COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2010

David R. Schanker
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. 2008AP2393 **Cir. Ct. No. 2007TP123**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BENNY O., A/K/A BENNIE O.,

RESPONDENT-APPELLANT,

DEBORAH S.,

RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM S. POCAN and CHRISTOPHER R. FOLEY, Judges. *Affirmed.*

¶1 BRENNAN, J.[1] Benny O., a/k/a Bennie O., appeals from an order terminating his parental rights to Javon O. on the ground of failure to assume parental responsibility and from an order denying his motion to withdraw his no contest plea.[2] He argues his plea was not knowing and intelligent. I affirm.

BACKGROUND

¶2 Javon was born on February 23, 2007. Javon's mother tested positive for cocaine and marijuana, and had a blood alcohol level of 0.058 at the time she was admitted to the hospital to give birth to Javon. At the time of Javon's birth, his mother had an open Child in Need of Protection and Services ("CHIPS") case for her other children, and she was not cooperating with the conditions of return. As a result, Javon was taken into protective custody from the hospital on March 16, 2007, and has never lived in the home of either biological parent.

¶3 On May 3, 2007, the State of Wisconsin filed a Petition for Termination of Parental Rights ("TPR") to terminate Benny's parental rights to Javon, alleging the statutory ground of failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6).[3] An initial plea hearing was held on May 22, 2007, but Benny did not appear. After several adjourned hearings, it was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Honorable William S. Pocan performed the plea colloquy and entered the order to terminate parental rights. The Honorable Christopher R. Foley entered the order denying Benny's post-termination motion to withdraw his plea.

[3] The TPR petition also set forth grounds to terminate the parental rights of Javon's mother. The court entered an order that terminated her parental rights. However, the mother's rights are not at issue on appeal.

discovered that Benny may be incarcerated. The matter was set over to produce Benny from custody, and time limits were tolled for good cause.

¶4 On November 1, 2007, Benny appeared in person for the first time. The court ordered that genetic testing be done, and on November 27, 2007, LabCorp results confirmed that Benny was the biological father of Javon. The matter was set over for counsel to be appointed, and time limits were again tolled for good cause.

¶5 On January 17, 2008, Benny appeared in person with his appointed counsel. The court advised Benny of the following:

> [Mr. O.], there's two parts to this case. This child that you've just been found to be the biological father of, there's been a lawsuit filed to terminate your rights to that child. That's why you're here.
>
> You're entitled to be represented by a lawyer. You have a lawyer sitting next to you. There's two parts to this case.
>
> The first part is whether or not there's grounds or legal basis to find that you're an unfit parent. You have a right to a jury trial or court trial on that issue.…
>
> If you're found to be an unfit parent, either by your agreement, by court trial or by jury trial, then there will be a second phase to the case which will address what the disposition should be[,] focusing on what's in the best interest of your child; and you also have a right to contest that matter by hearing with your lawyer, and you also have a right to substitute against the judge that's been assigned to this case.

The matter was then adjourned so that Benny could discuss with his counsel whether he wished to contest the TPR petition and whether he wished to request a substitution of judge. The time limits were tolled.

¶6 On February 4, 2008, Benny appeared with counsel. Benny stated that he did not want to substitute judges, that he did want to contest the TPR petition, and that he did want to exercise his right to a jury trial. The matter was adjourned for a final pretrial and jury trial, and time limits were tolled for good cause.

¶7 On March 3, 2008, Benny appeared with counsel for a final pretrial and jury trial. Benny's counsel indicated that Benny wished to plead no contest to the ground of failure to assume parental responsibility.

¶8 Benny was put under oath and questioned by the court regarding his no contest plea. Benny testified that he had an elementary school education, and was "[s]ort of" able to read and write the English language. When asked by the court if he had read the TPR petition, Benny stated he read it the "[b]est … I could" but that he went over the petition with his counsel who "explained the whole sheet to me" and that "I know what it's saying. I understand what they're saying."

¶9 The court then explained to Benny that by pleading no contest to the ground of failure to assume parental responsibility, Benny was giving up certain rights, stating:

> Sir, by pleading "No Contest" or stipulating to the ground of [f]ailure-to-[a]ssume, you're giving up certain rights.
>
> And one of the things you're giving up[] is the right to a [j]ury [t]rial. And that would mean that ten of twelve jurors sitting in that box across the room, would have to agree that grounds exist to terminate your parental rights.

