COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1157 **Cir. Ct. No. 2012TP8**

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

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

OZAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

CALLEN D. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: SANDY S. WILLIAMS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Callen D. M. appeals the termination of her parental rights to Carson E. B. Callen claims that her trial counsel was ineffective in failing to request a jury instruction on Callen's alleged impossibility to perform the conditions required for Carson's return to her care, because Callen was incarcerated during the final months that the petition was pending. She argues that the circuit court erred in denying, without an evidentiary hearing, her postdisposition motion for a new trial based on ineffective assistance of trial counsel.

¶2 Though it is framed as a claim of ineffective assistance of counsel, the real issue in Callen's appeal is whether the jury should have received the special instruction that an incarcerated parent's rights may not be terminated based solely upon conditions that were impossible to perform while incarcerated. Like the circuit court, we conclude that no such instruction was proper here because Callen had approximately two and one-half years before her imprisonment to comply with Ozaukee County's dispositional order before her incarceration and because incarceration was by no means the sole reason for termination of Callen's parental rights. Instead, it was just the proverbial straw that broke the camel's back.

¶3 Because we agree that Callen's inability to fulfill the conditions of return was due to her own failures prior to incarceration, we affirm the circuit court.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Facts

¶4 In March 2009, the Ozaukee County Department of Human Services filed a "child in need of protection and services" (CHIPS) petition on the basis that Callen was receiving treatment for drug abuse while pregnant. In July, the County entered a dispositional order requiring Callen to satisfy fourteen conditions to ensure Carson's well-being. The social worker assigned to Callen's case, Kim Quam, provided various services to aid Callen in meeting the obligations of the dispositional order. These services included transportation vouchers to get to drug treatment programs, daycare, and employment assistance.

¶5 Carson was born on September 9, 2009. In April 2010, Quam removed Carson from Callen's care for the first time because Callen violated the safety plan by moving back in with her mother, who also was known to have a substance abuse problem. About two months later, Carson was returned to Callen's care, after Callen resumed services. After a two-week trial reunification, however, Callen again lost custody of Carson because she attempted to submit a false urine sample during a standard drug test. Around Thanksgiving 2010, Callen fell out of contact with her family while Carson was in Callen's mother's care. Quam discovered that Callen was at Froedtert Hospital for drug treatment.

¶6 In June 2011, Quam found Callen to be complying sufficiently with her conditions and instituted a new safety plan for Carson's return. However, on September 2, 2011, Carson was taken into protective custody, after Callen was found to be using illegal drugs again and living in a motel. In January 2012, Callen was on a WIS. STAT. ch. 51 hold for suicide watch. Callen advised Quam that she was likely going to jail for the manufacture and delivery of narcotics.

Callen was released from the hospital directly to jail and was later sentenced to eighteen months in prison.

¶7 In October 2012, the County filed the TPR petition on the grounds that Callen failed to meet the conditions of the CHIPS order established for Carson's safety. By the time of the trial, the County had been involved with Callen for a total of approximately three and one-half years, but she only fulfilled most of the dispositional orders after she was confined. Specifically, between February 26, 2010, and September 2, 2011, Callen failed a total of five required drug tests, and Callen's longest period of maintained sobriety was during her incarceration, where she avoided drugs even though she could access them. Quam explained at trial that given Callen's young age, she was afforded more services than is customary in similar cases. By Callen's own admission, the programs provided by the prison system helped her realize the severity of her circumstances.

¶8 After trial, the jury found that Callen had failed to meet the conditions of return in the CHIPS order and that there was a substantial likelihood she would not meet these conditions within nine months of the hearing. The circuit court subsequently terminated Callen's parental rights after a dispositional hearing.

¶9 Callen appealed and filed a postdisposition motion for a new trial, arguing that her trial attorney had provided ineffective assistance of counsel by failing to request a jury instruction on the impossibility to perform CHIPS conditions, which undermined confidence in the fact-finding hearing. This court granted a remand on the motion to preserve Callen's claim of ineffective assistance of counsel for this appeal, and the circuit court decided on the briefs

that a ***Machner***[2] hearing was not necessary and that Callen was not entitled to a new trial.

Analysis

¶10 Callen's ineffective assistance of counsel argument is founded upon the belief that there was a factual dispute about whether it was impossible for Callen to meet the conditions of return and, thus, trial counsel was deficient in not requesting a special instruction concerning the impossibility of meeting the CHIPS conditions. Callen argues that this deficient performance prejudiced her. In the alternative, Callen argues that a new trial should be granted in the interests of justice. Because the underlying premise—that there was a factual dispute about the impossibility of satisfying the conditions—is erroneous, the ineffective assistance claim must fail.

There Was No Factual BasisfFor the Impossibility to Perform Instruction

¶11 A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To succeed on an ineffective assistance of counsel claim, a party must show both deficient performance by trial counsel and that the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court may choose to address either the "deficient performance" component or the "prejudice" component first. ***Id.*** at 697. If the appellant fails to satisfy either component, the court need not analyze the other. ***Id.*** Here, the syllogism of Callen's argument is as follows: (a) Prison always results in

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

impossibility of performance during the time the parent is in prison, (b) Callen was in prison prior to the petition to terminate her parental rights, therefore (c) her impossibility to parent while she was in prison raises a question of fact as to whether it was impossible for her to meet the conditions of return. For the reasons that follow, the syllogism is false and counsel was not ineffective when no instruction was requested.

