COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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Nos. 99-2384 and 99-2385

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

NO. 99-2384

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

BARRON COUNTY,

PETITIONER-RESPONDENT,

V.

KATHY S.,

RESPONDENT-APPELLANT.

NO. 99-2385

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

BARRON COUNTY,

PETITIONER-RESPONDENT,

V.

KATHY S.,

RESPONDENT-APPELLANT.

APPEALS from an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

¶1 HOOVER, P.J. Kathy S. appeals an order terminating her parental rights to her sons, Michael S. and Eric S. She contends that the trial court erred by instructing the jury that the Barron County Department of Social Services and Kathy were relieved of their respective responsibilities under a CHIPS[1] dispositional order during the period between the first and the second trial. She alternatively asserts that discretionary reversal under § 752.35, STATS., is appropriate and that she was denied effective assistance of counsel because counsel did not object to the instruction. She next claims that her due process rights were violated by the County petitioning to terminate her parental rights six weeks after the entry of a dispositional order requiring that she maintain a suitable dwelling for six months. She also asserts that her parental rights were terminated because of poverty in violation of her due process rights.

¶2 This court rejects her contentions. First, although the trial court misinformed the jury as to the law, Kathy failed to preserve the error for appeal and, moreover, was not prejudiced by the error. This court declines to reverse under § 752.35, STATS., because the error did not prejudice her in submitting evidence, arguing her case or the jury's deliberation of the real controversy.

[1] CHIPS is an acronym for child in need of protection or services.

Because Kathy was not prejudiced, her ineffective assistance of counsel claim is rejected.

¶3 Next, there were no due process violations. The court instructed the jury to consider whether Kathy had made substantial progress toward meeting the two previous dispositional orders' conditions over an eight-year period. These conditions were essentially the same as they had been in all orders entered after 1990, and she therefore had ample notice and time to comply. The record also reflects that she had adequate household income to obtain suitable housing, but chose not to.

¶4 Eric and Michael have been continuously placed outside their parental home since 1990. The initial placement resulted from Kathy's and her husband's failure to provide suitable housing. The family was residing in a structurally unsound dwelling without running water and cluttered with debris that attracted rats. Between 1991 and 1997, dispositional orders were extended on an annual basis. The conditions for return of the children to the parental home included that the parents have and maintain suitable housing, have a telephone and receive counseling. The last extension order in the case, entered in October 1997, was slightly different in that it required the parents to maintain a suitable dwelling for at least six months.

¶5 The County petitioned to terminate Kathy's parental rights on December 4, 1997.[2] The petition alleged that the children continued to be in need of protection and services because of Kathy's failure to meet the conditions for

[2] The petition also sought to terminate Ray S.'s parental rights. His rights were terminated after the first trial. He is not a party to this appeal.

return, specifically, the failure to have a "safe and adequate home to which the children may return." In February 1998, the matter was tried to a jury, which found grounds for termination.[3] The court subsequently ordered Kathy's rights terminated. That verdict and dispositional order were reversed on appeal.[4]

¶6 On remand, a new trial was held on April 19, 1999. The focus of the trial was whether Kathy was able to provide suitable housing for her children. She offered evidence that, from March 1998 through the second trial, she resided in the

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[3] A termination of parental rights, based upon the continuing need for protection or services, has four elements. They are:

> First, that (child) was adjudged in need of protection or services and placed or continued in placement outside the home of (parent) for a cumulative period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law. …
>
> Second, that (agency) has made a diligent effort to provide the services ordered by the court. "Diligent effort" means an earnest and conscientious effort to take good faith steps to provide those services, taking into consideration the characteristics of the parent or child, the level of cooperation of the parent, and other relevant circumstances of the case. You may find the agency's effort was diligent even though there were minor or insignificant deviations from the court's order. …
>
> Third, that (parent) has failed to demonstrate substantial progress toward meeting the conditions established for the return of (child) to the home. …
>
> Fourth, that there is a substantial likelihood that (parent) will not meet the conditions of return within the twelve-month period following the conclusion of this hearing. "Substantial likelihood" means that there is a real and significant probability rather than a mere possibility that (parent) will not meet the conditions for the return within that time period.

WIS J I—CHILDREN 323; *see also* § 48.415(2), STATS. The trial court directed a verdict as to the first element.

[4] *See* ***In re Michael M.S.***, Nos. 98-1536, 98-1537, unpublished slip op. (Wis. Ct. App. Dec. 22, 1998).

same home, that the home was suitable for the children and that she was therefore in substantial compliance with the extension order. She also argued to the jury that the County provided her with few, if any, services and that she was substantially likely to meet the conditions for return of her children within the next twelve months. The County offered evidence of, *inter alia*, the unsuitability of Kathy's current and previous dwellings and the efforts it made to assist her in finding suitable housing. The jury found grounds for termination, and the court ordered Kathy's parental rights to Michael and Eric terminated.

