COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2988

Cir. Ct. No. 01-TP-74
01-TP-75
02-TP-27

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO TIANNA T-W, TERRA T-W, MALACHI W., PERSONS UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PAUL W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Paul W. appeals orders which terminated his parental rights to three children. He claims the trial court erred in excluding certain evidence and in denying his motion to dismiss one of the actions on the grounds that La Crosse County failed to prove that he had received a copy of a CHIPS[2] dispositional order. We conclude the trial court erred in neither regard and we therefore affirm the three orders.

BACKGROUND

¶2 Paul W. is serving a seventeen-and-one-half-year sentence in federal prison. La Crosse County filed petitions to terminate his parental rights to three children, twin daughters born in 1998 and a son born in 2000.[3] The County alleged grounds for termination with respect to all three children under WIS. STAT. § 48.415(2) (continuing need of protection or services), and with respect to the son under § 48.415(6) (failure to assume parental responsibility). Paul denied the allegations and the matter was tried to a jury. The jury, with two dissents, found that the County had established the former grounds for all three children but not the latter with respect to the son. Following a dispositional hearing, the court entered orders terminating Paul's rights to each of the children.

¶3 Prior to the commencement of the trial, the County moved to exclude "[a]ny evidence regarding possible placement of any of the children with

[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 unless otherwise noted.

[2] Children in Need of Protection or Services. *See* WIS. STAT. § 48.13.

[3] The children's mother consented to the termination of her parental rights and she is not a party to this appeal.

… the children's paternal grandparents." The County argued that, although the potential placement had been an issue in the underlying CHIPS proceedings, it was not relevant to any issue in the termination of parental rights (TPR) proceedings and "would just confuse the jury." Paul opposed the motion, asserting that he wished to testify that the possibility of the children being placed with his parents, which he desired, "was really the justification and the reason why he may not have complied with all of the court orders." The court ruled that "the issue of whether or not the County should have placed them there during the CHIPS proceeding … [is] not an issue in this proceeding," and it granted the County's motion to exclude the evidence.[4]

¶4 At the close of evidence, Paul moved to dismiss the petition relating to his son because the County had failed to establish that he received the CHIPS dispositional order which placed the boy outside Paul's home and contained the statutorily required TPR notice.[5] The court denied the motion, concluding that there was sufficient "evidence that he had notice of those conditions and the warnings and I think the record will support that." The court's instruction to the jury and the special verdict form, to which Paul did not object, required the jury to determine whether the boy was placed outside Paul's home "pursuant to one or

[4] Notwithstanding the court's ruling, in responding to questions during cross-examination regarding his ability to meet the conditions for the children's return, Paul testified that he could do so if they were placed with his mother, who could well care for them and "[t]hey could be kind of with me."

[5] WISCONSIN STAT. § 48.415(2)(a)1 requires a CHIPS out-of-home placement order underlying a TPR petition to contain "the notice required by s. 48.356(2)," which in turn requires such an order to "notify the parent … of the information specified under sub. (1)." WISCONSIN STAT. § 48.356(1) provides that "the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home."

more court orders containing the termination of parental rights notice required by law," but did not require jurors to find that Paul received a copy of the order or orders.

ANALYSIS

¶5 Paul argues first that the court's exclusion of evidence relating to the possible placement of the children with his parents during the CHIPS proceedings deprived him of his "Due Process right to meaningfully participate" in the TPR proceedings. Because he frames his argument in constitutional terms, Paul asserts that our review must be de novo. We agree that, like a defendant in a criminal case, a parent subjected to TPR proceedings enjoys certain constitutional due process protections, including the right to present a defense to the allegations. ***State v. Frederick H.***, 2001 WI App 141, ¶17, 246 Wis. 2d 215, 630 N.W.2d 734. The constitutional guarantee of due process, however, does not include a right to present irrelevant evidence. *See* ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994). Thus, if the trial court did not erroneously exercise its discretion in excluding the evidence on these grounds, it did not violate Paul's right to due process. ***Id***.

