COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP548 **Cir. Ct. No. 2015TP000153**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

T. S. R.,

RESPONDENT-APPELLANT.

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

¶1 DUGAN, J.[1] T.S.R. appeals the trial court's orders terminating her parental rights to her child, T.S.J., and denying her postdispositional motion. On appeal, she contends that the trial court should have found that trial counsel was ineffective for failing to challenge, as applied to her, two statutory grounds that the State relied upon as the basis for termination of her parental rights was constitutional.[2] Those two grounds are continuing child in need of protective services (CHIPS) and failure to assume parental responsibility.

¶2 As to the failure to assume parental responsibility ground, she argues that the statute violates substantive due process because it was impossible for her to exercise daily care and supervision of T.S.J. when T.S.J. was in out-of-home care. As to the continuing CHIPS ground, she argues that the same right was violated because her mental illness made it impossible for her to fulfill the conditions for return.

¶3 For the reasons stated below, we conclude that the trial court did not err in determining that T.S.R. was not denied effective assistance of trial counsel, because, as applied to T.S.R., the statutory grounds for terminating parental rights

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[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.

Pursuant to WIS. STAT. RULE 809.107(6)(e), this court is required to issue a decision within thirty days after the filing of the reply brief. We may extend the deadline pursuant to WIS. STAT. RULE 809.82(2)(e) upon our own motion or for good cause. ***See Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995). On our own motion, we now extend the decisional deadline through the date of this decision.

[2] T.S.R. raised other contentions in her post-dispositional motion but does not raise them on appeal. Therefore, T.S.R. is deemed to have abandoned those contentions. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

based on continuing CHIPS and on failure to assume parental responsibility are constitutional. Therefore, we affirm.

¶4 The following background facts provide context for the issues in this case. Additional relevant facts are included in the discussion section.

BACKGROUND

¶5 T.S.J., now a seven-year-old child, was born on May 22, 2010. T.S.J. has chronic mental or emotional issues, diagnosed as an adjustment disorder with a mixed disturbance of emotions and conduct, and receives individual therapy four times a month.

¶6 T.S.R. is T.S.J.'s mother and R.D.J. is her father.[3] T.S.R. has a schizoaffective disorder with active visual and auditory hallucinations and bipolar features. In May 2011, T.S.R. began receiving supportive services from the Bureau of Milwaukee Child Welfare (BMCW)'s Safety Services program,[4] consisting of mental health, budgeting, parenting, and educational services. Those services continued until February 21, 2013, when T.S.R. sought emergency room treatment that resulted in a five-day hospitalization in the psychiatric ward. T.S.R. brought T.S.J along when she went to the emergency room.

[3] The parental rights of T.S.J.'s father were also terminated in parallel proceedings. R.D.J.'s case is not part of this appeal and will not be further discussed.

[4] The BMCW has since been renamed the Division of Milwaukee Child Protective Services. The agency was known by its prior name when this case was initiated; therefore, all references will be to the BMCW. The Safety Services program is an in-home program provided to parents who have safety concerns active in their household due to reports of abuse or neglect.

¶7 As a result of T.S.R.'s hospitalization, BMCW removed T.S.J. from her care and obtained a temporary custody order. T.S.J. was placed with foster parents and that original placement has continued, except for an unsuccessful three-month trial reunification in 2014. On May 1, 2013, T.S.J. was found to be a child in need of protective services and a dispositional order placing her outside the home in a BMCW-approved placement was entered. Between May 2013 and May 2014, T.S.R. made progress and transitioned to unsupervised visitation with T.S.J.

¶8 On June 14, 2014, an order allowing a ninety-day trial reunification of T.S.R. with T.S.J. in her home was issued. The order's implementation was delayed until July 2014 because T.S.R. needed to obtain utility service for the home. T.S.J. then began living with T.S.R. on a trial basis. However, the family case manager observed erratic behavior by T.S.R. and, on August 26, 2014, BMCW removed T.S.J. from T.S.R.'s home and placed her with the father. The placement with T.S.J.'s father was also unsuccessful because, contrary to BMCW's instructions, he moved in with T.S.R. The trial reunification order was revoked on September 22, 2014. Since that date, T.S.J. has not been reunified with either parent.

