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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re N.R., a Person Coming Under
the Juvenile Court Law.

B312001

(Los Angeles County
Super. Ct. No.
20CCJP06523A)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.R.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Martha A. Matthews, Judge. Affirmed.

Sean Angele Burleigh, under appointment by the Court of Appeal, for Defendant and Appellant.

Rodrigo A. Castro-Silva, County Counsel, Kim Nemoy,
Assistant County Counsel, and Sarah Vesecky, Senior Deputy
County Counsel, for Plaintiff and Respondent.

The juvenile court assumed dependency jurisdiction over 17-month-old N.R., the son of S.H. (Mother) and O.R. (Father), after finding he was at substantial risk of serious physical harm from Father's cocaine habit. The court removed N.R. from Father's custody and placed him with Mother. Father asks us to decide whether substantial evidence supports the court's substance-abuse-based jurisdiction finding and the related disposition order removing N.R. from his custody.

I. BACKGROUND

A. *The Department Begins Investigating*

On November 19, 2020, the Los Angeles County Sheriff's Department executed a search warrant at Mother's home. The primary targets of the warrant were maternal uncle E.P. and maternal grandmother's male companion, J.R. After law enforcement deemed the home safe, a Los Angeles County Department of Children and Family Services (Department) social worker entered and spoke with Mother.

Mother reported she and Father were not currently in a relationship but were cooperatively co-parenting without any custody orders. Mother denied having a substance abuse history. Mother admitted maternal grandmother had a history of drug abuse, which had, in part, led to the removal of one of maternal grandmother's children from her custody. The social worker asked Mother why she allowed maternal grandmother to care for N.R. given her history, and Mother said she had not thought about it as a concern.

The social worker completed a walk-through of the home, which smelled of marijuana. There was a partially consumed bottle of alcohol in Mother's bedroom on a dresser low enough to

be accessible to N.R. There were pots of marijuana plants in the front yard near maternal uncle E.P.'s sleeping area. Mother's car contained empty beer cans and bottles.

Mother agreed to have N.R. stay with Father during the Department's investigation. The social worker spoke to Father when he arrived to pick up N.R., and Father consented to an assessment of his home. During his conversation with the social worker, Father denied abusing any substances and agreed to take a drug test. The social worker then conducted a walk-through of Father's home and left N.R. in Father's care.

Father did submit to a drug test the same day, and the test results later returned positive for cocaine metabolites—with the metabolites registering at a high level. When questioned about the result, Father said he had been scared to tell the social worker he used cocaine. Father said his cocaine use occurred the prior weekend while celebrating his birthday—when he was not expecting to have to take care of N.R. Father claimed he did not know how much cocaine he used and said he was not an active user of cocaine.

The Department subsequently sought, and the juvenile court granted, an order removing N.R. from Father's custody. The child was placed with his maternal uncle.

B. The Petition and Detention Hearing

The Department filed a two-count dependency petition in December 2020. Count one alleged N.R. was at substantial risk of serious physical harm from Mother's decision to permit the maternal grandmother, a known drug abuser, to reside with N.R. and have unlimited access to him. Count two alleged N.R. was at similar risk from Father's past and current drug abuse.

The juvenile court held a detention hearing and continued N.R.'s placement with the maternal uncle. The court ordered the Department to provide appropriate referrals and voluntary drug testing to Mother and Father. They were granted monitored visitation.

C. Further Investigation

A Department social worker interviewed family members in the ensuing months. Mother claimed the maternal grandmother had not used drugs since Mother was thirteen and Father denied knowing the maternal grandmother used drugs at all. Mother had by then moved out of the home she was living in with maternal grandmother and had her own apartment.

As to the allegations about Father's drug use, Mother claimed she was shocked when she learned Father was using cocaine. She said they never lived together (they dated when they were eighteen and stopped when they were nineteen) and she did not even see Father smoke marijuana when the two were dating. Mother reported she had spoken to Father about the cocaine use, Father told Mother he was no longer using, and Mother believed Father was no longer under the influence.

