COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal Nos. 2012AP1283
2012AP1284

Cir. Ct. Nos. 2009TP344
2009TP345

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TENESHA T.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TENESHA T.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Tenesha T. appeals from the trial court's orders terminating her parental rights to Latrell L. and Daejon L. She contends that her right to due process was violated when the trial court permitted thirty minutes of trial testimony while she was absent, although her trial counsel was present. We disagree and affirm.

BACKGROUND

¶2 Latrell and Daejon were born on September 18, 2004, and January 12, 2006, respectively. They were removed from Tenesha's care on May 29, 2006, after Leonte,[2] Tenesha's oldest son, alleged that she had physically abused him.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] In its brief, the State alleges that while it originally petitioned to terminate Tenesha's parental rights to Leonte as well, that case was dismissed. Tenesha's parental rights to Leonte are not before us on appeal.

¶3 Latrell and Daejon were detained at a temporary physical custody hearing on May 31, 2006, and were found to be children in need of protection and services ("CHIPS").[3] Both children remained placed outside of Tenesha's home continuously since May 31, 2006, and the CHIPS dispositional order was extended on an annual basis.

¶4 On November 3, 2009, the State filed petitions to terminate Tenesha's parental rights to both Latrell and Daejon, alleging two grounds for termination: (1) that Latrell and Daejon continued to be children in need of protection or services, *see* WIS. STAT. § 48.415(2); and (2) that Tenesha had failed to assume parental responsibility for the children, *see* WIS. STAT. § 48.415(6).

¶5 The initial appearance on the termination petitions was held on November 24, 2009. Tenesha appeared in person and was advised that she had a right to an attorney. The trial court ordered Tenesha to attend all of her court appearances or to risk a default judgment. At the next court date on January 4, 2010, Tenesha appeared without an attorney and informed the trial court that she had not gone to the State Public Defender's office after the last court date to obtain an attorney. The trial court adjourned the hearing to allow Tenesha another chance to obtain counsel. At the next court date, on February 19, 2010, Tenesha appeared with counsel. The parties agree that Tenesha's counsel appeared at all future court dates.

[3] There is some discrepancy in the record regarding when Latrell and Daejon were found to be children in need of protection or services. We need not resolve this discrepancy to decide the issue raised on appeal.

¶6 After several adjournments due to court congestion, the case went to trial on March 14, 2011. On the first day of trial, Tenesha testified. She was the only witness called in support of her case. Among other things, Tenesha testified that she used marijuana and continued to do so during the pendency of the termination proceedings. She also testified that she had not completed anger management, parenting classes, or individual therapy; that she had not completed alcohol and other drug abuse ("AODA") treatment; that she had never consistently taken her psychiatric medication during the time she and her children were involved with the Bureau of Milwaukee Child Welfare ("BMCW"); and that she was not attending visitation on a regular basis. At the conclusion of Tenesha's testimony, the case was adjourned for the day and the parties were instructed to return the next day at 9:00 a.m.

¶7 The next morning, at 9:15 a.m., when the case was called, Tenesha failed to appear; her attorney, however, was present. The trial court noted that Tenesha was fifteen minutes late, and that the court's clerk had received a call from Tenesha during which Tenesha told the clerk that she had a doctor's appointment and would not be in court. The court's clerk encouraged Tenesha to instead attend trial, and Tenesha agreed, but told the clerk that she would not be able to get to court until 9:30 a.m., thirty minutes after the jury was told to arrive. The trial court agreed to wait until 9:30 a.m. to resume the trial. However, the trial court stated that it would bring in the jury at 9:30 a.m. regardless of whether Tenesha was present, stating that it was not going to let Tenesha "end up pushing me and [the jury] in[to] four days on this. That's just not appropriate." The court then took a short recess.

¶8 At 9:32 a.m., although Tenesha had not yet appeared, the parties reconvened, and the trial court had the following exchange with Tenesha's attorney.

