

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF TYLER L. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
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IN RE INTEREST OF TYLER L. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLANT,  
V.  
MELVIN L. AND JENNIFER L., APPELLEES.

Filed November 20, 2012. No. A-12-466.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Reversed and remanded for further proceedings.

Candace L. Dick, Deputy York County Attorney, for appellant.

Bruce E. Stephens, of Stephens Law Offices, P.C., L.L.O., for appellee Jennifer L.

Nancy G. Waldron, York County Public Defender, for appellee Melvin L.

Lisa M. Meyer, guardian ad litem.

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

MOORE, Judge.

**INTRODUCTION**

The State appeals from an order of the county court for York County, sitting as a juvenile court, dismissing the petition to adjudicate the minor children as juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). For the reasons set forth herein, we reverse, and remand for further proceedings.

**BACKGROUND**

Melvin L. and Jennifer L. have three children, who were residing in their home: Tyler L., Megan R., and Dylan J. Tyler is the child of Melvin and Jennifer. Megan is the child of Jennifer,

and Dylan is the child of Melvin. Megan's biological father and Dylan's biological mother are not subject to this appeal and will not be discussed further. All three children resided in the home of Melvin and Jennifer.

A search warrant was executed upon Melvin and Jennifer's home on January 24, 2012. The search led to the seizure of the following items: a black case with a glass smoking pipe, three digital scales, plastic bags containing a green leafy substance, a small blue plastic bag with white residue, plastic lighters, two metal smoking pipes, two 12-gauge shot guns, five rifles, a 9-millimeter pistol, ammunition, three knives, a plastic jar with black powder, a section of ignition fuse cord, a propane torch, and other miscellaneous items. All the evidence was seized from the first floor master bedroom.

One of the digital scales tested positive for methamphetamine, and another tested positive for methamphetamine and marijuana. The residue in the blue plastic bag tested positive for methamphetamine, and the other 10 plastic bags containing plant material tested positive for marijuana. As a result of the search, Melvin was booked in the York County jail. At that time, he admitted to using methamphetamine and marijuana in the prior week or two. While in a holding cell, Melvin said that he had last used drugs 4 or 5 days prior. A county jail employee described Melvin's behavior during this time as erratic and angry. Jennifer was also arrested after the search warrant was executed, and she was charged with one count of felony child abuse.

The State filed petitions alleging that all three children were within the meaning of § 43-247(3)(a) in that Melvin and Jennifer neglected or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the children; that Melvin and Jennifer are unable to provide or neglect and refuse to provide special care made necessary by the mental condition of the children; and that they are in a situation or engage in an occupation dangerous to life or limb or injurious to the health or morals of the children. Attached to the petitions are the affidavit of a law enforcement officer setting forth the factual basis for the petitions, which affidavit states, as summarized, that (1) bombmaking components, guns, and drug paraphernalia were found in the home upon execution of a search warrant and that (2) the living conditions or environment at the residence were dangerous and unhealthy for the children. An adjudication hearing was held before the county court for York County, sitting as a juvenile court, on April 24 and May 3, 2012.

A lieutenant was the primary investigator on the execution of the search warrant. When he entered the home, it smelled like dog feces and garbage. He also observed dog feces on the kitchen floor. He testified that although the feces could have been tracked in by one of the other officers, he did not observe that. A deputy who also participated in the execution of the warrant observed dog feces on the front porch, but he did not recall seeing it in the house.

The lieutenant also observed the upstairs bedrooms which he described as very cluttered. Tyler's bedroom "had everything piled up on the bed," which had no sheets, and was in a state of disarray. Dylan's bedroom had a mattress on the floor with no sheets, but had a couple of blankets and two pillows. The entire upstairs had a strong odor of cat feces and urine, and the litter box had not been emptied. The deputy testified that the upstairs area smelled "horrible" and made him "sick to [his] stomach."

The master bedroom, where all of the seized evidence was found, had a lock on the inside of the door that was unlocked when the warrant was executed. The handguns had loaded clips,

but the other guns were unloaded. The lieutenant testified that many of the other items found were drug paraphernalia, such as digital scales used to measure drugs to sell or package them.