1. JURY INSTRUCTION

¶7 A circuit court has broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case. *See* ***Peplinski v. Fobe's Roofing***, 193 Wis.2d 6, 24, 531 N.W.2d 597, 603-04 (1995) (quoting ***Fischer v. Ganju***, 168 Wis.2d 834, 849-50, 485 N.W.2d 10, 16 (1992)). "An instruction that is an incorrect or misleading statement of the law is erroneous." ***Nowatske v. Osterloh***, 198 Wis.2d 419, 428, 543 N.W.2d 265, 268 (1996). When the circuit court has given an erroneous instruction, a new trial is not warranted unless the error is prejudicial. *See* ***id***. at 429, 543 N.W.2d at 268. An error relating to an instruction is not prejudicial if it appears that the result would not be different had the error not occurred. *See* § 805.18(2), STATS.; *see also* ***Nowatske***, 198 Wis.2d at 429, 543 N.W.2d at 268.

¶8 Kathy contends that the trial court improperly instructed the jury with respect to the parties' legal duties between the first and second trials. The instruction she complains of, given without objection, was:

> From February 3, 1998 until today's date, the Barron County Department of Social Services had no legal duty to provide services, and the mother had no legal duty to

> comply with conditions for a return. However, you may consider the mother's actions during that period of time as they relate to question four of the verdicts; is there a substantial likelihood that the mother will not meet those conditions, will not meet these conditions within the 12 month period following the conclusion of this trial.

¶9 Kathy asserts that this instruction prevented consideration of whether she made substantial progress toward meeting the conditions for return after the first trial.[5] Therefore, she claims, the instruction permitted the jury to conclude that although she made substantial progress toward meeting the conditions during the period between the trials, that was irrelevant to determining whether the County had met its burden to prove question three of the verdict. The County contends that Kathy waived this claim of error by failing to object to the instruction. This court determines that although the instruction was erroneous, Kathy waived any claimed error by failing to object to it, and even if not waived, she was not prejudiced.

¶10 The instruction misstated the law. Section 48.368(1), STATS., provides:

> If a petition for termination of parental rights is filed under s. 48.41 or 48.415 or an appeal from a judgment terminating or denying termination of parental rights is filed during the year in which a dispositional order under s. 48.355 or an extension order under s. 48.365 is in effect, the dispositional or extension order shall remain in effect until all proceedings related to the filing of the petition or an appeal are concluded.

[5] Question three of the verdict was whether Kathy "failed to demonstrate substantial progress toward meeting the conditions established for the return of the child[ren] to the parents' [sic] home?"

The statute does not state that the dispositional order and the duties it imposes are stayed pending resolution of the proceedings, but rather that the order is in effect until the termination proceedings are concluded. Thus the order is viable from the first trial until the appellate process is complete in this litigation. During this period, the County is obligated to continue providing services and Kathy is obligated to meet the order's conditions.

¶11 Before the trial started, and again on three other occasions during trial, the court invited comment on the proposed instruction. Kathy did not object to the proposed instruction. Although Kathy's counsel expressed some concern about the concept embodied in the instruction at a pretrial conference, that concern never took the form of an objection. Section 805.13(3), STATS., provides that the "[f]ailure to object … constitutes a waiver of any error in the proposed instructions …." *See also* ***Schroeder v. Northern States Power Co.***, 46 Wis.2d 637, 645, 176 N.W.2d 336, 339-40 (1970) (a party that acquiesces without objection on the record to the inclusion of instructions cannot later be heard to object on appeal).

¶12 Moreover, even if the objection had been preserved, Kathy was not prejudiced. The instruction informed the jury that Kathy had no duty to comply with the conditions for return after the first trial; it did not specifically prevent the jury from concluding that she had in fact complied with those conditions during that time period. The jury obviously had to measure her actions against the conditions for return in considering whether she was likely to meet those conditions in the future.[6] Kathy introduced evidence and argued that she had in

[6] The court also instructed the jury that it could consider the entire period since 1990 up to the date of trial in answering whether it was substantially likely that Kathy would meet the conditions of the 1997 order within the next twelve months. That instruction is set forth in full in note 9.

fact made substantial progress toward meeting the conditions for the return of her children *without* the County's assistance. Based on the instructions as a whole and the evidence Kathy introduced, this court cannot say that the result would be different had the error not occurred.

