COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2011

A. John Voelker
Acting 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 Nos. 2010AP2696
2010AP2697
2010AP2698

Cir. Ct. Nos. 2007TP87
2007TP88
2007TP89

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

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

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

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

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

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

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] This is Jesus S.'s second appeal of orders terminating his parental rights (TPR) to Jasmine A.S., Cristos J.S., and Melina R.S. In the first appeal, we rejected all of Jesus S.'s arguments except the claim that his plea of no contest to the grounds alleged in the petitions was not made knowingly or voluntarily. *See* ***Portage Cnty. Health and Human Servs. Dep't v. Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op. (WI

[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.

App June 19, 2009). On that question, we remanded for an evidentiary hearing to resolve the dispositive issue of whether Jesus S. knew his entry of a no-contest plea to grounds would lead to an automatic finding of parental unfitness.

¶2 The trial court has since held the evidentiary hearing and issued orders determining Jesus S., in fact, knew that the entry of a no-contest plea would result in an unfitness finding. Jesus S. challenges this finding on appeal. We affirm.

BACKGROUND

¶3 Portage County filed petitions to terminate Jesus S.'s parental rights to Jasmine A.S., Cristos J.S., and Melina R.S., alleging as grounds failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6)(a). At a hearing on the petitions, Jesus entered a plea of no contest to the alleged grounds. The trial court held a colloquy with Jesus S., and established that Jesus S. understood that, if his plea were accepted, the court would conduct a second hearing to determine the children's best interests. However, the court did not attempt to establish that Jesus understood his no-contest plea would automatically result in a finding of parental unfitness. Following the colloquy, the court determined Jesus voluntarily and intelligently admitted that grounds existed to terminate his parental rights, and found Jesus S. to be an unfit parent. Later at a dispositional hearing, the court found it was in the children's best interest to terminate Jesus S.'s parental rights.[2]

[2] Additional facts and the long procedural history of this case are detailed in ***Portage Cnty. Health and Human Services Dep't v. Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op., ¶¶3-9 (WI App June 19, 2009).

¶4 Jesus S. appealed the termination order, raising various claims of trial court error and ineffective assistance of counsel. ***Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op. ¶1. We rejected all of these except a claim that his plea of no contest to grounds was not entered knowingly or intelligently. ***Id.***, ¶2. This claim was based on the undisputed fact that the trial court did not establish in the colloquy that Jesus S. understood his plea would lead to an automatic finding of unfitness, and Jesus S.'s assertion that he did not understand this fact. ***Id.***, ¶¶2, 40. We remanded for an evidentiary hearing to determine whether Jesus S. understood that his admission that grounds existed to terminate his parental rights would lead to an automatic finding of unfitness. ***Id.***, ¶40.

¶5 On remand, the trial court held a two-day evidentiary hearing at which Jesus S. and his trial attorney, Paul Goetz, testified. After taking briefs from the parties, the court issued a written decision finding that Jesus S. did know that he would be automatically declared unfit as a parent by admitting to the grounds alleged in the petitions. Additional discussion about the court's findings is included later in this opinion.

DISCUSSION

¶6 Before accepting a no-contest plea to a termination petition, the court must engage the parent in a colloquy to establish that the plea was entered knowingly and voluntarily pursuant to WIS. STAT. §§ 48.422(3) and (7).[3] *See*

[3] The pertinent parts of WIS. STAT. § 48.422 provide as follows:

(continued)

Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845. For a plea to be entered knowingly and voluntarily, the parent must be notified of the direct consequences of his or her plea. *See* ***Oneida Cnty. Dep't of Social Servs. v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122. In ***Therese S.***, we concluded a direct consequence of a plea of no contest to a termination petition is a finding of parental unfitness, and therefore a court must confirm that the parent understands that acceptance of the no-contest plea will result in an automatic finding of parental unfitness to establish that the plea is knowing and voluntary. ***Id.***, ¶¶10-11.

> **(3)** If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7).
>
> ….
>
> **(7)** Before accepting an admission of the alleged facts in a petition, the court shall:
>
> (a) Address 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.
>
> (b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified….
>
> ….
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

¶7 Courts employ a ***Bangert***[4] analysis in evaluating a challenge to a no-contest plea. ***Jodie W.***, 293 Wis. 2d 530, ¶24. The party asserting the challenge "must make a prima facie showing that the circuit court violated its mandatory duties of informing the party of his or her rights, and the party must allege that the party, in fact, did not know or understand the rights that he or she was waiving." ***Id.***, ¶26. If a prima facie showing is made, "the burden shifts to the county to establish by clear and convincing evidence that the parent knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.*** (citation omitted).

¶8 In our first decision, we concluded that Jesus S. had made the required prima facie showing because it was undisputed that the trial court had not established in the colloquy that Jesus S. understood his plea would lead to an automatic finding of unfitness, and Jesus S. had asserted that he did not understand this fact. ***Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op. ¶¶2, 40. We therefore remanded for an evidentiary hearing at which the County would have the burden to prove that he understood his admission that grounds existed to terminate his parental rights would lead to an automatic finding of parental unfitness. ***Id.***

¶9 As we noted in the first decision, the trial court lacked the benefit of ***Therese S.***, which was decided after Jesus S. entered his no-contest plea to the petitions. ***Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op. ¶¶28, 40 n.12, (WI App June 19, 2009). However, we concluded that ***Therese S.*** applied retroactively because it was not a "clear break" from prior law,

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

but merely clarified well-established case law in this area. ***Jesus S.***, Nos. 2008AP2740, 2008AP2741, 2008AP2742, unpublished slip op. ¶38.

