COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 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 Nos. 2017AP612
2017AP613

Cir. Ct. Nos. 2015TP302
2015TP303

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K. P.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K. P.,

RESPONDENT-APPELLANT.

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

¶1 BRENNAN, P.J.[1] K.P., the father of A.P. and J. P., appeals orders terminating his parental rights to both children.[2] The trial court found K.P.'s failure to appear on the day of the jury trial egregious and without justifiable excuse, and it struck his contest posture and proceeded to prove-up and disposition. The trial court found that the disposition that was the in the children's best interests was the termination of parental rights and adoption. K.P. argues that the trial court erroneously exercised its discretion in finding him in default because his conduct was not egregious. Specifically, he argues that because he showed up for some hearings, moved for visitation in March 2016, granted consent for A.P.'s therapy, and showed up for the dispositional hearing, his failure to appear for the jury trial cannot warrant a default finding.

¶2 For the reasons that follow we reject his argument and affirm the trial court orders.

[1] This appeal is decided by one judge 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.

[2] These matters were handled together by the circuit court and this court's review of the records and briefs indicates that consolidation on appeal is appropriate. *See* WIS. STAT. § 809.10(3).

BACKGROUND

The CHIPS orders.

¶3 The children who are the subjects of this termination of parental rights (TPR) petition are A.P., who was eight years old at the time the petition was filed, and J.P., who was seven years old. Neither child has ever lived with K.P., and he had no involvement or contact with the children during the periods of time when they were in out-of-home placement.[3]

¶4 In July 2014, a court granted temporary physical custody and placement to the Milwaukee Bureau of Child Welfare; K.P. was incarcerated at that time. A CHIPS order was entered for both girls February 24, 2015, naming K.P. and the girls' mother. The order specified a requirement for K.P., as an incarcerated parent, to have "at least monthly written contact" absent a court order to the contrary. K.P. did not do so. There was no court order prohibiting contact between K.P. and the children.

[3] A.P. had been placed in out-of-home placement at the age of three months, and J.P. had been removed from the home at birth. The first time CHIPS orders were entered for A.P. and J.P. (on February 25, 2008, and October 2, 2008, respectively), K.P. was incarcerated. The children were initially placed with their mother's grandmother. She died in February 2014. The children were returned to their mother and spent approximately three months there before the mother filed a *pro se* CHIPS petition, and the children were removed from the mother's home again. The three-month period in 2014 during which the girls were placed with the mother was the only time A.P. had been in in-home placement since she was three months old, and the only time J.P. had been in in-home placement since birth. The mother failed to comply with the CHIPS order, and she did not contest the petition for termination of parental rights petition filed against her in 2015. Her parental rights to A.P. and J.P. were terminated, and that termination was not appealed. This appeal concerns solely that portion of the order terminating K.P.'s parental rights.

The TPR petition and the hearings.

¶5 On October 19, 2015, the TPR petition in this case was filed, alleging grounds for termination as to both K.P. and the mother of the children. As to K.P., the State alleged abandonment under WIS. STAT. § 48.415(1)(a)2[4] and failure to assume parental responsibility under WIS. STAT. § 48.415(6).[5] K.P. was incarcerated at the time of the filing.

¶6 The factual basis offered as grounds for abandonment was that "[a] dispositional order was entered as to [A.P.] and [J.P.] on February 24, 2015, and [K.P.] has had no contact with the [children] from February 25, 2015 to October 13, 2015."

¶7 The State offered the following factual basis as grounds for failure to assume parental responsibility: that K.P. had "not lived with the children, visited them or inquired about the children's well-being"; that he had "a significant and long-standing criminal history which has repeatedly resulted in his being unavailable to care for his children"; that he had not attended any appointments for the children's care while they were in out-of-home care; that he had not provided for their support; and that he had attended no programming or services in

[4] To establish abandonment under WIS. STAT. § 48.415(1)(a)2 the State must prove the following:

> That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by [law] and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

[5] Such failure is established "by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6).

connection with the children. The petition also noted that A.P. and J.P. had spent "a substantial portion of their lives in out-of-home care."

¶8 For the first two calendared hearings in this case, the trial court ordered that K.P. be produced from custody to be brought to court, and he was present. Each time, the initial hearing was adjourned due to lack of appointed counsel.

¶9 For the third attempt at the initial appearance, on January 28, 2016, appointed counsel was in place and present, but K.P., who by then was no longer in custody, failed to appear. Trial counsel represented to the court that K.P. had contacted him to inform counsel that he would be "about fifteen minutes late." There is no indication in the record that K.P. arrived. The State requested that the court take a default finding as to K.P. "under advisement," and the court did so. The trial court warned K.P.'s trial counsel that if K.P. "is not on time for the next court date, he will most likely be found in default and lose his right to contest the petitions."

¶10 At the February 16, 2016 hearing, K.P. was present, and the trial court stated to K.P. directly:

> Mr. [P.], you do have to be here for every court date in person. You did miss a court date last time around. If you're not here for any future court date, you could be found in default and lose your right to contest the petitions.

¶11 While K.P. was present, dates were set for a visitation hearing, a final pretrial hearing, and a jury trial, set for June 6, 2016. K.P. was present for the visitation hearing on March 17, 2016, and also at the final pretrial hearing on May 26, 2016. At the final pretrial hearing, the trial court warned K.P. as follows:

> [Y]ou have to be here at 9:00 a.m. on June 6 and every day that week. If you are not here, the court may find you in default, which means you would lose the right to fight the petition in each case, so be on time on Monday.

