COURT OF APPEALS DECISION DATED AND FILED

December 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP2102
2016AP2103

Cir. Ct. Nos. 2015TP238
2015TP239

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S. N. N.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

S. N. N.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: MARY E. TRIGGIANO, Judge. *Affirmed*.

¶1 BRASH, J.[1] S.N.N. appeals from orders terminating her parental rights for N.L.P. and M.P.P. She contends that her plea was not knowingly, intelligently, and voluntarily made and thus she should be permitted to withdraw it. She further asserts that her trial counsel was ineffective for failing to object to testimony regarding the foster parents' proposed intent to allow contact to continue between S.N.N. and the children after the termination of parental rights was final, and seeks to vacate the termination of parental rights orders entered in this case. We affirm.

BACKGROUND

¶2 S.N.N. is the biological mother of N.L.P. and M.P.P., twin girls born on July 13, 2012. The children were detained by the Bureau of Milwaukee Child Welfare (BMCW),[2] on April 25, 2013, after both were found to have healing fractures: N.L.P. had a healing fracture to her right femur that was likely several weeks to months old, and M.P.P. had a healing fracture to her right tibia that was weeks old. The examining doctor stated that the injuries were inconsistent with

[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] 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.

those that would occur by falling, but the parents were "unable or unwilling to explain the injuries." Additionally, both girls were diagnosed as failing to thrive, because they were eight months old and weighed only nine and eleven pounds.

¶3 At the time they were detained, the twins were living with S.N.N. and four other siblings. The twins' adjudicated father, M.P.,[3] had moved into the same duplex as S.N.N. a few months before the twins were detained by BMCW and had gotten involved with their care. S.N.N. has had numerous referrals to BMCW since 2008 relating to her parenting skills, and there were further allegations at the time of the detention of N.L.P. and M.P.P. that S.N.N. had left all of her children unsupervised (the oldest was seven years old at the time, and the twins were infants) despite a history of her oldest child "physically hurting his sisters, sexually assaulting them and setting fires in the home." Additionally, M.P. had two of his other children placed with him at the time of the twins' detention and "struggle[d] to meet their needs on a regular basis."

¶4 Consequently, the twins were placed in foster care. A Child in Need of Protection and Services (CHIPS) dispositional order was filed on January 24, 2014, which set conditions that were to be met by S.N.N. and M.P. before the twins would be allowed to return home. These conditions included participating in services offered through BMCW such as parenting education, individual therapy, and regular supervised visitation with the twins.

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[3] The parental rights of M.P. were also terminated and were the subject of separate appeals, *see* ***State v. M.P.***, Nos. 2016AP2104 and 2016AP2105, which have previously been decided by this court.

¶5 S.N.N. failed to satisfactorily meet these conditions. She completed a psychological evaluation which identified several mental health issues, but did not regularly and consistently engage in therapy sessions. Additionally, she was only able to visit with a couple of her children at a time because she was unable to manage them all at once. As such, she was never able to progress to unsupervised visits. Moreover, S.N.N. was not employed and was living with her two sisters; her living space was confined to part of an attic, which was not suitable for the placement of the children.

¶6 As a result, a Petition for the Termination of Parental Rights (TPR) of S.N.N. for N.L.P. and M.P.P. was filed on August 14, 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).

¶7 S.N.N. entered into a stipulation to the continuing need for protection ground on March 3, 2016. The trial court found that S.N.N. had made this decision to stipulate "on a knowing, voluntary, and intelligent basis."

¶8 The proceedings then moved into the dispositional phase, where the trial court considered all of the relevant factors relating to termination as required by WIS. STAT. § 48.426(3). Ultimately, the trial court found that it was in the best interests of N.L.P. and M.P.P. that the parental rights of S.N.N. be terminated, effective May 10, 2016.

¶9 S.N.N. filed a notice of appeal, but subsequently filed a motion for post-dispositional relief and requested that this matter be remanded to the trial court for a hearing on her claims. Specifically, her post-dispositional motion alleged that her plea relating to the continuing need for protection ground was not

entered into knowingly, voluntarily, or intelligently. She further argued that her trial counsel was ineffective for failing to object to the admission of evidence regarding the foster parents' intent to allow visits between S.N.N. and the twins to continue after the termination of her parental rights.

