**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 5, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1197** **Cir. Ct. No. 2015TP67**

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

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO M.E.H.G., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**M. G.,**

**RESPONDENT-APPELLANT.**

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APPEAL from order of the circuit court for Milwaukee County: DAVID C. SWANSON, Judge. *Affirmed*.

¶1 BRASH, J.[1] M.G. appeals the order[2] that terminated his parental rights to M.E.H.G. and denied his postdispositional motion after this matter was remanded to the trial court for an evidentiary hearing. He argues that he should be permitted to withdraw his no-contest plea because it was not knowingly, intelligently, and voluntarily made. He further argues that his right to counsel was violated. We disagree and affirm.

## BACKGROUND

¶2 M.G. is the biological father of M.E.H.G., who was born on December 7, 2013. At the time of birth, M.E.H.G.'s urine tested positive for benzodiazepine and THC, and his meconium tested positive for THC and cocaine. On December 10, 2013, almost immediately after M.E.H.G. was discharged from the hospital with his biological mother, K.H., the Bureau of Milwaukee Child Welfare (BMCW)[3] received a call concerning the neglect of newborn M.E.H.G. On December 13, 2013,[4] a protective plan was put into place whereby M.E.H.G.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] This order also terminated the parental rights of K.H., M.E.H.G.'s biological mother, in Milwaukee County Circuit Court Case No. 2015TP67. The termination of K.H.'s parental rights and the denial of her postdispositional motion are the subject of a separate appeal, *see* ***State v. K.H.***, No. 2016AP1180, and are not at issue in the current proceeding.

[3] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

[4] We note that there are several typographical errors in the BMCW report relating to its initial contacts with M.G. and K.H. regarding M.E.H.G.; specifically, the report mistakenly references the year "2014" several times while discussing these initial contacts, instead of correctly referencing "2013," as these contacts occurred shortly after M.E.H.G.'s birth.

was to remain under the care of a caregiver, with M.G. and K.H. allowed supervised visitation with the child on a daily basis.

¶3 On January 24, 2014, a little more than a month after the placement plan's implementation, the caregiver advised BMCW that she was no longer willing to work with K.H. The caregiver had been assisting K.H. with appointment scheduling and medication for K.H.'s mental health issues, but stated that K.H. had become uncooperative with these efforts. An in-home safety plan was not an option, as BMCW workers determined that neither K.H. nor M.G. would "perform parental duties" and that the family did not "have or use resources necessary to assure the child's basic needs."

¶4 Consequently, M.E.H.G. was placed in foster care. A Child in Need of Protection and Services (CHIPS) dispositional order was entered on August 11, 2014, which set conditions that were to be met by M.G. prior to M.E.H.G.'s return. These conditions included participating in the services offered through BMCW such as parenting education, Alcohol and Other Drug Abuse (AODA) assessment and treatment, individual therapy, and domestic abuse education. A visitation plan with M.E.H.G. was also required to be established, and M.G. was to consistently follow that schedule.

¶5 M.G. failed to satisfactorily meet these conditions. For example, he completed AODA assessment but did not complete any random urine screenings to demonstrate sobriety, as required. He refused to participate in parenting education services because he felt there was no reason for him to do so. He was referred to individual therapy but attended only a few of the appointments. He failed to attend any domestic violence counseling sessions. Furthermore, his visitation with M.E.H.G. was very inconsistent.

¶6 As a result, a Petition for the Termination of Parental Rights (TPR) of M.G. for M.E.H.G. was filed on March 12, 2015. In the petition, the State alleged two grounds for termination: (1) continuing need of protection and services, pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). Additionally, the petition noted that M.G. had a prior history with child protective services: he has three older children who were removed from the home and were subjects of a petition seeking to terminate M.G.'s parental rights. These children were eventually returned to the custody of their mother. The order also noted that BMCW had reviewed police reports indicating a history of domestic violence with M.G.'s previous significant other.

¶7 At the initial appearance hearing on April 1, 2015, M.G. appeared in court without counsel, and was referred to the State Public Defenders Office for the appointment of counsel. At the rescheduled hearing on April 30, 2015, M.G. appeared with counsel, advised the trial court that he was contesting the TPR petition, and the matter was scheduled for trial.

¶8 At the final pretrial conference on October 2, 2015, counsel for M.G. requested time to discuss a possible no contest plea with M.G., because M.G.'s phone had been off prior to the hearing, and counsel had been on vacation. In the meantime, K.H. entered a no contest plea on the continuing CHIPS grounds set forth in the TPR petition. Prior to accepting K.H.'s plea, the trial court asked the social worker involved in M.E.H.G.'s case several standard required questions relating to the TPR; specifically, whether M.G. had been adjudicated as the father of M.E.H.G., whether any other man had filed a declaration of paternity, whether the Indian Child Welfare Act applied in this matter, and whether the current placement of M.E.H.G. was an adoptive resource.