Benny stated that he "d[id]n't know that," and the court allowed Benny to confer with his counsel. After a discussion off-the-record, Benny's counsel indicated that

he had talked to Benny, and that he thought that Benny now understood what the court was asking him. The court then explained to Benny again that by pleading no contest:

> one of the things you're giving up, is the right to a [j]ury [t]rial.
>
> ….
>
> You have a right to a [j]ury [t]rial on the "grounds" phase.
>
> And the … State would have to prove [its] case to a jury, if you wanted a [j]ury, as to whether there were grounds for termination.
>
> And it's my understanding that you are wishing to give up that right.
>
> Am I correct?

Benny responded, "The [j]ury, yes."

¶10 The court then advised Benny that he also had a right to a court trial on the grounds phase; that is, he could waive the jury but still have the court decide whether there were grounds for termination. Benny replied, "Huh?" Again, the court provided Benny the opportunity to confer with his counsel. After a discussion off-the-record, the court again asked Benny if he understood that by pleading no contest he would be giving up his right to a court trial on the grounds phase. Benny stated that he understood.

¶11 The court went on to advise Benny that he was giving up his right to present and cross-examine witnesses at the grounds phase, and Benny indicated he understood. The court advised Benny that he was giving up the right to demand that the State prove by clear, satisfactory, and convincing evidence, that grounds existed to terminate his parental rights. Benny then stated, "What [does] that

mean?" The court then decided to pass the case, in order to allow Benny another opportunity to meet with his counsel and to discuss the repercussions of his no contest plea.

¶12 After about twenty-five minutes, the case was again called on the record. The court told Benny that:

> the State has to prove, by evidence that is clear, satisfactory and convincing to a reasonable certainty, that grounds exist to terminate your parental rights.
>
> And by stipulating or pleading "No Contest", [sic] you're giving up your right to demand that the State … meet that burden in the "grounds" phase.
>
> Do you understand that?

Benny stated that he understood.

¶13 The court then said to Benny:

> And in this particular case, the ground that's alleged [] is [f]ailure-[t]o-[a]ssume-[p]arental-[r]esponsibility. In a moment we're going to take a little more testimony on that. But I want to make sure that you've gone over that with your attorney, so that you understand what we mean when we use terms like "[f]ailure-to-assume-parental-responsibility."
>
> Do you?

Benny stated that "Yes, yes," he understood the term.

¶14 Benny indicated that he wanted to plead no contest to the grounds phase and then have his counsel defend him at a dispositional hearing. Benny indicated that he was giving up his right to fight the State's allegations regarding the ground, and that he understood that if he was unsuccessful at the "best interests" phase, that he could potentially lose his parental rights to Javon forever.

¶15 The court then heard testimony in support of the factual basis for the no contest plea and accepted Benny's no contest plea to the failure to assume parental responsibility ground. The court entered a finding of unfitness regarding Benny. The matter was adjourned for a dispositional hearing, and time limits were tolled for good cause.

¶16 The dispositional hearing was held on April 10, 2008. The matter was adjourned for rebuttal and closing arguments, and time limits were tolled for good cause.

¶17 On June 19, 2008, the court heard rebuttal and the parties' closing arguments. The court noted that Benny was incarcerated, and his bail revoked, because he would rather go to prison than follow the rules of parole, despite the fact that he had a child. The court found that, taking all of the standards and factors in WIS. STAT. § 48.426 into account, it was in the best interests of Javon that Benny's parental rights be terminated. A written order was entered on June 24, 2008, terminating Benny's parental rights to Javon.

¶18 On June 26, 2008, Benny filed a notice of intent to pursue post-dispositional relief. On April 28, 2009, this court rejected a no-merit report and ordered that the state public defender appoint new appellate counsel for Benny, who should then challenge the validity of Benny's no contest plea. On September 18, 2009, this court ordered that the matter be remanded for a hearing challenging the validity of the ground for Benny's no contest plea.

¶19 An evidentiary hearing was held on December 9, 2009. At that hearing, Benny testified that his trial counsel had advised him that it was best to plead no contest. Benny testified that he had been absent from Javon's life as a father "since he was a month old."

¶20 Benny testified that he discussed unfitness with his counsel and that his counsel indicated that merely being incarcerated didn't make him unfit. However, Benny otherwise denied that his counsel discussed with him or explained to him the State's burden of proof, the two separate stages in a termination proceeding, or that he would be found unfit as a result of his no contest plea. And while Benny did recall his counsel telling him "something" about the ground of failure to assume parental responsibility, he did not recall the details of that conversation. Benny claimed to have almost no recollection of anything the court said to him during the plea colloquy or his responses to the court's questions.