¶12 Callen attempts to analogize her situation to that of Jodie W. in ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶19, 293 Wis. 2d 530, 716 N.W.2d 845. Our supreme court held in ***Jodie W.*** that an incarcerated parent could not be found unfit based solely on the parent's failure to meet a CHIPS condition that was impossible to fulfill while incarcerated. In Jodie W.'s case, Kenosha County filed a CHIPS petition after Jodie had already been incarcerated. ***Id.***, ¶¶4-5. Jodie arranged for her mother to care for her son, Max, while she was in prison, but shortly after Jodie was sentenced, her mother contacted social services to inform them that she could no longer care for Max. ***Id***., ¶4. A CHIPS dispositional order was in place, imposing seven conditions for Max's return, one of which was to "obtain, maintain and manage a suitable residence." ***Id.***, ¶¶6-7. In Kenosha County's petition to terminate Jodie's parental rights, it listed Jodie's failure to obtain a residence as the sole failure supporting termination of Jodie's rights. ***Id.***, ¶8. It was in these circumstances that the court concluded that "the circuit court improperly deemed Jodie unfit solely by virtue of her status as an incarcerated person without regard for her actual parenting activities or the condition of her child." ***Id.***, ¶55.

¶13 The facts in Callen's case stand in stark contrast to those in ***Jodie W.*** Callen had over two and one-half years to comply with the County's dispositional order before she entered custody, from March 2009 until January 2012, and it was

Callen's failure to fulfill the CHIPS requirements before her incarceration, not after, that supported the petition in her case.

¶14 Callen's serious substance abuse was ongoing during her pregnancy with Carson and resulted in a CHIPS order being put in place before Carson's birth. From 2010 through 2011, Callen went in and out of addiction and repeatedly failed to comply with the requirements of her dispositional order, even with the aid of multiple supportive services. In fact, the only time Callen was able to meet a majority of the CHIPS conditions was after she was incarcerated and forced into a more stable environment.

¶15 Hence, while it is technically true that the condition of obtaining and maintaining suitable housing was impossible for Callen to meet *while* in prison, unlike in ***Jodie W***., here this condition as well as many others had gone unmet for two and one-half years before Callen's imprisonment. The record conclusively establishes that Callen's substance addiction, not her incarceration, made it impossible for her to comply with the CHIPS conditions.

¶16 Additionally, this is not a ***Jodie W.*** case because, unlike in ***Jodie W***. where a single failure was asserted, here there were fourteen conditions total in the dispositional order, several of which Callen failed to meet long before her incarceration. For instance, evidence supported a finding that during the relevant time Callen repeatedly failed the condition requiring her to refrain from mood altering substances and demonstrate behavior consistent with abstinence principles. Indeed, it was her involvement with narcotics that led to her incarceration. Evidence also showed that Callen failed to maintain a stable residence or employment and to demonstrate the ability to provide for the physical and emotional needs of Carson. Before being incarcerated, Callen had, during

Carson's short life, lived out of a motel for some time; disappeared for over one month, leaving Carson behind; engaged in drug use and attempted to submit a fraudulent urine sample; and in general failed to take full advantage of services designed to help her end her addiction. Callen's progress since her incarceration is admirable, but the changes she has made while in a controlled environment do not negate her prior failures to comply with the CHIPS orders designed to protect her child's safety and well-being. Incarceration was not the sole basis for the termination of Callen's parental rights; it was merely the final affront.

¶17 Thus, this case is more analogous to ***Waukesha County DHHS v. Teodoro***, 2008 WI App 16, 307 Wis. 2d 372, 745 N.W.2d 701 (2007). In that case, a deported alien argued that ***Jodie W.*** controlled the result in his case, because it was impossible for him to comply with some CHIPS conditions from abroad. We rejected his argument, however, because of his failure to meet other conditions that were not affected by his location. ***Teodoro***, 307 Wis. 2d 372, ¶23. Although Teodoro was not in the same country as his daughter, he still could have met a number of the conditions of the CHIPS order, such as talking to doctors, teachers, therapists, and other people who cared for his child to learn what the child needed. ***Id.***

¶18 Like Teodoro, Callen failed to meet many other conditions besides those she alleges were impossible. The fact that Callen spent some time in prison, making it impossible to find suitable housing during her imprisonment, does not mean that it was impossible for her to properly parent throughout the two and one-half year period. This is where her syllogism goes wrong. Being sent to prison did not erase her failure to parent before incarceration. For her to be able to make her case for the impossibility instruction, there must have been evidence creating a question of fact as to the impossibility to perform throughout the two and one-half

years. That factual situation is simply not present here. Therefore, no ***Machner*** hearing was required when Callen's claim was based on a misreading of ***Jodie W.***—the fact of incarceration does not, by itself, mean that the impossibility of performance instruction had to be given. The facts in evidence showed much more than incarceration. We agree with the circuit court when it stated: "No reasonable juror could have found that it was impossible for her to meet the conditions of her return even if the instruction and special verdict would have been given."

A New Trial in the Interests of Justice Is Not Proper

¶19 In the alternative, Callen argues that a new trial should be ordered in the interests of justice, asserting that the real controversy has not been tried and that the circuit court failed to properly exercise its discretion to order a new trial. Because this argument is based upon the same assertion that we have already rejected, we conclude that justice does not require reversal.

By the Court.—Order affirmed.

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