COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2015

Diane M. Fremgen
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 No. 2015AP245 **Cir. Ct. No. 2013TP000230**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K. G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARK SANDERS, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Mr. G appeals from an order terminating his parental rights to A.K. and from an order denying his postdisposition motion.[2] He argues that: (1) the trial court failed to ensure that his stipulation to grounds was made voluntarily and with an understanding of the nature of the failure-to-assume-parental-responsibility ground; (2) WIS. STAT. § 48.415(6), as applied to him, violates his right to substantive due process; and (3) the trial court erroneously exercised its discretion when it denied him a new dispositional hearing based upon alleged newly discovered evidence. For the reasons which follow, we affirm.

BACKGROUND

¶2 A.K. was born on July 6, 2012. At the time of his birth, he tested positive for Subutex and Clonazepam, suffered from withdrawals and was hospitalized for the first three weeks of his life. He was released to the home of his biological mother and his maternal grandmother under a protective plan. He was eventually taken into custody on August 20, 2012, and placed in foster care.

¶3 On August 27, 2012, the State filed a petition for protection or services. The petition noted that there was no adjudicated father. Two potential fathers were alleged, one of whom was Mr. G. Both potential fathers submitted to DNA tests. Mr. G appeared in court on September 18, 2012, and was informed that he was A.K.'s biological father.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The trial court also terminated the parental rights of A.K.'s biological mother. However, only Mr. G's rights are before us in this appeal.

¶4 A CHIPS dispositional order was entered on November 28, 2012. On August 2, 2013, the State filed a petition to terminate Mr. G's parental rights to A.K. ("the TPR petition"). As relevant here, the petition alleged that Mr. G failed to assume parental responsibility for A.K. and that A.K. was a child in continuing need of protection or services.

¶5 On August 23, 2013, an initial appearance was held on the TPR petition. Mr. G appeared pro se and was given a copy of the petition. The trial court explained to Mr. G that the petition sought to terminate his parental rights to A.K. Regarding the failure-to-assume-parental-responsibility ground, the trial court stated:

> [w]hat that means is that you're … [A.K.'s] biological parent[] and that you haven't been able to develop a substantial parental relationship with [A.K.]. What that means is that … you failed to accept or exercise a significant degree of responsibility for the daily supervision, education, protection, or care of [A.K.].

The trial court also advised Mr. G of his procedural rights and Mr. G indicated an understanding of the same. The trial court then adjourned the case for cause to allow time for the appointment of counsel.

¶6 On September 20, 2013, Mr. G appeared in court with trial counsel and was again advised of the allegations against him. The matter was scheduled for a jury trial on February 10, 2014.

¶7 On January 31, 2014, trial counsel filed a motion to adjourn the trial because Mr. G was hospitalized following a serious car accident. The trial court granted the motion and the trial was rescheduled for May 5, 2014.

¶8 On May 5, 2014, the day the jury trial was set to commence, Mr. G stipulated to the ground of failure to assume parental responsibility. Mr. G testified that he was a high school graduate who attended college for one year. He acknowledged that he had received and read a copy of the TPR petition. The court then engaged in the following exchange with Mr. G:

> [THE COURT]: The second ground that the [S]tate alleges is something called failure to assume parental responsibilities. That is the ground that you're going to be agreeing to, is that right?
>
> [MR. G]: Right.
>
> [THE COURT]: What the [S]tate alleges there is that you are [A.K.]'s dad, and that you haven't been able to develop a substantial parental relationship with [A.K.]; that is to say, you haven't been able to accept or exercise a significant degree of responsibility for his daily supervision, education, protection, and care. Do you understand what the [S]tate alleges there?
>
> [MR. G]: Yes, I do.
>
> [THE COURT]: Now, you have all sorts of procedural rights in connections with this petition. The first of those rights is the right to have a trial to challenge these allegations. You understand that you have a right to a trial?
>
> [MR. G]: Yes, I do.
>
> ….
>
> [THE COURT]: Do you want to have a trial?
>
> [MR. G]: No, I do not.

¶9 The trial court then detailed the remainder of Mr. G's procedural rights. Mr. G told the trial court that he understood what was going on, that he did not have any questions for the court, and that he had had enough time to think about his decision. Mr. G expressed his desire to stipulate to the ground of failure to assume parental responsibility.

