COURT OF APPEALS DECISION DATED AND FILED

May 17, 2016

Diane M. Fremgen
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. 2016AP421

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K. M.,

RESPONDENT,

S. J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

¶1 KESSLER, J.[1] S.J. appeals an order of the circuit court terminating her parental rights to her son, S.J.[2] We affirm.

BACKGROUND

¶2 The child is the non-marital son of S.J. and an unknown father. In December 2015, the child was removed from his mother's care following an altercation between the father of the child's half-sister, K.M., and K.M.'s paternal aunt, Ki. M., which caused S.J. to drop K.M. S.J. and the child lived with K.M.'s father and Ki. M. When the child attempted to intervene in the altercation, K.M.'s paternal aunt grabbed the child by the face and pushed him away. The child and his sister were taken to the hospital, where S.J. met with Crystal Reyes, a representative of the Bureau of Milwaukee Child Welfare (BMCW).[3] S.J. told Reyes that there had been continued altercations with Ki. M. Reyes attempted to put a protective placement plan in place so that the children could go to a safe location, rather than continue to live with Ki. M. While waiting at the hospital, S.J. could not control the child, who was running in the halls, hitting things in the hospital, and hitting K.M.'s father.

¶3 Reyes later met with S.J. at the BMCW office, where she continued to look for a safe location for S.J. to live with her children. Reyes told S.J. that the children would be detained if S.J. did not find a safe place for them to live,

---

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

[2] Because the mother and child share the same initials, we refer to the mother as "S.J." and the child as "the child."

[3] The Bureau of Milwaukee Child Welfare changed its name to the Division of Milwaukee Child Protective Services. Because the name change occurred after the trial in this case, we refer to agency as the "BMCW."

prompting S.J. to yell at Reyes. Reyes told S.J. to leave the room, but S.J. refused and was eventually arrested. Reyes also expressed concern that S.J. was not managing her children's medical needs—particularly the child's ADHD and seizure disorder. S.J. indicated to Reyes that she was likely to return to the violent household with the children and would not file a restraining order against K.M.'s paternal aunt. The children were taken into protective custody. The State filed a petition for protective custody, alleging that the child was a child in need in protection or services.

¶4 The circuit court entered a dispositional order on April 8, 2013, and set multiple conditions for the child's return. The order required S.J. to meet multiple goals for behavioral change, maintain a relationship with the child by regularly participating in successful visitations, and demonstrate an ability and willingness to provide a safe level of care for the child. The order also required the BMCW to provide multiple services to help S.J. meet the conditions of return.

¶5 Ultimately, the State filed a petition to terminate S.J.'s parental rights, alleging that the child continued to be a child in need of protection or services because S.J. failed to meet the conditions for her child's return.

¶6 A jury trial was held as to the grounds for termination, where multiple witnesses testified. Mallorie Hebeker, S.J.'s original case manager, testified that S.J. failed to meet multiple conditions for the child's return. Hebeker testified that she met with S.J. and explained all of the conditions of return and the corresponding goals so that S.J. would understand what they meant. She stated that she made referrals for a psychological evaluation, individual therapy, a psychiatric evaluation, parenting services, and visitation. Hebeker also made referrals for home management to help S.J. learn how to budget and find housing.

Hebeker stated that S.J. was discharged from one counseling service for failing to regularly attend and that S.J. failed to attend two psychiatric evaluations. Hebeker also stated that S.J. was discharged from the Family Support Program—a program which provides one-on-one parenting sessions, home management, job search assistance, and visitation—because S.J. failed to regularly attend and the visitation worker feared for her safety. Hebeker also said that S.J.'s visits with the child were inconsistent.

¶7 Hebeker testified that in January 2014, S.J.'s visits with the child were suspended on the recommendation of the child's individual therapist. Hebeker said that S.J. was a "trigger" to the child because S.J. "[e]ither … wouldn't come to visits, and that would trigger his behavioral issues, or when she was at visits she would talk about the case details, or talk about getting a house, and that would put false hopes into [the child]." Hebeker said that she talked to S.J. "several times" about "not talking about that stuff with him." Hebeker testified that S.J. was not prevented from having contact with the child, even though visits were suspended. S.J. was permitted to write the child letters, send gifts, and communicate with case workers. S.J. would communicate with Hebeker, but Hebeker did not recall S.J. sending the child letters or contacting the child's foster family.

¶8 S.J. also testified. S.J. admitted to knowing and understanding the conditions for the child's return. S.J. admitted that she did not complete anger management. S.J. admitted that she was discharged from the Parenting Program, but stated that she restarted the program. S.J. also admitted that she did not meet the goals related to the child's physical health because she did not regularly attend his doctor and dental visits. S.J. stated that from the time the dispositional order was entered (April 8, 2013), until January 2014, she visited with the child two or

three times a week. She stated that her visits were reduced to once a week "because of supposed inconsistent visits and [the child's] behavioral changes after school." When questioned extensively about her inconsistent visits, S.J. ultimately admitted that she cancelled some visits and that the BMWC cancelled many of her scheduled visits because she failed to appear on time.

¶9 The jury was also presented with testimony and multiple evaluations detailing the child's mental health conditions and needs. Dr. Michelle Iyamah testified that the child had a history of neglect, physical abuse, and possible sexual abuse. She stated that the child showed signs of post-traumatic stress disorder, acted in a manner consistent with trauma, and had ADHD.

