COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 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. 2017AP788 **Cir. Ct. No. 2015TP65**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

N. C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] N.C. appeals from an order of the circuit court involuntarily terminating her parental rights to M.M., and an order of the circuit court denying her postdisposition motion to have the involuntary termination of parental rights order vacated and a voluntary termination of parental rights order entered in its place. N.C. contends that she was denied effective assistance of counsel when counsel failed to pursue having the order of termination entered as voluntary, rather than involuntary. For the reasons discussed below, I affirm.

BACKGROUND

¶2 N.C. is the biological mother of M.M., who was born in June 2012. In July 2015, Dane County Department of Human Services filed a petition seeking the involuntary termination of N.C.'s parental rights to M.M. The petition alleged as the sole ground for termination that M.M. remained in continuing need of protection or services (CHIPS), under WIS. STAT. § 48.415(2).

¶3 In September 2016, N.C. entered a no contest plea to the petition pursuant to an "Agreement on Disposition" with the Department. Under the terms of the agreement, if N.C. successfully completed agreed upon conditions, the Department would dismiss the petition against her. However, if N.C. failed to successfully meet the agreed upon conditions, her failure to do so would "conclusively establish grounds under [WIS. STAT. §] 48.415(2) for the [termination of parental rights] petition[] for [M.M.]," and the matter would proceed to the dispositional hearing. Pursuant to the parties' agreement, the

[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 indicated.

dispositional hearing was scheduled for three months from the date of their agreement.

¶4 The dispositional hearing was held in December 2016. It was undisputed at the hearing that N.C. did not successfully complete the conditions of the "Agreement on Disposition" and the court accepted N.C.'s no contest plea as to grounds. N.C. did not dispute that termination of her parental rights was in M.M.'s best interest, and the court concluded that it was. An order terminating N.C.'s parental rights involuntarily to M.M. was subsequently entered.

¶5 In June 2017, N.C. filed a motion with the circuit court to vacate the order involuntarily terminating her parental rights. N.C. asserted in her motion that the court should have entered an order voluntarily terminating her parental rights because the proceeding had evolved from an involuntary process to a voluntary process "in that [N.C.] entered a no contest plea to the single ground alleged by the [Department] in its petition and [N.C.] did not contest or oppose the termination of her parental rights at the disposition hearing." In a reply memorandum in support of her motion, N.C. asserted for the first time that the involuntary order of termination of parental rights should be vacated and a voluntary order of termination of parental rights be entered because her trial counsel was ineffective for failing "to raise the prospect of a voluntary termination of [N.C.'s] parental rights." N.C. asserted in her reply memorandum that this allegation constituted an amendment of her motion to vacate.

¶6 The circuit court denied N.C.'s motion without a ***Machner***[2] hearing. The court stated that N.C. had not moved to withdraw her plea and that there was no legal or factual support for her motion to vacate. With regard to N.C.'s assertion in her reply memorandum that her trial counsel was ineffective, the court rejected N.C.'s assertion that her allegation of ineffective assistance of counsel in the reply memorandum was effective as an amended motion to vacate on the ground of ineffective assistance of counsel. The court also concluded that N.C. had failed to present the court with any factual support that N.C.'s trial counsel was ineffective. N.C. appeals.

DISCUSSION

¶7 N.C. contends that the circuit court erred in failing to hold a ***Machner*** hearing on what she characterizes as her amended motion to vacate the involuntary order terminating her parental rights.

¶8 N.C. raised the issue of ineffective assistance of counsel for the first time in her reply memorandum in support of her motion to vacate, stating:

> Since the [Department] repeatedly mentions the failure of N.C.'s trial attorney to raise the prospect of a voluntary termination of [N.C.'s] parental rights, at this time, N.C. is amending her motion to include a claim that she was denied the effective assistance of counsel as a result of the failure of her trial attorney to do so when it became clear that [N.C.] would not be contesting disposition. A defendant is guaranteed effective assistance of counsel by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution. [A defendant] is denied this assistance when counsel's performance is deficient and the defendant is

[2] A ***Machner*** hearing is an evidentiary hearing evaluating counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> prejudiced as a result. The Wisconsin Supreme Court adopted the ***Strickland*** [***v. Washington***, 466 U.S. 668 (1984)] test to apply to proceedings for the involuntary termination of parental rights.
>
> In order to show prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. N.C. is entitled to have her present order vacated and a voluntary termination entered because she was prevented the chance to seek one as a result of the ineffective assistance of counsel. (Internal citations omitted).

The Department argues that N.C.'s assertion in her reply memorandum that the reply memorandum was effective as an amendment of her motion to vacate fails to meet the basic statutory requirements. *See* WIS. STAT. § 802.01(2)(a) (application to the court for an order "shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."); § 802.01(2)(b) (supporting records and papers "shall be served with the notice of motion and shall be plainly referred to.")

¶9 I will assume, without deciding, that N.C.'s reply memorandum was effective as an amendment of her motion to vacate. I conclude, however, that the circuit court did not err in denying her ineffective assistance of counsel claim without a ***Machner*** hearing.

¶10 To prevail on an ineffective assistance of counsel claim, a defendant must prove both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must point to specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that counsel's

errors were so serious "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***id.*** at 697.

¶11 A circuit court must hold an evidentiary hearing on a defendant's ineffective assistance claim if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). If, however:

> [T]he defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing.

Id. at 309-310. "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id***. at 310. This court will reverse a circuit court's decision to deny an evidentiary hearing only for an erroneous exercise of discretion. ***Id.*** at 311.

¶12 N.C.'s amended motion asserts in conclusory fashion that her trial counsel was ineffective. However, N.C. failed to allege facts, that if true, establish that her trial counsel was deficient for failing to "raise the prospect" of a voluntary termination, or that N.C. was prejudiced by her trial counsel's failure to do so. In particular, N.C. has failed to point to any facts that N.C. was interested in proceeding with a voluntary termination at any time. N.C. has also failed to point to any facts, or legal authority, that had N.C.'s trial counsel "raise[d] the prospect of a voluntary termination," the proceeding would have been converted to a voluntary termination, or that doing so would have made a difference.

Accordingly, I conclude that the circuit court did not erroneously exercise its discretion when it denied N.C.'s amended motion without a hearing.[3]

CONCLUSION

¶13 For the reasons discussed above, I affirm.

By the Court.—Orders affirmed.

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

[3] Because my determination as to N.C.'s ineffective assistance of counsel claim is dispositive, I do not address the State's arguments that there is no legal procedure for converting a termination of parental rights order from involuntary to voluntary, and that at a minimum, N.C. needed to have filed a motion to withdraw her no contest plea. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).