¶12 On June 6, the case was called at 11 a.m. K.P.'s counsel was present. K.P. was not present. Trial counsel represented to the trial court that he had spoken to K.P. by phone at 9:20 a.m., and K.P. had stated at that time that he was "on his way" but had taken the wrong bus. Trial counsel stated that after that point, he had repeatedly tried to call K.P. but had not been successful in reaching him.

¶13 The State and guardian ad litem (GAL) both sought to have K.P. found in default. The trial court made the following findings:

> It's 11:00. We were set for a 9:00 trial. [K.P.] is not here. The court finds that egregious with no clear justifiable excuse. The court finds him in default. As further grounds he was ordered to appear. He's failed to appear. As an additional basis for default, [the DMCPS supervisor on the case] testified he's not visiting with the children, not involved with services -- any services. I'm not sure why he's contesting. He's not involved in any way. We are going to set a disposition date.

¶14 The trial court scheduled the disposition hearing.[6] K.P. attended the disposition hearing, which occurred over two days, with counsel. He never asked the circuit court to vacate the default, never filed a motion or an affidavit to explain the reasons for his absence on the June 6 trial date. After prove-up, the trial court found K.P. unfit under WIS. STAT. §§ 48.415(1)(a)2 and (6). The trial

[6] The trial also concerned the parental rights of the mother of A.P. and J.P. There is no appeal of that part of the TPR order.

court also found that it was in the best interest of A.P. and J.P. to terminate K.P.'s parental rights. This appeal follows.

DISCUSSION

1. The trial court did not erroneously exercise its discretion in finding K.P. in default.

a. Standard of review and relevant law.

¶15 "[A] circuit court has both inherent authority and statutory authority under WIS. STAT. §§ 802.10(7), 804.12(2)(a), and 805.03 to sanction parties for failing to obey court orders." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768. "Pursuant to this authority, a circuit court may enter a default judgment against a party that fails to comply with a court order." ***Id.*** "The decision whether to enter a default judgment is a matter within the sound discretion of the circuit court." ***Id.*** at ¶18 (citation omitted). It is not an erroneous exercise of discretion to default a party if (1) the party has been given notice that default is a potential sanction, (2) the party has failed to comply with a court order, (3) the party's failure to comply is found to be in bad faith or egregious, and (4) the party had no justifiable excuse. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991), *overruled on other grounds by* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898. Conduct may be "so extreme, substantial and persistent that it can properly be characterized as egregious" even if it is unintentional. ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995)

¶16 Where there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no "clear and justifiable excuse" for the party's noncompliance, a reviewing court

will uphold the default finding. ***Id.*** Once these factors are established, it is within the circuit court's discretion to dismiss the action. ***Id.*** We will affirm the trial court's exercise of discretion unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances. ***Erbstoeszer v. American Cas. Co.***, 169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992).

b. K.P.'s argument.

¶17 K.P. argues that it was an erroneous exercise of discretion for the trial court to strike his contest posture because his failure to comply with the court's order was not egregious. He argues that he showed up for some hearings and that his case is therefore distinguishable from cases such as ***State v. Shirley E.***, 2006 WI 129, ¶69, 298 Wis. 2d 1, 724 N.W.2d 623, where the parent's egregious behavior was described as "protracted indifference" and a "consistent failure to show up for hearings[.]" In addition, he offers the following facts in support of his argument that his conduct does not rise to the level of egregiousness:

- he telephoned his trial counsel on January 28 and on June 6 to inform counsel that he would be late to the hearings;

- he had unsuccessfully attempted to establish visitation with A.P. and J.P. by motion and hearing;

- he agreed to sign a consent form for A.P. to receive therapy; and

- he showed up for the dispositional hearings.

c. K.P.'s egregious conduct.

¶18 We start by noting that the citation to ***Shirley E.*** is unhelpful. In that case, the finding of egregiousness was based on the parent's failure to appear in person at any hearing at all, *see* ***id.*** However, ***Shirley E.*** does not set a threshold or minimum number of no-shows before a court can find a party's conduct egregious.

¶19 Second, K.P.'s brief and argument fails to appreciate the applicable standard of review, which requires that we affirm the trial court decision unless the trial court applied the wrong law or reached an unreasonable conclusion.

¶20 Third, the repeated warnings the trial court delivered to K.P. personally and through counsel about the potential for default were clear and are on the record.

¶21 Fourth, K.P.'s phone calls to counsel are not an acceptable substitute for appearing in person as ordered by the court. Further, on the date of the jury trial, K.P. was apparently in touch with his trial counsel shortly after 9:00 a.m. but was not reachable thereafter. Even though the case was delayed two hours and was not called until 11:00 a.m., K.P. had neither arrived nor been in touch with counsel with an update. Nor are the other actions he mentions relevant to a determination of whether his failure to appear after multiple in-person warnings constituted egregious conduct.

¶22 Under the applicable standard of review, we conclude that the trial court properly applied the law and made a reasonable determination under the existing facts and circumstances that K.P.'s conduct was egregious. *See* ***Erbstoeszer***, 169 Wis. 2d at 644.

Accordingly, the orders of the trial court is affirmed.

By the Court.—Orders affirmed.

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