COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2018

Sheila T. Reiff
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. **2017AP1225**
2017AP1226
2017AP1227

Cir. Ct. Nos. **2014TP210**
2014TP211
2014TP212

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. J.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. J.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. J.,

RESPONDENT-APPELLANT.

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

¶1 BRENNAN, P.J.[1] L.J. appeals orders terminating her parental rights to three children.[2] First, she seeks to withdraw her no-contest plea to the grounds phase, arguing that her plea was not knowing, intelligent, and voluntary because she was not informed of the burden of proof that would apply at the dispositional hearing. Second, she argues that the statute[3] under which grounds

[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.

[2] The three children, L.W., L.W.M., and L.B.W., are the youngest of L.J.'s seven children. The four older children were initially subject to a termination of parental rights (TPR) petition, but pursuant to plea negotiations with L.J., the State dismissed the CHIPS count and agreed to dismiss the termination of parental rights petitions as to the four older children and list reunification as a goal. In exchange, L.J. entered a plea of no contest to the allegation of failure to assume parental responsibility in the grounds phase.

[3] WISCONSIN STAT. § 48.415(6).

were found for the termination—failure to assume parental responsibility—is unconstitutional as applied to her; she contends the statute creates "an impossible hurdle" because the CHIPS court took away from her the daily supervision of her children and without daily supervision of her children she had no way to establish that she was a fit parent. And third, she argues that the termination order was based on improper evidence—testimony at the disposition phase from foster parents concerning ongoing future contact between the three children and the parents and older siblings—and that trial counsel's failure to object to it therefore constituted ineffective assistance.[4]

¶2 We reject her arguments and affirm the orders.

BACKGROUND

¶3 On March 8, 2013, seven children were removed from the home of L.J. and C.W. This appeal concerns the three youngest of those children, who at the time of removal were five months old, two years old, and three years old.

[4] L.J. also makes an undeveloped due process violation argument based on the proposition that it is "fundamentally unfair" for the trial court to consider the harm of severing the child's relationship with the foster parents. Her argument conflates the standards for procedural due process violations and substantive due process violations and as a result completely omits the applicable test. She states that she is entitled to *procedural* due process without arguing that she did not receive it; and she argues that she was deprived of *substantive* due process without stating the test for such a violation, much less providing reasons that the test is satisfied here. As it stands, this argument is undeveloped, and we do not address it. *See generally* ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366 (Ct. App.1988) (we need not consider undeveloped arguments).

¶4 On March 15, 2013, the children were found to be in need of protection or services,[5] and on May 8, 2013, a dispositional order was entered placing the children outside of the home. On August 20, 2014, the State filed a petition for termination of parental rights as to all seven children. The grounds alleged in the petition were failure to assume parental responsibility (WIS. STAT. § 48.415(6)) and continuing CHIPS (WIS. STAT. § 48.415(2)).

¶5 In August 2015, the petition proceeded to a bench trial on the grounds phase. After five days of testimony, the trial was adjourned until December 15, 2015. On December 15, 2015, L.J. changed her plea to the allegation of failure to assume parental responsibility to no contest. In exchange, the State did the following: (1) dismissed the allegations of continuing need of protection or services as to the three youngest children; (2) dismissed the TPR petitions related to the four older children; and (3) agreed to list reunification as the primary permanence goal in the CHIPS proceedings involving those four children.

¶6 During the colloquy, the trial court explained what a no contest plea meant and asked if L.J. understood; she said she did. The trial court reviewed the rights L.J. would be giving up by entering the plea, and she said she understood. The trial court told L.J. that if the court accepted her plea, "the court would find [her] to be unfit as a parent as to that specific allegation as to those three children,"

[5] The reasons for the removal of the children included lack of food in the home, no clean clothing, no bedding, no needed childcare items, and ongoing domestic violence between the parents. The State filed a CHIPS petition on March 15, 2013, alleging that the parents were, for reasons other than poverty, unable to provide the children necessary care, food, clothing, medical and dental care, and shelter.

and L.J. said she understood. The court then explained the focus of the dispositional hearing:

> Court: [T]he only issue before the Court at disposition is what is in each child's best interest.
>
> Do you understand that as well?
>
> L.J.: Yes.
>
> Court: …[T]he focus of disposition is what is in the child's best interest.
>
> For example, what the Bureau did or did not do, it might come in, but it won't be the focus of the hearing.
>
> Do you understand that too?
>
> L.J.: Yes.

