COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 97-2363
97-2364

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

NO. 97-2363

IN RE THE TERMINATION OF PARENTAL RIGHTS OF WILLIAM A.H., JR., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WILLIAM A.H.,

RESPONDENT-APPELLANT.

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NO. 97-2364

IN RE THE TERMINATION OF PARENTAL RIGHTS OF LATISHA R.H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WILLIAM A.H.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

SNYDER, P.J. William A.H. appeals from orders terminating his parental rights to two of his children.[1] He contends that the trial court erred when it admitted evidence of his criminal history and that the failure of the trial court to prohibit the introduction of information from a presentence investigation report (PSI) constituted prejudicial error. We conclude that the trial court properly exercised its discretion in admitting the evidence of William's criminal history. While we agree that the use of the PSI was error, we conclude that in this case the error was harmless and we affirm.

FACTS

Latisha R.H. and William A.H., Jr. are the children of William A.H. and Karen.[2] When Karen gave birth to William, Jr. it was discovered that he was both cocaine and opiate addicted. The Kenosha County Department of Social Services (the Department) commenced proceedings against Karen. At that time, Latisha was sixteen months old and resided with Karen and William. William had previously been adjudicated the father of Latisha and he offered to take custody of both children. However, William, Jr. and Latisha were placed in foster care until a

[1] The record suggests that William has one other child who is in foster care in Madison.

[2] William was adjudicated the father of Latisha prior to July 24, 1991, and the father of William, Jr. on January 31, 1994. Although Karen was living with William at all times pertinent to this appeal, she was legally married to another man.

drug screening of William could be completed. William tested positive for cocaine; as a result, the children were found to be in need of protection and services and a CHIPS disposition was undertaken.

At the court proceedings, William was given all mandated warnings of the possible grounds for the termination of his parental rights.[3] The court also imposed conditions that had to be met before the children could be returned to the parents. One of the conditions was that William had to complete an alcohol and drug evaluation and cooperate with recommended treatment. The children resided in foster care for the next two years.

During that time, the main goal of the Department was to reunite Latisha and William, Jr. with their parents. On one occasion in 1993 a psychologist reported that she made a home visit while the children were on an extended visit at Karen and William's residence. When she arrived she smelled burning marijuana in the apartment. William admitted that "someone" had been smoking marijuana in the apartment.

During that same visit, the psychologist reported that she observed bruises on Karen. Karen admitted that William had beaten her and implied that it was not the first time. When the children returned to their foster home, the foster mother reported that Latisha told her that "her daddy had hit her mom, and knocked her to the floor." After this incident, William was ordered to participate in an anger management course. However, William was terminated from the program for absenteeism.

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[3] Karen voluntarily terminated her parental rights to Latisha and William, Jr. prior to trial. William refused to terminate his rights voluntarily; the court proceedings which resulted in the involuntary termination of his rights underpin this appeal.

A caseworker who was present during supervised visits between Karen, William and the children reported that on at least five or six occasions the parents would get into "shouting matches," often using profanities in front of the children. In 1992, William and Karen were involved in a theft at Karen's place of employment when William went through Karen's checkout lane and purchased an inexpensive item and Karen gave him $75 in change. Due to this incident, the court, at an extension hearing for the original CHIPS disposition, imposed as another condition of return that William not engage in further criminal acts.[4]

In October 1993, after the children had been in foster care for two years, the Department attempted to reunite the family. The children were returned to Karen and William with provisions that the parents continue working to meet specified conditions and that intensive in-home care be provided. After the children were in the home for one month and despite the condition that William not engage in further criminal acts, William was charged and subsequently convicted of three counts of delivery of heroin.[5] The children were at the residence with William during one of the scheduled drug purchases. William was incarcerated in November 1993 for these convictions and has a mandatory release date in the year 2000.

Following William's incarceration, the Department concluded that conditions of return had not been met in four years and likely would not be met in the near future. The Department commenced proceedings to terminate the

[4] Timely extension hearings on the original 1991 CHIPS disposition took place in 1992, 1993, 1994 and 1995 as William and Karen had not met the conditions of return.

[5] Subsequent to Karen's incarceration on an unrelated charge in December 1993, the children were returned to foster care.

parental rights of Karen and William. Prior to trial, Karen agreed to voluntarily terminate her parental rights.

At William's trial, a trained counselor testified that William had admitted to her that he had a criminal record, including three arrests for driving without a license, and that he had served a three-year prison sentence for burglary. She also reported that during the initial alcohol and drug evaluation, William described continuing alcohol and drug usage which began at age fifteen and had increased over time. The counselor testified that after the interview she found William "less than credible" and that he had a general disregard for laws and rules. She concluded that William's "alcohol and drug problems are much greater than diagnosed." Further, she opined that William had no plans as to how he was going to provide for his children. Another counselor assigned to work with William testified that in over one year of treatment he did not see any change or progress in William's behavior and that the sessions were not useful or productive.