¶10 Mr. G's trial counsel informed the trial court that she had spoken with Mr. G about the case the previous Thursday and Saturday, as well as that morning. They discussed the facts available to defend against the failure-to-assume-parental-responsibility ground, as well as the facts available to the State to potentially establish that ground. It was trial counsel's opinion that Mr. G was intelligent and that his stipulation was made knowingly, voluntarily, and intelligently. Counsel explained, "[w]e read the jury instructions together relative to this ground as well as the other ground." Counsel informed the trial court that Mr. G had initiated discussion about stipulating after seeing A.K.'s mother do so at a previous hearing. Counsel expressed her opinion that Mr. G had thought about his decision and that it was something he wanted to do. Mr. G agreed with all of his trial counsel's assertions.

¶11 The trial court then found that Mr. G had entered his stipulation freely, knowingly, voluntarily, and intelligently. The matter was scheduled for a "prove up" and disposition on August 12, 2014. On August 12, 2014, the State called Jordan Koconis-O'Malley of the Bureau of Milwaukee Child Welfare to testify to the failure-to-assume-parental-responsibility ground. After direct examination, Koconis-O'Malley was questioned by Mr. G's trial counsel. Given the line of questioning during the cross examination, the trial court expressed some concern about whether Mr. G wished to continue with his stipulation. The trial court then passed the case to allow Mr. G and his trial counsel to speak regarding how he wished to proceed.

¶12 Upon their return to the courtroom, the trial court was advised that Mr. G wished to continue with his stipulation. Mr. G then asked to talk, stating:

> I mean, the stipulation, I understand that. And I agree that, you know, I don't -- the finding -- the stipulation. I mean, I

> could not provide for him because he was not in my care. That's my objection about this stipulation. How could I provide for his day-to-day needs when he wasn't with me? I love my son. If he was with me, of course I would have provided for him. So that's what I don't -- I'm not contesting it, but I see where they're coming from. But how could I have, you know, provided for him on a day-to-day basis if he wasn't in my custody?

¶13 The trial court then read WIS—JI CHILDREN 346 to Mr. G, explaining:

> To establish failure to assume [parental] responsibilities the State of Wisconsin must prove by evidence that is clear, satisfactory, and convincing to a reasonable certainty that [Mr. G] has not had a substantial parental relationship with [A.K.]. Here's what substantial parental relationship means. The term substantial parental relationship means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of [A.K.]. Substantial parental relationship is assessed based on the totality of circumstances throughout the child's entire life. In evaluating whether [Mr. G] had a substantial parental relationship with [A.K.], the jury could consider, but was not limited to, whether [Mr. G] had expressed concern for or interest in the support, care, or well-being of [A.K.], whether [Mr. G] had neglected or refused to provide care or support for [A.K.], whether [Mr. G] exposed [A.K.] to [a] hazardous living environment, … whether [Mr. G] expressed concern for or interest in the support, care, or well-being of the mother during the pregnancy, and all other evidence bearing on the issue which would assist the jury in making that decision. The jury would be told that they could consider the reason for the parent's lack of involvement when they assess all of the circumstances throughout the child's entire life.

¶14 Mr. G expressed an understanding of this instruction. When asked if this is what he understood he was agreeing to, Mr. G responded, "Yes and no, because I don't agree upon the fact that he's in the State's custody and how can I provide for him? I did show interest in him. I was there at the visits. I brought the appropriate food for him. I brought diapers. And I understand what you're saying. I did show concern for him."

¶15 The trial court then engaged in the following discussion with Mr. G:

> THE COURT: Okay. So I understand where you're coming from. And I'm just going to ask you a bottom line question because it really is the bottom line that I'm trying to figure out and I'm trying to make sure you've got a better understanding about this. And maybe you want more time to talk to your lawyer or whomever. But the bottom line is do you want to agree to that or not?
>
> [MR. G]: If I don't agree to it, then we're going to go to trial, right?
>
> THE COURT: Yeah, because that's why we have trials. They say one thing, you say something else. I don't know what happened. The way we figure out what happened is we put all the evidence on, a bunch of people listen to it, and then they make a decision.

