COURT OF APPEALS
DECISION
DATED AND RELEASED

October 12, 1995

No. 95-2223

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

IN THE INTEREST OF KANE R.S.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

WILLIAM R.S.,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MC ALPINE, Judge. *Reversed and cause remanded*.

GARTZKE, P.J. William R.S., the father of Kane R.S., born March 25, 1982, appeals from an order terminating his parental rights.[1] William raises three issues: (1) whether he was deprived of due process when his

[1] The parental rights of Laura S., mother of Kane R.S., were terminated in the same proceeding. She has not appealed.

parental rights were terminated under a different version of § 48.415, STATS., rather than the prior version under which he was warned of the grounds for termination; (2) whether the verdict should have separated the question regarding continuing need of protection or services as between William and the child's mother; and (3) whether he was denied effective assistance of counsel.[2]

We conclude that William has no right to appellate review on the first and second issues, but § 752.35, STATS., empowers this court to grant a new trial because the real controversy was not tried. We order a new trial on that ground, limited to whether William's conduct meets the criteria under § 48.415, STATS., before its amendment. Because of our disposition, we do not reach the issues regarding the form of the verdict and effective assistance of counsel.

The jury instructions were based on new § 48.415(2)(c), STATS. William did not object. The court of appeals lacks the power to review unobjected-to error in the instructions, except to determine whether the party seeking review has had effective assistance of counsel, ***State v. Schumacher***, 144 Wis.2d 388, 408 n.14, 424 N.W.2d 672, 680 (1988), and except to exercise our discretion to order a new trial under § 752.35, STATS. ***Vollmer v. Luety***, 156 Wis.2d 1, 17, 456 N.W.2d 797, 805 (1990).

In ***In re Interest of Jason P.S.***, No. 95-1164 (Wis. Ct. App. July 13, 1995), we held that a person had been deprived of his or her parental rights without due process when the parent was warned that his or her rights could be terminated on the grounds stated in § 48.415(2)(c), STATS., before its 1993 amendment, but whose rights were terminated on the changed grounds provided in new § 48.415(2)(c).

Because it was constitutional error to terminate the parental rights of William on the basis of instructions to the jury applying the grounds of new § 48.415(2)(c), STATS., we may decide whether the unobjected-to-error resulted in the real controversy not being tried, a ground for our ordering a new trial under § 752.35, STATS.

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[2] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

The unobjected-to instructional error resulted in the real controversy not being tried. The controversy presented to the jury was whether William failed to demonstrate substantial progress toward meeting the conditions established for the return of Kane to the home and whether there is a substantial likelihood that he will not meet those conditions, the grounds for termination in new § 48.415(2)(c), STATS. The real controversy was whether William has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that he will not meet those conditions in the future, the grounds for termination in § 48.415(2)(c) before its amendment in May 1994, and the grounds for termination contained in the warning to him. If, as here, the jury instructions "arguably caused the real controversy not to be tried, reversal would be available in the discretion of the court of appeals under § 752.35, STATS." ***Vollmer***, 156 Wis.2d at 22, 456 N.W.2d at 807.

The guardian ad litem for Kane contends that the error was harmless because no reasonable possibility exists that it contributed to the termination of William's rights, citing ***In re D.S.P.***, 157 Wis.2d 106, 114, 458 N.W.2d 823, 827 (Ct. App. 1990), *aff'd* 166 Wis.2d 464, 480 N.W.2d 234 (1992). We are told that evidence produced at the trial established William had "a pattern of failing to follow through" which is

> so pronounced and so consistent that it demonstrates an inability on William's part to comply with the conditions of the CHIPS extension order. This inability is grounded in his psychological makeup. Due to his self-centeredness, he is unable to work with therapists and counselors to change his behavior. The evidence in the record regarding William's inability to meet the conditions in the CHIPS extension order is both overwhelming and uncontradicted.

Brief of Guardian ad Litem, 14-19.

Secondly, the guardian ad litem argues the record contains substantial evidence of William's wilful refusal to meet the conditions for the return of the child, in that after Kane had been placed outside his home, William

engaged in criminal acts and domestic violence involving his girlfriend, which should count as wilful refusals to meet the conditions in the extension order.

We conclude we should direct a new trial. The State's power to take away parental rights is awesome and must be exercised with great care. As we said in ***Jason P.S.***, No. 95-1164, slip op. at 9 (Wis. Ct. App. July 13, 1995, ordered published Aug. 29, 1995),

> The ground [for termination] under the new law is far easier to establish than the grounds under the old law. Under the new law, the ground for termination is purely objective: whether there has been a lack of substantial progress. Under the old law, the grounds are more stringent and are partly subjective.

The test for harmless error is whether no reasonable possibility exists that the error contributed to the verdict. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). We do not share the confidence of the guardian ad litem that a second jury, properly instructed under the old law, would find grounds for termination on the same evidence presented to the first jury. For that reason, we order a partial new trial under § 752.35, STATS.

By the Court.—Order reversed and remanded for a partial new trial.

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