COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1581 **Cir. Ct. No. 2003TP74**

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

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KATRINA R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Katrina R. appeals from an order terminating her parental rights. The lead issue is whether the circuit court lost competency to proceed when it held the fact-finding hearing beyond the forty-five-day limit of WIS. STAT. § 48.422(2). We hold that the delay in conducting the fact-finding hearing beyond the time limits of the statute was excused by good cause. We also reject Katrina's further arguments that she should have been allowed to withdraw her admission to the termination of parental rights petition, that her trial counsel was ineffective, that a new trial is necessary in the interests of justice, and that the trial court erroneously excluded evidence at the dispositional hearing.

BACKGROUND

¶2 The facts are undisputed but procedurally lengthy. On September 30, 2003, the Kenosha County Division of Children and Family Services (KCDCFS),[2] on behalf of the State, filed a petition for the termination of parental rights (TPR) to Katrina's daughter, Quiana T. As grounds, the petition alleged a continuing need of protection or services (CHIPS) for Quiana and a prior involuntary TPR of another child of Katrina. The juvenile court appointed a guardian ad litem (GAL) for Quiana the same day. The petition also sought termination of the parental rights of the adjudicated father, who was incarcerated during these proceedings. The matter was assigned to Judge David Bastianelli.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The Kenosha County Division of Children and Family Services is a unit of the Kenosha County Department of Human Services.

¶3 The initial appearance was set for October 30, 2001. To allow time for the incarcerated father to get a public defender, Judge Bastianelli reset the initial appearance for November 25, 2003. In conjunction with the TPR petition, the State had also filed a motion to suspend visitation between Katrina and Quiana. Judge Bastianelli directed that the State's motion also would be heard in conjunction with the initial appearance.

¶4 On November 25, the appearances included Katrina, her counsel by telephone, the father by telephone and through appointed counsel, the GAL, and the State. Katrina orally contested the petition, sought a substitution of Judge Bastianelli and requested a jury trial. No paperwork had been prepared on Katrina's behalf, so Judge Bastianelli offered to prepare the necessary substitution form for Katrina. The judge also indicated that the case likely would be assigned to Judge Mary Kay Wagner, and offered to try to set a return date before Judge Wagner. Katrina's attorney replied that she did not have her calendar with her. Judge Bastianelli responded that he nonetheless would "assign a date since everyone else is on the phone or here. If there's a problem, you will have to make arrangements to do a conference call with Judge Wagner's clerk." However, Judge Bastianelli deferred to Judge Wagner for purposes of setting a trial date and the entry of any scheduling order. Judge Bastianelli then reset the initial appearance and the hearing on the State's pending motion for suspension of visitation for December 2. The balance of the proceedings were conducted by Judge Wagner, and it is Judge Wagner's rulings that we review on this appeal.

¶5 At the December 2 hearing, Katrina appeared, but not her attorney. Katrina reported that her attorney had not had any contact with her since the last court appearance. The GAL and the father's attorney also appeared. The GAL entered an admission to the TPR petition. With the whereabouts of Katrina's

attorney unknown, the court was unsure whether to wait or "how to proceed without her counsel here." The court explored resetting the motion hearing and initial appearance within the week and also attempted to locate Katrina's absent attorney by telephone. Upon learning that Katrina's attorney would be in an adjoining courtroom on another matter the next day, the court adjourned the matter to the following day.

¶6 Meanwhile, the court also looked at scheduling a trial date workable for all of the parties. The father's attorney noted that his availability in January was limited by another TPR case, and that the father would waive the time limits if necessary. The court declined to immediately accept the waiver, but said it would further address the matter the following day. The GAL did not object to the father's offer to waive the time limits.

