COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 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. 2016AP483
2016AP484
2016AP485

Cir. Ct. Nos. 2014TP203
2014TP204
2014TP205

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

J. B.,

RESPONDENT-APPELLANT.

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APPEALS from orders of the circuit court for Milwaukee County: MARK A. SANDERS, and CHRISTOPHER R. FOLEY, Judges.[1] *Affirmed.*

¶1 BRENNAN, J.[2] Mr. B appeals from orders terminating his parental rights[3] to J.B, J.B, and J.B.[4] He argues that: (1) the circuit court erred when it proceeded to the dispositional hearing the day it found Mr. B in default; and (2) the circuit court erred when it failed to order a competence exam. For the reasons which follow, we affirm.

[1] The Honorable Mark A. Sanders presided over the trial and entered the orders terminating parental rights. The Honorable Christopher R. Foley presided over the post-disposition motion hearings and denied the motion for a new dispositional hearing and for a competency exam.

[2] 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.

[3] The trial court also terminated the parental rights of the biological mother of the three children. This appeal concerns only the termination of Mr. B's parental rights.

[4] The children share the same initials; at the time of disposition, their ages were two, five and seven.

BACKGROUND

¶2 On May 23, 2013, Mr. B's children were found to be children in need of protection or services, and on July 29, 2013, a CHIPS dispositional order was entered placing the children outside the home. Mr. B received the dispositional orders which contained written warnings regarding possible termination of parental rights. He was present and the warnings were given to him in person on that day. On August 18, 2014, the State filed petitions ("the TPR petitions") to terminate Mr. B's parental rights to the three children. The TPR petitions alleged the same three grounds for each child: abandonment, failure to assume parental responsibility, and continuing need of protection or services.[5]

¶3 On September 17, 2014, Mr. B appeared with counsel and was given a copy of the TPR petitions. After two adjournments, an initial appearance occurred on November 13, 2014. The trial court explained to Mr. B that the petitions sought to terminate his parental rights and explained each of the three grounds alleged. The trial court also advised Mr. B of his procedural rights, and Mr. B indicated an understanding of the same. The trial court ordered Mr. B and the children's mother to communicate and cooperate with counsel, comply with orders, and comply with discovery. The court specifically ordered them to appear personally:

> The last thing I will order is that each of you personally appear in court for each and every court appearance in this case. If this case is in court, I need you in my courtroom. I order that because there's all sorts of important decisions that have to be made in this case and

[5] The issues raised on appeal relate to the procedural aspects of the circuit court's order, not the merits, and therefore the facts upon which the petition for termination is based are not relevant here.

> you are two of the people that have to make them--make some of them, anyway. ….
>
> Now I fully expect both of you will cooperate with those orders, but if you violate those orders, either the State or the Guardian ad Litem or both of them could ask that you be found in default.

On March 16, 2015, Mr. B appeared in court with trial counsel for a final pretrial hearing. The matter was scheduled for a jury trial on April 13, 2015.

¶4 On April 13, 2015, when the case was called, counsel for Mr. B asked for an adjournment. He told the trial court that Mr. B was sick. Counsel reported that Mr. B had told him, "I'm not going to be here this afternoon, I'm going to the doctor." The trial was adjourned to August 31, 2015. The trial court then stated, "[W]hat I would like … is some sort of direct information from his doctor with the diagnoses." Counsel agreed to relay that requirement to Mr. B. At the next court date, August 31, 2015, the State noted that no doctor's excuse had ever been produced. Counsel for Mr. B advised the trial court that he had learned that on April 13, Mr. B "didn't go see a medical professional" and instead "went home and laid down."

¶5 On August 31, 2015, Mr. B's counsel explained to the trial court that Mr. B had been present that day but was "upset" and had left the courthouse even though counsel had repeatedly advised him not to leave. The State asked that Mr. B be defaulted and that the State be allowed to proceed to "prove up." The Guardian ad Litem concurred in the motion for default. The trial court noted that it had previously ordered Mr. B to appear and had explained to him that failing to do so could mean being found in default. It also noted that, by leaving, Mr. B acted "in direct contradiction of his advice from [counsel], persistent advice from [counsel] and in direct violation of … my order."

¶6 Counsel for Mr. B stated that he "had some questions about [Mr. B's] competency":

> He seems to be on a disconnect with what needs to be done and taking my advice, and I have to repeat things again and again and he just doesn't seem to get it. [The case manager] indicated to me that she felt he has issues with reading and writing, and … we talked about it, so I was going to ask for a competency evaluation. When I told him that, he got mad at me about that.