¶21 Benny's trial counsel also testified at the December 9, 2009 hearing. Counsel testified that at an initial meeting with a new client he normally discusses the allegations in the TPR petition, determines if the client understands them, and determines the client's side of the story. He looks to see if the client has any facts which conflict with what the petition alleges and determines if the client wants to contest the petition, wants a jury trial, or wants a substitution of judge.

¶22 Counsel further testified that he typically talks with clients and asks them whether they want to have a jury trial and explains to them what this would entail. Counsel testified that he typically explains to clients that when a judge or jury finds that grounds exist for termination it means that the parent has been found unfit and that when a parent stipulates to grounds the court finds the parent unfit.

¶23 Counsel testified that his standard practice is to discuss with clients the burden of proof that the State has to meet at the grounds phase trial and explain what the burden of clear and convincing evidence means. He testified that

although he could not specifically recall this conversation with Benny, he had no reason to believe that he would have deviated from his standard practice with him.

¶24 Counsel testified that he only vaguely recalled discussing the TPR petition with Benny, but that because failure to assume parental responsibility was the only ground pled, it was very likely that he discussed this with him. Counsel testified that he knew he discussed with Benny how his incarceration would impact this ground. Counsel recalled discussing with Benny the very limited contact he had with Javon, that it did not appear as though he really established a relationship with Javon, and that it would be very difficult for him to try and do so while he was in prison.

¶25 Counsel testified that he advised Benny to stipulate to grounds because the State's case against him, at least as to grounds, was very strong; there was very little evidence that he had established a significant relationship with Javon, or really any relationship; he had hardly ever seen Javon; he had been incarcerated for a long time; he was not communicating with Javon; he likely would not prevail at a jury trial; and the stipulation may keep out evidence that would otherwise come out in a jury trial. Counsel testified that Benny agreed with him, and that Benny decided, based on this advice, to stipulate to grounds.

¶26 Counsel testified that prior to the plea hearing he had an opportunity to talk with Benny about the nature of a no contest plea to grounds, the rights he would be giving up, and Benny's understanding of the ground failure to assume parental responsibility. Counsel testified that he specifically recalled discussing with Benny, prior to the plea, that a no contest plea would result in a finding of unfitness. Counsel stated that Benny never indicated to him that he did not understand what failure to assume parental responsibility meant. Nor did Benny

indicate to him that he did not understand he would be found unfit as a result of his plea.

¶27 Following the hearing, the post-termination court found that Benny failed to make a prima face showing that he did not understand the nature of the acts alleged in the petition, or that he did not understand the applicable burden of proof. The court concluded that the State had fully and completely established the knowing and voluntary nature of Benny's plea and therefore, denied Benny's post-termination motion. This appeal follows.

STANDARD OF REVIEW

¶28 Benny contends that at the time he entered his plea he did not understand and the circuit court did not properly inquire into whether he understood: (1) the statutory ground of failure to assume parental responsibility; (2) that his no contest plea would result in a finding of unfitness; and (3) the burden of proof applicable in TPR cases. Accordingly, Benny argues that the post-termination court erroneously exercised its discretion when it denied his motion to withdraw his plea and found that he entered the plea knowingly and voluntarily.

¶29 Before accepting a parent's no contest plea in the grounds stage of a TPR proceeding, the court must engage the parent in a personal colloquy to "determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions." WIS. STAT. § 48.422(7)(a); ***Oneida County DSS v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. "Additionally, the parent must have knowledge of the constitutional rights given up by the plea." ***Therese S.***, 314 Wis. 2d 493, ¶5.

¶30 "When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies."[4] ***Therese S.***, 314 Wis. 2d 493, ¶6. First, "the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing." ***Id.*** If the parent makes a prima facie showing, "the burden then shifts to the [State] to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition." ***Id.***

¶31 Whether a parent "has presented a prima facie case by pointing to deficiencies in the plea colloquy and sufficiently alleging [he or] she did not know or understand information that should have been provided in the colloquy is a question of law we review independently." ***Id.***, ¶7. Whether the State established that a parent knowingly, voluntarily, and intelligently waived the right to contest that grounds existed to terminate his or her parental rights raises a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). We review constitutional questions independent of the circuit court. ***Id.*** But "[w]e will uphold the circuit court's findings of evidentiary or historical facts unless the findings are 'contrary to the great weight and clear preponderance of the evidence.'" ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶28, 293 Wis. 2d 530, 716 N.W.2d 845 (citation omitted).

