COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2854 **Cir. Ct. No. 2012TP000259**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CONNIE P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Connie P. appeals from an order terminating her parental rights to her daughter Nevaeh P. She contends that her no-contest plea at the grounds phase of the termination of parental rights ("TPR") proceeding was involuntary and that she should be permitted to withdraw her plea. We disagree and affirm.

BACKGROUND

¶2 Nevaeh was born on March 30, 2010, to Connie and Ray B.[2] Connie, who had been diagnosed with mild mental retardation, was twenty years old when Nevaeh was born. Connie has a full scale IQ of 61 and can read at a fourth grade level.

¶3 At the time of Nevaeh's birth, her older brother had been removed from Connie's home and was in foster care. Despite the fact that she had a sibling in foster care and there were concerns about Connie's ability to care for a child, the Bureau of Milwaukee Child Welfare ("BMCW") attempted to maintain Nevaeh's placement in Connie's home. However, the protective plan involved having Connie reside with family members who were willing and able to help her care for Nevaeh, and in November 2011, those family members indicated that they were no longer willing to provide Connie with the support she needed. Consequently, Nevaeh was detained by BMCW. Nevaeh was later found to be a child in need of protection or services in April 2012.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Ray's parental rights to Nevaeh were also terminated, and Ray's attorney filed a no-merit report with this court concluding that Ray had no issues of arguable merit to appeal. For purposes of this decision, only Connie's rights are before us.

¶4 The BMCW offered Connie various services to assist her with being able to successfully parent. She was provided with a specialized parenting assistant and home management aide, as well as parenting and nurturing classes through the Milwaukee Center for Independence ("MCFI"). She was also provided resources on housing and individual therapy. While Connie was working with BMCW, she submitted to two psychological evaluations, both of which expressed concerns with Connie's ability to care for herself and opined that she would be unable to care for a child on a full time basis. Despite the provision of services, Connie was unable to make any progress towards being able to parent a child during the time she worked with BMCW.

¶5 Consequently, on October 16, 2012, the State filed a petition to terminate Ray's and Connie's parental rights to Nevaeh. As relevant to this appeal, the State alleged that Nevaeh remained a child in need of protection or services pursuant to WIS. STAT. § 48.415(2) and that her parents had failed to assume parental responsibility for her pursuant to § 48.415(6).

¶6 On June 11, 2013, a jury trial on grounds was set to commence.[3] Connie was present with her attorney and guardian ad litem ("GAL"). The GAL had been appointed due to concerns relating to Connie's low IQ. Ray was also present with his attorney and GAL.[4] While they were waiting for the jury, the trial court made the following comments to both Connie and Ray:

[3] The Honorable Pedro Colon presided over the June 11, 2013 hearing and accepted Connie's no-contest plea.

[4] Ray also had cognitive limitations and was also appointed a GAL.

We did talk about how to proceed today; and Connie and Ray, we're expecting to have a trial. That is what you requested and we want to honor your rights.

But also after looking at the file, I think that if your wish is to have Nevaeh back or have Nevaeh be taken care of by someone or have Nevaeh be adopted by someone, you can argue that at disposition.

Your attorneys have informed me that they are willing to do that.

In fact, [Ray's attorney] indicates there may be some family members that you think are capable and able to take care of your child.

And this is really hard for everyone. I understand. It's about babies and we care about them and they're babies; and so I know it's very difficult for you, but I want you to consider that. It will be outside of the presence of the jury for whatever that may be worth.

It is also a hearing where the rules of evidence, that is the rules I have to govern myself by and the attorneys have to govern themselves by are looser. That way you can make more arguments. They're allowed to make more arguments in a much easier fashion and they can just as well argue that Nevaeh can be taken care of by whomever you think should be that person.

I can tell you that obviously goes without saying you'll get a very fair hearing about all that I will decide after listen to all the parties.

I think the advantage of that is that if you wish, I can give you an adjournment. You can come back and talk about what alternatives there are. I don't know if it's a family member.

This is my file; okay? I know that the file is much bigger. You guys have a very full story about your relationship with Nevaeh; and that relationship, there are some good parts and some really difficult parts. I want you to consider that. That will avoid having to go through a formal trial in front of members that we chose from the community.

