NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF J.D., alleged deprived child:

BRITTANI WRIGHT and JERMAINE DENSON,

Appellants,

vs.

CARTER COUNTY, STATE OF OKLAHOMA,

Appellee.

Case No. 120,338
(Consolidated with
Case No. 120,351)

APPEAL FROM THE DISTRICT COURT OF
CARTER COUNTY, OKLAHOMA

HONORABLE CARSON M. BROOKS, TRIAL JUDGE

AFFIRMED

Brittani Wright
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Jessica L. Dice
ASSISTANT DISTRICT ATTORNEY
Ardmore, Oklahoma — For Defendant/Appellee

Patrick C. Madden
Ardmore, Oklahoma — For Child

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

The minor child J.D. was adjudicated deprived on August 26, 2021, and both parents, appellants here, had their rights to the child terminated on May 4,

2022. The parents argue that the trial court erred at all stages of the proceedings below by acting without jurisdiction, terminating their rights with insufficient evidence, and acting in contravention to their rights to due process. Because the record reflects no such errors, we affirm.

BACKGROUND

J.D. was born on June 14, 2021. While still in the hospital, the mother tested positive for illicit drug use, which prompted emergency removal.[1] An emergency show cause hearing was held on July 8, where continued emergency custody was granted, and the state filed a deprived adjudication petition on July 14. In its petition the state alleged that the mother had a history of drug use, had been charged with several crimes including assault and battery with a deadly weapon and burglary, had two children in Texas removed from her custody, and had her parental rights terminated to a child in Iowa. As to the father, the petition alleged failure to protect, risk of harm, and exposure to an inappropriate caregiver. The parents were served with notice on July 26, and the adjudication hearing was set for August 26, 2021.

Each parent appeared at the hearing *pro se*,[2] and the court sustained the allegations of the petition and adjudicated the child deprived. The first dispositional hearing was set for September 30. Both parents appeared at this

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[1] The mother has consistently contended that this "was a false positive due to medication administered in the hospital ... and [J.D's] cord blood tested negative." R. 27, *Motion to Dismiss*, pg. 3. She has further alleged that the hospital agreed that it was a false positive result. The allegation of the positive test was eventually stricken from the petition for adjudication, but the child was adjudicated deprived on other grounds.

[2] The record does not reflect that either parent ever requested counsel or obtained their own counsel.

hearing *pro se*. An ISP was adopted for both parents. The permanency plan was set as reunification. The father's ISP included learning protective capabilities for the child's well-being through a parenting class and counseling. The mother's ISP included a domestic violence inventory, a substance abuse assessment, a psychological evaluation, and a requirement to refrain from criminal activity. Both parents were also ordered to take hair follicle drug tests at the expense of the DHS.

Also on September 30, both parents filed a motion to dismiss that included an affidavit of the parents and an affidavit of a family friend. The motion alleged that an affiant had provided false statements to the state that had resulted in the petition for emergency removal of the child, that a "meeting to close the case" was held on June 21, 2021, and that "all parties agreed the best placement for the child was to remain in [the] family home." R. 27, *Motion to Dismiss*. The motion also claims that efforts had not been made to prevent the removal of the child and that adjudication was not supported by the evidence.

A little over a month later, on November 4, the state filed a motion seeking to place the children with their maternal grandmother in Montana. The motion was granted the same day. The child was ultimately placed with the grandmother sometime in late January.

An ISP progress report was filed with the trial court on December 21, 2021. Neither parent had started any of the services listed on the ISP despite Southern Oklahoma Family Services' numerous attempts to get in touch with the parents regarding substance abuse counseling. The report also revealed that the parents

were ordered by the court at the last hearing to immediately take a hair follicle test. Both parents failed to do so, but the father eventually completed his test on October 29 and tested positive for THC and methamphetamine in an amount sufficient to indicate daily use. Neither parent was participating in any of the services put in place by the ISP.

The state filed an application for termination of both parents parental rights on January 6, 2022. The legal basis for termination as to both parents was the alleged failure to correct the conditions that led to the deprived adjudication. The state also alleged that the mother had the rights to three of her other children previously terminated. As to the father, the state cited his failure to complete the parenting class, failure to understand what an appropriate caregiver for the child is, and failure to maintain contact with the child welfare worker. On January 11, 2022, the parents were served with notice and summons of the state's application to terminate their parental rights. The termination hearing was set for a non-jury trial on March 24, 2022.

