COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP1349 **Cir. Ct. No. 2015TP247**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

A.S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] A.S. appeals orders terminating his parental rights to K. and denying his post-disposition motion. On appeal, he renews his argument that he is entitled to a new dispositional hearing because the trial court erred when it denied his trial counsel's request for a continuance and proceeded to hold the dispositional hearing even though A.S. had failed to appear. A.S. argues that we review the denial *de novo*, that good cause existed to grant a continuance as his counsel requested, and that holding the hearing without A.S. violated his constitutional and statutory rights.[2] We affirm.

BACKGROUND

¶2 This appeal concerns the petition for termination of parental rights for K., who was born in early 2014 and shortly thereafter was detained and was found to be a child in need of protective services. K. has been in out-of-home care his entire life. A petition was filed August 19, 2015, seeking termination of parental rights as to both parents.[3]

¶3 A.S. personally appeared as ordered by the court at hearings on November 2, 2015 and December 15, 2015. He requested a jury trial. The trial was set accordingly, for April 11, 2016, with a final pretrial set for March 10, 2016.

[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] We address appellant's arguments on the merits and therefore do not reach his argument in the alternative that he is entitled to a new dispositional hearing on the grounds that trial counsel rendered ineffective assistance of counsel.

[3] K.'s other parent voluntarily terminated parental rights and has not appealed the order.

¶4 A.S. failed to appear for the final pretrial. Trial counsel and the trial court attempted unsuccessfully to reach A.S. by phone at a number he had given to counsel. A.S. appeared at the April 11, 2016 jury trial. He entered a plea to the continuing CHIPS ground in exchange for a postponement of the dispositional hearing, which was then set for October 17, 2016.

¶5 A.S. failed to appear on October 17, 2016. Trial counsel advised the court that A.S. was not returning his phone calls and that he had been unable to reach him for several weeks. The case was adjourned for a status hearing. A.S. appeared at a hearing on November 29, 2016, and there a date was set for a dispositional hearing on February 24, 2017.

¶6 A.S. failed to appear on the day of the dispositional hearing, February 24, 2017. This is the dispositional hearing that is the focus of this appeal. Trial counsel informed the court that A.S. had declined to meet in advance of the hearing to prepare for it. Counsel also explained that A.S. had contacted the check-in clerk by phone, left a phone number, and explained that he had transportation problems and would not be present. Counsel advised the court that he had attempted, unsuccessfully, to contact A.S. by phone at the number A.S. left with the clerk. The trial court then unsuccessfully attempted to reach A.S. by phone as well and stated that "it doesn't appear to be a working number."

¶7 Counsel for A.S. requested a continuance. The trial court denied the request. The trial court noted that A.S. was "certainly in violation of the court's order to appear in person" but declined to find the failure to appear "egregious" for purposes of applying WIS. STAT. § 48.23(2)(b)3, which describes circumstances

under which a parent is presumed to have waived the right to counsel and the right to appear by counsel in a TPR proceeding.[4]

¶8 The trial court proceeded with the dispositional hearing and at the conclusion held that the termination of A.S.'s parental rights were in K.'s best interest.

¶9 A.S. appealed and this court remanded for the trial court to address the motion for a new dispositional hearing. The trial court denied the post-disposition motion. This appeal follows.

DISCUSSION

I. Standard of review and relevant law.

¶10 WISCONSIN STAT. § 48.315(2) states that continuances are to be granted "only upon a showing of good cause in open court … and only for so long as is necessary, taking into account the request or consent of the district attorney

[4] WISCONSIN. STAT. § 48.23(2) Right of parent to counsel.

> …
>
> (b) In a proceeding involving … an involuntary termination of parental rights, any parent who appears before the court shall be represented by counsel, except as follows:
>
> …
>
> 3. … a parent … is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. ....

… and the interest of the public in the prompt disposition of cases." This provision applies to "all extensions of time deadlines under the Children's Code." ***M.G. v. La Crosse Cty. Human Servs. Dep't***, 150 Wis. 2d 407, 418, 441 N.W.2d 227 (1989).

¶11 The decision whether to grant or deny an adjournment request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion. *See* ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). "'[P]robing appellate scrutiny' of a decision to deny a continuance is not warranted." ***State v. Fink***, 195 Wis. 2d 330, 338-39, 536 N.W.2d 401 (Ct. App.1995). A circuit court properly exercises its discretion if it "employs a logical rationale based on the appropriate legal principles and facts of record." ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (citation omitted).

