COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2071 **Cir. Ct. No. 02TP000115**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAVONA T., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CLAURICE T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Claurice T. appeals the order terminating her parental rights to Javona. The sole issue on appeal is whether the trial court lost

[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.

competency to proceed because a fact-finding hearing was not held within forty-five days of the initial hearing on the petition for termination. We conclude the court did not lose competency to proceed because it complied with the requirements of WIS. STAT. § 48.315(2) for extensions beyond the forty-five-day time period. Accordingly, we affirm.

BACKGROUND

¶2 The petition was filed on August 14, 2002, alleging as grounds abandonment under WIS. STAT. § 48.415(1)(a)2, and child in need of protection and services with failure to meet the conditions for the safe return of the child (CHIPS) under § 48.415(2).[2] At the plea hearing on September 11, 2002, Claurice appeared unrepresented and stated that she wanted an attorney appointed for her. The court found good cause to continue the initial hearing so that an attorney could be appointed for her. The continued plea hearing was held on September 26, 2002, at which Claurice appeared with counsel, entered a denial to the petition, waived substitution of judge, and requested a jury trial. At the close of this proceeding, the court stated:

> THE COURT: Okay. I guess what we need to do then is schedule a pretrial conference and go from there, unless you're asking that I set the trial dates today. Since the guardian ad litem is not here, it doesn't make much point to try to schedule trial dates so we'll close the record unless there's anything else anybody wants to put on the record."
>
> [ATTORNEY FOR DANE COUNTY]: I don't believe so, Your Honor. We're just going to set a pretrial after we go off the record?

[2] The petition was also filed against Javona's father. The court found him in default and found that grounds had been established to terminate his parental rights; subsequently the court entered an order terminating his parental rights. That decision is not at issue on this appeal.

> THE COURT: We will. Okay. We'll go off the record.
>
> (Discussion off the record.)
>
> THE COURT: I need to find good cause to continue fact finding in this case and now we're back off.
>
> (Proceedings concluded.)

¶3 The pretrial conference took place on October 22, 2002. Claurice's counsel reaffirmed that Claurice maintained her denial to the petition and was requesting a jury trial. The parties and the court then discussed the length of time that would be needed for a trial, with the attorney for Dane County and the guardian ad litem indicating at least two days were needed, and Claurice's attorney not having a definite opinion, but willing to defer to the judgment of the other two attorneys. The following then occurred:

> THE COURT: Let's see what we have, and then we'll try and make the case fit into the time. Before we go off the record I'll find good cause to continue fact-finding in this case. And now we'll go off the record so we can schedule.
>
> (Discussion held off the record)
>
> THE COURT: I'll find good cause to continue these proceedings, fact-finding in these proceedings until January 6th, which is the date for the jury trial.

That concluded the proceedings on that date. The written pretrial order subsequently issued by the court stated that the trial would occur on January 6, 7, and 8.

¶4 On November 21, 2002, Claurice's attorney filed a motion to withdraw as Claurice's counsel on the ground that on November 20, 2002, when she met with Claurice at the Dane County Jail, after speaking to her for approximately five minutes, Claurice hung up the telephone and terminated the conference. Counsel opined that as a result of Claurice's refusal to speak with her

regarding the case, she (counsel) was unable to effectively represent Claurice. At the pretrial conference and motion hearing on December 16, 2002, Claurice explained that she had felt under a great deal of pressure and that is why she hung up the telephone on counsel, but, she stated, she believed she could still work with counsel. Based on counsel's representation that it would be better for Claurice to have another attorney and a "fresh start," the court granted the motion. Because it was then necessary to appoint new counsel, the court stated there would have to be another scheduling conference and they would "go off the record for a moment so that we can schedule this." After a discussion held off the record, the court stated: "Let's briefly go back on the record. I'll find good cause to continue fact-finding in this case due to the withdrawal of counsel and the need to appoint new counsel, and good cause until January 3rd. Thank you."

¶5 At the status conference held on January 3, 2003, Claurice appeared without counsel, none having yet been appointed for her. After going off the record to make arrangements for counsel to be appointed, the proceeding went back on the record with the court stating: "I will find good cause to continue for a status conference and hopefully scheduling conference until January 9th. Anything else to put on the record at this point?" Counsel had nothing further and the proceeding concluded for that date.

