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 No. 2016AP2045
2016AP2046

Cir. Ct. No. 2015TP114
2015TP115

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. W.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

M. W.,

RESPONDENT-APPELLANT.

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

¶1 KESSLER, J.[1] M.W. appeals from an order terminating her parental rights to two of her children, Ma. W. and D.T. She also appeals from the order denying her motion for postdispositional relief. We affirm.

BACKGROUND

¶2 On April 29, 2015, the State filed a petition to terminate M.W.'s parental rights to Ma. W. and D.T., alleging that the children were in continuing need of protection and services and that M.W. failed to assume parental

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

responsibility.[2] At a plea hearing on July 30, 2015, M.W. entered a contest posture and requested a jury trial.

¶3 At a pretrial conference on February 8, 2016, M.W.'s counsel told the court that M.W. wished to plead no contest to the continuing CHIPS ground and requested that the failure to assume parental responsibility ground be dismissed. Neither the State nor the guardian ad litem objected. The circuit court conducted a colloquy with M.W., during which the court assessed M.W.'s educational background, confirmed that M.W. reviewed the petition to terminate her parental rights with her counsel, and explained the rights M.W. was giving up, including the right to a jury trial. The court also confirmed that M.W. understood the elements of continuing CHIPS, telling M.W.:

> What that means is the State's alleged that a dispositional order[] in those two cases contain certain goals and conditions that you are to meet…. That you failed to meet those goals and conditions and it is substantially unlikely that you would meet them in the next nine months…. That is the allegation to which you are entering a no contest plea today?

(Some formatting altered.) M.W. responded in the affirmative. The court accepted the plea subject to the State establishing a factual basis. Due to other matters on the court's calendar, the court adjourned the establishment of the factual basis to March 15, 2016.

¶4 On that date, M.W. failed to personally appear in court, but ultimately participated in the morning session of the plea hearing by telephone. The circuit court ordered M.W. to be present in the courtroom later that day for the

[2] M.W.'s attorney moved this court to consolidate these appeals. We granted the motion on April 14, 2017.

contested disposition hearing. The State proceeded to establish the factual basis for the continuing CHIPS ground by presenting the TPR court report, eight exhibits, and testimony from M.W.'s case manager, Kimberly Keegan. Keegan testified that since she began working on M.W.'s case in 2013, the children had been out of M.W.'s home. Keegan also testified that M.W. failed to meet the conditions for her children's return. Particularly, M.W. failed to: undergo proper treatment for her mental health issues; take her medications; maintain stable housing; fully cooperate with AODA programming; complete domestic violence programming; be forthcoming about her relationships; and maintain continuous contact with her children. Keegan stated that M.W. was unlikely to meet the conditions for the children's return within the following nine months because M.W.'s history showed an inability "to make changes on a long term basis," and that M.W. exhibited a pattern of behavior that rendered the children unsafe with her on a permanent basis.

¶5 During Keegan's testimony, the circuit court heard M.W. laughing over the phone. The court asked: "I'm sorry, [M.W.]. We're hearing some laughter. Are you listening to what's going on in court?" M.W. told the circuit court that she was listening, but that Keegan was "not truthful" because M.W. "did some AODA." M.W. asked the circuit court if she could hang up the phone and come down to the court because "I'm not liking the fact that what's being said is not truthful." The circuit court told M.W. that she could hang up, but that it would continue with Keegan's testimony. M.W. remained on the line. After Keegan's testimony was complete, the circuit court adjourned the hearing to allow M.W. to come to court and confer with her lawyer.

¶6 The hearing continued in the afternoon, with M.W. present in the courtroom. M.W.'s counsel told the court that although M.W. "believes that she did complete a number of things that Ms. Keegan said she had not completed … there are things such as the housing situation that led … my client to make her no contest plea." Counsel told the court that M.W. felt Keegan's testimony was untruthful, but that M.W. admits "there were certain things that were not done, primarily [the] housing issue and [the] therapy issue." Therefore, counsel stated, M.W. still wished to plead no contest. The circuit court asked M.W. if counsel's explanation was correct, to which M.W. responded, "[y]es." The circuit court then found a sufficient factual basis for the elements of the continuing CHIPS ground, accepted M.W.'s plea, and found M.W. unfit.