¶13 Kathy alternatively requests that this court exercise its discretion under §752.35, STATS., and remand for a new trial because the real controversy was not tried and "it is apparent that justice has miscarried …." This court may, in its discretion, reverse the trial court if "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …." Section 752.35, STATS. This court's power of discretionary reversal is appropriately exercised only in exceptional cases. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990). This is not such a case; although the instruction was erroneous, Kathy was not prejudiced.

¶14 Our courts have reversed judgments pursuant to § 752.35, STATS., when the trial court gave an erroneous jury instruction that prevented the real controversy from being fully tried. *See* ***State v Harp***, 161 Wis.2d 773, 781-82, 469 N.W.2d 210, 213-14 (Ct. App. 1991). To reverse because the real controversy has not been fully tried, this court need not determine if the probability of a different result exists on retrial. *See* ***Vollmer***, 156 Wis.2d at 19, 456 N.W.2d at 805.

¶15 Here the real controversy was tried. The issue was whether Kathy had met, or could meet within the next twelve months, the condition of obtaining and maintaining a suitable dwelling for at least six months. The court's instruction did not change the focus of the controversy. As stated previously, the instruction informed the jury that Kathy had no duty to comply with the conditions for return;

it did not specifically prevent the jury from concluding that she had substantially complied with those conditions. Again, Kathy was able to argue that she took substantial steps toward meeting the conditions for return of her children without the County's assistance, a much stronger argument than that she made progress with assistance.

¶16 The second part to a § 752.35, STATS., inquiry is whether a miscarriage of justice has occurred. A reversal on this basis requires a conclusion by this court that grounds for termination of Kathy's parental rights should not have been found and that it is substantially probable that retrial would provide a different result. *See* ***Vollmer***, 156 Wis.2d at 19, 456 N.W.2d at 805. Other than repeating her arguments, Kathy has provided no basis to conclude that after yet another trial she would be found in compliance or substantially likely to comply with the conditions for the children's return.

¶17 Kathy contends that she was denied effective assistance of counsel because counsel failed to object to the instruction.[7] The County counters that Kathy waived her claim of ineffective assistance of counsel by failing to hold a ***Machner*** hearing. ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). Kathy responds that the appellate procedure for termination of parental rights does not provide a vehicle by which to bring post-trial motions before the

[7] Our supreme court extended the application of ineffective assistance of counsel to termination of parental rights proceedings based on the rationale that a "statutory provision for appointed counsel includes the right to *effective* counsel." ***In re M.D.S.***, 168 Wis.2d 995, 1004-05, 485 N.W.2d 52, 55 (1992). The test for ineffective assistance of counsel set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to involuntary termination of parental rights proceedings. *See* ***M.D.S.***, 168 Wis.2d at 1004-05, 485 N.W.2d at 55. To establish ineffective assistance of counsel, the defendant must prove both that counsel's performance was deficient and that such deficient performance prejudiced the defendant. *See* ***Strickland***, 466 U.S. at 687.

trial court. This court need not address this issue because Kathy has failed to show prejudice.

¶18 Normally, it "is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" at a postconviction hearing. *See* ***id***. at 804, 285 N.W.2d at 908. It is inappropriate for this court to determine the competency of trial counsel on unsupported allegations. *See* ***State v. Simmons***, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973). Section 809.107, STATS., which governs appeals of termination of parental rights proceedings makes no allowance for post-termination relief other than through a timely appeal. This court agrees with Kathy that the procedure for raising ineffective assistance claims in a termination proceeding is not clear. Given there is no procedure to raise post-trial motions and because of the expedited nature of a termination appeal, it may be appropriate to raise the issue with the appellate court. If the appellate court deems the issue has merit, it could then remand the case to the trial court to conduct a ***Machner*** hearing. The respondent must, however, provide adequate facts to the appellate court in order to warrant a remand. *See* ***State v. Bentley***, 201 Wis.2d 303, 310-13, 548 N.W.2d 50, 53-55 (1996).

¶19 This court concludes, however, that Kathy is unable to provide adequate facts to support her ineffective assistance claim. She cannot show prejudice. To satisfy the prejudice prong of the ***Strickland*** test, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Her claim is based on the failure of counsel to object to the court's instruction. This court has already determined that Kathy was not prejudiced by the instruction. That analysis applies here with equal force.

2. DUE PROCESS CLAIMS

¶20 Parents have a fundamental liberty interest in matters of family life. *See* ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982). In ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 50 (Ct. App. 1995), this court explained that fundamental fairness requires that parents be given fair warning of the actual conduct that could lead to the termination of their parental rights. The facts surrounding the notice Kathy received are undisputed. The application of the United States Constitution's due process clause to undisputed facts presents a question of law that this court reviews de novo. *See* ***id***. at 862, 537 N.W.2d at 49-50.