They're randomly chosen so it's fair, and they'll be fair to you also; but I think if the ultimate goal here is for you to argue that either Nevaeh should come home with

> either of you, that Nevaeh should be taken care of by someone else, or that Nevaeh should be adopted, you'll still have that right under disposition; and your attorneys know how to do this and you don't have to have the trial.
>
> If you want a trial, we're waiting for a jury. I'll give you a trial. That is what you requested.
>
> I want you to really think about that. I know this is a difficult process no matter what decision you make today, and I know this is hard; but at the same time, I think that you can save yourself or save ourselves -- we're all in it. All parties have to present the case and think about what you will ultimately want.
>
> What is it that you want to do with Nevaeh from your perspective? What do you want? Because we will argue. We're all ready to argue and everybody will go at it.
>
> I want you to think why we're arguing, 'what is it that I want to tell the judge should happen to Nevaeh. Because I love Nevaeh, and I want the best thing to happen.' I want to give you that opportunity.
>
> Think about that. We'll take a short break.

¶7 Following the short break, Ray's counsel told the trial court that Ray wished to stipulate to the failure-to-assume ground. Connie's counsel then told the court that Connie wished to plead no contest to the failure-to-assume ground. The State agreed to dismiss the continuing-CHIPS ground as to both parents.

¶8 The trial court then separately engaged Ray and then Connie in colloquies to ascertain the voluntariness of their pleas. Connie and the court engaged in the following exchange:

> Q. … [H]ow far did you go in school?
>
> A. 12th.
>
> Q. Where did you go?
>
> A. Milwaukee High School of the Arts.
>
> Q. Oh, yeah, that is a good school.

Now were you in regular or special education classes?

A. Special education classes.

Q. But you completed all schooling through 12th grade and got a diploma?

A. Yep.

Q. Very good.

Are you currently employed?

A. No.

Q. Has there ever been a period in your life after high school where you've been employed?

A. No.

Q. Okay. You're able to read and write the English language?

A. Yes.

Q. Now you know there is this petition filed by the State seeking to involuntar[il]y terminate your parental rights or establish grounds therefore.

Do you understand that?

A. Yes.

Q. And did you review this petition with [your attorney]?

A. Yes.

Q. And did [your GAL] help you review that petition?

(An off-the-record discussion was held between Counsel and [Connie].)

A. Yes.

Q. … Now you believe you understood the petition?

A. Yes.

Q. You are the mother of Nevaeh …; is that correct?

A. Yes.

Q. And are you currently taking any medications?

A. No.

Q. Are you under the influence of any drugs or alcohol.

A. No.

Q. Have you consumed any drugs or alcohol in the last 24 hours?

A. No.

Q. Have you ever been treated for a mental illness?

A. Yes.

Q. Okay. What is that?

A. I don't know.

Q. You don't know. Okay.

When was the last time you were treated do you think?

A. Couple of years.

….

Q. Now do you feel right now that you're experiencing any mental or emotional problems that would interfere with your ability to understand the questions I'm asking you?

A. No.

Q. You understand you're giving up the right to a jury trial where 12 people, ten of which would have to decide that grounds exist to terminate your parental rights.

Do you understand that?

A. Yes.

Q. You're also giving up a right to a trial to the Court. The judge would hear all the evidence that otherwise the jury would hear, but it would be decided by [the] Court.

Do you understand that?

A. Yes.

Q. Do you understand that you're allowed and have the right to call witnesses to come and tell the Court your side of the story.

Do you understand that?

A. Yes.

Q. And you understand that the State can call witnesses and [Ray] can call witnesses, [Nevaeh's GAL]. You have a right to cross-examine and ask questions of all those witnesses.

Do you understand that?

A. Yes.

Q. You also understand that there are two grounds that the State alleged in the petition. One is a failure to assume parental responsibility, and we talked about that with [Ray].

….

[CONNIE'S ATTORNEY]: She wants to do a no contest.

….

It's no contest to failure to assume.

THE COURT: …

Q. So by saying no contest, you're not admitting that these allegations are true; but based on what the State presents, I'm going to assume that they're true and I will therefore declare you unfit.

Do you understand?

A. Yes.

Q. And a failure to assume parental responsibility is that you've failed -- you've heard this before -- you failed to establish a substantial parental relationship with Nevaeh in that you failed to come forward and consistently accept and exercise significant responsibility for the daily supervision, education, protection and care of Nevaeh.

Do you understand that?

A. Yes..

….

Q. And have either of these two attorneys threatened you or coerced you or made you come and tell me that you wanted to plead no contest to this ground of failure to assume parental responsibility?

