COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

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. 98-2915
98-2916
98-2917

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

No. 98-2915

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

ZENIA C.,

RESPONDENT-APPELLANT.

No. 98-2916

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

ZENIA C.,

RESPONDENT-APPELLANT.

No. 98-2917

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

ROCK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

ZENIA C.,

RESPONDENT-APPELLANT.

APPEALS[1] from orders of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

EICH, J.[2] Zenia C. appeals from orders terminating her parental rights to her three children, Zanica C., Treona C. and Tiffany H., on grounds of abandonment. She argues: (1) that the trial court "improperly infringed upon the

[1] These appeals are expedited under § 809.107(6)(e), STATS.

[2] These appeals are decided by a single judge pursuant to § 752.31(2)(e), STATS.

fact-finding role of the jury and undermined her right to a fact-finding hearing," when it ruled, on her stipulation, that the statutory criteria for abandonment had been met, which shifted the burden of production and persuasion on the issue of "good cause" to her; and (2) that the court erred when it precluded her from testifying as to circumstances and events occurring outside the specific period of abandonment alleged in the termination petition. We reject her arguments and affirm the order.

Zenia C.'s three children were placed outside her home pursuant to CHIPS (Child in Need of Protection and Services) dispositional orders entered in June 1996. On October 13, 1997, the Rock County Human Services Department filed petitions to terminate Zenia C.'s parental rights to the children, alleging that she had "abandoned" them within the meaning of § 48.415(1)(a)2, STATS.,[3] by

[3] Section 48.415, STATS., provides in part as grounds for termination of parental rights:

> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving that:
>
> ....
>
> 2. The child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required ... and the parent has failed to visit or communicate with the child for a period of 3 months or longer;
>
> ....
>
> (c) Abandonment is not established under par. (a) 2. … if the parent proves all of the following by a preponderance of the evidence:
>
> 1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a) 2. ….
>
> 2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a) 2. ….

failing to visit or communicate with them since July 7, 1997—a period of more than three months. Zenia C. made her initial appearance with counsel and requested a twelve-person jury trial.

In a pre-trial deposition, Zenia C. admitted that she had not seen or talked to her children between July 8, 1997 and December 11, 1997. When asked why, she replied: "Because I wasn't keeping in contact with the social worker ... [b]ecause I don't get along with her." The County then asked if she had "any other reasons" for not seeing her children during that period, and Zenia C. said, "No." During the deposition, Zenia C. was also questioned regarding her drug and alcohol use. She testified that she had only used cocaine "about twice" since her children had been in foster care and that she only drinks alcohol "[o]nce in a blue moon."

Prior to trial, the County moved the court to shift the burden of production and persuasion to Zenia C. with respect to the existence of "good cause" under § 48.415(1)(c)1, STATS., on grounds that her deposition testimony—that she had neither seen nor communicated with her children during the five-month period—satisfied the elements of abandonment under § 48.415(1)(a)(2). The County also filed a motion in limine requesting the court to limit the testimony and evidence presented at trial to the time period specified in the abandonment petition.

The trial court heard the motion on April 20, 1998. Zenia C. did not appear. In her absence, her counsel argued that Zenia C.'s failure to communicate with her children was the result of her drug addiction, and that matters outside the alleged period of abandonment—particularly her prior history of drug and alcohol use—were therefore relevant as good-cause explanations for her failure to have

any contact with her children during the period in question.[4] Counsel then said that if the testimony were to be so limited, "there is really not any evidence that we would be putting forward." He also stated that, should the burden of persuasion be shifted to Zenia C., requiring her to proceed first with her case, there "would not be any cause for a jury trial." The court granted both of the County's motions.

