

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re _____ ,)	
A Person Coming Under the)	Court of Appeal No.
Juvenile Court Law.)	
)	_____
)	Superior Court No.
SAN DIEGO COUNTY HEALTH &)	_____
HUMAN SERVICES AGENCY,)	
Petitioner and Respondent,)	
)	
v.)	
)	
_____ ,)	
Defendant and Appellant.)	
_____)	

Appeal from the Superior Court of San Diego County
Honorable _____

**TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE STATE OF CALIFORNIA:**

Petitioner, _____, petitions for review following the denial of his motions to correct and augment the record for reporter’s transcripts of two proceedings in a hearing under Welfare and Institutions Code section 366.26.¹

¹A petition for review from an interlocutory order is authorized under California Rules of Court, rule 8.500(a)(1). (E.g., *People v. Gaston* (1978) 20 Cal.3d 476.)

ISSUE PRESENTED

May an appellate court as a matter of general policy deny, to an appellant in a dependency appeal (Welf. & Inst. Code, § 300 et seq.), a reporter's transcript of proceedings in which continuances of a hearing were granted, even though matters potentially relevant to the appeal may be and sometimes are handled at such proceedings and even though, as in this case, such matters are affirmatively shown in the clerk's minutes?

NECESSITY FOR REVIEW

Review is necessary in this case both to settle an important question of law involving the record to which an appellant is entitled and to secure uniformity of decision and practice among the Courts of Appeal. (Cal. Rules of Court, rule 8.500(b)(1).²)

A San Diego County juvenile court clerk has informed this attorney that, in dependency appeals (Welf. & Inst. Code, § 300 et seq.) to the Fourth Appellate District, Division One, the Court of Appeal has directed the clerks to order a reporter's transcript only of the final day(s) of the hearing appealed from and not to prepare transcripts from days where the hearing was continued, even if (as here) other matters than a continuance were discussed at the hearing. This information is corroborated by counsel's observations and those of other practitioners in that court, including staff attorneys of Appellate Defenders, Inc., the appellate project administering the system of appointed counsel in the Fourth District. The record on appeal in such proceedings consistently omits these hearings. The Court of Appeal also consistently denies requests to correct or augment the record to include these matters under rule 8.416(d).

²All further rule references are to the California Rules of Court.

The pattern was evidenced in the present case, an appeal from an judgment terminating petitioner's parental rights (Welf. & Inst. Code, § 366.26), where the reporter's transcript omitted continuance hearings shown in the minute orders, and the Court of Appeal denied petitioner's successive motions to correct and augment the record, even though topics related to contested issues that potentially may be raised on the appeal (petitioner's paternity and the effectiveness of the assistance rendered by his counsel) are noted in the minutes for those hearings.

The court's practice deprives appellants in general and in this case of a basic prerequisite for a meaningful and fair appeal – the opportunity for their appellate counsel to examine all relevant parts for the record for potential issues and to support their arguments with citations to the record. It is contrary to the policy behind rule 8.404 of providing normal records that contain such matters, so that appellate counsel may efficiently and effectively identify appellate issues, without the need to investigate what might or might not have happened. The Court of Appeal's further refusal to augment the record on a specific showing of relevance aggravates the effects of the practice and contravenes the state's policies on liberal augmentation of the record. The court's practices also are in direct conflict with the practices in other Courts of Appeal.

STATEMENT OF FACTS AND CASE

This petition arises in the context of an appeal from the termination of petitioner's parental rights under Welfare and Institutions Code section 366.26. After the jurisdictional/dispositional proceedings, during which petitioner's paternity was consistently in issue, the court denied reunification services and referred the case for a permanency plan hearing. (CT __) Petitioner's paternity continued to be at issue in the section 366.26 hearing that culminated in the termination of his parental rights. (RT __.) Also at issue were his failure to submit to paternity tests and his claim that his counsel had failed to keep him apprised of what was going on. (RT __.)

