Filed 8/10/07 In re Serenity B. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re SERENITY B., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. JOSE B., Defendant and Appellant.	F052166 (Super. Ct. No. JD109433) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Laura D. Pedicini, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel and Susan M. Gill, Deputy County Counsel, for Plaintiff and Respondent.

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Jose B. appeals from an order terminating his parental rights (Welf. & Inst. Code, § 366.26) to his daughter, Serenity B.[1] He contends the court erred at the dispositional

[*] Before Vartabedian, A.P.J., Cornell, J., and Kane, J.

phase when it determined that the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA) did not apply to the proceedings. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

Respondent Kern County Department of Human Services (the department) detained Serenity, the day after her birth in January 2006. Although both the newborn and her mother tested negative for drugs, the mother had tested positive for methamphetamine during her pregnancy. She also failed to obtain prenatal care. The department was aware of the mother's drug abuse in connection with ongoing dependency proceedings for Serenity's five siblings. Indeed, in September 2005, the Kern County Superior Court terminated the mother's and appellant's rights to the five children after the couple failed at reunification services. Appellant, as well as the mother, had a lengthy history of methamphetamine abuse. It was based on these facts that the department initiated dependency proceedings as to the newborn Serenity.[2]

Although appellant's whereabouts were unknown at the outset of the proceedings, the court appointed attorneys to represent him as well as the mother. In response to the court's questions, the mother testified she did not have Indian heritage although appellant did. However, she added, the father's tribe was not federally-recognized. As a result, the mother reported, in the siblings' dependencies, the court ruled ICWA did not apply. The court reserved the ICWA issue as to appellant once he appeared.

When appellant made his first appearance in late April 2006, he immediately asked the court to relieve his court-appointed counsel. The attorney had apparently served as appellant's attorney over the course of the siblings' dependencies. Following a

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The court would take judicial notice of its findings and orders in the siblings' cases.

Marsden[3] hearing, the court granted his request and referred appellant to the indigent defense panel for appointment of counsel. Meanwhile, the court continued the case for a jurisdictional and dispositional hearing.

On May 11, appellant was present with his new attorney, Michelle Trujillo. Trujillo advised the court she filed a statement regarding paternity on appellant's behalf and requested that he be elevated from alleged to presumed father based on his marriage to the mother. The court found good cause to grant the request. The court also granted Trujillo's request for twice-weekly visits between appellant and Serenity. As the record later reveals, appellant attended only two visits with Serenity over the course of her dependency.

At the next hearing on May 26, 2006, appellant was again absent. Due to the illness of one of the attorneys, the court continued the hearing to June 20, 2006.

Nonetheless, during the May 26th hearing, attorney Trujillo relayed to the court appellant's claim that he had Paiute and Yokut Indian heritage.[4] Consequently on May 31, 2006, the department served notice pursuant to ICWA (25 U.S.C. § 1912) to the Bureau of Indian Affairs, 30 federally-recognized tribes, and each of the parents.

Appellant was present at the June 20, 2006, hearing during which the court exercised its dependency jurisdiction over Serenity pursuant to section 300, subdivisions (b) (parental failure to protect) and (j) (abuse of siblings). The court also devoted much of the June hearing to appellant's Indian heritage claim. It first heard from county counsel, who reported on the department's efforts to affect ICWA notice. Those notices, along with the proofs of receipt had been filed with the court. The court announced it

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3 *People* v. *Marsden* (1970) 2 Cal.3d 118.

4 Although there was a court reporter present at the May 26th hearing, appellant did not augment the record with a transcript of the hearing. We glean the information about Trujillo's remarks from the reporter's transcript for a June 20th hearing.

was prepared to find substantial compliance with the notice requirements. With appellant once again present in court, county counsel also urged the court to conduct an on-the-record ICWA inquiry of him. Attorney Trujillo also advised appellant had completed that day a Judicial Council form entitled "PARENTAL NOTIFICATION OF INDIAN STATUS," claiming Pauite and Yokut heritage.

The court in turn questioned appellant who confirmed his belief that he might be a member of or at least be eligible for membership in a Pauite or Yokut tribe. When asked if he had any additional information, appellant testified the tribe was in the Owens Valley area of California because he went there for services. He referred to "Owens Valley," as a locale, as well as a tribe or an agency. He claimed to have received cash aid "through Owens Valley." He further testified he had "papers" to prove "you are recognized and you have blood." However, he left them in a car.