¶6 On January 9, 2003, Claurice appeared with new counsel. The attorney for the County stated at the beginning of the conference that they had been waiting for appointment of new counsel, and because Claurice's counsel was new, it was necessary to "reschedule the trial in this case and put together a scheduling order." The court agreed:

> THE COURT: Yes, we do and we'll go off the record to do that. We'll go back on, of course, when it comes time to

> make a good cause finding which I do need to do because whatever date we find will be outside the time limit, I'm sure. Okay. So let's go off the record.
>
> (Discussion off the record.)
>
> THE COURT: Let's go back on the record and I'll find good cause to continue fact finding to the date of the jury trial which is jury selection February 24th and jury trial 27th and 28th of February.

¶7 On February 5, 2003, Claurice's counsel moved for a continuance of the trial on these grounds: he still needed to obtain Claurice's medical records and her files from the Social Security Administration and Probation and Parole; he needed to take some additional depositions; the expert he had retained was not available on the trial dates; and meeting with Claurice was difficult because she was incarcerated. The court decided these reasons did not constitute good cause to postpone the trial. The court indicated, however, that if counsel concluded the expert's testimony was necessary and the expert was unable to appear by telephone, video conference, or any other alternative, counsel could renew the motion.

¶8 Jury selection began on February 24, and the trial took place from February 27 to March 1. The jury returned a verdict, one juror dissenting, that there were grounds for termination based on abandonment and, with two jurors dissenting, that there were grounds based on CHIPS. At the disposition hearing on March 26, 2003, the court determined that it was in Javona's best interests to terminate Claurice's parental rights.

DISCUSSION

¶9 Claurice contends on appeal that the court lost competency to proceed because it did not hold the fact-finding hearing within forty-five days of

the initial hearing as required by WIS. STAT. § 48.422(2)[3] and the requirements for a continuance under WIS. STAT. § 48.315(2) were not met. This latter section provides:

> **Delays, continuances and extensions.**
>
> ….
>
> (2) A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

It is well established that the time limits in § 48.422(2) are mandatory, and the only provision for delays, extensions, or continuances are contained in § 48.315. ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 639-40, 549 N.W.2d 489 (Ct. App. 1996). Failure to comply with the time limits without adhering to the requirements of § 48.315(2) for extending the time limits results in the court's loss of competency to proceed and requires dismissal of the petition. ***State v. April O.***, 2001 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927.

¶10 Whether the trial court complied with the requirements of WIS. STAT. § 48.315(2) when the relevant facts are undisputed presents a question of law, which we review de novo. ***April O.***, 233 Wis. 2d 663, ¶6.[4]

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[3] WISCONSIN STAT. § 48.422(2) provides:

> (2) If the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days of the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately.

¶11 We address at the outset Claurice's contention that, because the court put on the record only its determination that good cause existed and not the reasons for the determination, the court did not comply with WIS. STAT. § 48.315(2). The statute by its terms contemplates that the "showing of good cause" must be "in open court … on the record." *See* ***Darlene R.***, 201 Wis. 2d 633 at 641, 642 (stating § 48.315(2) requires that "the proceeding must be 'in open court … on the record'"; the "on the record" provision may be satisfied by the clerk's minutes of the proceeding). We agree with Claurice that this means that the reasons for the good cause determination, as well as the court's determination of good cause, must be apparent from the record—whether from the transcript or the clerk's minutes. While it makes sense for the trial court not to have the court reporter transcribe the discussion and details of scheduling, when the court "comes back on the record," the court should state the reasons for the determination of good cause as well as the determination itself. Not doing so may result in a reviewing court's inability to decide whether the trial court's determination has support in the record. *See* ***Coston v. Joseph P.***, 222 Wis. 2d 1, 7 n.5, 586 N.W.2d 52 (Ct. App. 1998).

¶12 However, we do not agree with Claurice that the trial court's failure here to expressly state the reasons for the good-cause determinations on the

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[4] Claurice appears to argue that we review the trial court's decision on good cause as an exercise of discretion, but she does not cite a case in support of that proposition. We applied a de novo standard of review in ***State v. April O.***, 2001 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927, and ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752. In the absence of case authority supporting a different standard of review, that is the standard of review we employ in this case. However, since a de novo standard of review is less deferential to the trial court than review of a discretionary decision, we would affirm under the latter standard as well. *See* ***Rodak v. Rodak***, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989) (we affirm discretionary decisions if the trial court applies the correct law to the facts of record and uses a rational process to reach a reasonable decision).

