COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0434

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF RONESHA P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RONNIE P.,

RESPONDENT-APPELLANT.

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

SCHUDSON, J.[1] Ronnie P., the adjudicated father of Ronesha P., appeals from the order terminating his parental rights to Ronesha. He argues that

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

the trial court erred in entering default judgment against him. He contends that because, he claims, he was never ordered to appear in person, and because his attorney appeared at trial, default judgment was improper. This court concludes, however, that Ronnie P. was required to appear for trial in person. This court also concludes that, in fact, the trial court actually allowed Ronnie, by counsel, to proceed at trial, notwithstanding his failure to appear. Accordingly, this court affirms.

The factual background relevant to resolution of this appeal comes from the chronology of court proceedings:

October 21, 1997: Summons – The trial court issued a summons to Ronnie informing him of the State's petition to terminate his parental rights to Ronesha. The summons, in relevant part, stated:

> You are hereby summoned to appear before the Circuit Court Children's Division, Judge Thomas Cooper presiding, for a hearing into a petition regarding Termination of Parental Rights on the day and at the time and place stated above. A copy of the petition is attached.
>
> **In the case of your failure to appear as summoned herein, you may be proceeded against by default, and the court may proceed to hear testimony in support of the allegations in the petition and grant the relief requested by the petitioner.**
>
> *You may appear alone or with an attorney of your choice*.

(Italicized emphasis added.)

November 12, 1997: Initial appearance on the petition for termination of parental rights — Ronnie did not appear because he was incarcerated.

January 8, 1998: Further proceedings — Ronnie, produced from the Dodge Correctional Facility, appeared in person. An attorney advised the court of her office's intention to appoint counsel for Ronnie by the next appearance. Ronnie was advised of the need to inform counsel if he would not be incarcerated where he expected to be, so that his appearance could be ordered from the correct facility.

March 4, 1998: Further proceedings — Ronnie, again produced from prison, appeared in person. His appointed attorney, Helen Mullison, also appeared. The court set a status date; because counsel waived Ronnie's next appearance, the court did not issue an order to produce.

March 30, 1998: Status — The court, advised of the need for a status date with Ronnie present, set another status date and issued an order to produce Ronnie.

April 29, 1998: Status — Ronnie was not produced; the court set a status date and a trial date, but did not issue an order to produce Ronnie because he was scheduled for release prior to those dates. The court advised that even though "[t]his is a civil matter," Ronnie had "an obligation to be here." Attorney Mullison responded: "That's fine. I will explain that to him." The court then added: "I think we need him for the status for sure. If he is not here at the status, I will find him in default. If we determine he is not in custody and he is not here, he will be defaulted."

July 8, 1998: Status — Ronnie, still in custody, did not appear. The court reiterated that "it's Ms. Mullison's responsibility to see to it that the appropriate order to produce is issued for her client" for the trial date and, if

Ronnie would be moved to a different facility, that the order be directed to the proper place.

July 20, 1998: Motion to adjourn trial — Ronnie remained in custody. The court granted Attorney Mullison's motion to adjourn the trial, and set another status date.

September 14, 1998: Status — Ronnie, still in custody, was not produced. The court set another trial date and advised, "If [Ronnie] is out [of custody], Ms. Mullison, it is your obligation to produce him."

October 21, 1998: Trial — Ronnie did not appear; the court entered default judgment based on the Attorney Mullison's Affidavit of Service. The affidavit summarized her unsuccessful efforts to contact Ronnie at the Drug Abuse Correctional Center at Winnebago and the Milwaukee County Jail, explaining that she had been informed of his transfer from the former and release from the latter. Her affidavit then stated:

