COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 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. 2017AP1578
2017AP1579
2017AP1580

Cir. Ct. Nos. 2016TP20
2016TP21
2016TP22

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2017AP1578

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

S. J.,

RESPONDENT-APPELLANT,

S. H.,

RESPONDENT.

NO. 2017AP1579

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

S. J.,

RESPONDENT-APPELLANT,

D. W.,

RESPONDENT.

2017AP1580

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

S. J.,

RESPONDENT-APPELLANT,

D. W.,

RESPONDENT.

APPEALS from orders of the circuit court for Dane County: JOHN D. HYLAND, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] S.J appeals orders terminating her parental rights to J.C., J.W., and J.W. S.J. argues that the circuit court erred in denying her motion to withdraw her pleas of no contest during the grounds phase of the termination of parental rights (TPR) proceedings as to each of the three children. I affirm for the following reasons.

BACKGROUND

¶2 Dane County filed a petition to terminate S.J.'s parental rights on March 24, 2016, alleging failure to assume parental responsibility and a continuing status of children in need of protection and services (CHIPS). The circuit court appointed an attorney to represent S.J. At a hearing on November 15, 2016, S.J. entered pleas of no contest as to the grounds for termination of her parental rights as to each child.

The Plea Hearing

¶3 The plea hearing was extensive, providing the circuit court with detailed background and information about S.J.'s understandings, which I summarize at some length given the nature of the issues raised on appeal. S.J. entered no contest pleas as to each child after answering under oath more than 80 pertinent questions posed by her own lawyer, the County's assistant corporation counsel, the guardian ad litem, and the court. Additionally, a County social worker testified to the factual basis for grounds for termination of S.J.'s parental rights.

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

¶4 When S.J. was asked at the beginning of the hearing if she knew why she was in court, she replied, "I'm here to plead no contest for the grounds of terminating my parental rights." S.J. was asked three different ways whether any promises or threats were made in exchange for her no contest pleas, and she answered in the negative each time.

¶5 S.J. testified that she understood that she was giving up her right to trial and all associated rights. She personally acknowledged that she was giving up: her right to cross examine, question, or call witnesses; her right to a jury of 12 people; and her right to make the County prove all the elements by clear and convincing evidence. S.J. also personally acknowledged her understanding that if the court ultimately terminated her parental rights, she would lose visitation rights, the right to inherit, the right to know anything about her children as time goes by, and the right to custody of her children.

¶6 In addition, S.J. told the court that she understood each of the elements that the County would have to prove by clear and convincing evidence, that there would be a finding of unfitness, that her plea decisions were "unchangeable" once she chose to enter pleas, and that she had a right to appeal from any errors by the circuit court.

¶7 S.J. testified that she understood that the grounds phase focused on what she and the father had or had not done relative to the children,[2] and that the

[2] The father of J.C., who is one of the three children involved in this TPR case, also entered a plea of no contest as to grounds at the same hearing as the one at issue in this appeal and also subsequently filed a motion to withdraw his plea. However, the father's rights are not at issue in this appeal.

dispositional hearing would focus on the best interests of the children. S.J. testified that she was satisfied with the representation she received from, and that she had enough time to speak with, her attorney. S.J. told the court that she had discussed all her options with her attorney, that she understood all of her options, and that she was making a strategic decision in entering her no contest pleas.

¶8 The court's explanations to S.J. included the following: "And [S.J.] just so you know, the reason there are a lot of questions is simply because the importance of the decision [requires] a very clear record as far as all the possible things that you may have thought about and your understanding, not that anybody is questioning or trying to influence you." S.J. replied, "I understand. You're trying to make sure that we don't want to do this trial, so we can set the date, no confusion, I understand clearly."

¶9 S.J.'s attorney told the court that she believed that S.J. understood the rights she was giving up and that the two had "discussed all of those issues." The attorney said that "S.J. is one of the brightest clients I've ever worked with, so I think she is knowingly and voluntarily deciding to plead no contest."

