COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0913 **Cir. Ct. No. 02TP000042**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRANDON M. B., A PERSON UNDER THE AGE OF 18:

WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NANNETTE C.,

RESPONDENT-APPELLANT,

RICHARD B.,

RESPONDENT.

APPEAL from orders of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed.*

¶1 BROWN, J.[1] Nannette C. appeals from an order terminating her parental rights to her son, Brandon M.B., and an order denying her posttermination motion alleging ineffective assistance of trial counsel. Nannette raises one issue on appeal: whether her trial counsel was ineffective for failing to present to the jury a defense based upon her sleep apnea condition. We hold that Nannette's counsel made a strategic decision not to present her condition to the jury based upon a reasonable belief that the jury would see it as another failure on her part to take responsibility for herself and her children and, therefore, his representation was not deficient. We also conclude that even if counsel's performance was deficient, his failure to introduce her condition to the jury did not result in prejudice to Nannette. Accordingly, we affirm.

¶2 Nannette's son, Brandon, was removed from her custody on January 2, 2000, after police responded to a call from the residence. On March 30, 2000, Brandon was found to be a child in need of protection or services by the Winnebago County Department of Human Services. The circuit court subsequently presented Nannette with conditions for the return of Brandon to her home.

¶3 On May 15, 2002, the County filed a petition for the termination of the parental rights to Brandon. The petition alleged that the Department had made reasonable efforts to provide services ordered by the circuit court, that the child's mother had not complied with the conditions for the return of the child, and that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

there was a substantial likelihood that the child's mother would not meet those conditions within the twelve months subsequent to a fact-finding hearing.

¶4 At the termination of parental rights hearing, Andrew Balog, a social worker for the Department, testified to Nannette's noncompliance with the conditions. Balog testified that Nannette did not abstain from the use of alcohol and other drugs. Balog based his assessment that she had not been free of alcohol and illicit drugs on her disorderly conduct citations, and allegations from tenants stating that they had seen alcohol in her room and beer cartons in the garage that Balog himself had seen when going to meet with Nannette. He also testified that while he never smelled intoxicants, based on her behavior, it appeared that she had drank not long before meeting with him.

¶5 Balog testified that Nannette failed to comply with recommendations made for her for treatment and counseling. She had been offered AODA (alcohol and drug abuse assessment) treatment and counseling, but had not taken advantage of those services. He testified that she was also offered counseling, financial assistance and home consultant services by the Department. Balog testified that she did not set up appointments or follow up with counseling. He said she failed to show up for scheduled meetings at least ten times. She also failed to show up for the yearly Permanency Plan Review Hearings before the Department.

¶6 Balog testified that Nannette failed to demonstrate adequate parenting skills and provide for Brandon's physical, emotional, and educational needs. He testified that she did not maintain a suitable residence with sufficient food, clothing, bedding and furniture to meet the needs of the child. He testified that during the last two and a half years, Nannette lived in at least ten different residences, which included hotel rooms, shelters, low-income housing, and jail.

She was unable to maintain employment or eligibility for the W-2 program in order to be able to support the household and child financially. Further, Nannette did not express interest in Brandon's new life. She never requested to attend any activity with Brandon. He also testified that she did not demonstrate adequate parenting skills with the older children who still lived at home.

¶7 The jury found that the County had made reasonable efforts to provide the services ordered by the circuit court to Nannette and that she had failed to meet the conditions established for the safe return of the child to the parental home. The circuit court entered an order terminating Nannette's parental rights to Brandon.

¶8 Nannette then filed a motion for a new trial based upon ineffective assistance of counsel. Nannette alleged that her counsel was deficient because he failed to explore her sleep apnea and introduce testimony about it at trial. She claimed that such testimony would have rebutted the County's contention that she was an alcoholic in need of treatment. She appears to have been arguing that had the jury heard this testimony, it would have concluded that she was fit to regain custody of Brandon.

¶9 At the ***Machner***[2] hearing, Dr. Bradley Lauderdale testified that Nannette has sleep apnea. He testified that he recommended treatment to her in May 2000, but that she did not return to see him after that. Nannette testified that she did not seek any treatment for the sleep apnea between May 2000 and November 2002. She said that she discontinued her treatment because she did not

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

have insurance. However, she admitted that she did not ask Balog whether any financial assistance was available to provide her with treatment for sleep apnea. She then testified that she started receiving treatment for sleep apnea in November or December 2002 at the Theda Clark Sleep Apnea Center. When reminded that the trial had started on November 18, 2002, she clarified her testimony to say that she had the equipment before trial, between November 1 and November 18. But she conceded that she was not sure whether she actually turned the records of treatment from Dr. Lauderdale over to her counsel.

¶10 Nannette's trial counsel testified that he had no notes in his file with respect to Dr. Lauderdale's assessment of Nannette. He testified that the first that he had heard of her sleep apnea was at the disposition hearing. He then testified that he chose not to pursue the sleep apnea issue because it did not fit within his defense plan. The trial court found that Nannette's counsel was not ineffective and denied her motion. Nannette appeals.

