

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

Nos. 99-0805, 99-0806, 99-0807

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 99-0805

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

APRIL O.,

RESPONDENT-APPELLANT.

No. 99-0806

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO TAYLOR J.O.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

APRIL O.,

RESPONDENT-APPELLANT.

NO. 99-0807

**IN RE THE TERMINATION OF
PARENTAL RIGHTS TO BRANDON R.O.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

APRIL O.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Remanded with directions.*

MYSE, P.J. April O. appeals orders terminating her parental rights to Everett W.O., Taylor J.O., and Brandon R.O. April contends that the trial court lost competency to proceed when it: (1) failed to hold the plea hearing within thirty days of the petition's filing, contrary to § 48.422(1), STATS.; and (2) failed to hold the dispositional hearing within forty-five days of the fact-finding hearing, contrary to § 48.424(4), STATS. April also contends that she was denied the effective assistance of counsel. This court is unable to determine from the record whether the statutory time limits for both hearings were properly extended.

Accordingly, this matter is remanded to the trial court with directions to conduct an evidentiary hearing in order to develop a factual record explaining the reasons underlying both hearing delays and to then determine from that record whether the hearings were properly extended or whether the mandatory statutory time limits were violated. Because April O. has failed to demonstrate that counsel's alleged deficient performance prejudiced her defense, her motion for a remand to conduct a *Machner* hearing is denied.¹

BACKGROUND

Brown County Human Services Department petitioned for termination of April's parental rights to Everett, Taylor and Brandon on July 17, 1998. A plea hearing was held on August 11, at which April requested a substitution of judge. The trial court granted her request. No further issues, however, were discussed at this hearing. The case was reassigned in an order entered August 18. The balance of the plea hearing was held on September 25, at which April denied the petition's allegations.

The fact-finding hearing was conducted on November 9-10. At its conclusion, a jury found that grounds existed for terminating April's parental rights. The court set the dispositional hearing for December 17. A hearing notice sent on November 12 confirmed this date. On November 16, however, the court sent out another notice which rescheduled the dispositional hearing to January 19, 1999. The notice did not offer a reason for the postponement. At the dispositional hearing, the court terminated April's parental rights.

¹ See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

April appealed, and this court consolidated the separate children's records. April then moved this court for a remand to litigate an ineffective assistance of counsel claim. April alleged that counsel failed to impeach Brandon's father's credibility at the fact-finding hearing. In an order, this court held the remand motion in abeyance and directed that the parties' briefs address whether prejudice resulted from the alleged deficient performance.

ANALYSIS

1. Competency To Proceed

April first contends that the trial court lost competency to proceed when it: (1) failed to hold a hearing within thirty days of the petition's filing, contrary to § 48.422(1), STATS.; and (2) failed to hold the dispositional hearing within forty-five days of the fact-finding hearing, contrary to § 48.424(4), STATS. A trial court's competency to proceed is a question of law this court decides independently. *In re Jason B.*, 176 Wis.2d 400, 407, 500 N.W.2d 384, 387 (Ct. App. 1993).

The first issue this court considers is whether the trial court lost competency to proceed with the termination proceeding when the plea hearing was not held within thirty days after the petition's filing. Wisconsin's Children's Code, ch. 48, STATS., establishes time restrictions to protect a child's constitutional due process rights. *See In re Kywanda F.*, 200 Wis.2d 26, 34-35, 546 N.W.2d 440, 444-45 (1996). Generally, failure to comply with the Code's mandatory time provisions causes the trial court to lose competency to proceed and requires the termination petition's dismissal. *Id.* Noncompliance, however, does not always result in loss of competency. *Id.* at 33, 546 N.W.2d at 444. Section 48.315, STATS., permits continuances and extensions of the Code's

various time periods. Specifically, § 48.315(1)(c), STATS., excludes any period of delay caused by the disqualification of a judge.

We have held that § 48.315(1)(c), STATS., provides that a request for substitution tolls the time limits not only until the appointment of the new judge, but also for a reasonable period of time necessary to appoint the new judge and to allow the new judge to be informed of and schedule the appropriate hearings. *In re Joshua M.W.*, 179 Wis.2d 335, 343-44, 507 N.W.2d 141, 144 (Ct. App. 1993). Recognizing that a court cannot extend indefinitely the amount of time it may delay hearings without losing competency, however, this court further concluded that a delay by the newly assigned judge exceeding thirty days after assignment is unreasonable as a matter of law, unless the court finds good cause for granting a continuance under § 48.315(2), STATS.² *Id.* at 344, 507 N.W.2d at 144-55.

In this case, April filed a request for substitution at her August 11, 1998, plea hearing, which the court accepted. The new judge was assigned to this case on August 18, and within the week he scheduled the remainder of the plea hearing for September 25. Even if the substitution request tolled the time limit, the September 25 plea hearing exceeds the thirty-day time limit from the date of the new judge's assignment. The record is devoid of evidence reflecting the reasons why the court scheduled this matter beyond thirty days after judicial reassignment. With no record before us, this court cannot determine the amount

² Section 48.315(2), STATS., states:

A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

of time reasonably necessary to effect the judicial substitution or whether “good cause” existed pursuant to § 48.315(2) for the court to extend the plea hearing deadline as it did. Therefore the matter is remanded and the trial court must conduct an evidentiary hearing in order to develop a factual record explaining the reasons underlying the delay and to then determine from that record whether the plea hearing was properly extended or whether the mandatory statutory time limit was violated.