¶9 The underlying CHIPS order was extended on February 20, 2015, and on May 27, 2015, a petition to terminate T.S.R's parental rights to T.S.J. was filed, alleging a continuing CHIPS ground and a failure to assume parental

responsibility ground.[5] T.S.R.'s initial appearance on the petition was adjourned several times and, at the October 1, 2015 initial appearance, a jury trial for the grounds phase was scheduled for February 2016.

¶10 On January 6, 2016, T.S.R. was taken into custody for a probation violation and she remained in custody with an anticipated July 2016 release. The court adjourned the trial date. The grounds phase was tried to a jury, from May 9 through May 12, 2016. The jurors found that T.S.R. had failed to assume responsibility for T.S.J. and that T.S.J. continued to be a child in need of protective services.

¶11 The trial court held a disposition hearing on July 14, 2016, and granted the petition to terminate T.S.R.'s parental rights, concluding that the termination of parental rights and adoption served T.S.J.'s best interests. The trial court found that T.S.R. had a "serious and chronic mental illness" that had "repeatedly occasioned mental health hospitalizations and periods of incarceration" and had most notably resulted in T.S.J. being removed from T.S.R.'s care on February 13, 2013, under "inordinately shocking" circumstances.[6] It also found that T.S.R. had not met and could not meet T.S.J.'s needs or provide

[5] Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the grounds phase, the petitioner must prove by clear and convincing evidence that at least one of the twelve grounds enumerated in WIS. STAT. § 48.415 exists. *See* WIS. STAT. § 48.31(1); ***Steven V.***, 271 Wis. 2d 1, ¶¶24-25. A finding that the State has established one statutory ground is all that is needed as the basis for declaring a parent unfit. In the dispositional phase, the court must decide if it is in the child's best interest that the parent's rights be permanently extinguished. *See* WIS. STAT. § 48.426(2); ***Steven V.***, 271 Wis. 2d 1, ¶27.

[6] When T.S.R. went to the emergency room in February 2013, she was acting erratically—spilling water on the floor, shouting "penis," and yelling at T.S.J. T.S.J. was very dirty, she had matted hair that took a week to comb out, and she smelled very badly.

the environment T.S.J. needed. In contrast, the trial court observed that T.S.J. had lived with the foster family for nearly three years. It also found that the foster family was committed to adopting T.S.J. and had consistently demonstrated an ability and commitment to provide her with "the nurturing, supportive, structured and loving environment" that those needs demand, in the face of highly challenging behavior occasioned by T.S.J.'s special needs. The trial court entered an order on July 19, 2016, terminating T.S.R.'s parental rights.

¶12 On July 27, 2016, T.S.R. filed a notice of intention to seek postdispositional relief. Thereafter, T.S.R. filed a notice of appeal, followed by a motion to remand so that she could seek postdispositional relief. This court granted T.S.R.'s motion and T.S.R. filed a motion for postdispositional relief. In October 2017, the trial court issued an order denying T.S.R.'s motion. The record was then retransmitted to this court and the parties briefed the issues on appeal.

DISCUSSION

¶13 On appeal, T.S.R. argues that trial counsel provided ineffective assistance for failure to argue that WIS. STAT. § 48.415(2), continuing CHIPS, and WIS. STAT. § 48.415(6), failure to assume parental responsibility, are unconstitutional as applied to her because her mental illness made completing her CHIPS conditions and assuming parental responsibility impossible. However, her appellate briefs make minimal reference to the two prongs of ineffective assistance and to the claim itself. Nonetheless, we will address her arguments in the context of ineffective assistance of counsel.

