COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1965 **Cir. Ct. No. 2006TP5**

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

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,
PETITIONER-RESPONDENT,

V.

MICHELE L. S.,
RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

¶1 SNYDER, P.J.[1] Michele L.S. appeals from an order terminating her parental rights to Paige C.S. and from an order denying her request for post disposition relief. Michele seeks to withdraw her no contest plea to the grounds for termination, arguing that she was unaware she would be found unfit as a result. She also contends the court erred when it failed to abide by statutory time limits, failed to take testimony from her, and failed to confirm that she received the required statutory warnings. We disagree with all of Michele's arguments and affirm the order of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 On January 27, 2006, the Sheboygan County Department of Health & Human Services filed a petition to terminate the parental rights of Michele L.S. and James S. to their daughter, Paige. The County alleged that, pursuant to WIS. STAT. § 48.415(2), termination was warranted because Paige was a child in continuing need of protection and services (CHIPS). The CHIPS dispositional order, filed on September 28, 2004, included conditions Michele would have to meet in order for Paige to be returned to her care. These conditions included abiding by all AODA treatment recommendations, refraining from the use of illegal drugs and alcohol, pursuing psychiatric treatment, participating in counseling, advising the social worker of address changes or changes in living arrangement, and maintaining a safe and stable home with enough food, clothes, beds, bedding and furniture for the child.

[1] This case is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise stated.

¶3 On February 23, 2006, the parents appeared in court with legal representation. The circuit court scheduled a pretrial conference for April 27 and a jury trial for May 2. At the pretrial conference, it became evident that the parties might reach a plea agreement, and the circuit court continued the matter to the following day. At the plea hearing on April 28, both parents entered pleas of no contest. Michele pled no contest to the facts and "reserve[ed] her right to present testimony at [the] dispositional hearing at a later date."

¶4 The court then conducted a plea colloquy with each parent. The court informed the parents that by entering a plea of no contest, they would waive their right to a jury trial on the allegations contained in the petition. The court asked the parents individually whether they understood the rights they were waiving by entering a plea, and both said they did. The assistant district attorney asked the parents whether they read and understood the petition seeking termination of their parental rights; they both indicated they had. The court confirmed their understanding again during its taking of the pleas and further ascertained that no threats or promises had been made to influence them to enter their pleas. The circuit court advised the parents that the decision of whether or not to terminate their rights would be determined by the court at the dispositional hearing. The court concluded that each parent knowingly and freely entered a plea of no contest. Based upon their pleas and the facts alleged in the petition, the court found that both parents were unfit.

¶5 The dispositional hearing took place on May 9, 2006. There, several witnesses testified, including Michele, a county social worker, another child of Michele, and Paige's foster parents. The circuit court then granted the petition for termination of parental rights.

¶6 Michele, now represented by new counsel, moved for post disposition relief. She sought to withdraw her plea and dismiss the petition. On November 13, 2006, the circuit court held a hearing to address Michele's motions. Michele failed to attend the hearing.

¶7 Nonetheless, the matter went forward with testimony from Michele's termination of parental rights (TPR) counsel. Counsel testified that he had met with Michele before the pretrial conference and they had discussed the facts that would likely come out during the trial. He also testified that at some point prior to the plea hearing, he had gone over the petition with Michele and reviewed what proof would be required to show grounds for termination. He also told her that if she pled no contest to the grounds for termination, the court would make a finding that she was an unfit parent and that "that was something she would have to deal with." Ultimately, Michele decided not to contest the grounds for termination but to contest the disposition instead.

¶8 In a written decision filed December 4, 2006, the circuit court denied Michele's motion to withdraw her plea. Michele appeals.

DISCUSSION

¶9 Michele raises four arguments on appeal. First, she contends that her no contest plea was not entered voluntarily, knowingly, and intelligently because she was not advised that she would be found an unfit parent as a result. Next, Michele maintains that the circuit court lost competency to proceed with the disposition when the dispositional hearing was not held "immediately" as required by WIS. STAT. § 48.424(4). Third, Michele asserts the court erred when it failed to take testimony in support of the plea as required under WIS. STAT. § 48.422(3).

