

# Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed May 27, 2009.

Not final until disposition of timely filed motion for rehearing.

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No. 3D08-2443

Lower Tribunal No. 97-15778

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**V. D.-T.,**  
Appellant,

vs.

**Department of Children and Families,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mindy S. Glazer, Judge.

Steven Grossbard, for appellant.

Karla Perkins, for appellee Department of Children and Families.

Hillary S. Kambour, for Guardian ad Litem Program.

Before COPE and SHEPHERD, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

The judgment terminating the appellant father's parental rights was supported by substantial competent evidence as to each of the three statutory

grounds assigned and is therefore affirmed. §§ 39.806(1)(c), 39.806(1)(d)(2), 39.806(1)(e)(2), Fla. Stat. (2008).

COPE, J. (concurring).

Although it makes no difference in this case, the trial court should not have relied on paragraph 39.806(1)(d)2., Florida Statutes (2007), as a ground for termination of parental rights. That statute allows termination “[w]hen the parent of a child is incarcerated **in a state** or federal **correctional institution** and . . . [t]he incarcerated parent has been determined by the court to be . . . a habitual violent felony offender as defined in s. 775.084 . . . .” According to the parties, the appellant father entered into a plea agreement pursuant to which he was sentenced as a habitual violent felony offender to 364 days in county jail. The problem here is that a county jail is not a state or federal correctional institution. That being so, the trial court should not have terminated his parental rights under paragraph 39.806(1)(d)2.

The trial court cannot be faulted for this because it appears that this issue was not raised in the trial court. Further, the father has not raised the point in this court, and has not made a claim that the error is fundamental. That being so, we can leave for another day the question whether this type of error is a fundamental error which can be raised for the first time on appeal.

This issue makes no difference to the outcome of this case, because, as stated in the majority opinion, competent substantial evidence supports the other grounds for termination of parental rights.