¶6 Accordingly, we review the trial court's decision to exclude the evidence in question for an erroneous exercise of discretion. The question before us is whether the court applied the correct law to the relevant facts and reasoned its way to a reasonable result. ***Frederick H.***, 2001 WI App 141 at ¶15. We conclude that it did.

¶7 Paul asserted in the trial court that he wanted to testify that because he thought the County was going to place his children with his parents, which was all right with him, he saw little need to comply with all of the conditions for

returning the children to his custody. Relying on ***Frederick H.***, Paul argues on appeal that this testimony would have constituted "mitigating" evidence regarding his failure to meet those conditions. We concluded in ***Frederick H.*** that the trial court had erred by not permitting the parents to present any evidence of their efforts to meet the conditions for regaining visitation with their children. ***Id***. at ¶10. Specifically, we found "no reasonable basis to uphold the trial court's ruling that the testimony Amanda S. and Frederick H. sought to elicit from the caseworker regarding their efforts to re-establish visitation was irrelevant." ***Id***. at ¶11. The same cannot be said with respect to the exclusion of evidence in this case regarding the potential placement of Paul's children with his parents.

¶8 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01; ***Frederick H.***, 2001 WI App 141 at ¶12. The questions put to the jury in this case included whether Paul "failed to meet the conditions established for the safe return" of his children to his home, and whether there was "a substantial likelihood that Paul … will not meet these conditions" within the ensuing twelve months. The focus of these verdict questions is on Paul's past acts and omissions in response to the CHIPS orders involving his children, and on his present circumstances and capacity to parent his children. The fact that the County may have considered placing the children with his parents has little or no bearing on the questions the jury was required to answer under WIS. STAT. § 48.415(2). Evidence relating to the potential placement of the children with Paul's parents does not tend to make it more or less probable that he did not meet the conditions specified for the return of the children to his home or that he is unlikely to meet those conditions in the foreseeable future.

¶9 We acknowledge that Wisconsin courts endorse a broad view of relevance. ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). Accordingly, we briefly address the County's alternative argument that even if the potential placement of the children with Paul's parents had some minimal relevance to the facts to be found by the jury, it was "substantially outweighed by the danger of … confusion of the issues, or misleading the jury." WIS. STAT. § 904.03. We agree with the County that testimony showing why it was or was not feasible or advisable for the County to place the children with Paul's parents, either during the CHIPS proceedings or as an alternative to terminating Paul's rights, would have served only to divert the jurors' attention from their charge to determine whether Paul himself had taken the necessary steps to provide a safe home for the children and whether he would be able to do so within twelve months of the trial.

¶10 Finally, we note that we also agree with the County (and with Paul, for that matter[6]) that the feasibility of placing the children with his parents may be relevant to the court's determination of whether a termination of Paul's rights is in the children's best interests. *See* WIS. STAT. §§ 48.426 and 48.427. Our holding in ***Frederick H.*** rested in part on the fact that the trial court "effectively foreclosed Amanda S. and Frederick H. from stating their reasons for failing to meet the conditions to re-establish visitation at both the fact finding hearing and the dispositional hearing." *See* ***Frederick H.***, 2001 WI App 141 at ¶14. Here, however, the fact that Paul's parents were willing (and apparently able) to provide

[6] Paul's counsel acknowledged during argument on the motion to exclude that the dispositional hearing was "probably" "the appropriate time" to argue that placement of the children with Paul's parents would be in the children's best interests and would obviate the need to terminate his rights to them.

a home for the children was well known to the court at the TPR dispositional hearing.

¶11 The County's dispositional report informed the court of the paternal grandparents' willingness to adopt all three children, as did a letter from the Wisconsin Department of Health and Family Services. Paul's counsel argued as follows at the dispositional hearing:

> [A]s is set forth in the letters that the Court received from [Paul's parents], that a year ago they were asked to meet certain requirements. Those requirements were met. A home study was completed, and they were found to be appropriate people where these kids could be placed at that time, and it's kind of frustrating that … we sit here and we've gone through a trial and we're sitting here today discussing this and the issue really is what is in the best interests of these kids and where should they … be.

