

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF KADEN S.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF KADEN S.,
A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLANT,
v.
SHAWN S. AND DEZERA H., APPELLEES.

Filed July 5, 2011. No. A-10-1151.

Appeal from the County Court for Scotts Bluff County: JAMES M. WORDEN, Judge.
Affirmed.

Andrea M. Longoria, Deputy Scotts Bluff County Attorney, for appellant.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellee
Shawn S.

Audrey M. Elliott, of Kovarik, Ellison & Mathis, P.C., guardian ad litem.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

INBODY, Chief Judge.

INTRODUCTION

The State appeals the order of the Scotts Bluff County Court, sitting as a juvenile court, finding that the State had produced insufficient evidence to find that the minor child, Kaden S., born in January 2010, was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and dismissing the juvenile petition. For the following reasons, we affirm.

STATEMENT OF FACTS

On March 30, 2010, the State filed a petition alleging that Kaden was a child within the meaning of § 43-247(3)(a) because he lacked proper parental care as a result of the fault or habits

of his biological mother, Dezera H., who admitted to using a controlled substance; due to domestic violence between Dezera and Kaden's biological father, Shawn S.; and because Shawn has a history of drug use and violence against previous domestic partners. At that time, Kaden was almost 4 months old and was removed from the home. Kaden was placed with Dezera's aunt, Wendy H. Thereafter, Dezera was given supervised visitation with Kaden for 7 days per week, up to 2 hours per visit. Shawn was allowed supervised visitation for 7 days per week, up to 1 hour per visit.

The contested hearing on the adjudication of Kaden was held on July 15, 2010, during which the State offered certified copies of several court documents, including criminal complaints, convictions, and juvenile petitions.

Ella Rae Nolde testified that she had previously been Dezera's probation officer. Dezera had been sentenced to 2 years' probation for attempted unauthorized use of a financial transaction device. Rae Nolde testified that through the terms of her probation, Dezera failed to comply with random urinalysis testing requirements on five occasions between December 29, 2009, and February 16, 2010. Rae Nolde testified that, on March 29, she met with Dezera at Dezera's parent's home, during which time Dezera refused to take a urinalysis test. Rae Nolde explained that Dezera admitted to using methamphetamine on March 25. Rae Nolde testified that Kaden was removed from the home at that time, but that Dezera's older child remained in the home with Dezera's parents. Dezera's older child is approximately 4 years old and is in a guardianship with Dezera's parents. Dezera's older child is not involved in these proceedings or this appeal, and Shawn is not Dezera's older child's father.

Dezera's mother testified that although Dezera was currently incarcerated at the detention center, she and Kaden had resided with her for several years. Dezera's mother testified that she had met Shawn and had no concerns regarding Shawn and Dezera's relationship.

Wendy, Dezera's aunt, testified that on March 22, 2010, she had spoken with Dezera, who requested that Wendy take care of Kaden because Dezera believed she would soon be incarcerated and Shawn was also in jail. Wendy testified that she agreed to take care of Kaden, but several days later was informed by Dezera that she was, instead, going to bail Shawn out of jail so he could take care of Kaden. Wendy testified that she had no knowledge of any domestic violence ever occurring between Dezera and Shawn.

Karol Garduno, a children and family services specialist, testified that she conducted the initial intake with Dezera on March 29, 2010. She also testified that Dezera had admitted to using methamphetamine on March 25. Garduno testified that said admission caused her concern for Kaden's safety and if he had been exposed to any drugs, although Garduno did not know if Kaden was present when Dezera had used drugs. Garduno testified that Dezera specifically requested that Kaden not be placed with Shawn, but instead that he be placed with Wendy. Garduno testified that Dezera had indicated that she and Shawn were not together and had disagreements, but Garduno did not recall any indication that those disagreements became physical, only that Kaden had been present during some of the arguments.

The State then called an officer with the Gering Police Department, who testified that she responded to a dispatch on November 17, 2008, of an overdose. The officer testified that, at that time, Dezera reported that Shawn had swallowed a quarter-sized amount of methamphetamine so he would not be caught with any substance.