¶10 On appeal, Jesus S. challenges the trial court's determination following the evidentiary hearing that he understood a plea of no contest to grounds would lead to an automatic finding of unfitness by the court. When reviewing a trial court's determination that a plea was knowingly and voluntarily entered, we must uphold the court's findings of historical and evidentiary fact unless they are clearly erroneous. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶28.[5]

¶11 In arguing that he did not know that his no-contest plea would result in a finding of unfitness, Jesus S. observes that Attorney Goetz's notes of his conversations with Jesus do not establish that the attorney discussed unfitness with Jesus. Jesus S. argues that Attorney Goetz's testimony likewise did not establish that he ever had such a conversation with Jesus, noting that Attorney Goetz testified that he "did not have a specific recollection" of discussing unfitness with Jesus, only that he "recalled going over generally the factual allegations" in the petitions and that it would have been his "general practice" to have discussed unfitness with a client. Based on this testimony and Jesus S.'s own testimony that he did not understand that his plea would lead to an automatic finding of unfitness, Jesus S. argues that the County failed to prove by clear and convincing evidence that he actually understood that his no-contest plea would lead to an automatic finding of unfitness.

[5] The ***Jodie W.*** court applied the great weight and clear preponderance of the evidence standard of review, which is essentially the same as the clearly erroneous standard. ***State v. Hambly***, 2008 WI 10, ¶16 n. 7, 307 Wis. 2d 98, 745 N.W.2d 48.

¶12 The County argues that there is ample evidence in the record to support the trial court's finding. The County points to Attorney Goetz's testimony that it was "[his] belief that [Jesus S.] was well aware that if grounds were proven or established that he would be found unfit." Attorney Goetz testified that he believed that Jesus S. "reads everything" and that he "understood everything that was happening" at the plea hearing. The County also notes that, while Attorney Goetz did not have a specific recollection of discussing unfitness with Jesus S., he maintained that "if a fact finding hearing goes against [a client], [his] habit or routine is to indicate to the client that he will be found unfit." Attorney Goetz testified that he was "more confident that [he] discussed" that a finding of unfitness would result from a plea of no contest with Jesus S. "prior to the actual admission hearing."

¶13 We conclude that the trial court's finding that Jesus S. knew that his no-contest plea would lead to an automatic finding of parental unfitness was not clearly erroneous. This finding was based in large part on the court's determination of the credibility of the witnesses, to which we must defer. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (citations omitted) (trial court is the "ultimate arbiter" of witness credibility because of its "superior opportunity … to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony").

¶14 At the hearing, Attorney Goetz testified that he discussed the allegations in the petition in a phone call with Jesus S. several months before the plea hearing. Attorney Goetz's handwritten notes from this phone call—the only written record of a conversation Goetz had with Jesus S.—supported this assertion. However, Jesus S. testified that Attorney Goetz never went over the

allegations in the petition with him. The trial court found this assertion to be incredible, given that Attorney Goetz's notes of the conversation indicated otherwise. The court also observed that these same contemporaneous notes make reference to unfitness in the context of discussing the allegations in the petitions, contradicting Jesus S.'s testimony that he had not heard the term unfit until the plea hearing itself.

¶15 The court also based its negative assessment of Jesus S.'s credibility on Jesus S.'s testimony about his immediate reaction at the plea hearing to the court's finding of unfitness. The court explained:

> When questioned about the proceeding in which [the] court found him unfit, Jesus S. described his reaction. The first sentence was "I didn't think anything of it." He quickly clarified it. "It however had came up so that didn't mean nothing…. I mean it was never brought to my attention…. It was [a] surprise." This testimony despite the fact that Jesus S. admitted [at the plea hearing] he had read and understood the allegations of the petition which specifically requested that the court find the parents unfit.

The court found that "discrepancies in the testimony of Jesus S. demonstrate a complete willingness to conform his testimony to the standard he hopes will bring the results he pursues, a further extension of a long drawn out process …." The court simply did not believe Jesus S.'s assertions that he did not understand that he would be found unfit by admitting to the grounds alleged in the petitions.

¶16 By contrast, the court found Attorney Goetz to be a more credible witness, relying on his testimony that he was "confident" that Jesus S. understood that a no-contest plea would lead to a finding of parental unfitness. The court described Attorney Goetz's client contact with Jesus as "significant, three in person meetings, at least nine telephone conferences, and correspondence."

Moreover, Attorney Goetz's testimony that it was his "habit or routine" or "general practice" to discuss with a client that a finding of unfitness would result from a determination of grounds supports the court's finding that Jesus S. actually knew that his no-contest plea would lead to an automatic finding of parental unfitness.

¶17 Jesus S. also argues on appeal that his plea was not knowing and voluntary because of allegedly mistaken legal advice he received from Attorney Goetz regarding the affect of a trial on the chances the children would be placed with a family member. However, this argument is beyond the scope of the issue addressed on remand, which was dictated by Jesus S.'s own no-contest plea argument in the first appeal. Our review of Jesus S.'s brief in the first appeal shows that the only basis for his no-contest plea challenge was the contention that he did not understand that his plea would result in a finding of parental unfitness. Any argument based on some other grounds for his plea not being knowing and voluntary have been forfeited. *See* ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 190, 509 N.W.2d 96 (Ct. App. 1993) (failure to raise argument in first appellate proceeding results in forfeiture of right to raise argument in subsequent proceedings absent an adequate reason).

By the Court.—Orders affirmed.

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