¶7 L.J.'s counsel confirmed that she believed L.J. would be entering the plea freely, voluntarily, intelligently, and with understanding. The transcript reflects that before accepting the plea, the court gave L.J. time to confer with counsel off the record and the court noted that there were extensive discussions outside of court. The trial court stated: "I took about forty minutes to allow everyone to talk about this more." The court observed that L.J. was very calm and appeared to have put a lot of thought into her decision.

¶8 The parties agreed on the record that the testimony from the court trial could serve as a factual basis for L.J.'s plea. Relevant testimony included testimony concerning the domestic violence the children had witnessed in the home, L.J.'s lack of participation in the children's education or behavior health since removal, and L.J.'s failure to complete conditions of return since removal, including addressing mental health needs.

¶9 The trial court made a finding that L.J. was unfit in each of the three cases.

¶10 Following a contested dispositional hearing on April 12, and April 13, 2017, the trial court found that termination of L.J.'s parental rights was in the best interests of the children and ordered termination. The trial court addressed the factors set forth under WIS. STAT. § 48.426(3). The court also considered the children's relationships with the foster parents and the fact that permanency for the children was unlikely at any time in L.J.'s home in the near future. The trial court stated that it "hope[d]" that the parties could "work things out in the future and can continue to preserve these relationships[.]"

¶11 L.J. sought review of the TPR order on multiple grounds. The post-disposition court found, based on the transcripts and the post-disposition motion, that the plea was voluntary and that L.J. was not entitled to an evidentiary hearing on the voluntariness of the plea.

¶12 The post-disposition court held an evidentiary hearing on L.J.'s ineffective assistance of counsel claims, which focused on: (1) trial counsel's failure to inform L.J. that the "clear, satisfactory and convincing" burden of proof that applied at the grounds phase trial did not apply to the disposition hearing; (2) trial counsel's failure to raise an as-applied constitutional challenge to the failure-to-assume statute; and (3) trial counsel's failure to object to testimony that the foster parents planned to allow contact with the biological family following the termination of parental rights. The trial court found that there was no basis to vacate the TPR order.

¶13 Additional facts will be included as necessary to the discussion below.

DISCUSSION

I. L.J. is not entitled to a hearing on the issue of the voluntariness of her plea because she has not made the required *prima facie* showing sufficient to trigger an evidentiary hearing.

Standard of review and relevant principles.

¶14 L.J. argues that she is entitled to an evidentiary hearing on her voluntariness challenge because WIS. STAT. § 809.107(6)(am) requires an evidentiary hearing in all cases and because she has asserted facts that if true would entitle her to relief. She is wrong on both counts.

¶15 A plea in a TPR case must be voluntary, knowing, and intelligent. *See* ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. The determination of whether a plea has satisfied that constitutional requirement is a question of constitutional fact. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶51, 233 Wis. 2d 344, 607 N.W.2d 607 (citing ***State v. Bangert***, 131 Wis. 2d 246, 283-84, 389 N.W.2d 12 (1986)). Prior to accepting a plea in a TPR proceeding, the trial court must undertake a personal colloquy with the respondent. *See* WIS. STAT. § 48.422(7) (setting forth the requirements of the colloquy) and ***Jodie W.***, 293 Wis. 2d 530, ¶25.

> When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies. Under that analysis, *the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing.* If a *prima facie* showing is made, the burden then shifts to the county to demonstrate by clear and convincing evidence

> that the parent knowingly and intelligently waived the right to contest the allegations in the petition.

Oneida Cty. DSS v. Therese S., 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122 (citation omitted; emphasis added).

L.J. has not made a prima facie showing that the trial court violated its mandatory duties.

¶16 To prevail on this issue, L.J. must make a *prima facie* showing that "the circuit court violated its mandatory duties" in conducting the plea colloquy. For example, in ***Therese S.***, this court noted that "it is undisputed that the circuit court never established on the record whether Therese understood she would be found unfit to parent as a result of her plea." ***Id.***, ¶8. It therefore found that Therese S. had made a *prima facie* showing that the trial court violated its mandatory duties. ***Id.***

¶17 The transcript in this case shows conclusively that the trial court complied with its mandatory duties; indeed, the trial court took additional measures to confirm that L.J.'s plea was constitutionally sound. As previously noted, the trial court specifically informed L.J. of the fact that a finding of unfitness would be entered as to the three children and that the dispositional phase would focus solely on the question of what was in each child's best interests. L.J. has identified no deficiency in the colloquy, and therefore has failed to make a *prima facie* showing that she is entitled to a hearing on the voluntariness of her plea. That ends the analysis.

