COURT OF APPEALS DECISION DATED AND FILED

March 22, 2005

Cornelia G. Clark
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. 04-2560

Cir. Ct. No. 02TP000437

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DEBRA F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed*.

¶1 WEDEMEYER, P.J.[1] Debra F. appeals from an order terminating her parental rights to her son, Branden F., born October 20, 1998. She also

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

appeals from an order denying her postdisposition motion. Debra claims: (1) the trial court erred when it denied the motion to transfer this termination case to the tribal court; (2) the trial court erred when it modified language from the Indian Child Welfare Act ("ICWA") in formulating jury instructions and the special verdict questions; and (3) her trial counsel provided ineffective assistance. Because each issue is resolved in favor of upholding the orders, this court affirms.

BACKGROUND

¶2 When Branden was born on October 20, 1998, there was cocaine in his bloodstream. Debra signed a voluntary agreement, placing Branden into foster care, where he remains to this day. Since December 20, 1998, Branden has lived in the home of Sharon and Mark Traner as a foster child.

¶3 Approximately six weeks after Branden was born, Debra was in an altercation with one of her adult sons, was charged criminally, and spent sixteen months in prison. During that time, she participated in alcohol and drug abuse counseling, anger management, and parenting classes. She was released in August of 2000. On September 15, 1999, Branden was found to be a child in need of protection or services and continued placement in the Traner home was approved by the Bureau of Milwaukee Child Welfare (Bureau). This order was extended annually.

¶4 On June 25, 2002, the State filed a petition seeking to terminate Debra's parental rights on the grounds that Debra had failed to assume parental responsibility pursuant to WIS. STAT. § 48.415(6) (2001-02). In July 2002, the White Earth Band of Minnesota Chippewa Tribe determined that Branden was eligible for enrollment in the tribe, thus triggering application of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et. seq. On August 19, 2002, the tribe

filed a motion to intervene in the TPR proceedings. The trial court granted the tribe's motion in October 2002.

¶5 On April 3, 2003, the tribe filed a motion to transfer jurisdiction of the TPR case to the tribal court, pursuant to 25 U.S.C. § 1911(b). The State and the *guardian ad litem* opposed the motion. On June 16, 2003, the trial court denied the motion based on the untimeliness of the tribe's motion and the best interests of Branden.

¶6 The first trial in this matter resulted in a mistrial. The second trial occurred in May 2004. At the conclusion of the trial, the jury answered each of the following special verdict questions affirmatively:

> QUESTION 1: Has Debra [F.] failed to assume parental responsibility for Branden [F.]?
>
> ….
>
> QUESTION 2: From July 11, 2002, through today's date, has the Bureau of Milwaukee Child Welfare made active efforts to provide remedial services and rehabilitative programs designed to assist Debra [F.] in regaining custody of Branden [F.]?
>
> ….
>
> QUESTION 3: Have the efforts referred to in Question 2 proved unsuccessful?
>
> ….
>
> QUESTION 4: Is it likely that Branden [F.] will suffer serious physical or emotional harm if, upon conclusion of this trial, he is removed from his current foster home placement, placed with Debra [F.] and continued in her custody?

¶7 At the June 24, 2004 dispositional hearing, the trial court found that it was in Branden's best interests to terminate Debra's parental rights. An order to

that effect was entered. Debra filed a postdisposition motion seeking a new trial based on ineffective assistance of counsel. The trial court denied the motion. Debra now appeals.

DISCUSSION

A. Transfer of Jurisdiction.

¶8 Debra argues that the trial court erred in denying the tribe's motion to transfer jurisdiction of this case to the tribal court. The State responds that the trial court's decision to retain jurisdiction was correct. This court agrees with the State.

¶9 The question of whether the trial court erred in denying the tribe's motion requesting transfer of jurisdiction requires statutory interpretation of the ICWA, which is a question of law reviewed independently. *See* ***In re Shawnda G.***, 2001 WI App 194, ¶6, 247 Wis. 2d 158, 634 N.W.2d 140. The pertinent portion of the ICWA requires the trial court to transfer the proceeding to the jurisdiction of the tribe unless good cause exists. *See* 25 U.S.C. § 1911(b); *see also* **Shawnda G.,** 247 Wis. 2d 158, ¶6. Although this particular provision does not define good cause, the Bureau of Indian Affairs guidelines offer guidance. Specifically, the guidelines state that good cause exists to deny the transfer when "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." 44 Fed. Reg. 67, 584-91 (1979); BIA Guidelines C.3(b)(i).