Finally, Michele contends that the County failed to establish that she received the warnings required by WIS. STAT. § 48.356(2). We take each issue in turn.

A Voluntary, Knowing, and Intelligent Plea

¶10 Termination of parental rights proceedings have two phases. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402. First, the circuit court determines whether grounds exist to terminate the parent's rights to the child. During the grounds phase, the parent's rights are paramount. ***Id.*** If the court determines that grounds exist and thereby finds the parent unfit, the proceedings move to the dispositional phase where the court determines whether it is in the child's best interest to terminate the parental rights. ***Id.***, ¶28. Michele's first issue requires us to consider the grounds phase of the termination proceedings, where she entered her plea of no contest to grounds for termination. The County alleged that Paige was a child in need of protection or services and therefore grounds for termination existed under WIS. STAT. § 48.415(2).

¶11 To be constitutionally sound, a plea must be entered voluntarily, knowingly, and intelligently. ***Kenosha County Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. Whether Michele's no contest plea was made voluntarily and with understanding of the nature of the acts alleged in the petition and the potential dispositions is, therefore, a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 284, 389 N.W.2d 12 (1986). The circuit court's findings of historical fact will be upheld unless they are clearly erroneous. ***Id.*** at 283. Whether the historical facts meet the constitutional test is a question of law that we determine independently, benefiting from the circuit court's analysis. *See* ***T.M.F. v. Children's Serv. Soc'y.***, 112

Wis. 2d 180, 188, 332 N.W.2d 293 (1983) ("the appellate court should give weight to the trial court's decision, although the trial court's decision is not controlling").

¶12 The analysis set forth in ***Bangert***, 131 Wis. 2d at 274-75, relating to a circuit court's acceptance of a guilty plea in criminal proceedings, is used to evaluate a challenge to a plea entered in a TPR proceeding. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. When challenging a no contest plea, the party must make a prima facie showing that the circuit court violated its duty to inform the party of his or her rights, and the party must allege that he or she did not know or understand the rights being waived. ***Id.*** If the party successfully makes a prima facie showing, the burden shifts to the county to establish by clear and convincing evidence that the parent "knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.***

¶13 Michele asserts that she was not informed that she would be found unfit as a parent as a result of her no contest plea, and she further asserts that she was not informed of the elements of the grounds alleged to support the petition for termination. She argues that although her attorney said he *presented* her with the fact she would be found unfit, he was unwilling to testify that he had *explained* this fact to Michele or that she was *aware* of it. Michele directs us to ***State v. Jipson***, 2003 WI App 222, ¶9, 267 Wis. 2d 467, 671 N.W.2d 18, for the proposition that a failure by the circuit court to explain the elements of a charge is a sufficient prima facie showing under ***Bangert***.

¶14 The County and the guardian ad litem (GAL) respond that the court record contradicts Michele's assertions. Specifically, the GAL points out that Michele responded to over twenty-five questions posed by the circuit court and the

assistant district attorney during the fact-finding hearing. Michele confirmed her understanding of the proceedings through questions regarding her education, employment, and her lack of impairment from drug or alcohol use. Michele told the court that she had read the petition and that she understood it. She stated that she knew her plea meant the court would find all of the allegations in the petition to be true. Further, Michele acknowledged that she read the allegations and had time to talk to her attorney about her plea.

¶15 At the plea withdrawal hearing, which Michele did not attend, her TPR attorney testified that he met with Michele prior to the plea hearing and reviewed the materials with her. Michele's attorney had represented her in the CHIPS matter as well, and he explained that he had gone over the allegations with her "both at the CHIPS phase and then as reviewing and preparing for the TPR action." He stated that he covered the things the State would have to prove in order to prevail at trial, including a showing that Michele would not be able to meet the conditions set forth in the CHIPS matter within twelve months. He told the court that he asked Michele to write responses to the CHIPS conditions, so that she could tell "her side of the story." He produced a copy of Michele's handwritten responses which he received from her prior to the fact-finding hearing. He said that he had told Michele her no contest plea would result in a finding that she was unfit. Finally, he testified that based on the facts that would come to light during a trial and the stress Michele would experience, Michele elected not to contest the grounds for termination but to save her arguments for the disposition.