Standard of Review

¶14 "Wisconsin has adopted the United States Supreme Court's two-pronged ***Strickland***[7] test to analyze claims of ineffective assistance of counsel." ***State v. Williams***, 2015 WI 75, ¶74, 364 Wis. 2d 126, 867 N.W.2d 736 (footnote added). Wisconsin has extended the ***Strickland*** test to involuntary termination of parental rights proceedings. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

¶15 "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Williams***, 364 Wis. 2d 126, ¶74. "The standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Thus, the trial court's findings of fact, 'the underlying findings of what happened,' will not be overturned unless clearly erroneous." ***Id.*** (citations omitted). "The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently." *See* ***id.*** at 128. "[C]ourts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.*** It is not ineffective assistance for trial counsel not to make a losing argument or motion. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

[7] ***Strickland v. Washington***, 466 U.S. 668 (1984).

I. WISCONSIN STAT. § 48.415(6) as Applied to T.S.R. is Constitutional

¶16 T.S.R. argues that her trial counsel was ineffective in failing to assert that WIS. STAT. § 48.415(6) violated her right to substantive due process because it was impossible for her to exercise daily care and supervision of T.S.J. when T.S.J. was placed in out of home care. She argues that she was prohibited by the court order that removed T.S.J. from exercising daily care and supervision.

¶17 ***Kenosha County Department of Human Services v. Jodie W.***, explains,

> 'The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair.' Substantive due process requires that when a statute adversely affects fundamental liberty interests, the statute must be narrowly tailored to advance a compelling interest that justifies interference with fundamental liberty interests.

Id., 2006 WI 93, ¶39, 293 Wis. 2d 530, 716 N.W.2d 845 (citations omitted).[8] The court in ***Jodie W.*** further explained that "[t]he United States Supreme Court has recognized a parent's fundamental right to the care and custody of his or her child, and concluded that a state may not terminate this right without an individualized determination that the parent is unfit." ***Id.***, ¶40.

[8] The State asserts that the rational basis test should be applied to T.S.R.'s constitutional challenge because the jury found that she did not have a substantial relationship with T.S.J., it explains that it only addresses the strict scrutiny test because the statute is constitutional under either standard. We will do the same for the same reason.

¶18 The court in ***Jodie W.*** explained that "[t]his court has already determined that the State's compelling interest underlying the [eleven] grounds for termination of parental rights under WIS. STAT. § 48.415 is to protect children from unfit parents." ***Jodie W.***, 293 Wis. 2d 530, ¶41. It also recognized the legislature's emphasis on "'eliminating the need for children to wait unreasonable periods of time for their parents to correct the conditions that prevent their safe return to the family.'" ***Id.***, ¶46 (citing WIS. STAT. § 48.01(1)(a)). Therefore, the threshold issue is whether WIS. STAT. § 48.415(6), as applied to T.S.R., is narrowly tailored to meet the State's compelling interest of protecting T.S.J. from an unfit parent. In this case, we must determine whether the trial court's application of the statute was constitutionally permissible when it determined that T.S.R. was an unfit parent because she failed to assume her parental responsibility for T.S.J.

¶19 In essence, T.S.R.'s argument is based on the premise that by placing T.S.J. out of T.S.R.'s home care, the trial court made it impossible for T.S.R. to assume responsibility for the daily care and supervision of T.S.J. The State argues that looking at the totality of the circumstances of T.S.J.'s life, T.S.R.'s inability to assume parental responsibility was not a function of T.S.J. being in out-of-home care, but was a function of T.S.R.'s lack of involvement in other unaffected aspects of T.S.J.'s life and her exposure of T.S.J. to a hazardous living environment when she had placement.

¶20 T.S.R. primarily relies on ***Jodie W.*** to support her argument that the removal of T.S.J. from her home made it impossible for T.S.R. to provide daily care and supervision for T.S.J. She asserts that ***Jodie W.*** stands for the proposition that it is unconstitutional to find T.S.R. unfit based solely on her failure to meet an

impossible condition. We reject T.S.R.'s argument because it overstates the holding in ***Jodie W.*** and because this case is distinguishable.