The trial court then explained the two phases of a TPR case to Mr. G and stated that the trial court would make the ultimate decision on disposition. Mr. G asked if he could appeal any decision of the trial court. When told that he could, the following exchange took place:

> THE COURT: So here is what we're going to do, I'm not sure that you know what you want to do.
>
> [MR. G]: No, I do know where -- I don't want to go to trial. I would like to get this settled today. We can move on, continue on.
>
> THE COURT: You'd like to continue with your stipulation; is that right?
>
> [MR. G]: Yes.

¶16 When the trial court stated that he thought Mr. G had understood all of this at the time of his original stipulation, Mr. G responded, "I did, just, you know --" The trial court then determined that the State had established the ground of failure to assume parental responsibility and found Mr. G unfit.

¶17 On August 14, 2014, at the conclusion of the dispositional hearing, the trial court found that it was in A.K.'s best interests that the parental rights of Mr. G be terminated. A written order was entered accordingly.

¶18 Mr. G filed a notice of appeal and subsequently filed a motion with this court requesting remand to the trial court for postdisposition proceedings. In the motion, Mr. G's counsel stated she anticipated:

> filing a postdisposition motion asserting that: (1) [Mr. G]'s stipulation to grounds was not knowingly, voluntarily, and intelligently entered[;] (2) the circuit court erroneously exercised its discretion in determining that termination of [Mr. G]'s rights was in [A.K.]'s best interests; and (3) new evidence necessitates reconsideration of whether the termination of [Mr. G]'s rights was in [A.K.]'s best interest.

We granted the motion for remand.

¶19 Mr. G did file a postdisposition motion upon remand, and, in it, claimed that: (1) his stipulation to the failure-to-assume ground was not entered knowingly, intelligently, and voluntarily; (2) the trial court's application of the failure-to-assume ground and finding of unfitness violated Mr. G's substantive due process rights; (3) he received ineffective assistance of trial counsel; and (4) he was entitled to a new dispositional hearing based upon newly discovered evidence, that is, Nevada state court documents demonstrating he had custody of his son K.T. After a hearing, the trial court denied Mr. G's motion. This appeal follows.

DISCUSSION

¶20 Mr. G raises three issues on appeal. First, he argues that his stipulation was not made voluntarily with an understanding of the nature of the ground. Second, he argues that WIS. STAT. § 48.415(6), as applied to him, violates his substantive due process rights. And third, he contends that he is entitled to a

new dispositional hearing based upon newly discovered evidence, to wit, documents he submitted from the Nevada state court.[3] We address each concern in turn.

I. Mr. G has failed to make a prima facie case that the trial court did not ensure that Mr. G stipulated to the failure-to-assume ground with an understanding of the nature of the ground.

¶21 Mr. G first argues that his stipulation to the failure-to-assume-parental-responsibility ground was not voluntarily made with an understanding of the nature of the ground. He claims that the trial court's comments led him to believe that his inability to provide *daily* care for A.K.—because A.K. was in foster care at the time Mr. G was adjudicated his father—meant Mr. G had no defense. For the reasons which follow, we disagree.

¶22 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder determines whether termination is in the child's best interest. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402. When a parent enters an admission or a no-contest plea that a ground exists to terminate his or her parental rights at the grounds phase, WIS. STAT. § 48.422(7) requires the trial court to, among other things, "[a]ddress the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions." ***Id.***

[3] To the extent that Mr. G raised claims in his postdisposition motion that he does not raise before this court, we deem those claims abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

¶23 When assessing a claim that the trial court failed in this mandatory duty under WIS. STAT. § 48.422(7), we follow the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. First, a parent must make a prima facie showing that the trial court violated its mandatory duties under § 48.422(7) and that the parent did not know or understand the information that should have been provided by the trial court. ***Therese S.***, 314 Wis. 2d 493, ¶6. Second, if the parent is able to make such a prima facie showing, the burden shifts to the State to show by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently waived the right to contest the allegations in the petition. ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

¶24 Whether a parent presented a prima facie case sufficient to allege that he did not know or understand information that should have been provided in the trial court's colloquy is a question of law that we review de novo. ***Therese S.***, 314 Wis. 2d 493, ¶7. We look to the entire record and the totality of circumstances to determine whether the trial court's actions were sufficient. ***Steven H.***, 233 Wis. 2d 344, ¶42. Having looked at the record and the totality of circumstances here, we conclude that Mr. G did not make a prima facie showing.