¶16 We note that in ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶34, 279 Wis. 2d 169, 694 N.W.2d 344, our supreme court considered a scenario where the parent had

> "multiple opportunities to contest the determinations made at each fact-finding stage in the statutory scheme that was employed in advance of the termination … [and] chose not to contest any of these predicate steps. Instead, he pled no contest to the allegation that WIS. STAT. § 48.415(4) provided a ground for terminating his parental rights."

There, the court concluded that the record as a whole supported the conclusion that the father was an unfit parent. ***Id.*** It noted that a CHIPS petition may not be granted unless one of the fourteen grounds described in WIS. STAT. § 48.13 is proven by clear and convincing evidence. ***Ponn P.***, 279 Wis. 2d 169, ¶29. Though the facts here are different from those in ***Ponn P.***, we note that Michele also had the opportunity to challenge the factual findings of the CHIPS court, but instead admitted to the grounds alleged.[2]

¶17 Ultimately, Michele chose, after consultation with her attorney, to plead no contest to the grounds for termination. Her attorney's testimony demonstrates that she knew and understood the grounds for termination and the fact that she would be found unfit as a parent. Most telling, perhaps, is the way Michele entered her plea. She decided to "change her plea to one of no contest to the fact situation but reserving her right to present testimony at [the] dispositional hearing at a later date." Furthermore, Michele's decision not to attend her own plea withdrawal hearing to offer testimony left the court without any direct testimony about Michele's understanding of the grounds for termination or the implications of her plea. We agree with the County and the GAL that the record

[2] The CHIPS petitions alleged that Paige was a child "[w]hose parent … neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." *See* WIS. STAT. § 48.13(10).

supports the conclusion that Michele's plea was voluntary, knowing, and intelligent.

Competency to Proceed With Disposition

¶18 Michele argues that the court lost competency to proceed with the disposition when it adjourned the proceedings after the fact-finding hearing. Specifically, she argues that the court was required to hold the dispositional hearing immediately, as required by WIS. STAT. § 48.424(4). Failure to abide by the time limit, she contends, deprived the court of competency to proceed. A circuit court's competency presents a question of law that this court decides independently, without deference to the circuit court. ***State v. Kywanda F.***, 200 Wis. 2d 26, 32-33, 546 N.W.2d 440 (1996).

¶19 Upon finding grounds for involuntary termination of parental rights under WIS. STAT. § 48.415 and declaring the parent unfit, a circuit court "shall then proceed immediately to hear evidence and motions related to the dispositions enumerated" by statute. WIS. STAT. § 48.424(4). The court may delay the dispositional hearing if all of the parties agree or the court has not yet received the court report referenced in WIS. STAT. § 48.425. *See* § 48.424(4)(a) and (b). The court report includes information on the social, medical and genetic history of the child, facts supporting the need for termination, prior adjudications, services needed for the child, and information about anticipated adoption or permanent placement. *See* § 48.425(1).

¶20 Michele argues that the circuit court failed to hold a hearing immediately as required by WIS. STAT. § 48.424(4). Michele acknowledges that the court can adjourn the matter for up to forty-five days if all parties agree to the continuance or if the court has not yet received the court report. However, she

emphasizes that here, the circuit court failed to make a record explaining why the dispositional hearing was being continued. Michele also directs us to WIS. STAT. § 48.315(2), which states that a continuance shall be granted only upon a showing of good cause "on the record."

¶21 Michele's points are well taken. The transcript of the April 28 plea hearing does not demonstrate that all parties agreed to delay the disposition.[3] Furthermore, we cannot locate any statement on the record regarding the lack of a court report, which would justify the delay under WIS. STAT. § 48.424(4)(b). The transcript from the fact-finding hearing shows a short dialogue about the time limits for continuing the dispositional hearing and then indicates a brief recess and discussion off the record occurred. The transcript then states:

> COURT: Back on the record. And while we've been off the record, we've talked amongst ourselves about dates for the dispositional hearing. [The assistant district attorney] thinks that it'll take about two hours to do the whole hearing.
>
> I have time on Tuesday, May 9th, at 1:30. I will block off from 1:30 to 4:00 for that hearing. And [the attorneys for each of the parties] have all indicated that they [will] be available at that time.