On March 21, 2022, the final ISP progress report was filed with the court. In the report, the DHS requested that the child remain in its custody with placement in Montana. Termination of parental rights as to both parents was also recommended due to lack of participation in the case, lack of accountability, and a failure to correct the conditions that led to adjudication. The report indicated that neither parent had been responding to the DHS, had not started any services required by the ISPs, and had not corrected any concerning behaviors. J.D.'s permanency plan was set as adoption.

Both parents were present at the hearing on March 24, 2022. The court at that time denied the parents' motion to dismiss.[3] The parents did not waive their right to jury trial and so the court placed the matter of termination on the jury docket call for April 14, 2022.[4]

The mother and father both failed to appear at the April 14 docket call and the matter was set on the May docket call, to begin May 2, 2021, at 1:30 p.m. Both parents failed to appear at the May docket call. Thus, on May 4, the court held a non-jury trial and entered its order terminating both parents' rights to J.D. The termination order cites the parents' failure to appear, their failure to correct conditions, their failure to support, and the mother's previous terminations.

Both parents appeal.[5]

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[3] It is not entirely clear if this was a denial of the first or second motion to dismiss, which the mother filed on January 6, or both. Because an order of termination was entered, we presume both motions were denied.

[4] On April 15 (mailed April 13 or 14), the mother filed this appeal, attaching only the March 24 permanency order to her petition in error. That petition was deemed premature, but the error was remedied with the parents' supplemental petition in error, filed May 26, 2022, which appealed the order of termination. The mother also filed a second appeal of the permanency order only, No. 120,351. The appeals were consolidated.

[5] The child's attorney filed a (second) motion to dismiss seeking to dismiss the appeal for want of a completed record. The basis of the motion is that the parents, despite having designated not less than twelve transcripts, have not succeeded in having any transcript included in the record. A trial court order attached to the motion reveals that the parents never paid the cost deposit required for the reporter to produce the transcript, and that neither parent has been declared (or ever requested to be declared) indigent. Although a lack of transcripts obviously makes the parents' effort on appeal far more difficult, it does not require dismissing the appeal. The notice of completion was filed on June 2, 2022, without the transcripts, and we are able to review the parents' allegations of error in light of the record before us. The child's motion to dismiss, filed August 26, 2022, is therefore denied.

STANDARD OF REVIEW

This appeal raises due process and insufficiency of evidence issues. In determining whether there was a constitutional deprivation of due process in a termination of parental rights proceeding, we review the issue *de novo*. *Matter of A.M. & R.W.*, 2000 OK 82, ¶ 6, 13 P.3d 484, 486-87. *De novo* review requires an independent, non-deferential re-examination of another court's legal rulings. *Id.*

When reviewing a trial court order terminating parental rights, an appellate court must review the record to determine whether the factual findings are supported by clear and convincing evidence. *Matter of S.B.C.*, 2002 OK 83, ¶ 6-7, 64 P.3d 1080, 1082. "Clear and convincing" evidence is "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *Matter of C.G.*, 1981 OK 131, ¶ 17 n.12, 637 P.2d 66, 71 n.12.

ANALYSIS

The parents raise, in effect, three issues on appeal. They claim that the trial court violated their due process rights, terminated their rights with insufficient evidence, and lacked jurisdiction to do so. Each argument is addressed in turn.

Due Process

The first issue addressed in the parents' brief-in-chief is their right to due process. The alleged due process violations primarily focus on notice and on personal prejudice by the trial court. To determine whether the parents' due process rights were violated we must inquire as to whether the parents possessed

an interest protected under the umbrella of due process, and if so, whether they were afforded an appropriate level of process. *Matter of A.M.*, 2000 OK 82, ¶ 7. When dealing with a termination of parental rights, the answer to the first question is clear because the parents have a constitutionally protected liberty interest in the continuity of the legal bond with their children. *Id.* ¶ 8. Whether they were afforded an appropriate level of due process, however, must be determined on a case-by-case basis because the due process clause does not mandate any particular form of procedure, but rather calls for such procedural protection as the particular situation demands. *Id.* ¶ 9.

