COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0901 **Cir. Ct. No. 03TP000009**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JOSHUA S., A PERSON UNDER THE AGE OF 18:

SHEBOYGAN COUNTY DEPARTMENT OF SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

MATTHEW S.,

RESPONDENT-CO-APPELLANT,

RACHEL B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for SHEBOYGAN County: THOMAS S. WILLIAMS, Judge. *Affirmed.*

¶1 BROWN, J.[1] The circuit court terminated the parental rights of Matthew S. and Rachel B. to Joshua S. after a jury found that neither parent would be able to meet the conditions of return within a twelve-month period. Both Matthew and Rachel appeal. Matthew claims that the trial court should have allowed him to demonstrate his counsel's ineffectiveness by questioning counsel about why he never objected that one of the conditions violated Matthew's ***Miranda***[2] rights. This condition required Matthew to accept responsibility for abusing another child while Matthew's appeal from his conviction for that offense was still pending. He also claims his counsel was ineffective for not seeking placement of Joshua with Matthew's parents as an alternative to termination. Finally, he claims the jury did not hear enough evidence to find that the Sheboygan County Department of Social Services made reasonable efforts to help him comply with his conditions. Rachel's claim is that the court improperly continued her fact-finding hearing past a forty-five day statutory deadline and that the error dooms the termination proceeding. We reject all issues. Both the ***Miranda*** and the forty-five day arguments are waived, the theoretical placement with Matthew's parents would not have eliminated the trial court's concern that nonadoptive placements could not offer Joshua the stability of a permanent home, and the evidence supported the conclusion that the Department provided the best services it could under the circumstances. We affirm.

¶2 Joshua was born on October 10, 2001, to Rachel. On November 30, the circuit court found Joshua to be a child in need of protection or services,

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] ***Miranda v. Arizona,*** 384 U.S. 436 (1966).

pursuant to WIS. STAT. § 48.13(3m) and (10) and ordered him placed in a foster home. The CHIPS order imposed numerous conditions on Rachel and her husband, Ronald B., for Joshua's return, presuming Ronald to be Joshua's father. However, on January 8, 2002, it adjudicated Matthew the father. On September 5, 2002, an order of the circuit court granted the Department's petition to amend the CHIPS order to reflect the change in paternity.

¶3 On January 8, 2002, the same day the court adjudicated Matthew's paternity, he began to serve a ten-year jail sentence. This sentence arose out of a conviction, currently the subject of a pending appeal, for the abuse of Joshua's half-brother, Christopher B. Therefore, he was already incarcerated when the circuit court amended the CHIPS order.

¶4 The revised CHIPS order imposed upon Matthew the following conditions:[3]

> 2. Matthew S[.] shall sign all Releases of Information to assist the worker in determining what services would be appropriate and to allow the social worker and the Court to monitor the terms and conditions of the Dispositional Order.
>
> 3. Matthew S[.] shall demonstrate that he can fulfill his right as a parent to protect, train, and discipline, provide food, shelter, legal services, education, and ordinary medical and dental care of his son, Joshua S[.]
>
> 4. Matthew S[.] is to have no contact, directly or indirectly with Rachel B[.]

[3] Although this court would not ordinarily include a list of the conditions in a CHIPS order, in this case, many of the conditions are particularly significant to our conclusion that the Department made reasonable efforts to provide services to Matthew.

> 5. Matthew S[.] is to have no contact with children under the age of 18, unless pre-authorized by Joshua's social worker and Matthew S[.]'s social worker.
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> 6. Matthew S[.] shall maintain employment during the pendency of the Court Order in order to demonstrate that he can perform his duties as a parent to Joshua.
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> 7. Matthew S[.] shall inform the social worker whom he has contacted for services.
>
> 8. Matthew S[.] shall inform the worker of any medications prescribed by a physician or psychiatrist….
>
> ….
>
> 10. Matthew S[.] shall accept full responsibility for his behavior and actions for the injuries of Christopher B[.], without blaming or minimizing his behavior.
>
> 11. Matthew S[.] is to cooperate with all programming and medications recommended by the Department of Corrections.… Through anger management, Matthew S[.] must understand the barriers that prevent him from maintaining self-control and making rational decisions. He must develop an appropriate coping mechanism so as to remain sufficiently calm and stable when faced with stressful events.
>
> 12. Matthew S[.] shall follow all rules required of him during incarceration.
>
> 13. Matthew S[.] shall complete a parenting program. The parenting program needs to be preauthorized by the social worker….
>
> 14. Matthew S[.] must be able to refrain from using physical discipline.
>
> 15. The parents shall cooperate with the Sheboygan County Child Support Agency in contributing toward the cost of their children's care….

