COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1421 **Cir. Ct. No. 2004TP30**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MATTHEW D.G., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CELESTE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Celeste H. appeals an order of the circuit court terminating her parental rights to her son, Matthew D.G. Celeste argues that the circuit court erred when it gave the jury an "***Allen***" instruction after the jury had deliberated only two and one-half hours. We disagree and affirm.[2]

Background

¶2 On April 30, 2004, Rock County filed a petition for termination of Celeste H.'s parental rights to her three-year-old son Matthew. The grounds for the petition were a continuing need of protection and services. Celeste contested the petition, and the case proceeded to a jury trial on January 27-28, 2005.

¶3 Including Celeste, eight witnesses testified. The evidence showed that Celeste had a long-term addiction problem involving several drugs, including heroin. She had been arrested and convicted several times and was incarcerated at the time of trial. Celeste had limited success in treatment programs. She had been terminated from a treatment program at the Rock County Jail.

¶4 The trial began January 27. At 12:30 p.m. on January 28, the jury began deliberating. At 3:00 p.m., the jury sent out a message indicating that they were deadlocked on question number four and requesting instruction:

> THE COURT: We're back on the record in 04TP30. The record should reflect the appearance of the parties and counsel. I have another question from the jury and it reads: "Our vote on number 4 is 4 for no and 8 for yes. Nobody is moving, exclamation point. Should we

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] WISCONSIN JI—CRIMINAL 520 is commonly referred to as the "***Allen*** charge" after ***Allen v. United States***, 164 U.S. 492 (1896).

turn this in like this, question mark." Would you like me to give them the [***Allen***] charge at this point in time? Only been out two-and-a-half hours.

MR. BREHM: I would not request that, myself.

[MS.] TIMMERMAN: What is the general summary?

THE COURT: The general summary is please go back and try to do this again. You have heard the evidence. If this case were to be retried no other jury could do as well as you could do. Something to that effect.

[MS.] TIMMERMAN: I guess I don't have a strong opinion either way. I will defer to the court's judgment on that.

THE COURT: I don't have it specifically in front of me. I can certainly go up and get it and then I can read it to you and we might have a better idea where you want to go. Why don't I do that. So we will recess momentarily while I get that instruction.

(Short recess).

THE COURT: All right. We're back on the record again in 04TP30 with all parties and counsel present. I have had a chance to run off 520, supplemental instruction of agreement and provided a copy to counsel. Ms. Timmerman, you have had a chance to look at that. Do you want me to read that to the jury?

[MS.] TIMMERMAN: Your Honor, you know, I have never had a hung jury before. At what point—I don't know at what point it becomes futile to do this. I wouldn't object to the court doing this and trying for a little while longer. But I also would not be upset if we just stopped now.

THE COURT: Ms. Nash Elliott.

MS. NASH ELLIOTT: I guess I would agree with her statements on that.

THE COURT: I certainly know how you feel, Mr. Brehm. Do you want to put it on the record?

MR. BREHM: For the record I would disagree with this instruction being given at this point. The jury has not

> really been out all that long in the grand scheme of things, so I think it's probably premature.
>
> THE COURT: Well, then are you asking me just to have them continue to deliberate without reading the instruction, Mr. Brehm? Is that what you're asking?
>
> MR. BREHM: Yes.
>
> THE COURT: Well, I think that if I am going to have the jury come back in here I have to give them some direction. And I think if they are going to continue to deliberate I should read the instruction. I know it's somewhat less time than might be normal to give this charge. But I think it's appropriate to give it and I will give it, then, at this time. So we will bring in the jury and I will read them this instruction and return them and see how things go.

¶5 The court read the jury an instruction based on WIS JI—CRIMINAL 520. The instruction that the court gave reads as follows:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that might be called to determine such issues. You are not going to be made to agree nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate. They should be open-minded. They should listen to the arguments of others and talk matters over freely and fairly and make an honest effort to come to a conclusion on all of the issues presented to them. And I am sure that's what you folks are doing. But I am going to ask you to go back in the jury room and rehash this one more time, see where you're at. And whatever you come to, fill out the verdict to the best of your ability after you have done that for another period of time. Thank you for your question, and I'll ask you to retire back to the jury room.

The jury returned to its deliberations and, shortly thereafter, reached a verdict.

Discussion

¶6 Celeste argues that the circuit court erred when it gave the jury an "***Allen***" instruction after the jury had deliberated only two and one-half hours.