¶10 Shanna Sullivan, a therapist with the Children's Hospital of Community Services, testified that she became one of the child's therapists following a referral from the BMCW. Sullivan testified that she had multiple conversations with S.J. about the child's treatment and referred S.J. for a mental health evaluation because S.J. "appeared to have difficulty remembering dates and times, was speaking in a very pressured manner, which suggested to me that she was having some difficulty with her thoughts at the time." Sullivan stated that she ultimately wrote a letter to the BMCW recommending temporary suspension of S.J's visits, pending S.J.'s mental health evaluation.

¶11 The BMCW eventually did suspend S.J.'s visits with the child in January 2014. In August or September 2014, the BMCW attempted to restart visitation. A therapist for S.J., Dr. Gregory Hintz, testified that when the child found out he would be seeing his mother after eight months of suspended visits, the child "decompensated significantly." The child would get into fights at school,

kick and hit, even targeting a child at school and repeatedly hitting her. Dr. Hintz recommended continued suspension of S.J.'s visits with the child.

¶12 At the close of testimony, the State moved for a directed verdict on two of the four special verdict questions—whether the child was ruled a child in need of protection or services and had been placed outside of the home for more than six months, and whether S.J. failed to meet the conditions for her child's return. The circuit court granted the motion. As to the other two questions—whether the BMCW made reasonable efforts to provide the services necessary for S.J. to meet the conditions of the child's return, and whether there was a substantial likelihood that S.J. would meet those conditions within a nine-month period—the jury found that the State proved grounds for termination.

¶13 This appeal follows.

DISCUSSION

¶14 On appeal, S.J. argues that "[t]he TPR process, as applied to S.J., violated her substantive due process rights where it was impossible for her complete the conditions of reunification with [the child]." (Capitalization and bolding omitted.) She also argues that the jury's verdict that the BMCW made a reasonable effort to provide S.J. with services ordered by the court is not supported by the evidence.

I. S.J.'s Substantive Due Process Rights Were Not Violated

¶15 Termination of parental rights is a two-step process. First, a fact-finder decides whether there are facts that justify governmental interference in whatever relationship there is between the birth-parent and his or her child. *See* WIS. STAT. §§ 48.415, 48.424; ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 672-

73, 599 N.W.2d 90 (Ct. App. 1999). If there are grounds to terminate a person's parental rights to a child, the circuit court judge then determines whether those rights should be terminated. WIS. STAT. §§ 48.424(3) and (4); 48.426; 48.427.

¶16 S.J. contends that WIS. STAT. § 48.415(2), as applied to her, violates her right to substantive due process. Whether a statute, as applied, violates the constitutional right to substantive due process presents a question of law we review *de novo*. *See* ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831.

¶17 Statutes enjoy a presumption of constitutionality and we construe them so as to preserve their constitutionality. *See* ***State v. Bertrand***, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991). A party challenging the constitutionality of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Thus, a party making an as-applied challenge to a statute must "prove, beyond a reasonable doubt, that as applied ... the statute is unconstitutional." ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

¶18 S.J. contends that WIS. STAT. § 48.415(2) was unconstitutionally applied to her because suspended visitation made it impossible for her to meet the conditions of the child's return. Specifically, she contends that the BMCW prohibited communication between S.J. and the child, rendering it impossible for her to have visitation with the child.

¶19 S.J.'s argument asks us to take a limited view of the record. While the record does establish that S.J. did make some effort to maintain a relationship with the child, it also demonstrates that S.J. failed to adequately care for her son's mental health conditions and failed to understand how to interact with her child,

prompting two therapists to suggest suspended visits. S.J. still had opportunities to communicate with her child by sending letters and contacting the foster family, but failed to do so. According to Dr. Hintz, the child became violent when learning that visitation would resume, suggesting that contact with S.J. was a "trigger" for the child's disturbing behavior. The record also establishes that before visitation was suspended, S.J. failed to regularly attend visitation with her son. Accordingly, S.J.'s substantive due process rights were not violated.

II. There Was Sufficient Evidence to Support the Jury's Verdict

¶20 S.J. argues that there was insufficient evidence to support the jury's verdict on question four of the special verdict, which asked whether the BMCW made a reasonable effort to provide her with the services necessary to meet the conditions of the child's return. We disagree.

¶21 A party seeking to set aside a jury's verdict based on insufficient evidence must convince us that there is "no credible evidence" to support the jury's findings. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995) (citation omitted). Our duty is to search the record to find precisely such evidence, accepting all reasonable inferences drawn by the jury. *See* ***Heideman v. American Family Ins. Grp.***, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991). If credible evidence supports the verdict we must uphold the jury's findings even if there is strong, contrary evidence. *See* ***Weiss***, 197 Wis. 2d at 389-90.

¶22 S.J. argues that the evidence is "replete with example[s] of the [BMCW] failing to work with S.J. to help her meet her conditions of return." S.J. points to a statement by the circuit court, in which the court stated: "I won't make any secret about it, had this case been tried to the Court, the Court would have

answered the fourth question on the special verdict no…. The jury spoke differently…. And it's not enough to set aside the jury verdict, but it's enough for me to express my opinion to the Court." (Some formatting altered.) Indeed, S.J. points to evidence which contradicts the jury's findings. However, as the circuit court noted, "it's not enough to set aside the jury verdict." The record shows that BMCW representatives provided S.J. with multiple psychological and psychiatric referrals, offered transportation for visitation, and provided referrals for parenting classes, anger management, housing assistance, and job assistance, among other things. The evidence supports the jury's verdict.

By the Court.—Order affirmed.

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