When asked about the allegation regarding his drug use, the Department reported that Father said, "I'm so upset that they caught me! My mom was upset too. She was crying when I told her I tested positive. This cocaine thing is not me! I'm so upset!" Father admitted he first tried cocaine at age 21 or 22 (he was 26 at the time of the dependency proceedings) and he denied

his cocaine use was an addiction.¹ Later during his conversation with the social worker, however, Father acknowledged he had been using cocaine once or twice every two weeks and he said he used to “rave” a lot and would use cocaine with friends at big parties. As to the circumstances leading to the positive cocaine metabolite test result, Father said his birthday was on Wednesday, November 11, and he celebrated from Thursday, November 12 to Sunday, November 15—using cocaine all four days. Father was unsure how much cocaine he consumed (allowing it was “[m]aybe . . . a big amount”), but he claimed he and his friends “pitched in 10 dollars each to get something small and that’s it.”²

Father represented he did not “party” or use cocaine on the weekends when N.R. previously stayed with him pursuant to the custody arrangement with Mother. Father believed Mother knew about his cocaine use. Father admitted he used marijuana in the past, but he denied being a current user. Father expressed a willingness to submit to random drug tests. The social worker asked Father if he wanted to participate in the Child Family Team program, and Father declined, stating he just wanted the

¹ Father claimed if he were addicted to cocaine he would “be broke.” Father lived with his mother and was an out-of-work barber who found a job working in a warehouse for 20 hours a week.

² At another point during the same interview, Father said he never paid for cocaine himself and he would just participate when his friends “did it together.”

drug testing. Father also said, “It’s too much. It’s already a big deal I have two kids. I just want it over with.”³

The Department’s jurisdiction and disposition report stated Father’s positive test for cocaine metabolite, at the level of 1441 ng/ml, was an “extremely high and rare level even four days after use.” The Department found Father’s cocaine use—and the amount of use shown by the lab test results—extremely concerning. The jurisdiction report explained the combination of cocaine and alcohol (both of which Father used when “celebrating” his birthday) creates a substance called cocaethylene, which increases the addictiveness of each individual substance and the risk of violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings, and sudden death.

Father submitted to two random drug tests in January 2021 that were both negative. Father missed his next test and told the social worker he missed the test because of work. He asked to only test on Mondays and Fridays to accommodate his work schedule; the social worker responded testing was random and he had to test when his name was called. The social worker set Father up for a makeup test and the sample at that test leaked and could not be tested. Father missed a subsequent test and then appeared and tested negative once in March 2021.

In advance of the jurisdiction and disposition hearing, the Department submitted a report describing, in list form, the reasonable efforts the Department claimed to have made to avoid the need for removing N.R. from the parents’ care: emergency

³ Father’s other child came from a different relationship.

response services; family reunification services; face-to-face contacts; notices for the jurisdiction and disposition hearing; and the Child Family Team program, which both parents declined at the time it was offered.

In the months shortly before the April 2021 jurisdiction hearing, the juvenile court ordered the Department to, among other things, provide a weekly drug and alcohol testing referral for Father. A last minute information report prepared by the Department indicated a social worker verbally referred Father to services on March 23, 2021, and sent him an email listing available services on March 31, 2021.

D. The Jurisdiction and Disposition Hearing

After hearing argument at the jurisdiction and disposition hearing, the juvenile court dismissed the petition count alleging risk of harm from exposure to the maternal grandmother because the Department had not provided any evidence regarding the maternal grandmother's current drug use—such that there was no evidence Mother did anything wrong in allowing the maternal grandmother to care for N.R.

The juvenile court, however, found the Department had shown Father has a substantial drug abuse history and tested positive for a fairly high amount of cocaine metabolites in November of 2020.⁴ The court noted both Mother and Father

⁴ The court declined to consider the missed tests as positive results because Father had been testing voluntarily, not pursuant to a court order, and the court believed case law holding a missed test can constitute a positive test applies only after a person has been ordered to test.

admitted Father used alcohol and cocaine. While both Mother and Father claimed Father would not care for N.R. while using cocaine, it was undisputed Father was responsible for taking care of N.R. at the time of the November 2020 positive test. After amendments by interlineation, the petition as sustained by the court stated Father has a history of substance abuse and is a recent abuser of cocaine, rendering him incapable of providing regular care to N.R., who is of such a young age as to require constant care and supervision. As to Mother, the petition stated she failed to protect N.R. when she knew or reasonably should have known about Father's substance abuse but allowed Father to have unlimited access to the child.

Turning to disposition, Father and Mother objected to having N.R. removed from their custody. The Department argued it was necessary to remove N.R. from both parents' custody. Counsel for N.R. contended that under the applicable clear and convincing evidence standard of proof, the Department had demonstrated it was necessary to remove N.R. only from Father's custody, not from Mother's.