Citing ***Quarles v. State***, 70 Wis. 2d 87, 233 N.W.2d 401 (1975), Celeste asserts that the ***Allen*** charge may only be given when a jury is actually unable to reach agreement. Celeste argues that "[t]here is a difference between having difficulty reaching agreement and being *unable* to reach agreement." Moreover, Celeste argues that the circuit court viewed the situation as all or nothing: either give the ***Allen*** charge, or don't answer the jury's question. Celeste points out that there was a middle ground because the court could have simply told the jurors to make a reasonable effort to reach an agreement. We are not persuaded.

¶7 We agree with the County that a jury may be given an ***Allen*** charge even if it has not indicated an inability to agree. Indeed that was the precise issue in ***Quarles***, where a trial judge gave an ***Allen*** charge on his own initiative without any indication that the jury was unable to agree. ***Quarles***, 70 Wis. 2d at 89-90. The ***Quarles*** court rejected the defendant's argument that an ***Allen*** charge could only be given when a jury informed the court that it was deadlocked or having difficulty reaching a verdict. ***Quarles***, 70 Wis. 2d at 91.

¶8 As to Celeste's argument that there was a middle ground, we fail to see why this middle ground is substantively different than Wisconsin's ***Allen*** charge. And, even if there was a substantive difference, Celeste's trial counsel did not suggest a middle ground. This argument is waived.

¶9 We also agree with the County that the jury in this case informed the court that it was having serious trouble agreeing on a verdict. The note sent to the judge read: "Our vote on #4 is 4 for no and 8 for yes. Nobody is moving! Should we turn this in like this?" This note plainly communicates that jury deliberations have stalled out. The judge sensibly responded by giving the ***Allen*** charge.

¶10 Celeste says that the ***Allen*** charge is known as the "dynamite charge" and she says its purpose is to "jolt a 'stuck' jury." But this is hardly a fair characterization of Wisconsin's version of the ***Allen*** charge. The ***Quarles*** court explained:

> The defendant acknowledges that prior decisions of this court have held that this supplemental instruction is not coercive on its face.
>
> ….
>
> The defendant refers to the supplemental instruction given in this case as the "***Allen*** charge," and also as the "so-called ***Allen*** instruction." We would emphasize that the supplemental instruction given in this case and approved by this court in ***Kelley v. State***, *supra*, ***Madison v. State***, *supra*, and ***Ziegler v. State***, *supra*, is not the "***Allen*** charge" or "so-called ***Allen*** instruction."
>
> This court … expressed its disapproval of [the] coercive element of the ***Allen*** charge thirty years ago in ***Mead v. Richland Center*** (1941), 237 Wis. 537, 297 N.W. 419. The drafters of the Wisconsin instruction considered that decision, omitting all references to minority or majority views. The present Wisconsin instruction charges *all* members of the jury to make an *honest effort* to agree. In addition, the instruction expressly informs the jury members they will not "'be made to agree, or ... be kept out until [they] do agree.'" ***Kelley v. State***, *supra*, p. 647.

Quarles, 70 Wis. 2d at 89-90 (citations and footnote omitted).

¶11 It is no surprise that our supreme court has concluded that Wisconsin's ***Allen*** charge is non-coercive. The instruction simply tells the jurors that they are as competent to decide the case as any other jury, that they are not going to be made to agree or held until they do agree, that they have a duty to make an honest and sincere attempt to arrive at a verdict, that they should not be obstinate but instead open-minded, that they should listen to the arguments of others and talk freely, and that they should make an honest effort to come to a

conclusion on the issues. Notably, Celeste does not point to any coercive language in the instruction.

¶12 Finally, Celeste relies on ***State v. Hammond***, 609 P.2d 1171 (Kan. Ct. App. 1980). In ***Hammond***, the Kansas Court of Appeals held that "the giving of an ***Allen***-type instruction after the jury has deliberated for only 3 hours and 27 minutes, and particularly when the giving of same is objected to, is error." ***Id.*** at 1176. We do not find this opinion helpful. First, the opinion does not specify the content of the Kansas ***Allen*** charge. Second, the opinion does not explain what language in the Kansas ***Allen*** charge is coercive. Third, it is apparent that the ***Hammond*** court was influenced by the fact that one hour after the ***Allen*** charge was given the trial court *sua sponte* ordered the jury to return and again prompted them. Fourth, the ***Hammond*** court's conclusion that the trial court erred in giving the ***Allen*** charge did not result in a new trial; instead, the Kansas appellate court found that the error was harmless. ***Hammond***, 609 P.2d at 1176.

¶13 In sum, the circuit court in this case reasonably chose to respond to the jury's note by reading the jury the ***Allen*** charge. The jury had indicated that it was stuck, and the instruction gently informs a jury that it should do its best to reach a verdict. The circuit court did not misuse its discretion.

By the Court.—Order affirmed.

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