COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2304 **Cir. Ct. No. 2006TP31**

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

IN THE INTEREST OF ZOEE J.B., A PERSON UNDER THE AGE OF 18:

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CAROLYN S. B.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

¶1 SNYDER, J.[1] Carolyn S.B. appeals from an order terminating her parental rights to Zoee J.B. She contends that she received ineffective assistance of counsel because her attorney did not raise and argue the defense afforded incarcerated parents under ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845. Carolyn asserts that her lawyer should have advised her to contest the grounds for termination because her incarceration prevented her from complying with her conditions of return. She further argues that her attorney was ineffective for failing to call an expert to explore Carolyn's likelihood of success in treatment for alcoholism. We disagree and affirm the order for termination of Carolyn's parental rights.

¶2 Carolyn also appeals from an order denying her motion to withdraw her plea. She contends that her no contest plea to the grounds for termination stemmed from a misunderstanding of the law caused by ineffective assistance of counsel and that the circuit court erred when it concluded that her plea was knowingly, voluntarily and intelligently made. She also argues that the court failed to consider the statutory factors or the proper legal standard when reaching its decision to terminate her parental rights. We ascertain no error in the circuit court's rulings and therefore affirm the order denying Carolyn's motion for plea withdrawal.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

¶3 Zoee was born to Carolyn on March 21, 2004.[2] She was found to be a child in need of protection or services on February 20, 2006, pursuant to WIS. STAT. § 48.13(8), (10) and (3m). Zoee was placed outside of the home and remained in such placement until the petition for termination of Carolyn's parental rights was filed on September 14, 2006.[3]

¶4 According to the terms of the CHIPS dispositional order, Carolyn was to participate in an AODA assessment and a psychological evaluation and follow through with any resulting recommendations, refrain from ingesting any alcohol or drugs before visits with Zoee, cooperate with the assigned social worker, participate in regularly scheduled visits, sign all necessary releases, complete a parenting program, demonstrate an ability to provide for Zoee's physical and emotional needs, establish and maintain a suitable residence with sufficient food and other necessities, and demonstrate a reasonable effort to obtain and maintain employment. The TPR petition alleged that Carolyn had complied with two conditions: she signed all necessary releases and she completed a parenting program through Children's Service Society. The petition alleged that she had substantially failed all other conditions and that because she had "a

[2] On the petition for termination of parental rights, Zoee's date of birth is incorrect. The correction is made on the record at the TPR plea hearing. William H., Jr. was adjudicated Zoee's father but voluntarily terminated his parental rights.

[3] Zoee was first removed from Carolyn's home on December 15, 2005, and spent one night with her grandmother. She then went to her aunt's home, where she stayed for two weeks while her aunt was on vacation from work. Zoee was then moved to a foster home, where she stayed just two or three days. The foster home was unable to care for Zoee's special health needs. Zoee was moved to a second foster home and spent approximately one week there. Again, she was unable to stay longer due to serious health concerns. Finally, Zoee was placed in a third foster home, where she remained throughout the TPR process.

longstanding history of abuse of alcohol or other drugs … [she would] not be able to meet the conditions of return within the 12 month period following any fact-finding hearing."

¶5 At the first phase of the TPR proceedings, Carolyn entered a plea of no contest, admitting that there was "a factual basis for the termination of [her] parental rights." The circuit court then proceeded with the plea colloquy. It confirmed that Carolyn knew her plea meant the court would make a finding that she was an unfit parent. The court went through the specific allegations concerning Zoee's status as a child in continuing need of protection or services. It assessed Carolyn's understanding of the right to a jury trial on the question, including the right to call and confront witnesses, and her knowledge of the burden the County would face in proving the allegations in the petition. Finally, the court asked Carolyn if she understood that her plea could lead to the termination of her parental rights and she stated that she did.

¶6 The circuit court then heard from Carolyn that she had received a copy of the TPR petition, had reviewed it with her attorney, and understood the contents. Carolyn agreed that the information in the petition was "basically true and correct." She stated that she had discussed her decision to plead no contest with the social worker and with Zoee's guardian ad litem. Carolyn told the court that her plea was not coerced, that she did not need any more time to consider her plea, and that she had made her decision. The court accepted her plea.