¶25 Mr. G stipulated to the ground of failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6). In order to prevail on this ground, the State must establish that the parent has not had a substantial parental relationship with the child. Section 48.415(6) defines a "substantial parental relationship" as:

> the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the

> child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

In ***Tammy W-G. v. Jacob T.***, 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, our supreme court described the statute as "prescrib[ing] a totality-of-the-circumstances test." ***Id.***, ¶3. The court concluded that a factfinder applying the test "should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting [his] child and exposure of the child to a hazardous living environment." ***Id.*** The supreme court's language in ***Tommy W-G.*** has been incorporated into WIS JI—CHILDREN 346.

¶26 Mr. G claims that the trial court's colloquy not only failed to ensure that he understood the nature of the failure-to-assume ground, but that the trial court's colloquy actually misled Mr. G into believing that he had no defense to the allegations because of his lack of opportunity to provide *daily* care for A.K. while A.K. was in foster care. The record belies Mr. G's assertion.

¶27 On May 5, 2014, when Mr. G stipulated to the failure-to-assume ground, he presented himself as an educated individual, who had received and read a copy of the TPR petition setting forth the failure-to-assume ground, and who had reviewed the failure-to-assume ground at length with his attorney. Mr. G told the court in no uncertain terms that he did not want to have a trial, that he understood everything that was going on in court, that he had no questions for the court or his attorney, and that he had had time to think about his decision. When the trial court

asked him, "[d]o you wish to agree to the failure to assume parental responsibilities ground alleged by the [S]tate?" Mr. G responded, "Yes, I do."

¶28 Mr. G's attorney then told the court that she had discussed Mr. G's decision to stipulate to the failure-to-assume ground with him over a period of several days and that she had reviewed both the TPR petition and the relevant jury instruction with Mr. G. Counsel told the court that she had explained to Mr. G that counsel "thought [there] were facts that could possibly persuade a jury that he had fulfilled the requirement of having a substantial parental relationship with his son," but that despite her explanation of a possible defense, Mr. G wished to continue with the stipulation. Mr. G's counsel told the court that she believed Mr. G's stipulation to grounds was made both "freely and voluntary" stating, "he's thought about it a lot. He probably thinks I'm trying to talk him out of it. But I -- you know, this is a very serious case, so I just want to make sure that this is something that he wants to do. I believe it is." Mr. G agreed that his counsel had accurately recounted their previous conversations.

¶29 In other words, the record shows that Mr. G had considered his decision to stipulate to the failure-to-assume ground over a period of several days and that he only decided to stipulate to the ground after extensive conversations with his attorney. Mr. G's attorney explained to him that there were defenses available to him, and she also reviewed with him the relevant jury instruction, which would have informed Mr. G that the jury could "consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life." *See* WIS JI—CHILDREN 346. The record is clear that Mr. G's stipulation was made with an understanding of the nature of the failure-to-assume ground.

¶30 In so holding, we reject Mr. G's assertions that his alleged misunderstanding of the nature of the failure-to-assume ground should have been made clear to the trial court during the prove up on August 12, 2014, when Mr. G told the court:

> I mean, the stipulation, I understand that. And I agree that, you know, I don't -- the finding -- the stipulation. I mean, I could not provide for him because he was not in my care. That's my objection about this stipulation. How could I provide for his day-to-day needs when he wasn't with me? I love my son. If he was with me, of course I would have provided for him. So that's what I don't -- I'm not contesting it, but I see where they're coming from. But how could I have, you know, provided for him on a day-to-day basis if he wasn't in my custody?