The minute orders in the clerk's transcript disclose that, after the referral order and before the final termination order, several hearings related to the section 366.26 proceedings were held, a reporter's transcript of which was missing from the record on appeal:

The first omitted hearing was on [date A]. At this hearing, as to petitioner, the court relieved former counsel and appointed new counsel and also continued the section 366.26 hearing to [date B]. (CT __.) In addition, the mother filed a petition for modification pursuant to section 388 and requested a contested section 366.26 hearing. (CT __.)

A second missing transcript was for a [date B], hearing. At this session of the section 366.26 proceedings, the juvenile court granted the county's motion to continue the sections 388 and 366.26 hearings, granted petitioner's request that he be tested for paternity while in jail (CT __), and issued an order to produce petitioner for the continued hearing (CT __).

There were two other omitted transcripts, which are not at issue here, except as evidence that San Diego County juvenile court clerks are under direction not to order transcripts for sessions of dependency proceedings at which a continuance was ordered. One was a hearing on [date C], at which time the juvenile court found the mother's petition for modification established a prima facie showing and set it for the same date as the already scheduled section 366.26 hearing; the Court of Appeal granted petitioner's request to correct that omission. (CT __; Exhibit A, attached.) A fourth missing record was a hearing on [date D], that did not involve petitioner: the juvenile court granted the mother's request to continue the section 388 hearing and reconfirmed the contested 366.26 hearing for [date B]. (CT __.)

By means of letter to the superior court, served on the Court of Appeal, as required by rules 8.416(d) and 8.155(c) of the California Rules of Court, petitioner notified the superior court to correct the four omitted

transcripts from the normal reporter's transcript, which is prescribed by rule 8.404(b). On its own motion the Court of Appeal granted "ONLY" (the court's capitalization) the transcript for [date C]. (Exhibit A.)

Petitioner then filed a motion to augment the record. In it he argued:

(1) The missing sessions on [date A] and [date B], were formal parts of the section 366.26 process that "resulted in the order or judgment being appealed" and thus were *required* by rule 8.404(b) as part of the normal reporter's transcript. (2) Other matters than a continuance relating to petitioner were handled at those times, including substitution of counsel for him and paternity testing, which were contested issues at the permanency planning hearing and likely to be relevant to the appeal. The Court of Appeal denied the motion in full. (Exhibit B.)

Copies of the relevant minute orders are attached as Exhibit C.

This petition seeks review of the court's orders denying the transcripts for [date A] and [date B]. In doing so it also challenges the policy of excluding continuance hearings from the normal reporter's transcript in dependency appeals and denying subsequent motions for correction and/or augmentation of the record.

ARGUMENT

THE COURT'S POLICY OF REFUSING TO INCLUDE CONTINUANCE HEARINGS IN REPORTER'S TRANSCRIPTS AND DENYING MOTIONS TO CORRECT AND/OR AUGMENT THE RECORD FOR THESE MATTERS DEPRIVE PETITIONER AND OTHER APPELLANTS OF THE RECORD NECESSARY FOR IDENTIFYING AND ARGUING ISSUES ON APPEAL

According to a San Diego County juvenile court clerk, the Court of Appeal, Division One of the Fourth Appellate District, has directed the clerks not to include a transcript of oral proceedings in which a continuance of a Welfare and Institutions Code section 300 et seq. hearing has been granted. These statements are consistent with counsel's experience, as well as that of other appellate practitioners handling dependency cases in that court. These transcripts are routinely missing from the record on appeal, and motions to correct or augment the record are routinely denied by the Court of Appeal. In the collective experience of these attorneys, they are familiar with no other appellate court that follows such a practice, and communication with appellate project attorneys throughout the state confirms this experience.

As applied in this case, that practice has deprived petitioner of reporter's transcripts of two hearings between the referral and termination

orders, at which issues related to petitioner's paternity and his counsel's effectiveness were handled. These were the principal issues petitioner raised throughout the dependency proceedings and at the final section 366.26 hearing and are relevant to potential issues on appeal.

The court's practice and its application in this case undermine the right to appeal and will prevent petitioner's counsel from fulfilling [his or her] duties properly. Without an adequate record, counsel cannot be assured that [he or she] has identified all arguable issues cognizable on the appeal, has ascertained all of the relevant facts, or will be able to support [his or her] arguments with appropriate citations to the record. The practice contravenes California's policy of providing a normal record that will enable counsel to perform their responsibilities. It violates the principles and rules governing augmentation of the record. It is also inconsistent with the practices of other appellate courts.

