COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1180 **Cir. Ct. No. 2015TP67**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

K.H.,

RESPONDENT-APPELLANT.

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

¶1 BRASH, J.[1] K.H. appeals the order[2] that terminated her parental rights to M.E.H.G. and denied her postdispositional motion after this matter was remanded to the trial court for an evidentiary hearing. She argues that this court should vacate her no-contest plea because it was not knowingly, intelligently, and voluntarily made. She further argues that her due process rights were violated because the factual basis for the plea was established after the plea colloquy rather than before, and the trial court then relied on those facts despite K.H.'s dispute of some of those facts. We disagree and affirm.

BACKGROUND

¶2 K.H. is the biological mother of M.E.H.G., who was born on December 7, 2013. At the time of birth, M.E.H.G.'s urine tested positive for benzodiazepine and THC, and his meconium tested positive for THC and cocaine. On December 10, 2013, almost immediately after M.E.H.G. was discharged from the hospital and sent home with K.H. and M.G., M.E.H.G.'s biological father, the Bureau of Milwaukee Child Welfare (BMCW)[3] received a call concerning the

[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.

[2] This order also terminated the parental rights of M.G., M.E.H.G.'s biological father, in Milwaukee County Circuit Court Case No. 2015TP67. The termination of M.G.'s parental rights and the denial of his postdispositional motion are the subject of a separate appeal, *see* ***State v. M.G.***, No. 2016AP1197, unpublished slip op. (WI App July 5, 2017) and are not at issue in the current proceeding.

[3] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

neglect of newborn M.E.H.G. On December 13, 2013,[4] a protective plan was put into place whereby M.E.H.G. was to remain under the care of a caregiver, with M.G. and K.H. allowed supervised visitation with the child on a daily basis.

¶3 On January 24, 2014, a little more than a month after the placement plan's implementation, the caregiver advised BMCW that she was no longer willing to work with K.H. The caregiver had been assisting K.H. with appointment scheduling and medication for K.H.'s mental health issues, but stated that K.H. had become uncooperative with these efforts. An in-home safety plan was not an option, as BMCW workers determined that neither K.H. nor M.G. would "perform parental duties" and that the family did not "have or use resources necessary to assure the child's basic needs."

¶4 Consequently, M.E.H.G. was placed in foster care. A Child in Need of Protection and Services (CHIPS) dispositional order was entered on August 11, 2014, which set conditions that were to be met by K.H. prior to M.E.H.G.'s return. These conditions included participating in the services offered through BMCW such as parenting education, Alcohol and Other Drug Abuse (AODA) assessment and treatment, individual therapy, and domestic abuse education. A visitation plan with M.E.H.G. was also required to be established, and K.H. was to consistently follow that schedule.

¶5 K.H. failed to satisfactorily meet these conditions. For example, she completed AODA assessment, but she was not believed to have been truthful with

[4] We note that there are several typographical errors in the BMCW report relating to its initial contacts with M.G. and K.H. regarding M.E.H.G.; specifically, the report mistakenly references the year "2014" several times while discussing these initial contacts, instead of correctly referencing "2013," as these contacts occurred shortly after M.E.H.G.'s birth.

the AODA assessor, and has not completed any random urine screenings to demonstrate sobriety, as required. She was discharged from the parenting education services due to her lack of engagement. She was inconsistent with her attendance for therapy and inconsistent with taking her medication for her mental health issues. She was referred to domestic violence educational services in January 2015 after it was reported that she and M.G. had a physical altercation on Christmas Day, but she denies the need for this service. Furthermore, her visitation with M.E.H.G. was very inconsistent; in fact, visitation was put on hold in December 2014 due to inconsistency. Visitation was reinstated later in December 2014, but K.H. still failed to make regular visits.

¶6 As a result, a Petition for the Termination of Parental Rights (TPR) of K.H. for M.E.H.G. was filed on March 12, 2015. In the petition, the State alleged two grounds for termination: (1) continuing need of protection and services, pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). At the initial appearance hearing on April 1, 2015, K.H. appeared in court without counsel, and was referred to the State Public Defender's Office for the appointment of counsel. At the rescheduled hearing on April 30, 2015, K.H. appeared with counsel, advised the trial court that she was contesting the TPR petition, and the matter was scheduled for trial.

¶7 At the final pretrial conference on October 2, 2015, counsel for K.H. requested time to discuss a possible no contest plea with K.H., because K.H.'s phone had been off during the week prior to the hearing. After that break, the trial court was advised that K.H. wished to enter a no contest plea on the continuing CHIPS grounds set forth in the TPR petition.

