COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-2034

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SAMUEL J.R., ALEXANDER J.R., CABBET J.R. AND JEREMY T.R., PERSONS UNDER THE AGE OF 18:

CALUMET COUNTY HEALTH & SOCIAL SERVICES,

PETITIONER-RESPONDENT,

V.

MICHAEL J.R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County: PATRICK L. WILLIS, Judge. *Affirmed*.

¶1 BROWN, J.[1] This is a termination of parental rights case. Michael J.R., whose rights to his four natural children were terminated, raises three arguments, each of which we reject. His claim that WIS. STAT. § 48.415(4) is unconstitutional as a violation of substantive due process is waived. His argument that the trial court erred by not making its egregiousness determination in accordance with a recent decision by this court, ***State v. Kelly S.***, 2001 WI App 193, ___ Wis. 2d ___, 634 N.W.2d 120, is disallowed for three reasons: the trial court did not have the benefit of ***Kelly S.*** when it made the decision, the ***Kelly S.*** issue was never raised before the trial court and ***Kelly S.*** will be applied prospectively by this court. We therefore uphold the egregiousness finding as is. Finally, we agree with his assertion that WIS. STAT. § 48.427(1) mandates trial courts to enter any dispositional order within ten days after the taking of any evidence relating to the disposition or lose competency to enter such an order; however, the issue fails because he has not shown prejudice.

¶2 Michael's constitutional argument is as follows: WIS. STAT. § 48.415(4) permits a finding of unfitness to be grounded upon proof of two facts—that there exists a court order denying visitation or physical placement and that such order has been in effect for one year without modification. In Michael's view, this statute violates substantive due process because it presumes unfitness simply on the basis of an order that remains unchanged for a year. This, according to Michael, relieves the State from having to prove the existence of harmful conduct or negligence by the parent. As such, the statute results in taking

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

away the fundamental right of parenting without any factual showing of actual harm to the child.

¶3 To this argument, the State and the guardian ad litem have each claimed that the issue is waived because it is being raised for the first time on appeal. Michael replies that a constitutional argument alleging that a statute is facially invalid is not subject to waiver.

¶4 Michael is correct that challenges to the facial validity of a statute are not subject to waiver. But his constitutional argument is not an attack on the facial validity of a statute; it is what he claims it to be—a substantive due process argument. A substantive due process argument is not an attack on the facial validity of a statute.

¶5 An attack on the facial validity of a statute is, in clearer terms, an attack on a statute because it is vague. A statute is unconstitutionally vague only if it fails to give fair notice of the conduct prohibited and fails to provide an objective standard for enforcement. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1973). The law assumes that persons are free to steer between lawful and unlawful conduct. Our courts have therefore insisted that statutes give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly; such notice is a basic requirement of due process. ***Elections Bd. v. Wis. Mfrs. & Commerce***, 227 Wis. 2d 650, 676-77, 597 N.W.2d 721 (1999). The law also requires that the statute provide those who enforce and apply the law with objective standards with which to do so. ***State v. Curiel***, 227 Wis. 2d 389, 415, 597 N.W.2d 697 (1999). It is for reasons of proper notice and objective standards of enforcement that a constitutional challenge on vagueness grounds raises an issue of subject matter

jurisdiction that cannot be waived. *See* ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 538-39, 280 N.W.2d 316, 321 (Ct. App. 1979). At bottom, the principles underlying the void for vagueness doctrine stem from concepts of *procedural* due process. ***Curiel***, 227 Wis. 2d at 414.

¶6 Michael's argument is not a procedural due process argument. It is not about whether he had proper notice of the factual situation which could cost him his parental rights. How much more clear would a statute have to be than to say that if a parent is under an order denying visitation or physical placement and that order does not change for a year, the parent is subject to termination? And how much more objective a test could it possibly be? The answer is that the statute is clear, not vague. Michael's real argument is not that the statute is vague; it is that the statute does not require proof of improper conduct by the parent within that year. His argument is not one of procedural due process, but substantive due process as he has readily asserted. Substantive due process rights fall under the rule announced in ***Bradley v. State***, 36 Wis. 2d 345, 359-59a, 153 N.W.2d 38 (1967). There, the supreme court wrote that "even the claim of a constitutional right will be deemed waived unless timely raised in the trial court." ***Id***. at 359. Michael's argument that he has a constitutional right to expect more evidence from the State than the mere fact that there was a denial of visitation or physical placement order in place without change for a year is waived.

¶7 Before leaving this issue, we acknowledge that this court may nonetheless decide a constitutional question not raised below if it appears to be in the interests of justice to do so and where there are not factual issues for resolution. ***Id.*** at 359-59a. We decline to exercise our discretion because we are not convinced that the interests of justice compel us to do so.

¶8 Regarding Michael's second argument, he observes that the trial court did not conduct its egregiousness analysis in a manner consistent with our decision in ***Kelly S.*** He contends that this was tantamount to a failure to exercise discretion. As Michael points out, ***Kelly S.*** clarified the case law in that it gave a "definitive interpretation" by virtue of a two-part sequential test. We are uncertain whether Michael is requesting that we send the case back for a new egregiousness determination or whether he is asserting that we should reverse outright.

