COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP151 **Cir. Ct. No. 2013TP48**

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

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

A.C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] A.C. appeals the circuit court order terminating his parental rights to J.A.M. A.C. argues that the termination order should be vacated because his trial counsel provided him ineffective assistance with regard to the petition to terminate his parental rights to J.A.M. Specifically, he asserts counsel was ineffective in (1) failing to inform him "that his incarceration standing alone was not a sufficient basis to terminate his parental rights" and (2) failing to "file a motion to dismiss the termination petition on the basis that the grounds were unconstitutional as applied to [A.C.] because, based on his incarceration, the conditions for return were impossible to meet."[2] We disagree with A.C. and affirm.

Background

¶2 A.C. was adjudicated J.A.M.'s father in August 2012, when J.A.M. was six months old and had been already subjected for five months to a child in need of protection and services (CHIPS) proceeding related to J.A.M.'s mother. On September 25, 2012, the circuit court established conditions of return to be completed by A.C., which included A.C. maintaining a suitable residence, cooperating with the County's Division of Children and Family Services (DCFS), having regular contact with J.A.M., providing financial support to J.A.M., actively participating and cooperating with J.A.M.'s medical and educational planning, and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Before the circuit court, A.C. argued for plea withdrawal on the basis of the plea not being knowing, intelligent, and voluntary and on the basis of trial counsel being ineffective. Although in his briefs on appeal A.C. references his plea not being knowing, intelligent, and voluntary, he only argues that his plea should be withdrawn on the basis of ineffective assistance of counsel; as a result, that is the only issue we address.

actively participating in services such as parenting classes, counseling, and other drug and psychological services.

¶3 Two days after the circuit court set these CHIPS conditions, A.C. was incarcerated and remains incarcerated, with a release date set for 2016 or 2018, depending upon whether A.C. successfully completes an early release program. In light of A.C.'s incarceration, in June 2013 the circuit court revised the dispositional order to include new conditions specific to incarcerated parents, but also continuing all prior conditions. The new conditions included: (1) sign releases for communication between DCFS and the prison social worker regarding A.C.'s progress on completing programming relating to conditions of return; (2) demonstrate ability to obey institution rules; (3) successfully participate in all recommended programming for conditions of return and actively participate in prison-recommended programming; (4) contact DCFS monthly with update on prison status; (5) write letters to J.A.M. weekly and forward same to DCFS; and (6) communicate with J.A.M.'s educational and medical providers, including requesting regular updates from providers relating to J.A.M.'s health and well-being.

¶4 Two months later, on August 14, 2013, the County petitioned for termination of A.C.'s parental rights to J.A.M. alleging two grounds—continuing CHIPS and failure to assume parental responsibility. On February 21, 2014, A.C. pled no contest on the CHIPS ground, and after a colloquy with the court, the court accepted his plea. The failure to assume parental responsibility ground was dismissed. The circuit court held an uncontested hearing on the CHIPS ground and found A.C. unfit. At the conclusion of a subsequent dispositional hearing, the court terminated A.C.'s parental rights to J.A.M.

¶5 A.C. moved the court to withdraw his plea as not knowing, voluntary, and intelligent and based on ineffectiveness of his counsel, and to vacate its order terminating his parental rights to J.A.M. The court held a ***Machner***[3] hearing at which trial counsel, A.C., and the DCFS caseworker testified. The court denied the motion and A.C. appeals. Additional facts are set forth below.

Discussion

¶6 A.C.'s argument on appeal is that his counsel was ineffective. A parent is entitled to effective assistance of counsel in a proceeding to terminate parental rights. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to prove ineffective assistance of counsel, the parent has the burden to show both that counsel's performance was deficient and that the deficient performance prejudiced the parent. *See* ***id.*** at 1005; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the parent fails to prove either prong, we need not address whether the other prong was satisfied. *See* ***Strickland***, 466 U.S. at 700.

¶7 Whether a parent proves ineffective assistance of counsel is a mixed question of fact and law. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Factual determinations of the circuit court will be upheld unless they are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient and whether it prejudiced the parent are questions of law we review de novo. *See* ***id.***

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 To prove deficient performance, the parent must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690. There is a strong presumption that the parent received adequate assistance and that counsel's decisions were justified in the exercise of reasonable professional judgment. *See* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" ***Domke***, 337 Wis. 2d 268, ¶36 (citation omitted). Counsel's performance is deficient only if the parent proves that counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35.

