COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2407
2014AP2408

Cir. Ct. Nos. 2013TP24
2013TP25

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

T. N.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] T.N. appeals orders terminating his parental rights to his two daughters and challenges the denial of post-dispositional relief.[2] T.N. argues that the circuit court's entry of default judgment against him and denial of his motion to vacate the judgment were "improper" for multiple reasons, that his trial counsel was ineffective, and that he is entitled to a new trial in the interests of justice. For the reasons discussed below, I affirm.

BACKGROUND

¶2 In May 2011, when the daughters were seven and four years old, the Bureau of Milwaukee Child Welfare received a referral that T.N. and his wife, L.M.-N., were neglecting the children. The children were reportedly living in "deplorable conditions." Following up on the referral, bureau social workers found the home to be "uninhabitable" and reported receiving numerous accounts of drug dealing and "all night partying" at the home. Police on the scene with the social workers arrested both T.N. and L.M.-N., and the children were removed from the home.

¶3 The State filed Child in Need of Protection or Services (CHIPS) petitions in June 2011, and the circuit court subsequently entered dispositional orders that outlined the conditions T.N. needed to meet to regain custody of the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e)(2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Hon. John DiMotto presided over the termination of parental rights proceedings throughout the grounds and dispositional phases of the trial. Following a remand from this court for a hearing challenging trial counsel's effectiveness, the Hon. Rebecca Bradley presided over post-dispositional proceedings.

children.[3] After determining that the parents had not made substantial progress toward meeting the conditions for the return of the children to their custody, the State filed petitions in January 2013 for termination of parental rights (TPR) of the parents to the daughters. The TPR petition against T.N. alleged that T.N. had failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6), and that the daughters remained children in need of protection or services, *see* § 48.415(2).

¶4 T.N. appeared in person at the initial appearance and hearing on the TPR petitions. At this hearing, the court advised T.N. of his rights, including his right to an attorney, discussed the grounds alleged in the petition, explained the two phases of a TPR case, and laid out his options in choosing to contest or not contest the petition at each of the phases. The circuit court then specifically ordered that T.N.: appear at all subsequent court proceedings; communicate and cooperate with his attorneys; and cooperate with discovery that might be taken. In ordering T.N. to appear at proceedings and to cooperate, the court gave the following explanation of possible consequences for violations of the orders:

> Once you get your lawyers, you got to make sure you stay in touch with and cooperate with your lawyers, because your lawyers are skilled in these cases, but they are going to need your assistance.
>
> To the extent that any discovery goes on, depositions, written interrogatories, requests to admit or deny, you got to cooperate in that.

[3] The children were also removed from their mother L.M.-N.'s care and, ultimately, the circuit court also terminated her parental rights to the two daughters. Although many background facts overlap, there are differences in the procedural background of the two cases and the issues raised on appeal by L.M.-N. and T.N. L.M.-N. appeals the circuit courts' judgments and orders separate from T.N.'s appeals. Due to extensions of time to file briefs, L.M.-N.'s appeal is not yet fully briefed in this court.

> You got to follow all court orders. Make all court appearances.
>
> Here is the down side. If you don't do these things, particularly if you don't come to court, the D.A., or the guardian ad litem, or both may say judge, take away their right to a trial in the grounds phase. And if they're not even here, if that's the violation, go right to dispositional hearing. I would have the power -- I could do that, but I don't want to. I want to give you every opportunity to exercise all your rights. But with rights come responsibilities and obligations to stay in touch with and cooperate with your lawyer -- once you get the lawyer -- to make all court appearances, follow all court orders, cooperate in all discovery.

Prior to adjourning the initial hearing, the court set the date for the next court proceeding on the TPR petitions.

¶5 Despite the order requiring T.N.'s presence at "all court appearances," T.N. failed to appear in person at the next scheduled court appearance. T.N.'s court-appointed attorney was present. T.N.'s attorney informed the court that she had sent T.N. a letter and had left him a telephone message, but that T.N. had not responded to either. Stating that it would allow T.N.'s appearance by phone, the court then attempted to contact T.N. at the phone number T.N. had provided to the public defender's office. The court was informed that T.N. was no longer at that number and would not be returning. Based on T.N.'s non-appearance, in violation of the order, the State moved for "default subject to prove up" and the guardian ad litem did not object. T.N.'s attorney objected, and requested another opportunity for T.N. to personally appear in court.

