COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2016AP1827 Cir. Ct. No. 2015TP198

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

D. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DAVID C. SWANSON and LAURA GRAMLING PEREZ, Judges.[1] *Affirmed*.

¶1 DUGAN, J.[2] D.W. appeals the trial court's order entered April 15, 2016, terminating his parental rights to his son, A.W., and the ***Machner*** court order entered on January 6, 2017, denying his postdispositional motion that alleged that trial counsel was ineffective.

¶2 On appeal, D.W. argues that trial counsel was ineffective for failing to call Ar.W., D.W.'s sister and A.W.'s aunt, to testify at the dispositional hearing and for failing to move for a change of A.W's placement to Ar.W., from the foster mother, prior to the termination of D.W.'s parental rights. Additionally, D.W. argues that as the result of the delay between the entry of his plea to the grounds for termination and the hearing to establish the factual basis for the earlier plea (the "prove-up"), his plea was defective.[3]

[1] The Honorable David Swanson presided over the litigation of the petition for termination of parental rights and entered the order terminating D.W.'s parental rights. The Honorable Laura Gramling Perez presided over the ***Machner*** motion hearing and entered the order denying that motion. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). For clarity, the court refers to Judge Swanson as the trial court, and Judge Gramling Perez as the ***Machner*** court.

[2] This is a one-judge appeal pursuant to Wis. Stat. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] In rendering its oral decision on the postdispositional motion, the ***Machner*** court noted that it would not address the claim that the delay in the prove-up for the plea violated due process because appellate counsel had raised that issue only to preserve it as a legal issue before this court.

¶3 The State[4] argues that trial counsel was not ineffective and that D.W.'s plea was knowing and voluntary.

¶4 For the reasons stated below we agree with the ***Machner*** court that D.W. has not established that his trial counsel was ineffective. Additionally, we find that D.W. abandoned his claim that his plea was defective.

BACKGROUND

¶5 A.W. is an eight-year-old boy. He was born on December 9, 2011. His father is D.W. and his mother is J.Y. Since May 2014, when he was three years old, A.W. has been living in foster care.

¶6 The foster care placement took place because A.W. was removed from his parents' home by the Division of Child Protective Services (DMCPS). DMCPS had become involved with the family because of allegations of physical abuse to A.W.'s sister and neglect. The parents' home was dirty, there were many people coming in and out, and the children were going to school with feces and urine on them.

¶7 A.W. was found to be a Child in Need of Protection or Services (CHIPS) in June 2014, and an order placing him outside of his parents' home was entered on January 30, 2015.

¶8 When A.W.'s sister, age five, entered foster care she received a medical examination. The exam revealed that she had genital herpes and further investigation indicated she had been sexually abused. D.W. was identified as the

[4] Because the State and the guardian *ad litem* are united in the arguments on appeal, for ease of reading we will refer to them as "the State."

perpetrator, charged with repeated sexual assault of the same child, convicted on those charges, and sentenced on March 12, 2015, to thirty seven years of initial confinement and thirteen years of extended supervision. He was prohibited from visiting A.W. because of the criminal court's no contact order. Further, A.W. also has alleged that D.W. sexually abused him.

¶9 Before the actual removal from the parents' home, DMCPS implemented two plans to keep A.W. and his siblings safe in his parents' home. D.W.'s mother had been identified as the protective caretaker for the second plan. The abuse and neglect, and later discovered evidence of the sexual assault to A.W.'s sister occurred while D.W.'s mother was responsible for keeping the children safe.

¶10 After placement outside of his parents' home, A.W. lived in two homes before his current placement. The first was an assessment foster home from May 19, 2014, to September 3, 2014; the second was an unrelated adult identified as A.W.'s godmother. This individual asked that A.W. be removed. A.W. has behavior issues, an Individualized Educational Plan at school, sexualized behaviors and wets himself. In December 2014, he went to live with his current foster parent and adoptive resource, T.H.

¶11 A petition to terminate the parental rights of A.W.'s mother, J.Y., and D.W. was filed on June 17, 2015. The first plea hearing was scheduled for July 17, 2015. Both parents appeared, were advised of their rights and requested appointment of counsel. The hearing was adjourned until August 6, 2015, and time limits were tolled.

¶12 On August 6, 2015, J.Y. filed a request for substitution of judge. The case was transferred to the trial court, time limits were tolled, and the hearing was adjourned to August 26, 2015.