The case manager informed the court that "a psych eval was scheduled" but it had never been done because Mr. B was "very noncompliant." She stated, "I can see some competency issues …. I don't know if it's drug related or if it is like disability related …. There is obviously a fog, but he refuses any and all services, so I don't know." The GAL stated:

> With regard to the competency question, Mr. [B] has extensive criminal history with a criminal case pending set for trial next month. I see no indication that his competency has been questioned. [H]e has never been found incompetent. …. I don't think this [c]ourt should delay the proceedings in order to attempt to address a competency issue that I don't think exists."

The trial court noted that Mr. B's competence had not been raised in the CHIPS case.

¶7 The trial court found Mr. B in default subject to prove-up. It then took a recess for two hours and forty-five minutes to "give Mr. [B] the opportunity to cool off and decide maybe he wants to come back to court." The trial court also announced that the case would move to disposition that day.

¶8 When the case was recalled at 1:30 p.m., counsel informed the trial court that Mr. B had not responded to his text message. The trial court stated to

counsel, "I am going to ask you to continue with your skill of representation this afternoon."

¶9 The case proceeded to prove-up. The State called Nadia Ali, the ongoing case manager for the three children, to testify. After direct examination, Ali was questioned by Mr. B's trial counsel and the GAL. The trial court determined that the State had established all three grounds alleged and found Mr. B unfit.

¶10 The case then proceeded to disposition. Additional testimony was taken from Ali. The trial court checked with trial counsel during the proceedings, and counsel confirmed that he still had received no text or call from Mr. B. At the conclusion of the dispositional hearing, the trial court found that it was in the best interests of the children that the parental rights of Mr. B be terminated. Written orders were entered accordingly.

¶11 Mr. B filed a notice of appeal.[6] He subsequently filed a motion with this court requesting remand to the trial court for post-disposition proceedings. We granted the motion for remand.

¶12 Mr. B filed a post-disposition motion upon remand seeking a competency evaluation, arguing that trial counsel's failure to seek a competency evaluation was ineffective representation and a new dispositional hearing due to

[6] The appeal was initially filed as a no-merit but in response to an order from this court, appellate counsel filed a supplemental report addressing the timing of the dispositional hearing, Mr. B's competency, and trial counsel's effectiveness. After the supplemental report was filed and appellate counsel moved to remand the matter for a post-dispositional hearing, the no-merit report was rejected and the proceedings were converted to appeals on the merits.

the trial court's error in failing to wait two days after default. After a hearing, the trial court denied Mr. B's motion. This appeal follows.

DISCUSSION

¶13 Mr. B raises two issues on appeal. First, he argues that, under WIS. STAT. § 48.23(2)(b)3., the trial court was required to wait two days after finding him in default, and it erred when it proceeded immediately to a dispositional hearing. Second, he argues that based on statements to the trial court by trial counsel and the case manager questioning Mr. B's competency, the trial court was required to order a competency exam. He contends that because of these trial court errors, he is entitled to a new dispositional hearing.[7]

I. The trial court did not err in holding the dispositional hearing on the day Mr. B was found in default.

¶14 This question requires us to interpret and apply WIS. STAT. §§ 48.424(4) and 48.23(2)(b)3. The construction of statutes and their application to a particular set of facts is a question of law, which we review *de novo*. ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). "However, despite our *de novo* standard of review, we benefit from the trial court's analysis." ***Id.***

¶15 Termination of parental rights cases consist of two phases: a grounds phase, at which the factfinder determines whether there are grounds to terminate a parent's rights, and a dispositional phase, at which the factfinder

[7] Mr. B raised a third issue in his post-dispositional motion that he does not include in his appellate briefing, namely trial counsel's ineffective assistance in not requesting a competency evaluation. Because the State and GAL have addressed it in their appellate brief, this court chooses to resolve it as well.

determines whether termination is in the child's best interest. ***Sheboygan Cnty. DHHS v. Julie A.B.***, 2002 WI 95, ¶¶24-28, 255 Wis. 2d 170, 648 N.W.2d 402.

¶16 WISCONSIN STAT. § 48.424 sets forth the requirements for the fact-finding hearing as to whether grounds exist. As relevant here, it provides that

> **If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit**. A finding of unfitness shall not preclude a dismissal of a petition under s. 48.427(2). **Except as provided in s. 48.23(2)(b)3., the court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 48.427**.