¶31 Upon hearing Mr. G's concerns at the August 12, 2014 prove up, the trial court took care to re-read the relevant jury instruction to Mr. G, again explaining that the jurors would be told that they could consider "the totality of circumstances" and that they "could consider the reason for [Mr. G's] lack of involvement when they assess all the circumstances throughout [A.K.]'s entire life." After re-explaining the jury instruction to Mr. G, the trial court asked Mr. G if he had "a better understanding about this" or whether he wanted more time to discuss the failure-to-assume ground with his lawyer. Mr. G did not tell the court that he did not understand or ask for more time to discuss the ground with his lawyer. Instead, Mr. G stated, "If I don't agree to it, then we're going to go to trial, right?" After some more discussion, Mr. G told the court, "No, I do know where -- I don't want to go to trial. I would like to get this settled today. We can move on, continue on." In an attempt to clarify, the trial court asked Mr. G, "You'd like to continue with your stipulation; is that right?" and Mr. G responded, "Yes."

¶32 In sum, the record plainly shows that the trial court carefully and repeatedly discussed the failure-to-assume ground with Mr. G and gave him every opportunity to ask questions and discuss the ground with his attorney. While the TPR petition and the trial court both made references to Mr. G's ability to provide "daily supervision" to A.K., they did so because that is the language defining a "'substantial parental relationship,'" as set forth in the failure-to-assume statute. *See* WIS. STAT. § 48.415(6). The record shows that the trial court read the relevant jury instruction to Mr. G, and explained that the jury would consider that definition "based upon the totality of circumstances" and that the "jury would be told that they could consider the reason for [Mr. G]'s lack of involvement when they assess all of the circumstances throughout the child's entire life." Moreover, the trial court also established that Mr. G had reviewed the ground at length with his attorney and that his attorney had told him that he did have potential defenses to the failure-to-assume ground if he wished to pursue them. In doing so, the trial court complied with its mandatory duties set forth in WIS. STAT. § 48.422(7) and ensured that Mr. G understood the nature of the ground. As such, we affirm.

II. When Mr. G stipulated to the failure-to-assume ground, he waived his right to argue that WIS. STAT. § 48.415(6) is unconstitutional as applied to him.

¶33 Next, Mr. G challenges the TPR order on the basis that the failure-to-assume-parental-responsibility statute, WIS. STAT. § 48.415(6), is unconstitutional as applied to him. Whether a statute, as applied to a parent, violates the parent's constitutional right to substantive due process presents a question subject to independent appellate review. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We begin with the presumption of the statute's constitutionality. ***Id.***

¶34 Because termination of parental rights interferes with a fundamental right, strict scrutiny is applied to the statute. *See* ***id.***, ¶¶17, 23. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. ***Id.***, ¶17. Because the Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***Kelli B.***, 271 Wis. 2d 51, ¶25, the sole issue here is whether that statute, as applied to Mr. G, is narrowly tailored to meet the State's compelling interest in protecting A.K., *see* ***id.***, ¶17.

¶35 Mr. G argues that WIS. STAT. § 48.415(6) is not narrowly tailored to cases like his "where a child is removed from his mother's custody because of her drug use, prior to the child's father's adjudication." In short, Mr. G argues that because A.K. was already in foster care when Mr. G was adjudicated A.K.'s father, it was impossible for Mr. G to establish a substantial parental relationship with A.K.[4]

¶36 The problem with Mr. G's argument, however, is that he stipulated to a finding of unfitness at the grounds phase. In doing so, he waived his right to challenge the constitutionality of WIS. STAT. § 48.415(6) as applied to him. *See* ***State v. Cole***, 2003 WI 112, ¶46, 264 Wis. 2d 520, 665 N.W.2d 328.

[4] In making this argument, Mr. G ignores evidence of his many missed opportunities to establish a substantial parental relationship with A.K. that were available to him, despite A.K.'s placement in foster care. For instance, there was evidence demonstrating that Mr. G: did not financially support A.K.; did not give [A.K.] a Christmas present; did not ask any questions about [A.K.]'s doctor until July 31, 2014; often missed visits with [A.K.] and testified that it was sometimes difficult for him to visit A.K. twice a week; never progressed to unsupervised or overnight visits with A.K.; was allegedly involved in a violent relationship with A.K.'s mother; and asked A.K.'s mother to leave his residence even though she told him she was pregnant with A.K.

¶37 In his reply brief, Mr. G argues that we should not find that he waived his right to raise his constitutional argument because: (1) the "issue was identified as a basis for remand"; and (2) the State forfeited its waiver argument when it failed to raise the issue in response to Mr. G's postdisposition motion. We reject both of these arguments.

