

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Dependency of	)	No. 81776-1-I (consolidated with
	)	No. 81777-9-I)
M.T.	)	
(DOB: 2/4/2018),	)	DIVISION ONE
	)	
K.T.	)	
(DOB: 2/4/2018),	)	UNPUBLISHED OPINION
	)	
Minor Children.	)	
	)	
B.T.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF WASHINGTON,	)	
DEPARTMENT OF CHILDREN,	)	
YOUTH, AND FAMILIES,	)	
	)	
Respondent.	)	
_____	)	

MANN, C.J. — B.T. appeals the trial court’s order terminating his parental rights to M.T. and K.T. Because the trial court did not abuse its discretion when denying B.T.’s motion to continue, and because B.T.’s counsel was not ineffective, we affirm.

FACTS

On February 4, 2018, twin boys M.T. and K.T. were born drug affected due to their mother's substance abuse.<sup>1</sup> The twins' father, B.T., was incarcerated at the time of their birth.

The Department of Children, Youth and Families (the Department) took custody of the children and placed them in foster care with their older sister, who had previously been the subject of a dependency action resulting in termination. Agreed orders of dependency were entered on April 13, 2018 (mother) and May 11, 2018 (B.T.)

On November 16, 2018, the Department filed petitions to terminate B.T.'s parental rights to M.T. and K.T. On February 25, 2019, at the preliminary hearing, B.T. appeared in person and requested to proceed pro se. Consequently, the trial court continued the hearing to March 4, 2019. At the hearing, B.T. submitted a written waiver of counsel in support of his motion to proceed pro se. The trial court, however, denied B.T.'s request, finding that his waiver was not made "knowingly and intelligently." The court then directed B.T. to the Office of Public Defense (OPD) in order to obtain assigned counsel. As a result, the court continued the pretrial hearing to April 5, 2019, and the trial to May 6, 2019.

On April 5, 2019, B.T. again appeared pro se at the pretrial conference. B.T. stated that he would be securing private counsel. On May 6, 2019, B.T. appeared at trial and provided the court with an e-mail that indicated he had assigned counsel. Shortly thereafter, attorney Eric Beckendorf telephoned in, indicating he was assigned

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<sup>1</sup> The twins' mother relinquished her parental rights and is not party to this appeal.

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counsel, but had yet to file a notice of appearance. The court continued the trial date to May 13, 2019 in order to secure Beckendorf's notice of appearance.

On May 13, 2019, B.T. appeared at trial represented by Beckendorf. To provide Beckendorf additional preparation time, the court continued the trial date to July 22, 2019. Due to counsel being in trial for other cases, the court continued the trial date to August 12, 2019, and again to September 9, 2019 by agreement of the parties.

On September 9, 2019, B.T. did not appear for trial. The twins' mother sought a continuance in order to resolve the matter without trial. Beckendorf asserted that he was unaware of B.T.'s position on the matter. As a result, the court stayed proceedings until the following morning at 9:00 a.m.

On September 10, 2019, the mother informed the court that she signed relinquishment paperwork. The court then attempted to begin trial in regards to B.T., but he was once again absent from the courtroom. Beckendorf informed the court that B.T. was en route, and that B.T. wished to represent himself. After B.T. arrived around 10:45 a.m., Beckendorf motioned to withdraw because B.T. wished to represent himself and "ethical issues emerged which required [Beckendorf] to withdraw from the case." B.T. requested a continuance, stating that he wished to obtain private counsel. The court denied the motions as untimely.

After the court denied the initial motions, Beckendorf requested to withdraw pursuant to Rule 1.16 of the Rules of Professional Conduct due to ethical issues. Following an in-chambers discussion between the trial court and Beckendorf, the court granted Beckendorf's motion to withdraw, and continued the trial date, scheduling a status conference for September 17, 2019.

In the court's September 10, 2019 order of continuance, it noted that:

The court has advised [B.T.] on the record that he has a right to counsel, however he does not have a right to appointed counsel of his choice nor does he have the right to continue to delay this procedure by seeking repeated change of counsel. The court notes that the prior court orders in this proceeding indicate a pattern of delay tactics by [B.T.]. [B.T.] has previously indicated that he would be obtaining a private attorney, and has [had four months] to do so."

The trial court characterized B.T.'s use of switching counsel as intentionally delaying trial.

On September 17, 2019, B.T. appeared late to the status conference. He informed the court that he had screened with OPD. The court then set the trial date to October 14, 2019.