¶8 The trial court then engaged in a lengthy colloquy with K.H. It explained to K.H. that entering the plea meant that she was agreeing that if the case went to trial, the State could prove its case by the requisite standard: clear, convincing, and satisfactory evidence. It further explained the rights K.H. was giving up in entering the plea, including the right to a jury trial.

¶9 At times during these proceedings, K.H. seemed confused. She also indicated that she had not taken all of the medication that she was prescribed. The trial court expressed concern that K.H. was not able to fully understand the proceedings. K.H.'s trial counsel then engaged in a direct examination of K.H. to further determine her understanding. Subsequently, after asking K.H. additional questions related to her understanding, the trial court was satisfied that K.H. understood the proceedings and accepted her plea, confirming that the plea was made "freely, voluntarily, intelligently and with whole understanding" of the proceedings. The trial court then proceeded to establish a factual basis for the plea.

¶10 At the final dispositional hearing on February 19, 2016, the trial court found that based on all of the factors set forth in WIS. STAT. § 48.426, it was in the best interests of M.E.H.G. that the parental rights of K.H. be terminated. A written order terminating the parental rights of K.H. as to M.E.H.G. was entered on February 19, 2016.

¶11 K.H. filed a Notice of Appeal on June 8, 2016. She subsequently filed a Motion for Remand to the Trial Court on July 29, 2016, for an evidentiary hearing on whether her plea was knowing, intelligent, and voluntary. Additionally, she argued that remand was necessary to determine whether there was a "sufficient undisputed factual basis" to support the plea, because the prove-

up hearing that provided the factual basis for the plea occurred after the colloquy and after the plea was accepted, thus giving K.H. no opportunity to contest the testimony of the social worker who provided the evidence for the factual basis. The remand motion was granted by this court, with a hearing held on October 11, 2016, and continued on January 6, 2017, and February 28, 2017.

¶12 The remand court[5] found that K.H. had not made a prima facie showing that the plea colloquy was deficient. Nevertheless, because the evidentiary hearing already occurred, the remand court made a ruling on K.H.'s motion, finding that the State had proven by clear and convincing evidence that K.H.'s plea was made knowingly, intelligently, and voluntarily.

¶13 Furthermore, the remand court found that there was no due process violation that had occurred because of the manner in which the factual basis for K.H.'s plea was established. Specifically, the remand court found that by the nature of a no contest plea, the parent is not stipulating to any facts, and thus there is no disadvantage to K.H. by having the prove-up hearing occur after the plea is accepted. Furthermore, the remand court found that no new information was presented during the prove-up hearing; rather, the facts provided at that time were merely a summary of the allegations set forth in the TPR petition, which K.H. had stated she had reviewed prior to the plea hearing.

¶14 Therefore, the remand court denied K.H.'s motion to withdraw her no contest plea. This appeal follows.

[5] This matter on remand was heard by the Honorable Laura Gramling-Perez; the plea and dispositional hearings were before the Honorable David Swanson.

DISCUSSION

1. K.H.'s plea was knowingly, intelligently, and voluntarily made.

¶15 K.H. claims that her plea was not knowing, intelligent, and voluntary on several grounds: (1) because she believed that she was being given an additional six to nine months to complete the conditions set forth in the CHIPS order; (2) because she contested significant portions of the testimony provided at the prove-up hearing and did not understand that her plea meant that she was giving up the opportunity to contest that testimony; (3) because she did not understand the burden of proof requirement on the State; and (4) because she did not understand that she was giving up the right to contest the continuing CHIPS grounds of the TPR petition.

¶16 When a parent alleges that a plea was not knowingly and intelligently made, we apply the ***Bangert***[6] analysis. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. Under the ***Bangert*** analysis, the parent "must make a prima facie showing that the [trial] court violated its mandatory duties and [s]he must allege that in fact [s]he did not know or understand the information that should have been provided at the § 48.422 hearing." ***Steven H.***, 233 Wis. 2d 344, ¶42. "If [the parent] makes this prima facie showing, the burden shifts to the [State] to demonstrate by clear and convincing evidence that [the parent] knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.*** If the parent fails to

[6] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

make a prima facie showing, the trial court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