> THE COURT: ….
>
> We're again on the record in the L[.] matter. [Tenesha] has not yet arrived. It's now 9:32. We're going to bring [the jury] in. I'm going to explain to them that we did hear from her. We assumed that it's temporary transportation problems. We assume that she will be arriving shortly, but we can't wait because for fear that that would cause back-end problems. And I'm going to get a pledge from them that they wouldn't take this little glitch into consideration in determining the merits of this case.
>
> I don't know what else to do. I can't wait any longer because now we are getting into a situation in which there is a very significant likelihood that if we don't get moving that we'll back-end this and have them here on Thursday, which is not fair to these people. If we go, there is very significant likelihood we can get this done and not intrude on their lives for an additional day.
>
> So make your objections for the record, [Tenesha's counsel], and let's move on.
>
> [TENESHA'S COUNSEL]: Yes, your Honor. She did call the Court and I think she tried to communicate with the Court or the situation she did have a doctor's appointment, I understand. So I think she will be here momentarily. I ask the Court for further indulgence.
>
> THE COURT: Okay. Thank you. Let's get the jury.
>
> The jury was brought in at 9:37 a.m., and the trial court explained Tenesha's temporary absence:
>
> THE COURT: ….
>
> Okay. Good morning. Welcome back. I apologize for the delay. You will note that [Tenesha] is not here. We received a call this morning indicating that she was having some logistical issues. I -- and I appreciate that.
>
> I -- after getting the information I met with the lawyers and agreed to wait an additional half an hour and

> now it's about thirty-seven minutes. But I did tell the lawyers that because of my concerns about how this might [a]ffect us on the back-end, that's a jury thing, I couldn't give her any[]more than half an hour.
>
> I -- we are -- all of us, I think certainly [Tenesha's counsel] and I, are confident that she is diligently attempting to get here as quickly as she can. She -- I don't believe she has readily accessible transportation available to her. I believe she relies upon public transit. I do.
>
> We need to move forward because I have these concerns about the back-end effect of this. And/but I do need a pledge from all of you that, you know, this should not have any impact on the merits of your decisions. Obviously, she has had some problems. She couldn't get here. I can't accommodate any further delay because of issues that she has encountered. It has no bearing on the merits of this. We're going to move forward. She will arrive[] momentarily, I hope, and this needs to be decided on the merits, and this issue has no bearing on the merits. All with me on that?
>
> Anybody have any problems with that?
>
> Let's go.

¶9 The State then called former ongoing case manager, Eden Seaman, to testify. Seaman testified about numerous services made available to Tenesha, including parenting classes, AODA counseling, random urine screens, individual therapy, parenting classes, and visitation. Seaman also testified that Tenesha had not completed any of these recommended services during Seaman's tenure on the case.

¶10 The State then called another former ongoing case manager, Pamela Werra. Tenesha arrived in the courtroom at 10:07 a.m., after the State had asked Werra two questions. Werra went on to testify that while a case manager on this case she attempted to get Tenesha involved in AODA treatment, individual therapy, parenting classes, nurturing classes, and family counseling, but that

Tenesha did not successfully complete any of these services while Werra was assigned to the case.

¶11 Finally, with Tenesha now present, the State called current ongoing case manager, Sarah Goldman. Goldman testified that Tenesha was not involved in any services to be reunited with Latrell or Daejon when Goldman was first assigned to the case in February 2010. Goldman also testified that, during the entire time Goldman was the case manager, Tenesha was not participating in AODA treatment, individual therapy, parenting classes, or nurturing classes, and that Tenesha's attendance at visitation was sporadic.

¶12 Following the completion of testimony, the jury was given instructions and listened to closing statements. The jury returned unanimous guilty verdicts on both grounds—continuing-CHIPS and failure-to-assume-parental-responsibility—as to both Latrell and Daejon. The trial court found Tenesha unfit.

¶13 After several adjournments, the case went to disposition on December 21, 2010. Tenesha failed to appear when the case was called in the morning. She did, however, make an appearance when the case was called in the afternoon. After hearing testimony from the ongoing case manager, as well as numerous relatives and Tenesha herself, the trial court stated that it was going to terminate Tenesha's parental rights to both Latrell and Daejon based on all of the criteria under WIS. STAT. § 48.426, but held off actually terminating Tenesha's rights until a January 2012 court date. On January 24, 2012, Tenesha failed to appear for the final hearing. At the conclusion of the hearing, the trial court entered the orders terminating Tenesha's parental rights to Latrell and Daejon. Tenesha appeals.