A psychologist who made home visits testified that William was alcohol and drug dependent and "needed long-term treatment and to get into recovery and work a real program." She also testified that William was not taking any responsibility for his children being in foster care. A probation and parole agent testified that in 1993 William was $13,728.90 in arrears in child support payments.

Another caseworker testified that William took no responsibility for his use and selling of drugs and that William "had no respect for the system, no respect for authorities." The lead caseworker stated that over the course of the four years he had worked with William in trying to reunite him with the children,

William had not progressed and may have even regressed since the caseworker's initial contact in 1991.

A probation and parole agent who conducted the PSI after William's 1993 heroin convictions testified that William told him he had a $50 per day heroin habit. In addition, William told the probation agent that he had used marijuana and cocaine and had also used heroin from 1973 to 1982 and from 1987 to his arrest in 1993. The agent stated that William did not see his heroin usage as a problem and was not interested in treatment. The agent testified extensively about William's criminal conduct which began in 1969 with a delinquency adjudication for burglary. That testimony outlined William's numerous convictions as an adult, which included burglary, possession of a controlled substance, battery, robbery by force, resisting/obstructing, theft, and delivery of heroin. The agent also testified that William's work history was sporadic and that most recently he was terminated after less than a month due to his arrest for delivery of heroin.

William testified that he never told the Department about his continued heroin use because it was "none of their business," but admitted that he has a long-standing problem with drugs. He further admitted that he had hit Karen but not in front of the children—according to William "they couldn't have seen it because they were asleep." William also blamed the State for his current incarceration and testified that the conditions of return imposed on him were "hassling."

After deliberations, the jury returned verdicts finding that grounds did exist for the termination of William's parental rights to Latisha and William, Jr. The court subsequently entered termination orders and this appeal followed.

ADMISSIBILITY OF CRIMINAL HISTORY

William first contends that the trial court erred when it permitted evidence of his criminal history to be offered in these proceedings. He argues that "it was not relevant to the question of whether his rights as a parent should be terminated" and was highly prejudicial. He characterizes this evidence as being "other crimes" evidence improperly offered to prove that he is a "bad character."

Questions of admissibility of evidence are within the trial court's discretion. *See* ***C.N. v. Waukesha County Community Human Servs. Dep't***, 143 Wis.2d 603, 619, 422 N.W.2d 450, 456 (1988). The issue of relevancy must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct. *See* ***State v. Pharr***, 115 Wis.2d 334, 344, 340 N.W.2d 498, 502 (1983). A trial court's decision will be upheld unless it constitutes a misuse of discretion. *See* ***id***. at 345, 340 N.W.2d at 503. Further, this court will uphold a discretionary decision if it can find a reasonable basis for it. *See* ***State v. Kuntz***, 160 Wis.2d 722, 745-46, 467 N.W.2d 531, 540 (1991).

Section 904.05(2), STATS., provides that when the character or a trait of character of a person is an essential element of the charge, claim or defense, proof may be made of specific instances of an individual's conduct. Two of the grounds for the termination of parental rights are whether William has failed to demonstrate substantial progress towards meeting the conditions of return of the children and a showing that there is a substantial likelihood that he will not meet these conditions in the future. *See* § 48.415(2), STATS., 1993-94. Evidence of William's criminal behavior relates to his character, which in turn is a factor that pertains to his ability to care for his children and is an essential issue in this case.

The trial court articulated that William's criminal history was relevant because "the best indicator of where someone is going is where they've been." The elements the State is required to prove specifically go to the issue of whether this parent will be able to provide a stable environment for his children. William's criminal history was relevant evidence of the issues before the jury in its determination of whether his parental rights should be terminated. We conclude that the trial court properly exercised its discretion in admitting the evidence of William's criminal past.

William also argues that the evidence of his criminal past should have been prohibited because the trial court failed to articulate a probative value/prejudicial effect analysis. Our examination of the record shows that the court initially stated that William's criminal history was relevant because "we are dealing in the real world…. [E]vidence as to his criminal history would be relevant in terms of where [William] might be going in the future." William's attorney argued that the prejudicial effect of the evidence outweighed its probative value and that argument was rejected by the trial court when it ruled against William.[6] Our examination of the record convinces us that the required analysis

[6] While the trial court did not specifically articulate its analysis of the probative value/prejudicial effect of the proffered evidence when it considered William's motion in limine, when William's counsel objected to the introduction of this evidence during the course of the trial, the trial court stated:

> The Court believes that the evidence concerning [William's] criminal record is appropriate. Conditions of return require the respondent to maintain a separate clean, separate stable home, including an AODA evaluation with periodic urinalysis, cooperate with any recommended treatment, remain drug free, demonstrate the ability to meet the children's physical, emotional and special needs, visit with the children regularly, complete appropriate parenting classes, demonstrate the principles learned, have no further criminal contacts, refrain from any further domestic violence.