¶21 ***Jodie W.*** holds that court-ordered conditions for return must be tailored to a parent's status as an incarcerated person "in cases where a parent is incarcerated and *the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent's incarceration*." ***Id.***, 293 Wis. 2d 530, ¶51 (emphasis added). ***Jodie W.*** involved a termination of parental rights proceeding under WIS. STAT. § 48.415(2)—continuing CHIPS. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶8. It did not involve a claim under § 48.415(6) for failure to assume parental supervision. *See* ***id.***

¶22 As T.S.R. acknowledges, the termination of T.S.R.'s parental rights does not involve incarceration. Nonetheless, T.S.R. argues that in her case, removal of T.S.J. from her home made it impossible for her to provide daily care and supervision for her child and, thus, her situation is analogous to that of ***Jodie W.*** However, she cites no legal authority suggesting that the definition of "substantial parental relationship" is deficient or holding that having a child in out-of-home placement makes it impossible to assume parental responsibility.

¶23 Further, as the trial court explained:

> The law is clear and the instructions adequately apprised the jury, a parent of a child in out-of-home care can establish and/or maintain a substantial parental relationship with a child while not exercising the responsibilities of daily supervision and care by expressions of care and concern for the welfare of the child; visiting the child; engaging with substitute caregivers, teachers, daycare providers, health care providers; providing emotional, financial and material support (when able). Most commonly, the conditions of safe return in related CHIPS orders—when they exist, as they did here—specifically encourage or mandate the parent to engage in all or

> substantially all of those activities. As the instruction advises and the law provides, the existence or nonexistence of a substantial parental relationship is assessed based upon the totality of the circumstances of the child's life.

¶24 Here the jury found that T.S.R. failed to establish a substantial parental relationship with T.S.J. from March 2013 through the May 2016 trial. The following evidence supports the jury's finding that T.S.R. failed to accept and exercise significant responsibility for T.S.J.'s daily supervision, education, protection, and care. We note that T.S.J. has been diagnosed with chronic mental or emotional issues in the form of an adjustment disorder with a mixed disturbance of emotions and conduct for which she attends individual therapy sessions four times a month. T.S.R. does not grasp how her own emotional needs, mental health, and history of not taking her medications for a period of time, affect her ability to parent T.S.J. Further, as we will explain in greater detail, T.S.R. had opportunities to engage with T.S.J., by participating in parent-child therapy, but T.S.R. did not complete the program.

¶25 The jury could also reasonably find that the evidence showed that T.S.R. exposed T.S.J to a hazardous environment at home and elsewhere. In February 2013, when T.S.R. went to the emergency room, she brought T.S.J. with her. As described previously, T.S.R.'s behavior was erratic and included yelling at T.S.J., who was then about twenty-two months old. T.S.J. also made comments to the family case manager about alcohol and being drunk when talking about tea parties and naps.

¶26 Other hazardous erratic behavior occurred when T.S.J. was living with T.S.R. during August 2014. To begin with, after less than a month of the trial reunification, without medical approval, T.S.R. stopped taking one of her medications. Within weeks, T.S.R.'s mental condition deteriorated. In late

August 2014, the family case manager stopped by T.S.R.'s home to deliver school supplies and witnessed T.S.R's erratic and manic behavior and T.S.R.'s inability to respond appropriately to T.S.J.'s out-of-control behavior. T.S.R. also was unable to respond appropriately to the case manager's question about possible options if T.S.J. needed a temporary placement. T.S.R.'s response was that her aunt was on fire and her grandma was beating it out of her. The case manager also asked T.S.R. about a kitchen knife that was stuck in the wall. T.S.R. responded that she was "practicing" and "it happened when T.S.J. was sleeping." T.S.R. left the knife in the wall—a hazardous condition.

¶27 During the visit, T.S.R.'s behavior further escalated, when she screamed at T.S.J, then about four-years old, about her ancestry. T.S.R also told the case manager that she had "better go before I knife you like a Ninja," and said that she "would never threaten a white woman with blonde hair who is not human." At the time, the case manager also suspected that T.S.R. was under the influence of alcohol because T.S.R. stumbled, slurred words, and had the smell of alcohol on her breath. The August 2014 incident showed that T.S.R.'s living environment was hazardous for T.S.J.