¶7 The hearing addressing the initial appearance and the motion to suspend visitation was held the next day, December 3, 2003. Katrina, her attorney and the GAL appeared in person.[3] Katrina, the foster mother, and the managing case worker all testified. The GAL concurred in the case worker's recommendation that visitation between Katrina and the child be suspended during the pendency of the TPR, based in part on Quiana's failure to bond with Katrina. The court found that the visits were detrimental to the child, and ordered the visits and telephone contact suspended.

[3] Neither the father nor his attorney appeared because the motion to suspend visitation did not involve the father, and the father had indicated on December 2 that he was contesting the petition, requesting a jury trial and not seeking a substitution of judge.

¶8 The court then offered February 9, 2004, as a plea hearing/fact-finding date. Katrina's attorney rejected that date, stating that it conflicted with a case which already had been adjourned several times. That matter involved an adult criminal defendant who was not in custody. This exchange followed:

> THE COURT: But it's an adult criminal case?
>
> [KATRINA'S ATTORNEY]: It is an adult criminal case. If I needed to, I guess [I] could adjourn it given the importance of this matter.
>
> THE COURT: Well, the juvenile cases, especially on a termination of parental rights, is the most critical type of case, far more than a criminal case.

¶9 The court then found good cause to toll the time limits because of the congestion of the attorneys' calendars, set the pretrial conference for January 14, and set the plea hearing/fact-finding hearing for February 9, 2004.

¶10 Katrina's attorney did not appear at the pretrial and could not be reached by telephone. The court noted its reluctance to proceed without Katrina's attorney present, but nonetheless directed that the parties' proposed jury instructions and special verdicts be filed by January 21.

¶11 The plea hearing/fact-finding hearing was held on February 9, 2004, sixty-eight days after the December 3, 2003 initial appearance. The appearances included Katrina, in person and by counsel; the incarcerated father, by phone and by counsel; the GAL; the State; and a KCDCFS social worker. Katrina and the State then advised the court that Katrina would enter a no contest plea to the allegation relating to the prior involuntary TPR of another of her children, and the State would dismiss the allegation relating to the CHIPS allegation. Accordingly, Katrina entered a no contest plea.

¶12 When the parties assembled for the adjourned disposition hearing on March 24, 2004, Katrina at first was not there, and her attorney could not explain her absence. Katrina arrived just as the court itself attempted to telephone her. The court adjourned the disposition hearing to accommodate Katrina, whose witnesses were not present. After taking a day-by-day look at the parties' and its own calendars, the court again found good cause to toll the time limits for the disposition hearing, "scheduling as best we can" for 4:30 p.m. on March 30, the following Tuesday.

¶13 The two-day disposition hearing was held on March 30 and April 1, 2004. The court heard testimony from Katrina and from Quiana's psychotherapist, caseworker, grandmother, father and stepfather. The court also reviewed a TPR report prepared by the caseworker and a bonding assessment conducted through the Children's Service Society. At the conclusion, the court made numerous findings, including that the GAL had participated fully in the proceedings, had entered an admission to the petition, and had recommended that Katrina's parental rights to Quiana be terminated. The court also found that granting the TPR as to both natural parents was in Quiana's best interests and signed an order consistent with that finding.

¶14 On April 16, 2004, Katrina's trial counsel filed a notice of intent to seek postdispositional relief, indicating that counsel would be representing Katrina on appeal.[4] Thereafter, on July 6, 2004, the court conducted a permanency plan

[4] The office of the State Public Defender had confirmed that it would not appoint counsel for Katrina.

review for Quiana.[5] Katrina's counsel apparently did not appear at this hearing. This prompted a letter dated August 27, 2004, from the State to Katrina's attorney, advising that the State's and Judge Wagner's repeated telephone messages to counsel to ascertain the status of the appeal had gone unanswered. The letter also reminded Katrina's counsel that she still had not complied with her August 17, 2004 verbal commitment to request transcripts, which should have been ordered within fifteen days of filing the notice of intent to seek postdispositional relief. WIS. STAT. § 809.107(4). The State advised Katrina's attorney that if transcripts were not requested by September 1, 2004, it would ask the court to find that the appeal was abandoned.