(continued)

was conducted by the trial court and that the admission of the evidence was a proper discretionary act.

ADMISSIBILITY OF INFORMATION FROM THE PRESENTENCE INVESTIGATION

William contends that "[t]he failure of the court to prohibit the introduction of the appellant's presentence investigation report from a 1993 felony drug conviction, coupled with the testimony of the author of the presentence report, constituted prejudicial error." William argues that the statutory language of § 972.15, STATS., prohibits the use of an individual's PSI except in specified instances, and that using information at a trial for the termination of parental rights is not one of the valid, enumerated reasons.[7] While we agree that the statute

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> The Court believes that the children of the respondent have come on to this drama in the second act, and that the first act of [William's] life, prior to the birth of his children, is relevant and material to the … inquiries the jury will have …. [T]he Court believes that it's relevant in that any prejudice is outweighed by the substantial probative value of this information to the jury.

[7] Section 972.15, STATS., provides in relevant part:

> **(4)** After sentencing, unless otherwise authorized under sub. (5) or ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.
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> **(5)** The department may use the presentence investigation report for correctional programming, parole consideration or care and treatment of any person sentenced to imprisonment or the intensive sanctions program, placed on probation, released on parole or committed to the department under ch. 51 or 971 or any other person in the custody of the department or for research purposes. The department may make the report available to other agencies or persons to use for purposes related to correctional programming, parole consideration, care and treatment, or research.

carefully circumscribes the instances in which an individual's PSI can be utilized, we conclude that, in this case, the error which occurred was harmless.

We begin by noting that it is not clear from the record how either the probation and parole agent who originally prepared the PSI or the assistant district attorney came to have this report in his or her possession. Subsection (4) of the statute governing the preparation and use of these reports specifies, "After sentencing … the presentence investigation report *shall be confidential and shall not be made available to any person except upon specific authorization of the court.*" Section 972.15(4), STATS. (emphasis added). There is no indication in the record that any such authorization was ever obtained. Therefore, under the plain and unambiguous language of the statute, neither the agent who prepared the report nor the assistant district attorney should have had access to it.[8]

Having concluded that the applicable statute prohibits the use of PSI information without first obtaining a court order, and that its use by the assistant district attorney and the testifying agent was error, we nonetheless hold that in this case the resulting error was harmless. "An error is harmless when there is no reasonable possibility that the error contributed to the termination of [William's] parental rights." ***I.P. v. State,*** 157 Wis.2d 107, 114, 458 N.W.2d 823, 827 (Ct. App. 1990). When an error occurs, the reviewing court "'should be sure that the error did not affect the result or had only a slight effect.'" ***State v. Harris,*** 199 Wis.2d 227, 255, 544 N.W.2d 545, 556 (1996) (quoted source omitted).

[8] We do not know whether agents preparing PSI reports routinely keep a copy of the report in a file. If that is what occurred in this case, such a practice would appear to be in violation of the statute which requires that the record remain confidential.

In the instant case, trial testimony from numerous witnesses for the State underscored William's inability, for various reasons, to comply with the conditions for the return of his children. Multiple witnesses testified concerning William's long-standing drug use, his inability to keep a job, his prior criminal convictions including the most recent one for delivery of heroin, instances of domestic violence, sporadic contact with the children, his inability to follow through when offered opportunities to work toward meeting the conditions of return of the children and his failure to understand the importance and impact of his life choices on his parental responsibilities. William's own testimony underscored this, as he stated that his problems were caused by the State "hassling" him and not due to his inability to avoid criminal conduct and drug usage.

The testimony William offers as highly prejudicial concerned statements he made to the agent preparing the PSI. Yet much of the information testified to by the author of the PSI was information the jury was already aware of through the testimony of other witnesses. While the use of the PSI report was error, we are convinced that the testimony which the jury heard from that report likely had no impact on its finding that there was a substantial probability that William would be unable to meet the Department's conditions of return of the children in the future.

Because the evidence detailing William's criminal history was properly admissible under the trial court's discretionary determination and the use of the information in the PSI in this case was harmless error, we affirm the orders of the trial court terminating William's parental rights.

By the Court.—Orders affirmed.

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