therefore unnecessary.

The court noted that there was a question of fact as to which parent had taken F. G. to Florida, and found that there was sufficient evidence that F. G. had been neglected based on his mother's incarceration, his father's alleged substance use while he was F. G.'s caregiver, and his parents' failure to cooperate with the Department. The court ordered that shelter care was necessary and issued a "pick-up order" for F. G. to be delivered to the custody of the Department.

The CINA Hearing

On November 28, 2017, the circuit court held a hearing on the Department's CINA petition. Appellant was present and represented by counsel. The Department alleged that F. G. was a child in need of assistance based on the incarceration of both parents. F. G.'s attorney agreed, noting that although F. G. was doing well in foster care, he had not fully recovered from upper respiratory issues. Appellant contested the CINA petition, reiterating her earlier claims that she had arranged for F. G. to reside in Florida with her sister during her incarceration, and that this information had been disclosed to the Department. Counsel for appellant also moved to strike the reference to a hair follicle test conducted on F. G. at the request of the Department, the results of which were included in a report that the Department had introduced into evidence. The report indicated that F. G.'s hair follicle test was positive for cocaine.

Ms. Woods testified that, after the court had granted the shelter care petition and F. G. was picked up by authorities in Florida, he required hospitalization for four days to treat either pneumonia or an upper respiratory infection and head lice. Ms. Woods said that when F. G. was returned to Maryland, she requested the hair follicle test because neighbors had reported to police that F. G.'s father was known to use illegal substances. Neighbors also said that F. G. had appeared to be under the influence as well. The hair follicle sample was collected on November 2, 2017. Ms. Woods acknowledged on cross-examination that she did not personally interview the neighbors who had made the reports to the police, and that she did not have a court order or parental permission to test F. G.

The Department's report, submitted by Ms. Woods and Ms. Latresha Cruz, indicated that on October 5, 2017, Ms. Woods had conducted an unannounced visit to the home where F. G. was reported to be living with his father. She interviewed the landlord, who reported last seeing F. G. four days earlier. Ms. Woods was granted access to the home, and she observed living conditions that did not meet minimum standards, such as trash strewn throughout the residence, broken windows, an empty toilet in the hallway, and a strong animal odor. She was also unable to determine whether the residence had electricity and running water.

Ms. Cruz, a parent foster care worker assigned to coordinate with appellant regarding her older child's CINA proceedings, testified that appellant was very cooperative in responding to her inquiries about F. G. Ms. Cruz acknowledged, however, that the last time she had seen F. G. was in May 2017. Ms. Cruz testified that when she visited the home in June 2017, appellant told her that F. G. was in New York with her family, and she was told that F. G. was still in New York in July. In August 2017, appellant told Ms. Cruz that she was at work and unavailable for a home visit, and then did not follow up to reschedule the appointment. In September 2017, having not seen F. G. in three months, Ms. Cruz visited appellant in the detention center, at which time appellant informed her that F. G. was in Florida with her sister, but that she did not have contact information to reach her. Despite multiple requests in early October, appellant did not provide her sister's contact information to the Department until the morning of the shelter care hearing.

Appellant took the stand at the hearing and invoked her Fifth Amendment right against self-incrimination.

At the close of testimony, counsel for appellant again moved for the court to strike the reference to F. G.'s hair follicle test from the Department's report and to find the evidence inadmissible because the test was conducted without authorization. In response, the Department argued that it had full authority under the shelter care order to conduct the test, and F. G.'s attorney agreed. After hearing arguments from counsel, the court ruled that the hair follicle test was admissible, and explained:

> THE COURT: Here we have professionals who deal with drugs making a referral to the Department of Social Services; both professional agencies, both who deal with criminal issues and neglect issues, and a host of other issues, seeing families in – in homes – and I use that term loosely – such as the one described in the report.
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> So there is a reasonable suspicion in this case that the child may have been exposed to CDS; and in that situation the child is – in fact, the department is – they must have this test done, the hair follicle test; and certainly the order that I signed last week or two weeks ago gives them permission to treat emergency medical and standard – I'm sorry – I am losing the –
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> [CHILD'S ATTORNEY]: Routine and emergency medical treatment.
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> THE COURT: Routine medical – here we go – routine medical and emergency treatment. This is both. It's an emergency because you have to do something for a child that's exposed to drugs. You have to know how to treat this child, why he's having whatever symptoms are the result of the cocaine, or if it's something else.