¶15 On February 10, 2005, Katrina's attorney moved to withdraw as counsel, intimating that the delay in ordering transcripts was due to Katrina's inability to pay for them. The court granted the request, rejecting the State's request, with the GAL's concurrence, to deem the appeal abandoned. Later, the court of appeals granted Katrina's motion to reinstate her appeal rights by extending the time for Katrina to request transcripts and for the appointment of counsel. ***Kenosha County DHS v. Katrina R.***, No. XX-20979, unpublished slip op. at 3 (Wis. Ct. App. Mar. 28, 2005). A public defender was appointed.

¶16 The case then was remanded to the circuit court to address the ineffective assistance of counsel claim filed against Katrina's trial counsel. At the

[5] A permanency plan is designed to ensure that a child is reunified with his or her family when appropriate or quickly attains a placement or home providing long-term stability. WIS. STAT. § 48.38(1)(b). The agency placing the child outside the home must prepare a written permanency plan for the child. Section 48.38(2). The permanency plan must be reviewed at prescribed intervals. Section 48.38(5)(a).

Machner-type[6] hearing held on September 30, 2005, the court found that trial counsel was not ineffective. This appeal followed.

DISCUSSION

1. COMPETENCY TO PROCEED

¶17 WISCONSIN STAT. § 48.422(2) provides that, unless the parties agree to an immediate hearing on the merits, the circuit court must set a date for a fact-finding hearing to be held within forty-five days of the hearing on the petition. Relying on this deadline, Katrina contends the circuit court was without jurisdiction to conduct the February 9, 2004 plea hearing/fact-finding hearing because it was conducted more than forty-five days after the December 3, 2003 initial hearing on the petition.[7] In particular, Katrina argues that the reason stated by the court—congestion of the attorneys' calendars—is not supported by the record and so cannot constitute the requisite showing of good cause under WIS. STAT. § 48.315(2).

¶18 Contested TPR petitions must proceed within the time limits prescribed in WIS. STAT. §§ 48.422(2) and 48.315. However, § 48.315(2) provides that a continuance shall 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 or the parties and the interest of the

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[6] *See* ***State v. Machner,*** 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App.1979).

[7] Katrina's failure to raise a competency challenge in the circuit court does not waive her right to raise it on appeal. *See* ***Sheboygan County DSS v. Matthew S.***, 2005 WI 84, ¶30, 282 Wis. 2d 150, 698 N.W.2d 631, *reconsideration denied*, 2005 WI 150, ___ Wis. 2d ___, 705 N.W.2d 664 (stating that a competency challenge based on the court's failure to act within WIS. STAT. ch. 48 time periods cannot be waived).

public in the prompt disposition of cases." Thus, while these time limits generally are mandatory, a lack of strict compliance does not always result in loss of competency to exercise jurisdiction. ***Sheboygan County DSS v. Matthew S.***, 2005 WI 84, ¶18, 282 Wis. 2d 150, 698 N.W.2d 631, *reconsideration denied*, 2005 WI 150 ___ Wis. 2d ___, 705 N.W.2d 664. Indeed, as noted, a continuance is legislatively contemplated in §48.315(2). ***Matthew S.***, 282 Wis. 2d 150, ¶18.

¶19 Where the facts are undisputed, whether the circuit court complied with the time limits and properly granted a continuance[8] under WIS. STAT. § 48.315(2) presents a question of law we review independently. ***State v. Quinsanna D.***, 2002 WI App 318, ¶37, 259 Wis. 2d 429, 655 N.W.2d 752. We observe that while the circuit court should state its reasons on the record for continuing a fact-finding hearing beyond the forty-five days, it need not engage in an "incantation of statutory phrases" to properly invoke § 48.315(2). ***State v. Robert K.***, 2005 WI 152, ¶33, ___ Wis. 2d ___, 706 N.W.2d 257 (citation omitted). Good cause and the necessity of the length of the delay can be inferred if we find ample support in the record. ***Id.***, ¶¶33, 34.