¶6 The court denied the attorney's request for additional time to locate T.N. and to give him another chance to appear. The court explained that it had been clear in its orders and admonitions that T.N. was "to stay in touch with and

cooperate with [his] lawyer, to cooperate in discovery, follow all court orders, and make all court appearances" and that the court had informed T.N. of the consequences of not complying. The court concluded that T.N.'s conduct was "egregious," "glaring," and "flagrant," and that T.N. "was put on notice as to the potential sanction being the quote unquote 'civil death penalty' of default judgment in the grounds phase." For these reasons, the court granted the motion for default as to T.N., subject to prove up. However, the court instructed T.N.'s counsel that if T.N. appeared in court again "sooner [rather] than later, in all likelihood with a reasonable explanation[,] [the court] would reopen and vacate … the default judgment finding."

¶7 The court subsequently held hearings on the TPR petitions in June and September 2013, at which T.N. again failed to appear in person. At another hearing, later in September, over five months after the court defaulted T.N., T.N.'s attorney and the assistant district attorney informed the court that they had learned that T.N. had recently been arrested and remained in custody. Due to T.N.'s absence, the court set a later date for the prove-up on grounds as to T.N. and for the dispositional hearing as to both parents.

¶8 Three days before the scheduled prove-up and dispositional hearings, T.N., through his attorney, filed a motion to vacate the default judgment. At the hearing on that motion, the court was informed that at the time of T.N.'s default in April of the previous year, T.N. had not been taking prescribed mental health medications, and that a few days after the missed hearing, T.N. went to the hospital, resumed taking his medication, and was stabilized and released. The court also learned that, following his stabilization, T.N. absconded from the treatment facility and was absent without leave from probation, until he was arrested on a warrant in September 2013. The circuit court denied T.N.'s motion

to vacate the default judgment, citing the fact that T.N. was back on medication and stabilized just days after the entry of the default, yet made no apparent effort "to get the case back on track" until after he was arrested and placed in custody. In further support of its conclusion, the court noted that further delays would result from vacating the default judgment against T.N., which would not be fair to the children. The court observed that there are strict time deadlines in TPR cases "because the legislature does not want children to be left in a state of limbo." The court explained that the default judgment remained subject to the "prove-up," and if the prove-up produced evidence to support the grounds alleged in the petition, then T.N. could fully participate in proceedings in the dispositional phase.

¶9 Based on the evidence received at the prove-up hearing, the circuit court determined that the State had proven "by clear, convincing, and satisfactory evidence" that T.N. failed to assume parental responsibility as to both children, and that T.N. was an unfit parent and not likely to meet the conditions for the return of the children. The court proceeded to the dispositional phase of the trial, and applying the dispositional factors set forth in the statutes, concluded that it was in the best interests of the children to terminate T.N.'s parental rights.

¶10 Following a remand from this court for a ***Machner***[4] hearing on the alleged ineffectiveness of T.N.'s trial counsel, the circuit court denied T.N.'s motion for post-dispositional relief. The court concluded that T.N. failed to establish that his attorney's representation was ineffective, and declined to "second guess the well reasoned and legally supported decisions" of the other circuit court. T.N. appeals.

[4] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

DISCUSSION

¶11 T.N. presents several arguments in support of his position that the circuit court erroneously terminated his parental rights. He argues that a supreme court rule prevents a circuit court from ordering parents to attend TPR proceedings. In the alternative, T.N. argues that the circuit court here erroneously entered a default judgment against him because the orders and admonitions at issue were deficient, and T.N.'s conduct did not warrant the entry of default against him. T.N. also argues that the circuit court erred in concluding that T.N.'s trial counsel was not ineffective. Finally, T.N. argues that he is entitled to a new trial in the interests of justice for these same reasons. For the following reasons, I reject each of T.N.'s arguments.

A. Default Judgment

1. The Authority of the Circuit Court

¶12 T.N. argues that Wisconsin Supreme Court Rule 11.02 precludes the circuit court from ordering parents to appear at TPR proceedings. The rule provides that "[e]very person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person." SCR 11.02(1). T.N. argues that the circuit court violated this rule in ordering T.N. to appear in person at all future court proceedings, and therefore there was not a valid order upon which default could rest.

¶13 However, the supreme court has concluded that circuit courts have the authority to order a parent's appearance and to grant default judgment if the parent fails to appear, subject to a prove-up on the grounds for termination. *See*

Evelyn C.R. v. Tykila S., 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. Whether SCR 11.02 could be interpreted to require a different result, requiring modification or overruling of ***Evelyn C.R***., is a question for our supreme court alone. *See* ***Cook v. Cook***, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶14 The court in ***Evelyn C.R*** stated:

> Although [the mother] was not physically present at the fact-finding hearing, she nevertheless "appeared" at the hearing via her counsel. Thus, § 806.02(5) does not govern the outcome of this case. Nevertheless, a circuit court has both inherent authority and statutory authority under Wis. Stat. §§ 802.10(7), 804.12(2)(a), and 805.03 to sanction parties for failing to obey court orders. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991) (noting the same, but citing a prior version of the Wisconsin Statutes). Pursuant to this authority, a circuit court may enter a default judgment against a party that fails to comply with a court order. *See* Wis. Stat. §§ 802.10(7), 804.12(2)(a), 805.03; *see generally* ***Chevron Chem. Co. v. Deloitte & Touche LLP***, 207 Wis. 2d 43, 557 N.W.2d 775 (1997).