¶9 To show prejudice, the complaining party must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Pitsch***, 124 Wis. 2d at 642 (quoting ***Strickland***, 466 U.S. at 694). "It is not sufficient for the [parent] to show that his [or her] counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" ***Domke***, 337 Wis. 2d 268, ¶54 (quoting ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting ***Strickland***, 466 U.S. at 693)). In the context of a request to withdraw a plea, as in this case, a parent "must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he [or she] would not have pleaded [no contest] and would have insisted on going to trial.'" *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

¶10 One of the elements for termination based upon continuing CHIPS is that "the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under [WIS. STAT. §] 48.424." WIS. STAT. § 48.415(2)(a)3. This is the element at issue in this case. A.C.'s entire appeal is founded upon the fact it was impossible for him to meet one of the conditions of return—maintaining suitable housing—due to his incarceration. He argues his trial counsel performed deficiently by failing to advise him prior to his plea that under ***Kenosha County v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, "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." *See* ***id.***, ¶49. He states he would not have entered his plea had counsel informed him about ***Jodie W.*** He also argues his counsel was ineffective for failing to file a motion to dismiss the TPR petition based upon ***Jodie W.*** A.C.'s singular reliance on the holding in ***Jodie W.*** is not justified by the facts of record in this case.

¶11 In ***Jodie W.***, the supreme court held that a court may not find a parent unfit under WIS. STAT. § 48.415(2)(a) "based *solely* on the parent's failure to meet an impossible condition of return" and "a parent's incarceration does not, *in itself*, demonstrate that the individual is an unfit parent. We further conclude that 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." ***Jodie W.***, 293 Wis. 2d 530, ¶¶19, 49 (emphasis added; citation omitted). The ***Jodie W.*** court also stated, however:

> In light of the legislature's emphasis on "eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe

> return to the family," *the amount of time a parent is unable to provide for his or her child due to the parent's incarceration can and should be considered* by the circuit court as part of the court's evaluation of the relevant facts and circumstances.

Id., ¶46 (emphasis added).

¶12 Considering the holding of ***Jodie W.***, the circuit court concluded that even if trial counsel had brought a motion to dismiss based on that case, it would have been denied. The court determined that counsel's strategy—not bringing a motion, which counsel believed, correctly, would not likely have been successful, and instead focusing on setting the case in the best possible light for the disposition phase—was reasonable. The circuit court is correct.

¶13 At the ***Machner*** hearing, trial counsel testified he had been practicing law for thirty years and approximately fifteen percent of his cases were TPR cases. He further testified he is familiar with the continuing CHIPS ground for termination and was aware of and considered the ***Jodie W.*** case in determining his defense strategy. He testified he did not file a motion to dismiss based upon ***Jodie W.*** because he did not believe there was sufficient likelihood of success with such a motion. Specifically, counsel noted that in addition to conditions A.C. could not meet due to his incarceration, there were conditions of return that A.C. could have met but had failed to do so.

¶14 Here, trial counsel was not deficient for failing to advise A.C., based upon ***Jodie W.***, that A.C. could not be found unfit on the sole basis that he was incarcerated, because that was not the sole basis that would have been before the judge or a jury regarding A.C.'s unfitness as a parent. In addition to failing to maintain suitable housing, obviously due to his incarceration, the DCFS worker testified, and A.C. did not dispute, that A.C. did not write weekly letters to J.A.M.,

did not maintain monthly contact with DCFS, and never made any contact with J.A.M.'s medical provider, all conditions of return which A.C. could have performed while incarcerated but chose not to. As the County points out, "[n]othing prevented [A.C.] from completing these conditions for incarcerated parents." In short, A.C.'s failure to maintain a suitable residence did not "stand[] alone" as the sole reason for a finding of unfitness and termination. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶49. Relatedly, trial counsel was not deficient for failing to file a motion to dismiss based upon ***Jodie W.*** The holding of ***Jodie W.*** simply does not apply in this case for the reasons stated; thus, it cannot be said that counsel's failure to file a motion to dismiss based upon ***Jodie W.*** was "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690.

¶15 Similarly, trial counsel's performance related to his trial strategy and conduct was not deficient. Counsel testified he discussed with A.C. the elements of the continuing CHIPS ground, was permitted by the circuit court as much time as needed with A.C. prior to the hearing, and answered all of A.C.'s questions. Counsel indicated A.C. was not only aware that there were conditions of return he needed to satisfy with regard to the CHIPS petition, but that he also knew the conditions for incarcerated parents that applied to him as well. After discussing his options with counsel, A.C. decided to plead no contest to the continuing CHIPS ground.