¶10 In finding at the plea hearing that the pleas were knowingly, voluntarily, and intelligently given, the circuit court stated, based on the testimony and its observations of S.J., that it appeared that S.J. had "given a good deal of thought to this matter," noting that S.J. had testified that she had enough time to consult with her attorney before the plea hearing, and to speak with family members and friends about the pleas and the TPR proceeding. The court found that it was "satisfied" that S.J. had "taken sufficient and indeed a good amount of time to think about, decide[,] and to enter the plea of no contest here."

Motion For Plea Withdrawal And Hearing On Motion

¶11 Several months after S.J. entered her pleas, S.J., through a new attorney, filed a motion to withdraw the no contest pleas, alleging that, as a result of ineffective assistance of counsel, they were not knowingly, voluntarily, and intelligently given. The circuit court held a hearing and oral argument on the withdrawal motion.

¶12 The circuit court issued a written decision denying S.J.'s motion. In assessing whether S.J.'s pleas had been knowingly, voluntarily, and intelligently given, the court found "nothing about [S.J.'s] answers as reflected in the [plea hearing] transcript which cause the court to believe that her plea[s] [were] not in satisfaction of the requirements of the law." The court found that, at the plea hearing, "[S.J.'s] demeanor and appearance were as they had been [in earlier court appearances]. She was involved, attentive[,] and spoke clearly and without obvious stress or confusion…. She was lucid, involved, and appeared to listen to each question and respond accordingly. She never asked to have anything restated or explained."

¶13 The circuit court explained that the "record, including the Court's observations, are in stark contrast to the picture [S.J.] sought to paint with her testimony at the evidentiary hearing" to withdraw her pleas. The court observed that at the evidentiary hearing, in contrast to the plea hearing, S.J. testified that her attorney was unavailable to S.J. and did not explain things to her, misled S.J. as to trial strategy, convinced her to give up her rights and enter the pleas, and never discussed with her that S.J. would be "named unfit as a result of the plea." The court made an explicit finding that it did "not find [S.J.] credible in her testimony during the evidentiary hearing." In contrast, the court found that S.J.'s original

attorney was "credible in her testimony describing" extensive meetings and discussions the two had had regarding the plea decisions.

¶14 The circuit court found that S.J. did not make the necessary prima facie showing required to withdraw her no contest pleas, namely a showing that the plea colloquy was deficient and that S.J. did not know or understand her rights. *See* ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122 (citing ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)) (setting forth necessary requirements to make prima facie showing to withdraw plea). The court went on to find that, even if S.J. had made a prima facie showing, "the Court finds that the county has established by clear and convincing evidence that the plea[s] [S.J.] entered [were] knowing, voluntary and intelligently given." *See* ***id.***

¶15 After denying S.J.'s motion to withdraw her pleas, the circuit court held dispositional hearings and terminated S.J.'s parental rights in a written decision, a decision not directly challenged on appeal. S.J. appeals regarding the no contest pleas.

DISCUSSION

¶16 On appeal, S.J. argues that she should be allowed to withdraw her no contest pleas in the grounds phase because the circuit court applied the wrong legal standard. More specifically, she analogizes TPR cases to criminal cases, and argues that it appears that the court applied a "manifest injustice" standard to S.J.'s pre-disposition plea withdrawal request when it should have applied a "fair and just reason" standard. However, in making this argument, S.J. makes an unsupported request that I create a new standard for the analysis of plea

withdrawals in the TPR context. That is, S.J. fails to point to Wisconsin authority that either the manifest injustice or fair and just reason standards apply to a motion to withdraw a no contest plea in a TPR proceeding. Instead, as the County argues and I now explain in more detail, when reviewing a claim that a no contest plea in a TPR proceeding was not knowing, voluntary, and intelligent, courts follow the analysis set forth in ***Bangert***, familiar from the criminal context.[3] *See* ***Therese S.***, 314 Wis. 2d 493, ¶6.