A. No.

Q. Has anybody given you anything of value like money or things in order to for you to plead no contest?

A. No.

Q. Okay. Do you have any questions for me?

A. No.

Q. Is your decision being made freely and voluntarily?

A. Yes.

Q. Do you understand that similarly to what I've talked about with [Ray], you'll have the opportunity to come to a dispositional hearing and argue about your alternatives for permanence within the best interest of Nevaeh?

Do you understand that?

A. Yes.

> Q. Are you satisfied with the representation of your attorney?
>
> A. Yes.

¶9 Following the colloquy, the trial court found that Connie understood her rights and accepted her no-contest plea to the failure-to-assume ground. The court then took testimony to establish a factual basis for grounds.

¶10 The trial court held a dispositional hearing on September 11, 2013. At the conclusion of the hearing, the trial court found that it was in Nevaeh's best interests to terminate Ray's and Connie's parental rights.[5]

¶11 On December 23, 2013, Connie filed a Notice of Appeal with this court. Thereafter, she moved to remand the matter to the trial court to address whether her no-contest plea should be withdrawn because it was not voluntary. We granted her motion for remand.

¶12 On remand, the post-termination court held an evidentiary hearing to consider Connie's claim that her plea was not voluntary.[6] Connie testified at the hearing. She told the court that she lived in Milwaukee, that she did not work, but that she had recently been accepted into a college to become a medical assistant. With regard to her decision to plead no contest to grounds, Connie had the following exchange with her attorney:

[5] The Honorable Mark Sanders presided over the dispositional hearing and entered the order terminating Connie's parental rights.

[6] Judge Sanders also presided over the case on remand.

Q. Now, in this case you came to a hearing, and there were two hearings: There was a hearing that had to do with your fitness as a parent. Do you remember that?

A. Yes.

Q. And do you remember the day you were to go to trial.

A. No.

Q. The day you came to court and there was going to be a trial, that day?

A. Yeah, I remember that.

Q. So when you came to court, the judge asked you if you wanted to stipulate to the finding of unfitness as a parent, isn't that right?

A. Yes.

Q. And what was your understanding about when the judge asked you that question. What did you understand that day?

A. I have no clue.

Q. Did he say you could have a trial, or we could -- you could admit to the grounds for the finding of unfitness as a parent and we would just go to disposition to decide about Nevaeh?

A. A trial?

Q. Did he ask you if you wanted a trial?

A. Yes.

Q. And what did you say?

A. I said no.

Q. And do you want a trial?

A. Yes.

Q. So why did you say no that day?

A. I have no clue.

> Q. Do you remember why you decided to say you didn't want to have a trial?
>
> A. No.
>
> Q. So that day there was two -- both you and the dad were together in the courtroom?
>
> A. Yes.
>
> Q. And did you both agree to not have a trial?
>
> A. I didn't talk to Dad.
>
> Q. But he was agreeing at that time?
>
> A. He didn't want one, so I changed my mind and said I didn't want one.
>
> Q. So you changed your mind when you heard he was not going to go ahead with the trial?
>
> A. Right.
>
> Q. And how do you feel about that now?
>
> A. Upset.
>
> Q. Do you wish you hadn't changed your mind?
>
> A. Yeah.
>
> Q. So are you saying you would like to go ahead with a trial at which the [S]tate would present evidence
>
> A. Yeah.
>
> Q. -- as to why -- I'm sorry?
>
> A. Yes.

¶13 On cross-examination, the assistant district attorney engaged in the following exchange with Connie, as relevant to this appeal:

> Q. When the judge was talking to you in court that day, did you understand what he was saying?

A. Not really.

Q. Okay. When the judge asks you questions and you don't understand him, you let him know that you don't understand, right?

A. Right.

Q. If he says something and it doesn't make any sense to you, you tell him, right?

A. Right.

Q. So if the judge asked you something and you told the judge that you understood, does that mean that you understood it?

A. Yes.

Q. Yes, okay. And you understood that day that we were in court when you said you didn't want to have a trial, then we didn't have a trial, right?

A. Right.

Q. And do you remember talking to your attorney about what would happen at a trial?

A. Yeah.

Q. And we took a break so you could talk to your attorney a little more, right?

A. Yes.

Q. Did she answer all of your questions?

A. No.

Q. She didn't. What questions didn't she answer?

A. A couple of them, actually.

Q. What were some things you needed to know but you didn't?

A. Like, was I going to be able to see my child again, was I going to be able to do another visit with her, and all of that. She never answered it.

