COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1219 **Cir. Ct. No. 02TP000058**

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

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

WINNEBAGO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRUCE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, J.[1] In this termination of parental rights case, the trial court, without the benefit of this court's decision in ***Stephen V. v. Kelley H.***, 2003 WI App 110, ¶35, 263 Wis. 2d 241, 663 N.W.2d 817, *review granted*, 2003 WI 91, 262 Wis. 2d 500, 665 N.W.2d 375 (Wis. June 12, 2003) (No. 02-2860), did not advise Bruce H. of his right to a continuance to consult with an attorney to discuss requesting substitution of the judge pursuant to WIS. STAT. § 48.422(5). Bruce argues that he is entitled to a new trial as a result. However, we conclude that the question of prejudice has yet to be determined. We remand for a further hearing on the question pursuant to ***State v. Kywanda F.***, 200 Wis. 2d 26, 546 N.W.2d 440 (1996).

¶2 The controlling facts are brief. On July 3, 2002, the Winnebago County Department of Health and Human Services filed a petition seeking to terminate Bruce's parental rights to his daughter, Brianna S.B., pursuant to WIS. STAT. § 48.415(2). Following a fact-finding hearing in October, a jury found grounds existed to terminate Bruce's parental rights. The court subsequently held a dispositional hearing in November. At the conclusion of the hearing, the court ordered Bruce's parental rights terminated. Bruce filed a motion for a new trial, alleging that he did not learn that he could substitute judges in a termination of parental rights case until after the dispositional hearing. At the motion hearing, Bruce specifically testified that no one explained to him that he could substitute the judge at his first appearance and that it was not until after the dispositional hearing that he learned of this right. At the conclusion of the hearing, the court denied the motion for a new trial. This appeal followed.

[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.

¶3 The ***Steven V.*** court determined that in a termination of parental rights proceeding, the trial court has a duty to advise the nonpetitioning party at the initial hearing of his or her right pursuant to WIS. STAT. § 48.422(5) to request a continuance to consult with his or her attorney on the substitution of the judge. ***Steven V.***, 263 Wis. 2d 241, ¶35. Of course, we are bound by this determination, as is the trial court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Here, the trial court did not inform Bruce of this right at the initial hearing. At the posttermination motion hearing, the trial court explained:

> I don't as a practice indicate that [the parent has a right to substitution] in involuntary TPR hearings and the reason I don't is because I cannot find any statutory requirement that I have to.

While we recognize that the trial court's view has merit, *see* ***Steven V.***, 263 Wis. 2d 241, ¶¶43-55 (Lundsten, J., concurring), it is not the law at this time. Thus, the question before the court is whether the trial court's omission entitles Bruce to a new trial.

¶4 In ***Kywanda F.***, a delinquency proceeding, the trial court failed to advise the delinquent of the right to judicial substitution pursuant to WIS. STAT. §§ 48.29(1) and 48.30(2). ***Kywanda F.***, 200 Wis. 2d at 30-32. The supreme court first held that the trial court's failure to follow this mandatory directive did not defeat the trial court's subject matter jurisdiction or competency to proceed.[2] ***Id.*** at 33-34.

---

[2] On the matter of competency to proceed, the supreme court observed that prior case law had never held that the failure to advise of the right to judicial substitution had resulted in a loss of competency to proceed. ***State v. Kywanda F.***, 200 Wis. 2d 26, 34, 546 N.W.2d 440 (1996). Instead, the court observed that the loss of competency to proceed was limited to instances where the trial court had failed to abide by the time

(continued)

¶5 Instead, the supreme court held that the appropriate remedy was a prejudice inquiry. ***Id.*** at 37-41. Such prejudice is shown "if it is established that the juvenile was not told of the right and did not know of that right." ***Id.*** at 37. In making that determination, the supreme court adopted a ***Bangert***-type[3] analysis. The juvenile must first make a prima facie showing that the court violated its mandatory statutory duties and allege that he or she in fact did not know of the information that the court was statutorily required to provide. ***Kywanda F.***, 200 Wis. 2d at 38. If the juvenile makes this showing, the burden then shifts to the State to demonstrate by clear and convincing evidence that the juvenile knew of the statutory right and therefore was not prejudiced. ***Id.***

¶6 Applying the ***Kywanda F.*** analysis to this case, we first observe that there is no dispute that the trial court failed to inform Bruce of his right to a continuance to consult with an attorney about his right to substitution of the judge. We also observe that Bruce has alleged and testified that he did not know of his right to seek substitution of the judge until the dispositional hearing. Therefore, we hold that Bruce has made his required prima facie case, and the burden has shifted to the County pursuant to ***Kywanda F.***

---

limits prescribed by WIS. STAT. ch. 48. ***Kywanda F.,*** 200 Wis. 2d at 34. In support, the court noted the statutory history indicating that the strict time limits of the juvenile code were designed to protect the due process rights of the parties whereas no such equivalent legislative history existed with regard to the substitution of judge statute. ***Id.*** at 35-36. In addition, while recognizing the constitutional right to be tried by an impartial judge, the supreme court rejected the argument that a failure to advise of the right of judicial substitution violated due process. ***Id.***

[3] ***State v. Bangert,*** 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶7 However, we are unable to take the analysis any further because the trial court's posttermination ruling was not premised on ***Kywanda F.*** or any ***Bangert*** analysis. Instead, the court conducted a harmless error analysis, stating:

> [Bruce] has not shown the court any bias or prejudice or any reason why he would have asked for substitution of judge at the time, and I think there has to be some prejudice shown here by the defendant that because he didn't ask for a substitution and wasn't told about that that he was prejudiced in some fashion. I can't find that.
>
> He didn't present to the court any testimony today of any bias or prejudice that resulted from him not requesting a substitution, so the court is going to find, based upon all that, that he was not prejudiced in any fashion here.

Thus, the trial court did not make a finding that Bruce nonetheless knew of his right to substitution in this particular setting.[4] It is not our function as an appellate court to make findings of fact. ***Wurtz v. Fleischman,*** 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Rather, this determination is appropriately left to the trial court. The supreme court faced this same dilemma in ***Kywanda F.*** and remanded the matter to the trial court for that determination. ***Kywanda F.,*** 200 Wis. 2d at 41. We do likewise.

By the Court.—Order reversed and cause remanded with directions.

[4] The County, relying on ***Steven V.***, implicitly argues that the trial court correctly applied a harmless error analysis. ***Steven V.***, however, must be read in context. There, it was undisputed that the parent knew she had the right to substitution and had discussed it with her counsel; thus, the finding of no prejudice turned on her knowledge of the right to a continuance. ***Steven V. v. Kelly H.***, 2003 WI App 110, 263 Wis. 2d 241, ¶42, 663 N.W.2d 817, *review granted*, 2003 WI 91, 262 Wis. 2d 500, 665 N.W.2d 375 (Wis. June 12, 2003) (No. 02-2860). Harmless error in this instance is not a question of whether the sitting judge was actually prejudiced, but is rather a question of whether the parent knew about the right to request substitution even absent the right to counsel.

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