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. **2017AP1228**
2017AP1229
2017AP1230

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.

C. W.,

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.

C. W.,

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.

C. W.,

RESPONDENT-APPELLANT.

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

¶1 BRENNAN, P.J.[1] C.W. appeals the orders terminating his parental rights to three children,[2] and he seeks to withdraw his no-contest plea to the grounds phase. He argues first that his plea was not voluntary and that he has a statutory right to an evidentiary hearing on that claim; second, that there was no

[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.

Notwithstanding WIS. STAT. RULE 809.107(6)(e), this court may on its own motion extend the time to issue a decision in termination of parental rights (TPR) cases. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we extend the decisional deadline in this appeal to the date of this decision.

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

factual basis for his plea; and third, that the statute[3] under which grounds were found for the termination—failure to assume parental responsibility—is unconstitutional as applied to him. The constitutional challenge is based on his argument that because the CHIPS court took away from C.W. the daily supervision of his children, the State impermissibly made the conditions for establishing a substantial parental relationship impossible. Finally, he argues that notwithstanding clear language in ***State v. Margaret H.*** to the contrary ("the court may afford due weight to an adoptive parent's stated intent to continue visitation with family members"[4]), it is improper to permit testimony concerning ongoing future contact—and that trial counsel's failure to object to it therefore constituted ineffective assistance.[5]

¶2 We reject his arguments and affirm the orders.

---

[3] WISCONSIN STAT. § 48.415(6).

[4] ***State v. Margaret H.***, 2000 WI 42, ¶29, 234 Wis. 2d 606, 610 N.W.2d 475.

[5] C.W. also argues conclusorily that there was a due process violation based on the proposition that it was "fundamentally unfair" for the trial court to consider the harm of severing the child's relationship with the foster parents. He cites case law for the proposition that he is entitled to procedural due process. However, he does not argue any defect in the *procedure* in this case; rather, he asserts that "the test that the court used is fundamentally unfair to parents." What he is making, therefore, is a *substantive* due process argument. "The right to substantive due process addresses 'the content of what government may do to people under the guise of the law.'" ***Dane Cty. DHS v. P.P.***, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted). "It protects against governmental action that either 'shocks the conscience ... or interferes with rights implicit in the concept of ordered liberty.'" ***Id.*** (citation omitted). "The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair." ***Id.*** C.W.'s arguments do not answer how the court's action was "arbitrary, wrong or oppressive[.]" *See* ***id.*** We do not address the due process argument further. *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).

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 the removal were five months old, two years old, and three years old.

¶4 On March 15, 2013, the children were found to be in need of protection or services,[6] 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, C.W. changed his 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] 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.

¶6 During the colloquy, the trial court explained what a no contest plea meant and asked if C.W. understood; he said he did. The trial court reviewed the rights C.W. would be giving up by entering the plea, and he said he understood. The trial court told C.W. that if the court accepted his plea, "that means the Court will enter a finding of unfitness. The court will find you unfit as a parent as to the three youngest children." C.W. said he understood. The court then explained the focus of the disposition hearing: "At disposition, the only issue before the Court is what is in each child's best interest." C.W. said he understood. The Court then asked C.W.'s counsel to confirm that all the information had been reviewed with C.W. and that counsel was satisfied that C.W. understood the consequences of entering a plea.

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

¶8 The trial court made the following statement as to the factual basis for the plea:

> I'm obviously very familiar with the cases and heard a number of days of testimony, heard from both parents and a number of other witnesses regarding the struggles the family has had.
>
> I understand from hearing that testimony and I agree there are certainly sufficient facts in the record for the Court to find that the parents' change of pleas are supported by those facts ….

> So based on that finding, the parents' agreement today, the Court can use those facts as established in the testimony.
>
> The Court does find that a factual basis has been established supporting each parent's plea as admitted in court this morning.

The court then made a finding that C.W. was unfit in each of the three cases.

¶9 Following a contested dispositional hearing on April 12, and April 13, 2017, the trial court found that termination of C.W.'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 C.W.'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[.]"

¶10 C.W. 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 C.W. was not entitled to an evidentiary hearing on the voluntariness of the plea.

¶11 The post-disposition court held an evidentiary hearing on C.W.'s ineffective assistance of counsel claims, which focused on: (1) trial counsel's failure to raise an as-applied constitutional challenge to the failure-to-assume statute; (2) trial counsel's failure to raise a challenge to the factual basis for the plea; 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

the parental rights. The trial court rejected C.W.'s arguments and found that there was no basis to vacate the TPR order.

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

DISCUSSION

I. C.W. is not entitled to a hearing on the issue of the voluntariness of his plea because he has not made the required *prima facie* showing to trigger an evidentiary hearing.

Standard of review and relevant principles.

¶13 C.W. argues that he is entitled to an evidentiary hearing on his voluntariness challenge because WIS. STAT. § 809.107(6)(am) requires an evidentiary hearing in all cases. He is wrong.

¶14 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)).

¶15 C.W. asserts that WIS. STAT. § 809.107(6)(am) independently requires the post-disposition court to hold the evidentiary hearing he seeks on the question of the voluntariness of his 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).

¶16 C.W. argues that this means that the post-disposition court was required to grant his demand for an evidentiary hearing in order to "'hear and decide' the issue" of the voluntariness of his plea. 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* post-judgment 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 post-judgment fact-finding—i.e., an evidentiary hearing—and which claims do not. *See* ***Oneida Cty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. Because the transcript conclusively showed that the trial court had not violated its duties in conducting the colloquy, the post-disposition court's disposal of that claim without an evidentiary hearing was consistent with the statute.

II. The trial court correctly found that the trial testimony provided a factual basis for C.W.'s plea.

¶17 WISCONSIN STAT. § 971.08(1)(b) sets forth a requirement that a trial court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." "This 'factual basis' requirement is distinct from the … 'voluntariness' requirement for guilty pleas." ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). "The factual basis requirement 'protect[s] a defendant who is in the position of pleading voluntarily

with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" ***Id.*** (citation omitted).

¶18 C.W. argues that there was no factual basis for his no-contest plea because of a comment the trial court made, at the contested disposition hearing, that it was "very clear each of these boys has a substantial relationship with each of these parents." C.W. essentially argues that the court's statement cannot be reconciled with a finding that there is a factual basis for the plea.

¶19 The factual basis for the failure to assume parental responsibility grounds was alleged, as noted above, in the TPR petition. At the change of plea hearing, C.W. expressly stipulated that the evidence introduced during the five days of trial could serve as the factual basis for the plea, which by its terms conceded that the State could prove the allegations in the petition. C.W. has therefore waived the right to challenge the factual basis for the plea. If we were to reach the merits of his claim, we would conclude that the plea was adequately supported by a factual basis and that the factual basis was not undermined by the trial court's statement concerning a substantial relationship between C.W. and the three children. Because there was a factual basis for the plea, trial counsel did not render constitutionally ineffective assistance by failing to object that there was not one.

III. WISCONSIN STAT. § 48.415(6) can lawfully apply as a basis for terminating C.W.'s parental rights because the trial court's finding of unfitness was not based on "an impossible condition of return."

¶20 A trial court's finding of parental unfitness, if "based on an impossible condition of return," is "contrary to a constitutionally permissible interpretation of WIS. STAT. § 48.415(2)(a)." ***Jodie W.***, 293 Wis. 2d 530, ¶3.

¶21 C.W. 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 his parental rights because the State's removal of the three children from his home made it impossible for him to assume parental responsibility.

¶22 Contrary to C.W.'s argument, he was not in a position where the conditions of return were made "impossible" to satisfy because he did not have custody of the children. The TPR petition lists C.W.'s lack of participation in the children's education or behavior health *since removal*, and C.W.'s failure to complete conditions of return *since removal*, including addressing mental health needs. There was ample evidence presented in the trial, prior to C.W.'s decision to enter a plea, of his failure to assume the parental responsibility he 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." ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 704, 598 N.W.2d 924 (Ct. App. 1999). Similarly, C.W. was in no way prohibited from participating in his children's education or behavioral health following their removal from his home, and their placement outside the home did not make it impossible for him to exercise parental responsibility. Therefore, we reject his constitutional challenge to the application of the failure-to-assume statute on the grounds that it imposed an impossible condition.

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

¶23 C.W. argues that trial counsel rendered constitutionally ineffective assistance by failing to object to the testimony of the foster parents for the three children that they intended to continue contact between the children and their biological family members.

¶24 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* ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402. 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.

¶25 C.W. acknowledges that this court is bound by ***Margaret H.***, 234 Wis. 2d 606, which directly affirms a trial court's discretion to consider testimony concerning continued contact with the child after termination. While he characterizes the language at issue in ***Margaret H.*** as "dicta," he also acknowledges that this court cannot disregard it on that basis. *See* ***Zarder v.***

Humana Ins. Co., 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. He argues that this court should "signal its disfavor by certifying this issue to the Wisconsin Supreme Court or by stating that [***Margaret H.***] was wrongly stated." We decline to do so.

¶26 We conclude that the trial court's consideration of the foster parents' testimony was not error. A trial court "may within its discretion consider [a] good faith promise" by an adoptive parent to continue contact with a biological parent. ***Margaret H.***, 234 Wis. 2d 606, ¶30. We note 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* ***id.*** In fact, here, the trial court merely expressed its "hope" that there could be continued contact. 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.

¶27 For these reasons, C.W. is not entitled to withdrawal of his plea.

By the Court.—Orders affirmed.

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