A. The Court's Policies and Its Orders in This Case Interfere with the Right to a Meaningful Appeal

An adequate record of the trial court proceedings is undoubtedly the single most critical prerequisite to an appeal. Without it, neither the court nor the parties can ascertain what occurred and what errors if any were committed.

The governing principle of appellate review is that “[a] judgment or order of a lower court is presumed to be correct on appeal” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133), and “error must be affirmatively shown” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564). Because the burden is on the appellant to overcome the presumption of correctness, the appellant must procure an adequate appellate record to demonstrate error, and failure to do so will result in affirmance of the order appealed from. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

For this reason, indigents have a constitutional, due process right to a free transcript provided at public expense in many kinds of appeals. (E.g., *M.L.B. v. S.L.J.* (1996) 519 U.S. 102 [termination of parental rights appeal]; *Mayer v. Chicago* (1971) 404 U.S. 189, 195-196 [misdemeanor]; *Griffin v. Illinois* (1956) 351 U.S. 12 [felony]; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835 [conservatorship]; U.S. Const., 14th Amend., Cal. Const., art. I, § 7(a).)

The right to an adequate record is implemented in California by statutory provisions and the Rules of Court. In juvenile dependency appeals, Welfare and Institutions Code section 395, subdivision (a)(3), provides for free transcripts for indigents. Rule 8.404 prescribes a normal

record, and rules 8.408 and 8.416(d) offer ways of correcting and augmenting those transcripts.

Failure to raise a critical assignment of error on appeal can amount to ineffective assistance of appellate counsel. (*People v. Lang* (1974) 11 Cal.3d 134; *People v. Stephenson* (1974) 10 Cal.3d 652, 661; *People v. Rhoden* (1972) 6 Cal.3d 519, 529; *In re Smith* (1970) 3 Cal.3d 192, 198.) Accordingly, appellate counsel has the responsibility to ensure a complete record, in order to permit identification of all arguable issues and provide the necessary factual foundation for the issues raised. (*People v. Barton* (1978) 21 Cal.3d 513, 518-520; *People v. Silva* (1978) 20 Cal.3d 489; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Harris* (1993) 19 Cal.App.4th 709, 714; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393-394.)

In *People v. Barton, supra*, 21 Cal.3d 513, 519-520, this court found the defendant had been denied effective assistance when appellate counsel attempted to argue error in denying a Penal Code section 1538.5 suppression motion without first obtaining a transcript of one full date of the hearing on that motion. It stated that “counsel has a duty to insure that there is an adequate record before the appellate court from which those contentions may be resolved on their merits.” If counsel has a duty to

obtain the record, it follows that the court may not refuse to provide it as a matter of policy.

In this case appellate counsel has made substantial efforts to obtain the reporter's transcripts from the [date A] and [date B] proceedings and has shown those transcripts may be useful to petitioner on appeal because they pertain to matters contested in the trial court and potentially relevant to issues on appeal. The Court of Appeal has thwarted those efforts. This is not an isolated occurrence but is the result of a general policy of refusing to provide a reporter's transcript of proceedings at which a continuance was granted. Such records are needed, in this case and other appeals, to ensure arguable issues are identified and can properly be supported by citations to the record. Without them, the right to a meaningful appeal is threatened.

B. Routine Refusal To Include Transcripts of All Hearings in Termination of Parental Rights Proceedings Violates the State Policy of Providing Transcripts Likely To Be Needed on Appeal in a Normal Record

For several broad categories of appeals, the California Rules of Court adopt the policy of requiring automatic preparation of a "normal" record covering most of the relevant proceedings. (E.g., rules 8.320, 8.404, 8.450(g).) The contents of a normal record are the matters that appellate counsel not previously familiar with the case would most likely need in order to identify the arguable issues cognizable on appeal. The rationale is

that if the original record did not include such matters, counsel would have the duty to move to augment it.