record—that is, either recorded in the transcript or in the clerk's minutes—automatically means the court did not comply with the requirements of WIS. STAT. § 48.315(2). In situations where the trial court has not explicitly made a determination of good cause, we have reviewed the record to decide whether it contained evidence to support such a determination. ***R.A.C.P. v. State***, 157 Wis. 2d 106, 113, 458 N.W.2d 823 (Ct. App. 1990); ***State v. Quinsanna D.***, 2002 WI App 318, ¶39, 259 Wis. 2d 429, 655 N.W.2d 752. This case differs in that the trial court did explicitly make the determination but did not explicitly state the reasons. However, the principle is the same: we examine the record as a whole to decide whether it contains evidence that supports the trial court's determinations of good cause. We conclude that it does.

¶13 In this case, both parties agree that the forty-five days for holding a fact-finding hearing did not begin to run before September 26, 2002, the date of the continued initial hearing at which Claurice contested the petition. However, both parties also recognize that in ***Darlene R.***, 201 Wis. 2d at 642-43, we held that the scheduling of a pretrial constitutes a good cause for a continuance under WIS. STAT. § 48.315(2), and there is no need for the court to specifically recite the benefits of a pretrial. Thus, Claurice does not dispute that in this case the forty-five days did not begin to run until October 22, the completion of the pretrial, when the case was ready to be scheduled for trial. On that date, the court scheduled the trial for January 6, one month after the expiration of forty-five days from October 22. Although the court did not expressly state that good cause existed because this was the first date available for a trial of the length needed, that reason is plainly evident from the record. The two attorneys who had an opinion felt that at least two days were needed; the court went off the record to "see what we have," then, back on the record, stated there was "good cause to continue …

fact-finding in these proceedings until January 6." The congestion of the court's calendar constitutes good cause under § 48.315(2), ***J.R. v. State***, 152 Wis. 2d 598, 607, 449 N.W.2d 52 (Ct. App. 1989).

¶14 The reasons the fact-finding hearing was not held on January 6, 2003, flow from Claurice's counsel's motion to withdraw and the resulting need to appoint new counsel and reschedule to accommodate new counsel. At each of these points, the court determined there was good cause for continuing the proceeding, and we are satisfied the record supports each determination. There is no question that the withdrawal of Claurice's counsel on December 16 and the need to appoint new counsel constituted good cause not to have the trial begin January 6 as scheduled. It was then necessary to schedule another pretrial conference with new counsel present, and the court did that for January 3. However, that conference had to be continued because new counsel had not been appointed by January 3; once this was brought to the court's attention, the court acted expeditiously in getting new counsel appointed and holding the conference on January 9. As we have already explained, the holding of a pretrial conference constitutes good cause, and that includes not only the initial pretrial, but the continued ones as well. ***Darlene R.***, 201 Wis. 2d at 643.[5]

[5] We stated in ***Waukesha County v. Darlene R.***, 201 Wis. 2d 633, 643, 549 N.W.2d 489 (Ct. App. 1996), that the pretrial process "consisted of not only the initial pretrial, but a series of continued pretrial proceedings," with the last held four-and-one-half months after the first.

> Our experience teaches that a pretrial often requires a number of hearings to complete. But this does not change the fact that there was one collective pretrial which was not completed until the final pretrial on May 9. Thus, under ordinary circumstances, the thirty-day time limit for the fact-finding hearing would have begun running on that date.

(continued)

¶15 The final time period involved is that from the completed pretrial on January 9 to the fact-finding hearing, which began on February 24. It is evident from the court's explanation before going off the record at the close of the January 9 conference that the court was attempting to find open dates on its calendar that would accommodate the time needed for the fact-finding hearing. As we have already concluded, the congestion of the court's calendar constitutes good cause for not holding the hearing sooner, that is, not holding it closer to January 9, the completion of the pretrial.

¶16 In summary, we conclude the court did not lose competency to proceed because it complied with the requirements of WIS. STAT. § 48.315(2) for extensions beyond the forty-five-day time period.

By the Court.—Order affirmed.

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

Id. Because ***Darlene R.*** was a CHIPS case, not a termination of parental rights case, the time period for holding a fact-finding hearing was thirty days from the plea hearing. WIS. STAT. § 48.30(7). We added the phrase "under ordinary circumstances" because there a request for a psychological evaluation further tolled the thirty-day time period under WIS. STAT. § 48.315(1)(a). ***Id.*** at 643-45.