The juvenile court agreed with the argument made by counsel for N.R. and found the Department met its burden to order the boy removed from Father's custody (but did not meet its burden as to Mother). The court placed N.R. with Mother and ordered Father to submit to 12 drug tests, with the further condition that Father must participate in a drug treatment program if he missed a test or tested positive for drug use. The court also ordered Father to participate in a parenting course and granted him monitored visitation with N.R.

II. DISCUSSION

Substantial evidence supports the juvenile court's jurisdiction finding. Father's regular cocaine use, which he described as occurring once or twice every other week, combined with the positive test result showing a high level of cocaine metabolites while he was responsible for caring for N.R., were sufficient to demonstrate he abused, not just used, cocaine. Particularly given N.R.'s young age, this was sufficient to establish jurisdiction.

There is also adequate evidence, keeping in mind the heightened standard of proof in the trial court (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005, 1011), to support the juvenile court's disposition order removing N.R. from Father's custody. Father's indifference toward the Department's efforts to intervene (including his rejection of the Child Family Team program because it was "too much" and he wanted it "over with"), his missed drug tests, the evidence of his fairly longstanding and frequent cocaine usage (including the binge around his birthday just before N.R. was in his custody), and his persistent denials that cocaine was a problem for him are substantial evidence that there were no adequate means short of removal to mitigate the substantial danger to N.R.—despite reasonable efforts the Department made to avoid that outcome.

A. *The Jurisdiction Finding Is Supported by Substantial Evidence*

Welfare and Institutions Code section 300, subdivision (b)(1) authorizes a juvenile court to exercise dependency jurisdiction over a child if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm

or illness, as a result of the failure or inability of the child's parent . . . to adequately supervise or protect the child" This statutory basis for jurisdiction "does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction." (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Our review of a juvenile court's determination that this statutory standard is met is for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633 [reviewing courts determine whether "substantial evidence, contradicted or uncontradicted" supports the juvenile court's order].)

Substantial evidence supports the juvenile court's exercise of jurisdiction over very young N.R. because of Father's abuse of cocaine. After initially denying any substance abuse, Father tested positive for cocaine. And the test result was not just barely positive; the result reflected a high level of cocaine metabolites that was consistent with Father's subsequent admission to have used cocaine (in combination with alcohol) over the course of four days. Father, who was 26 years old at the time of the dependency proceedings, said he first began using cocaine four or five years earlier (when 21 or 22) and he admitted to using it once or twice every two weeks. This rather longstanding cocaine habit, with intensive use on at least one known occasion, provides substantial evidence to support the trial court's finding of substance abuse. (See, e.g., *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218 [finding the mother's repeated use of cocaine, including while pregnant, was indicative of substance abuse] (*Christopher R.*).

Father, however, argues the evidence demonstrates only that he used substances not that he abused substances. Relying on *In re L.C.* (2019) 38 Cal.App.5th 646 (*L.C.*), he contends his

use of cocaine does not constitute abuse because he believes it has not negatively interfered with his life functions.

In *L.C.*, the juvenile court found evidence the parent used methamphetamine seven times during a period of 10 months insufficient to support allegations of substance abuse. (*L.C.*, *supra*, 38 Cal.App.5th at 652.) Father's situation here is different. He admitted to using cocaine on a bi-weekly basis. And even by Father's own admission, he used enough cocaine the weekend prior to accepting custody of N.R. to still register a positive test at a high reference level. Yet Father did not disclose his substantial cocaine usage to the Department when he was asked if he could take custody of N.R. following the investigation of Mother's home. Father also suggested his friends were funding his cocaine habit while he was less than fully employed (working at most 20 hours a week even when employed as a barber); this too allows an inference that Father's cocaine habit had risen to the level of abuse. (*Christopher R.*, *supra*, 225 Cal.App.4th at 1218 [enumerating factors indicative of abuse, including failure to fulfill major obligations at school or home and the neglect of children or a household].)

Though we accordingly believe the juvenile court had evidence before it that would justify a conclusion that Father was abusing cocaine, a Welfare and Institutions Code section 300, subdivision (b)(1) finding "cannot be based on substance abuse alone; jurisdiction [also] requires a substantial risk of harm to the child arising from the substance abuse. [Citation.]" (*In re J.A.* (2020) 47 Cal.App.5th 1036, 1046.) Where very young children like N.R. are concerned, however, "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a

substantial risk of physical harm.’ [Citations.]” (*Christopher R.*, supra, 225 Cal.App.4th at 1219; see also *In re K.B.* (2021) 59 Cal.App.5th 593, 603.)