¶10 Here, Debra argues that the case was not at an advanced stage because the motion to transfer was filed eight months before the trial date. The State and the *guardian ad litem* respond that the trial date is not the dispositive

factor in addressing the timeliness of the motion. Branden has never lived with Debra because he was placed in foster care immediately after he was born as a result of cocaine in his bloodstream. The Bureau contacted the tribe in November 1998 to inquire about any tribal affiliation. The tribe responded with two separate letters declaring that Branden was not eligible for tribal membership. The tribe did not take any action when Branden was found to be a child in need of protection or services. The tribe made no efforts with respect to Branden or the need to protect his Indian heritage until after the TPR was filed. It was not until July 2002 that the tribe decided Branden was eligible for membership. By that point in time, Branden had lived with his foster parents for almost four years.

¶11 The trial court viewed this case as a continuum and recognized these facts. The tribe initially denied any affiliation or interest in Branden, let four years go by, and did not act until the TPR and permanency planning for Branden occurred. A California court, facing a similar issue, held that good cause to deny a tribe's motion to transfer exists when a tribe fails to intervene until after the court has engaged in permanency planning for the child. ***In re Robert T.***, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988). In ***Robert T.***, the tribe did not file a motion to transfer jurisdiction until a TPR petition was filed, over sixteen months after the child was first detained. ***Id.*** at 172. The court found that a tribe's motion to transfer should be filed *before* a child's permanency plan becomes TPR and adoption, because the child forms a bond with the pre-adoptive placement, and breaking that bond will harm the child. ***Id.*** at 173.

¶12 In the instant case, like in ***Robert T.***, the tribe waited until after the TPR petition was filed to request a transfer of jurisdiction. The delay here was even longer than in the ***Robert T.*** case—almost four years. Moreover, the tribe declined the invitation to become involved in this case when Branden was only a

few months old. If the tribe had acted at that time, Branden could have been placed with an Indian family or other relatives. The tribe declined the invitation to become involved at that point in time.[2]

¶13 Under these circumstances, this court concludes that the trial court's decision to deny transfer of jurisdiction was not erroneous. The excessive delay of the tribe to request a transfer constitutes good cause for the trial court's decision.

¶14 This court also concludes that the trial court did not err in considering Branden's best interests as it related to the request to transfer jurisdiction. The timeliness requirements referred to in the ICWA reflect a concern for the best interests of Indian children. The trial court's consideration of Branden's best interests was considered as a factor relating to the untimeliness of the tribe's attempt to take jurisdiction of his case. Branden had spent four years in a period of uncertainty as to his future. At the time the tribe intervened, Branden was close to obtaining permanency in his life and adoption by the foster parents who had raised him since infancy. To remove him at that point and transfer his case to tribal court would have created more uncertainty, and undoubtedly

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[2] Debra argues that this court should not rely on ***In re Robert T.***, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988) because the ***Robert T.*** "court ignored the requirements of ICWA, which is designed to 'promote the stability and security of Indian tribes and families' through deference to 'the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families.'" (Citations omitted.) We disagree with Debra's assessment of the ***Robert T.*** case. The court in ***Robert T.*** was faced with facts similar to the trial court in the instant case—whether an Indian tribe's substantial delay in requesting a transfer of jurisdiction constitutes "good cause" to deny transfer of jurisdiction. Thus, this court is not persuaded by Debra's claim that ***Robert T.*** offers "faulty reasoning."

additional delay in a permanency plan for Branden. Thus, the "best interests" consideration was tied to the timing of the motion to transfer.[3]

B. Jury Instructions/Verdict Language.

¶15 Debra next complains that the trial court erred when it modified language from the ICWA for the jury instructions and verdict used in this case. First, Debra contends that the trial court erred when it modified the "active efforts" language from the ICWA for the jury instruction. Specifically, the ICWA requires the State to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs *designed to prevent the breakup of the Indian family* and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (emphasis added). The trial court modified the emphasized language so the jury was instructed as to whether the State proved that "the Bureau of Milwaukee Child Welfare has made active efforts to provide remedial services and rehabilitative programs designed to … assist Debra [] *in regaining custody of Branden* …." (Emphasis added.) This court concludes that the trial court's modification of the language did not constitute an erroneous exercise of discretion.