Q. So those questions where she said I can't answer that, did she say it's up to the judge?

A. Yeah.

Q. Was it explained to you that if we had a trial they would bring in 12 people who would sit in those chairs over to your right?

A. Yeah.

Q. That was explained to you?

A. Yes.

Q. If we had a trial, 10 out of those 12 people would have to agree?

A. Yes.

Q. You understood that too?

A. Yes.

Q. And was it explained to you that if we had a trial, I would call witnesses to come in and testify?

A. Yes.

Q. And that you would have the right to ask questions of those witnesses?

A. (Indicating.)

Q. You're nodding yes?

A. Yes.

Q. Okay. Was it also explained to you that you could also call witnesses to come in and testify?

A. Yes, I had a couple of them, but --

Q. But then you decided you didn't want the trial?

A. I didn't want the jury trial, but I wanted a trial.

Q. Okay. Do you remember either the judge or your attorney also telling you that you could have a trial with just the judge deciding?

A. Yeah.

Q. But you didn't do that either?

A. I think I did.

Q. You wanted to do that?

A. Yeah.

Q. Okay. But then you found out that it had to be a jury trial, that's when you decided you didn't want a trial at all?

A. I didn't want -- no.

Q. Okay. And then when you found out that [Ray] wasn't going to have a trial, you decided to do what [Ray] was doing, by not having a trial?

A. Yeah.

….

Q. You know that -- that our cases are two parts: The first part is, is there a reason to terminate your parental rights; and the second part is, what is best for Nevaeh, do you remember that?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And then if you agreed that I could prove the first part, that we would go to a hearing where the only thing the judge would decide is what is best for Nevaeh?

A. Yes.

Q. And on that day when we were in court last summer, that's what you decided you wanted to do?

A. Yes.

> Q. And nobody threatened you to get you to do that?
>
> A. No.
>
> Q. Nobody promised you anything to get you to do that?
>
> A. No.
>
> Q. But now that we're in February, you kind of wish you hadn't done it?
>
> A. Right.

¶14 The post-termination court found Connie's testimony to be credible but concluded that she did not make a prima facie case demonstrating that the trial court did not meet its mandatory obligations when accepting her no-contest plea to grounds. The post-termination court found that there was no evidence that Connie suffered from any mental deficiencies, other than attending some special education classes in high school, and noted that Connie had recently applied for and been accepted to a college to begin studying to become a medical assistant. The court also found that Connie credibly testified that:

> her decision to enter a no contest plea was made not because of any pressure by the judge, not because of some lack of understanding or some confusion about what was going on, but was made because she didn't want to have a jury trial and because Nevaeh's father was entering a no contest plea, or entering a stipulation.

The court noted that Connie was not coerced and that she was able to recite all of the rights that she had, including the right to have a trial, the right to call witnesses, the right to confront witnesses, and the right to make the State prove its case. The post-termination court went on to conclude that, even if Connie had made a prima facie showing, the State had demonstrated by clear and convincing evidence that Connie's plea was made knowingly and intelligently.

DISCUSSION

¶15 The sole issue before us on appeal is whether Connie's no-contest plea to the failure-to-assume ground was knowingly and voluntarily made. Connie asserts that she could not have pled to grounds knowingly and voluntarily because she was unduly influenced by both the trial court's comments prior to the scheduled grounds trial and Ray's decision to stipulate to grounds. We disagree.

¶16 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. When a parent enters a no-contest plea that a ground exists to terminate his or her parental rights at the grounds phase, WIS. STAT. § 48.422(7) requires the trial court to:

> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission ….
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified. ….
>
> (br) Establish whether any person has coerced a birth parent [into making an admission].
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

Additionally, the parent must have knowledge of the constitutional rights given up by the plea. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845.

¶17 When assessing a claim that the trial court failed in its mandatory duties under WIS. STAT. § 48.422(7), we follow the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. A parent must make a prima facie showing that the trial court violated its mandatory duties under § 48.422(7) and that the parent did not know or understand the information that should have been provided by the trial court. ***Therese S.***, 314 Wis. 2d 493, ¶6. If the parent is able to make such a prima facie showing, the burden shifts to the State to show by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently waived the right to contest the allegations in the petition. ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

¶18 Whether a parent presented a prima facie case sufficient to allege that she did not know or understand information that should have been provided in the trial court's colloquy is a question of law that we review *de novo*. ***Therese S.***, 314 Wis. 2d 493, ¶7. We look to the entire record and the totality of circumstances to determine whether the trial court's actions were sufficient. ***Steven H.***, 233 Wis. 2d 344, ¶42. Having looked at the record and the totality of the circumstances, we conclude that Connie did not make a prima facie showing here.