¶28 The existence of a hazardous environment was further supported by clinical psychologist Dr. Michelle Iyamah's June 2015 report. She advised that T.S.R. should be "more closely monitored" and have supervised visits with T.S.J. due to the presence of unusual thoughts that might be distressing to T.S.J.

¶29 Additionally, the evidence showed that T.S.R. did not express concern for or interest in the support, care or well-being of T.S.J. Since at least 2013, T.S.R. was not involved in T.S.J.'s education or medical care. There is no evidence that T.S.R. attended any of T.S.J.'s medical or dental appointments or

demonstrated any interest in such treatments. Further, T.S.J. has significant needs that T.S.R. is unable to meet. T.S.J.'s intellectual function is borderline, she has an individualized education plan (IEP) stating that as a first-grader, T.S.J. was functioning at a 22 to 24-month old level, and a behavioral management plan. Although T.S.J. was in first-grade, there is no evidence that T.S.R. attended any school function.

¶30 The record also supports a conclusion that T.S.R. failed to demonstrate concern or that she cared for T.S.J.'s needs or placed them above her own. T.S.R. continued to commit crimes, which resulted in her being on probation and being in and out of custody. She used alcohol and other non-prescribed drugs but denied that she had any problem related to such usage and rejected treatment. Even in June 2014, when T.S.R. had progressed to an extent that the court authorized trial reunification, implementation had to be delayed because T.S.R did not have utility service for her home. Additionally, although T.S.J. had lived with her foster parents for almost five years, it was not until March 2016 with the May 2016 jury trial date approaching, that T.S.R. began writing letters to T.S.J. A month prior to trial was the first time that T.S.R. included a small gift for T.S.J.

¶31 We hold that T.S.R. had opportunities to establish or maintain a substantial relationship with T.S.J. while T.S.J. was in out-of-home care, but she failed to do so. Based on the foregoing, we conclude that WIS. STAT. § 48.415(6), as applied to T.S.R., was constitutional. Based on our holding, trial counsel was

not deficient for failing to raise the issue because any objection would be without merit.[9] *See* ***Swinson***, 261 Wis. 2d 633, ¶59.

II. WIS. STAT. § 48.415(2) as Applied to T.S.R. is Constitutional

¶32 T.S.R. argues that her trial counsel was ineffective in failing to assert that WIS. STAT. § 48.415(2) was unconstitutional as applied to her because her mental illness made it impossible for her to meet the conditions of return. Once again she relies on ***Jodie W.***, asserting that the court held that it was unconstitutional to find a parent unfit based on the parent's inability to fulfill an impossible condition. Referencing WIS. STAT. § 48.415(3), she also argues that the legislature has made it clear that when a parent is suffering from mental illness that rises to the level of a potentially permanent disability, that parent must be given at least two years of inpatient treatment to regain their sanity prior to proceeding to termination.

¶33 By contrast, the State asserts that although T.S.R. suffered from a mental illness, it is also evident that when properly medicated, T.S.R. was able to control her mental illness and parent. It points out that she was able to work with the Safety Services program for two years before T.S.J. was removed from her home. During that time, T.S.R. was able to continue parenting due, in part, to taking her medication. The State further argues that once T.S.R. stopped taking her medications consistently, she regressed to the point where T.S.J was removed, but when T.S.R. began taking her medications again, she was able to progress to a point where T.S.J. was returned to her for a trial unification.

[9] Since we conclude that trial counsel was not deficient, we need not address the prejudice argument. *See* ***Johnson***, 153 Wis. 2d at 127.

¶34 Once again, our threshold issue is whether WIS. STAT. § 48.415(2), as applied to T.S.R., is narrowly tailored to meet the State's compelling interest of protecting T.S.J. from an unfit parent. In this case, we must determine whether the trial court's application of the statute was constitutionally permissible when it determined that T.S.R. was an unfit parent because she failed to fulfill the conditions the trial court set for T.S.J. to be returned.