¶22 The County asserts that the dispositional hearing was delayed because the circuit court had not yet received the required court report. *See* WIS.

[3] The GAL argues that "implicit in the off the record discussion referenced in the transcript is the agreement that all parties were consenting and there was good cause to delay the dispositional hearing." We cannot consider an off-the-record conversation, nor will we rely on the summary of such a conversation in an appellate brief. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981) (assertions of fact that are not part of the record will not be considered). We strongly discourage the practice of discussing essential matters off the record. Here, we are able to cobble together what occurred by other facts in the record, but that will not always be the case.

STAT. § 48.424(4)(b). Though this reason is not explicit from the hearing transcript, it is supported by the record. The fact-finding hearing took place on April 28. The WIS. STAT. § 48.425 court report was filed by the case worker on May 4, several days after the fact-finding hearing. We agree with the County that the circuit court would have needed all of the social, medical and genetic history, the facts supporting the need for termination, services needed for the child, and information about anticipated adoption or permanent placement prior to ruling on termination. The dispositional hearing took place five days after the court report was filed. Under the statute, a dispositional hearing scheduled within forty-five days of the fact-finding hearing is timely if the court has not yet received the court report. *See* § 48.424(4)(b).

¶23 Furthermore, case law has established that a circuit court's scheduling limitations may amount to good cause for delay or continuance under WIS. STAT. § 48.315(2). *See* ***State v. Robert K.***, 2005 WI 152, 286 Wis. 2d 143, 706 N.W.2d 257. There are no magic words a court must utter to invoke good cause under § 48.315(2). Here, the record indicates that the April 28 plea hearing was originally scheduled as a pretrial conference on April 27, and a trial date had been scheduled for May 2. The parents' decision to enter no contest pleas changed the nature of the hearing. Furthermore, the father asked "for the chance to make argument at disposition," and Michele "reserve[ed] her right to present testimony at [the] dispositional hearing *at a later date*." (Emphasis added.) Clearly, Michele contemplated a delay in the proceedings. The County anticipated that the dispositional hearing would take two hours. Therefore, the court accommodated Michele and the County by continuing the matter to May 9. Accordingly, we conclude that the circuit court did not lose competency to proceed.

Required Testimony Under WIS. STAT. § 48.422(3)

¶24 Michele contends that the circuit court erred when it found her unfit without taking testimony as required by statute. The relevant statutory language is as follows: "If the petition is not contested the court shall hear testimony in support of the allegations in the petition …." WIS. STAT. § 48.422(3).

¶25 In ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, our supreme court reviewed a similar scenario. There, Steven entered a no contest plea and no testimony beyond the colloquy was taken. ***Id.***, ¶49. The supreme court concluded that this was not fatal to the plea, but rather that "[u]nder ***Bangert***, 131 Wis. 2d at 274-75 … a court may examine the entire record, not merely one proceeding, and look at the totality of the circumstances to determine whether the circuit court's procedures and determinations are sufficient." ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶26 In its post disposition decision, the circuit court rejected Michele's challenge, stating that her plea was supported by other testimony in the proceedings. It cited the CHIPS dispositional order and the conditions established for Paige's return. The court also referenced Michele's subsequent testimony that she failed to make substantial progress toward complying with the CHIPS order. For example, Michele testified that she used cocaine in March 2006 and that when asked to take a drug test in April 2006, the same month as the plea hearing, she would have tested positive for marijuana. The court concluded that Michele's admission that she continued to use illegal drugs up to the time of the plea hearing "provide[d] a basis to support the allegation that there was no substantial likelihood that she would comply in the following 12 months."

¶27 Our independent review of the totality of the circumstances demonstrates that Michele's plea of no contest is supported by testimony in the record. Thus, Michele was not prejudiced by the court's failure to take testimony at the plea hearing. *See* ***id.***, ¶57 (the parent cannot rely on the court's failure to take testimony to reverse the termination where the parent was not prejudiced by the court's failure to comply with the statute). We conclude that the circuit court's acceptance of Michele's plea after the colloquy, but before taking testimony, does not afford Michele an opportunity to withdraw her plea.