¶17 Under the appropriate analysis, a parent seeking to withdraw a plea in a TPR proceeding must first make a prima facie case establishing that the circuit court violated its mandatory duties under WIS. STAT. § 48.422(7)[4] and asserting that the parent did not know or understand the information the court should have provided. ***Id.*** If the parent fails to establish a prima facie case, the court need go no further and may deny the motion for plea withdrawal. ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶43, 233 Wis. 2d 344, 607 N.W.2d 607, *modified on other*

---

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

[4] WISCONSIN STAT. § 48.422(7) requires that a circuit court:

> (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.

grounds by ***St. Croix Cty. DHHS v. Michael D.***, 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107. If the parent makes a prima facie showing, the State (or, here, the County) must then show by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently waived the right to contest the allegations in the petition. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶18 Having set forth the standard that applies to a motion for a plea withdrawal in a TPR proceeding, I now turn to S.J.'s arguments that I should reverse the circuit court's denial of her withdrawal motion because the court applied the wrong legal standard and that there was a fair and just reason to grant S.J.'s motion.

S.J. Forfeited Her "Wrong Standard" Argument By Not Raising It In Circuit Court

¶19 I reject S.J.'s wrong standard argument because she did not present it to the circuit court, as S.J. concedes on appeal. *See* ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 ("Arguments raised for the first time on appeal are generally deemed forfeited ....") (quoted source omitted). And, S.J. provides no substantive argument against application of the forfeiture rule here.

¶20 I could end at this point. However, I now explain why I conclude that the circuit court properly determined, under the pertinent legal standards, that S.J. failed to make a prima facie case showing both that the plea colloquy was deficient and that she did not know or understand the information the trial court should have provided. Then I separately explain why I conclude that, even if the court had been obligated to apply the fair and just reason standard, as S.J. now

urges, the court did not erroneously exercise its discretion in denying S.J.'s motion to withdraw her pleas.

Legal Standards For TPR Pleas And Plea Withdrawals

¶21 In the grounds phase of a TPR case, the factfinder determines whether there are grounds to terminate a parent's rights and "'the parent's rights are paramount.'" *See* ***Sheboygan Cty. DHS v. Julie A. B.***, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402 (quoted source omitted). "If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit." WIS. STAT. § 48.424(4). "Once the court has declared a parent unfit, the proceeding moves to the second, or dispositional phase, at which the child's best interests are paramount." ***Steven V. v. Kelley H.***, 2004 WI 47, ¶26, 271 Wis. 2d 1, 678 N.W.2d 856.

¶22 To be constitutionally sound, a no contest plea in a TPR proceeding must be entered knowingly, voluntarily, and intelligently. *See* ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. Under WIS. STAT. § 48.422(3),"[i]f the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." The parent must also have knowledge of the constitutional rights being given up by the plea. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶25. These rights include: (1) the right to counsel; (2) the right to a jury trial; (3) the right to have the State prove the parent's unfitness by clear and convincing evidence; and (4) the right to a fact-finding hearing on fitness. *See* ***Brown County DHS v. Brenda B.***, 2011 WI 6, ¶¶42 n.12, 43-44, 331 Wis. 2d 310, 795 N.W.2d 730. However, the circuit court need not inform a parent of every detail implicated by the no contest plea, because

such a requirement would be unduly burdensome. *See* ***Therese S.***, 314 Wis. 2d 493, ¶17.

¶23 As explained above, courts apply the ***Bangert*** test in this context, starting with the required prima facie showing. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶26. Whether a parent has presented a prima facie case by pointing to deficiencies in the plea colloquy and sufficiently alleging that she did not know or understand the information that should have been provided in the circuit court's colloquy is a question of law that this court reviews de novo. ***Therese S.***, 314 Wis. 2d 493, ¶7. I look to the entire record and the totality of the circumstances to determine whether the circuit court's actions were sufficient. ***Steven H.***, 233 Wis. 2d 344, ¶42.

Analysis Of S.J.'s Pleas

¶24 As should be readily evident from the above summary of the plea hearing as well as the circuit court's findings at the hearing on the motion for plea withdrawal, S.J. cannot demonstrate that the plea colloquy was deficient and that she did not know or understand the information that the court should have provided. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6 (applying ***Bangert***, 131 Wis. 2d 246). In my view, the colloquy could hardly have been more painstaking and detailed.