In response to additional questions, appellant claimed he was related to the tribe in Owens Valley through his mother, who was present in court. The paternal grandmother at this point was the caregiver for Serenity as well as a prospective adoptive parent for the siblings. Appellant admitted she "probably" knew more about the specific tribe.

The court then addressed the paternal grandmother. She stated she was Pauite and the tribe was located in the Owens Valley area. She also clarified that it was her husband's family that was Yokut.

At the conclusion of the June 20th proceedings, the court continued the dispositional hearing to August 16th in order to comply with a state rule of court which required a 60-day waiting period from the date of ICWA notice before concluding ICWA did not apply. The parties waived time for the hearing. The department meanwhile mailed notice of the August 16th hearing date to all of the tribes which had not as yet responded to the notice.

Neither appellant nor Serenity's mother was present on the August 16th hearing date. According to the department's reports, the parents had been uncooperative and

failed to take advantage of departmental referrals for services and opportunities to visit Serenity. The department recommended that the court adjudge Serenity a dependent child, deny the parents reunification services and set a section 366.26 hearing.

The court proceeded with the August 16th hearing in the parents' absence. In particular, the court observed that appellant had been in court when the hearing date was set. The court confirmed that it had found days earlier that the provisions of ICWA did not apply to Serenity's case based on documentation provided by the department. It also reiterated its finding. With respect to its disposition, the court adjudged Serenity a dependent child and removed her from parental custody. The court also denied the parents reunification services on three separate statutory grounds (§ 361.5, subds. (b)(10), (11) & (15).) The court in turn set a section 366.26 hearing to select and implement a permanent plan for Serenity.

Due to the parents' absence, the court ordered written notice to them of their writ remedy. That same day the court's clerk mailed writ notice to each parent at their last known address. Neither parent filed a timely notice of intent to challenge the court's orders.

More than three months later, appellant submitted to the court clerk's office both a notice of intent to file a writ petition and a notice of appeal from the court's August 26th dispositional orders. Both notices were marked "RECEIVED" rather than filed, apparently due to their untimeliness.

In advance of the section 366.26 hearing, the department prepared a "SOCIAL STUDY" in which it recommended the court find Serenity adoptable and terminate parental rights. The paternal grandparents, who by this point had adopted Serenity's five siblings, were committed to adopting her as well.

The court eventually conducted its section 366.26 hearing in late January 2007. The mother testified about her visits with Serenity in an effort to persuade the court that

termination would be detrimental to the baby. Attorney Trujillo advised that appellant was opposed to termination but had no evidence to introduce.

As closing arguments drew to a conclusion, appellant announced in court he wanted his attorney "fired." He criticized Trujillo for not attending a recent meet-and-confer hearing. He claimed her absence prevented him from presenting any evidence. The court made a specific finding that attorney Trujillo's absence did not prejudice appellant's opportunity to present evidence. When asked if there was some evidence he wanted to present, appellant again brought up the meet-and-confer hearing which the court ruled was not relevant. The court asked for any other evidence. Appellant replied "I am Indian. That's the whole reason." Appellant also stated he wanted to testify. At this point, the court gave appellant the chance to consult with Trujillo about putting on further evidence. Trujillo thereafter advised that she did not believe there was any reason why appellant wanted to put on further evidence. Nonetheless, she added, appellant indicated he did not want her to represent him. The court then interrupted the proceedings for an in camera *Marsden* hearing.

During the *Marsden* hearing, appellant continued to complain about the meet-and-confer hearing. He also appeared convinced that the "whole reason my kids got taken away the first time" was due to drug testing evidence which the judge "threw . . . out of court."

When the court asked him to focus on what he felt Trujillo should have done, appellant cited three complaints. One, Trujillo allegedly did not file the appeal when appellant asked her. Two, appellant allegedly did not receive any paperwork from anyone about the case. Three, when he asked Trujillo to do something, "she never does it." He explained he had the rules of court and he "read stuff too." "That's why I ask her to do things. But they act like I'm ignorant."

The court gave attorney Trujillo the opportunity to respond. She did not recall appellant asking her to file an appeal or a writ nor could she imagine him asking her to do

so and her failing to act. They "did discuss that we would file an appeal after today, and that would be my intention." Otherwise, she did not recall appellant specifically directing her. As to appellant's paperwork complaint, Trujillo replied "he's had paperwork with him, and he's never told me he didn't receive [a report]." She could recall at least a couple of occasions that he had reports. She could not recall anytime when appellant asked her to provide him with a copy of some document and she failed to do it. As for appellant's requests, Trujillo acknowledged she did not always agree with them but she tried to bring up those issues on which he had a point. She noted that on the originally scheduled date for the section 366.26 hearing, there was a notice issue. Appellant was willing to waive time, but she disagreed and would not acquiesce. She did not think waiver was appropriate.