¶9 When M.G. returned to court later that day, he entered a no contest plea to the continuing CHIPS grounds of the TPR as well. The trial court explained to M.G. that he was required to agree that the factual basis for his plea was substantially true prior to the court accepting his plea; however, the trial court did not repeat the standard factual questions that it had asked the social worker during K.H.'s plea hearing, noting that the social worker had already answered those questions on the record. After a lengthy colloquy with M.G., the trial court accepted his plea, confirming that the plea was made "freely, voluntarily, intelligently and with full understanding" of the proceedings.

¶10 At the final dispositional hearing on February 19, 2016, the trial court found that based on all of the factors set forth in WIS. STAT. § 48.426, it was in the best interest of M.E.H.G. that the parental rights of M.G. be terminated. A written order terminating the parental rights of M.G. as to M.E.H.G. was entered on February 19, 2016.

¶11 M.G. filed a Notice of Appeal on June 10, 2016. He subsequently filed a Motion for Remand to the Trial Court on July 21, 2016, for an evidentiary hearing on whether his plea was knowing, intelligent, and voluntary. Additionally, he argued that his right to counsel had been violated, because at the time the trial court asked the social worker the standard questions relating to the TPR, neither M.G. nor his trial counsel were present. The remand motion was granted by this court, and a hearing was held February 28, 2017.

¶12 The remand court[5] found that M.G. had not made a prima facie showing that the plea colloquy was deficient. Nevertheless, because the evidentiary hearing already occurred, the remand court made a ruling on M.G.'s motion, finding that the State had proven by clear and convincing evidence that M.G.'s plea was made knowingly, intelligently, and voluntarily. The remand court commented on M.G.'s poor recall of the proceedings, which was detrimental to his credibility. In contrast, the remand court noted that M.G.'s trial counsel had good recall of his explanation to M.G. of the proceedings and their consequences. Accordingly, trial counsel's testimony that he believed that M.G. had understood the ramifications of the plea, was found to be credible by the remand court.

¶13 Furthermore, the remand court found that M.G's right to counsel was not violated. The court stated that M.G. was present with his trial counsel at all critical times during the plea proceeding, and that the standard required questions asked of the social worker during K.H.'s plea hearing (that were not repeated during M.G.'s plea hearing) were not related to the critical phase of establishing the factual basis for M.G.'s plea.

¶14 Therefore, the remand court denied M.G.'s motion to withdraw his no contest plea. This appeal follows.

## DISCUSSION

### *1. M.G.'s plea was knowingly, intelligently, and voluntarily made.*

[5] This matter on remand was heard by the Honorable Laura Gramling-Perez; the plea and dispositional hearing was before the Honorable David Swanson.

¶15 M.G. claims that he was confused by statements made by his trial counsel and the trial court with regard to his right to a trial, and therefore his plea was not knowing, intelligent, and voluntary. Specifically, M.G. points to a statement by his trial counsel at the beginning of the plea hearing, when he stated "[m]y client maintains his right to trial regarding disposition and the best interest phase." He also asserts that he was confused by the trial court's statement made during the colloquy with M.G. that "the dispositional hearing is basically a second trial. It's just a trial to the judge, no jury at that stage."

¶16 When a parent alleges that a stipulation was not knowingly and intelligently made, we apply the ***Bangert***[6] analysis. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Under the ***Bangert*** analysis, the parent "must make a prima facie showing that the [trial] court violated its mandatory duties and he must allege that in fact he did not know or understand the information that should have been provided at the § 48.422 hearing." ***Steven H.***, 233 Wis. 2d 344, ¶42. "If [the parent] makes this prima facie showing, the burden shifts to the [State] to demonstrate by clear and convincing evidence that [the parent] knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.*** If the parent fails to make a prima facie case, the trial court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

¶17 Whether a parent has presented a prima facie case by showing deficiencies in the colloquy and by alleging that he did not know or understand the information that should have been provided by the trial court, is a question of law

[6] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

that we review *de novo*. *See* ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122. In doing so, we look to the totality of the circumstances and the entire record to determine the sufficiency of the trial court's colloquy. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶18 Our independent review of the record shows that M.G. unquestionably entered his plea freely, voluntarily, and intelligently. During the plea colloquy, M.G. affirmed that he understood he was giving up his right to trial and his right to contest the continuing CHIPS grounds. Furthermore, while the trial court included in its explanation of the proceedings the statement that the dispositional hearing is "basically a second trial," the court went on to state that "the only issue before the [c]ourt at disposition is what is in the child's best interests." M.G. stated that he understood.