The circuit court then found that F. G. was a child in need of assistance, and ruled as follows:

> So by a preponderance of the evidence, noting the maltreatment of the child, that is the presence of cocaine in his system, the fact that he had other issues that arose in Florida, certainly that lends doubt to whether the caretaker in Florida should have had the care of this child, given that he either had an upper respiratory infection or pneumonia, both of which are serious, and the

> fact that both parents are incarcerated, the court finds that the child is, in fact, a child in need of assistance, and will sign an order.

The Standard of Review

We utilize three different but interrelated standards when reviewing a juvenile court's CINA determination. We review the juvenile court's factual findings under the clearly erroneous standard. *In re Adoption/Guardianship of Ta'Niya C.,* 417 Md. 90, 100 (2010) (quotation marks omitted) (citing *In re Yve S.,* 373 Md. 551, 586 (2003)). The legal conclusions of the juvenile court are subject to *de novo* review. *In re Adoption/Guardianship of C.A. and D.A.,* 234 Md. App. 30, 45 (2017) (citing *Yve S.*, 373 Md. at 586). We review the juvenile court's ultimate conclusions under an abuse of discretion standard. *In re Yve S.,* 373 Md. at 583. We do not disturb the decisions of the juvenile court absent a clear abuse of discretion, which occurs "when the court's decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *In re Adoption/Guardianship of C.A.,* 234 Md. App. at 45 (quoting *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 313 (1997)).

Analysis

A "child in need of assistance" is one who requires court intervention because:

> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

Md. Code, Courts and Judicial Proceedings Article ("CJP") § 3-801(f).

"The purpose of CINA proceedings is 'to protect children and promote their best interests.'" *In re Priscilla B.*, 214 Md. App. 600, 622 (2013) (quoting *In re Rachel T.*, 77 Md. App. 20, 28 (1988)). Courts need not wait until a child has suffered actual abuse or neglect but may intervene and find that a child is a CINA where there is sufficient evidence of "substantial risk of harm." *Tamara A. v. Montgomery Cty. Dep't of Health & Human Servs.*, 407 Md. 180, 183-84 n.1 (2009). An allegation that a child is a CINA must be proven by a preponderance of the evidence. *In re J.J.*, 231 Md. App. 304, 345 (2016) (citing *In re Nathaniel A.*, 160 Md. App. 581, 595, *cert. denied*, 386 Md. 181 (2005)); CJP § 3-817(c). The rules of evidence apply in juvenile adjudicatory hearings. *In re Michael G.*, 107 Md. App. 257, 265 (1995); CJP § 817(b).

We now turn to the question appellant raises on appeal.

Appellant argues that the juvenile court erred in admitting F. G.'s hair follicle test into evidence at the CINA hearing. She contends that Ms. Woods' decision to test F. G. was based on the unsubstantiated reports of neighbors to police that F. G.'s father had a reputation in the community for substance use, and that F. G. had appeared to be under the influence as well. She claims that, because the allegations were made nearly a month before F. G. was tested, the test was not "emergency medical treatment" authorized by the shelter care order, especially since he was hospitalized for four days without any treatment for symptoms related to cocaine exposure. Appellant maintains that the Department had no authority to test F. G. without parental consent or a court order, and that the hair follicle test was therefore inadmissible. This argument is not persuasive—the Department clearly had the authority to order the hair follicle test.