¶18 L.J. further asserts that WIS. STAT. § 809.107(6)(am) independently requires the post-disposition court to hold the evidentiary hearing she seeks on the

question of the voluntariness of her plea. That portion of the TPR appellate procedures statute reads as follows:

> If the appellant intends to appeal *on any ground that may require postjudgment fact-finding*, the appellant shall file a motion in the court of appeals … raising the issue and requesting that the court of appeals … remand to the circuit court to hear and decide the issue…. If the court of appeals grants the motion for remand, it shall set time limits for the circuit court to hear and decide the issue ….

WIS. STAT. § 809.107(6)(am) (emphasis added).

¶19 L.J. argues that upon remand, the post-disposition court was required to "'hear and decide' the issue" of the voluntariness of her plea by acquiescing to her demand for an evidentiary hearing. The statute by its plain language does not entitle appellants to evidentiary hearings upon demand. Rather, the appellate court's remand requires the post-disposition court to "hear and decide" any issue "*that may require* postjudgment fact-finding[.]" ***Id.*** (emphasis added). As is spelled out in relevant case law such as ***Therese S.***, the post-disposition court must decide under the applicable framework which claims require an evidentiary hearing and what do not. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6. The test in this case is whether a *prima facie* showing had been made that the trial court violated its mandatory duties. The transcript conclusively showed that the trial court had not, and the post-disposition court's disposal of that claim without an evidentiary hearing was consistent with the statute.

The absence of discussion of the burden of proof for the disposition phase in the plea colloquy did not render L.J.'s plea involuntary.

¶20 L.J. further argues that her plea was not knowing, intelligent, and voluntary because she "was never told that the burden once she entered her plea, was reduced to only the preponderance of the evidence" and had she known that,

she would not have entered her plea. She cites to one of this court's cases for the proposition that in the absence of a specified burden of proof in the statutes or case law, "the correct burden of proof at the dispositional hearing is the preponderance of evidence" because it is a civil proceeding. *See* ***S.D.S. v. Rock Cty. DSS***, 152 Wis. 2d 345, 357, 448 N.W.2d 282 (Ct. App. 1989) (discussing the burden of proof for the purpose of analyzing the applicability of an exception to the general issue preclusion rule). She implies that in the absence of that clarification she in fact believed that the burden of proof would remain the "clear and convincing" standard that applied at the grounds phase.

¶21 The State correctly points out that the standard that applies at the dispositional phase is a determination of what is in the child's best interests. *See* WIS. STAT. § 48.427(1) (stating that a trial court "shall" enter a disposition after receiving "any evidence" from "any party"), WIS. STAT. § 48.426(2) (stating that the sole determination to be made is what is in the best interest of the child), and ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶37, 255 Wis. 2d 170, 648 N.W.2d 402. The State notes that a trial court is barred from dismissing a TPR petition at a dispositional hearing unless it is in the best interests of the child to do so. *See* ***id.***, ¶38. The discussion in ***S.D.S.*** of the burden of proof occurred in the context of an analysis of a claim preclusion argument, *see* ***S.D.S.***, 152 Wis. 2d at 354; its designation of a burden of proof for purposes of that analysis is irrelevant to the application of the well established best-interests standard for purposes of making a determination at the disposition phase. L.J. identifies no case in which a determination of the best interests of the child has been analyzed in terms of whether the burden of proof has been satisfied. The State notes that the best-interests standard overrides and moots any burden of proof inquiry because a court can dismiss a petition only if it finds "the evidence does not warrant the

termination of parental rights." *See* WIS. STAT. § 48.427(2). The legislature imposed no burden of proof in the statute, and the determination of the child's best interests does not turn on distinctions between levels of proof.

¶22 L.J.'s premises—that the burden of proof is dispositive in the dispositional phase, that it is lower than at the grounds phase, and that she is entitled to have been informed of these facts—are unsound. The sole standard is the one she was explicitly informed of in the plea colloquy. Her plea is therefore not defective on these grounds.

II. WISCONSIN STAT. § 48.415(6) can lawfully apply as a basis for terminating L.J.'s parental rights because, contrary to her assertion, the State showed that L.J. had failed to exercise the opportunities she had for supervision of her children *after* their removal from her home.

¶23 L.J. argues that WIS. STAT. § 48.415(6), which provides a basis for termination of parental rights where a parent has failed to assume parental responsibility, cannot be applied to terminate her parental rights because the State's removal of the three children from her home made it impossible for her to assume parental responsibility.