A complete transcript is especially important when appellate counsel did not participate in the trial court proceedings, because counsel is unable to designate relevant matters for a record without knowing what happened.

As this court in *People v. Gaston*, *supra*, 20 Cal.3d 476, 483, observed:

“. . . Frequently, issues simply cannot even be seen – let alone assessed – without reading an accurate transcript [A] conscientious counsel freshly entering the case at the appellate stage normally is likely to conclude that a full or partial transcript of the trial proceedings will be indispensable if the requisite ‘dependable record’ is to be obtained as a basis for evaluating the case.” (Boskey, *The Right to Counsel in Appellate Proceedings* (1961) 45 Minn.L.Rev. 783, 793.)

It is extremely rare in California for trial counsel in a court-appointed case to handle the appeal. (See Cal. Rules of Court, rule 8.300 [provisions for appointment of counsel on appeal]; *People v. Bailey* (1992) 9 Cal.App.4th 1252, 1254-1255 [disapproving appointment of trial counsel on appeal].)

The requirement of a normal record obviates the need for counsel, courts, court clerks, and reporters to make ad hoc judgment calls on a case-by-case basis as to what should or should not be included. It also precludes them from adopting an *a priori* policy that matters prescribed by the Rules of Court for the normal record should not be included.

Rule 8.404(b) provides in pertinent part that for a juvenile case: “The reporter’s transcript must contain: (1) . . . [T]he oral proceedings at any hearing that resulted in the order or judgment being appealed.” It provides for no exceptions for sessions at which a continuance was granted. Those sessions are a formal and integral part of the entire section 366.26 hearing, not a separate type of hearing. While a simple uncontested continuance does not usually give rise to appellate issues, neither appellate counsel nor the appellate court can ascertain whether the proceedings were of such a type without a reporter’s transcript. The fact a clerk’s minute order describes the proceedings as a “continuance” is not conclusive of what actually went on, since the content of a minute order necessarily depends on the clerk’s selective judgment about what to include. Continuances are sometimes contested, and other matters than a continuance can and frequently do take place at that session.

The minute orders in this case, for example, show that on [date A] and [date B], the court dealt with appointment of new counsel for petitioner and issues of his paternity, both which topics were litigated in the final section 366.26 hearing and are potential issues on appeal. Appellate counsel cannot effectively evaluate or argue such issues, or determine what other issues might be presented by those proceedings, without the

opportunity to examine the applicable records. For the appellate court or superior court clerk or reporter to decide, before even seeing it, that the record is irrelevant or insignificant is to resolve the very question *counsel* is called on to evaluate. That incongruity is what the rules on normal records, and rule 8.404(b) in particular, recognize and seek to address.

Another purpose of a normal record is to prevent the cost and delay of inevitable augmentation. In counsel's experience in multiple districts around California, other Courts of Appeal interpret rule 8.404 to require, in a termination of parental rights appeal, a transcript of the oral proceedings from the date of the referral order through the section 366.26 hearing and ultimate order for a permanent plan. The policy of Division One of the Fourth Appellate District as to continuance transcripts is all the more puzzling because, among the appellate courts in California, it is the leader in its commitment to handling dependency appeals on an efficient, expedited basis. It does so out of an understanding that undue delay can be detrimental to a child.

The court's transcript policy, ironically, *causes* delays and *increases* costs, because it forces counsel repeatedly to spend resources and divert time from briefing in order to obtain an adequate record. The court then must review the motion and rule on it. The policy can even, as is happening

in this case, require counsel to resort to review in this court – a process that adds considerably to the time and expense of an appeal. A transcript of a simple continuance would take very little time to prepare. If it is more than a simple continuance, the record should, *a fortiori*, include it. Forcing counsel to go through multiple hoops (often unsuccessfully) to get something already ordained by the rules on the normal record does a disservice to the appellate system and especially to the appellants and children affected by the delay and lack of an adequate record.