The next day, Zenia C. appeared before the court in person, indicating through her counsel that she wished to waive her right to a jury trial and "stipulate to the facts brought forth in the deposition." She then asked the court to "make its findings" and "schedule the matter for disposition." Based on Zenia C.'s deposition testimony and her in-court statements, the court found that the grounds for abandonment had been established under § 48.415(1)(a)(2), STATS. The court then asked Zenia C. a series of questions to ensure that her jury-trial waiver was given knowingly and voluntarily, and ruled that it was.[5]

---

[4] As indicated above, *supra*, note 3, under § 48.415(1)(c), STATS., a showing of abandonment may be rebutted by evidence that the parent had "good cause" for failing to visit or communicate with the child.

[5] Zenia C. maintains that she did not knowingly and voluntarily waive her right to a jury trial because the court's pretrial rulings effectively nullified her right to a jury trial by removing all the contested issues from the jury's consideration. We reject the argument. The court questioned her extensively as to her knowledge of the rights she was waiving, and she stated that she understood the court's admonitions. In response to the court's further questions, she stated her waiver was being made freely and voluntarily, that she was not threatened or coerced in any way, that no one had made any promises to her, that she understood that her statements made during her deposition constituted grounds for termination, and that she did not disagree with any of those statements.

While the court's ruling limiting the evidence may have punctured Zenia C.'s defense strategy, it did not force her to waive her right to a jury. She had every opportunity to proceed with a jury trial and to present evidence relating to the allegations of abandonment. The fact that she had nothing to present does not render her waiver ineffective.

A dispositional hearing was held on July 6, 1998, at which time Zenia C. stated that she now wanted her children back. Contrary to her deposition testimony, she acknowledged her ongoing substance abuse, but stated that she had taken specific steps to "get control" of her problems. Nancy Carey, a county social worker, also testified. She said she didn't think that Zenia C. would be able to successfully complete drug and alcohol treatment because she never followed through with treatment in the past. She also stated that, in her opinion, it would be in the children's best interests if Zenia C.'s parental rights were terminated.

At the conclusion of the hearing, the court found Zenia C. to be an unfit parent and entered written orders terminating her parental rights to each of her three children. Zenia C. appeals.

Parental rights may be terminated if the parent "abandons" his or her child by failing to "visit or communicate with the child for a period of three months or longer." Section 48.415(1)(a)(2), STATS. As we have noted above, however, a showing of abandonment may be rebutted if the parent proves by a preponderance of the evidence that there was "good cause" for failing to contact the child, or the child's caretaker, during that time period. Section 48.415(1)(c).

Zenia C. argues first that the trial court "improperly invaded the province of the jury" by shifting the burden of production and persuasion to her.[6]

[6] Zenia C.'s preliminary argument that, pursuant to ***In Interest of Phillip W.***, 189 Wis.2d 432, 525 N.W.2d 384 (Ct. App. 1994), "summary judgment is impermissible in involuntary termination of parental rights cases," is unavailing. First, this is not a summary judgment case; nor is it similar to one. It is a case where the parent, Zenia C., conceded her failure to contact her children, stipulated that the statutory requirements for abandonment existed, and specifically requested the court to make a finding of abandonment and proceed to disposition. Second, ***Phillip W.*** involved a parent who, unlike Zenia C., disputed the termination, and we said that, in such circumstances, the involuntary termination of parental rights is inappropriate. Here, as indicated, Zenia C. stipulated to the existence of TPR grounds.

Citing ***Odd S.-G. v. Carolyn S.-G.***, 194 Wis.2d 365, 373, 533 N.W.2d 794, 797 (1995), she claims that abandonment is a question for the fact-finder, and that the burden of proof shifts to the parent only if the petitioner first persuades the *fact-finder* of the actual existence of the basic facts necessary to prove abandonment. This must be so, she says, because "whether a parent failed to visit or communicate with a child during a particular time period necessarily requires factual and credibility determinations that must be resolved by the finder of fact, not the court." And she maintains that, by ruling that her deposition testimony satisfied the County's burden of persuasion as a matter of law—and then shifting the burden to her to establish "good cause" for failing to communicate with or visit her children over the alleged period of abandonment—the court usurped the fact-finding function of the jury and undermined her due-process right to a fact-finding hearing.