On September 25, 2019, attorney Demetri Heliotis filed a notice of appearance for B.T. The court continued trial to December 2, 2019 to allow Heliotis time to review discovery and file answers to the termination petitions.

On November 15, 2019, Heliotis motioned to again continue the trial date. The Department objected and the court denied the motion. The parties then filed two agreed continuances due to the unavailability of a witness, continuing the trial to February 10, 2020.

In the spring of 2020, the events of the COVID-19 pandemic began to unfold. As a result, the Washington court systems suspended certain proceedings, including dependency proceedings.<sup>2</sup> This suspension resulted in B.T.'s trial being continued until at least June 5, 2020.

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<sup>2</sup> The King County Superior Court Orders in response to the pandemic are available at <https://kingcounty.gov/courts/superior-court.aspx>.

On May 29, 2020, Heliotis's firm terminated its contract with OPD. Meredith Hutchison replaced Heliotis, but withdrew as counsel. On June 8, 2020, Roxana Florea became B.T.'s assigned counsel.

During a pretrial status conference on June 19, 2020, Florea moved to continue the termination trial to the following month; the Department requested a shorter continuance of one week. Based on the numerous prior continuances, the court continued the trial for one week, setting the date to July 13, 2020.

On the day of trial, July 13, 2020, B.T. failed to appear, but was represented by Florea. Florea promptly moved for a continuance, to which the Department objected. Florea indicated she had not had the opportunity to speak with B.T. during her approximately six-week period as assigned counsel. As a result, Florea explained she did not have direction, and was unprepared given B.T.'s lack of communication and the volume of information she needed to review. The trial court denied the continuance, noting that Florea had several weeks to prepare, that B.T. was responsible for communicating with his attorney in order to participate meaningfully in the proceeding, and that it was in the best interest of the children to move forward.

After the court denied Florea's motion to continue, she moved to withdraw. Florea asserted that she was so unprepared that it would be tantamount to B.T. having no counsel. The court denied the motion, stating that Florea had the basic direction from B.T. in that he opposed termination of his parental rights.

The trial began the following day, where two of the Department's witnesses testified, each with a cross-examination by Florea. The next day during the third witness's testimony, B.T. appeared at trial for the first time via Zoom. The court took a

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recess during which Florea spoke to B.T. When Florea returned, she renewed her request for a continuance, explaining that she talked to her client for the first time regarding filed exhibits. The court again denied the request, noting the multiple previous continuance orders were all due to B.T.'s behavior. The court recessed until the following day to allow B.T. and Florea to confer. The trial continued for two more days, during which B.T. was only intermittently present, even during the time allotted for his own testimony. The court ultimately terminated B.T.'s parental rights to K.T. and M.T.

B.T. appeals.

### ANALYSIS

#### A. Denial of Continuance

B.T. argues that the trial court abused its discretion in denying his July 13, 2020 motion to continue. We disagree.

We review a trial court's denial of a motion to continue for an abuse of discretion. In re Dependency of V.R.R., 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006). A trial court may exercise its discretion to "manage its own affairs so as to achieve the orderly and expeditious disposition of cases." Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995). A trial court abuses its discretion if its decision is based on untenable grounds or for untenable reasons. State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006).

Here, the trial court's denial of B.T.'s motion to continue did not rise to an abuse of discretion. B.T. had requested continuances on four prior occasions, resulting in months of delay. Given Florea had six weeks to prepare for trial, and had been granted

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an additional week, the trial court did not find her argument that she needed more time convincing. In respect to Florea's lack of communication with B.T., the court noted that it was B.T.'s responsibility to communicate with his attorney in order to participate meaningfully in the trial. Finally, the court determined that it was in the best interest of the children that the trial proceed. For these reasons, the trial court acted within its discretion when denying B.T.'s motion to continue in order to expeditiously dispose of the case.

B. Ineffective Assistance of Counsel

B.T. argues that, due to the trial court's denial of his July 13, 2020, motion to continue, he received ineffective assistance of counsel. The Department argues that B.T. waived his right to counsel. We disagree with both parties.