¶11 On appeal, Nannette claims, as she did in the trial court, that her trial counsel was ineffective for failing to call Dr. Lauderdale or any other sleep apnea expert to testify regarding the major symptoms and treatments of the condition. Nannette claims that such testimony would have rebutted the testimony of Balog that Nannette was alcohol dependent and in need of treatment and would have demonstrated to the jury that the symptoms that Balog relied upon to conclude that Nannette was incapable of adequately caring for Brandon were inaccurate.

¶12 A parent in an involuntary termination of parental rights proceeding has a right to effective assistance of counsel. ***A.S. v. State***, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992). ***Strickland v. Washington***, 466 U.S. 668 (1984), sets out a two-prong test for deciding whether there has been ineffective assistance of

counsel: (1) whether counsel was deficient in his or her representation; and (2) whether that deficiency prejudiced his or her client. ***Id***. at 687, 692; *see also* ***State v. Harvey***, 139 Wis. 2d 353, 374-75, 407 N.W.2d 235 (1987) (adopting the ***Strickland*** test).

¶13 To fulfill the first prong, the parent must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. To prove the second prong, the parent must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. Finally, this court need not address both ***Strickland*** prongs if the petitioner fails to make a sufficient showing on either one. ***Id***. at 697.

¶14 In a claim of ineffective assistance of counsel, we are presented with a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). We will not overturn a trial court's findings of fact unless they are clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The legal conclusions as to whether counsel's performance was deficient and prejudicial, however, are questions of law that we review de novo. ***Flores***, 183 Wis. 2d at 609.

¶15 We begin our analysis with a discussion of the first prong of the ***Strickland*** test. Nannette argues that it was sleep apnea and not alcoholism that caused her failure to fulfill the conditions for the return of Brandon to her home. She argues that counsel was deficient because he was aware of her sleep apnea but

failed to investigate it further and introduce testimony at trial about its symptoms and treatment. However, Nannette's counsel testified that she did not inform him of her sleep apnea condition until the dispositional hearing. The client-lawyer relationship is essentially one of agency and the client, as a principal, owes certain duties to the lawyer**.** GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 2.4 (3d ed. Supp. 2003). A client has a duty to "arm the lawyer with sufficient truthful information to enable the lawyer to carry out his side of the bargain effectively." ***Id***. By failing to timely inform counsel of her sleep apnea, Nannette limited her counsel's ability to introduce this evidence at trial. Furthermore, once armed with the information about her sleep apnea condition, Nannette's counsel testified that he made a strategic decision not to pursue the issue.

¶16 The circuit court correctly noted that introducing Nannette's sleep apnea would have cut both ways. While the testimony of Dr. Lauderdale may have demonstrated that Nannette was not an alcoholic, it may have been more detrimental to her case. Dr. Lauderdale's testimony revealed that Nannette was aware of her condition, yet did not seek treatment for over two years. His testimony then would reinforce Nannette's lack of personal and parental responsibility. Therefore, counsel's decision not to introduce sleep apnea was a rational choice and one that a reasonably proficient attorney could have made. *See* ***Flores***, 183 Wis. 2d at 620. To engage in that type of trial strategy is not deficient performance by counsel.

¶17 Although we need not address the prejudice prong of the ***Strickland*** test, we choose to do so because even if Nannette is correct and her counsel's representation was somehow deficient, our confidence in the outcome of the proceeding is not undermined by her counsel's failure to introduce Nannette's

condition to the jury. Nannette contends that had her sleep apnea condition been introduced at trial, the testimony of Balog would have been rebutted and the jury would have believed that the County did not do enough to meet her special needs and, therefore, she had good cause for failing to meet the conditions for the return of Brandon. Nannette misses the point.

¶18 Regardless as to whether Nannette was suffering from alcoholism or sleep apnea, the bottom line is that both alcoholism and sleep apnea are diseases and the question in a termination of parental rights case is how the disease affects the individual's ability to parent. *See* ***B.L.J. v. Polk County DSS***, 163 Wis. 2d 90, 112, 470 N.W.2d 914 (1991) (recognizing that parental rights are terminated not because a parent is an alcoholic, but rather because of the effect that his or her particular problem has on his or her ability to function as a parent). Assuming that Nannette's problems were caused by sleep apnea and not alcoholism, Nannette still demonstrated an inability to take responsibility for her disease and her children. Nannette knew her disease was negatively affecting her ability to parent and her ability to comply with the court-required conditions for the return of Brandon, yet she did not take any action. Nannette did not seek treatment for sleep apnea or inquire about the possibility of receiving financial assistance for obtaining treatment for the disease from social services. Thus, presenting Nannette's sleep apnea condition to the jury would have only reinforced its conclusions that Nannette could not properly take care of herself or Brandon and that she did not have good cause for failing to meet the standards for Brandon's return. Nannette's argument that she was prejudiced by her counsel's failure to introduce her sleep apnea condition to the jury is, therefore, also without merit. For the foregoing reasons, we affirm the holding of the circuit court.

By the Court.—Orders affirmed.

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