¶9 Regardless of what his prayer for relief is, we will not mandate that ***Kelly S.*** must be complied with in this case. First, the issue of whether a two-part test should be used was never raised before the trial court, there was no motion to vacate on this ground and there was no appeal made raising this issue before ***Kelly S.*** was released. A decision of an appellate court may be applied prospectively in such a situation. ***Olson v. Augsburger***, 18 Wis. 2d 197, 200-01, 118 N.W.2d 194 (1962). As Justice E. Harold Hallows wrote in that case, "The purpose of this exception was to prevent a judgment settled on the old rule from being disturbed on appeal solely on the ground of the new rule." ***Id***. at 201.

¶10 More recently, our supreme court has reasoned that prospective application of a new rule, coined as "sunbursting," is a question of policy and involves balancing the equities peculiar to a particular case or rule so as to mitigate hardships that may occur in the retroactive application of new rules. ***Colby v. Columbia County***, 202 Wis. 2d 342, 364-65, 550 N.W. 2d 124 (1996). Retroactive application has been denied where the purpose of the new rule cannot be served by retroactivity, and where retroactivity would tend to thrust an excessive burden on the administration of justice. ***Id***. This court is convinced that the trial court's determination of egregiousness is supported by the facts of

record and are thorough. There would be no good purpose to retroactively apply ***Kelly S.***

¶11 As to the merits of the egregiousness finding, Michael takes issue with the trial court's findings regarding the abuse Michael heaped on his children. The trial court commented on torture inflicted on his children, placing a child in a dog cage in a cold, unheated basement and throwing a child out of the house without any shoes or clothes on a cold night. Michael observes that the parties stipulated that evidence supporting a child abuse ground would not be presented at the fact-finding hearing since the sole issues before the fact finder were the denial of visitation and abandonment. Michael asserts that the trial court may only find egregious conduct based upon the facts presented at the fact-finding hearing and may not look to the total record to make the findings.

¶12 WISCONSIN STAT. § 48.426(3) sets forth the factors a trial court must examine in determining whether the termination of parental rights is in the best interests of the child. One of the criteria is whether the child has a substantial relationship with the parent and whether it would be harmful to the child to sever this relationship. The ultimate determination of whether to terminate parental rights is discretionary with the trial court. ***State v. Margaret H.***, 2000 WI 42, ¶27, 234 Wis. 2d 606, 610 N.W.2d 54 (underscoring the flexibility that the circuit courts need to make this evaluation). The role is an evaluative one. *See* ***id***. at ¶¶27-30.

¶13 The legislature obviously saw the need for this kind of flexibility. WISCONSIN STAT. § 48.427(1) states that "[a]ny party may present evidence relevant to the issue of disposition …." This language underscores how the ultimate determination is made using any facts pertinent to disposition, not just the

facts pertinent to whether grounds exist for termination. The two processes are completely different. In light of the case law and the statute, we are convinced that the legislature did not want the circuit courts of our state to be making a disposition determination in a vacuum. The legislature wanted the courts to be allowed to look at all relevant and material facts pertinent to disposition, not just the facts at the fact-finding hearing. We are satisfied that the trial court acted within the bounds of its discretion by reaching into those facts which caused the denial of visitation order in the first place as well as the absence of the physical custody. There was no misuse of discretion here.[2]

¶14 Finally, we address Michael's claim that a written order had to be filed by the trial court within ten days of the evidentiary hearing regarding the disposition. We agree with Michael that the statute contemplates a written order within ten days since the statute obligates the court to "enter" an order. Entry of orders are accomplished by filing them in the office of the clerk of courts. WIS. STAT. § 807.11(2). However, that does not end the matter. As pointed out by the guardian ad litem, WIS. STAT. § 805.18(2) states that "[n]o judgment shall be reversed … for error as to any matter of … procedure, unless … after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse … the judgment …." This court is convinced that the statute applies here. We see

[2] Michael cites ***State v. Kelly S.***, 2001 WI App 193, ___ Wis. 2d ___, 634 N.W.2d 120, for the proposition that the trial court is limited to only those facts adduced at the fact-finding hearing. He cites the following from ***Kelly S.***: "After a jury has found evidence supporting termination of parental rights, the trial court's duty is to determine whether *such* evidence was 'egregious' such that termination should occur." (Emphasis added.) ***Id.*** at 193, ¶1. The language Michael cites to refers only to the first part of the egregiousness test the trial court must conduct. The second part of the egregiousness test examines the best interests of the child, and the factual content the trial court may draw upon is much wider.

two reasons for the ten-day rule. One reason is to expedite matters for the benefit of the children's stability. A second reason is to allow the parent to seek timely postjudgment relief. It has not been shown that the stability of the children has been affected by the extra time it took to enter a written order. And, Michael has not explained how the short delay affected his right to a timely appeal. Our review of the record reveals that he received his timely appeal. And as to the appeal, this court affirms.

By the Court.—Order affirmed.

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