¶19 The trial court then provided a detailed explanation of the dispositional hearing, noting the similarities to a jury trial on the continuing CHIPS grounds. The court then explained the primary distinguishing factor of the jury trial from the dispositional hearing: that at a jury trial, the State would have had to prove its case on the continuing CHIPS grounds by "clear, satisfactory and convincing evidence" and that M.G. was "giving up the right to make the State prove its case."

¶20 Additionally, the court pointed out that M.G. would still be able to participate in the dispositional hearing and explained what a dispositional hearing would entail, including the potential outcomes. The court then asked M.G. whether he understood that description to be related only to the disposition. M.G. answered affirmatively.

¶21 Additionally, M.G. affirmed that he had gone over all of the proceedings with trial counsel, that he understood all of his rights, and that he was entering the plea knowingly, intelligently, and voluntarily. Moreover, the trial court noted at the end of its "very thorough colloquy" that M.G.'s demeanor indicated that he understood exactly what had been discussed. At that point, the trial court accepted M.G.'s plea.

¶22 We agree with the trial court that its colloquy was very thorough, and not deficient in any way. Furthermore, although M.G. may have initially been confused by the trial court's description of the disposition as a "second trial," the trial court's subsequent explanation of the rights being forfeited with regard to the jury trial, and its comparison of the jury trial to the disposition, was clear and explicit. Moreover, the trial court stated that M.G.'s demeanor during the colloquy clearly denoted his understanding of the proceedings. Therefore, we agree with the trial court that M.G. did not meet his burden of presenting a prima facie showing that the trial court violated its mandatory duties and that M.G. did not understand the information provided. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42. Accordingly, we affirm the remand court's denial of M.G.'s motion to withdraw his plea.

*2. M.G.'s right to counsel was not violated.*

¶23 M.G. also argues that his right to counsel was violated during the plea hearing. Specifically, he contends that the trial court's questioning of the social worker when neither M.G. nor his trial counsel were present in the courtroom was a critical stage in the plea proceedings, creating a situation of per se prejudice resulting in a denial of his right to counsel.

¶24 In Wisconsin, there is a statutory right to the assistance of counsel in a termination of parental rights proceeding which is "essential to a fair proceeding." ***State v. Shirley E.***, 2006 WI 129, ¶60, 298 Wis. 2d 1, 724 N.W.2d 623. As such, if a parent in a TPR proceeding is "totally deprived of the presence and assistance of an attorney during a critical stage in the proceeding, reversal is automatic." ***Id.***, ¶61. This right to counsel "extends to all critical stages of the proceedings." ***State v. Mills***, 107 Wis. 2d 368, 370, 320 N.W.2d 38 (Ct. App. 1982). "'A critical stage is any point in the criminal proceedings when a person may need counsel's assistance to assure a meaningful defense.'" ***State v. Carter***, 2010 WI App 37, ¶18, 324 Wis. 2d 208, 781 N.W.2d 527 (citation omitted).

¶25 The remand court found that the standard required questions asked by the trial court outside of the presence of M.G. and his trial counsel—whether M.G. had been adjudicated as the father of M.E.H.G., whether any other man had filed a declaration of paternity, whether the Indian Child Welfare Act applied in this matter, and whether the current placement of M.E.H.G. was an adoptive resource—were not related to the critical phase of establishing the factual basis for M.G.'s plea. We agree.

¶26 This information, while relevant to these proceedings, was not part of the factual basis for his plea. In fact, most of the information provided by the answers to those questions had previously been provided to the trial court in the Court Report for Termination of Parental Rights, filed April 1, 2015; there is no information in the record, and thus none in the report, that any other man had filed a declaration of paternity. Thus, M.G. could have raised any issues regarding this information in the six months prior to the plea hearing.

¶27 Rather, the testimony critical to establishing the factual basis of M.G.'s plea was confirmed during the lengthy and thorough colloquy between the trial court and M.G., during which both M.G. and his trial counsel were present. We further note that M.G. subsequently appeared with counsel during the other critical stages of these proceedings: the dispositional hearing on December 18, 2015 ; the permanency plan hearing on January 13, 2016; and the continued dispositional hearing held on February 19, 2016. As a result, we find that there was no violation of M.G.'s right to counsel.

¶28 Therefore, we affirm the denial of M.G.'s postdispositional motion that he should be permitted to withdraw his no contest plea because it was not knowingly, intelligently, and voluntarily made, and that his right to counsel was violated.

*By the Court.*—Order affirmed.

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