COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

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. 2016AP917 **Cir. Ct. No. 2015TP265**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO K. H.-H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

L. H.-H.,

RESPONDENT-APPELLANT.

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

¶1 KESSLER, J.[1] L.H.H. appeals the order terminating his parental rights to his daughter, K.H.H. L.H.H. contends that his no contest plea during the grounds phase was not knowing, intelligent and voluntary because he was unaware that he would be found unfit as a result. We disagree and affirm the circuit court.

BACKGROUND

¶2 On September 8, 2015, the State filed a petition for the termination of L.H.H.'s parental rights. The petition alleged failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(6).

¶3 On November 23, 2015, L.H.H. appeared before the circuit court with counsel. At that hearing, the circuit court engaged in a lengthy colloquy with L.H.H., in which it explained: the State's allegations in the termination of parental rights petition; L.H.H.'s rights to a jury trial, counsel, and substitution of judge; the State's responsibility to prove the allegation; and the details of the allegation, among multiple other things. As relevant to this appeal, the circuit court provided a comprehensive explanation about the termination of parental rights process and the potential outcomes:

> Every termination of parental rights case has two completely separate parts. The first part is called the grounds phase, the grounds part of the proceeding. What we focus on there is whether there is a reason to terminate parental rights, that is, whether the State can prove in this case the only ground, only reason they allege that they are trying to terminate your parental rights. In this stage we focus largely on what parents did or didn't do with respect to their kids and it's in this stage of the proceedings you have the right to have a trial and have the right to make the State prove it by clear, satisfactory and convincing evidence.

[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.

Now, the second part of the proceeding is that we may not even get to is called the dispositional hearing. What happens at that part of the proceeding is we focus on what outcome from the case is in the best interests of the kids that are involved. Let me give you a little more information about the first part, first phase.

There are basically four separate outcomes of the grounds phase, first part of every termination of parental rights case.

The first potential outcome is simply called voluntary consent. That is when a parent comes to court and says to me, Judge, I've given this a lot of thought. I thought what's in my best interest, what's in my child's best interest, and Judge, I'm going to agree, I'm going to consent to my parental rights being terminated.

If the parent tells me that, I have a conversation with them to make sure they are doing it for the right reason….

….

So the first potential outcome is called voluntary consent.

The second potential outcome of the grounds phase of every termination of parental rights case is something called an agreement or stipulation, that there is a reason to terminate parental rights. That's what happens when a parent comes to court and says to me, Judge, I'm not agreeing to terminate my parental rights, but I will agree or at least I'm not going to contest that the State can prove at least one of the grounds, one of the reasons that they allege in the petition.

If a parent tells me that, again, I have a conversation with them to understand what they are doing, to make sure they are doing it for the right reasons. If they do and they are, I'll accept their agreement. There is a reason to terminate their parental rights.

I then take some testimony from the State to make sure they actually had evidence….

Now, if I do that, by law I also have to find that that parent is unfit. Here's why that is important. First, that unfitness finding means we can go to the second phase of the proceeding, to that dispositional hearing. The second

> thing it means is that under some circumstances the State can try to use that unfitness finding to try to terminate that parent's parental rights with respect to other kids in the future. That's why that unfitness finding is important.
>
> In a voluntary consent situation there is not an unfitness finding.
>
> In an agreement or stipulation that there is a reason to terminate parental rights, assuming the State has enough evidence, then there would be an unfitness finding.
>
> So that's the second potential outcome of the grounds phase in every termination of parental rights case….

The court went onto explain that the "third potential outcome is a trial with a finding of grounds," and that the "fourth potential outcome is a trial without a finding of grounds." The court confirmed that L.H.H. understood, stating: "Listen, I know that's a lot of information, but do you understand how the grounds phase of these proceedings work?" L.H.H. responded in the affirmative. The court also explained: "All right. If there is an unfitness finding, then we go to the second phase, the second part of these proceedings. That's the dispositional hearing." The court explained the proceedings in great detail and told L.H.H. that the focus of the proceeding is to determine the best interest of the child. L.H.H. indicated that he understood. L.H.H., through counsel, indicated that he wished to contest the termination petition and reserve his right to a jury trial.