¶5 On March 7, 2003, Martha Mittelstaedt, the social worker in Joshua's case, petitioned the court to terminate both parents' parental rights, pursuant to WIS. STAT. § 48.415(2), which provides that a ground for termination exists when a child is in continuing need of protection or services. In support of

that ground, the petition alleged that Joshua had been adjudged a child in need of protection and removed from the home by court order, and that the Department had made reasonable efforts to provide court-ordered services. It also explained how both parents had failed to meet the conditions of the CHIPS order and opined that based on Rachel's lack of progress over the preceding year and Matthew's previous violence and long-term incarceration, neither parent would be able to comply with those conditions within a twelve-month period following any fact-finding hearing.

¶6 Both parties denied the grounds for termination at the March 27 plea hearing, and the circuit court set April 29-30 as the dates for the fact-finding hearing. Due to several postponements requested by both parents and by the Department, however, the circuit court delayed Matthew's hearing until September 17 and Rachel's until October 15-17. At each, the jury returned a special verdict in favor of the Department.

¶7 The circuit court held a dispositional hearing and terminated the rights of both parents on October 30. With respect to the termination of Matthew's rights, the trial court observed that most of the conditions the CHIPS order imposed upon Matthew were impossible for him to meet.[4] It accorded great weight in making its decision to Joshua's need for a permanent home and the inability of foster care to meet that need.

> You really get down to the stability and permanency aspect. As we have heard today and most of us knew before, foster home placements aren't permanent. Adoption is a permanent arrangement. Both Ms. B[.] and Matthew S[.] agree that the shift from one foster home to

[4] Rachel B. does not contest the grounds for her termination.

> another creates emotional problems. In my judgment, the stability given by the adoption process is important to Joshua.

¶8 At various points prior to and throughout these termination proceedings, Matthew's parents, Bud S. and Mary S., had expressed an interest in having Joshua placed with them. Although both Matthew and his parents had "a number of times" discussed with Matthew's trial counsel their interest in filing for guardianship, counsel refused to file such a motion, because he believed that doing so would be imprudent and unsuccessful.

¶9 Both parents appealed the circuit court's order, and this court granted Matthew's motion for remand and permission to file a postjudgment motion. At the resulting postjudgment hearing, the trial court heard Matthew's ***Machner***[5] claim that trial counsel was prejudicially ineffective for his failure to seek placement with Matthew's parents and his claim that the evidence was insufficient to show that the Department had made "reasonable efforts" to provide court-ordered services. It rejected both claims.

¶10 During the motion hearing, Matthew also attempted to demonstrate trial counsel's ineffectiveness by establishing his failure to object to Condition 10 in the CHIPS order, which would have required Matthew to incriminate himself during his pending appeal. The trial court excluded this line of questioning as irrelevant. We now reach the issues.

¶11 Matthew first contends that the trial court erred at the postjudgment hearing when it concluded that trial counsel's reasons for his failure to object to

[5] ***State v. Machner,*** 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App.1979).

the self-incriminating condition in the CHIPS order were irrelevant to Matthew's ***Machner*** claim. We determine, based on Matthew's failure to raise the issue in his written motion for a new trial, that the trial court properly exercised its discretion to exclude this evidence.[6] This court reviews an evidentiary ruling under the erroneous exercise of discretion standard. *See* ***State v. Pharr****,* 115 Wis. 2d 334, 340 N.W.2d 498, 501 (1983). We will not overturn such a ruling if the trial judge considered the pertinent facts, applied the proper law, and reached a reasonable conclusion. *See* ***id.*** As to the pertinent facts, the trial court concluded that the written motion did not raise trial counsel's nonobjection to Condition 10 as an independent ground supporting Matthew's ineffective assistance claim. The trial court stated, "There is essentially a listing of some of the conditions, but it's not part of the allegations of ineffectiveness."

¶12 We agree. Although the motion made an editorial comment that the condition "arguably infringed Matthew J.S.'s Fifth Amendment privilege against self-incrimination" and cited case support for that proposition, it only made mention of Condition 10 in a brief factual discussion including some of the conditions in the CHIPS order. The motion made no link between ineffectiveness and any of the conditions it listed. Matthew's written motion for a new trial specifically raised only one argument related to trial counsel's ineffectiveness: his failure to seek placement of Joshua with his paternal grandparents.