¶10 This court granted S.N.N.'s motion and remanded the case to the trial court for post-disposition proceedings.[4] After taking testimony on the issues over several days, the trial court issued a written decision on July 12, 2017, denying S.N.N.'s motion. The court found that "consideration of post-TPR contact is appropriate under established case law," and thus any objection by counsel to the testimony relating to the foster parents' intent would not have been successful. Because failing to object to permitted testimony does not constitute deficient performance on the part of trial counsel, the court ruled that S.N.N. had not established that she had received ineffective assistance of counsel.

¶11 The trial court further found that S.N.N. had failed to establish a prima facie case that the trial court violated its statutory duties or violated S.N.N.'s due process rights in accepting her stipulation. It also found that she had failed to make a prima facie showing that her plea was not made knowingly, voluntarily, and intelligently. The trial court therefore denied her motion for post-dispositional relief. We then resumed jurisdiction over this appeal.

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[4] M.P. also appealed and subsequently filed a post-dispositional motion, which was remanded to the trial court and heard in conjunction with S.N.N.'s motion. It was also denied.

DISCUSSION

1. Plea Withdrawal

¶12 S.N.N. first argues that she should be permitted to withdraw her plea relating to the continuing need for protection ground because it was not entered into knowingly, voluntarily, or intelligently. She asserts that she was not informed by her trial counsel or the trial court that there would be a lower burden of proof for the dispositional phase of the proceedings, or that she was relinquishing her right to have witnesses appear on her behalf. Furthermore, S.N.N. contends that her trial counsel coerced her into entering the plea, based in part on a meeting trial counsel had arranged with the twins' foster parents in which they made promises relating to future contact with the twins.

¶13 When a parent alleges that a plea was not knowingly, voluntarily, and intelligently made, we apply the ***Bangert***[5] analysis. *See* ***Waukesha Cty. 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 [s]he must allege that in fact [s]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

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

make a prima facie showing, the trial court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

¶14 Whether a parent has presented a prima facie case by showing deficiencies in the colloquy and by alleging that she did not know or understand the information that should have been provided by the trial court, is a question of law that we review *de novo*. *See* ***Oneida Cty. 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.

¶15 There are several threshold issues with S.N.N.'s claims. In the first place, there is no requirement incumbent upon the trial court to provide information regarding the burden of proof for a phase of the TPR proceedings to which the parent is not entering a plea, and S.N.N. provided us with no legal support for adding such a requirement. Rather, it is well established that the information the trial court is required to provide to the parent is the statutory standard that will be applied during the dispositional phase; that is, that '"[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition…."' ***Therese S.***, 314 Wis. 2d 493, ¶16 (quoting WIS. STAT. § 48.426(2)). Additionally, the trial court must also inform the parent that after hearing evidence during the dispositional phase, it will determine whether to terminate the parent's rights. ***Id.*** Our review of the record indicates that the trial court complied with these requirements.

¶16 With regard to her second claim—that she did not understand that she would not be able to call witnesses on her behalf—S.N.N. fails to develop this argument. It is unclear who these witnesses were or to what they would testify,

and how this affected S.N.N.'s plea. Moreover, S.N.N. did not argue this issue in her post-dispositional motion. Therefore, because this argument is not developed, we will not address it. *See* ***Indus. Risk Insurers v. Am. Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("we will not abandon our neutrality to develop arguments").

¶17 In S.N.N.'s final argument regarding the withdrawal of her plea, she alleges that her trial counsel coerced her into making the plea. In particular, she points to a meeting with the twins' foster parents prior to entering the plea, arranged by her trial counsel and without the knowledge of the trial court, during which the foster parents indicated that they would permit S.N.N. to remain in contact with the twins even after termination. S.N.N. claims that she relied on this promise in entering her plea. S.N.N. also contends that she believed she could be facing jail time after her trial counsel advised her that a discrepancy in her deposition testimony relating to when she last saw her boyfriend could result in a perjury charge. In short, S.N.N. asserts that she believed that her only option to avoid going to jail was to allow her parental rights to be terminated.