¶20 When the circuit court attempted to set a date for the fact-finding hearing, it conferred with the parties both on and off the record. It then stated: "So, the Court's going to schedule this for February 9th and toll time limits and find good cause to toll the time limits because of the congestion of the attorneys' calendars until that date of February 9th." Katrina does not dispute that lawyer and litigant scheduling conflicts may constitute good cause under WIS. STAT.

[8] A "continuance" encompasses situations in which the fact-finding hearing is originally scheduled beyond the statutory forty-five-day time period. ***State v. Robert K.***, 2005 WI 152, ¶28, ___ Wis. 2d ___, 706 N.W.2d 257.

§ 48.315(2). ***Robert K.***, 706 N.W.2d 257, ¶30; ***Quinsanna D.***, 259 Wis. 2d 429, ¶39. Her argument instead seems to be that the court merely recited the words "good cause" without actually making a finding of it, and, further, that the record does not support such a finding. We disagree.

¶21 When evaluating whether good cause existed, we consider four main factors: (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 interests of the child. ***Robert K.***, 706 N.W.2d 257, ¶35. We conclude that these factors, considered in light of the record, weigh in favor of a finding of good cause for the continuance.

¶22 As to the first factor, good faith on the part of the moving party, we candidly acknowledge that no party expressly moved for a continuance. However, we also observe that the record illustrates the "squeeze factor" common in TPR scheduling matters. The court was faced with accommodating within a narrow time frame the weighty and often conflicting rights of Katrina, the father and, not least of all, the child. *See* WIS. STAT. § 48.01(1)(a) (recognizing both the paramount interest of the child and a goal of preserving family unity). The court's respect for the import of the proceeding and the statutory time limits was amply demonstrated. The court expressly recognized the critical nature of TPRs, prioritizing it even over a criminal case where defendant's liberty was at stake. When Katrina's attorney did not appear at the initial hearing, the court expressed its concern about proceeding without all parties represented, and itself tracked the attorney down and set the hearing for the very next day. The court also declined to accept the father's waiver of the time limits until its necessity became clear. The father's attorney's calendar posed the added inflexibility of another TPR trial with its own imperative time lines. When Katrina's attorney appeared at the adjourned initial hearing, she at first resisted the court's proposal of February 9 as

the plea hearing/fact-finding hearing date because of a conflict with the pending criminal case. But this resistance was not based on any complaint that the court was not complying with the statutory deadline. To the contrary, counsel merely noted that the date conflicted with counsel's prior commitment in another matter. This suggests that counsel would have agreed to a later date instead of insisting on a earlier one. Nonetheless, the court adhered to the February 9 date.

¶23 Harmonizing tight schedules and conflicting interests while simultaneously monitoring strict time limits was a daunting exercise: each ball being juggled had to be kept aloft. The court exerted a laudable, good faith effort to do so. Finally, we observe that nothing in the record suggests that any party dragged its feet or that the court extended the date for any reason but necessity to accommodate the schedules of the multiple parties and their attorneys.

¶24 The next factor is prejudice to the objecting party. We first observe that no party, including Katrina, ever objected to the trial court's scheduling of the February 9 hearing date. While that failure does not defeat Katrina's right to raise her jurisdictional argument on appeal, the absence of an objection is nonetheless relevant to the question of prejudice. Katrina complains solely about the fact of the twenty-three day delay but alleges no prejudice resulting from it. We do not minimize the importance of a court striving to adhere to the statutory deadlines, but we do not believe the court ignored this factor. To the contrary, the court expressly noted the deadlines. Given the court's efforts and the lack of asserted prejudice, this factor also supports the continuance.

¶25 The third factor, whether the dilatory party took prompt remedial action, does not apply here. With no dilatory party, no remedial action was necessary.