To determine whether the appropriate level of process was afforded in a termination proceeding, three factors are to be considered: (1) the parent's interest in continuing the family bond with the child, (2) the state's interest in the welfare of children in the state, and (3) whether the procedure employed by the trial court posed a risk of an erroneous deprivation of the parents' rights. *Id.* ¶¶ 10, 11 (applying due process factors referenced by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The parents' interest and the state's interest here are both of utmost importance, and thus, we direct our focus to the procedure employed by the trial court to determine whether it posed a risk of an erroneous deprivation of the parents' rights. *Id.* ¶ 11. We review procedural claims by determining whether the parties were given a "meaningful and fair opportunity to defend." *Id.* ¶ 9.

A large portion of the parents' due process argument concerns issues with notice and delay. The parents claim they did not receive notice of the original

removal of the child nor did they receive notice of the emergency custody hearing that followed, but they do admit that they personally appeared at that hearing. *Brief-in-chief*, pg. 4. We have no indication as to whether the parents actually received notice for the emergency custody hearing because the record does not include anything prior to the deprived petition being filed on July 14, 2021. Notwithstanding the fact that they personally appeared at the emergency custody hearing, we find that even if there was a lack of notice, this in no way deprived the parents of a meaningful and fair opportunity to defend their parental rights at the termination stage.

They also argue that the court failed to determine custody at the end of the emergency custody hearing and instead ordered a seven-day continuance. However, the state's summary of the record outlined in its response brief, which was adopted by the minor child in his response brief, indicates that continued emergency custody was granted at the conclusion of the hearing. There is again no indication as to what actually happened because of the transcript's omission from the record. Nevertheless, we cannot find that a seven-day delay of an emergency custody order deprived the parents of a meaningful and fair opportunity to defend their parental rights.

The parents also argue that the written order following the verbal order at the emergency custody hearing was submitted a day later than it should have been, and that the deprived petition was filed twelve days after the emergency custody hearing when 10A § 1-4-205(B) requires that such petition be filed within seven days of the child going into emergency custody. *Brief-in-chief*, pg. 4,

5. While the delay in the adjudication hearing violates the statute, we find no due process violation occurred given the parents had a meaningful and fair opportunity to defend. *See Matter of E.H.*, 2018 OK CIV APP 67, ¶ 25, 429 P.3d 1003, 1010 (holding that a near two-year delay in adjudication hearing on state's petition did not violate procedural due process). Further, our harmless error doctrine requires that we "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." 12 O.S. § 78. We find that each of the claims discussed thus far require affirmance under this rule.

The parents final claim for lack of notice is more significant. They claim they were not provided notice to appear for the termination hearing held on May 4, 2022. *Petition in Error,* Exhibit B. The record belies the parents' argument here. It is undisputed that the parents were served on January 7 with notice and summons for the hearing held on March 24, 2022, at which both parents personally appeared. At the hearing on March 24, the issue of termination was not decided, and the case was set for docket call on April 14, 2022 at 9 a.m. According to both the state and the minor child's response briefs, the parents were advised in open court of the docket call date and time. Further, the date and time is explicitly noted on the final page of the March 24 order. When that docket call came, both parents failed to appear and the termination hearing was set for "jury trial on the May 2022 Jury Docket which begins May 2, 2021, at 1:30 p.m." R. 118, 119. The hearing was held on May 4 (during the same trailing

docket), the parents failed to appear, and their rights were terminated after a bench trial.

Title 10A O.S. § 1-4-905(A)(5) governs this very scenario:

> When a parent who appears voluntarily or pursuant to notice is directed by the court to personally appear for a subsequent hearing on a specified date, time and location, the failure of that parent to personally appear, or to instruct his or her attorney to proceed in absentia at the trial, shall constitute consent by that parent to termination of his or her parental rights.