¶35 Although T.S.R. relies on ***Jodie W.***, the facts in this case stand in stark contrast to those in that case. ***Jodie W.*** holds that court-ordered conditions for return must be tailored to a parent's status as an incarcerated person "in cases where a parent is incarcerated and *the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent's incarceration*." ***Id.***, 293 Wis. 2d 530, ¶51 (emphasis added). The court found that a violation of Jodie W.'s substantive due process rights was because she was found unfit, solely based on her incarceration status, without regard to her actual parenting skills. ***Id.***, ¶52. It found that there was no evidence that the conditions of return were created or modified specifically for Jodie W.

¶36 This is not a ***Jodie W.*** case because unlike ***Jodie W.*** where a single failure was asserted, the dispositional order had three conditions and the first condition had six goals. Further, the conditions of return were narrowly tailored to T.S.R. and her needs. The conditions of return were consistent with the results of Iyamah's June 2015 psychological examination of T.S.R., indicating that T.S.R. should continue with individual therapy and psychiatric care, comply with all medications, work on maintaining sobriety, not use any alcohol or unlawful drugs and build a positive support network.

¶37 Further, unlike Jodie W.'s incarceration, TS.R.'s mental illness is treatable and she can function if she takes her medication, engages in regular therapy, and does not use alcohol or unlawful drugs. For example, although T.S.J. was born prematurely and remained in the hospital for a month, T.S.R. visited her daily. While engaged in regular treatment, T.S.R. also was able to progress so that in June 2014 a trial reunification was authorized by the court.

¶38 Despite T.S.R.'s knowledge of the May 2013 court-ordered conditions for T.S.J.'s return,[10] as of the May 2015 date of the petition for termination of parental rights, T.S.R. had not completed the first dispositional order goal. That goal was to meet her own emotional needs by abstaining from using alcohol and unlawful drugs and developing coping skills to manage her mental health needs. To help meet that goal, she was provided with an AODA (alcohol and other drug abuse) assessment; mental health treatment, including individual therapy and psychiatric treatment; support services, including services through NAMI (National Alliance for Mental Illness), SALE (a county-run mental health support services program), and Mental Health of America; medication management; and psychological evaluations.

¶39 Nonetheless, T.S.R. did not consistently attend her mental health appointments or her AODA evaluations, declined SALE, and stopped attending NAMI programs. T.S.R. missed numerous psychiatric and other mental health

[10] On June 12, and October 12, 2015, the family case manager wrote T.S.R. letters outlining the court-ordered conditions and the behavioral changes that she needed to make to satisfy those conditions. The October 12, 2015 letter stated that T.S.R. needed to attend to her mental health needs, engage in AODA services, engage in anger management services and demonstrate housing stability. The letter also noted that T.S.R. had been referred to the Wiser Choice program (a county-run mental health and substance abuse recovery program) on five different occasions during 2015 and had not followed through with any of those referrals.

appointments throughout 2015. Additionally, T.S.R. did not refrain from using alcohol and unlawful drugs, and she did not maintain her mental health treatment.

¶40 T.S.R. was not satisfying her third goal involving her emotional needs.[11] After the trial reunification ended in September 2014, T.S.R. had not cooperated with individual therapy, psychiatry, psychological evaluation, medication management, AODA services, support services, NAMI, SALE, and Mental Health of America. T.S.R. also discontinued medications and clinical therapy services that assisted her in controlling her emotions, which were affected by mental illness. T.S.R. only attended eight therapy sessions with the family therapist at Shore Haven Behavioral Health between January and September 2015.

¶41 Furthermore, in early August 2014, during the trial reunification when T.S.R. was responsible for T.S.J.'s care and supervision, without consulting a medical provider, T.S.R. discontinued one of her own medications. In addition, T.S.R.'s inability to manage her mood swings and emotions was also manifested by her outbursts of anger and yelling at the family case manager.