Father’s reaction to the Department’s discovery of his substance abuse supports the finding that this abuse poses a risk of harm to N.R. Father stated he was “so upset that they caught me[.]” He claimed the “cocaine thing” was “not me” even while admitting he had been using cocaine for approximately four years, and prior to the commencement of dependency proceedings was using once or twice every other week. Further, though Father agreed to submit to random drug tests, he declined to participate in the Child Family Team program the Department offered, saying it was “too much.” Father’s inability to recognize the problematic nature of his drug abuse and his early declination of additional services indicate there was a risk of harm to N.R.

Father argues he rebutted this prima facie showing at the jurisdiction and disposition hearing by pointing to the passage of time since the last positive drug test and Father’s occasional negative tests since that time. While Father’s negative tests were a sign that things were moving in a more positive direction, there were only three negative tests in the record, and there was an entire month for which the juvenile court had no data regarding his test results (due to missed or faulty tests). The negative tests alone do not alone suffice to rebut the showing given Father’s substantial history with cocaine, his admission of regular use, and his four-day binge prior to accepting custody of N.R.

B. The Disposition Order Is Supported by Substantial Evidence

Welfare and Institutions Code section 361, subdivision (c)(1) provides a dependent child may only be removed from a parent if the dependency court finds “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s . . . physical custody.” The court must also “make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home” and “state the facts on which the decision to remove the minor is based.” (Welf. & Inst. Code, § 361, subd. (e).)

“The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citation.] The court may consider a parent’s past conduct as well as present circumstances. [Citation]” (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170.) Our review is for substantial evidence, although, as already described, we employ a more searching form of that standard of review.

Substantial evidence establishes both that N.R. would be at substantial danger if returned to Father’s unsupervised care and there were no reasonable means short of removal to mitigate the danger to N.R.⁵ Father had, by his own admission, been

⁵ Particularly when Father raised no objection during the hearing, the juvenile court’s on-the-record statement that it

regularly using cocaine for at least four years. His steady pattern of use escalated on at least one known instance around his birthday, and Father at that time took N.R. into his care without a word to the Department that he had just been on a four-day cocaine and alcohol binge that, even then, left him with a high level of cocaine metabolites in his system. This failure to disclose his most recent cocaine abuse was no accident, of course; Father later told a social worker that he was upset that his attempt to hide his cocaine use had been foiled. Once he had been found out, Father still declined to engage with the Department's early efforts to intervene and ameliorate the problem. He refused to participate in a Child Family Team, saying it was too much, and then he failed to consistently participate in the drug testing that he did agree to. Father's behavior—especially his initial effort to conceal his drug use and his steadfast denial that his drug use was a problem—demonstrate he was unable or unwilling to substantively engage with any efforts that might have prevented the need to remove N.R. from his custody so as to mitigate the substantial danger to the very young child from Father's cocaine abuse.

The same evidence demonstrates the Department made reasonable efforts to avoid removal, specifically offering Father an opportunity to participate in the Child Family Team program and to undergo random drug testing. The Department also made other referrals to Father in the weeks leading up to the disposition hearing.

agreed with the position articulated by counsel for N.R. sufficed to state the facts on which the decision to remove the minor was based.

Father asserts this was not enough. He argues regular drug testing was an available way to ensure N.R.'s safety in Father's care. But Father had previously volunteered to submit to drug testing and then missed tests. Father also contends that if the Department had granted his request to allow him to test on two specific days each week, he could never be under the influence of cocaine when caring for N.R. But the record contains no expert testimony establishing that claim is accurate, and even if true, N.R. could still be in substantial danger for the days before a positive test would first register. Finally, Father argues the court acknowledged he was sober at the time of the dispositional hearing. This misreads the record. Though the juvenile court declined to order Father attend a full drug treatment program, it did so because Father claimed he was not using at the time, not because the court had means to verify Father was, in fact, sober.⁶

⁶ Father also complains he received certain additional referrals for services only a week or two prior to the disposition hearing. He does not, however, point to any evidence indicating he attempted to pursue those referrals prior to the hearing but could not due to the timing of their provision. Under the circumstances, the point does not undermine a conclusion that reasonable efforts were made to prevent or to eliminate the need for removal. (See, e.g., *In re Misako R.* (1991) 2 Cal.App.4th 538, 547 ["The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances"].)

DISPOSITION

The juvenile court's orders are affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.