Duty to Warn

¶28 Michele's final appellate issue is whether the termination should be reversed because she did not receive the written warnings required by WIS. STAT. § 48.356(2). That statute provides:

> **Duty of court to warn. (1)** Whenever the court orders a child to be placed outside his or her home … because the child … has been adjudged to be in need of protection or services … the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under [WIS. STAT. §] 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home ….
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home … shall notify the parent … of the information specified under sub. (1).

Sec. 48.356. Michele concedes she received the oral notice pursuant to subsection (1).

¶29 The duty to warn a parent is included in that "panoply of substantive rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well-

considered, fact-finding process … unless there is a specific, knowledgeable, and voluntary waiver." ***M.W. v. Monroe County DHS***, 116 Wis. 2d 432, 437, 342 N.W.2d 410 (1984). Here, the dispositional order in the underlying CHIPS case was filed on September 28, 2004. A copy of this order, along with the required written warnings, was incorporated as Exhibit A in the petition for termination of parental rights. Michele does not contend that the warnings were not sent to her, but asserts that she did not receive them.

¶30 Whether Michele received the required warnings presents a question of fact, which this court reviews for clear error. *See* WIS. STAT. § 805.17(2). Because the matter was not contested at the fact-finding hearing, there is no specific finding in the record. Implicit in the final disposition, however, is the conclusion that all of the procedural steps required for termination were accomplished. To avoid the consequences of waiver, which would prevent Michele from raising this on appeal, she frames the issue in terms of ineffective assistance of counsel. She asserts that her TPR attorney was ineffective for "failing to investigate whether Michele received the written warnings contained in the CHIPS dispositional order … before allowing [her] to change her plea."

¶31 To prevail on her claim of ineffective assistance of counsel, Michele must establish that her TPR counsel's performance was deficient and that this deficient performance prejudiced her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether her attorney's performance was deficient and whether his conduct resulted in prejudice are questions of law, which we decide de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). When analyzing an ineffective assistance claim, we may address either the deficient performance or the prejudice component first. *See* ***Strickland***, 466 U.S. at 697. If

we determine that Michele has made an inadequate showing on either component, we need not address the other. *See* ***id.***

¶32 We begin with the deficient performance component, because it is dispositive. At the plea withdrawal hearing, which Michele did not attend, her TPR counsel testified as follows: "I can also inform you that a copy of the TPR was apparently served upon [Michele] on the 30th of January of this year [2006] at the Fourth Street address." He also testified that "the TPR warnings were read [when Michele was present at the CHIPS dispositional hearing on September 27, 2004] and that the TPR warnings were later attached to the written disposition." He told the court that he could not recall Michele informing him that she did not have a copy of the CHIPS disposition. In other words, Michele's attorney understood that Michele had a copy of the CHIPS order and required warnings. Finally, he testified that he and Michele "did go over the written information and specifically the conditions that she was expected to meet as part of the CHIPS disposition."

¶33 Michele has failed to demonstrate that her TPR attorney's performance was deficient. Had her attorney raised an objection based on insufficient notice or warnings during the fact-finding hearing, he would have directly contradicted the facts as he knew them. Furthermore, Michele's failure to attend the plea withdrawal hearing prevented her from rebutting her TPR attorney's testimony. The record defeats Michele's contention that she did not receive the written warnings required by WIS. STAT. § 48.356(2). Consequently, her attorney was not ineffective.

CONCLUSION

¶34 Our independent review of the record supports the conclusion that Michele's plea was voluntary, knowing, and intelligent. Also, the court's decision to delay the dispositional hearing within the forty-five day statutory limit for good cause did not deprive the court of competency to proceed. Furthermore, the court's failure to take testimony in support of Michele's no contest plea did not result in prejudice to Michele because the record as a whole supports the plea. Finally, the record defies Michele's contention that she did not receive the required warning under WIS. STAT. § 48.356(2). Accordingly, we affirm both the order terminating Michele's parental rights and the order denying her motion to withdraw her plea.

By the Court.—Orders affirmed.

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