¶13 The State filed an amended petition to terminate parental rights and the parents contested the amended petition, reserved their jury trial rights and a final pretrial was scheduled for November 30, 2015. A jury trial was also scheduled for December 7, 2015.

¶14 On the day of the final pretrial, A.W.'s mother, J.Y., voluntarily consented to the termination of her parental rights. D.W. waived his right to contest the child in continuing need of protection or services (continuing CHIPS) claim and the failure to assume parental responsibility claim was dismissed. After questioning D.W., the trial court determined that his waiver was knowing and voluntary and it accepted his no-contest plea. The prove-up was scheduled for December 7, 2015, to be concurrent with the dispositional hearing.

¶15 On December 7, 2015, the parties asked to adjourn the hearing because the guardian *ad litem* was beginning a jury trial in another court. Trial counsel told the court he was also requesting an adjournment because he had just learned of a possible placement resource for A.W. and he needed time to investigate. The prove-up and dispositional hearing was rescheduled for March 2, 2016. On March 2, the guardian *ad litem* was in trial in another court so the entire matter was adjourned to April 14, 2016, with a back-up date of April 28, 2016.

¶16 On April 14, the trial court heard testimony at the prove-up and found there was a sufficient factual basis for D.W.'s no-contest plea, that grounds for termination of D.W.'s parental rights were proven by clear and convincing evidence and that D.W. was unfit. The trial court then conducted the dispositional

hearing, and upon completion ordered the termination of J.Y. and D.W.'s parental rights.

¶17 At the dispositional hearing, D.W.'s defense focused on the issue of whether a family member existed who could assume guardianship of A.W. instead of terminating D.W.'s parental rights. A.W.'s child welfare supervisor, Jessica Reese, testified about the contact DMCPS had with various relatives and explained the procedure DMCPS uses to locate relatives when children enter out-of-home care. Letters are sent to all family members that DMCPS is aware of and in this case the DMCPS case manager sent a letter to D.W. asking him to contact her. Had he responded, she would have asked him about available relatives.

¶18 D.W. questioned Reese about several of D.W.'s relatives. Reese had not spoken to D.W.'s brother, a maternal grandmother, or Ar.W. Reese testified that ongoing case manager Quintella Watts met with D.W. in the Milwaukee County Jail on July 15, 2014 and, to Reese's knowledge, D.W. did not give Watts any names of relatives who would be available to take placement of A.W.

¶19 At the conclusion of the evidence, trial counsel argued against termination of D.W.'s parental rights and urged the court to require DMCPS to further investigate whether the option of placing A.W. with one of D.W.'s relatives was appropriate. The trial court made findings and ordered the termination of D.W.'s parental rights.

¶20 D.W., represented by a different attorney, filed a timely notice of intent to pursue postdispositional relief and a timely notice of appeal. In addition, D.W. filed a motion with this court requesting that this matter be remanded for a determination of whether trial counsel was ineffective because he did not present

Ar.W. as a witness for a relative placement at the dispositional hearing. This court granted his motion and remanded this matter.

¶21 Upon remand, D.W. filed a postdispositional motion seeking a ***Machner*** hearing on his ineffective assistance of counsel allegations and asserting that his plea was defective because of the five-month delay between entry of the plea and the prove-up hearing.[5] After a hearing, the ***Machner*** court determined that trial counsel's performance was not deficient, and that even if it was deficient, there was no prejudice. This appeal followed.

***MACHNER* HEARING**

¶22 D.W. did not testify at the ***Machner*** hearing. Through his attorney, he called his trial counsel as his first witness. Trial counsel testified that he was referring to D.W.'s brother, D.J., when he told the court on December 7, 2015, that he had learned of a possible relative placement for A.W. He testified that he made efforts to contact D.J. between December 7, 2015, and the April 14, 2016, dispositional hearing, leaving him messages, but he never heard from him.

¶23 Trial counsel also testified that D.W. mentioned his mother as a placement option. However, trial counsel recognized that D.W.'s mother was not a viable option because of her health issues, and because she had not followed through with the safety plan in effect when the abuse and neglect of A.W.'s sister occurred

¶24 Trial counsel did not learn of any other potential relative placements until the day of the April 14, 2016, dispositional hearing. Ar.W.'s name came up

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

for the first time when trial counsel was at court for the hearing and waiting for D.W.'s mother to arrive. When D.W.'s mother did not appear he called her and she told him to talk to her daughter, Ar.W. He called Ar.W. but was not able to reach her. Trial counsel testified that D.W. had never mentioned Ar.W. as a possible placement. He also testified that his strategy was to present a relative at the dispositional hearing who might be interested in a permanency placement for A.W., as D.W.'s only hope.

