COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 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 Nos. 2016AP440
2016AP441

Cir. Ct. Nos. 2014TP168
2014TP169

STATE OF WISCONSIN

IN COURT OF APPEALS

DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. B.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO E. C. B., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. B.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: DAVID SWANSON, Judge. *Affirmed.*

¶1 KESSLER, J.[1] D.B. appeals from orders terminating his parental rights to two of his children, M.T.S. and E.C.B. We affirm.

BACKGROUND

¶2 On July 14, 2014, the State filed petitions to terminate D.B.'s parental rights to his children M.T.S. and E.C.B. on the grounds that the children were in continuing need of protection or services (Continuing CHIPS) and that D.B. failed to assume parental responsibility.

¶3 On April 17, 2015, D.B. pled no contest to the Continuing CHIPS ground. The circuit court conducted a colloquy with D.B., during which the court assessed D.B.'s educational background, confirmed that D.B. reviewed the petition to terminate his parental rights with his counsel, and explained the rights D.B. was giving up, including the right to a jury or court trial and "the right to

[1] These appeals are 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.

make the State prove its case by evidence that is clear, convincing and satisfactory."[2] D.B. stated that he understood all of the rights he was giving up.

¶4 The court also discussed each of the elements of the Continuing CHIPS ground and asked D.B.:

> [Y]ou are not agreeing that the ground of continuing CHIPS is a ground for terminating your parental rights but you are not contesting or disputing the State's ability to prove each of those elements of that ground. Do you understand that?

D.B. responded in the affirmative. The circuit court also asked D.B.'s counsel, Deborah Strigenz, whether she explained the meaning of a no contest plea, discussed the phases of the termination proceedings, and explained the consequences of the court finding grounds for termination. Counsel answered affirmatively to all of the court's inquiries, assuring the court that D.B.'s no contest plea was knowing, intelligent and voluntary. The court accepted D.B.'s plea and determined that the State proved the Continuing CHIPS ground by clear and convincing evidence. The court found D.B. unfit. The parties agreed to hold a dispositional hearing on July 28, 2015, three months after the grounds hearing.

¶5 On July 28, 2015, the original date of the dispositional hearing, Strigenz told the circuit court that D.B. wished to withdraw his no contest plea. Strigenz also moved to withdraw as D.B.'s counsel. D.B. was not present, however, as he refused to cooperate with an order to produce. The circuit court

[2] The Honorable Rebecca Bradley conducted the colloquy with D.B. The Honorable David Swanson denied D.B.'s initial motion to withdraw his no contest plea and entered the order terminating D.B.'s parental rights. The Honorable Karen Christenson presided over the post-disposition hearing and denied D.B.'s post-disposition motion. The order denying the post-disposition motion was signed by The Honorable David Swanson.

granted Strigenz's motion to withdraw, but found no basis to allow D.B. to withdraw his no contest plea. The court also rescheduled the dispositional hearing to give D.B. time to confer with new counsel.

¶6 D.B., through new counsel, filed a motion to withdraw his no contest plea, arguing that "the conditions for return were imposed at the time he was incarcerated and were impossible for him to meet," and that "he was unaware that his due process rights were violated and that his no contest plea did not waive his right to constitutionally challenge [WIS. STAT.] § 48.415(2) and therefore his no contest plea was not voluntarily, knowingly, and intelligently entered."

¶7 The circuit court denied D.B.'s motion, finding that his plea was knowing, voluntary and intelligent, and that there was a sufficient factual basis for the plea. At the dispositional hearing, the circuit court ultimately found termination of D.B.'s parental rights to be in the children's best interests.

¶8 Through new counsel, D.B. filed a post-disposition motion to withdraw his plea, arguing that the circuit court's colloquy was insufficient because the court did not inform him "that one of the potential outcomes he faced at disposition could be an order terminating his parental rights."

¶9 Both D.B. and Strigenz testified at a hearing on the motion. D.B. told the circuit court that when he entered his no contest plea, he thought the next step was for the judge to make decisions about his treatment or to order parenting classes. D.B. did not expect the court to terminate his parental rights. D.B. acknowledged however, that on the day he entered his plea, he told the court he understood his right to challenge the termination of his parental rights at the dispositional hearing.