¶7 The matter immediately proceeded to the dispositional phase, where the circuit court heard from the children's foster mother and again from Keegan. The foster mother testified that the children were well-adjusted and well-bonded to their foster parents, that the children's emotional and psychological needs were being met, that the foster parents intended to adopt the children, and that the foster parents intended to maintain contact with M.W. Keegan also testified that the foster parents and M.W. had a plan for frequent contact between M.W. and the children, though Keegan noted that the foster parents could stop contact between M.W. and the children when they chose. Keegan testified that it would be unlikely for the foster parents to break contact with M.W. because the foster parents believed that ongoing contact between the children and M.W. was good for the children.

¶8 Ultimately, the circuit court found that terminating M.W.'s parental rights was in the best interest of the children.

¶9 On March 18, 2016, M.W. filed a notice of intent to pursue post-dispositional relief. On October 11, 2016, she filed a Notice of Appeal. On November 16, 2016, M.W. filed a motion for remand with this court, asking that we remand the matter to the circuit court for a determination of whether her plea was knowing, voluntary, and intelligent. M.W.'s motion also alleged that the circuit court terminated her parental rights despite finding a substantial relationship between M.W. and her children. She also asked this court to remand for a determination of whether "a sufficient undisputed factual basis exists to support the plea" because M.W. "repeatedly indicated disagreement that she had failed to meet certain conditions, and repeatedly indicated that the social worker was not being truthful." On February 17, 2017, this court remanded the matter for a fact-finding hearing.

¶10 Post-disposition, M.W. argued that: (1) her plea was not knowing, voluntary, and intelligent because the facts the circuit court relied on to accept the plea were determined after M.W.'s plea colloquy and were not undisputed; (2) her due process rights were violated because the court established the factual basis for the plea after conducting the colloquy; (3) counsel was ineffective for failing to object to testimony from both Keegan and the foster mother indicating that the foster parents planned to maintain contact between the children and M.W. if termination were to occur; and (4) the circuit court's reliance on this testimony was erroneous.

¶11 Following a hearing on the motion, the circuit court denied M.W.'s motion for post-dispositional relief. The court found that M.W. failed to establish a *prima facie* case that her plea was not knowingly, voluntarily, and intelligently made. The court also stated that it was "not necessary for the Court and the party

to come to a meeting of the minds as to exactly which facts are true and not true in order for there to be a sufficient factual basis for the plea." The court also found that counsel was not ineffective, and that it was not an error for it to consider the testimony of the foster mother and case worker when determining the best interest of the children.

¶12 This appeal follows.

DISCUSSION

¶13 On appeal, M.W. raises the same issue she raised in her post-disposition motion.

M.W.'s plea was knowing, voluntary and intelligent

¶14 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 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. When a parent enters a no contest plea that a ground exists to terminate his or her parental rights at the grounds phase, WIS. STAT. § 48.422(7) requires the circuit court to:

> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified....

> (br) Establish whether any person has coerced a birth parent [into making an admission.]
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

See ***id.*** Additionally, the parent must have knowledge of the constitutional rights given up by the plea. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶25, 293 Wis. 2d 530, 716 N.W.2d 845.

¶15 When assessing a claim that the circuit court failed in its mandatory duties under WIS. STAT. § 48.422(7), we follow the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See* ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. A parent must make a *prima facie* showing that the circuit court violated its mandatory duties under § 48.422(7) and that the parent did not know or understand the information that should have been provided by the circuit court. ***Therese S.***, 314 Wis. 2d 493, ¶6. If the parent is able to make such a *prima facie* showing, the burden shifts to the State to show by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently waived the right to contest the allegations in the petition. ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

¶16 Whether a parent presented a *prima facie* case sufficient to allege that she did not know or understand information that should have been provided in the circuit court's colloquy is a question of law that we review *de novo*. *See* ***Therese S.***, 314 Wis. 2d 493, ¶7. We look to the entire record and the totality of circumstances to determine whether the circuit court's actions were sufficient. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42. Having looked at the record and the totality

of the circumstances, we conclude that M.W. did not make a *prima facie* showing here.

¶17 The heart of M.W.'s argument is that the circuit court established a factual basis for accepting the plea after conducting the colloquy and that M.W. disagreed with parts of that factual basis. Noticeably, however, M.W. does not argue that the colloquy failed to comply with the mandates of WIS. STAT. § 48.422(7). Accordingly, M.W.'s no contest plea must stand.