¶25 Trial counsel further explained that he did not file a petition for transfer of guardianship or a formal change in placement because he did not have anyone who was going to come forward and accept responsibility for A.W.

¶26 D.W. also called Ar.W. as a witness. Ar.W. testified she first became interested in placement in 2015 and by the time she talked to D.W.'s CHIPS attorney about it, he said that he no longer represented D.W. and the case had gone to termination of parental rights. She never talked to trial counsel prior to the dispositional hearing. She testified that she works between fifty to sixty hours each week, has three children, and hoped to move to a bigger place to have room for A.W. Ar.W. also testified that she did not see A.W. from May 2014 until November or December 2016.

¶27 D.W.'s next witness was Watts, A.W.'s ongoing case manager, who had been on maternity leave when the dispositional hearing occurred. Watts was assigned to A.W.'s case in October or November of 2014 and, before taking over the case, worked several months with the former ongoing case manager, Jill Collins. On July 14, 2014, she and Collins met with D.W. while he was incarcerated. He mentioned Ar.W. as a possible placement. Collins investigated and decided Ar.W. was not appropriate for placement.

¶28 The State called Reese who confirmed that DMCPS had investigated two of D.W.'s relatives, his mother and Ar.W., and decided they were inappropriate for placement. She testified that D.W.'s mother was found to be inappropriate for placement because she failed to protect the children during the time that she was the protective provider for A.W. and his sister who was found to have a sexually transmitted disease.

¶29 Reese testified that Ar.W. was found to be inappropriate for placement based on her statements to the case workers, Watts and Collins. Ar.W.'s position was that she did not believe her mother would have neglected to protect the children from physical harm or sexual abuse and that D.W. would never have physically or sexually assaulted any of the children. Ar.W. was "very adamant" that none of the abuse occurred. Reese then explained that,

> if this caregiver does not believe that their sibling sexually assaulted a child or physically assaulted a child, the fear then or the concern then would be that that caregiver then is going to allow contact or unsupervised contact or inappropriate contact that's not going to be supervised or seen over. In that case, additional abuse could occur. Additionally, if the child believes that this has happened and is displaying behaviors, such as [A.W.] has, the other concern, if the caregiver doesn't believe it, that they're not going to get him the treatment that he would need.

¶30 At the conclusion of the hearing, the ***Machner*** court found that trial counsel was not deficient, and that even if counsel was found to be deficient, D.W. was not prejudiced. The ***Machner*** court made extensive oral findings and conclusions, which will be referred to in greater detail in this court's discussion of the issues D.W. raises on appeal.

DISCUSSION

I. D.W. Received Effective Assistance of Counsel.

A. Standard of Review

¶31 D.W. asserts that that trial counsel was deficient in failing to appropriately pursue a possible placement of A.W. with a relative and a change of placement earlier in the termination of parental rights case before the actual dispositional hearing. "Wisconsin has adopted the United States Supreme Court's two-pronged ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] test to analyze claims of ineffective assistance of counsel." ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736, 751 (2015), *cert. denied,* 136 S. Ct. 1451 (2016). Wisconsin has extended the ***Strickland*** test to involuntary TPR proceedings. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992).

¶32 "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Williams***, 364 Wis. 2d 126, ¶74. "Deficient performance means that defendant's counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 686). "Prejudice means that, but for counsel's unprofessional errors, there is a reasonable probability that the trial's outcome would have been different." ***Id.*** (quoting ***Strickland***, 466 U.S. at 694). "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 694). "[C]ourts may apply the deficient performance and prejudice tests in either order, and may forgo the deficient performance analysis altogether if the defendant has not shown prejudice." ***Id.***

¶33 The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). "Thus, the trial court's findings of fact, 'the underlying findings of what happened,' will not be overturned unless clearly erroneous." ***Id.*** (citations omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." ***Id.*** at 128. "[C]ourts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.***

B. Trial Counsel Acted Appropriately in Trying to Identify an Appropriate Relative Who A.W. Could be Placed With.

¶34 This court will not overturn the ***Machner*** court's findings of fact, "the underlying findings of what happened," unless they are "clearly erroneous." *See* ***Johnson***, 153 Wis. 2d at 127. Here the ***Machner*** court made detailed findings of fact and found that trial counsel was not ineffective. Significantly, the ***Machner*** court stated, "so I find today that all of [trial counsel's] testimony is true, that the facts as I've just outlined are, in fact, facts that have been established in this case."