WIS. STAT. § 48.424(4). The dispositions enumerated in § 48.427 include termination of parental rights. § 48.427(3). But, as noted above, WIS. STAT. § 48.424 creates an exception to the "immediate" disposition hearing as set forth in the following language in § 48.23(2)(b)3.:

> [A] parent 18 years of age or over is **presumed to have waived** his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the **parent fails to appear in person as ordered**, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse. **If the court finds that a parent's conduct in failing to appear in person as ordered was egregious and without clear and justifiable excuse, the court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least 2 days have elapsed since the date of that finding.**

WIS. STAT. § 48.23(2)(b)3. (Emphasis added.) This is new statutory language[8] and is the basis for appellant's argument that the trial court erred in going immediately to disposition here.

¶17 Mr. B argues that the new version of WIS. STAT. § 48.23(2)(b)3. requires a two-day waiting period in every case where there is a finding of default, even if there is no finding of a waiver of the right to counsel. Although his argument is unclear in this regard, it appears to be that a finding of default automatically triggers the provisions of the statute for a two day wait.

¶18 The post-disposition court disagreed, concluding that the statute did not remove the procedure outlined in ***Shirley E.***[9] of keeping the lawyer in the case even if the parent defaulted. Rather, the statute merely provided courts with the option, not the obligation, to proceed from a finding of default to a finding of waiver of counsel and then to discharge counsel, in which case the two-day waiting period applies. The post-disposition court stated,

> … [T]he amendments didn't mandate that the ***Shirley E***[.] process not be followed.
>
> A court has the option of … discharging the lawyer in conjunction with a default finding which then … dictated that if the court did both, that the court had to delay disposition.

[8] This provision is a recent amendment, enacted by 2013 Wis. Act 337 and effective April 25, 2014.

[9] *See* ***State v. Shirley E.***, 2006 WI 129, ¶43, 298 Wis. 2d 1, 724 N.W.2d 623 ("The absence of an explicit and unambiguous requirement in § 48.23 that a parent appear in person to maintain a right to counsel means that a parent's right to counsel is not contingent upon the parent's personal attendance at the proceeding.") The Wisconsin Legislative Council Act Memo for 2013 Wis. Act 337 noted that the holding of ***Shirley E.*** "**prevent[ed] a court from discharging an attorney** for the parent regardless of whether the parent failed to personally attend a hearing in contravention of a court order." (Emphasis added.)

> … [T]he materials that have been submitted to me suggest that [the trial court] did not follow that process; he did not discharge counsel.
>
> … [M]y understanding of that statute is that we still have the option of proceeding under the ***Shirley E.*** scenario, keeping the lawyer on board; and that under that scenario there is no requirement that the dispositional hearing be adjourned for [two days].
>
> … If you read the last sentence of [§ 48.23(2)(b)3.], it's very broad language. But it occurs in--It is a right to counsel statute and it is a waiver of counsel statute. And no waiver of the right to counsel occurred here. Counsel was retained. And what [the trial court] did was entirely consistent with the ***Shirley E.*** dictates.

¶19 This court agrees. Although the language in the last sentence of WIS. STAT. § 48.23(2)(b)3. is concededly broad, it is significant that it is found in the statute entitled "Right to counsel," and that it does not include any requirements for trial courts to find a waiver of counsel when a parent defaults. The amended language creates a presumption of waiver where three conditions are met: the court orders a parent to appear, the parent fails to appear, and the court finds the failure to appear egregious and without excuse. Even where those conditions are met, there is no indication that a default converts *automatically* into a waiver of the right to counsel. The legislature "placed great emphasis on the necessity of counsel" in TPR cases, *see* ***Shirley E.***, 298 Wis. 2d 1, ¶30, and it would not be consistent with that emphasis to allow waivers to occur absent a circuit court's explicit finding. The Wisconsin Legislative Council Act Memo for 2013 Wisconsin Act 337 lends support to this view: "The Act requires that at least two days must pass from **a court's finding that an adult parent has waived the right to counsel** by a failure to appear before a court may hold a dispositional hearing on an involuntary termination of parental rights or a contested adoption." (Emphasis added.)

¶20 In this case, the trial court made a finding that Mr. B was in default but made no finding that Mr. B had waived the right to counsel. The trial court specifically asked counsel to continue his representation of Mr. B after the default. Counsel continued to represent Mr. B's interests through the prove-up and the dispositional hearing, conducting cross-examination of witnesses, raising objections, and arguing against the termination of parental rights. At the close of the hearing, counsel filed a notice of intent to pursue post-disposition relief on Mr. B's behalf.

¶21 Because the two-day waiting period is triggered by a finding of waiver of counsel, which did not occur in this case, it was not error for the trial court to proceed directly to the dispositional hearing with Mr. B's counsel representing his interests.

II. The trial court did not erroneously exercise its discretion in failing to order a competency exam.

¶22 Next, Mr. B argues that in light of the statements by trial counsel and the case manager concerning his competency, the trial court erred by proceeding without ordering a competency exam, and trial counsel was ineffective for failing to seek a competency evaluation.