Evelyn C.R., 246 Wis. 2d 1, ¶17. While the court did not explicitly refer to SCR 11.02, this statement reflects that, in recognizing the authority of courts to issue enforceable orders requiring parents to appear in person along with their representatives, the court took into account the concept that Wisconsin law generally permits parties to appear by their attorneys at TPR proceedings.

¶15 Based on ***Evelyn C.R.'s*** recognition of a circuit court's "inherent" and "statutory authority" to issue orders and to sanction parties for failure to comply with those orders, I conclude that SCR 11.02 does not deprive circuit

courts of authority to order parents to appear at TPR proceedings and to sanction them for failure to comply with such orders.

2. Entry of the Default Order in T.N.'s Case

¶16 T.N. argues that, even if the circuit court had authority to order T.N.'s personal appearance, the court erroneously exercised its discretion in entering the default judgment against T.N. and in denying his motion to vacate the default judgment. In support, T.N. argues that the entry of the default violated due process because the orders and admonitions on which the default was based were "constitutionally inadequate." Separately, he argues that his conduct did not support the entry of a default judgment against him because his conduct was not egregious. I address each argument in turn.

¶17 With respect to the orders and admonitions, I conclude that they were adequate to put T.N. on notice of their meaning and import, specifically including the potential consequences for violating them. As summarized at length above, the circuit court unambiguously, using appropriately simple language, explained to T.N. what the court described as both T.N.'s "rights" and his accompanying "responsibilities."

¶18 In his principal brief, T.N. appears to argue that the circuit court's orders and admonitions were inadequate because they were not in writing. However, T.N. provides no controlling authority to support the proposition that orders or admonitions of the type at issue here are inadequate when delivered only orally, or the proposition that a court is without authority to enter a default judgment under the circumstances here for failure to comply with its explicit orders if the orders were delivered only orally. Moreover, T.N. retreats from this position in his reply brief, stating that he "is not claiming that warnings must be in

writing" to be adequate, only that "warnings must be constitutionally adequate, which written warnings would ensure."

¶19 Regarding the adequacy of the orders and admonitions, this leaves the argument that the circuit court should have defined the term "default" and explained to T.N. that his failure to appear in court could result in T.N. losing his right to contest the allegations and result in the court finding him unfit.

¶20 It is true that the court did not use the legal term "default" in issuing its orders and explaining the consequences of noncompliance. However, the court clearly explained the concept of default to T.N. The court cautioned T.N. that he was obligated to make all court appearances, to stay in contact with his attorney, and to comply with discovery requests, and especially stressed the importance of T.N.'s presence in court and the fact that T.N. would not be able to "exercise all [his] rights" if he did not show up. The court stated that if T.N. did not appear in court, the State could ask the court to "take away [T.N.'s] right to a trial in the grounds phase" and informed T.N. that the court would prefer not to have T.N. relinquish any of his rights, but that the court could do so.

¶21 T.N. argues that he did not understand the difference between the grounds phase and the dispositional phase. The problem with this argument is that, as summarized above, the court explicitly explained the two phases to him on the record, and T.N. stated that he understood. I conclude that the orders and admonitions were sufficient to put T.N. on notice both that he was required to attend court proceedings and to cooperate with his lawyer and that a failure to do either could result in the loss of his right to trial.

¶22 I now turn to T.N.'s second contention, which is that, even if the orders and admonitions were valid, the circuit court erroneously exercised its

discretion in granting default judgment against him and denying his motion to vacate the judgment because his failure to appear before the court did not constitute egregious conduct.

¶23 Whether to enter a default judgment is a matter within the sound discretion of the trial court. ***Evelyn C.R.***, 246 Wis. 2d 1, ¶18. Similarly, a circuit court's determination to grant or deny a motion seeking to vacate a default judgment is also a discretionary act that we will not overturn absent an erroneous exercise of discretion. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). "A proper exercise of discretion requires the circuit court to apply the correct standard of law to the facts at hand." ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶32, 234 Wis. 2d 606, 610 N.W.2d 475.

¶24 As already discussed, the orders and admonitions were clear. I conclude that the circuit court did not erroneously exercise its discretion, either in entering a default judgment against T.N. or in denying T.N.'s motion to vacate the default judgment. T.N. repeatedly and unjustifiably failed to comply with clear orders. This could reasonably be characterized as egregious conduct under the circumstances. As a result, the circuit court's decision to enter default judgment was reasonable and I will not disturb it.