C. The Court of Appeal Abused Its Discretion in Denying Petitioner’s Motion To Augment the Record with the Requested Transcripts

Even if rule 8.404 on the normal record is interpreted not to include earlier sessions of a section 366.26 hearing leading up to the judgment, the rules provide a means for augmenting the record with a “transcript . . . of oral proceedings” not included in the original record. (Cal. Rules of Court, rule 8.155(a)(1)(B), made applicable to fast-track dependency proceedings by rule 8.416(d)(1).) The policy of this state is to permit liberal augmentation of the record when a possible need for additional record is shown. (*People v. Gaston, supra*, 20 Cal.3d 476, 482-483.)

In *People v. Gaston, supra*, 20 Cal.3d 476 this court held that in order to obtain augmentation of the appellate record “the litigant need only

explain with ‘some certainty’ *how* the materials he requests may be useful to him on appeal” – i.e., “the *manner* in which the materials may be useful” – not the contents of the materials themselves. (*Id.* at p. 482, italics original; see also *People v. Silva, supra*, 20 Cal.3d 489, 492-493; *People v. Hill* (1967) 67 Cal.2d 105, 124; see *People v. Barton, supra*, 21 Cal.3d 513, 521.) This burden was satisfied in *Gaston* when the appellant pointed out that the material sought – the closing arguments of counsel³ – could help him argue prejudice as to certain errors and to determine whether other errors occurred during argument. (*Gaston*, at p. 484.) In *Silva*, this court held that the appellant has adequately justified augmentation of the record with oral jury instructions by arguing trial courts may make mistakes in rendering the instructions.⁴ Similarly, closing arguments should be transcribed because it would enable counsel to evaluate whether prosecutorial misconduct took place or trial counsel rendered effective assistance. (*Silva*, at p. 493.) In neither case did the appellant have to prove the record *would* in fact be useful, but only how it *might* be.

³Such arguments have since been made part of the normal record. (Rules 8.320(c)(9)(B), 8.404(b)(1).)

⁴Oral instructions are now part of the normal record in criminal appeals. (Rule 8.320(c)(4).)

Petitioner's motion to augment the record on appeal sought the reporter's transcripts from [date A] and [date B]. It stated the transcript for [date A] was needed because petitioner's attorney was relieved at that hearing and a new attorney was appointed; the effectiveness of counsel and counsel's role in petitioner's failure and/or inability to submit to paternity testing had been a contested issue in the proceedings and at the final section 366.26 hearing on [date E]. The record for [date B] was necessary because paternity testing was discussed and ordered at that time. Again, paternity was at issue throughout the proceedings.

The fact the requested records contained matters on contested issues in the proceedings below and could assist petitioner in evaluating and arguing specific potential issues on appeal is a sufficient showing as to how they "may be useful to him on appeal." (*People v. Gaston, supra*, 20 Cal.3d at p. 482; *People v. Silva, supra*, 20 Cal.3d at p. 492; *People v. Hill, supra*, 67 Cal.2d at p. 124.) He did not have to prove that they *would* be useful, nor could he do so without first seeing the records. The Court of Appeal, Fourth District, Division One, therefore erred when it denied petitioner's motion to augment the record.

CONCLUSION

The practice of the Court of Appeal, Fourth Appellate District, Division One, of denying a reporter’s transcript of proceedings in which a continuance of a Welfare and Institutions Code section 300 et seq. hearing is granted is at odds with the right to an adequate record for appeal, the policy of providing a normal record of matters most likely to be needed on appeal, the legal principles governing augmentation of the record, and the practice of other courts in the state. Review is necessary to determine important issues of law – the contents of the normal record in dependency appeals under rule 8.404 of the California Rules of Court and the right of an appellant to augmentation for a transcript upon showing its relevance to contested issues. It is also to secure uniformity of decision among the courts.

Petitioner asks that review be granted to resolve these matters and to direct the Court of Appeal to order augmentation with reporter’s transcripts of the hearings on [date A] and [date B].

Dated:

Respectfully submitted,

EXHIBIT “A”

**Order of Court of Appeal
For Correction of Record “ONLY” as to Proceedings
On [Date C]___**

EXHIBIT “B”

**Order of Court of Appeal
Denying Petitioner’s Motion for Augmentation**

Exhibit “C”

Minute Orders of Proceedings Omitted from Original Record:

[date A]

[date B]

[date C]

[date D]