¶12 "Although a determination of good cause may be based on many factors, courts have emphasized the following four factors when evaluating good cause: (1) good faith of the moving party; (2) prejudice to the opposing party; (3) prompt remedial action by the dilatory party; and (4) the best interest of the child." ***State v. Robert K.***, 2005 WI 152, ¶35, 286 Wis. 2d 143, 706 N.W.2d 257.

A. We review the denial of the adjournment for an erroneous exercise of discretion.

¶13 A.S. argues that review of the trial court's denial of the request to adjourn presents a question of law because it requires statutory interpretation. For this proposition, A.S. cites ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752 and ***State v. April O.***, 2000 WI App 70, ¶6, 233 Wis. 2d 663, 607 N.W.2d 927. Both cases required statutory interpretation

because in each case, the appellant parent argued that the trial court had violated the statute and lost competency by granting a continuance that resulted in a hearing outside the statutory time limits. ***Quinsanna D.***, 259 Wis. 2d 429, ¶2 ("Quinsanna also argues that the trial court lost competency to conduct the dispositional hearing because it adjourned the hearing for more than forty-five days following the verdicts without finding good cause for the continuance. She contends that the adjournment violated WIS. STAT. §§ 48.424(4) and 48.315(2)."); *see also* ***April O.***, 233 Wis. 2d 663, ¶4 ("April appealed and argued that the circuit court violated the mandatory statutory time limits for holding both the initial and dispositional hearings.").

¶14 Nothing in either case affects the standard of review for a denial of a request for adjournment in a case like this one, where there is no claim of a loss of competency by the trial court. The fact that a statute creates a time limit does not automatically make all rulings on continuances questions of law. Therefore, we apply the discretionary standard of review as prescribed, and we consider whether in denying the adjournment request made by A.S.'s counsel, the trial court employed "a logical rationale based on the appropriate legal principles and facts of record." ***Village of Shorewood***, 174 Wis. 2d at 204 (citation omitted).

B. The trial court's decision not to grant an adjournment was not an erroneous exercise of discretion.

¶15 A circuit court properly exercises its discretion if it "employs a logical rationale based on the appropriate legal principles and facts of record." ***Id.***

¶16 "Although a determination of good cause may be based on many factors, courts have emphasized the following four factors when evaluating good cause: (1) good faith of the moving party; (2) prejudice to the opposing party; (3)

prompt remedial action by the dilatory party; and (4) the best interest of the child." ***Robert K.***, 286 Wis. 2d 143, ¶35.

¶17 A.S. argues that "good cause existed" for an adjournment and this court should therefore grant A.S. a new dispositional hearing. He argues that there was no finding of egregiousness, that there was communication with the court's clerk, that this was the first continuance he had sought in the case, that there was no prejudice to the State, and that even though A.S. had been warned about the consequences of failing to appear, he had not been reminded of it at the last hearing he attended.

¶18 Even if those facts are relevant, they are viewed through the lens of the discretionary standard of review. We do not address *de novo* the question of whether good cause existed; we are limited to addressing whether the trial court erroneously exercised its discretion.

¶19 Here the trial court specifically referenced three of the factors in making its ruling. It made no finding that the failure to appear was a bad-faith act by A.S. In fact, it stated that it was taking "on its face" A.S.'s claim of transportation problems. As to the prejudice factor, the trial court explicitly acknowledged the interests that would be prejudiced by a delay: "[A]ll of this discussion occurs in the context of the interests of other parties as well, most specifically, this child. And others.… Certainly the State[.]" The final factor, the best interest of child, was also directly weighed in the ruling: "You can probably find eight or nine references in Chapter 48 that tell us make decisions, make them quick, because that's what's in the best interests of these children. Lingering in foster care is directly contrary to their best interests."

¶20 The trial court thus based its rationale on the appropriate legal principles and facts of record. *See* ***Village of Shorewood***, 174 Wis. 2d at 204. Under the applicable standard of review, that is the end of the analysis.

C. The court's denial of the adjournment motion did not violate A.S.'s constitutional due process right to participate in the hearing.

¶21 Whether a parent has been afforded the opportunity to participate meaningfully is a question of constitutional fact that is reviewed independently of conclusions of law. ***Rhonda R.D.***, 191 Wis. 2d 680, 699-700, 530 N.W.2d 34 (Ct. App. 1995). The court defers to a circuit court's findings of historical fact. ***Id.*** at 700. The best interests of the child are paramount at the dispositional phase. *See* WIS. STAT. § 48.426.