¶23 We will not disturb a trial court's determination whether there is reason to doubt a defendant's competence and order a competency evaluation unless the court exhibited an erroneous exercise of discretion or the court's decision was clearly erroneous. ***State v. Weber***, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). A trial court erroneously exercises its discretion if it applies the wrong law, fails to consider the relevant facts, or reaches a result

that a reasonable judge could not have reached. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

> WISCONSIN STAT. § 48.235(g) states:
>
> **The court shall appoint a guardian ad litem** for a parent who is the subject of a termination of parental rights proceeding**, if any assessment or examination of a parent** that is ordered under s. 48.295(1) **shows that the parent is not competent** to participate in the proceeding or to assist his or her counsel or the court in protecting the parent's rights in the proceeding.

¶24 "Before the competency of the defendant at the time of the proceedings must be looked into, there must be some evidence raising doubt as to his competence or a motion for a determination on the question setting forth the grounds for belief that such competency is lacking." ***State v. McKnight***, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974) (citing ***Nathaniel v. Estelle***, 493 F.2d 794 (5th Cir. 1974)). A person who is incompetent "lacks the ability to reasonably understand pertinent information, rationally evaluate litigation choices based upon that information, or rationally communicate with, assist and direct counsel." ***Kainz v. Ingles***, 2007 WI App 118, ¶3, 300 Wis. 2d 670, 731 N.W.2d 313. "[T]he focus of a competency exam is modest, seeking to verify the defendant's mental capacity to understand the proceedings and to assist counsel at the time of the proceedings." ***State v. Slagoski***, 2001 WI App 112, ¶7, 244 Wis. 2d 49, 629 N.W.2d 50. A suggestion by counsel that a client is incompetent is insufficient to require a court to order a competency examination. ***McKnight***, 65 Wis. 2d at 595.

¶25 Here, Mr. B's trial counsel raised the question of Mr. B's competency for the first time in the context of informing the trial court that Mr. B was not present for trial. Counsel stated that the case manager had noted Mr. B

had problems with reading and writing. Counsel also told the court that Mr. B was uncooperative and hostile.

¶26 At the post-dispositional hearing, the court took testimony from the case manager, Mr. B's trial counsel, and Mr. B. The case manager testified that in her prior comments about Mr. B's competence, she had confused a competence exam with a test of I.Q. that is typically administered in connection with a psychological evaluation. Mr. B had been ordered to undergo a psychological evaluation as part of the case, and the case manager testified that he had failed to show up at the scheduled appointments on two occasions. Mr. B's counsel testified that there was a "disconnect" when counsel explained how the process worked. Counsel further testified that Mr. B "seemed to be thinking that he could get it the way he wanted to" but also that "he was understanding what I was saying; I mean, he was understanding what was going on." The State noted that the issue of competence had not been raised in any of Mr. B's nine prior criminal cases. Mr. B testified that on the day of trial he had been "frustrated" by the fact that his counsel had told him that the TPR case would not be adjourned again, and Mr. B thought he would lose because he had an open criminal case at that time. In denying the motion for a competency exam, the post-disposition court noted that refusing to take advice from counsel did not meet the standards for incompetence in ***Kainz*** and that the evidence was insufficient to order a competency exam.

¶27 Mr. B argues in his brief that because "two people believed that [Mr. B] may have issues understanding the court proceeding" the circuit court erroneously exercised its discretion when it denied the motion for a competency exam. The concern of counsel alone does not constitute a sufficient factual basis to require a competency exam. *See* ***McKnight***, 65 Wis. 2d at 595. The basis for

their statements was the concern that Mr. B had problems with reading and writing and had been unwilling to accept advice from counsel—not concern that he was unable to understand the proceedings. This was even more clear at the post-dispositional hearing: although facts were presented relative to Mr. B's unwillingness to follow court orders, no facts were presented that would lead to the conclusion that he had an inability to understand them. The trial court considered the facts, applied the proper standard of law. *See* ***id.*** *See also* ***Kainz***, 300 Wis. 2d 670, ¶3. It reached a conclusion that a reasonable judge could reach. It was therefore not an erroneous exercise of discretion for the trial court to proceed with the trial without ordering a competency exam for Mr. B.

¶28 Because we conclude the record failed to support a reasonable basis for seeking a competency exam, we conclude trial counsel was not ineffective for failing to seek the exam. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (to establish ineffective assistance, a convicted defendant must show deficient performance and prejudice); *see also* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (attorney's failure to pursue a meritless motion does not constitute deficient performance).

By the Court.—Orders affirmed.

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