¶25 Briefly recapping, after the appointment of counsel, T.N. failed to take an active role in his TPR case. He failed to contact the court or his attorney at or around the time of any of the missed hearings, remained out of contact for over five months after default was entered, failed to respond to attempts by his attorney to contact him, and never attempted to obtain a new court date after missing the hearing that resulted in the entry of default judgment. T.N. failed to turn himself in to his probation officer, call the court or the public defender's office, or inquire

about the status of his TPR case—all without apparent good reason. Reinforcing the court's conclusion that T.N.'s conduct was inexcusable, when asked at the post-dispositional hearing why he took none of these simple steps to get his case back on track, T.N. responded that he did not have "the slightest idea."

B. Ineffective Assistance

¶26 A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to establish that he did not receive effective assistance of counsel, T.N. must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced" him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687(1984); ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (***Strickland*** test created in criminal law context, but also applies to involuntary TPR proceedings). A lawyer's performance is not deficient unless the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if T.N. can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice. *See* ***id.*** To satisfy the prejudice prong, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (quoted source omitted).

¶27 The record here does not support T.N.'s argument that his trial counsel's performance was deficient. T.N. first argues that his trial counsel's performance was deficient because she failed to object to the court's orders and

admonitions for T.N. to appear in person, cooperate with his attorney, and comply with discovery requests. However, as discussed above a circuit court has the authority both to order a parent's appearance and to default the parent if he fails to comply with the order, and T.N. fails to explain on what legitimate basis his attorney could or should have objected.

¶28 I also reject T.N.'s argument that trial counsel's performance was ineffective "because she failed to contact T.N." and because her attempts to challenge the default judgment were "thin." The evidence is that T.N.'s attorney attempted unsuccessfully to contact him by phone and by letter, and that T.N. absconded from his treatment facility and was absent without leave from his probation, until he was arrested on a warrant in September 2013. With respect to trial counsel's attempts to challenge the default judgment, the record reflects that counsel objected to default judgment when T.N. initially failed to appear, provided the court with what little information T.N. had provided to his attorney's office, made a motion to vacate the default once T.N. was finally contacted, and presented evidence and arguments in an attempt to convince the court that T.N.'s failure to comply with the court's order was justifiable or at least not egregious.

¶29 I could stop here, having concluded that T.N. fails to show deficient performance. However, I also note that, even if T.N.'s attorney's performance was deficient, I would separately conclude that T.N.'s ineffective assistance of counsel claim fails because he has failed to demonstrate that the results of his TPR proceedings would have been different had trial counsel taken a different approach to challenging the default judgment.

¶30 T.N. fails to point to evidence that, given a more "diligent" effort by his attorney in defending against the entry of the default judgment, T.N.'s parental

rights would not have been terminated. The circuit court denied T.N.'s motion based on T.N.'s ongoing seeming lack of interest in the TPR proceedings, as demonstrated by his failure to appear at any court proceedings or make any inquiries into the status of his case in the five months between the entry of the default judgment and T.N.'s arrest, which finally put him back into contact with his attorney and the court. The circuit court also declined the invitation to vacate the default judgment because further delays in the proceedings would be detrimental to the children. T.N. fails to provide evidence supporting the proposition that the circuit court would have reached a different result if the attorney had been more "diligent," particularly in light of the amount of time that had passed since the beginning of the TPR proceedings.

¶31 Similarly, T.N. fails to point to evidence that the results of the dispositional phase would have been different if he had not been defaulted. T.N. actively participated in the dispositional phase. His attorney called him to testify, cross-examined the State's witnesses, and argued that the court should dismiss the TPR. At the hearing, the court heard evidence that the children had been out of the home for over three years, that the children's mental health was affected by trauma they endured under T.N.'s purported care, and that the children did not wish to return to the home because they were afraid. At the close of the evidence, the circuit court applied the correct legal standards and, after evaluating the evidence in terms of the best interests of the children, terminated T.N.'s parental rights.

¶32 In sum, I conclude that T.N. fails to show that trial counsel performed deficiently, and note that if I were required to reach the issue I would separately conclude that he also fails to show that he was prejudiced by any assumed deficient performance.

C. New Trial

¶33 Arguing that the "full controversy was not fully and fairly tried," T.N. asks this court to grant a new trial in the interests of justice pursuant to WIS. STAT. § 752.35. However, T.N. fails to develop an argument on this point beyond merely restating the arguments rejected above. I therefore decline T.N.'s request to order a new trial.

CONCLUSION

¶34 For the foregoing reasons, I affirm the decision of the circuit court terminating T.N.'s parental rights and deny his request that I remand the case to the circuit court for a new trial in the interests of justice.

By the Court.—Orders affirmed.

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