¶35 Although D.W. told trial counsel about two relatives who might be appropriate placements for A.W.—his brother, D.J. and his mother, he did not tell trial counsel about his sister. Trial counsel first became aware that D.W. had a sister the morning of dispositional hearing, and that information came from D.W.'s mother.

¶36 The record establishes that prior to the dispositional hearing, trial counsel worked with the information that D.W. had provided without finding a relative appropriate for placement. The ***Machner*** court noted that it hadn't heard anything about D.J. during the hearing except that trial counsel had made several phone calls to determine whether he was willing to be considered for placement of A.W. and got no response.

¶37 D.W. also told trial counsel about his mother as a possible relative placement. However, trial counsel testified that based on his independent review of discovery, he had determined that D.W's mother was not a viable option due to her health issues, and because she did not follow through with the safety plan that was in effect to protect A.W. and his sister when they were in her custody, as established by the abuse and neglect of A.W.'s sister during that time.

¶38 The ***Machner*** court specifically found that trial counsel,

> took appropriate steps to review many, many pages of discovery in this case, that likely, among other things, that he did that with an eye toward identifying other potential family placement, family members to take placement of [A.W.] and that he did not find other potential family placements, other than [D.W.'s] mother, who we've already discussed.

¶39 With respect to Ar.W., trial counsel was expecting D.W.'s mother to appear at the April 2016, dispositional hearing and when she didn't, he called her and she told him to call her daughter, Ar.W. Once he learned of Ar.W.'s existence, trial counsel immediately attempted to contact her by phone. He also explained that had he known where Ar.W. was and how to contact her, he would have tried to get her to attend the hearing. However, he was not able to talk with her until some time later after the dispositional hearing. The ***Machner*** court found that, although Ar.W. had called an attorney prior to the dispositional hearing, she

called D.W.'s former CHIPS counsel not D.W.'s trial counsel. These factual findings are not clearly erroneous and, therefore, they are accepted by this court. *See* ***Johnson***, 153 Wis. 2d at 127**.**

¶40 The ***Machner*** court found that trial counsel was not deficient because he did all that he could based on the information he had to locate potential family members who might be willing to have A.W. placed with them. It also found that, at the dispositional hearing, trial counsel had "argued vehemently for the possibility of placement with a relative and transfer of guardianship to a relative, [and] that he argued appropriately with the information that he had available to him." The ***Machner*** court went on to hold:

> Based on all of that, I do not conclude that [trial counsel's] performance was deficient. I find that it absolutely was not outside of the range of professionally competent assistance. In fact, I believe that [trial counsel] did everything that he could potentially have done with the information that he received from his client. And he took all possible steps to obtain additional information from his client and from other family members.

The ***Machner*** court clearly found trial counsel's conduct was not deficient.

¶41 Having independently considered the question, we agree and find that trial counsel was not deficient in attempting to locate D.W.'s relatives, particularly since D.W. never told trial counsel that he had a sister.

C. Even if Trial Counsel was Deficient in Not Having Ar.W. Present at the Dispositional Hearing D.W. was Not Prejudiced.

¶42 Although the ***Machner*** court said that it need not address the issue of prejudice it found "there was not prejudice in this case either." The ***Machner*** court considered that, under the circumstances, trial counsel had limited arguments

he could make because he did not have any family members he could present to the trial court to be considered for a family placement. Trial counsel testified that, without D.W.'s mother or Ar.W. in attendance, his strategy at the dispositional hearing was to argue to the trial court that he had just learned that D.W. had a sister who might be interested in a permanency placement of A.W. or in pursuing a guardianship of him. Trial counsel requested an adjournment of the hearing to allow him to present Ar.W.

¶43 Moreover, the ***Machner*** court reviewed the transcript from the dispositional hearing and found that "[trial counsel] argued vehemently for the possibility of placement with a relative and transfer of guardianship to a relative, [and] that he argued appropriately with the information that he had available to him."

¶44 Additionally the ***Machner*** court considered whether having D.W.'s relatives at the dispositional hearing would have affected the trial court's decision to terminate D.W.'s parental rights. First, the ***Machner*** court noted that DMCPS had previously looked into all the family members whom D.W. proffered at the ***Machner*** hearing with the exception of D.J. With respect to D.J, the ***Machner*** court commented, "[s]o there's no evidence in front of me that [D.J.] has ever come forward, has ever expressed a desire to take placement of [A.W.], or is any way an appropriate placement for [A.W.]." It then stated, "so I can only conclude that he has not come forward and that he would not likely be an appropriate placement for [A.W.]." Moreover, on appeal, D.W. does not argue that trial counsel was ineffective regarding D.J.