¶16 Counsel testified that, in discussing A.C.'s options with him prior to his plea, counsel explained to A.C. that counsel had had a similar prior case, with a mother who had been in and out of her child's life due to going to jail or back to prison, and that "the jury was out ten minutes after three days of testimony." Counsel stated he advised A.C. that "if we're going to have a shot at this, it's probably going to be at disposition."

¶17 Counsel testified he believed it more advantageous to A.C. to accept an agreement with the County, which ultimately was accepted by the parties and the court, in that the second ground for termination, failure to assume parental responsibility, would be dropped if A.C. pled to the single ground of continuing CHIPS. As the County points out, this move carried with it an advantage to A.C. because if the failure to assume parental responsibility ground had been found following a trial, a determination would already have been made that A.C. did not have a substantial parental relationship with J.A.M. Presumably the lack of relationship also would have been highlighted even further for the court through the course of the trial. *See* WIS. STAT. § 48.415(6). Trial counsel added that he believed A.C.'s best argument would be made at the dispositional hearing when A.C. could provide the court with proof of his completion of programming, much of which had not yet been completed at the time of the grounds phase. Counsel further testified that the advantage to doing this would be "not putting the Court through an unnecessary exercise … and reserving our arguments for disposition. And we knew [from speaking with the mother's counsel], too, that the mother was probably going to have a trial for sure and ultimately she did." On this last point, counsel added that if the mother's parental rights were not terminated, then A.C.'s would not be either.

¶18 A.C. also testified at the ***Machner*** hearing. He stated that the first time he met with trial counsel, counsel informed him that his "MR [mandatory release] date was 2018," and that the County would have grounds to terminate his parental rights. He stated counsel told him that the continuing CHIPS ground for terminating his parental rights was "me being incarcerated," but that he knew of

the various "grounds"[4] because he received them every month from the "Project Home manager." A.C. testified that counsel told him he should "just enter the plea" because "the trial was going to be the grounds was me being incarcerated. So they was going to find me guilty of that anyway." He stated he was not aware prior to the plea that he had been facing two grounds for termination. A.C. further testified and confirmed that he believed he did not have a defense to a continuing CHIPS ground because he was incarcerated, and he would not have entered his plea if he knew he could have argued at trial that the conditions for return were impossible to meet.

¶19 On cross-examination, A.C. acknowledged that in June 2013 the court entered additional conditions of return, specifically related to incarcerated parents, that he needed to fulfill. He acknowledged those conditions were conditions he could fulfill while incarcerated, including writing letters to J.A.M. on a weekly basis and having contact with J.A.M.'s medical providers. A.C. stated he believed he wrote to J.A.M. about twice a month and acknowledged he never communicated or attempted to communicate directly with J.A.M.'s medical provider. A.C. also acknowledged he was required, as an incarceration condition, to maintain contact with DCFS, but that he had failed to do so.

¶20 A DCFS caseworker who had been assigned to J.A.M.'s case also testified at the ***Machner*** hearing. She stated she was familiar with all the conditions the court had set for A.C. to meet and confirmed that A.C. did not meet

[4] A.C. used the word "grounds" here, but we assume he was referring to the conditions for return of J.A.M.

a number of them, including keeping in regular contact with DCFS and allowing months to pass without writing to J.A.M.

¶21 With the various bases on which A.C. failed to satisfy the conditions of return and conditions specifically related to his incarceration, trial counsel apparently believed he was unlikely to succeed with a jury on both grounds and that it was a better strategy to plead to one and then focus his arguments on the disposition phase. It is always easy to look back with hindsight and contend counsel should have handled things differently; however, we are to avoid looking with the benefit of hindsight. *See* ***Domke***, 337 Wis. 2d 268, ¶36. Had counsel succeeded in avoiding a decision to terminate A.C.'s parental rights, A.C. likely would have thought counsel a genius with his strategy to concede the continuing CHIPS ground, jettison the failure to assume parental responsibility ground, and position A.C. in the best possible light for arguing to the court that his parental rights should not be terminated. That the disposition hearing did not turn out as he had hoped does not mean counsel was deficient with his choice of strategy.

¶22 Because A.C. has not met his burden of showing that trial counsel performed deficiently in any respect, we need not consider the prejudice prong. We conclude, based on the record, that trial counsel did not provide ineffective assistance of counsel to A.C. when he did not seek a dismissal of the petition pursuant to ***Jodie W.*** or expressly inform A.C. about the holding in that case prior to A.C.'s plea of no contest to the continuing CHIPS ground.

By the Court.—Order affirmed.

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