¶42 Further, treating her own mental illness was not the sole condition that T.S.R. failed to fulfill. She failed to fulfill the fourth goal of the dispositional order—understanding T.S.J.'s needs. T.S.R. was referred to parenting support services, parenting classes, parenting education, parent/child interaction therapy, visitation, and a parent capacity assessment to meet that goal. For example, a parent/child interaction therapist worked with T.S.R. and T.S.J. from April 2014 to

[11] T.S.R.'s second goal was managing her mental health needs. The family case manager stated that T.S.R. was compliant with medications when she was in custody, but when she was out of custody, compliance fell off. However, she indicated that T.S.R. was also medicated between February 2013 and July 2014, a time that she believed T.S.R. was not in custody.

August 2014, in a weekly two-stage Children's Hospital's program that teaches participants new skills to enhance the parent-child relationship and to help manage difficult child behavior. Although the first stage went well, T.S.R. and T.S.J. only came to two second-stage sessions and did not complete the program. T.S.R. was also discharged from visitation in the late fall of 2014 because she was not receptive to feedback about her parenting skills and was confrontational with staff members.

¶43 With regard to T.S.R.'s fifth goal of household management, for which she received home management, parenting, and visitation services, T.S.R. did not meet that goal. That goal also involved T.S.R.'s attendance at T.S.J.'s medical and dental appointments. As noted earlier, T.S.R. did not attend or ask about attending any of T.S.J.'s appointments or the identity of T.S.J.'s medical service providers.

¶44 As required by the statute, BMCW offered multiple services as a reasonable effort to provide services intended to assist T.S.R. in maintaining a relationship with T.S.J. However, she did not consistently accept the services and/or follow through with them. Thus, the evidence demonstrates T.S.R. failed to participate in services designed to help her be a better parent for T.S.J. and failed to consistently take medication that helped her control her mental illness.

¶45 The above facts distinguish this case from ***Jodie W.*** In ***Jodie W.***, the court explained that there was no indication that the mother "had problems maintaining a home" or had "exhibited any parental deficiencies" before her incarceration. ***Id.***, 293 Wis. 2d 530, ¶¶4, 53. By contrast, the trial testimony noted above is starkly different than the facts in ***Jodie W.*** regarding the mother. Here, T.S.R. had problems maintaining a home and exhibited chronic parental

deficiencies. T.S.R. continued to use alcohol and/or unlawful drugs, denied that use, and rejected treatment for the problem. Further, unlike the conditions for return in ***Jodie W.***, the conditions of return here were not impossible for T.S.R. to meet. They were narrowly tailored to her treatment needs. It was T.S.R.'s conduct that prevented her from fulfilling the conditions. For almost two years, while T.S.R participated in treatment via the Safety Services program, she was able to continue to parent T.S.J. and then again, while participating in treatment after T.S.J. was removed from the home, T.S.R. was able to progress to a point where a trial reunification was implemented.

¶46 Therefore, we conclude that the conditions for return did not violate T.S.R.'s constitutional substantive due process rights. Consequently, T.S.R.'s trial counsel was not ineffective in failing to raise the issue because any objection would be without merit.[12] *See* ***Swinson***, 261 Wis. 2d 633, ¶59 (stating that trial counsel was not deficient for failing to file a meritless motion).[13] *See* ***Johnson***, 153 Wis. 2d at 128.

CONCLUSION

¶47 We conclude that the trial court did not err in determining that T.S.R. was not denied her right to effective assistance of counsel and that neither

[12] Citing WIS. STAT. § 48.415(3) T.S.R. also argues that the legislature has made clear that a parent who is suffering from a mental illness that rises to the level of a potentially permanent disability must be given at least two years of inpatient treatment to regain their sanity before the State can proceed with a termination of parental rights. However, this argument is undeveloped and, therefore, we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[13] We also note that T.S.R. raised a new prejudice argument in her reply brief. "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

WIS. STAT. § 48.415(6), the failure to assume parental responsibility ground, nor § 48.415(2), the continuing CHIPS ground, are unconstitutional as applied to T.S.R. Therefore, we affirm the trial court's orders.

By the Court.—Orders affirmed.

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