¶24 We note first that L.J. initially frames her argument on this issue as an as-applied constitutional challenge to the statute. However, aside from the conclusory assertion that the statute cannot be constitutionally applied where a child has been removed from the parent's home, she does not reference the constitution and she fails entirely to identify the constitutional rights that are in play. Rather, the basis for her argument appears to be a statutory one: that the facts of this case are governed by the tolling statute that applies to TPR actions based on grounds of abandonment. The sole legal support for her argument

consists of language from ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 704, 598 N.W.2d 924 (Ct. App. 1999), holding that WIS. STAT. § 48.415 bars penalizing a parent "for failure to do something [that] he or she is prohibited from doing":

> Under [WIS. STAT.] § 48.415(1)(a)3., abandonment may be established by showing that … "the parent has failed to visit or communicate with the child for a period of six months or longer." [Section 48.415(1)(b)] states that the time period under this section "shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child."
>
> ….
>
> We conclude that the logical interpretation of § 48.415(1)(b) is that the parent cannot be penalized for failure to do something [that] he or she is prohibited from doing.

Id. at 702-04 (footnote omitted).

¶25 Abandonment is not the grounds on which L.J.'s parental rights were terminated, and the abandonment tolling statute interpreted in ***Carla B.*** therefore simply does not apply.

¶26 However, we further note that contrary to L.J.'s argument, she was not "penalized for failure to do something [that] … she [was] prohibited from doing." The termination of parental rights petition lists L.J.'s lack of participation in the children's education or behavior health *since removal*, and L.J.'s failure to complete conditions of return *since removal*, including addressing mental health needs. There was ample evidence presented in the trial, prior to L.J.'s decision to enter a plea, of L.J.'s failure to assume the parental responsibility she could have assumed even with the children placed outside of the home. As the ***Carla B.*** court noted, a court order prohibiting one form of contact but allowing another "does not

excuse a complete lack of contact." ***Id.*** at 704. Similarly, L.J. was in no way prohibited from participating in her children's education or behavioral health following their removal from her home, and their placement outside the home did not make it impossible for her to exercise parental responsibility. Therefore, her challenge to the application of the failure-to-assume statute fails.

III. There was neither deficient performance by counsel nor prejudice to L.J. relative to the testimony of the foster parents regarding a continued relationship with family members, and therefore, counsel was not constitutionally ineffective.

¶27 L.J. argues that trial counsel rendered constitutionally ineffective assistance by failing to object to certain testimony of the foster parents. The foster parents of the three children testified that they intended to continue contact between the children and their biological family members. The premises for this argument are (1) that the trial court relied on this testimony in its dispositional ruling, and (2) that the testimony was erroneously admitted because it is "more prejudicial than probative" and is "against public policy."

¶28 A trial court's decision to terminate parental rights is overturned only where it has erroneously exercised its discretion. *See* ***Rock Cty. DSS v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). A trial court must give "adequate consideration of and weight to" the standards and factors listed in WIS. STAT. § 48.426(3). ***State v. Margaret H.***, 2000 WI 42, ¶35, 234 Wis. 2d 606, 610 N.W.2d 475. The court considers any relevant evidence when determining what is in the child's best interest. *See* WIS. STAT. § 48.427(1). It must explain the basis for its disposition. *See* ***Julie A.B.***, 255 Wis. 2d 170, ¶30. A discretionary determination is upheld if a trial court logically interpreted the facts, applied the proper legal standard, and used a rational process to reach a conclusion a

reasonable judge could reach. ***Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544.

¶29 We conclude that the trial court's consideration of the foster parents' testimony was not error. We note first that the trial court did not condition the termination of parental rights on continued contact with the children's biological family members. Nor did it improperly "hinge its determination on [the] legally unenforceable promise" of continued contact between a child and a parent whose legal rights to the child have been terminated. *See* ***Margaret H.***, 234 Wis. 2d 606, ¶30. A trial court "may within its discretion consider [a] good faith promise" by an adoptive parent to continue contact with a biological parent. ***Id.*** In fact, here, the trial court merely stated that it "hope[d]" that the parties could "work things out in the future and can continue to preserve these relationships[.]" Further, the trial court's consideration of such contact is fully consistent with its obligation to consider any relevant information. There was no error in consideration of this testimony, and it was therefore not deficient performance for trial counsel to fail to object to it.

¶30 For these reasons, L.J. is not entitled to withdrawal of her plea.

By the Court.—Orders affirmed.

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