¶18 The record establishes that the circuit court had multiple discussions with M.W. about her colloquy. The first occurred on February 8, 2016, when M.W. changed her plea to a no contest plea on the continuing CHIPS ground. As stated, the circuit court summarized the grounds alleged in the petition, assessed M.W.'s mental health, assessed her understanding of the rights she was giving up, advised her of her right to participate in the disposition phase, explained the potential outcomes, and told M.W. that she would be found unfit. M.W. indicated that she understood. The court asked M.W. whether she needed more time to discuss her plea with counsel, to which M.W. responded that she did not need more time. The court accepted the plea subject to the State establishing a factual basis.

¶19 On March 15, 2017, the circuit court heard testimony regarding the factual basis for the continuing CHIPS ground. Although M.W. disagreed with the portions of Keegan's testimony regarding M.W.'s failure to complete AODA treatment, M.W. also admitted, through counsel, that she failed to meet other conditions for her children's return. Counsel told the court that those failures influenced M.W.'s decision to plead no contest to the continuing CHIPS ground.

M.W. also told the court that despite her disagreement with portions of Keegan's testimony, she still wished to plead no contest.

¶20 M.W. has not established that her due process rights were violated because the circuit court established the factual basis for the plea *after* M.W.'s colloquy, nor has she established that the court was required to rely on an undisputed set of facts prior to accepting her plea. By M.W.'s own admission, she failed to complete certain conditions required for the return of her children. The circuit court also confirmed with her multiple times that she wished to plead no contest. Moreover, as the circuit court noted, a no contest plea does not require a party to agree with all aspects of the factual basis establishing the plea, it simply requires a party to acknowledge that sufficient facts are true for the State to prove its case. The record establishes that M.W.'s plea was entered knowingly, voluntarily, and intelligently.

Ineffective Assistance of Counsel and Circuit Court Error

¶21 M.W. contends that her counsel was ineffective for failing to object to testimony from both the foster mother and Keegan that the children will continue to maintain contact with M.W. if the court were to terminate M.W.'s parental rights. M.W. argues that this testimony was inadmissible as being prejudicial and against public policy. She also argued that the admission of the testimony hindered her ability to have a fair dispositional hearing. Along the same lines, M.W. argues that the circuit court erred in considering the testimony at issue. We disagree.

¶22 A parent in a termination of parental rights case is entitled to effective assistance of counsel. ***A.S. v. State of Wis.***, 168 Wis. 2d 995, 1004-05,

485 N.W.2d 52 (1992). To prove ineffective assistance of counsel, a party must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Performance is deficient if it falls below an objective standard of reasonableness. ***Id.*** at 688. To show prejudice, a party must show a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. ***Id.*** at 669. "A reasonable probability is a probability sufficient to undermine any confidence in the outcome" of the proceeding. ***Id.*** at 694.

¶23 We conclude that counsel was not ineffective for failing to object to the testimony at issue because the testimony was admissible as a relevant consideration for the circuit court in determining whether termination was in the best interests of the children.

¶24 The Wisconsin Supreme Court's decision in ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, 234 Wis. 2d 606, 610 N.W.2d 475, essentially kills both of M.W.'s arguments with one stone. In that case, the Wisconsin Supreme Court acknowledged that continued contact between children and their biological families can be a relevant consideration for circuit courts when determining the best interests of children in TPR actions, stating "[i]n its discretion, the [circuit] court may afford due weight to an adoptive parent's stated intent to continue visitation with family members," *see* ***id.***, ¶29. Upon remanding a termination matter back to the circuit court, the court in ***Margaret H.*** noted that the circuit court could "certainly choose to examine the probability that [the adoptive resource] will be faithful to her promise [to allow continued contact between the children and the biological family], at the same time bearing in mind that such

promises are legally unenforceable once the termination and subsequent adoption are complete." ***Id.***, ¶30. That is precisely what the circuit court did here.

¶25 Here, the circuit court considered the several factors outlined by WIS. STAT. § 48.426(3), including whether severing ties with the children's biological family would harm the children. The court acknowledged that the children are well-bonded with their foster family, have a substantial bond with M.W., and that the foster family and M.W. have a positive relationship. The court acknowledged the foster family's plan to maintain contact with M.W., but recognized that the amount of contact may change over time. The court found that regardless of how much contact the children continued to have with M.W., severing the relationship would ultimately not be harmful to them. The court considered the appropriate statutory factors and was not in error for considering potential continued contact between M.W. and her children. Accordingly, counsel was not ineffective for failing to object to testimony the circuit court was entitled to consider.

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

By the Court.—Orders affirmed.

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