COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP1087
2009AP1088

Cir. Ct. Nos. 2008TP33
2008TP34

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

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

WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MICHELLE P.,

RESPONDENT-APPELLANT,

RICKEY B., SR.,

RESPONDENT-CO-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Michelle P. and Rickey B., Sr. appeal from orders terminating parental rights to their children, Ricky B., Jr. and Taylor B. Michelle's appeal basically boils down to the following argument made by her: WISCONSIN STAT. § 48.415(2) allows parental rights to be terminated if the parent has failed to meet several conditions of return of the children. Michelle claims that, along the way, her visitation privileges with the children were taken away by the Waukesha County Department of Health & Human Services, that the Department had no authority to suspend visitation without approval of the court—something the Department did not obtain, and that the Department's unlawful action prejudiced her ability to improve as a parent such that the children would no longer be in need of protection or services. She argues that she was denied constitutional due process in this way. The trial court agreed with Michelle that the suspension was unlawful but found that it did not amount to a due process violation because the error was harmless. We agree that Michelle was not prejudiced and affirm her termination. We also reject Rickey's arguments.[2]

¶2 The facts pertinent to this appeal occurred largely before the petitions for termination of parental rights were filed. Rickey B., Jr. and Taylor B. were born in 1996 and 1998, both cocaine positive. Both were adjudicated juveniles in need of protection and services based on truancy in September 2006.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Both parties acknowledge that that their main argument concerning WIS. STAT. § 48.415(2), the same argument made by Tanya in ***Sheboygan County DH&HS v. Tanya M.B.,*** 2010 WI 55, Nos. 2008AP3065, 2008AP3066, 2008AP3067, 2009AP136, 2009AP137 & 2009AP138, was decided against Tanya and therefore is no longer tenable. Although Rickey B., Sr. did not withdraw his appeal, he makes no further § 48.415(2) argument. We do not address the parties' § 48.415(6) arguments, or Rickey B., Sr.'s § 48.415(1) argument, because only one ground is necessary to terminate parental rights.

Then, they were placed outside of Michelle P.'s home on November 2, 2006. The initial reasons for their removal are irrelevant. After they were removed, visits were established immediately for Michelle P. She missed the first visit on November 6, 2006, and continued to miss 9 out of the first 12 scheduled visits between then and February 2007.

¶3 On January 22, 2007, both children were adjudicated in need of protection and services and a dispositional order was entered specifying supervised visitation for Michelle P. Neither parent came to the hearing, despite proper notice. On February 16, 2007, based on Michelle P.'s numerous missed visits and resulting stress on the children, a family court commissioner issued an order for temporary physical custody suspending visitation. Michelle P. did not receive official notice of the hearing and was not present for it.

¶4 As a result of the recent supreme court decision in ***Tanya M.B.***, the February 16, 2007 order suspending visitation is the only remaining, viable issue in this case. *See* ***Sheboygan County DH&HS v. Tanya M.B.,*** 2010 WI 55, Nos. 2008AP3065, 2008AP3066, 2008AP3067, 2009AP136, 2009AP137 & 2009AP138. She appears to argue that the order was unlawful because only a circuit court may suspend visitation under the law; a family court commissioner may not do so. After the hearing, the Department gave Michelle P. a list of conditions to be met before visits could be reinstated, including a clean urine screening, three consecutive meetings with her social worker, and some signed releases. Those conditions were not met until September 2007. At that point, the Department allowed visitation to be reinstated with the proviso that they be in a therapeutic setting, again without a court order so limiting visitation. Michelle P. began to see a therapist in November 2007. In February 2008, the Department, after deciding to pursue termination, revoked visitation without any judicial

imprimatur. Michelle P. argued to the trial court, and the trial court agreed, that all of these changes to the visitation plan should have been brought to the trial court as modifications of the CHIPS dispositional order. While this issue is interesting, we will not address it because we are convinced that, assuming error, it was harmless and did not interfere with Michelle P.'s due process rights.