¶4 On January 4, 2016, at the final pretrial conference, L.H.H. changed his plea to no contest. The court then informed L.H.H. that it was "going to ask you a bunch of questions…. It's just my responsibility to make sure that you're making this decision to give up your right to trial in the grounds phase in a knowing and voluntary fashion and that nobody threatened you in any way or forced you to do this." The court went through a series of questions with L.H.H., in which the court established L.H.H.'s age, educational level, medical condition

of ADHD, explained the rights L.H.H. would be giving up, and explained the focus of the dispositional hearing, among many other things. L.H.H. told the court that he understood everything. As relevant to this appeal, the court told L.H.H. that at the dispositional hearing: "the question of whether there's a reason to terminate your parental rights or not is no longer in play because you pled no contest and agreed that [the State] could prove a reason to terminate your parental rights." L.H.H. indicated that he understood. L.H.H. also told the court that he consulted with his counsel prior to deciding to plead no contest. Prior to accepting L.H.H.'s plea, the court reiterated:

> So [the State has] alleged only failure to assume parental responsibility. To prove that, they'd have to prove, again, to a reasonable certainty by clear, satisfactory and convincing evidence that you have failed to establish a substantial parental relationship with your daughter.
>
> That means you have failed to assume and exercise significant responsibility for the daily supervision, education, protection and care of your daughter by pleading no contest to the claim of failure to assume parental responsibility.
>
> You're giving up your right to make them prove those facts to a reasonable certainty by clear, satisfactory and convincing evidence. Do you understand that?

L.H.H. answered affirmatively. The court accepted L.H.H.'s plea and made a finding of unfitness.

¶5 On January 26, 2016, the circuit court held the dispositional hearing. The court heard from multiple witnesses, including K.H.H.'s foster mother, her case manager, L.H.H.'s relatives who were requesting placement of the child, and L.H.H. himself. Ultimately, the court found that termination of L.H.H.'s parental rights was in the child's best interest.

¶6 On June 1, 2016, L.H.H. filed a motion for remand with this court, requesting that we remand to the circuit court to determine whether his no contest plea was knowing, voluntary and intelligent. The motion alleged that L.H.H. "did not understand that he was admitting that he is an unfit parent." We granted the motion.

¶7 As relevant to this appeal, at the remand hearing, the circuit court heard testimony from L.H.H. and his former TPR counsel. L.H.H. told the court that counsel did not explain that a no contest plea would result in a finding of unfitness. L.H.H. told the court that he would not have entered a no contest plea if he knew about the unfitness finding. L.H.H also admitted that he has ADHD and was not taking any medications for the condition at the time of his plea. He admitted that he has trouble focusing and a bad memory. L.H.H testified that he did not remember whether his counsel spoke to him about unfitness.

¶8 L.H.H.'s former counsel testified that he has several standard practices he employs when representing clients facing termination of their parental rights. He stated:

> With respect to unfitness I will advise my clients who are going to be entering into some sort of stipulation as to grounds or no contest that the judge is required under the law to make a statutory finding of unfitness. I will tell him that the judge will actually use those words and that he shouldn't be upset by that…. I will say that [the judge] will tell you that he's not prejudging the case by using those words but he's required by law to enter that statutory finding of unfitness.

Counsel stated that he had no reason to believe that he did not follow his regular practice with L.H.H.

¶9 The circuit court acknowledged that it did not use "magic words" to inform L.H.H. that his no contest plea would result in a finding of unfitness and noted that it was "stunned" by its omission. However, the court found that L.H.H. failed to establish a *prima facie* case that he was unaware of the complete consequences of his no contest plea. The court referenced its detailed colloquy with L.H.H. at his initial appearance[2] and the "substantial likelihood" that L.H.H.'s counsel "used the magic word prior to [L.H.H.] offering his no contest plea." The court reasoned that L.H.H. entered his plea with an understanding of the results.

¶10 This appeal follows.

DISCUSSION

¶11 To be constitutionally sound, a plea must be entered voluntarily, knowingly, and intelligently. ***Kenosha Cty. Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. Whether L.H.H's no contest plea was made voluntarily and with an understanding of the nature of the acts alleged in the petition and the potential dispositions is, therefore, a question of constitutional fact. *See* ***State v. Bangert***, 131 Wis. 2d 246, 284, 389 N.W.2d 12 (1986). The circuit court's findings of historical fact will be upheld unless they are clearly erroneous. *See* ***id.*** at 283. Whether the historical facts meet the constitutional test is a question of law that we determine independently, benefiting from the circuit court's analysis. *See* ***T.M.F. v. Children's Serv. Soc'y. of Wis.***, 112 Wis. 2d 180, 188, 332 N.W.2d 293 (1983) ("'the appellate court should give

[2] The Honorable Mark Sanders presided over the initial appearance.

weight to the [circuit] court's decision, although the [circuit] court's decision is not controlling'") (citation omitted).