[3] Debra spends a significant portion of her reply brief rebutting the State's argument that the ICWA should not apply to children who "have never been a member of an Indian home or culture." The trial court rejected this argument, and instead ruled that the ICWA did apply to this case despite the fact that Branden has never lived with Debra or with the tribe. As evidenced by the dispute over the modification of the language of ICWA for the jury instructions and special verdict, this was no doubt a difficult case. The facts and circumstances presented here were unique because Branden was not declared to be an Indian child immediately upon birth. The trial court, nevertheless, made significant efforts to ensure that the protections offered under the ICWA were followed in this case. This court concludes that the trial court did not err in rejecting the State's request to except this matter from the ICWA. This court declines to address the broader issue as to whether Wisconsin should adopt the "existing Indian family" doctrine in every case.

¶16 A trial court has wide discretion in issuing jury instructions based on the facts and circumstances of the case. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). The discretion applies to both choice of language and emphasis. ***Id.*** at 690-91. This court will not find an erroneous exercise of discretion if the overall meaning communicated by the instructions was a correct statement of the law. ***Fisher v. Ganja***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992).

¶17 In the factual context of this case, the phrases "prevent the breakup of the Indian family" and "assist Debra in regaining custody of Branden" mean essentially the same thing. If the active services provided by the Bureau resulted in Debra regaining custody, the breakup of the Indian family is prevented. The concern the trial court had in using the former phrase, was that the jury would be confused because Branden had never resided in Debra's home. Branden was placed in foster care immediately after birth. Debra had not established the familial relationship with Branden. The trial court's decision was reasonable and did not alter the meaning of the language.

¶18 Debra's second contention is that the trial court erred in instructing the jury that the "active efforts" requirement needed to be proven by clear and convincing evidence. Debra argues that the court should have required proof beyond a reasonable doubt.

¶19 The portion of the ICWA at issue here provides that the State "shall *satisfy the court* that active efforts have been made …." 25 U.S.C. § 1912(d) (emphasis added). There is no specific burden of proof listed. In fact, the plain language of the statute seems to suggest that this a threshold issue to be decided by the court, rather than submitted to the jury. Nevertheless, the trial court here

submitted the issue to the jury. The trial court determined that, based on ***Santosky v. Kramer***, 455 U.S. 745 (1982), the State must prove allegations to support a TPR petition by at least the clear and convincing standard. ***Id.*** at 747-48.[4]

¶20 The trial court then needed to determine whether the clear and convincing standard applied or whether the higher burden of beyond a reasonable doubt applied. After reviewing the pertinent case law, the trial court concluded that the proper standard was clear and convincing evidence. In reaching this determination, the trial court relied on a well-reasoned opinion from a California Court of Appeals, ***In re Michael G.***, 74 Cal. Rptr. 2d 642 (Cal. Ct. App. 1998). The court noted that sections 1912(e) and 1912(f) specifically referred to the requisite burden of proof for the requirements in those sections. Section 1912(f) requires proof beyond a reasonable doubt, and section 1912(e) requires proof by clear and convincing evidence. The court then applied the following rule of statutory construction:

> It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded. If Congress meant for the "active efforts" determination to be supported by evidence beyond a reasonable doubt, it could easily have said so.

In re Michael G., 74 Cal. Rptr. 2d at 648 (citations omitted). The trial court in Branden's case applied the same rule of statutory construction, *see* ***Outagamie County v. Town of Greenville***, 2000 WI App 65, ¶9, 233 Wis. 2d 566, 608

[4] Debra argues that ***Santosky v. Kramer***, 455 U.S. 745 (1982) does not apply because it is not an ICWA case. Although this court agrees that ***Santosky*** is not controlling authority because it did not specifically address the burden of proof in an ICWA case, it does offer persuasive authority because it addressed the burden of proof relative to a TPR proceeding.