Finally, in deciding to order the termination of Paul's rights, the court specifically considered the potential adoption by his parents: "These children have to have a permanent, stable placement, be it with the foster parents or be it with the grandparents, or be it with someone else the Department might ultimately recommend …."[7]

¶12 We thus conclude that the trial court did not erroneously exercise its discretion in excluding the evidence in question at trial. Paul was *not* precluded from presenting evidence tending to mitigate his failure to meet the conditions for the return of his children to his home. He testified that he was only vaguely aware of what would be required of him to gain custody of his children, that he made some efforts to comply with the requirements of which he was aware, and that the

[7] Paul does not argue that the trial court erroneously exercised its discretion in ordering the termination of his rights under WIS. STAT. §§ 48.426 and 48.427.

County did not adequately assist him in meeting the requirements or actively thwarted his efforts to do so. We thus also conclude that Paul was not denied the opportunity to meaningfully participate in the TPR proceeding. *See* ***Frederick H.***, 2001 WI App 141 at ¶13.

¶13 Paul's second claim of error is that the trial court should have dismissed the petition relating to his son, or at a minimum, instructed the jury that it must find that Paul actually received a copy of the CHIPS dispositional order containing the required TPR notice or warning (see footnote 5). The County responds that WIS. STAT. § 48.415(2)(a) does not require that the underlying CHIPS orders be served on parents, only that the orders contain the necessary notice or warning. The County's argument is technically correct but fundamentally flawed. Although it is true that nothing in § 48.415(2) requires that parents be served with copies of CHIPS dispositional orders, WIS. STAT. § 48.355(2)(d) plainly imposes such a requirement: "The court shall provide a copy of a dispositional order relating to a child in need of protection or services to the child's parent …." ***Id***.

¶14 We would thus be hard pressed to conclude that if the County had made no effort to see that Paul was provided a copy of the CHIPS order placing his son outside the parental home, it could nonetheless proceed to terminate his parental rights to the child under WIS. STAT. § 48.415(2). Rather, we conclude that the requirement under § 48.415(2)(a) that a child be placed outside the parental home pursuant to an order containing the statutory TPR notice[8]

[8] Paul does not dispute that the order in question contained the notice and information required under WIS. STAT. § 48.356.

necessarily encompasses the requirement under WIS. STAT. § 48.355(2)(d) that a copy of the order be provided to the parents. It simply would not be reasonable, in our view, to conclude that although the legislature specified in WIS. STAT. §§ 48.356 and 48.415(2) that orders placing children outside the parental home must include a notice to the parents that a failure to remedy the conditions that resulted in the children's removal might ultimately result in a termination of their parental rights, the legislature did not intend that parents actually receive the required notice before their rights may be terminated.[9]

¶15 We conclude, however, that the record establishes that the County complied with WIS. STAT. § 48.355(2)(d). We first note that, at the time the CHIPS dispositional order was entered relating to Paul's son, Paul had not yet been adjudicated the boy's father. The County introduced an affidavit of mailing showing that the dispositional order was subsequently mailed to Paul at the following address: "C/O DANE COUNTY JAIL, 115 DOTY STREET, MADISON, WI 53703." Paul concedes that as of the date of the mailing, he was an inmate at the Dane County Jail, but he points out that another item in the record, a federal judgment of conviction entered one week before the mailing of the order, lists his address as "c/o Dane County Jail, 210 Martin Luther King Jr. Blvd., Madison, WI 53709." We reject Paul's suggestion that the address discrepancy raises any "doubt the County sent the notice to the correct address," as he argues in his reply brief. We take judicial notice of the fact that the two