¶18 However, the post-dispositional testimony of S.N.N.'s trial counsel does not support these claims. Trial counsel testified that she went over all the "pros and cons" of the options of going to trial or stipulating to grounds. For example, S.N.N. had previously had her parental rights terminated for three other children, and trial counsel advised her that information relating to those terminations may come up if she proceeded to trial on these proceedings. Trial counsel also discussed with S.N.N. that strategically, it could be beneficial to M.P.'s case for S.N.N. to stipulate to grounds because trial counsel believed M.P's case was stronger, and thus it was possible that M.P. would prevail and the twins would be returned to him.

¶19 Trial counsel also testified as to a discussion regarding S.N.N.'s deposition testimony relating to the relationship she had with her boyfriend. That discussion entailed trial counsel's review of S.N.N.'s personal calendar that contained a notation about seeing the boyfriend at a later date than what she had testified to in her deposition. When counsel asked S.N.N. about the discrepancy, S.N.N. replied that "she didn't want it to look bad" that she had continued to see the boyfriend.

¶20 Trial counsel also testified regarding the pre-dispositional meeting with the twins' foster parents. Counsel was present for the meeting, and testified that the possibility of future contact was addressed, but no promises were made by the foster parents. Trial counsel also emphasized to S.N.N. that the conversation did not constitute an enforceable agreement, and that she facilitated the meeting because S.N.N. requested it and counsel thought the conversation might ease S.N.N.'s mind with regard to the twins' potential adoption.

¶21 Although S.N.N. entered her plea the day after the meeting with the twins' foster parents, she indicated to the trial court that no one had "promised [S.N.N.] anything or threatened [S.N.N.] in any way to get [S.N.N.] to stipulate to grounds." She declared that she had been thinking about stipulating to grounds for "about a couple months." She further stated that she understood the effects of the decision and had discussed the decision with her attorney. The trial court concluded by asking S.N.N. whether she was making a knowing, voluntary, and intelligent decision with regard to the stipulation, to which S.N.N. responded in the affirmative.

¶22 Based on our review of the record, we find that S.N.N. has not established a prima facie case for withdrawing her plea. The record indicates that

the trial court performed its mandatory duties in accepting the plea, and further shows that S.N.N. declared her understanding of the information that was provided to her. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42. We therefore affirm the trial court's denial of S.N.N.'s post-dispositional motion to withdraw her plea.

2. Ineffective Assistance of Counsel

¶23 Next, S.N.N. argues that her trial counsel was ineffective for failing to object to testimony regarding the foster parents' intent to allow visits between S.N.N. and the twins to continue after the termination of her parental rights. S.N.N. asserts that this testimony was inadmissible and that it allowed the trial court to "avoid its mandated duty" to determine if the severance of the substantial relationship between S.N.N. and her children would be harmful to the children, in accordance with WIS. STAT. § 48.426(3)(c); consequently, S.N.N. claims that the trial court's reliance on this alleged inadmissible testimony was prejudicial to her.

¶24 To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." ***Id.*** at 691. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. However, if a defendant fails to prove either of these two prongs, the court need not consider the other. ***Id.*** at 697. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶25 Whether the termination of parental rights is in the best interests of a child is a discretionary decision of the trial court. ***In re Michael I.O.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). As part of that determination, the trial court is required under WIS. STAT. § 48.426(3) to consider all of the factors set forth therein. The third factor, which is set forth at subsection (c) and is the factor at issue in this case, has previously been interpreted by our supreme court in ***State v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475.

¶26 In ***Margaret H.***, the trial court had dismissed a TPR petition for twin boys whose mother had abandoned them shortly after birth, but whose maternal grandmother had taken over their care. ***Id.***, ¶3. The twins were removed from the grandmother's home and were placed in a series of foster care placements; however, the grandmother was still considered an option for permanent placement of the twins if she was able to secure suitable housing. ***Id.***, ¶¶4-5. These continuing efforts by the grandmother, as well as the trial court's finding that there was a substantial relationship between the twins and their grandmother that would be harmful to the twins if severed, were the primary bases for the trial court's dismissal of the TPR petition. ***Id.***, ¶10.

