IN RE DAVID P.*
(AC 36933)

Lavine, Beach and Pellegrino, Js.

*Argued November 12—officially released December 17, 2014***

(Appeal from Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Elgo, J.)

Michael D. Day, for the appellant (respondent mother).

Tammy Nguyen-O'Dowd, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Gregory T. D'Auria*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent mother[1] appeals from the judgment of the trial court terminating her parental rights as to her minor child, D. The respondent claims that the trial court erred in failing to make an explicit factual finding regarding the restorability of her competency and thus violated her due process rights. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. D was born in 2012 and was one and one-half years old at the time of trial. Shortly after D's birth, the Department of Children and Families (department) received a referral from Yale New Haven Hospital concerning him on September 10, 2012. Upon discharge from the hospital, D was released to his presumed father until the department received DNA test results that determined that he was not the biological parent. On the November 16, 2012, the petitioner, the Commissioner of Children and Families, filed a neglect petition and a motion for an order of temporary custody.[2] That same day, the motion for temporary custody was granted by the court. On January 22, 2013, the court, *Wolven*, *J.*, adjudicated D neglected and committed him to the care and custody of the petitioner.

The petitioner filed a petition to terminate the respondent's parental rights with respect to D on September 23, 2013. At trial, the respondent was represented by counsel and a guardian ad litem represented her best interest. The court, *Elgo*, *J.*, found that the respondent had failed to achieve a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i), and that she had no ongoing parent-child relationship with D, pursuant to § 17a-112 (j) (3) (D). The court further found that the termination of the respondent's parental rights was in D's best interest. Accordingly, on June 4, 2014, the court terminated the respondent's parental rights with respect to D.

In her memorandum of decision, Judge Elgo made the following relevant findings of fact. The respondent has struggled with mental health issues prior to and following D's birth. Prior to D's birth, the respondent presented with psychotic behavior at Yale New Haven Hospital's emergency room and was later committed to the Connecticut Mental Health Center (center). The center discharged the respondent in December, 2012, from its inpatient care and recommended weekly individual therapy at its facility. After the petitioner took custody of D, Judge Wolven issued specific steps for the respondent to complete, including attending parenting classes and individual counseling, and taking daily medication for her schizoaffective disorder. Historically, the respondent failed to take her medication daily, which led to decompensation and hospitalization. As a result, Judge Wolven ordered the respondent to continue treat-

ment with the center and the Continuum of Care program. The respondent failed to comply with the rules and requirements of the program and with the necessary medical intervention. On May 9, 2013, the Probate Court for the district of New Haven appointed a conservator of her person and estate due to her "chronic paranoid schizophrenia . . . and . . . history of refusing medical intervention." The respondent was again psychiatrically hospitalized from March, 2013 through May, 2013.

On September 19, 2013, upon motion by the petitioner pursuant to General Statutes § 46b-129 (i) and Practice Book § 32a-9, the court, *Brown J.*, ordered a competency evaluation of the respondent. On November 19, 2013, both parties appeared before the court, *Cronan, J.*, for a competency hearing. At the hearing, Judge Cronan received a competency evaluation of the respondent. Remy Sirken, a psychiatrist from Yale School of Medicine, conducted the competency evaluation and was the sole witness to testify regarding her findings. Sirken concluded in her report that the respondent "is not capable of understanding the nature of the proceedings pending at the Superior Court for Juvenile Matters, and that she is not capable of adequately assisting her attorney in her case. [Additionally, the respondent's] competency in these areas cannot be restored, and she would benefit from the appointment of a Guardian Ad Litem."

"The test for competency is whether the respondent has sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding—and whether [she] has a rational as well as factual understanding of the proceedings . . . ." (Internal quotation marks omitted.) *In re Kaleb H.*, 306 Conn. 22, 32, 48 A.3d 631 (2012). Sirken reaffirmed her findings at the November 19, 2013 hearing. The respondent's counsel did not submit any evidence regarding her competency. In closing argument, counsel for the petitioner iterated that based on the evidence, the court should adjudicate the respondent both incompetent and not restorable, and appoint a guardian ad litem to represent her best interest. Pursuant to Practice Book § 32a-9, Judge Cronan concluded that "[s]hort of any other expert . . . that would contradict the findings, I would be prepared to adopt the findings of Dr. Sirken that [the respondent] is not able to fully understand the proceedings and cannot sufficiently assist in her own defense, that I will accept the recommendation of the [petitioner] and appoint a guardian ad litem for her in finding that she is not competent." The court appointed a guardian ad litem to act on the respondent's behalf at the termination of parental rights trial. Following trial, Judge Elgo terminated the respondent's parental rights with respect to D. This appeal followed.

The respondent claims that Judge Cronan violated Practice Book § 32a-9 (b) by failing to find explicitly

whether her competency was restorable within a reasonable period of time. Specifically, she argues that the alleged failure violated her due process rights. We disagree.