¶13 Matthew next contends that his trial counsel provided ineffective assistance when he failed to seek placement of Joshua with his paternal

[6] We also note that trial counsel's failure to object to a CHIPS order condition more properly supported an ineffectiveness claim with respect to the CHIPS proceeding, not the subsequent involuntary termination proceeding.

grandparents. However, we do not agree that this failure prejudiced the termination proceeding. Parents in involuntary termination of parental rights cases have a statutory right to counsel, WIS. STAT. § 48.23(2), that includes the right to effective counsel. ***A.S. v. Dane County Dep't of Soc. Servs.***, 168 Wis. 2d 995, 485 N.W.2d 52, 55 (1992).

¶14 When we review a circuit court's resolution of a claim that counsel was ineffective, mixed questions of law and fact are at issue. ***State v. Johnson***, 153 Wis. 2d 121, 449 N.W.2d 845, 848 (1990). This court will not disturb the circuit court's factual findings unless they are clearly erroneous, but we review de novo whether counsel's performance was deficient and prejudicial, because those issues present questions of law. ***Id.*** Our supreme court has applied the two-part test of ***Strickland v. Washington***, 466 U.S. 668 (1984), to determine counsel's effectiveness in involuntary termination of parental rights proceedings. *See* ***A.S.***, 485 N.W.2d at 55. The defendant must first show that counsel's performance was deficient. ***Strickland,*** 466 U.S. at 687. Second, the defendant must prove that counsel's deficient performance prejudiced his or her defense, which entails showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, [one] whose result is reliable." ***Id.*** The defendant can meet this second requirement by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. A defendant must meet both parts of the ***Strickland*** test to prevail. ***Id.*** at 687.

¶15 Matthew has failed to undermine our confidence in the outcome.[7] He acknowledges that the trial court greatly emphasized Joshua's need for a permanent home in deciding to terminate Matthew's parental rights. The record contains ample evidence that placing Joshua with his paternal grandparents would not have guaranteed him a long-term home. The court heard testimony at the dispositional hearing from Ann Fuenger, an employee of the Wisconsin State Department of Health and Human Services who has worked on special needs adoptions for the past twenty-nine years. Fuenger expressed reservations about placing Joshua with his grandparents, based on her impression that Bud and Mary were more interested in raising Joshua until his father got out of prison than in fulfilling the parental role themselves. Mittelstaedt gave similar testimony. She also articulated concerns that Bud and Mary might not be able to choose between Joshua and Matthew, based on an earlier conversation with them. Given this evidence, and common experience with the strength of familial loyalties, it is far from clear that Joshua would have remained in a permanent arrangement with his grandparents if, upon his release, Matthew came knocking on their door to reclaim him.

¶16 Even if the trial court accepted that Bud and Mary would not have been so inclined to bend to their son's desires, it expressed concern with foster care by its very nature. "As we have heard today and most of us knew before, foster home placements aren't permanent." A foster care placement with Joshua's paternal grandparents could promise the child only the inherent impermanence of foster care. By arguing that his counsel was ineffective for seeking a necessarily

[7] Because he cannot meet the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668 (1984), we need not consider whether counsel's performance was deficient.

nonadoptive placement, Matthew actually champions more impermanency in Joshua's life, a condition the trial court expressly determined was contrary to the child's best interests.

¶17 Matthew lastly contends that the jury had insufficient evidence before it to answer affirmatively the special verdict question, "Did the Sheboygan County Department of Social Services make a reasonable effort to provide the services ordered by the court?"[8] We will not upset a jury verdict as long as credible evidence, viewed in the light most favorable to the verdict, supports the verdict. ***Meurer v. ITT Gen. Controls*****,** 90 Wis. 2d 438, 280 N.W.2d 156, 162 (1979). This deference is especially important where the trial judge approves the verdict. ***Id.*** We are satisfied that a reasonable jury could have concluded that clear and convincing evidence existed to support a finding of "reasonable effort." *Cf.* ***Steven V. v. Kelly H.***, 2004 WI 47, ¶4, 271 Wis. 2d 1, 678 N.W.2d 856 (due process and WIS. STAT. § 48.31 require proof of grounds for termination by clear and convincing evidence). WISCONSIN STAT. § 48.415(2)(a)2.a. defines "reasonable effort" as "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court and takes into consideration the characteristics of the parent or child … the level of cooperation of the parent … and other relevant circumstances of the case."