[4] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

DISCUSSION

A. Failure to Assume Parental Responsibility

¶32 The plea court's colloquy with Benny shows that Benny knew and understood the nature of the ground he was pleading to, despite Benny's arguments to the contrary at the post-termination hearing.[5] While the plea court never explicitly told Benny what failure to assume parental responsibility means, it did the next best thing. The plea court confirmed with Benny that: (1) he had read the petition, which stated the ground and the facts supporting it; (2) his counsel had discussed the petition with him and explained the ground to Benny; and (3) he understood the failure to assume parental responsibility ground. I conclude that the State has shown by clear and convincing evidence that Benny did know and understand the failure to assume parental responsibility ground when he entered his plea. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6.

¶33 First, Benny acknowledged under oath that he had read the TPR petition and that his counsel had explained it to him. He told the plea court that he read it the "[b]est … [he] could," that his counsel "explained the whole sheet to [him]," and that "[he] understood what [the State was] saying." The TPR petition

[5] I note that Benny has not argued on appeal that he lacked competence to understand the charges. The record shows that he had an elementary education and basic ability to read and write. When Benny had questions during the plea proceeding, the plea court gave him an opportunity to confer with his counsel—twice at side bar and once for approximately twenty-five minutes. At the conclusion of each of those breaks, the plea court picked up the thread of the plea colloquy where Benny had expressed some question and confirmed that Benny now understood. I also note that Benny was comfortable asking the plea court questions and that his question about the impact of his incarceration on the unfitness finding shows a depth of understanding that contradicts Benny's later claims of lack of knowledge.

contained a definition of the failure to assume parental responsibility ground. The petition stated:

> Failure to Assume Parental Responsibility: [Benny] … [has] failed to assume parental responsibility, as defined by [WIS. STAT. § 48.415(6)]. [Benny has] failed to establish a substantial parental relationship with the child, in that [he has] failed to come forward to accept and exercise any responsibility for the daily supervision, education, protection or care of Javon.

That language flows directly from the statutory definition of failure to assume parental responsibility.[6]

¶34 Second, Benny specifically told the plea court that he understood the failure to assume parental responsibility ground. The plea court asked:

> And in this particular case, the ground that's alleged[] is [f]ailure-[t]o-[a]ssume-[p]arental-[r]esponsibility. … I want to make sure that you've gone over that with your attorney, so that you understand what

[6] WISCONSIN STAT. § 48.415(6) states:

> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent … [has] not had a substantial parental relationship with the child.
>
> (b) … "substantial parental relationship" means 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.

> we mean when we use terms like "[f]ailure-to-assume-parental-responsibility". [sic]
>
> Do you?

Benny responded, "Yes, yes." The post-termination court correctly determined that these two statements fulfilled the plea court's duties under WIS. STAT. § 48.422(7) and ***Bangert***.

¶35 Nonetheless, Benny argues that the plea court failed to ask enough questions to determine his level of understanding of the ground and that he in fact did not understand the ground. The post-termination court found Benny's testimony that he did not understand the ground to be incredible. I defer to the post-termination court's findings of credibility. *See* ***State v. Peppertree Resort Villas***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶36 At the post-termination hearing, Benny testified that he had almost no recollection of anything the plea court said to him during the plea colloquy or his responses to the plea court's questions. But he did remember that his counsel told him "something" about the ground, although he did not recall the details of that conversation.

¶37 Benny's counsel testified at the post-termination hearing that it was his standard practice to explain the grounds for a TPR petition to a client, and although he had no specific memory of discussing the failure to assume parental responsibility ground with Benny—because the plea hearing had been held two years prior to his testimony—he believed it was "very likely" that he discussed the ground with Benny, especially because failure to assume parental responsibility was the only ground pled. Counsel specifically recalled discussing with Benny his very limited contact with Javon and that it did not appear as though he really

established a relationship with Javon. Benny had testified that he had been absent from Javon's life as a father "since he was a month old."

¶38 The post-termination court found Benny's testimony that he did not understand the ground to be incredible, stating that "Finally, and quite importantly, I would note that Mr. O's testimony in support of his motion was, in my mind, not credible." After listening to the testimony of both Benny and his trial counsel, the post-termination court found Benny incredible, in contrast to his counsel, stating that:

> [Benny's] assertions that [his trial counsel] never discussed with him the nature of the State's claim flies directly in the face of [Benny's] acknowledgment at the hearing that [his trial counsel] "explained the whole sheet to me" and that he explained what the phrase meant. [Benny] rather incredibly indicated that [his trial counsel] did not speak to him virtually at all regarding the no contest plea and related issues when the record reflects that a break was taken during plea [sic] colloquy for twenty[-]five minutes for the specific purpose of allowing [Benny] to further consult with his lawyer.