¶5 In June 2008, petitions for termination of parental rights were filed. Both parents waived their right to a trial by jury, so the grounds phase was tried to the court on October 20 through October 23, 2008. After a two-and-a-half-day trial, the trial court found grounds to terminate both parents' parental rights. We look to that record to help us in our determination of whether the supposed error was harmless.

¶6 As it relates to the WIS. STAT. § 48.415(2) ground, the trial court stated that Michelle P. had failed to meet several conditions of return: she failed to show adequate interest in her children, maintain contact with her social worker, complete psychological treatment and programming, or have successful visits with her children. In particular, the trial court expressed concern that she had failed to show empathy for her children, i.e., she failed to understand their need for a response from her when they wrote her letters, she failed to understand why she should apologize to them, and she stated to her therapist in January 2008 that she did not even want them back until June 2008. The trial court noted that Michelle P.'s therapist had expressed similar concerns about her lack of empathy for her children at trial.

¶7 The trial court also addressed, as it must, the likelihood that Michelle P. could meet the conditions of return within nine months after trial, *see* WIS. STAT. § 48.415(2)(a)3, concluding that "despite what this court would even

characterize as milestones from where we were at the beginning ... we are nowhere near the finish line. This court is satisfied that we will not be there in nine months[.]"

¶8 Following the conclusion of the postdisposition hearing, the trial court revisited the record in addressing whether the error complained of was harmless. The court stated:

> [I]n terms of reviewing the decision ... the court had talked about how [Michelle P.'s therapist] had concluded that mom has no empathy and just could not understand what the children had gone through. The court had talked about how communications of four cards or four letters over a period of time was insufficient in terms of meeting the conditions. And thus ... despite the fact that supervised visitation was changed ... the court finds that there are other sufficient grounds upon which this court can conclude and allow its decision to stand[.]

¶9 As the trial court noted, Michelle P. had many problems meeting many conditions of return, only one of which was a lack of successful visitation with her children. Michelle P. argues that "the [trial] court's reasoning draws an unrealistic line between visitation and the other conditions for return, because the conditions were intertwined," and that "Michelle P. largely met the conditions that were unrelated to parent-child visitation." We disagree. While Michelle P. did complete some conditions of return—resolving criminal issues, obtaining a safe and suitable home and completing a parenting class, AODA evaluation, and psychological evaluation—these conditions were not at the heart of the case or the concerns about her parenting.

¶10 The trial court expressed serious concerns when it came to Michelle P. meeting conditions such as showing an interest in her children, keeping in contact with her social worker, and successfully completing the follow-up to her

psychological evaluation. All of these conditions could have been met without successful visits with her children and none of them were. She did not simply fail to meet conditions related to parent-child *visitation*, she failed to meet conditions related to her parent-child *relationship*. The trial court did not believe that the visitation, if it had remained in place, would have impacted Michelle P.'s ability to meet the other conditions and neither do we.

¶11 We point out that, under WIS. STAT. § 805.18(2), circuit court findings may only be set aside if there is an error that has "affected the substantial rights of the party seeking to reverse." For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the proceeding. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. Because visitation issues were not central to the termination of Michelle P.'s parental rights under § 48.415(2), and because she failed to complete so many conditions that she could have completed without visitation, we agree with the trial court that, even assuming the denial of visitation was unlawful, it was harmless error.

¶12 Now, on to Rickey B. As mentioned in footnote 2 of this opinion, Rickey B., Sr.'s only argument regarding termination of his parental rights under WIS. STAT. § 48.415(2) was resolved in the public's favor in ***Tanya M.B.,*** 2010 WI 55. Because only one ground is necessary to terminate parental rights, and because we find against both parents under § 48.415(2), we do not reach either parent's arguments regarding the other grounds for terminating their parental rights.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.2391)(b)4.