¶45 With respect to D.W.'s mother, the DMCPS supervisor testified at the ***Machner*** hearing that D.W.'s mother was found to be an inappropriate

placement because she failed to protect the children during the time that she was the protective provider for A.W. and his sister who was found to have a sexually transmitted disease. In its decision, the ***Machner*** court stated, "[a]nd I believe that had [the trial court] heard any additional information about [D.W.'s mother], [the trial court] would have come to that same conclusion." These factual findings are supported by the record.

¶46 With respect to Ar.W., the ***Machner*** court found that, although trial counsel did not learn about her existence until the morning of the dispositional hearing, DMCPS had investigated her as a possible relative placement. The ***Machner*** court then found that Ar.W. told the case worker that she did not believe that D.W. sexually assaulted A.W.'s sister and that her mother would not have neglected the children. The ***Machner*** court then concluded, "I think that it is reasonable for the DMCPS to make a decision that [Ar.W.] was not an appropriate placement for the children."

¶47 The ***Machner*** court explained:

> [T]here has been considerable trauma in this family, that a sister of [A.W.] has been proven to have been very significantly sexually abused by [D.W.], that [A.W.] himself ha[s] made allegations that are not proven at this point, but that [A.W.] does exhibit significant indicators of trauma for whatever reason. And I don't believe that [Ar.W.]— although, I believe she is well meaning and has come forward in good faith to seek to take the children—I don't believe that [Ar.W.] has an understanding of [A.W.'s] needs, an understanding of the family dynamics, and the ability at this time to appropriately care for [A.W.] And I believe that that would have been [the trial court's] conclusion as well, had [it] heard further testimony about [Ar.W.]

¶48 Addressing the dispositional order, the ***Machner*** court stated:

> I note that [the trial court] heard testimony that [A.W.] was in a good placement, not an extremely long-term placement, but in a treatment foster home that was trained and qualified to address his special needs, that [A.W.] did have significant, special needs. And based on all of that, I believe that [the trial court] would have come to the same conclusion and made the same order, even had he heard testimony from [Ar.W.] or [D.W.'s mother] or any other family members, and even had there been additional information for [trial counsel] to present to [the trial court].

The ***Machner*** court then found that even if trial counsel's performance was deficient, there was no prejudice.

¶49 We agree. The trial court was charged with determining the placement for A.W. that would be in the child's best interests. None of the information disclosed about potential placement with a family member would cause this court to conclude that there was a reasonable likelihood that the outcome of the dispositional hearing would have been different.

II. D.W. Abandoned his Argument that his Plea was Defective.

¶50 D.W. argues, without citing any authority, that his plea was defective because his plea was taken on November 30, 2015, but the prove-up hearing was not held until April 14, 2016.

¶51 After summarizing the law regarding challenging pleas, D.W. states:

> Here, there was a nearly five-month time lag between when D.W. pled no contest to the ground of Continuing CHIPS and when the State's "prove-up" (establishing the factual basis for this ground that D.W. agreed not to contest) took place. If the factual basis for the plea was procedurally incomplete or inadequate, then the no-contest plea that D.W. entered was not done so knowingly, intelligently, or voluntarily.

D.W. fails to cite any facts or make any argument that the factual basis for the plea was procedurally incomplete or inadequate.

¶52 D.W. fails to develop his argument or point to any legal authority to support his assertion that a several-month time lag between the taking of the plea and the prove-up somehow affects the validity of the plea. Issues raised on appeal but not argued are deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W. 2d 285 (Ct. App. 1998). In ***A.O. Smith***, this court stated, "[h]ence, we interpret this well-known rule of law to mean that in order for a party to have an issue considered by this court, it must be raised and argued within its brief." *See* ***id.*** This court went on to explain that "a party has to adequately, and with some prominence, argue an issue in order for this court to decide it. It is insufficient to just state an issue on appeal without providing support for the position and providing legal authority supporting the position." *See* ***id.***

¶53 Because D.W. merely stated that there is an issue whether his plea was defective, but fails to provide any factual or legal authority supporting that position, we find that he has abandoned the argument.

CONCLUSION

¶54 For the reasons stated above, we find that trial counsel's performance was not deficient and, even if it was, there is no prejudice. Additionally, we find that D.W. abandoned his argument that his plea was defective.

By the Court.—Orders affirmed.

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