I defer to that court's credibility findings. *See* ***id.***

¶39 Benny's statements at the plea hearing confirming that he understood the contents of the TPR petition (which set forth the failure-to-assume parental responsibility ground), his statement that he understood what the failure to assume parental responsibility ground meant, and Benny's trial counsel's testimony that he discussed the ground with Benny, support the post-termination court's credibility findings and provide clear and convincing evidence that Benny knew and understood the ground before entering his no contest plea. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6.

B. Finding of Unfitness

¶40 Benny next argues that the State did not meet its burden of establishing that he understood that his no contest plea would result in a finding of his unfitness. *See* ***id.***, ¶¶6, 10-11. I agree that Benny has established a prima facie case that the plea court failed to advise him that the acceptance of his no contest plea would result in a mandated unfitness finding. However, I also conclude that the State has "clearly and unquestionably" established that his plea was offered with full understanding that an unfitness finding would result. Even though Benny did not explicitly state that he understood he would be found unfit if he pled no contest, there is clear and convincing evidence that Benny was aware of that fact at the time he pled. *See* ***id.***, ¶6.

¶41 First, at his initial hearing the court told Benny that the purpose of the grounds phase was to determine whether he was unfit, and that the determination would be made "by [Benny's] agreement, by court trial or by jury trial." The court went on to explain that if Benny was found unfit, he would move to the second phase of the TPR proceeding, disposition, at which point if he was unsuccessful he could lose his parental rights forever. Thus, the court did advise Benny of the consequences of "his agreement" to a finding of unfitness, namely, that he would move on to the second phase of the TPR proceeding, disposition.

¶42 At that point Benny asked the court whether his incarceration made him unfit. The court told him to discuss that with his counsel. Benny later testified that his counsel told him that merely being incarcerated did not make him unfit, and that he and his counsel discussed the fact that the State would have to prove that he was unfit. Benny's question about the impact of his incarceration and his admission of this discussion with his counsel on the topic of the unfitness

finding, demonstrates inferentially, that he understood the importance, i.e., consequence, of an unfitness finding.

¶43 Additionally, Benny's counsel testified at the post-termination hearing that he specifically recalled discussing with Benny, prior to the plea, that a no contest plea would result in a finding of unfitness and that he was quite content at the time of the plea that Benny knew that an unfitness finding would necessarily follow. Counsel indicated that Benny did not tell him or otherwise demonstrate that he did not understand that his plea would result in a finding of unfitness. The post-termination court found counsel's testimony credible. The post-termination court found incredible Benny's "generalized assertions" that he did not understand that an unfitness finding would follow his no contest plea. I must defer to the court's credibility findings. *See* ***Peppertree Resort Villas***, 257 Wis. 2d 421, ¶19.

C. Burden of Proof

¶44 Finally, Benny's claim that he did not understand the applicable burden of proof at the time of the plea colloquy is without merit. The record clearly shows he was advised of the burden. The post-termination court correctly found that Benny "was specifically told the applicable burden during the plea colloquy … and indicated he understood it." However, Benny argues on appeal that he initially told the plea court that he did not understand the burden of proof and that the plea court "disregarded" that assertion. Benny is mistaken.

¶45 While it is true that Benny did initially indicate that he did not understand the burden of proof, the plea court passed the case and gave Benny an opportunity to discuss the burden of proof, and the rights Benny was giving up by pleading, with his counsel. After twenty-five minutes, the plea court recalled the case and stated:

> the State has to prove, by evidence that is clear, satisfactory and convincing to a reasonable certainty, that grounds exist to terminate your parental rights.
>
> And by stipulating or pleading "No Contest", [sic] you're giving up your right to demand that the State … meet that burden in the "grounds" phase.
>
> Do you understand that?

Benny indicated that he understood. Accordingly, Benny's explicit acknowledgement that he understood the burden of proof belies his current claim to the contrary. The evidence is clear and convincing that he was aware of the State's burden of proof when he pled no contest. *See* ***Therese S.***, 314 Wis. 2d 493, ¶6.

By the Court.—Orders affirmed.

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