¶26 The last factor, the best interests of the child, clearly weighs in favor of the continuance. The record reveals that Katrina has had her parental rights terminated to at least one other child. The record also reveals that Quiana was twenty-one months old when she was removed from Katrina's care on grounds of neglect. After being moved about in several temporary placements, Quiana was placed in foster care with a family that planned to adopt her, offering her a chance at being raised in a permanent, stable home. In addition, Quiana's GAL admitted to the TPR petition, concluding that such a disposition was in Quiana's best interests.

¶27 At the same time, we well recognize that Katrina and the birth father faced termination of some of their most fundamental human rights in this joint petition. *See* ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶20, 246 Wis. 2d 1, 629 N.W.2d 768 (a termination of parental rights affect some of parents' most fundamental human rights). Since these proceedings were vitally significant to all, setting a hearing date suitable to all most likely would lead to finality regarding Quiana's circumstances, and thus was in Quiana's best interest.

¶28 Katrina nonetheless argues that the record is devoid of evidence that a continuance until February 9, 2004, was necessary. She concedes that the father's attorney had another TPR trial in January, but argues that the record "does not indicate the trial's date(s)." Her suggestion that a TPR trial might account for as little as a day seriously underestimates the time involved in preparing for a proceeding of that stature, and we reject it.

¶29 We also reject Katrina's assertion that there is no explanation "why the fact-finding hearing could not be held the last three weeks of December or the first two weeks of January." A calendar suggests one explanation. We take

judicial notice that Christmas 2003 and New Year's Day 2004, both legal holidays, fell on Thursdays, and Christmas Eve and New Year's Eve fell on Wednesdays. Also, the courthouse likely would not have operated on a regular schedule on the day after the legal holidays, in effect making each of those weeks two-day workweeks. We recognize that these legal holidays and the associated "eves" commonly accorded unofficial holiday status in this case would not formally affect time computation. *See* WIS. STAT. § 990.001(4). As a practical matter, however, they further splinter the calendar for the court and the parties and reduce days actually available for scheduling.

¶30 Having determined that the record supports a finding of good cause, we next consider whether the delay was "only for so long as is necessary." WIS. STAT. § 48.315(2). The record also satisfies us that the hearing was set as soon as the parties' and the court's calendars allowed. We note that the continuance was granted as soon as it was apparent that literal compliance with the time limits would not be feasible, and was for a period of just twenty-three days. *Compare* ***Robert K.***, 706 N.W.2d 257, ¶54 (good cause found to support granting six-month continuance). We underscore that every effort should be made to honor the statutory time limits. Compromise at times may be called for, however, and we conclude that this was one of those times. Neither Katrina, the father, nor the GAL[9] objected to the date being outside the statutory time frame. Katrina's attorney initially resisted the court's scheduling of the hearing only on grounds of a scheduling conflict. But, as we have noted, that resistance did not even remotely

[9] Because we hold that good cause existed for the extension, we need not answer whether the GAL's acquiescence constitutes consent under WIS. STAT. § 48.315(1)(b). *See* ***Robert K.***, 706 N.W.2d 257, ¶58 (having concluded that good cause existed for continuance, court declined to reach whether GAL's acquiescence fulfills statutory consent requirement).

suggest a concern that the hearing was not scheduled within the statutory time limit. To the contrary, as previously noted, counsel's statement was as readily susceptible of requesting a later date rather than an earlier one. In summary, the delay was not unnecessarily long.