DISCUSSION

¶14 On appeal, Tenesha does not challenge the factfinders' substantive findings, to wit, she does not argue that the jury improperly found that legal grounds existed to terminate her parental rights to Latrell and Daejon or that the trial court improperly found that termination of her parental rights was in the children's best interests. *See* ***Steven V. v. Kelley H.***, 2003 WI App 110, ¶18, 263 Wis. 2d 241, 663 N.W.2d 817 ("[A] TPR proceeding is a two-step procedure …: the first step is a fact-finding hearing to determine whether grounds exist, and the second step is the dispositional hearing."). The only issue Tenesha raises on appeal is whether the trial court violated her statutory and constitutional right to due process when it allowed thirty minutes of testimony on the second day of trial in her absence. We review that question *de novo*, *see* ***Farrell ex rel. Lehner v. John Deere Co.***, 151 Wis. 2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989) (right to due process presents a constitutional question subject to *de novo* review); ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶16, 233 Wis. 2d 344, 607 N.W.2d 607 (questions involving statutory interpretation are reviewed independently), and conclude that Tenesha's due process rights were not violated.

¶15 Wisconsin courts recognize that "the severe nature of … termination proceedings require heightened legal safeguards." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768. As such, "Wisconsin's Children's Code, WIS. STAT. ch. 48, sets forth a 'panoply of substantial 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 utilizing all the protections afforded by the statutes.'" ***State v. Shirley E.***, 2006 WI 129, ¶25, 298 Wis. 2d 1, 724 N.W.2d 623 (citation and footnote omitted). However, Tenesha cites to no case or statute that holds that the "'panoply of

substantial rights'" includes a parent's right to be present at a jury trial where the parent appeared, voluntarily absented herself, and was continuously represented by counsel even in her absence, *see* ***id.*** (citation and footnote omitted), and our review of the statutes and case law revealed no such authority.

¶16 Tenesha bases her argument on ***Shirley E.***, contending that a parent's right to be present during termination proceedings is inherent in ***Shirley E.*** In ***Shirley E.***, our supreme court looked at the scope of a parent's statutory right to counsel, set forth in WIS. STAT. § 48.23(2), and determined that the right should be broadly construed. ***Shirley E.***, 298 Wis. 2d 1, ¶¶35, 40-41. The court did not rule upon or consider whether a parent subject to termination has a right to be present during trial. However, the supreme court noted that a parent can appear by counsel during trial, *see* ***id.***, ¶49, and that "no statutory provision deprives a parent's counsel from presenting evidence and arguing at a termination of parental rights proceeding when the parent has 'appeared' but has not appeared in person," *see* ***id.***, ¶46 (emphasis added). In other words, contrary to Tenesha's assertion, ***Shirley E.*** does not stand for the proposition that a parent has a right to be present during trial and, in fact, contemplates situations in which a parent might not be present. *See* ***id.***

¶17 We also reject Tenesha's attempt to establish a parent's right to be present at trial by equating TPR proceedings with criminal proceedings. *See* ***State v. Anderson***, 2006 WI 77, ¶37, 291 Wis. 2d 673, 717 N.W.2d 74 ("An accused has both a constitutional and statutory right to be present at the criminal trial."). Contrary to Tenesha's assertions, a TPR proceeding is civil, not criminal, in nature. *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶21. Indeed, we have recognized that "the severe nature of … termination proceedings require heightened legal safeguards against erroneous decisions." ***Id.*** However, the additional procedural

safeguards for parents facing TPR petitions are set forth in WIS. STAT. ch. 48. ***Id.***, ¶22. The legislature did not include in those additional safeguards the right to be present during trial. We cannot extend that right to Tenesha when the legislature did not think it prudent to do so.

¶18 Finally, we reject Tenesha's assertion that the trial court erred in permitting testimony in Tenesha's absence without first finding that her absence was egregious or in bad faith. The case Tenesha cites in support of that argument stands for the proposition that the trial court must make a finding that a parent's absence, in defiance of a court order, is egregious or in bad faith before entering a default judgment. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶13 n.3. Here, the trial court did not enter a judgment against Tenesha as a sanction for her absence. Instead, the court merely permitted two of the State's witnesses to take the stand so that Tenesha's absence would not delay the efficient resolution of Tenesha's case.

CONCLUSION

¶19 When facing termination proceedings, due process ensures a parent the opportunity to be heard at a meaningful time and in a meaningful manner. ***Id.***, ¶49. Here, Tenesha was permitted both opportunities. She was given an opportunity to testify and cross-examine the witnesses against her, and she was present for all but thirty minutes of trial, during which time she was amply represented by counsel. As such, we discern no due process violation.

By the Court.—Orders affirmed.

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