A sergeant, who is a nationally certified hazardous device technician, testified that “CO2 cartridge[s],” ignition fuse, and black powder found in the home could be used to manufacture a destructive device or explosive. Although no complete devices were found and the individual items are not dangerous, the sergeant testified that all the items were found in the same proximity and that a device could be constructed in seconds. Melvin and Jennifer did not have a permit for an explosive device.

Melvin testified that they had permits for all of the guns and that they were used for hunting. He maintained that keeping unlocked guns in an unlocked room was safe as long as the guns were not loaded. Melvin testified that the guns were only loaded when the children were not in the home and that all of the children had been through gun safety courses.

Melvin testified that he is self-employed and does mowing, plumbing, and roofing. He is diagnosed with bipolar disorder and receives disability payments. Melvin testified that Dylan and Tyler take medication for attention deficit hyperactivity disorder and that Tyler also takes medication for bipolar disorder and acid reflux. Dylan and Tyler also receive disability payments. Melvin testified that part of the disability money for Dylan and Tyler goes toward the family’s rent and that he and Jennifer intend to transfer title to the house to them when they are “of age.” The payments also go toward paying bills, sports, and other things Dylan and Tyler want to do.

Both a woman and a man testified about using drugs with and buying drugs from Melvin. The woman was a former coworker of Jennifer, and she testified that she purchased marijuana from Melvin three or four times during the fall and winter of 2011. She also was present when others bought drugs from Melvin outside of his home. Although the children were not outside at the time of the purchases, they were inside the home. She also observed Melvin using methamphetamine himself. The man testified that he used methamphetamine with Melvin, but never with Jennifer. However, Jennifer and the children were inside the home when he and Melvin used drugs in the locked bedroom. The man also stated that he was “absolutely not” a good influence to have around the children.

Megan was the only one of the children who testified at the adjudication hearing. Megan, who was 16 years old at the time of the hearing, dropped out of high school in December 2011 during her sophomore year. Megan testified that she was receiving straight A’s, but she was falling asleep, not being challenged, and was being harassed by other students. She testified that she started studying in January 2012 to obtain her diploma through the GED program. Megan wants to start classes to become a certified nursing assistant, go to community college for criminal justice, and learn Chinese.

The record shows that there were other factors at play which required Megan to take a more active role in helping her family. Megan testified that in the fall of 2011, she took Jennifer to the hospital, because Jennifer had chest pains and had fluid in her lungs. Jennifer also recently had surgery on her arm and was not able to lift things. Megan helped around the house and started working to help pay the bills.

Megan testified that she never saw Melvin, Jennifer, or anyone else use drugs in their home. She said that the master bedroom was locked when Melvin or Jennifer were in it and that

the children knew not to go in by themselves. She testified that some of the guns found in the home were being restored by Melvin for his friends. She also explained that the fuse cord was used to make fireworks longer and safer for the children to light during the summer and that the black powder was used to reload the shotgun shells. Megan testified that Dylan and Tyler have BB guns, which could explain the “CO2 cartridges”; however, officers did not seize or observe any BB guns during the search.

Megan also testified that Dylan and Tyler were sharing a room, and the bed was usually made. She asserted the pictures taken by the officers were done after they were there and did not accurately depict what the rooms looked like. Prior to leaving the house on the morning of the search, Megan did not smell odor from the litter box and did not observe any dog feces in the house. When she returned, she believed that the officers tracked the dog feces into the house. Megan testified that the family dog is 10 years old and has medical problems, so it sometimes will go to the bathroom on their porch.

On May 9, 2012, the juvenile court entered an order dismissing the case because the State failed to prove by a preponderance of the evidence the allegations in the petitions. It noted the conflicting testimony or alternative explanations about the dog feces, the testimony of the smell upstairs, the unkempt bedrooms, the guns, and the bombmaking materials. The court compared this case to *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012). The court noted that in both cases, the parents engaged in or tolerated activities in the home that are illegal or are of concern to the State; however, there was no evidence that any of the aforementioned situations, circumstances, or activities caused any harm to the children. The State appeals.

#### ASSIGNMENTS OF ERROR

The State asserts, consolidated and restated, that the juvenile court erred when it found that the State did not meet its burden of proving by clear and convincing evidence that the children come within the meaning of § 43-247(3)(a).

#### STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court’s findings. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

#### ANALYSIS

The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile’s best interests. *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247, the State must prove the allegations of the petition by a preponderance of the evidence, and 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 Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010).

Ultimately, the purpose of the adjudication phase is to protect the interests of the child and ensure the child’s safety. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). 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 future harm. See, e.g., *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008). Although the children in this case suffered no harm, we recognize that if evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused. See *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

In *In re Interest of Anaya*, *supra*, the Nebraska Supreme Court found that the parents' failure to submit their newborn infant to mandatory blood testing required by Neb. Rev. Stat. § 71-519 (Reissue 2009) did not, standing alone, establish neglect to warrant adjudication under § 43-247(3)(a). The court noted that the evidence at the adjudication hearing established that during a Department of Health and Human Services home visit, it was observed that the child's needs were being met and that he was a healthy 6-week-old baby. Further, the court noted there was insufficient evidence to prove that without immediate testing, the child, who was well past the first 24- to 48-hour emergency time period set forth in the newborn screening statutes, was at immediate risk of harm warranting jurisdiction under § 43-247(3)(a).

In *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012), the State's petition alleged that the mother left her child unsupervised outside at a time when he was not quite 2 years old and that the mother tested positive for various drugs. In affirming the county court's dismissal of the first allegation of the petition, this court noted that the evidence did not establish that the child had been unattended for anything more than a few minutes and that there could be no inference that he was in imminent danger or at a definite risk of harm. With regard to the allegation of testing positive for drugs, the evidence showed that the Department of Health and Human Services obtained a urine sample from the mother but the results were apparently not offered in evidence. The mother reported being prescribed hydrocodone, Xanax, and clonazepam, and she also reported taking a morphine pill from a friend the previous day to alleviate back pain. Because there was no evidence that ingestion of these medications caused the mother to become incapacitated, we concluded that while taking an unprescribed medication (morphine pill) may be illegal, this activity--without more--is not sufficient to adjudicate a child. We found that there was no evidentiary nexus between the consumption of drugs, mostly pursuant to prescription, and any definite risk of future harm to the child. We therefore reversed the adjudication on this ground. See, also, *In re Interest of Carrdale H. II*, 18 Neb. App. 350, 781 N.W.2d 622 (2010) (no evidence to establish that father's possession of illegal drugs placed child at risk for harm); *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000) (no evidence that parents' consumption of alcohol had impact on children).

In the present case, the record shows more than just illegal activity by one or both of the parents. The evidence shows that there was a history of drug use by Melvin, that the children were present in the home when Melvin conducted drug transactions in front of the home, and that the children were present in the home when Melvin used drugs with his friends in the master bedroom. One of these friends admitted that he would be a bad influence for the children. Melvin was arrested following the execution of the search warrant. While the record indicated that the drug usage and activity did not occur directly in front of the children, the children were present in the home while these activities were occurring. It does not take much imagination to conclude that harm could befall children with this type of activity taking place in and at the home.

Additionally, there was evidence presented that there were multiple guns, both loaded and unloaded; ammunition; and components that could be used to make explosives in an unlocked bedroom. Despite the assertion that the materials found were for innocuous purposes, the sergeant, who was a hazardous device technician, testified that an explosive could be constructed in seconds with the materials that were all found in close proximity. Finally, there was evidence that the inside of the home contained dog feces, a very strong odor of cat feces and urine, and disarray in the children's bedrooms. Based on our de novo review of the totality of the evidence, we conclude that the State proved by the preponderance of the evidence the allegations of neglect in the petitions.

In reaching this conclusion, we note that the county court based its decision in part upon its conclusion that the children had not been harmed. However, the question is not whether actual harm has occurred, but, rather, whether there is a definite risk of harm to the children. The evidence was sufficient in this case to show a definite risk of harm such that we should not wait for disaster to befall these children. Accordingly, we reverse the order of the county court dismissing the petitions and remand the cause for further proceedings.

#### CONCLUSION

After reviewing the record de novo, we find that the State proved by a preponderance of the evidence that Tyler, Megan, and Dylan are children as defined by § 43-247(3)(a). We reverse the decision of the county court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS.