COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2489 **Cir. Ct. No. 2017TP11**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

F.E.L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 BRASH, J.[1] F.E.L. appeals a circuit court order terminating his parental rights of A.A.W., as well as the denial of his postdispositional motion to withdraw his no contest plea. In that motion, and in this appeal, F.E.L. argues that he should be permitted to withdraw his no contest plea because the factual basis for the plea was insufficient. We affirm.

BACKGROUND

¶2 F.E.L. is the biological father of A.A.W., whose date of birth is January 27, 2016. A.A.W.'s mother, A.J.W., was shot and killed by F.E.L. on March 30, 2016. Two-month-old A.A.W. was present in the home at the time of the shooting.

¶3 F.E.L. and A.J.W. had a history of domestic violence incidents. In July 2015, while A.J.W. was pregnant with A.A.W., F.E.L. was charged with false imprisonment and misdemeanor battery after he pointed a gun at A.J.W. and punched her in the face while demanding that she give him her email address and passwords. However, the charges were dismissed due to A.J.W.'s failure to follow through with the prosecution. Additionally, the Division of Milwaukee Child Protective Services (DMCPS) received several referrals relating to domestic violence incidents between F.E.L. and A.J.W., but because there were no child safety issues (A.A.W. had not yet been born), DMCPS did not take any action.

¶4 The violent incidents continued after A.A.W. was born. In February 2016, A.J.W. and A.A.W. were staying with a relative when F.E.L. came to that

[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.

location and broke a window in an attempt to talk to A.J.W. A.J.W. took A.A.W. and left the residence with F.E.L. The relative called police, but nothing was done.

¶5 The next call to DMCPS regarding F.E.L. and A.J.W. was when he shot her. DMCPS took custody of A.A.W., and a Child in Need of Protection and Services (CHIPS) petition was filed the next day on April 1, 2016. F.E.L. was immediately considered a suspect in the shooting; thus, for safety reasons, A.A.W. was placed in an undisclosed foster home. F.E.L. was eventually taken into custody, and ultimately was convicted of first-degree reckless homicide. He is currently incarcerated, serving a sentence of twenty years of initial confinement to be followed by ten years of extended supervision.

¶6 A petition for the Termination of Parental Rights (TPR) of F.E.L. was filed on January 12, 2017. In that petition, the State alleged F.E.L.'s failure to assume parental responsibility as grounds for termination, pursuant to WIS. STAT. § 48.415(6). F.E.L. pled no contest to the grounds, but preserved his right to dispute the termination of his parental rights during the dispositional phase.

¶7 Following a dispositional hearing on September 19, 2017, the trial court entered a written decision on September 20, 2017, terminating F.E.L.'s parental rights. The court found that F.E.L.'s murder of A.A.W.'s mother "significantly outweigh[ed]" all of the other dispositional considerations under WIS. STAT. § 48.426(3). The court pointed out that "[s]uch conduct establishes a summary basis for a finding of parental unfitness" pursuant to WIS. STAT. § 48.415(8). The court also discussed the other factors it considered under § 48.426(3), including that A.A.W. was very likely going to be adopted by a

member of his mother's family. Accordingly, the circuit court determined that it would be in A.A.W.'s best interests to terminate F.E.L.'s parental rights.

¶8 F.E.L. filed a motion for postjudgment relief, seeking to withdraw his no contest plea because the factual basis for the plea was not sufficient. Specifically, F.E.L. contended that the testimony of Kristina Janik, the case manager for A.A.W., was insufficient to prove that F.E.L. failed to assume parental responsibility as asserted in the TPR petition. In her testimony, Janik stated that she was familiar with the circumstances under which A.A.W. was referred to DMCPS; that there had been reports of domestic violence between F.E.L. and A.J.W. prior to A.J.W. being killed; and that F.E.L. had been convicted of the crime.

¶9 The trial court denied the motion. It stated that its decision to terminate F.E.L.'s parental rights was based on the entire record—confirmed by Janik's testimony—which showed that F.E.L. presented "an extremely dangerous level of domestic violence" since he had killed A.A.W.'s mother. The trial court opined that this conduct "falls clearly, stunningly and reprehensibly within the ambit of the [failure to assume parental responsibility] statute." As a result, the court found that the claim of failure to assume parental responsibility was "overwhelmingly established." This appeal follows.

DISCUSSION

¶10 On appeal, F.E.L. contends that the trial court violated WIS. STAT. § 48.422(3) in its failure to hear sufficient testimony to support the allegations in the TPR petition. He also asserts that he did not understand that his parental rights could not be terminated solely because of his conviction for A.J.W.'s murder. As a result, he contends that he is entitled to withdraw his no contest plea.

¶11 In criminal cases, before accepting a plea the trial court is required to conduct a colloquy with the defendant to ascertain that the defendant understands the elements of the crime to which he is pleading guilty, the constitutional rights he is waiving by entering his plea, and the maximum potential penalty that can be imposed. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). This colloquy with the defendant helps to ensure that the defendant is knowingly, intelligently, and voluntarily waiving the rights being given up by entering a plea. *See* ***State v. Brown***, 2006 WI 100, ¶23, 293 Wis. 2d 594, 716 N.W.2d 906. This same analysis is used to evaluate pleas entered in TPR cases. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

¶12 Under the ***Bangert*** analysis, the parent seeking plea withdrawal "must make a prima facie showing that the [trial] court violated its mandatory duties and [the parent] must allege that in fact he [or she] did not know or understand the information that should have been provided at the [TPR petition] 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 showing, the trial court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

¶13 Whether a parent has made this prima facie showing 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 our review, 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.

¶14 We conclude that F.E.L. has not established that the trial court violated its mandatory duties. The determination of whether a parent has failed to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6), requires the application of the "totality-of-the-circumstances test" to ascertain whether the requisite grounds have been met. *See* ***Tammy W-G v. Jacob T.***, 2011 WI 30, ¶3, 333 Wis. 2d 273, 797 N.W.2d 854. In its analysis, the court "may include the reasons why a parent was not caring for or supporting [his or] her child and exposure of the child to a hazardous living environment." ***Id.***

¶15 The trial court did just that. It found that F.E.L. had exposed A.A.W. to "an extremely dangerous level of domestic violence" during the first two months of his life, and further, that in killing A.J.W., F.E.L. had "render[ed] both himself and [A.J.W.] unavailable to provide necessary care" for A.A.W. Thus, we conclude that the record fully and completely supports the trial court's finding that F.E.L.'s failure to assume parental responsibility was firmly established through his actions that ended A.J.W.'s life and permanently altered A.A.W.'s life as well as his own. Accordingly, we affirm.

By the Court.—Order affirmed.

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