When asked for his response, appellant told the court "She is lying [about] [e]verything she just said." Appellant later added "I got some other papers that I got to receive. I just forgot to bring them. They were from the Indian bureau."

The court ruled there was nothing Trujillo had done that was inconsistent with her duty to advocate on appellant's behalf. It in turn denied appellant's request for either new counsel or to represent himself.[5]

Returning to open court, the court took the matter under submission. It adopted the department's recommendations and terminated parental rights.

DISCUSSION

In his appeal from the termination order, appellant challenges for the first time the court's August 2006 dispositional determination that ICWA did not apply to Serenity's dependency. He contends the department's ICWA notice confused his Indian heritage, by attributing to the paternal grandmother Yokut heritage and to the paternal grandfather Pauite heritage when the paternal grandmother had testified she was Pauite and her

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[5] Notably, appellant does not challenge the court's denial of his *Marsden* motion.

husband was Yokut. Appellant also complains the department did not include the paternal grandmother's place of birth in its ICWA notice.

The problem for appellant is that the court's August 2006 determination was final and therefore no longer reviewable when he appealed from the court's 2007 termination order. The court's determination was reviewable by way of a writ proceeding when the court also issued its setting order for the section 366.26 hearing. (§ 366.26, subd. (*l*); *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1023.) Due to appellant's absence from the August 16th hearing, he had 12 days thereafter within which to file a notice of intent. (Cal. Rules of Court, rule 8.450(e)(4)(B), formerly rule 38.) However, and despite proper notice of his writ remedy, appellant did not pursue the matter by filing a timely notice of intent, let alone a writ petition. Having failed to pursue timely writ relief, appellant is statutorily foreclosed from raising the issue on this appeal. (§ 366.26, subd. (*l*).) The fact that he attempted to file a notice of intent three months later does not cure his forfeiture.

In addition, in *In re Pedro N.* (1995) 35 Cal.App.4th 183, 185, this court held a parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues, once the court's ruling is final, in a subsequent appeal. In so ruling, we specifically held we were only addressing the rights of the parent, *not* those of a tribe.

Appellant invites us to revisit our holding because other appellate courts, most notably the court in *In re Marinna J.* (2001) 90 Cal.App.4th 731 (*Marinna J.*), do not apply the waiver doctrine. The *Marinna J.* court disagreed with our holding on the theory it was inconsistent with the protections ICWA affords to the interests of Indian tribes. On this point, we differ. This court did not foreclose a tribe's rights under ICWA on account of a parent's appellate waiver. (*Pedro N., supra*, 35 Cal.App.4th at p. 185; see also *In re Desiree F.* (2000) 83 Cal.App.4th 460 [where this court reversed the denial of a tribe's motion to intervene after a final order terminating parental rights and

invalidated actions dating back to the outset of the dependency and taken in violation of ICWA].)

Even so, we note the facts in the pending case are so different from those in *Marinna J., supra,* as to make that decision and its analysis inapplicable to this case. In *Marinna J., supra,* 90 Cal.App.4th at page 739, the appellate court made a point of explaining there was no record that the department sent notice of the proceedings either to any of the identified tribes in which the children could be members or to the BIA. Further, it observed the trial court in *Marinna J., supra,* took no action on its part to assure compliance with the ICWA notice requirements. It was thus under those circumstances that the appellate court would not invoke the waiver doctrine. (*Ibid.*) In this case, there is no question but that the appropriate tribes and the BIA received notice of Serenity's dependency proceedings in compliance with ICWA (25 U.S.C. § 1912). Furthermore, the juvenile court here specifically ruled based on that notice that ICWA was inapplicable. Under these circumstances, we are confident appellant, by his silence up until now, has waived his right to complain.

To overcome his forfeiture, appellant criticizes his trial counsel as ineffective and attempts to blame her for his waiver. In his view, Trujillo should have filed a notice of intent on his behalf and pursued the issue. Appellant overlooks the law that makes it *his* obligation, not his attorney's, to seek writ review. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 724.) In addition, to the extent he relies on his allegation at the January 2007 *Marsden* hearing that he had asked his attorney to file an appeal on his behalf, he overlooks the superior court's apparent credibility determination against appellant when it concluded attorney Trujillo had done nothing that was inconsistent with her duty to advocate on appellant's behalf.

DISPOSITION

The order terminating parental rights is affirmed.