¶17 Whether a parent has presented a prima facie case by showing deficiencies in the colloquy and by alleging that she did not know or understand the information that should have been provided by the trial court, is a question of law that we review *de novo*. *See* ***Oneida Cnty. DSS v. Therese S.***, 2008 WI App 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122. In doing so, we look to the totality of the circumstances and the entire record to determine the sufficiency of the trial court's colloquy. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶18 In our independent review of the record, we do not find any evidence to support K.H.'s claims. For example, with regard to K.H.'s claim relating to additional time for meeting the CHIPS conditions, the trial court explained during the plea colloquy that one of the allegations included in the K.H.'s no contest plea was that it was "substantially unlikely that [K.H.] could meet all the goals and conditions [of the CHIPS order] within the next nine months." K.H. answered affirmatively. Furthermore, K.H. confirmed that she understood she was giving up her right to trial and her right to contest the continuing CHIPS grounds. Additionally, the record clearly indicates that the trial court advised K.H. of the burden of proof that the State would be required to meet to prove the allegations if they went to trial, but that with the plea the State would not have to prove those allegations with evidence. Again, K.H. answered affirmatively.

¶19 Although K.H. expressed a lack of understanding at some points during the plea hearing, her trial counsel made every effort to explain the proceedings to her. In fact, the record indicates that trial counsel requested a recess prior to the plea hearing in order to more fully explain to K.H. the import of

a no contest plea. He also performed a direct examination of K.H. during the hearing to assure himself that K.H. understood the proceedings. The trial court also repeatedly explained the details of the proceedings to K.H. during the hearing until it was convinced that she understood what the plea meant and its ramifications.

¶20 In sum, the record shows that K.H. entered her plea freely, voluntarily, and intelligently. Consequently, we agree with the remand court that K.H. did not meet her burden of presenting a prima facie showing that she did not understand the plea proceedings and the information provided by the trial court. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42. Accordingly, we affirm the remand court's denial of K.H.'s motion to withdraw her plea.

2. K.H.'s due process rights were not violated when the factual basis for the plea was established after the plea was accepted by the trial court.

¶21 K.H. also asserts that her due process rights were violated when the trial court accepted her plea prior to establishing the factual basis for the plea, because she did not agree with all of those facts as provided. She bases her argument in large part on ***Ernst v. State***, 43 Wis. 2d 661, 674, 170 N.W.2d 713 (1969), where our supreme court held that prior to accepting a plea, the defendant must first admit to the conduct which "constitutes the offense," in accordance with Rule 11 of the Federal Rules of Criminal Procedure.

¶22 However, the court has since rescinded that mandate. In ***Bangert***, the court withdrew "any language from our prior decisions which indicates that plea hearing procedures, beyond the general standard discussed in ***Boykin v. Alabama***, 395 U.S. 238 [] (1969), are mandated by the Federal Constitution,"

effectively overruling ***Ernst***. ***Bangert***, 131 Wis. 2d at 256-57. Moreover, in ***State v. Thomas***, 2000 WI 13, 232 Wis. 2d 714, 605 N.W.2d 836, the court found that "a judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." ***Id.***, ¶22.

¶23 In this case, after the trial court conducted the plea colloquy with K.H., the social worker was called to prove up the factual basis for K.H.'s plea. Once the social worker's testimony was complete, the court explained to K.H. that these were the allegations against her, and that by entering the no contest plea she was agreeing that the State would be able to prove *most* of the allegations at a trial. K.H. voiced her disagreement with several of the factual bases, and the trial court again expressed concern about accepting K.H.'s plea.

¶24 The State then explained that it was "not surprised" that K.H. was not agreeing to all of the allegations; that was why she was pleading no contest as opposing to stipulating to the grounds. Nevertheless, the State reiterated that for a no contest plea, K.H. had to agree only that the testimony established a factual basis to support the plea. *See* ***Steven H.***, 233 Wis. 2d 344, ¶52 ("Deciding not to contest the allegations of the petition is not equivalent to admitting the allegations in a petition.") In other words, the requirement set forth in WIS. STAT. § 48.422(7) that compels the court to establish a factual basis before accepting an admission by plea is not applicable in the case of a no contest plea because there are no admissions involved. ***Steven H.***, 233 Wis. 2d 344, ¶52. The court then again explained to K.H. the meaning of the no contest plea, and asked whether she agreed that the State could prove "enough of those allegations if we went to trial." K.H. answered affirmatively.

¶25 As a result, K.H.'s argument that her due process rights were violated fails. Based on the record, and the procedural requirements set forth in the statutes and relevant case law, we are satisfied that the trial court properly established a factual basis for K.H.'s no contest plea.

¶26 We therefore affirm the denial of K.H.'s postdispositional motion requesting that she be permitted to withdraw her no contest plea because it was not knowingly, intelligently, and voluntarily made, and because her due process rights were violated.

By the Court.—Order affirmed.

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