COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
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. **2017AP1138**
2017AP1139
2017AP1140
2017AP1141

Cir. Ct. Nos. 2013TP353
2013TP354
2013TP355
2014TP254

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A. N. W., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. S. S.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO N. T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. S. S.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A. L. T. JR., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. S. S.,

RESPONDENT-APPELLANT.

IN RE THE TERMINATION OF PARENTAL RIGHTS TO A.M.S., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

C. S. S.,

RESPONDENT-APPELLANT.

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

¶1 KESSLER, J.[1] C.S.S. appeals the orders terminating her parental rights to her four children, A.N.W., N.T., A.L.T., and A.M.S. C.S.S. also appeals the order denying her postdisposition motion. She contends that her no contest plea at the fact finding hearing was not knowing, voluntary and intelligent because she did not understand the circuit court's statements about what the State's burden would be at the disposition hearing. We affirm.

[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.

BACKGROUND

¶2 On September 30, 2014, the State filed petitions to terminate C.S.S.'s parental rights to her four children.[2] The petitions alleged that the children were in need of protection and services (continuing CHIPS).

¶3 Following multiple litigation delays, the trial was finally calendared for April 25, 2016. At the final pretrial on April 18, 2016, C.S.S. asked to change her plea to no contest as to the continuing CHIPS ground. The circuit court then engaged in a lengthy colloquy with C.S.S. to assess the voluntariness of her plea, her understanding the rights she was giving up, and to explain the termination procedure moving forward. The court also explained the level of proof required to establish unfitness if C.S.S. had chosen to have a trial:

> You're giving up your right to make the State prove that there was the claim of continuing need of protection and services to prove that the facts alleged in the petition were true or substantially true to a reasonable certainty by clear, satisfactory and convincing evidence. It's called a burden of proof. It's not beyond a reasonable doubt, but it's not just a preponderance of the evidence.
>
> If we proceeded to trial, after listening to all the testimony in the trial the jury would have to be convinced to a reasonable certainty, so pretty sure the facts were true and pretty sure the facts were true because the evidence that the State presented was so powerful and convincing. If they didn't prove it to that level of certainty to that quality of evidence, then the petition would have to be dismissed and your parental rights would not be terminated.
>
> You're giving up your right to make them meet that burden of proof by pleading no contest. Do you understand that?

[2] The State filed two petitions—one for the older three children and a separate petition for A.M.S. The two petitions were joined for trial.

C.S.S. responded in the affirmative.

¶4 The court also explained the purpose of the disposition hearing:

> At the contested dispositional hearing, you have all the rights we talked about earlier except the right to a jury determination. You can testify, yourself; call other witnesses; have [counsel] ask questions of the witnesses testifying against your position to try and show they were lying or fudging, whatever; and, you've got the right to make them prove to me to a reasonable certainty by clear, satisfactory and convincing evidence that it's in the children's best interest to terminate your parental rights and allow adoption.
>
> But that's the controlling factor, what's in their best interest, to terminate your parental rights and allow adoption or to dismiss the petition and pursue some other alternative that you and [counsel] will be arguing for at that hearing.
>
> ….
>
> But the one and only issue is: What's in your children's best interest, to allow your rights to be terminated and allow them to be adopted or to dismiss the petition and pursue some other alternative. Do you understand that?

C.S.S. responded in the affirmative.

¶5 Following a three-day disposition hearing, the circuit court issued a written decision finding that terminating C.S.S.'s parental rights was in the best interest of her four children.

¶6 C.S.S., by postdisposition counsel, filed a motion to withdraw her plea on the basis that it was not knowing, intelligent or voluntary. C.S.S. argued that she did not understand "that once she entered a plea to the fact finding stage, that the burden of proof was lower at the dispositional hearing, which would make

[it] easier for the State to prove that termination was in the best interest of the children." Specifically, she argued that she did not know "that the burden once she entered her plea, was reduced to only the preponderance of the evidence," and was not "the level of clear and convincing evidence," as she was informed by the circuit court.

¶7 At a hearing on the motion, the postdisposition court summarized the issue and explained its process at the disposition hearing as follows:

> [C.S.S.] alleges that this Court in the plea colloquy at which she offered a no-contest plea to the claim of continuing need of protection and services misinformed her as to the burden of proof that the State would have to meet in the dispositional phase of the proceedings and that therefore, her no-contest plea was not knowing and voluntary. [C.S.S.'s counsel] asserts that the law is clear that the burden at disposition is the lower burden, the ordinary burden…. I have always imposed and did impose in this case the higher burden…. I think that takes the air out of the argument.

¶8 C.S.S. then testified, telling the court that if she knew the burden of proof at the disposition hearing was preponderance of the evidence, she would not have pled no contest. On cross-examination, however, C.S.S. admitted that she did not understand the difference between the burdens of proof and that she pled no contest, in part, because she did not want a jury trial and because the State "offered [her] more time with therapeutic visitation with [the] children." C.S.S. admitted that the therapeutic visitation would delay the disposition hearing, which she thought would be helpful to her case. C.S.S. said she thought pleading no contest was "a good idea at the time," and that she understood all of the questions presented during the colloquy, but that she ultimately pled no contest on the advice of her counsel and was hesitant to do so.