First, we disagree with the underlying premise of her argument. We did not hold in ***Odd S.-G.***, as Zenia C. asserts, that the burden-shifting principle is an "evidentiary mechanism to be applied by the jury in assessing the evidence." Rather, we concluded that once abandonment is established by clear and convincing evidence, the burden of proof shifts to the parent to show by a preponderance of evidence that disassociation with the child did not occur. ***Id.*** at 369, 524 N.W.2d at 795. And while we referred to the burden shifting only after the fact-finder is persuaded that "abandonment" occurred, we do not interpret that language as designating the fact-finder as the ultimate and sole arbiter of abandonment, and barring respondents in TPR cases from stipulating to the existence of the grounds for termination and waiving a jury trial. Our discussion in ***Odd S.-G.*** must be viewed against the factual backdrop of the case—one in which abandonment was contested and put before the jury. In ***Odd S.-G.*** the jury

returned a verdict that the parent did not abandon the child; and the issue on appeal was whether the jury was properly instructed on the burden of proof with respect to abandonment. Here, the case never reached the jury because, once Zenia C. stipulated to abandonment, there were no factual disputes for the fact-finder to resolve, and the burden properly shifted to her.

Second, what Zenia C. is really arguing is that she is entitled to have the jury assess whether she was telling the truth when she testified at her deposition that she had failed to visit or communicate with her children, as alleged by the County. As we have stressed throughout this opinion, Zenia C.: (1) admitted to not visiting or communicating with her three children for more than the alleged period of abandonment; (2) proposed that the parties stipulate that she "abandoned" her children; (3) specifically asked the court to make a finding of abandonment and proceed to disposition; and (4) waived her right to a jury trial. She had the benefit of counsel throughout the proceedings, and nothing in the record suggests that her actions were anything but knowing and voluntary. Once she stipulated to the facts, they were no longer in dispute and there was no need for a fact-finder.[7]

Zenia C. also argues that the trial court erred when it granted the County's motion in limine precluding her from offering testimony relating to events outside the alleged period of abandonment, concluding that the evidence was irrelevant. According to Zenia C., she wanted to testify that her prior history

[7] Arguing that it is the fact-finder's role to judge whether Zenia C. was telling the truth when she stipulated to abandoning her child is akin to a criminal defendant freely and voluntarily pleading guilty to an offense and proceeding to sentencing, and then claiming a due-process violation on grounds that it is the jury's role to determine whether he or she was lying by admitting to the factual basis for the plea.

of drug and alcohol abuse—her previous inability to control her substance abuse, her unsuccessful participation in treatment in prior years, and the fact that she had been "on the run" from the police—was the major problem interfering with her ability to raise her children. She clams that these past "battle[s]" with drug abuse—all occurring well prior to the period of abandonment alleged in the petitions—constitute "good cause" for her failure to contact her children in 1997; and she argues that this is a question for the jury, not the court.

The admission of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). We do not test a trial court's discretionary rulings by some subjective standard, or even by our sense of what might be a "right" or "wrong" decision; the court's ruling will stand unless "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). Indeed, we generally look for reasons to sustain discretionary decisions. ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991).

The trial court excluded evidence of events occurring outside the alleged period of abandonment on grounds that, while such evidence might well be relevant in the dispositional phase of the case, it was not relevant to prove lack of contact with the children during the five-month period alleged in the County's petitions. On this record—which includes Zenia C.'s deposition testimony denying the existence of any substance-abuse problems and stating that the only reason she had no contact with her children during the five-month period was that

she didn't get along with her social worker—the trial court could reasonably rule as it did. We conclude, therefore, that the court did not erroneously exercise its discretion in granting the motion in limine.

By the Court.—Orders affirmed.

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