¶25 To provide just one of the many examples of testimony that supports my conclusion that the pleas were knowingly entered, S.J. repeatedly and unambiguously told the court (both at the plea hearing and at the hearing on the withdrawal motion) that she made a strategic decision to enter the pleas, to avoid

the court hearing negative information about her prior to the dispositional hearing. Further, S.J.'s original attorney testified that:

> [i]n going through the information and talking to her and talking to different folks, it seemed clear that it would be very, very difficult to make it through the grounds phase because she had not met the conditions of return and … [S.J. was] in jail at that time, so it seemed to me the overwhelmingly best strategy was to enter a no contest plea ….

¶26 In addition, I conclude that the circuit court would have denied the withdrawal motion applying either the manifest injustice standard, as S.J. contends the court did, or the fair and just reason standard, which S.J. argues it should have. In other words, assuming without deciding that the fair and just reason standard applies to pre-disposition TPR cases, I would still affirm the circuit court's decision to deny S.J.'s withdrawal motion.

¶27 Under the fair and just reason standard, "[a] circuit court should freely allow a defendant to withdraw his plea prior to sentencing if it finds any fair and just reason for withdrawal, unless the prosecution has been substantially prejudiced by reliance on the defendant's plea." ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995) (citation omitted). A fair and just reason for withdrawal of a plea "'is some adequate reason for defendant's change of heart other than the desire to have a trial.'" ***Id.*** (quoted source omitted).

¶28 As explained in ***Garcia***, the burden is on the defendant, or, in this case if the test applied, the respondent, to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence. *See* ***id.*** I conclude that S.J. could not meet her burden of establishing a fair and just reason for plea withdrawal in her brief. Here, the circuit court found that S.J.'s assertions of lack

of knowledge or understanding due to ineffective assistance of counsel as a reason for withdrawing her plea was "not ... credible" and therefore denied her motion to withdraw. The Wisconsin supreme court held in ***State v. Canedy*** that if the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea. ***Canedy***, 161 Wis. 2d 565, 585, 469 N.W.2d 163 (1991). Thus, if the circuit court's factual findings are supported by the record, then I will affirm its decision to deny S.J.'s withdrawal motion. *See* ***Garcia***, 192 Wis. 2d 845, 863, 866.

¶29 My review of the record reveals that the circuit court did not erroneously exercise its discretion by finding that S.J. knowingly, voluntarily, and intelligently entered her pleas and that her testimony in support of her withdrawal testimony was not credible. The circuit court was properly within its discretion to make credibility determinations and to weigh the testimony of S.J. and S.J.'s original attorney in making its decision. *See, e.g.*, ***Johnson v. Merta***, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (citation omitted) (circuit court is ultimate arbiter of the credibility of witnesses).

¶30 As I have just explained, S.J. does not meet the burden of proving by a preponderance of the evidence that there was a fair and just reason for plea withdrawal. Moreover, even assuming that S.J. had met this burden, it cannot seriously be disputed that both the County and the three children would be prejudiced by reopening the matter and conducting a trial as to grounds. *See* ***Garcia***, 192 Wis. 2d 845, 861-62 (even if court finds fair and just reason for plea withdrawal, it should not allow withdrawal if the State would be substantially prejudiced). Over 18 months have passed since the County filed this TPR petition. The three children, ranging in age from four to seven, have been in foster care for

over three years, and the youngest child has been out of the home for over three-fourths of her life. Further delays in the process would substantially prejudice the County and the children. *See* ***T.M.F. v. Children's Serv. Soc. of Wisconsin***, 112 Wis. 2d 180, 187, 332 N.W.2d 293 (1983) ("Finality of the circuit court's decision is critical, because the delays and uncertainties involved in appeals and rehearings leave a child 'in limbo' for a substantial period of time and may even result in taking a child from an established home life.").

CONCLUSION

¶31 For the foregoing reasons, I conclude that the circuit court did not erroneously exercise its discretion in denying S.J.'s motion to withdraw her pleas. Accordingly, I affirm the orders of the court terminating S.J.'s parental rights.

By the Court.—Orders affirmed.

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