¶19 To begin, Connie has not alleged that the trial court failed to comply with its mandatory duties under WIS. STAT. § 48.422(7) in that she does not

identify any part of the trial court's plea colloquy that was deficient. Furthermore, our independent review of the colloquy reveals no deficiency.

¶20 During the plea colloquy, the trial court established that Connie graduated from high school, that she had read and understood the TPR petition, and that she was not on any medications, or under the influence of drugs or alcohol. Connie told the court she understood the rights she was giving up by pleading no contest, including: the right to a jury trial, the right to a trial to the court, the right to call witnesses, and the right to cross-examine the State's witnesses. The court also addressed whether any promises or threats were made to coerce Connie into agreeing to plead no contest. Connie replied "no," telling the court that no one had threatened or coerced her and no one had given her anything of value to influence her decision.

¶21 The trial court then gave Connie an opportunity to ask questions and she declined to ask any. Connie affirmed for the court that her decision to plead no contest to grounds was being made freely and voluntarily. The trial court then took testimony to establish a factual basis for the plea. As such, the trial court met the mandatory requirements of WIS. STAT. § 48.422(7).[7]

[7] The State points out in its brief that, at the time the trial court accepted Connie's plea, the court did not ascertain whether an adoptive resource had been identified as required by WIS. STAT. § 48.422(7)(bm). The court did, however, identify an adoptive resource at a later hearing. As such, the State argues that any error by the court was harmless. *See* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶57, 233 Wis. 2d 344, 607 N.W.2d 607. Connie does not raise the issue in her brief to this court and she did not file a reply brief. As such, she does not acknowledge the State's argument that any error by the trial court in identifying an adoptive resource at the plea hearing was harmless. Therefore, we deem the argument admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

¶22 The crux of Connie's argument is that, as a cognitively disabled adult, she was particularly perceptible to coercion and that both the trial court's statements prior to her plea and Ray's decision to forgo a trial improperly influenced her decision to plead no contest. However, even if we were to accept that argument as sufficient to establish a prima facie showing that she did not know or understand the information provided by the trial court, the State has demonstrated by clear and convincing evidence that Connie's decision to plead no contest was made knowingly, voluntarily, and intelligently.

¶23 As we have established, during the plea colloquy, Connie told the trial court that she had graduated high school, could read and write the English language, and had reviewed the petition with her attorney and her GAL. She told the court that she understood the contents of the petition, including the two grounds alleged. Connie told the court she understood the rights she was giving up by pleading no contest, including: the right to a jury trial, the right to a trial to the court, the right to call witnesses, and the right to cross-examine the State's witnesses. Connie said "yes" when the court asked her if she understood that by pleading no contest to the failure-to-assume ground that she was saying that the allegations in the petition were true. She stated that she understood that her plea meant she was agreeing that she failed to establish a substantial parental relationship with Nevaeh.

¶24 While Connie only gave one-word answers to the trial court's questions, the court gave her an opportunity to ask questions, and she said she did not have any. At the post-termination hearing, she testified that she would have told the trial court if she did not understand something and that if she told the trial court she understood, it was because she understood.

¶25 Connie also testified on remand that she understood the rights she was giving up when she pled no contest to grounds. She told the post-termination court, consistent with her testimony at the plea hearing, that she understood at the time she pled no contest that she was giving up her right to a jury trial, the right to call witnesses, and the right to cross-examine witnesses. At the post-termination hearing she stated that she decided to plead no contest because she did not want a jury trial and because Ray was stipulating to grounds. But as the court pointed out at the post-termination hearing:

> The reasons that a person uses when reaching [the] decision [to plead] are as personal in this case as they are in any case. So long as that decision is based on an understanding of the law and the rights that are given up and the procedures in the case, the party has the ability and -- to decide to enter a no contest plea. That is what occurred here.

We agree.

¶26 Connie testified at the plea hearing and at the post-termination hearing that she understood the consequences of her plea and that she was making that plea knowingly, intelligently, and voluntarily. Prior to her plea, the trial court merely explained the various options available to Connie and encouraged her to consider them carefully. Connie admitted at her post-termination hearing that she had not spoken to Ray about his decision to plead to grounds. There is simply no evidence in the record that Connie's plea was coerced by the trial court, Ray, or someone else. As such, we affirm.

By the Court.—Order affirmed.

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