The next issue is whether the trial court lost competency to proceed with the termination proceeding because the disposition hearing was not held within forty-five days of the jury’s fact-finding determination as required under § 48.424(4), STATS., which provides:

- (4) If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2). The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427. The court may delay making the disposition and set a date for dispositional hearing no later than 45 days after the fact-finding hearing if:
 - (a) All parties to the proceeding agree; or
 - (b) The court has not yet received a report to the court on the history of the child as provided in s. 48.425 from an agency enumerated in s. 48.069(1) or (2) and the court now directs the agency to prepare this report to be considered before the court makes the disposition on the petition.

At the end of the second day of the fact-finding trial, April’s attorney indicated that he might be requesting a psychological evaluation of his client. The judge initially scheduled the dispositional hearing for December 17, 1998, which was within forty-five days of the jury’s factual determination. The court also

indicated that the parties must have their expert's reports in prior to the dispositional hearing. After the trial, the court sent a notice of hearing indicating the hearing was scheduled for December 17. Shortly thereafter, the matter was rescheduled to January 19, 1999, which is outside the forty-five day statutory limit. The record is silent as to the reasons for the continued date, although the notice reminds the parties that the report is due before the hearing.

Section 48.315(1), STATS., lists specific circumstances that toll the running of a time limit under the Code. For example, periods of delay are excluded that result from: (1) a psychological examination of a parent under § 48.295, STATS., or a hearing related to the mental condition of the child's parent; *see* § 48.315(1)(a); *see also* ***Waukesha County v. Darlene R.***, 201 Wis.2d 633, 549 N.W.2d 489 (Ct. App. 1996); or (2) a continuance granted at the request of or with the consent of the child and his counsel. *See* § 48.315(1)(b), STATS. In addition, court congestion and calendar management constitute good cause for a continuance. *See In re J.R.*, 152 Wis.2d 598, 607, 449 N.W.2d 52, 55-56 (Ct. App. 1989).

While the record alludes to a request for a psychological examination of April, this court cannot determine from the record that this caused the court to reschedule the original disposition hearing. The delay may have been occasioned by this or other circumstances properly falling within the tolling provisions of § 48.315, STATS., and supporting case law. This court cannot make that determination, however, based upon the record before this court. Therefore, this court remands and instructs the trial court to conduct an evidentiary hearing to develop a factual record explaining the reasons why the disposition hearing was rescheduled outside the forty-five day statutory time limit and to then determine

whether that time limit was properly extended or whether the mandatory time limit was violated.

2. Ineffective Assistance of Counsel

April has moved this court for a remand to litigate an ineffective assistance of counsel claim. In an order, this court held the remand motion in abeyance and directed that the parties' briefs address whether prejudice resulted from the alleged deficient performance. April claims that she was denied the effective assistance of counsel because counsel failed to impeach Brandon's father's credibility with evidence of his criminal convictions at the fact-finding hearing. April contends counsel failed to request a judicial determination that such evidence was admissible as required by § 906.09(3), STATS., and failed to establish that Brandon's father had three prior convictions.³

To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's actions constituted deficient performance and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both elements of the test must be satisfied, we may dispose of an ineffective assistance of counsel claim when the defendant fails to satisfy either element. *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). To show prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

³ Section 906.09(3), STATS., provides:

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Whether counsel’s actions, if deficient, prejudiced the defense, is a question of law which this court reviews independently. *State v. Hubanks*, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992).

The record discloses no § 906.09(3), STATS., determination. As to counsel’s impeachment of Brandon’s father, Steve Putzlocker, counsel asked Putzlocker whether he had any convictions and Putzlocker responded affirmatively. When asked how many, Putzlocker was unable to respond with a specific number. To complete the impeachment, counsel did not identify each of the prior convictions which he is permitted to do when the witness declines to respond as to the number of convictions. *See Nicholas v. State*, 49 Wis.2d 683, 691, 183 N.W.2d 11, 16 (1971).

Notwithstanding these allegations of counsel error, April has failed to establish her defense was prejudiced. The record further discloses that the criminal conduct underlying two of Putzlocker’s convictions was identified and introduced into evidence, including that he had previously battered April O. and that he had used cocaine himself. This conduct underlies two of the three convictions which could have been specifically identified. Because the jury was aware that there were prior convictions, that the number of prior convictions exceeded one and that the conduct underlying two of those convictions was introduced into evidence, this court concludes that April’s defense was not prejudiced by counsel’s alleged deficient performance. Whether two or three prior convictions had been identified is insignificant within the context of this case. Based on these facts, this court is persuaded that there is no probability that a different result would be obtained were this evidence placed before the jury.

Because this court concludes April's defense was not prejudiced by counsel's alleged deficient performance, her motion seeking remand for a *Machner* hearing is denied.

Because this court is unable to determine from the record whether the statutory time limits for both the plea and dispositional hearings were properly extended, this matter is remanded to the trial court with directions to conduct an evidentiary hearing in order to develop a factual record explaining the reasons underlying both hearing deadline delays and to then determine from that record whether the hearings were properly extended or whether the mandatory statutory time limits were violated. Because April O. has failed to demonstrate that counsel's alleged deficient performance prejudiced her defense, her motion for a remand to conduct a *Machner* hearing is denied.

By the Court.—Orders remanded with directions.

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