In Washington, a parent has a statutory right to counsel at all stages of a dependency proceeding. In re Dependency of Grove, 127 Wn.2d 221, 226, 897 P.2d 1252 (1995); RCW 13.34.090. "[C]onsistent with the constitutional requirements of fairness, equal protection, and due process," this right includes the right to effective assistance of counsel. Grove, 127 Wn.2d at 232; see also RCW 10.101.005. A parent may lose their right to counsel by (1) voluntarily relinquishing that right, (2) waiving the right by conduct, or (3) forfeit the right through "extremely dilatory conduct." City of Tacoma v. Bishop, 82 Wn. App. 850, 859, 920 P.2d 214 (1996).

Here, B.T. did not lose his right to counsel. Following Florea's assignment as B.T.'s counsel, at no point did he knowingly and voluntarily waive his right "by an affirmative, verbal request." Bishop, 82 Wn. App. at 858. Nor did B.T. forfeit his right to counsel. Because forfeiture results in a loss of a right regardless of intent, B.T. must

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have engaged in extremely severe and dilatory conduct, such as threatening or abusing counsel, which he did not. In re Welfare of G.E., 116 Wn. App. 326, 334, 65 P.3d 1219 (2003).

The Department asserts that B.T. forfeited his counsel via waiver by conduct. In doing so, the Department cites In re Dependency of A.G., 93 Wn. App. 268, 280, 968 P.2d 424 (1998). There, the parent's attorney lost all contact with the parent. A.G., 93 Wn. App. at 274. On the day of trial, the attorney moved to withdraw, and the trial court granted the motion, further holding that the parent's failure to respond did not prevent the State from obtaining a judgment terminating the parent's rights. A.G., 93 Wn. App. at 274. B.T.'s proceeding is different, however, as the court did not grant Florea's motion to withdraw. Florea continued to represent B.T., confer with him during trial, and cross-examine the Department's witnesses. These interactions do not constitute a waiver by conduct.

B.T. argues he received ineffective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of fact and law that we review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, a party has the burden of establishing that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. In re Dependency of S.M.H., 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (citing State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001)); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 80 L. Ed. 2d 674 (1984). The inability to establish either prong is fatal to an ineffective assistance of counsel claim. Strickland, 466 U.S. at 700.



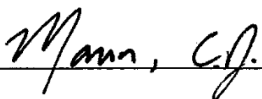
Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of counsel's performance is highly deferential; we strongly presume the performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If trial counsel's conduct is characterized as legitimate trial strategy or tactics, the conduct does not equate to ineffective assistance of counsel. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1020 (2009).

Here, B.T.'s ineffective assistance of counsel claim fails on the first prong; Florea's performance was not deficient. First, Florea properly moved for a continuance and withdrawal when she thought herself unprepared to represent B.T. Second, Florea successfully limited the Department's evidence and competently cross-examined its witnesses.

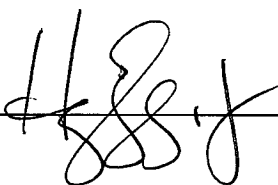
Florea's motion to continue and motion to withdraw demonstrated reasonable performance and legitimate trial strategy. When Florea was unable to contact B.T., and because she felt she did not have sufficient time to prepare the case, she moved to continue. The trial court, however, believed that six weeks constituted sufficient preparation time and that B.T. had a responsibility to contact his attorney, denying her motion. She then moved to withdraw, which the court likewise denied. Both of these motions demonstrate reasonable performance of a competent attorney. It would have been less reasonable, rather, for Florea to have abstained from making these motions. Florea's attempts to continue the trial and withdraw do not equate to ineffective assistance of counsel.

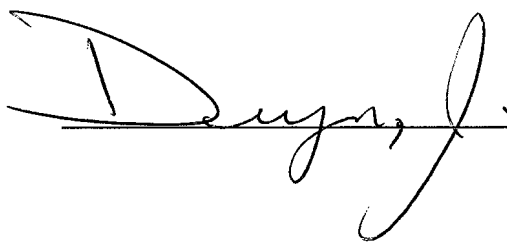
Florea further demonstrated competence by limiting the Department's evidence and cross-examining its witnesses. Florea made evidentiary objections to witness recitation of B.T.'s childhood history, the dependency order of B.T.'s older child, the order terminating B.T.'s rights to his older child, the mother's order of dependency, criminal court orders, and witness knowledge, to name a few. Florea also cross-examined the Department's witnesses: Shepel, Utevsky, Whalen, Camp, and B.T. Despite what could have been had the trial court decided to grant Florea's continuance, her performance at trial was not deficient. B.T.'s claim of ineffective assistance of counsel fails.

Affirmed.

  
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WE CONCUR:

  
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