N.W.2d 414, to conclude that if Congress had wanted the higher burden to apply to the active efforts determination, it certainly could have so specified.

¶21 The trial court thus concluded, based on statutory construction and the persuasive authority offered in ***Sandusky***, that the proper standard was clear and convincing evidence. This court concludes that the trial court's analysis is not erroneous.[5]

¶22 Debra's third argument is that the State failed to prove by clear and convincing evidence that it provided "active efforts" in this case. In reviewing a finding by a jury, this court applies a deferential standard of review:

> Our review of a jury's verdict is narrow. Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding.

Morden v. Continental AG, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). The record reflects credible evidence to support the jury's finding that the State made "active efforts" in this case. Even before Brandon was recognized as an Indian child, Debra was provided with a parenting class, and alcohol and drug abuse assessment. Treatment was recommended and arranged for counseling. Debra's prison term interrupted that treatment. The Bureau brought Branden to the prison twice to see Debra, and provided a visitation schedule when Debra was released from prison. After Debra's release, the Bureau

[5] Debra cites ***In re D.S.P.***, 166 Wis. 2d 464, 480 N.W.2d 234 (1992) for the proposition that the higher burden should be employed. ***D.S.P.***, however, did not address what burden of proof applied to § 1912(d). Therefore, ***D.S.P.*** does not control the burden of proof issue involved in the instant case.

again arranged for alcohol and drug abuse treatment and random urine tests. Visitation and counseling services were provided up until the date of trial. In fact, Debra conceded that the Bureau made active efforts to provide services to her in every way except regarding visitation. Based on the foregoing, this court cannot overturn the jury's finding that active efforts were proven by clear and convincing evidence.[6]

¶23 Debra's fourth complaint is that the trial court erroneously modified the ICWA language for a special verdict question regarding the harm element of § 1912(f). 25 U.S.C. § 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of

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[6] Debra contends that the State did not prove "active efforts" as instructed by the BIA Guidelines to "take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe," and "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers." *See* BIA Guidelines D.2 & D.2 commentary. Debra also pointed to a manual used in Iowa in these cases, which defines "active efforts" as a "vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts …" and provides steps for the Bureau to comply with the active efforts requirements. The steps are: (1) the Bureau should request the child's tribe to provide traditional support actions or services; (2) involve tribal representatives at the earliest point in case assessment and service planning; (3) consult with extended family about support services that they could provide for the child and family; (4) exhaust all family preservation alternatives deemed appropriate by the tribe before out-of-home foster care placement; (5) provide information to the family on community resources that may be able to offer them housing, financial assistance, transportation and other services or assistance; and (6) allow frequent visits in the Indian child's home and the homes of the child's extended family members. *See* Iowa Code § 232B5(19).

Debra's argument fails because the State does not need to comply with guidelines particular to an Indian child when the State has been told twice that the child is not an Indian child. The tribe rejected the State's early inquiries as to whether Branden was a member of the Indian tribe. During the time period when the Bureau was making efforts to return Branden to Debra, the tribe was not involved and had stated that Branden was not a member. It was not until after the TPR petition was filed that the tribe entered the case. Thus, the BIA Guidelines and the Iowa manual do not apply.

> the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

¶24 The trial court in this case was faced with the problem of crafting jury instructions and verdict questions that would convey the meaning and spirit of the ICWA without confusing the jury. Clearly, § 1912(f) contemplated a situation where a parent had custody of a child. That was not the situation in this case. Branden was not in the custody of Debra. Thus, instead of using the "continued custody" language, the trial court asked the jury to determine whether Branden would suffer serious emotional or physical harm if he "was removed from his current foster home and placed with Debra F[.]."

¶25 Debra argues that this change in language diverted the jury's attention away from Debra's home and inevitably required an affirmative answer. Although this court can understand Debra's concern, this court cannot conclude that the trial court's modification of the language constituted an erroneous exercise of discretion or a violation of the ICWA.