> 5. On September 24, 1998[,] counsel sent a registered letter to Mr. Parker, in care of Clara Maben, his maternal aunt. In that letter, counsel informed Mr. Parker of the trial time, date and location. Counsel also informed Mr. Parker of the danger of a default judgment being entered against him in the event of appearing late, or failing to appear at all.
>
> 6. On September 30, 1998[,] counsel talked to Mrs. Maben, who informed counsel that she had personally handed the September 24, 1998 letter to Mr. Parker. She did not know his address, but said that he came over to her home on a daily basis.
>
> 7. Counsel has also sent Mr. Parker letters on October 5, 1998 and October 14, 1998, informing him of the trial time, date and location, and reiterating the dangers of a default judgment being entered against him. Counsel learned from Mrs. Maben through a telephone call on October 16, 1998 that Mrs. Maben

> had also handed these letters personally to Mr. Parker.

The trial court concluded that Ronnie received actual notice, stating, "I'm satisfied as well as could be that … service has been accomplished … and reasonable efforts have been made [by counsel] to contact him."[2]

The supreme court summarized the standards governing a trial court's default judgment decision, and an appellate court's review:

> The decision to grant or vacate a default judgment is within the discretion of the trial court. However, the law views default judgment with disfavor, and "prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." An appellate court will not reverse a discretionary decision unless the trial court has [erroneously exercised] its discretion. This court will find an [erroneous exercise] of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard.

Oostburg State Bank v. United Savings & Loan Ass'n, 130 Wis.2d 4, 11, 386 N.W.2d 53, 57 (1986) (footnote and citations omitted). Here, Ronnie has offered nothing to establish that the trial court failed to exercise discretion or failed to apply proper legal standards. The record supports the trial court's decision.

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[2] Ronnie notes that the court also said he "probably" had actual notice, and argues that "'probably' should not be an adequate standard in a termination of parental rights case." The court's use of the word, "probably," however, immediately following its reference to being "satisfied as well as could be that … service has been accomplished," appears to be nothing more than its acknowledgment that counsel's affidavit did not establish the *absolute* certainty of actual service.

Although counsel objected to the default judgment, she offered neither argument nor evidence to counter the obvious import of her own affidavit, and she requested neither additional time to gain Ronnie's appearance nor a hearing to ascertain why he had failed to appear for trial.

Ronnie contends that "[t]he summons … did not specifically order him to appear personally." He is wrong. The summons explicitly provided Ronnie with two options: "appear alone" or "appear … *with* an attorney." (Emphasis added.) It did not offer the third option Ronnie now seeks: "appear … *by* an attorney." The trial court then, repeatedly and explicitly, emphasized that Ronnie would have to appear in person or face default judgment. Thus, the record, in combination with Ronnie's concession that default judgment is appropriate if a court has ordered personal appearance, all but concludes this appeal. Given, however, the disfavor for default judgments, *see* ***id.***, and given, further, the gravity of a termination decision, this court notes two additional aspects of this case.

First, Ronnie argues that the trial court "should have at least granted a hearing regarding the issue of default." But Ronnie's counsel never requested such a hearing, and never returned to the trial court offering anything to suggest that, contrary to her affidavit, she no longer believed he had received actual notice.

Second, even if this court were to assume that Ronnie could not be defaulted because, in a termination action – a civil case – a party may appear by counsel, *see* ***Sherman v. Heiser***, 85 Wis.2d 246, 254, 270 N.W.2d 397, 401 (1978), this court still would affirm because, in effect, Ronnie was not defaulted. Despite what the trial court concluded about actual notice, and despite stating that "[t]he remedy for nonappearance at a jury trial is rather obvious," the trial court proceeded to conduct the trial, taking testimony and, among other things, providing Ronnie's lawyer the opportunity to participate without any apparent restriction stemming from Ronnie's failure to appear. In fact, Attorney Mullison both questioned the single trial witness and presented a closing argument.

Therefore, this court concludes that the record not only supports the trial court's default judgment, but also establishes that, notwithstanding the default judgment, Ronnie, with counsel representing him, was granted his day in court.

By the Court.—Affirmed.

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