If the parents were directed in open court to appear on a specified date, time and location, as the record, the state, and the minor child suggest happened, the subsequent failure to appear constitutes consent to termination. The appellant must affirmatively show the alleged error from the record on appeal, otherwise, we will presume that no prejudicial error was committed by the trial court. *Fleck v. Fleck*, 2004 OK 39, ¶ 12, 99 P.3d 238, 240–41. Because nothing in the record indicates a lack of notice to the parents of the subsequent proceedings, we cannot find that the trial court failed to afford the parents the required notice.

The parents also allege, for the first time on appeal, bias by the trial court. Generally, judicial prejudice would constitute a due process violation. *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶ 16, 163 P.3d 548, 553. However, the law presumes that a judge is not biased, and a party must point to some fact to overcome this presumption. *Id.* ¶ 18 (citing *Pierce v. Pierce*, 2001 OK 97, ¶ 19, 39 P.3d 791, 799). Here, we find nothing in the record, and the parents fail to point to anything, that would indicate judicial bias. The parents make assertions of "obvious personal prejudice against the mother and father," and a "clear conflict of interest," but provide no basis whatsoever for these claims. *Brief-in-*

chief, pg. 9, 11. The predominant reason for the parents' claim of prejudice appears to be that they disagreed with the trial court's adjudication of deprivation and subsequent orders. But, of course, this is no basis for recusal. Having failed to demonstrate any merit to this claim, it is rejected.

Insufficient Evidence

The parents argue that throughout the entire proceedings, from emergency removal to termination, the evidence against them was insufficient. Because no transcripts were included in the record on appeal, our review is confined to the documents filed of record and the facts to which both parties agree. *Fleck*, 2004 OK 39, ¶ 2.

Their first claim is that the initial removal of the child was "illegal," "warrantless," and without probable cause.[6] *Brief-in-chief*, pg. 10-11. Then, at the deprived adjudication hearing, the parents allege that the state presented no evidence that was factually sufficient and that the court failed to make the mandatory findings of abuse or neglect. *Brief-in-chief*, pg. 5. They claim the factual allegations of the petition are not supported by a preponderance of the evidence, citing to 10A O.S. § 1-4-602. These issues were presumably argued at

[6] We have no indication as to the truth behind these claims as the record supplied to us begins with the state's deprived petition filed on July 14, 2021, leaving out all information from the emergency removal and hearing. The record does indicate that the parents argued that an affiant provided false statements that resulted in the emergency removal of the child. This would indicate that there was probable cause, whether the information was false or not, to warrant emergency removal of the child. But these issues, from what we can observe from the record provided, were first raised in a motion to dismiss filed September 29, 2021, which was over a month after the child was adjudicated deprived. The parents should have made this argument at the deprived hearing, but we find nothing in the record before us to indicate that they did, or that the trial court was required to believe them over the other evidence at that hearing.

the deprived hearing, but we have no way of knowing what the parents argued absent transcripts from the hearing and we will not presume error by the trial court. *Fleck*, 2004 OK 39, ¶ 12.

Next, the parents argue that the grounds for termination provided by the state were faulty because there were no existing conditions to be corrected, and no sibling of the minor child had been previously adjudicated deprived. *Brief-in-chief*, pg. 6. On the issue of failure to correct conditions, the record reflects several conditions the parents were instructed to correct prior to the termination of their parental rights. The deprived adjudication order lists five separate conditions that caused the child to be deprived. The parents were at the hearing and received a copy of the order. At the subsequent disposition hearing, the ISP was adopted, and it reiterated the conditions and provided detailed instructions on how the parents could correct the conditions. The specific conditions to be corrected were domestic violence, substance abuse, mental health, and neglect for the mother. The father's conditions were failure to protect and neglect. Both parents were at this hearing, and they were mailed a copy of the order. Although the parents claim there "were no certain existing conditions," *brief-in-chief*, pg. 6, a review of the record reveals the opposite, and the parents provide nothing to substantiate their claim that no conditions existed. We must again reiterate that this Court will not presume error, and it is the appellant's burden to affirmatively show the alleged error from the record on appeal. *Fleck*, 2004 OK 39, ¶ 12.

The parents only argue that no conditions existed; they do not dispute that they failed to correct any alleged conditions. Without an effort to dispute this

fact, the record unequivocally shows a failure by the parents to correct the conditions. The ISP was adopted on September 30, and on December 22 the ISP progress report indicates no participation by the parents.[7] The March 21 progress report indicates a continued lack of participation. This is all ultimately reflected in the termination order, citing a failure to correct conditions.