The county court took the matter under advisement and then issued an order dismissing the juvenile petition entirely. The court found that the State had not proved by a preponderance of the evidence that there had been domestic violence between Shawn and Dezera. The court found that the evidence offered in support of the allegations of Shawn's criminal history and history of drug use was not indicative of abuse or neglect and that admission of drug use on one occasion by Dezera was likewise not sufficient to support a finding that Kaden was abused or neglected.

The State has timely appealed the order of the county court to this court.

ASSIGNMENT OF ERROR

The State assigns that the county court erred by dismissing the juvenile petition.

STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

ANALYSIS

The State contends that the county court erred by dismissing the juvenile petition after determining that the allegations in the adjudication petition had not been proved by a preponderance of the evidence.

Section 43-247(3)(a) grants the juvenile court jurisdiction over any juvenile who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile[.]

To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

In this case, the State alleged that Kaden lacked proper parental care because of the fault or habits of Dezera, who admitted to using a controlled substance; due to domestic violence between Dezera and Shawn; and because Shawn had a history of drug use and violence against previous domestic partners.

Evidence presented at the adjudication hearing indicated that Dezera admitted to various individuals that she had used methamphetamine on one occasion. This evidence supports the State's allegation within the juvenile petition that Dezera had admitted to using a controlled substance on a single occasion.

The second allegation raised by the State in the petition is that domestic violence between Shawn and Dezera had occurred in the presence of Kaden. However, there was no evidence adduced which would suggest that there had been domestic violence between Shawn and Dezera and that any such alleged domestic violence occurred in the presence of Kaden. Testimony indicated that the two individuals often fought and had many disagreements, but there was no testimony or evidence to indicate that those disagreements escalated to any actual physical violence. The evidence presented is insufficient to support this allegation.

Finally, we are left with the State's final allegation in the State's petition that Kaden lacks proper parental care as a result of Shawn's history of drug use and violence against previous domestic partners. The State argues that the convictions show that Shawn has a significant history, which rendered him incarcerated and incapable of providing for Kaden. The State also argues that the county court ignored the juvenile proceedings involving Shawn's two other children with another woman.

At the hearing, the county court received into evidence numerous certified court documents in support of this particular allegation. Those documents include a conviction for a protection order violation in 2007, to which Shawn pled no contest; a no contest plea, in 2008, for a conviction of intimidation by telephone call; a violation of a harassment protection order, in 2008, of which Shawn was found guilty; and convictions for possession of marijuana, less than 1 ounce, or drug paraphernalia in June 2008, October 2009, and March 2010, to which Shawn pled no contest. The court ultimately determined that the convictions in 2008, and before, were irrelevant and that, while the two remaining drug-related convictions were relevant, those two convictions were based upon no contest pleas and were not a sufficient basis to show abuse or neglect to Kaden.

We note that all but one of these convictions occurred prior to the birth of Kaden, who was born in January 2010, and that none of the cases involved Dezera. The State also failed to adduce any evidence that there had been any drug use by either Shawn or Dezera in the presence of Kaden, whether either individual had drugs in his or her possession, whether Kaden was affected by Shawn's drug history, or any other evidence which would suggest that Shawn's drug history presently placed Kaden at risk for harm. It is undisputed that Shawn was incarcerated at the time of the petition; however, Shawn was in attendance at the hearing, and there was no evidence adduced by the State that Shawn was still incarcerated or would be in the near future. Furthermore, while the State adduced evidence that Shawn had been involved in other juvenile proceedings, there was no evidence, apart from Shawn's incarceration, that Shawn had neglected or abused Kaden.

Generally, the State need not prove that the juvenile has actually suffered harm but must establish that without intervention, there is a definite risk of harm. *In re Interest of Carrdale H.*, 18 Neb. App. 350, 781 N.W.2d 622 (2010). Based upon this record, we find that there is insufficient evidence to show by a preponderance of the evidence that Kaden lacked parental

care and was at definite risk of harm. Therefore, we affirm the order of the district court dismissing the juvenile petition and find that the State's assignment of error is without merit.

AFFIRMED.