¶7 The circuit court held a dispositional hearing on February 21, 2007. There, the circuit court heard testimony from Carolyn's probation agent, Zoee's social worker, Zoee's grandmother, her half-brother, and from Carolyn. Ultimately, the court terminated Carolyn's parental rights to Zoee.

¶8 Carolyn subsequently moved to withdraw her plea on grounds her attorney was ineffective and that her plea did not reflect an understanding of her right to contest the grounds for termination. Her motion was denied.

DISCUSSION

Ineffective Assistance of Counsel

¶9 On appeal, Carolyn first argues that she received ineffective assistance of counsel because her attorney did not rely on ***Jodie W.*** to contest the grounds for termination. In ***Jodie W.***, our supreme court held that "a parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent." ***Id.***, 293 Wis. 2d 530, ¶49. To prove ineffective assistance of counsel, Carolyn must show (1) deficient performance by her attorney and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). She asserts that her trial counsel's failure to mount an argument drawing from the precept of ***Jodie W.*** amounted to deficient performance and resulted in prejudice.

¶10 In ***Jodie W.***, our supreme court stated that termination of a parent's fundamental right to parent his or her child requires an "individualized determination of unfitness." ***Jodie W.***, 293 Wis. 2d 530, ¶49. Furthermore, "a parent's failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit." ***Id.*** Therefore, the trial court must evaluate the "particular facts and circumstances relevant to the parent and the child involved in the proceeding." ***Id.***, ¶50.

¶11 The State argues that Carolyn's reliance on ***Jodie W.*** is misplaced and we agree. In ***Jodie W.***, the mother's period of incarceration began nearly two years before the TPR petition was filed and her earliest parole eligibility was over

one year after the dispositional hearing. ***Id.***, ¶¶4, 8, 13. Contrary to Carolyn's assertion that her situation is similar and that her incarceration made it impossible to meet the conditions of return, Carolyn had several opportunities to meet those conditions while out of jail. The court found Zoee to be a child in need of protection or services on February 20, 2006, and conditions of return were set. Carolyn, who was released into the community in May, had the opportunity to change her situation, to continue her treatment, and to create an environment for Zoee's safe return. Instead, Carolyn was detained for alcohol-related violations of her probation and was re-incarcerated twice in July. The TPR petition followed on September 14, 2006. Carolyn was again jailed in November for another alcohol-related incident. At the postdispositional proceeding on Carolyn's motion for plea withdrawal, the circuit court observed that Carolyn "had ample opportunity meet the conditions when she was not incarcerated; and for some of the time she … was released specifically for treatment to meet the conditions of return."

¶12 When testifying in response to Carolyn's motion for plea withdrawal, her TPR counsel explained that she had reviewed ***Jodie W.*** but had determined that it was inapplicable to Carolyn's situation. She testified as follows:

> If my understanding is correct, [***Jodie W.***] focuses on whether the issue of incarceration can be used as a sole factor for determining the parent to be unfit …. I didn't see that as applying in our case because [Carolyn] would not be incarcerated for more than six months under the terms of the ATR [alternative to revocation], and she would have a period of 12 months after the fact-finding hearing in which to complete [the conditions].

¶13 As our analysis above indicates, this was a reasonable conclusion. Carolyn's incarceration did not keep her from meeting the conditions of return; rather, Carolyn's repeated probation violations, or more specifically her alcohol

abuse while on probation, kept her from meeting the conditions for Zoee's return. The State captures the concept well by asserting:

> The Wisconsin Supreme Court's holding in ***Jodie W.*** should not be read to give an unfit parent *carte blanche* to behave in ways inimical to responsible parenting, to return oneself to jail repeatedly when parental rights hang precariously in the balance, and to then cry "impossible to meet conditions of return."

¶14 Carolyn has not shown that her TPR attorney's assessment of ***Jodie W.*** was legally deficient. Further, because ***Jodie W.*** offers little guidance under the particular facts of Carolyn's case, failure to raise and argue it was not prejudicial.