¶18 Matthew relies primarily on testimony by Mittelstaedt that she had not made reasonable efforts to provide Matthew with services because of his incarceration. Certainly, the record contained such testimony. However, the

[8] We note that Matthew never expressed dissatisfaction with the services he received before the termination proceeding. He could have sought modification of the CHIPS order.

deferential standard of review obligates us to search for evidence *sustaining* the verdict, even if other evidence supports a contrary finding. ***Meurer*,** 280 N.W.2d at 162-63.

¶19 A wide range of evidence the jury heard could have sustained the verdict. First, WIS. STAT. § 48.415(2)(a)2.a. specifically mentions *court-ordered* services. The transcript of Matthew's hearing indicates that the only services the CHIPS order expressly ordered the Department to provide in Joshua's case were supervision and foster care for Joshua. It ordered no services for Matthew. Nevertheless, Mittelstaedt acknowledged an implicit obligation to help Matthew comply with the conditions the CHIPS order imposed upon him and testified to a variety of services she had provided him. "I have tried to keep you informed of all happenings in Joshua's life. I attempted to assist in having you receive information from the Clinic. I kept you informed of his circumcision, evaluation through Birth to Three Program, and his evaluation at Children's Hospital by Hematology." The jurors could reasonably construe the updates about Joshua's health care and schooling as an attempt to keep Matthew involved, to the extent possible, in Joshua's education and medical care—issues Condition 3 addressed. The jury heard additional testimony that Mittelstaedt had responded to Matthew's request for information on parenting by forwarding information from a public health nurse, had informed Matthew's social worker at the Department of Corrections about the conditions in the CHIPS order, and had written Matthew several times to ask how he planned to comply with the CHIPS order, what services he had made himself available to through the DOC, and what he had learned from information he had received on parenting. These latter efforts were particularly relevant to assessing whether and to what extent Matthew required assistance in complying with Conditions 11 and 13, which required him to

participate in anger management and parenting classes, respectively. Certainly, the record supported a determination of good faith.

¶20 The record also contains evidence that Matthew was far less than cooperative, another factor the jury could properly consider in deciding what efforts were "reasonable efforts." He failed even to comply with all the conditions that were entirely within his control. His own testimony revealed that he violated Condition 12, which required him to follow all correctional rules. He admitted to three conduct reports, one of which resulted in missing a visit with Joshua. Matthew also admitted that he was taking prescribed medications. Despite his obligation in Condition 8 to inform the Department about any such medications, Mittelstaedt related that he had never done so. A reasonable jury could even conclude that Matthew went out of his way to frustrate the Department's efforts to help him. Mittelstaedt stated that he did not return her correspondence regarding his plans to comply with the CHIPS order, what services he availed himself of through the DOC, or what he learned from the parenting materials he received from other sources. This evidence supported an inference that the Department was willing to at least explore with Matthew various means of complying with the CHIPS conditions and that Matthew simply dropped the ball. It could not assess his progress or determine what additional needs he had when he refused to provide the social worker with even a starting point. Accordingly, it would be entirely reasonable for a fact finder to conclude that any further efforts would have been similarly rebuffed and that the Department's duty to make "reasonable efforts" did not require going through the motions.

¶21 Finally, the jury heard evidence about other relevant circumstances, particularly Matthew's incarceration, which greatly limited the assistance the Department could feasibly offer. Conditions 11 and 13 required Matthew to

complete programs in anger management and parenting. No one disputes that the Department never offered Matthew such programming. However, Mittelstaedt testified that she had no influence over what programs the DOC makes available to inmates. Rational fact finders could easily determine that "reasonable efforts" imposed no duty on the Department to exceed its authority through unprofessional attempts to dictate to the DOC how to administer its own programs.

¶22 Additionally, Matthew's incarceration made compliance with many of the other CHIPS conditions impossible. Condition 3, for example, required Matthew to "demonstrate that he can fulfill his right as a parent to protect, train, and discipline, provide food, shelter, legal services, education, and ordinary medical and dental care of his son." Condition 6 obligated him "to maintain employment … in order to demonstrate that he can perform his duties as a parent to Joshua." While in prison, Matthew could not provide his son with most of the care Condition 3 describes. Joshua could not live with Matthew, and no amount of Department assistance could make that happen. Similarly, the testimony reflected that Matthew's biweekly income of a few dollars from his prison employment and schooling could not demonstrate an ability to perform parental duties.