¶10 Strigenz told the circuit court that she discussed all of D.B.'s trial options with him, as well as the options to plead no contest at the grounds phase, to contest at the dispositional hearing, and to voluntarily consent to terminating his rights. Strigenz stated that D.B., who was incarcerated at the time, thought he had a good chance of gaining an early release from prison. Strigenz told D.B. that pleading no contest would allow the dispositional hearing to be delayed by ninety days, giving them time to find out whether D.B. would actually be released from prison early. Strigenz also told the court that she moved to withdraw as counsel because D.B. "indicated to me that he was in the law library and that he had decided that it would be … better grounds for appeal if we had proceeded with the jury trial. He felt there were not appellate grounds and he wanted to proceed with the jury trial because of that." Strigenz said that she was uncomfortable pursuing a plea withdrawal on that basis and thought D.B. would be better suited with another attorney if he wanted to take that route.

¶11 Ultimately, the circuit court denied D.B.'s motion. This appeal follows.

DISCUSSION

¶12 On appeal, D.B. contends that his no contest plea as to grounds for termination was not knowing and intelligent because the circuit court's colloquy was defective and he did not understand the direct consequences of his plea. Specifically, D.B. contends that the court did not inform him that it could order termination at the end of the disposition hearing. Rather, he thought the court would discuss his treatment options or order parenting classes. Courts must ascertain that criminal defendants are aware of the constitutional rights that they are waiving by entering a plea, ***State v. Bangert***, 131 Wis. 2d 246, 265-66, 389

N.W.2d 12 (1986), and of the direct consequences of the plea, ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998). A ***Bangert*** analysis is used to evaluate the knowingness of a parent's no contest plea in a termination proceeding. *See, e.g.*, ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

> Under th[is] analysis, 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. If a prima facie showing is made, the burden then shifts to the county to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition.

Oneida County Dep't of Social Servs. v. Therese S., 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122 (internal citations omitted).

¶13 To show that D.B.'s no contest plea was entered knowingly and intelligently, the State was required to prove that D.B. understood at the time of his no contest plea: (1) that he would be found unfit as a parent as a result of the plea; (2) the potential dispositions set forth in WIS. STAT. § 48.422(7)(a), namely the State's petition may be dismissed at the dispositional hearing, or the court may terminate his parental rights; and (3) that the best interests of the children will be the prevailing factor at the disposition hearing. *See* ***Oneida County***, 314 Wis. 2d 493, ¶¶10,16; *see also* WIS. STAT. §§ 48.427(2), (3), 48.426(2).

¶14 We accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *See* ***Steven H.***, 233 Wis. 2d 344, ¶51 n. 18. We independently determine whether those facts demonstrate that D.B.'s plea was entered knowingly and intelligently. *See* ***id.***, ¶51. We may examine the entire record, not merely one proceeding, to determine whether the evidence supports the

court's conclusion that the State met its burden to show that D.B.'s plea was knowing and intelligent. *See* ***id.***, ¶42.

¶15 Here, the circuit court found that D.B.'s no contest plea was knowing, voluntary, and intelligent based on the colloquy and testimony from Strigenz. During the colloquy, the circuit court informed D.B. of the rights he was giving up, the elements of the continuing CHIPS ground, and that the next step was the dispositional hearing. D.B. indicated that he understood. The court told D.B. that the main factor to consider at the dispositional hearing was the best interest of his children. D.B. indicated that he understood. D.B. also indicated that he understood his right to challenge the termination of his parental rights *at the dispositional hearing*. The court confirmed with Strigenz that D.B. understood the two phases of the proceedings and the meaning of a no contest plea. At no point during the colloquy did the court or counsel suggest that the dispositional hearing would involve discussion of D.B.'s treatment options or possible parenting classes.

¶16 Moreover, at the post-disposition hearing, Strigenz discussed the strategy behind the no contest plea and confirmed that D.B. understood. She stated that she moved with withdraw as D.B.'s counsel when D.B. indicated his desire to withdraw his no contest plea and have a jury trial because D.B. believed his chances for a successful appeal would be higher following a jury trial. The circuit court found Strigenz's testimony credible. Accordingly, we conclude that the record supports the circuit court's finding that D.B.'s no contest plea was knowing, voluntary, and intelligent.

By the Court.—Orders affirmed.

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