¶15 Carolyn also argues that her trial counsel was ineffective for failing to present expert alcohol treatment testimony. Carolyn directs us to ***Brown County v. Shannon R.***, 2005 WI 160, ¶¶4-5, 286 Wis. 2d 278, 706 N.W.2d 269, for the proposition that it is error to exclude expert testimony about the likelihood a parent will be able to meet conditions of return. She asserts that an expert could have testified about alcoholism, relapse, and treatment, specifically with regard to how Carolyn could "resolve her alcoholism and break her cycle of relapsing." However, as the circuit court summed up, Carolyn's attorney identified four alcohol counselors who had worked with Carolyn and "[i]ndicated she could get no positive testimony from any of them." Nothing in Carolyn's arguments contradicts this statement. Again, we see nothing that leads us to conclude counsel's performance was deficient.

Plea Withdrawal

¶16 Next, Carolyn challenges the circuit court's refusal to allow her to withdraw her no contest plea to the grounds for termination. She asserts that her

plea was not knowingly, voluntarily and intelligently made because she was never informed of the possible impact ***Jodie W.*** would have on her case. Whether an admission of grounds in a TPR proceeding was made knowingly and with understanding of the facts alleged in the petition is a matter of constitutional fact. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51 n.18, 233 Wis. 2d 344, 607 N.W.2d 607. We accept the historical facts as found by the circuit court unless clearly erroneous. ***Id.*** Whether the historical facts meet the constitutional test is a question of law. ***Id.***

¶17 Carolyn argues that she "could not have understood the practical effect of giving up her right to contest the grounds hearing because her attorney did not understand the effect of ***Jodie W.***" Carolyn essentially repeats her arguments regarding the applicability of ***Jodie W.*** to her case. As we discussed above, Carolyn's trial counsel made a reasonable assessment that ***Jodie W.*** did not apply. As the circuit court so aptly put it, Carolyn's counsel has "oversold the significance of [***Jodie W.***] as it applies to these facts." Nothing in Carolyn's appellate brief suggests that she did not understand the allegations in the petition, the evidence to support them, or the potential consequences she faced when she entered her plea. The circuit court properly refused to allow Carolyn to withdraw her plea.

Statutory Factors and the Best Interests Standard at TPR Disposition

¶18 Carolyn challenges the integrity of the circuit court's dispositional order. She contends that the circuit court did not consider all of the necessary statutory factors in relation to the record facts and that the court's decision was not in Zoee's best interests. At the dispositional hearing, the circuit court must consider any agency report submitted in accordance with WIS. STAT. § 48.425 and

the six factors listed in WIS. STAT. § 48.426(3). ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶4, 255 Wis. 2d 170, 648 N.W.2d 402. It must make a disposition that is "calibrated to the prevailing standard: the best interests of the child." ***Id.*** The WIS. STAT. § 48.426(3) factors are:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.
>
> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶19 Carolyn criticizes the circuit court's failure to "mention much less consider" the agency report and accuses the court of making "a cursory recitation of the factors without discussing the facts of record." She contends that where the court did not discuss a particular factor at length on the record, it failed to properly exercise its discretion. The State, although disputing Carolyn's characterization of the court's exercise of discretion, correctly observes that the statute "is silent on whether the trial court must make explicit and lengthy reference on the record" to the six statutory factors, "although doing so makes appellate review far simpler."

¶20 We will affirm a circuit court's discretionary decision provided the court examined the relevant facts, applied the proper standard of law, and used a

rational reasoning process to reach its conclusion. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶43. Where the court's reasoning is terse, we independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698. We begin with the statutory factors.[4]

¶21 The first factor that the circuit court must consider is the likelihood that the child would be adopted after the parental rights are terminated. WIS. STAT. § 48.426(3)(a). The court had before it the agency report, which stated, "The present foster parents have expressed an interest in applying to adopt." At the dispositional hearing, Zoee's social worker testified that there was a "strong likelihood" that Zoee would be adopted after termination because the foster parents indicated that they would be able to adopt her. At the dispositional hearing, having heard all of the testimony, the court determined that it was "likely that [Zoee] will be adopted." Thus, the court considered the first factor.