¶22 Due process requires "that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" ***Mathews v. Eldridge***, 424 U.S. 319, 348-49 (1976) (citations omitted). "All that is necessary is that the procedures be tailored … to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." ***Id.*** *See also* ***Rhonda R.D.***, 191 Wis. 2d at 701. Due process protections ensure that when fundamental rights are at stake, a person has an "opportunity to be heard at a meaningful time and in a meaningful manner." ***Rhonda R.D.*** at 701.

¶23 The trial court has discretion as to how to guarantee that a birth parent's participation in proceedings to terminate parental rights is meaningful. ***State v. Lavelle W.***, 2005 WI App 266, ¶2, 288 Wis. 2d 504, 708 N.W.2d 698.

¶24 A.S. argues that proceeding with the dispositional hearing when he was not present "violated his constitutional due process right to meaningfully participate" because he "did not get to observe and hear the witnesses or assist his counsel during the proceeding" and did not "have an opportunity to decide after hearing the testimony whether to testify." In support of this argument, he cites ***Lavelle W.*** In that case, this court held that the State deprived a parent who participated in a hearing via a poor phone connection of the opportunity to meaningfully participate in the TPR proceeding.[5] ***Id.***, ¶9.

¶25 Contrary to his assertion, the constitutional due process requirement is met where there is "notice of the case against him and opportunity to meet it." *See* ***Mathews***, 424 U.S. at 348-49 (citation omitted). A.S. had both. As ***Mathews*** requires, procedures were "tailored, in light of the decision to be made" to insure that he was "given a meaningful opportunity to present [his] case." *See* ***id.*** at 349. In this case, procedures were repeatedly tailored to give A.S. an opportunity to participate notwithstanding A.S.'s failure to cooperate with counsel, failure to show up for deposition, and failure to appear at the March 10, 2016 final pretrial, the October 17, 2016 dispositional hearing, and the February 24, 2017 dispositional hearing. Further, when A.S. failed to appear at the February 24, 2017 dispositional hearing, the trial court specifically declined to default him and

[5] We note that in other cases, telephone participation—where there is evidence of an adequate phone connection—*has* been found sufficient to satisfy the requirement of "an opportunity to meaningfully participate." For example, in ***Rhonda R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995), this court so found, and stated:

> We decline to hold that meaningful participation always requires physical presence. Rather, we hold that whether a respondent in a TPR proceeding can meaningfully participate without being physically present depends on the circumstances of each case.

declined to find his conduct was egregious and therefore constituted a waiver of counsel. The trial court stated on the record that it would have permitted A.S. to participate by telephone even though A.S. was technically in violation of the court's order to appear in person. In ***Lavelle W.***, the State deprived the parent of his opportunity to meaningfully participate when it required him to proceed without adequate communications equipment. There is no corresponding deprivation in this case.

D. The court's denial of the adjournment motion did not violate A.S.'s statutory right to be physically present and participate in the hearing.

¶26 A.S. argues that multiple statutes "establish[] a right for parents to participate in a dispositional proceeding" in a TPR case. He cites WIS. STAT. §§ 885.60(2)(a): "Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) [including all proceedings under the children's code] is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings."[6]

¶27 Statutory interpretation is a question of law that we review *de novo*. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-365, 560 N.W.2d 315 (Ct. App. 1997). There is no question that A.S. had the right to participate in the dispositional hearing on the termination of his parental rights. There is no

[6] A.S. further cites WIS. STAT. § 48.427(1) ("Any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court.") and WIS. STAT. § 48.23(2)(b)3 (stating that the "court may not hold a dispositional hearing on the contested adoption or involuntary termination of parental rights until at least two days have elapsed since the date of" a finding that a parent's conduct in failing to appear is egregious).

authority to the contrary. The question is whether he has a right to a new dispositional hearing when he failed to appear at the February 24, 2017 hearing. A.S. conflates two concepts. An absolute right of a respondent to be present—a right the State cannot abridge—is not the same thing as a prohibition on the State from proceeding in the absence of a respondent who is refusing to exercise that right. The State did nothing to abridge A.S.'s statutory right to participate in the dispositional hearing, and therefore it was not a violation of the statute for the hearing to proceed in his absence.

¶28 The orders are therefore affirmed.

By the Court.—Orders affirmed.

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