1. VACATION OF TPR ORDER

¶31 Katrina next contends that the order terminating her parental rights should be vacated because: (1) her admission to the grounds for termination was unknowing and involuntary; (2) she was not afforded effective assistance of counsel; and (3) it is in the interests of justice. We address each in order.

a. Whether Admission was Unknowing and Involuntary

¶32 The TPR petition alleged as grounds both WIS. STAT. § 48.415(10) (prior involuntary TPR to another child) and § 48.415(2) (CHIPS). At the plea hearing, the parties advised the court that Katrina would enter a no contest plea to the prior TPR allegation and the State would dismiss the CHIPS allegation. The State said that Katrina would enter her plea "consistent with the agreement." Katrina argues that the words "consistent with the agreement" should have cued the court to inquire into her understanding of the nature of any agreement. She submits that the court's questioning would have revealed that she was unaware that a defense existed to the prior TPR allegation, and that she also thought she could introduce at the dispositional hearing the efforts she had made to satisfy the

conditions set in the CHIPS order. Accordingly, she argues that the TPR order should be vacated because her admission[10] to it was unknowing and involuntary.

¶33 Whether an admission of grounds in a TPR proceeding was made knowingly and with understanding of the facts alleged in the petition is a matter of constitutional fact. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51 n.18, 233 Wis. 2d 344, 607 N.W.2d 607; *see* WIS. STAT. § 48.422(7) (outlining court's obligations before accepting an admission of the facts alleged in the petition). Whether the historical facts meet the constitutional test is a question of law. ***Steven H.***, 233 Wis. 2d 344, ¶51 n.18. When evaluating a challenge to the proceeding mandated by § 48.422, we look to the analysis set forth in ***State v. Bangert,*** 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), relating to a circuit court's acceptance of a guilty plea in a criminal case. ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶34 On the same day as the plea hearing, Katrina completed a written plea questionnaire and waiver of rights form, initialing fifty-seven separate statements to signify her understanding of them. At the plea hearing, the circuit court engaged Katrina in a colloquy, methodically ascertaining her understanding of each item she had initialed. Both in writing and verbally, Katrina asserted that no promises were made to her in connection with the case. She also indicated that she understood the form and had no questions for the court. Katrina modified the form in several places to indicate that she was pleading only to the prior TPR. This understanding was reiterated at the plea hearing:

[10] Katrina pled no contest, which in effect constituted an admission that the allegations were true.

> [ASSISTANT DISTRICT ATTORNEY]: Your Honor, it's my understanding the mother will enter a no contest plea to the prior involuntary TPR ground consistent with the agreement.
>
> ….
>
> THE COURT: I'm not there yet. I'm still talking to [the father].
>
> ….
>
> THE COURT: What is your plea to the grounds portions of the termination of parental rights action that's before the court today?
>
> [DEFENSE COUNSEL]: Your Honor, I just wanted to clarify. I think [the Assistant District Attorney] was starting to explain that my client is entering a plea only to the prior involuntary TPR grounds. I think I clarified that on the form, actually. And I don't know what they're planning on doing with the continuing CHIPS portion of that. I would imagine they're— [the Assistant District Attorney] is planning on dismissing that as well, but that's the part that my client is pleading to only.

¶35 The detailed plea questionnaire and colloquy reassure us that the only "agreement" to which the State referred was the parties' shared understanding that Katrina would plead no contest to the prior involuntary TPR allegation and the State would dismiss the continuing CHIPS allegation. This agreement was fully honored. The plea questionnaire and colloquy further reassure us that Katrina's plea was knowing, voluntary and intelligent. Withdrawal of the plea is unwarranted.

b. Alleged Ineffective Assistance of Counsel

¶36 Katrina also asserts that her trial attorney rendered ineffective assistance because the attorney had told her that she had no defense to the prior involuntary TPR ground when an "as-applied" constitutional challenge was, in fact, available. *See* ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶25 n. 6, 279 Wis. 2d 169, 694 N.W.2d 344. Katrina raises this claim in the context of ineffective assistance of counsel because she pled no contest. *See* ***State v. Cole***, 2003 WI 112, ¶46, 264 Wis. 2d 520, 665 N.W.2d 328 (an as-applied challenge can be waived because it is a non-jurisdictional defect).