¶26 As the *guardian ad litem* points out, the harm question of § 1912(f) focuses on the *change in custody*. Our supreme court has addressed a situation similar to this one where Branden has never been in Debra's custody:

> When the child is not in the custody of the parents for a protracted period of time, as in this case, it would be irrelevant to receive testimony as to whether or not the continued custody of the child by the parents will harm the child. Therefore, testimony as to what effect returning the child to the custody of the parents will have upon the child is probative of whether the continued custody of the child by the parents is likely to result in harm to the child.

In re D.S.P., 166 Wis. 2d 464, 479, 480 N.W.2d 234 (1992). Here, placing Branden with Debra cannot be separated from removing him from the only home he has known for more than four years. The trial court's modification of the

ICWA language recognized this and presented the jury with both removal and placement. Under the circumstances of this case, to follow § 1912(f) word for word would have been without logic or meaning in this case.

¶27 Debra's last complaint about the verdict involved the time frame incorporated into the harm question. Section 1912(f) does not specify a time frame. Debra argued that the question should have been read in the context of a gradual reunification plan under which Branden could be returned to Debra's custody after about six months. The State and the guardian ad litem respond that the trial court properly imputed an immediate time frame into the harm question, based on the purpose of the ICWA and the facts in this case. This court agrees.

¶28 In addressing this issue, the trial court noted the provisions of another federal act pertaining to the welfare of Indian children, the Adoption and Safe Families Act of 1997. The trial court held that statutes concerning the same subject matter or sharing the same purpose should be construed together. It determined that the adoption act required states to proceed expeditiously to permanence for children once rehabilitation efforts have failed.

¶29 The jury unanimously found in this case that Debra had failed to assume parental responsibility and that rehabilitation efforts had been unsuccessful. After over four years of trying, reunification efforts had clearly failed. Thus, to allow the jury to consider another reunification plan of six months or more would clearly contravene the objectives of the adoption act. The trial court, at every point in this case, attempted to reconcile the language of the ICWA with the specific facts and circumstances of this case so that the jury would not be confused and could make a reasonable analysis of the evidence. The trial court's actions did not constitute an erroneous exercise of discretion. Rather, the record

demonstrates that the trial court fashioned jury instructions and a special verdict to comport with both the facts of this case and consistent with the purpose of the ICWA.

C. Ineffective Assistance of Counsel.

¶30 Debra claims she received ineffective assistance of counsel because her attorney failed to call an expert witness to rebut the State's expert witness, who testified that removing Branden from the foster home and returning him to Debra's custody would harm him. The trial court summarily denied the motion without conducting a hearing. This court affirms the trial court's decision.

¶31 In reviewing Debra's ineffective claim, this court presumes that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). An evidentiary hearing is not required in every case. Rather, the trial court shall conduct a fact-finding hearing on an ineffective assistance of counsel claim only when the petitioner alleges sufficient material facts that, if true, entitle him or her to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In order to satisfy this standard, it is suggested that postdisposition motions "allege the five 'w's' and one 'h'"; that is, who, what, where, when, why, and how." *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶32 If the petitioner does not raise sufficient facts, if the allegations are merely conclusory or if the record conclusively shows that the petitioner is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 309-10. Here, this court cannot

hold that the trial court erroneously exercised its discretion when it summarily denied Debra's claim.

¶33 Debra claims that counsel should have called Dr. Nancy Hawkins to rebut the State's expert. Debra submitted a portion of Dr. Hawkins's deposition in support of her motion and the State submitted the deposition in its entirety for the court's review. The trial court found that Dr. Hawkins's testimony would not have been relevant to rebut the State's witness because Dr. Hawkins's opinion related to the issue of termination of Debra's parental rights, not to the issue of emotional damage that Branden would suffer if removed from the foster home and placed with Debra. Debra did not submit an affidavit or other proof to demonstrate that Dr. Hawkins would also opine on the issue of emotional harm. Thus, the trial court concluded that counsel's decision not to call Dr. Hawkins was reasonable and not prejudicial.

¶34 Debra also asserts that counsel should have found another expert to rebut the State's witness. However, Debra's motion failed to provide any evidence supporting its contention that such a witness existed. Thus, Debra's assertion was merely conclusory and insufficient to require an evidentiary hearing. The trial court's decision did not constitute an erroneous exercise of discretion.

By the Court.—Orders affirmed.

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