[9] We do not address the question of what steps, if any, a County must take to provide the required notice to a parent whose whereabouts are unknown. We note, however, that the rights of an absent parent whose whereabouts are unknown may be subject to termination on grounds other than those under WIS. STAT. § 48.415(2). *See, e.g.*, WIS. STAT. § 48.415(1)(a) (abandonment); § 48.415(6) (failure to assume parental responsibility). These other grounds do not require proof of out-of-home placements under orders which contain the notice required by § 48.415(2)(a)1.

addresses noted are for two Dane County buildings adjacent to one another in downtown Madison, each of which houses a portion of the Dane County Jail.[10]

¶16 We thus conclude that the County's affidavit averring that it mailed a copy of the CHIPS order to Paul at an address for the institution in which he was then incarcerated is prima facie evidence that he was provided a copy of the order as required under WIS. STAT. § 48.355(2)(d).[11] Paul's testimony at trial regarding receipt of the order was equivocal at best, and did not rebut the presumption that he received it.[12] When first asked by his counsel whether he received the order, he

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[10] *See* WIS. STAT. § 902.01(2)(a) and (3) (A "court may take judicial notice, whether requested or not" of a "fact generally known within [its] territorial jurisdiction."). The buildings in question are, literally, right outside our windows. The official Dane County web site (www.co.dane.wi.us), under the listing for Sheriff's Office "frequently asked questions," provides the following information:

> The Dane County Sheriff's Office operates three jail facilities:
>
> The City-County Building Jail, located at 210 Martin Luther King Jr. Blvd., Madison, Wisconsin, houses maximum security prisoners who are awaiting trial or who do not have work release privileges on their sentences.
>
> The Public Safety Building Jail, located at 115 West Doty Street, Madison, Wisconsin houses medium security prisoners and prisoners sentenced to jail with work release. It also contains our Booking facility for processing new prisoners into the jail, and is the centralized location for releases from the jail facilities. All property, financial, and administrative offices are located at this facility.

[11] *See* WIS. STAT. § 801.14(2) ("Service by mail is complete upon mailing."); *Cf.*, WIS. STAT. § 879.07(1) ("Proof of service by mail shall be by the affidavit of the person who mailed the notice showing when and to whom the person mailed it and how it was addressed.").

[12] *See* ***Mullen v. Braatz***, 179 Wis. 2d 749, 753, 756, 508 N.W.2d 446 (Ct. App. 1993) ("The mailing of a letter creates a presumption that the letter was delivered … which merely shifts to the challenging party the burden of presenting credible evidence of nonreceipt …."; an "addressee's bare assertion that she did not receive the notice was insufficient to rebut the presumption that mail properly sent was received." (citing ***Solberg v. Secretary of DH&SS***, 583 F. Supp. 1095, 1097 (E.D. Wis. 1984)).

answered that he did but "I got it super late after the court date." He then said in response to a follow-up question that he did not get the order. On cross-examination, however, Paul acknowledged that at the time the order was mailed, he was still "in the Dane County Jail," and to the suggestion "it's possible that you received the order at that time?" he replied: "Really I'm in a daze, to tell you the truth …."

¶17 In short, we are satisfied that the record does not establish Paul's failure to receive a copy of the order relating to his son. Moreover, the record also indicates that Paul was aware from the prior CHIPS proceedings relating to his daughters, for which he was present in court, of the potential for a TPR if he did not remedy the conditions leading to the removal of his children, and, generally, of what was required of him in order to gain their return. We thus agree with the trial court that there was "evidence that he had notice of those conditions and the warnings," and we conclude that the court did not err in denying Paul's motion to dismiss the petition relating to his son.

¶18 As to whether the jury should have been instructed that it must find that Paul actually received the court order in question, we agree with the County that Paul's failure to object to the instructions given, or to request an additional instruction, precludes our review of the issue. *See* WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) ("[T]he court of appeals ha[s] no power to reach … unobjected-to instructions.").

CONCLUSION

¶19 For the reasons discussed above, we affirm the appealed orders.

By the Court.—Orders affirmed.

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