¶37 A parent facing the involuntary termination of his or her parental rights is entitled to effective assistance of counsel. ***A.S. v. State***, 168 Wis. 2d 995, 1004, 485 N.W.2d 52 (1992). The two-prong test of ineffective assistance requires the challenger to show that counsel's deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The ***Strickland*** test arose in the context of criminal law, but also applies to involuntary TPR proceedings. ***A.S.***, 168 Wis. 2d at 1005. Evaluating whether trial counsel provided ineffective assistance presents a mixed question of law and fact. ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. We will not disturb the circuit court's factual findings unless they are clearly erroneous. ***Id.*** Determining whether there was deficient performance and any resultant prejudice, however, are questions of law that we review independently. ***Id.*** We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that all significant decisions were made in the exercise of reasonable professional judgment, viewed as of the time of counsel's conduct. ***Strickland***, 466 U.S. at 689, 690. Simply put, we assess whether the

representation was reasonably effective, not whether it was ideal. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994).

¶38 At the ***Machner*** hearing, the narrow issue was whether Katrina's trial counsel had considered challenging the constitutionality of WIS. STAT. § 48.415(10), the prior involuntary TPR statute. Citing ***Ponn P.***, 279 Wis. 2d 169, ¶25 n.6, and ***Monroe County DHS v. Kelli B.***, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831, Katrina's appellate counsel asserted that under Wisconsin case law an "as-applied" challenge to the constitutionality of the statute could have been mounted and that another subsection of the statute had been found violative of due process in an incestuous parentage case.[11]

¶39 The circuit court found that nothing about trial counsel's research, advice, counseling, efforts to settle the case, arguments, or presentation of the case were in any way deficient. These findings are not clearly erroneous. Trial counsel testified that in her ten years of legal practice she had done considerable appellate work. She also testified that, based on her experience, challenges to a statute's constitutionality virtually always were unsuccessful. She testified that she had researched issues related to the prior involuntary TPR, leading her to rethink her initial strategy of seeking dismissal of that ground based on lack of notice. Counsel testified that she did not see challenging the statute's constitutionality as a viable option and that, although she had "looked really hard" at ways to mount a challenge to what seemed an unfair law, she ultimately advised Katrina that "our

[11] These cases were cited in the motion Katrina filed pursuant to the court of appeals July 18, 2005 order remanding the case to the circuit court for a hearing on Katrina's ineffective assistance of counsel claim.

best bet was to challenge the matter at disposition." This was a strategic choice which counsel was entitled to make. *See* ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996).

¶40 We also see no error of law on counsel's part. Statutes generally are presumed to be constitutional. ***Ponn P.***, 279 Wis. 2d 169, ¶16. A challenger seeking to overcome that presumption must demonstrate unconstitutionality beyond a reasonable doubt, with any doubts being resolved in favor of constitutionality. ***Id.***, ¶¶17, 18. Trial counsel's decade of experience, supplemented with research particular to this case, informed her decision that Katrina would be unlikely to carry this heavy burden and prevail on a challenge to the statute's constitutionality. We view this as a deliberate strategy made after considering the available options. *See* ***Elm***, 201 Wis. 2d at 464.

¶41 The cases Katrina cited in her motion do not change our analysis. First, both were decided after the March 30-April 1, 2004 disposition hearing, ***Ponn P.*** on March 23, 2005, and ***Kelli B.*** on April 28, 2004.[12] In addition, neither holds that WIS. STAT. § 48.415(10) is unconstitutional as applied. The footnoted language Katrina looked to in ***Ponn P.*** states only that that case does not "foreclose[] the possibility of an as-applied substantive due process challenge to WIS. STAT. § 48.415(4)," a different subsection than is at issue here. *See* ***Ponn P.***, 279 Wis. 2d 169, ¶25 n.6. Likewise, ***Kelli B.*** asked whether WIS. STAT. § 48.415(7) was narrowly enough drawn where the mother of the children was the