Appellant, citing *In re A.N., B.N., and V.N.*, 226 Md. App. 283 (2015), contends that this Court must reverse based on the juvenile court's improper reliance on inadmissible evidence. In that case, the court modified a permanency plan for custody and guardianship based, in part, upon evidence of the mother's polygraph examination results. *Id.* at 288. We vacated the juvenile court's order and remanded the case because "'[i]t is well-settled in Maryland that the results of a polygraph test are inadmissible.'" *Id.* (citation omitted). Appellant's reliance on this case is misplaced, as she cites no authority declaring that the results of a hair follicle test are inadmissible or otherwise limiting the authority of the Department to request a hair follicle test in situations like the one before the CINA court.

Family Law Article ("FL") § 5-706(b) states (emphasis added):

> **Promptly** after receiving a report of suspected abuse or neglect of a child who lives in this State that is alleged to have occurred in this State, the local department or the appropriate law enforcement agency, or both, if jointly agreed on, **shall make a thorough investigation of a report of suspected abuse or neglect to protect the health, safety, and welfare of the child or children.**

FL § 5-712 states in pertinent part (emphasis added):

> (b) Any provider [the term includes a physician] who is licensed or authorized to practice a profession in this State **shall examine or treat any child**, with or without the consent of the child's parent, guardian, or custodian, **to determine the nature and extent of any abuse or neglect to the child** if the child is brought to the provider:
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> * * *
>
> (2) by a representative of a local department of social services who states that the representative believes the child is an abused or neglected child[.]

The two statutes must be read together. FL § 5-706(b) requires the Department to "thoroughly" investigate allegations of child abuse and or neglect. FL § 5-712 authorizes a health care provider to examine a child at the Department's request based upon the

Department's representation that the child may be abused or neglected. There's no question that such a representation was made by the Department in this case. In effect, appellant is asserting in her brief that the Department's request was unreasonable or unfounded. We do not agree.

A "thorough" investigation may very well require a drug exposure screening as a matter of routine, but we need not address that issue because there was an ample basis for the Department to order the test in F.G's case.

At the time that Ms. Woods requested the test, the Department had been unable to conduct an in-person safety check on F. G. for three months. It had received a referral from the police that neighbors had reported that F. G. was living in unsafe conditions, was being left unsupervised, was crying for extended periods, and that there was illegal substance use occurring in the home, despite his mother's assurances to her foster care worker that he was living out of state with relatives. An unannounced home visit revealed conditions that did not meet the minimum standards for a child's safety or well-being. This is more than a sufficient basis for the Department to request a drug exposure test. It is true that the Department did not order the hair follicle test "promptly" after receiving the referral, but that was because F. G. was in Florida, not Maryland.[1] We agree with the Department that it was authorized to ask for the hair follicle test as part of its investigation of the allegations

[1] Ms. Woods testified that she had requested the medical records for F. G.'s hospitalization in Florida, but that she hadn't received them as of the date of the CINA hearing.

of child abuse and neglect. Accordingly, we find no error on the part of the juvenile court in admitting the results of the hair follicle test into evidence.

Even if we agreed with appellant's argument as to the admissibility of the drug exposure test results (and we do not), we would nonetheless affirm the CINA court's judgment. "It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and* prejudice to the appealing party." *In re Ashley E.*, 158 Md. App. 144, 164 (2004) (emphasis in original). In this context, "prejudice" means that it is likely that the outcome of the case was affected by the court's error. *Id.*

In addition to F. G.'s exposure to cocaine, the court sustained the Department's CINA petition because the home where F. G. was living with his father was unsafe. The court also concluded that the care that appellant's sister had provided to F. G. was inadequate, in light of F. G.'s hospitalization for pneumonia and head lice while in Florida. Additionally, and what is independently dispositive, the court also found that both of F. G.'s parents were incarcerated and were unable to care for him. With or without the results of the drug test, there was overwhelming evidence that F. G. was a child in need of assistance.

THE JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY, SITTING AS A JUVENILE COURT, IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.