¶38 First, Mr. G fails to provide a citation to the record for his assertion that the issue was "identified as a basis for remand." In his motion for remand, counsel stated that he "anticipate[d] filing a postdisposition motion asserting that: (1) [Mr. G]'s stipulation to grounds was not knowingly, voluntarily, and intelligently entered[;] (2) the circuit court erroneously exercised its discretion in determining that termination of [Mr. G]'s rights was in [A.K.]'s best interests; and (3) new evidence necessitates reconsideration of whether the termination of [Mr. G]'s rights was in [A.K.]'s best interests." Nowhere in the motion does Mr. G mention a violation of constitutional rights. Furthermore, in our order remanding the case to the trial court, we noted that Mr. G's motion indicated that he "will raise the issues regarding the voluntariness of his stipulation to grounds for the petition, whether the circuit court properly exercised discretion in terminating his parental rights, and newly discovered evidence." We did not identify a constitutional issue as "a basis for remand."

¶39 Second, while the State did not raise the waiver issue in response to Mr. G's postdisposition motion, the general rule requiring matters to be first raised in the trial court is limited to the appellant. *See* ***State v. Lock***, 2013 WI App 80, ¶40, 348 Wis. 2d 334, 833 N.W.2d 189. A respondent may advance any argument that will sustain the trial court's ruling. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). Moreover, we can affirm a trial court's

ruling on any ground, and do so here. *See* ***State v. Milashoski***, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (Ct. App. 1990).

¶40 In short, we conclude that Mr. G waived his constitutional argument when he stipulated to the failure-to-assume ground.

III. The trial court properly exercised its discretion when it denied Mr. G's request for a new dispositional hearing.

¶41 Finally, Mr. G asserts that the trial court erroneously exercised its discretion when it denied his postdisposition motion for a new dispositional hearing based upon newly discovered evidence. Mr. G argues that evidence he submitted from a Nevada state court showing that he was granted custody of his twelve-year-old son K.T. was newly discovered and affected the advisability of the trial court's order terminating Mr. G's parental rights. We disagree. The record shows the trial court's decision was reasonable and based upon the record. As such, we affirm.

¶42 WISCONSIN STAT. § 48.46(1m) allows the parent of a child whose status has been adjudicated in an order entered pursuant to WIS. STAT. § 48.43 to petition the court for a rehearing on the basis of new evidence. *See* § 48.46(1m). Newly discovered evidence is evidence that: (1) was brought to the party's attention after trial; (2) the party was not negligent in seeking; (3) was material to an issue in the case; and (4) was not cumulative. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42.

¶43 The granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. ***Id.***, ¶31. We will uphold a trial court's discretionary decision if the court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process,

reached a conclusion that a reasonable judge could reach." *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Here, Mr. G has failed to demonstrate that the trial court erroneously exercised its discretion when it concluded that the evidence Mr. G presented from the Nevada state court was not newly discovered.

¶44 In response to Mr. G's postdisposition motion, the trial court concluded that the evidence was not newly discovered because Mr. G was aware of the Nevada case at the time of the dispositional hearing and failed to present the evidence to the court in a "concrete or clear[] way." The trial court also found that the evidence was not material because K.T. and A.K. were different ages and there was no indication that they had similar needs. Furthermore, the court found the evidence to be cumulative because there was testimony at the dispositional hearing that Mr. G had gained custody of K.T. Ultimately, the court stated that the new evidence would not have changed the outcome of the dispositional hearing.

¶45 We discern no error in the trial court's decision. Mr. G was well aware of the Nevada court action at the time of the dispositional hearing. In fact, both Mr. G and Koconis-O'Malley testified that K.T. was living with Mr. G at that time pursuant to the court action in Nevada. Moreover, we agree with the trial court that Mr. G has failed to demonstrate how anything in the order placing K.T. in Mr. G's home relates to what is in A.K.'s best interests such that the order is relevant to the outcome of the dispositional hearing. *See* WIS. STAT. § 48.426(3).

¶46 The record demonstrates that the trial court did not erroneously exercise its discretion when it determined that the Nevada court documents were not newly discovered evidence that affected the advisability of the trial court's dispositional order. As such, we affirm.

By the Court.—Orders affirmed.

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