[12] In her motion, Katrina cited only to the supreme court opinion, ***Monroe County DHS v. Kelli B.***, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831. In her appellate brief, she cites to the court of appeals opinion, decided March 27, 2003. ***Monroe County DHS v. Kelli B.***, 2003 WI App 88, 263 Wis. 2d 413, 662 N.W.2d 360

victim of incest. ***Kelli B.***, 271 Wis. 2d 51, ¶¶15-17. Counsel testified that she had considered and disregarded that case as being too factually distinguishable. We will not second-guess a considered strategy or the exercise of professional judgment in the face of alternatives trial counsel has weighed. ***Elm***, 201 Wis. 2d at 464. Nor will we fault counsel for not raising an issue rooted in unsettled law. ***McMahon***, 186 Wis. 2d at 84-85. Katrina has not overcome the strong presumption that counsel's conduct fell on the continuum of professional reasonableness. Seeing no legal deficiency, we need not address the prejudice prong. ***Strickland***, 466 U.S. at 697.

c. New Trial in the Interest of Justice

¶42 Katrina next contends that her fitness as a parent has not been fully and fairly determined, and thus urges us to exercise our discretionary reversal power under WIS. STAT. § 752.35 to grant her a new trial in the interest of justice. We decline her invitation. A new trial in the interest of justice is granted only in exceptional cases. ***State v. Cuyler,*** 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). Katrina entered her plea freely, knowingly and intelligently, was assisted by effective counsel, and has stated no other compelling reason for us to reverse.

2. EXCLUSION OF EVIDENCE AT DISPOSITIONAL HEARING

¶43 Finally, Katrina asks this court to vacate the dispositional order and remand for a new dispositional hearing because, she contends, the court wrongly excluded evidence of her efforts to meet the conditions of return. The admission or exclusion of evidence in a TPR proceeding rests within the discretion of the circuit court. *See* ***State v. Joseph P.***, 200 Wis. 2d 227, 231, 546 N.W.2d 494 (Ct. App. 1996) (holding that the court did not misuse its discretion in admitting other crimes evidence at disposition hearing). A circuit court properly exercises its

discretion when it employs a rational thought process based on an examination of the facts and a proper application of the law. ***Sheboygan County DHHS v. Julie A.B.***, 2002 WI 95, ¶43, 255 Wis. 2d 170, 648 N.W.2d 402.

¶44 Katrina's argument stumbles on its own faulty premise. On direct examination, Katrina answered in the affirmative when asked whether she recalled the conditions imposed by the CHIPS order and whether she had worked on them. Her attorney then stated: "I'd like to go through the conditions with my client just as far as what the – what the conditions are. Okay?" The State objected, asking "to which standard and factor these relate." *See* WIS. STAT. § 48.426 (enumerating the standards and factors the court must consider at disposition). After some colloquy, the court directed defense counsel to "[g]o ahead. Get your testimony in about what you think benefits this child and is in the child's best interests." Counsel then proceeded to question Katrina at length, with no further objections as to the conditions of return.

¶45 Katrina was permitted virtually free rein at questioning about the conditions of return. Among other things, she testified about parenting classes, her immediate family's freedom from KCDCFS supervision, her mental health issues and her attempts to integrate Quiana into Katrina's extended family. We are perplexed as to how this leeway now can be termed an exclusion of evidence or an improper use of the court's discretion. Any limits on the information elicited were self-imposed. This argument fails.

CONCLUSION

¶46 We hold that the circuit court did not lose competency to proceed when the fact-finding hearing was set beyond the statutory forty-five days. Good cause in the record supports the continuance, and the delay did not exceed what

was necessary to accommodate the parties' competing interests and schedules. We also hold that Katrina's plea to the petition was freely and knowingly made, her trial counsel rendered reasonably effective representation, and there is no reason to vacate the TPR order in the interests of justice. Finally, we hold that evidence was not wrongly excluded at the dispositional hearing.

By the Court.—Order affirmed.

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