¶21 Kathy claims that "use of the October 28, 1997 dispositional order [at trial] deprived her of fair notice and due process." She asserts that the 1997 order contained different conditions from the earlier orders and that she had insufficient time to comply because the County filed its petition to terminate her rights in December 1997. Her specific complaint is that the order required her to maintain a suitable dwelling for at least six months. She claims that it was physically impossible for her to meet this condition by the time of the first trial in February 1998. This court concludes that there is no due process violation of the nature Kathy describes.

¶22 Kathy's argument misconstrues the compliance element that the County must prove before grounds for termination are shown. The County is required to prove that the parent failed to demonstrate *substantial progress* toward compliance with a condition, not actual noncompliance. Question three of the jury verdict read: "Has Kathryn S[.] failed to demonstrate substantial progress toward meeting the conditions established for the return of the child to the parents' [sic]

home." It was not impossible for Kathy to show substantial progress toward meeting the conditions of the 1997 order after several months.

¶23 Moreover, the court instructed the jury that it could consider her activities since 1990.[8] Thus the jury had approximately eight years of Kathy's activities to consider in determining whether she made substantial progress toward meeting the conditions of the 1997 order. Kathy's argument that compliance was impossible because of the short time frame between the 1997 order and the termination petition is thus unfounded.

¶24 Further, Kathy had fair notice of the conditions for return of her children. The children were originally removed from Kathy's residence because it was unsuitable. She knew since 1990 that a condition for the return of her children was maintaining a suitable dwelling. The difference between the 1997 order and the earlier orders was not significant for notice purposes; the 1997 order required her to have a suitable dwelling for at least six months, as opposed to the unspecified time period of the earlier orders.

[8] The trial court instructed the jury that:

> Jury, there has been a series of orders in this case going back as early as 1990. The Petition is brought on the basis of the last two orders, dated 1996 and 1997, which are in evidence. The activities on the part of the Department and on the part of the parent that took place since [the] 1990 order was first entered are relevant, and you may consider those in respect [to] these last two orders and in reaching your verdict.
>
> You are instructed, however, that in answering Verdict question #4, it is only the conditions of the 1997 order which are considered.

¶25 Finally, Kathy's impossibility-of-compliance argument, carried to its logical extreme, would require that any parent subject to a dispositional order be given the full term of the order to comply before a termination of parental rights (TPR) petition may be heard. Again, this view misconstrues the compliance element that must be proved before grounds for termination are shown. The County is not required to prove noncompliance with a condition, but rather that the parent failed to demonstrate *substantial progress* toward compliance. Thus, neither §§ 48.417 nor 48.42, STATS., governing TPR petitions, requires that a CHIPS dispositional order with conditions for return be expired before a petition for termination may be filed or heard. Indeed, the very statute that Kathy relied on to show that the circuit court misinstructed the jury demonstrates that a TPR petition may be tried and heard while a dispositional order is in effect.

¶26 Kathy next complains that her parental rights were terminated because of her poverty.[9] She asserts that she and her husband could not afford to dwell in a city or village (the location of low-income housing) because it was too expensive. She contends that terminating her parental rights because of poverty violates due process. This court need not address Kathy's due process argument because her premise that her rights were terminated because of poverty is contradicted by the record. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663, 665 (1938) (only dispositive issues need be addressed). The County presented convincing evidence that low-income housing was available to Kathy and her spouse but that they rejected that housing because, as she said, "I preferred to be out in the country …." In fact, the evidence showed that low-income

[9] Both Kathy and her husband, Ray S., are disabled. They derive their income from Supplemental Security Income benefits.

housing would have been less expensive than some of the housing Kathy actually rented. At one point she was paying $300 per month for a home that did not include heat. The family income at that time was $802 per month. Low income housing, including heat, was available at $240 per month. Earlier, the family income had been $401 per month; low income housing would have been available at $120 per month. This court concludes that it is not an issue of poverty, but of personal choice and responsibility.

¶27 In conclusion, although the jury instruction was erroneous, the error was waived. Moreover, the error did not prejudice Kathy in submitting the evidence, arguing her case or in the jury's deliberation of the real controversy. Kathy was not denied her due process rights because she was provided with ample notice of the conditions for the return of her children; the change contained in the last extension order has no significance. Kathy was not found unfit because of poverty, but rather because of her failure to comply with the conditions for the return of her children. Accordingly, the verdict and order are affirmed.

By the Court.—Order affirmed.

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