The respondent acknowledges that this claim is unpreserved, and therefore requests review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[3] Under *Golding*, "a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail." (Emphasis in original; footnote omitted). Id., 239–40. The first two prongs of *Golding* are satisfied by the respondent,[4] but the claim fails on the third prong; the respondent has not shown that the alleged constitutional violation clearly exists and clearly deprived her of a fair trial.

Practice Book § 32a-9 provides in relevant part: "(b) At a competency hearing held under subsection (a), the judicial authority shall determine whether the parent is incompetent and if so, whether competency may be restored within a reasonable time, considering the age and needs of the child or youth, including the possible adverse impact of delay in the proceedings. If competency may be restored within a reasonable time, the judicial authority shall stay proceedings and shall issue specific steps the parent shall take to have competency restored. If competency *may not be restored* within a reasonable time, the judicial authority may make reasonable accommodations to assist the parent and his or her attorney in the defense of the case, including the *appointment of a guardian ad litem* if one has not already been provided." (Emphasis added.)

The respondent argues that the plain meaning of Practice Book § 32a-9 (b) requires the judicial authority to make an explicit factual finding on the record regarding whether the respondent may be restored to competency. Practice Book § 32a-9 (b) does provide that the court must make such a determination.[5] Here, the trial court's finding was implicit for the following reasons: the sole witness at the competency hearing, Sirken, concluded that the respondent had a long history of mental health issues, including a diagnosis of chronic paranoid schizophrenia; Sirken found that the respondent was incompetent and *not restorable*; and the petitioner argued in his closing statement that the court should align its ruling with Sirken's findings and appoint a guardian ad litem. Judge Cronan stated that short of

any expert to contradict Sirken's findings, he would adopt those findings, which included the conclusion that the respondent's competency was not restorable. Moreover Judge Cronan appointed a guardian ad litem pursuant to Practice Book § 32a-9 (b), which permits such an appointment only after the court determines that the respondent is *not restorable*.[6] Notably, under subsection (b), if the court determines that competency *may be restored* within a reasonable time, considering the age and needs of the child, the court shall stay the proceedings and issue specific steps for the respondent. Practice Book § 32a-9 (b). Here, Judge Cronan did not stay the proceedings or issue specific steps.

In this case, the conclusion that the respondent's competency could not have been restored is further supported by the respondent's own concession at oral argument before this court. Concessions made during oral argument may be properly considered by the appellate courts in rendering their decision. *Hirsch* v. *Braceland*, 144 Conn. 464, 469, 133 A.2d 898 (1957). During argument before this court, counsel for the respondent conceded that the significant amount of evidence presented leads to the sound conclusion that at the time of the Judge Cronan's ruling, the respondent could not have been restored to competence within a reasonable time. It is important to note that the respondent is not challenging the evidence before the trial court, but only the lack of an explicit finding on the record regarding her restorability. At oral argument before this court, the respondent's counsel agreed that any finding that the respondent could be restored to competency would be clearly erroneous. Judge Cronan's implicit finding, therefore, did not violate Practice Book § 32a-9 (b).

We conclude that the respondent is unable to demonstrate that a constitutional violation clearly exists and clearly deprived her of a fair trial, and, therefore, her claim fails. See *State* v. *Golding*, supra, 213 Conn. 240. Accordingly, we cannot conclude that Judge Elgo erred in terminating the respondent's parental rights with respect to D.

The judgment is affirmed.

In this opinion the other judges concurred.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** December 17, 2014, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court terminated the parental rights of the child's father in the same proceeding, but he is not a party to this appeal. We therefore refer to the mother as the respondent in this opinion.

[2] The respondent had a history with the department prior to this date. As a teenager, the respondent herself was committed to the department. In 2008, the department again became involved when the respondent gave birth to her first child.

[3] The respondent also seeks relief under the plain error doctrine, pursuant to Practice Book § 60-5, based on her assertion that the issue on appeal is

a structural error. We are not persuaded that this claim warrants plain error reversal. "To prevail under the plain error doctrine, the [respondent] must demonstrate that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . . This doctrine is not implicated and review of the claimed error is not undertaken unless the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Silva*, 65 Conn. App. 234, 243–44, 783 A.2d 7, cert. denied, 258 Conn. 929, 783 A.2d 1031 (2001). As our disposition of the respondent's claim under *Golding* makes clear, we do not find that the alleged impropriety implicates such concerns.

[4] "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [respondent] may prevail." (Internal quotation marks omitted.) *State* v. *Lavigne*, 307 Conn. 592, 599, 57 A.3d 332 (2012). The second prong of *Golding* is satisfied in accordance with the well settled notion that "[t]he right of a parent to raise his or her children has been recognized as a basic constitutional right." *In re Alexander V.*, 223 Conn. 557, 560, 613 A.2d 780 (1992); see also *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). In *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), the United States Supreme Court held, accordingly, that the due process clause of the fourteenth amendment applies when a state seeks to terminate the parent-child relationship.

[5] Although Practice Book § 32a-9 (b) does not require an express finding, it is advisable that the trial court do so.

[6] At oral argument before this court, the respondent's counsel conceded that under Practice Book § 32a-9 (b) the trial court may appoint a guardian ad litem if, and only if, it determines that her competency cannot be restored.