¶22 The second consideration is the age and health of the child. WIS. STAT. § 48.426(3)(b). Zoee was born in March 2004 and placed under the supervision of the Sheboygan county DHHS in February 2006. At the time of the TPR dispositional hearing on February 21, 2007, Zoee was approaching three years old. The record indicates that when Zoee was first placed in foster care she suffered from an active infection, commonly referred to as MRSA. The agency

[4] We acknowledge Carolyn's assertion that the circuit court did not mention the agency report in its ruling. However, the same circuit court judge presided over both the CHIPS case and the TPR proceedings. Therefore, the judge was familiar with the history of the case prior to the TPR disposition. Furthermore, the court heard testimony from Zoee's social worker, who had prepared the agency report. We are satisfied that the court was aware of and considered the information contained in the report.

report indicates that the foster family was taking precautions to avoid spread of the infection and that Zoee was not on any medications at that time. The agency report also stated that when Zoee entered foster care she was delayed in her speech and motor skills but after thirteen months in foster care was "functioning appropriately for her age." In its ruling, the court noted that Zoee was "in good health." Carolyn points to this comment as evidence the court did not know of or consider Zoee's MRSA infection and therefore its decision was uninformed. We are satisfied, however, that the court's statement reflected its understanding of the progress Zoee had made in foster care in terms of the nature of her infection, and her progress regarding speech and motor skills.

¶23 The third factor to consider is whether the child has substantial relationships with the parent or other family members and whether it would be harmful to sever these. WIS. STAT. § 48.426(3)(c). As is often the case, the facts here do not line up conveniently on the side of termination or on the side of preserving the parental relationship. The record clearly reveals that Carolyn wished to be a better parent. The agency report conveys that she appeared "very genuine in her love towards Zoee" and "has the ability to be a good parent when she is not under the influence of alcohol or other drugs." The report also indicates that Zoee had significant relationships with her grandmother, aunt, and one half-brother. The court weighed these relationships and concluded, "It is unfortunate that this order will sever relationships that are valuable to Zoee, and I think there will be harm, at least, in the short term. The State of Wisconsin recognizes the value of keeping families together. Unfortunately, that interest is outweighed here." Clearly, this factor influenced the court's decision.

¶24 The fourth factor, the wishes of the child, was addressed in the agency report as follows: "Zoee is not old enough yet to express her desire for

permanency, but her family members, [her half-brother], [grandmother], and [aunt] have spoken on her behalf on numerous occasion[s] … indicating that they believe Zoee deserves permanency and would like her to continue living with the foster family." Zoee's half-brother stated that, while he loved his mother, he did not want Zoee to "have to live through the life that he did with his mother." Zoee was just shy of three years old at the time of the dispositional hearing. At the dispositional hearing, the court stated that it did not consider the wishes of the child "for obvious purposes given the age." The court acknowledged the statutory factor and reasonably concluded that Zoee was too young to comprehend the proceedings.

¶25 The final two factors are the duration of the separation of the parent from the child and whether more stable and permanent relationships will result from the termination. WIS. STAT. § 48.426(3)(e) and (f). Zoee was first removed from Carolyn's home on December 15, 2005 and was placed under the ongoing supervision of the DHHS in February 2006, in accordance with the CHIPS order. At the time of the dispositional hearing, Zoee was nearly three years old and had been living outside of Carolyn's home for approximately fourteen months. Zoee's grandmother and aunt were not able to keep her and Zoee eventually was placed in a foster home that wished to adopt her. The court did consider that "Zoee has been in placement with the proposed adoptive parents for about a year." It concluded that "Zoee is likely to enter a more permanent relationship" with the adoptive family. This satisfies the fifth and six statutory factors.

¶26 Having considered the statutory factors, the circuit court concluded that it was "in the best interests of Zoee that the parental rights … be terminated." The court explained to Carolyn its reasoning, referencing her long history of alcohol addiction and the court's concern that she would be unable, in the short

term at least, to maintain sobriety. It determined that continuing the parent-child relationship would be "contrary to the welfare of the child." The record demonstrates that Zoee's best interests drove the court's decision and we ascertain no error here.

CONCLUSION

¶27 We conclude that Carolyn received effective assistance of counsel at all phases of the TPR proceedings and that her plea was knowingly, intelligently and voluntarily made. We further conclude that the court considered the agency report and the statutory factors when making its decision as to the disposition in this matter. Having encountered no error, we affirm.

By the Court.—Orders affirmed.

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