¶27 This court then reversed that decision and remanded it back to the trial court, finding that the trial court had failed to consider all of the requisite factors set forth at WIS. STAT. § 48.426(3). ***Margaret H.***, 234 Wis. 2d 606, ¶12. However, specific to subsection 3(c), this court stated that there was no evidence that the relationship between the twins and their grandmother would be severed upon the termination of parental rights and subsequent adoption by their current foster parent, based on evidence in the record that the foster parent had declared her intent to continue contact between the twins and their birth family. ***Id.***, ¶23. This court therefore concluded that the trial court's determination that the twins'

relationship with their birth family would be severed upon termination was clearly erroneous. ***Id.***

¶28 Our supreme court rejected this court's interpretation of WIS. STAT. § 48.426(3)(c). It found that we had erroneously "approached the issue as a question of fact and concluded that because the evidence contained in the record did not reveal an actual severance, the [trial] court's conclusion was 'on its face, wrong.'" ***Margaret H.***, 234 Wis. 2d 606, ¶25. The supreme court stated that this court's interpretation would "severely limit[] the [trial] court's discretionary authority to determine whether the termination of parental rights lies in the best interest of the child," and further, that this interpretation would have the effect of precluding the trial court "from considering the adverse effects stemming from the dissolution of the legal rights and duties of the birth family." ***Id.***, ¶27.

¶29 Put another way, the supreme court explained that WIS. STAT. § 48.426(3)(c) "requires only that the [trial] court examine the impact of a legal severance on the broader relationships existing between a child and his or her family" as opposed to mandating that the trial court consider specific statements made by foster families or prospective adoptive families. ***Margaret H.***, 234 Wis. 2d 606, ¶29. In other words, it is within the trial court's discretion to consider a "good faith promise" made by a foster parent regarding continued visitation, but the trial court "should not be bound to hinge its determination on that legally unenforceable promise." ***Id.***, ¶30. Therefore, the supreme court held that the trial court "may certainly choose to examine the probability that [the twins' foster parent] will be faithful to her promise, at the same time bearing in mind that such promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***

¶30 We construe this decision as a clear directive by our supreme court regarding the consideration of statements by foster parents. In fact, the supreme court utilized the crux of S.N.N.'s argument—that by their nature foster parents' statements of post-termination intent are "entirely illusory and not binding"—in explaining why this court's interpretation of WIS. STAT. § 48.426(3)(c) was erroneous, since it essentially required the trial court to consider them. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶28. Instead, the supreme court concluded that any consideration of such statements is encompassed in the trial court's discretionary power in deciding TPR cases. ***Id.***, ¶30.

¶31 S.N.N. focuses particularly on a statement in ***Margaret H.*** where the supreme court stated that "[i]n its discretion, the [trial] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members, although we cannot mandate the relative weight to be placed on this factor." ***Id.***, ¶29. S.N.N. asserts that this is dicta and should have no bearing on our determination of this issue.

¶32 We decline to take a position on whether the above statement is dicta because we do not find that statement relevant to our analysis. Although the supreme court suggested that affording due weight consideration may be appropriate for such statements, it also specifically stated that it could not mandate such a directive. ***Id.*** Furthermore, as stated above, the supreme court recognized that statements by foster parents are illusory, and thus should be considered under the trial court's broad discretion. ***Id.***, ¶30.

¶33 In this case, the trial court did not indicate that it applied any certain weight to its consideration of the testimony regarding the foster parents' intent regarding visitation. In fact, the trial court acknowledged that it did not know

whether there would be future contact allowed by the foster parents, and thus that factor was not part of its analysis; rather, the trial court specifically recognized that it is "required to consider the effect of the legal separation and the emotional and psychological bonds between child and family." Thus, the only issue before this court relating to this factor is whether the trial court properly exercised its discretion by applying the correct standard of law to the facts of the case. *See* ***id.***, ¶32. We find that it did.

¶34 Therefore, we reject S.N.N.'s argument. As a result, S.N.N.'s trial counsel was not ineffective for failing to pursue an ineffectual argument. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Accordingly, we affirm the decision of the trial court to terminate S.N.N.'s parental rights of N.L.P. and M.P.P.

By the Court.—Orders affirmed.

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