¶12 The analysis set forth in ***Bangert***, 131 Wis. 2d at 274-75, relating to a circuit court's acceptance of a guilty plea in criminal proceedings, is used to evaluate a challenge to a plea entered in a TPR proceeding. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. When challenging a no contest plea, the party must make a *prima facie* showing that the circuit court violated its duty to inform the party of his or her rights, and the party must allege that he or she did not know or understand the rights being waived. *See* ***id.*** If the party successfully makes a *prima facie* showing, the burden shifts to the State to establish by clear and convincing evidence that the parent "knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.***

¶13 L.H.H. asserts that he was not informed that he would be found unfit as a parent as a result of his no contest plea. "[I]n order for no contest pleas at the grounds stage to be entered knowingly and intelligently, parents must understand that acceptance of their plea will result in a finding of parental unfitness." ***Oneida Cty. Dep't of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122. Generally, when the record establishes that the circuit court's colloquy fails to demonstrate a parent's understanding that a no contest plea will result in a finding of parental unfitness, there is sufficient grounds to conclude that the parent established a *prima facie* case that the plea was not knowing, intelligent or voluntary. *See* ***id.***, ¶12. However, we conclude that under the facts of this particular case, the record establishes that L.H.H.'s plea was knowing, voluntary and intelligent despite the circuit court's oversight.

¶14 The circuit court acknowledged that it did not use "magic words," as it should have, to establish L.H.H.'s understanding that a no contest plea would result in a finding of parental unfitness. However, the record establishes that L.H.H. nonetheless understood the consequences of entering a no contest plea. First, at the initial appearance, the circuit court explained the meaning of a no contest plea at length and established that L.H.H. understood:

> The second potential outcome of the grounds phase of every termination of parental rights case is something called an agreement or stipulation, that there is a reason to terminate parental rights. That's what happens when a parent comes to court and says to me, Judge, I'm not agreeing to terminate my parental rights, but I will agree or at least I'm not going to contest that the State can prove at least one of the grounds, one of the reasons that they allege in the petition.
>
> If a parent tells me that, again, I have a conversation with them to understand what they are doing, to make sure they are doing it for the right reasons. If they do and they are, I'll accept their agreement. There is a reason to terminate their parental rights.
>
> I then take some testimony from the State to make sure they actually had evidence….
>
> *Now, if I do that, by law I also have to find that that parent is unfit. Here's why that is important. First, that unfitness finding means we can go to the second phase of the proceeding, to that dispositional hearing. The second thing it means is that under some circumstances the State can try to use that unfitness finding to try to terminate that parent's parental rights with respect to other kids in the future. That's why that unfitness finding is important.*
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> In a voluntary consent situation there is not an unfitness finding.
>
> *In an agreement or stipulation that there is a reason to terminate parental rights, assuming the State has enough evidence, then there would be an unfitness finding.*
>
> So that's the second potential outcome of the grounds phase in every termination of parental rights case….

(Emphasis added.)

¶15 Second, when L.H.H. entered his no contest plea, the circuit court engaged in a thorough colloquy with L.H.H., in which it explained all of the rights L.H.H. would be giving up, explained the purpose of the disposition hearing, and established that L.H.H.'s decision was knowing, voluntary, intelligent, and a result of consultation with his counsel. L.H.H. indicated that he understood all of the rights he was giving up, that his plea was knowing, intelligent and voluntary, and confirmed that he consulted with counsel prior to entering his plea. When the court actually made its finding of unfitness, L.H.H. did not object or express any sort of surprise on the record.

¶16 Finally, at the remand hearing, L.H.H. admitted to having at least two meetings with counsel, but was unable to remember the details of those meetings and could not remember whether counsel discussed the issue of unfitness with him. Counsel testified that his standard practice involved explaining to clients "that the judge is required under the law to make a statutory finding of unfitness. I will tell him that the judge will actually use those words and that he shouldn't be upset by that…. I will say that [the judge] will tell you that he's not prejudging the case by using those words but he's required by law to enter that statutory finding of unfitness." The circuit court found counsel credible and found it likely that counsel appropriately advised L.H.H. When a circuit court sits as a fact finder, it is the circuit court's role to assess the credibility of witnesses, ***Fidelity & Deposit Co. of Maryland v. First National Bank of Kenosha***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980), and the weight to be given to each witness's testimony, ***Milbauer v. Transport Employes' Mutual Benefit Society***, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). We will not overrule a circuit court's credibility determination absent a finding that it is "'inherently or patently

incredible,'" or "'in conflict with the uniform course of nature.'" *See* ***Nicholas C.L. v. Julie R.L.***, 2006 WI App 119, ¶23, 293 Wis. 2d 819, 719 N.W.2d 508 (citation omitted). Accordingly, we accept the circuit court's finding that counsel properly explained to L.H.H. the consequences of L.H.H.'s no contest plea.

¶17 For the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

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