¶23 A rational fact finder was entitled to reject the proposition that the Department's efforts fell short of reasonableness just because the conditions imposed upon Matthew were impossible for him to satisfy. Our supreme court made clear in ***Ann M.M. v. Rob. S.,*** 176 Wis. 2d 673, 500 N.W.2d 649 (1993), that the law does not recognize the opportunity to parent as a prerequisite to termination. Although ***Ann M.M.*** involved a different ground for termination, failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6), that ground is similar to § 48.415(2) at issue in this case. Subsection (6) is based on failure ever to assume parental responsibility, whereas subsec. (2) addresses

situations in which the parent has failed to assume parental responsibilities as addressed by a CHIPS order and remains unlikely to meet those conditions within a twelve-month period. We read subsec. (2) to impose on the parent the same absolute duty to properly parent the child. Parents must *succeed* in meeting their obligations, whereas the Department needs only to make a concerted effort to facilitate that end. Its duties are therefore not coextensive with Matthew's duties. To hold otherwise would require us to exempt incarcerated parents from even the most basic of parenting responsibilities. We acknowledge that such a holding would serve Matthew's best interests. The law, however, protects *Joshua's* best interests. It is mightily unfortunate for Matthew that his brutality toward one child precluded him from providing a loving home for his own son, but these circumstances were of his own making. He, not Joshua, must pay the tragic price for his actions.

¶24 Rachel also contests the dispositional order for terminating her parental rights to Joshua. She asserts that the circuit court was incompetent to proceed with her case when it made the order. Her plea hearing occurred on March 27, but the court held her fact-finding hearing on October 15, 16, and 17. Rachel claims that based on WIS. STAT. § 48.422(2), which requires the court to hold a fact-finding hearing within forty-five days of the plea hearing, the court lost competency on May 12. None of the extensions, she claims, satisfied the requirements of WIS. STAT. § 48.315(2).[9]

[9] It is well established that the time limits in WIS. STAT. § 48.422(2) are mandatory and that only compliance with WIS. STAT. § 48.315 will result in a valid delay, extension, or continuance. *See* ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 549 N.W.2d 489, 492 (Ct. App. 1996) (time limits in the Children's Code are mandatory). If the court grants an extension without adhering to the requirements of § 48.315(2), it will lose competence to proceed. *See* ***State v. April O.,*** 2000 WI App 70, ¶5, n.4, 233 Wis. 2d 663, 607 N.W.2d 927.

¶25 We hold that Rachel's claim comes too late, because she never raised the issue in the circuit court. Our supreme court decided ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ___ Wis. 2d ___, 681 N.W.2d 190, last term. It held that "because competency does not equate to subject matter jurisdiction, a challenge to the circuit court's competency is waived if not raised in the circuit court." ***Id.,*** ¶3. ***Mikrut*** purported not to extend its holding to competency challenges based on violations of mandatory statutory time limitations, which were not at issue in that case.[10] However, the sweeping language of that holding convinces us that the court would do so in a case where the issue was properly raised. Because we therefore conclude that it meant to sub silentio overrule all cases necessitating a contrary result, this court cannot in good conscience decline to follow ***Mikrut*** in this case.[11]

¶26 We conclude that the circuit court properly terminated the parental rights of both Matthew and Rachel. The circuit court was well within its discretion when it concluded from Matthew's written motion that trial counsel's rationale for omitting to object to the "arguably illegal" CHIPS condition was irrelevant. Matthew also cannot claim his counsel was ineffective for not seeking placement of Joshua with his parents, because that omission in no way prejudiced

[10] "Because the competency challenge in this case is not premised upon noncompliance with statutory time limitations, we do not address the issue of waiver in this context except to note that these cases appear to simply perpetuate by rote the rule in older case law that statutory time limitations are 'jurisdictional' and therefore cannot be waived." ***Village of Trempealeau v. Mikrut,*** 681 N.W.2d 190, ¶3, n.1.

[11] We note, however, that if ***Mikrut*** did not apply, Rachel's claim would probably be proper. In ***April O.***, the parents, like Rachel, neglected to object to improper delays. Moreover, both had actually sought many of these postponements. *See* ***April O.***, 607 N.W.2d 927, ¶12. This court nonetheless reversed the orders of termination because the circuit court had lost competency by not complying with WIS. STAT. § 48.315(2). ***April O***., 607 N.W.2d 927, ¶¶1, 12.

him. Finally, Matthew's insufficient evidence claim ignores ample evidence in the record supporting the jury's conclusion that the Department made reasonable efforts to comply with the CHIPS order. Rachel neglected to timely raise her competency claim. We therefore affirm the order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).