We find the argument that no sibling of the child had previously been adjudicated to be unconvincing. The parents, in the same sentence, claim that their minor child, J.D., had not been adjudicated either. *Brief-in-chief*, pg. 6. This is simply wrong as the child was adjudicated deprived in August of 2021, well before the parents wrote this brief. The only expanded argument outside of this one-sentence claim in their brief-in-chief comes from their January 6 motion to dismiss. There they claim that the caseworker, in claiming the mother had prior adjudications, was "incorrect about the mother and the mothers (sic) other children as prior cases do not involve the same family unit, household or parents of the child(ren)." R. 75. The focus of the argument there seems to be that the parents, together as a family unit or household, did not have children adjudicated. But the state points to adjudications of only the mother's children,[8] which is what the relevant statute requires. *See* 10A O.S. § 1-4-904(B)(6).

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[7] The only participation indicated was that the father finally submitted to a court ordered drug test. The court also ordered the mother to submit to a drug test, but she never complied with the order. The father's results were positive for THC and Methamphetamine in an amount that would indicate daily use.

[8] The state claims she had two children in Texas removed from her custody and/or terminated due to substance abuse and exposure to domestic violence, and that her parental rights were terminated to a child in Iowa due to domestic violence, child abuse, and substance abuse. R. 1, 141.

The parents go on to dispute every finding listed in the termination order. They argue that they did not fail to support the child six out of twelve months prior to the filing of the termination application because the child was not born six months prior to its filing, no child support was ordered, and neither parent abandoned the child. *Brief-in-chief,* pg. 7. Whether or not the child was "abandoned" plays no part in determining whether the parents neglected to contribute to the support of the child. The other two arguments are in complete contradiction to the record. J.D. was born on June 14, 2021, and the application for termination was filed on January 6, 2022—six months and twenty-three days later. Child support was established in the adjudication order at $50 per parent. This was reiterated in the trial court's September 30 disposition order, and referenced in the January 6 review order and the March 24 permanency order. The ISP progress reports from both December 22 and March 21 do not indicate that child support payments were made. Nothing in the record indicates that either parent ever made a payment pursuant to the court's order. This argument alone is not enough to meet their burden of proving error, especially in light of a record reflecting the contrary.[9]

Jurisdiction

The parents finally claim that the trial court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. They specifically list

[9] The state concedes that J.D. was not in foster care placement for six out of twelve months preceding the application for termination. However, only one statutory ground is necessary to terminate, thus this fact alone cannot support reversal.

three requirements: (1) that the court must give a question of jurisdiction priority if raised by a party under 43 O.S. § 551-107, (2) that physical presence of a child is not necessary or sufficient to make a child custody determination under 43 O.S. § 551-201, and (3) that a court of this state has temporary emergency jurisdiction if the child has been abandoned or if it is otherwise necessary in an emergency situation under 43 O.S. § 551-204. Their arguments are without merit.

The specific statutes and requirements referenced by the parents are of little use. First, "priority" is only relevant when jurisdictional questions exist in the first place, and the record reveals no such questions. Second, although physical presence alone is not sufficient for jurisdiction, we find nothing to indicate the jurisdictional requirements of 10A § 551-201(A) were not satisfied. The record indicates that Oklahoma was the home of both J.D. and the parents when the proceedings began, satisfying § 551-201(A)(1), and nothing in the record indicates that any of the other subsections of § 551-201(A) were implicated so as to call into question the trial court's jurisdiction. Further, the trial court had emergency jurisdiction under 10A O.S. § 1-4-101(A), which gives a court jurisdiction over a child alleged to be deprived. The record reveals no jurisdictional defect, and the parents fail to substantiate such claims.

CONCLUSION

The parents allege many errors by the trial court throughout the proceedings below. But the record before us indicates that the vast majority of the errors claimed did not occur and that any errors the parents have shown

were harmless. Simply put, the parents have failed to demonstrate any reversible error in the minimal, transcript-free record before us.

AFFIRMED.

FISCHER, J., and BARNES, V.C.J. (sitting by designation), concur.

April 20, 2023