¶9 The postdisposition court denied the motion, finding that "[t]he level of certainty that a Court needs [to] achieve under either [the clear and convincing or the preponderance] burden is the same, reasonable certainty." This appeal follows.

DISCUSSION

¶10 C.S.S. raises a number of arguments on appeal, all centering around her contention that she was confused about the State's burden of proof at disposition and that she would not have pled no contest if she properly understood. Because the record supports our conclusion that C.S.S.'s plea was knowing, intelligent and voluntary, we reject her arguments.

¶11 When a parent alleges that a stipulation was not knowingly, intelligently and voluntarily made, we apply the ***Bangert*** [3] analysis. *See* ***Waukesha Cty. 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 circuit court violated its mandatory duties and he [or she] must allege that in fact he [or she] did not know or understand the information that should have been provided at the … 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 make a prima facie case, the circuit court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

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

¶12 Whether a parent has presented a prima facie case by showing deficiencies in the colloquy and by alleging that the parent did not know or understand the information that should have been provided by the circuit court, is a question of law that we review *de novo*. *See* ***Oneida Cty. 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 circuit court's colloquy. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶13 We conclude that C.S.S. has not made a prime facie showing that her plea was not knowing, voluntary and intelligent. The heart of C.S.S.'s argument is that when she entered her plea, she was confused about the State's burden of proof at disposition and that she would not have pled no contest had she understood the proper burden. This argument fails for numerous reasons.

¶14 Our independent review of the record shows that C.S.S. unquestionably entered her plea knowingly, voluntarily and intelligently. The circuit court engaged in a thorough colloquy with C.S.S. in which the circuit court: explained the rights C.S.S. was giving up, obtained assurance from C.S.S. that she understood those rights, inquired about C.S.S.'s level of understanding, questioned C.S.S. about her knowledge of jury trials, and confirmed that counsel explained the consequences of the plea. The circuit court explained that if C.S.S. pled no contest to grounds, the court would find her unfit as required by statute and that at the disposition hearing, the court would determine whether her parental rights should be terminated based on what was in the children's best interest. The court determined that based on C.S.S.'s age, level of education, communication with her counsel, and her responses to the court's questions that she was freely entering a plea of no contest. This was sufficient. *See, e.g.*, ***Brown Cty. DHS v. Brenda B.***,

2011 WI 6, ¶¶43-44, 331 Wis. 2d 310, 795 N.W.2d 730 (explaining that a parent must understand that by pleading no contest, he or she is waiving the right to make the State prove unfitness by clear and convincing evidence, that the acceptance of the plea will result in a finding of unfitness, and that disposition is determined based on the child's best interests).

¶15 We could end our analysis here. However, we note that at the postdisposition hearing, C.S.S. admitted that her decision to plead no contest was driven primarily by her desire to avoid a jury trial and to have increased visitation time with her children. Indeed, at the postdisposition hearing, C.S.S. was still unclear about the varying burden of proof levels, making it highly unlikely that her understanding of burdens of proof had anything to do with her decision to plead no contest.

¶16 Moreover, the circuit court's comments about the burden of proof at the disposition hearing are irrelevant. As the State points out, there does not appear to be a statutory allocation of the burden of proof or a specific designation of the level of the burden of proof at disposition. The rules of evidence are not binding at disposition, *see* WIS. STAT. § 48.299(4)(b), and the circuit court is to admit all evidence having probative value. ***Id.*** Any party can submit evidence from which the court must make a discretionary determination as to what is in the best interest of the children. *See* ***id.***, WIS. STAT. § 48.426; ***Sheyboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶29, 255 Wis. 2d 170, 648 N.W.2d 402 ("Any party may present evidence relevant to the issue of disposition, including expert testimony, and may make alternative dispositional recommendations to the court…. The court should welcome this evidence. It may consider factors favorable to the parent … [and it] *shall* consider the six factors set out in

§ 48.426(3)".)(one set of quotation marks and citation omitted; emphasis in original).

¶17 Here, the court gave C.S.S. a detailed explanation of the disposition hearing and thoroughly described C.S.S.'s rights at the hearing. The court explained the potential outcomes and unequivocally stated that its primary consideration at disposition was the best interest of the children. *See* ***Brenda B.***, 331 Wis. 2d 310, ¶44. Indeed, the court twice informed C.S.S. that the "controlling factor" at disposition would be the best interest of her children. The court's decision reflects that it abided by this standard. In a detailed written decision, the court analyzed the WIS. STAT. § 48.426(3) factors as to each of the children and ultimately determined that termination of C.S.S.'s parental rights was in their best interest.

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

By the Court.—Orders affirmed.

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