COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 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 No. 2017AP1715 **Cir. Ct. No. 2016TP193**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

T.G., SR.,

RESPONDENT-APPELLANT.

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

¶1 BRASH, J.[1] T.G. Sr. appeals an order terminating his parental rights of T.G. Jr., as well as the denial of his postdispositional motion to withdraw his no contest plea. In that motion, and in this appeal, T.G. Sr. argues that he should be permitted to withdraw his no contest plea because he has mental health issues that adversely affected his ability to understand the termination proceedings, and because his trial counsel was ineffective for failing to fully explain that he was waiving his right to a jury trial. He further argues that the trial court erred in denying his motion without an evidentiary hearing. We reject his claims and affirm.

BACKGROUND

¶2 T.G. Sr. is the adjudicated father of T.G. Jr., whose date of birth is July 24, 2010. T.G. Jr.'s mother, A.C., resides in Texas.

¶3 T.G. Jr. came to the attention of the Bureau of Milwaukee Child Welfare (BMCW)[2] in October 2013. BMCW had received a referral relating to T.G. Sr.'s girlfriend, N.G., regarding drug use and domestic violence in the presence of her children. It was discovered that T.G. Sr. and T.G. Jr. were also residing with N.G. T.G. Sr. was taken into police custody due to several outstanding warrants. Additionally, drugs and drug paraphernalia were found in the home.

[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.

[2] The Bureau of Milwaukee Child Welfare (BMCW) has since been renamed The Division of Milwaukee Child Protective Services. Since the agency was still the BMCW at the time of these proceedings, all references will be to the BMCW.

¶4 T.G. Sr. was sent to the Monroe County Jail on the outstanding warrants. As an immediate protective plan, T.G. Jr. was placed with his paternal aunt until it could be determined when T.G. Sr. would be released on bail and then assessed by BMCW. However, soon after his release from the Monroe County Jail on November 15, 2013, T.G. Sr. was re-arrested in Sparta, Wisconsin, for drinking in violation of his bail conditions. T.G. Sr. then informed BMCW on November 29, 2013, that he had pled guilty to the charges in Monroe County and would be returning there in about a month to serve a 180-day sentence.

¶5 A Child in Need of Protection and Services (CHIPS) petition was then filed on December 4, 2013, for T.G. Jr. The correlating CHIPS dispositional order, filed on March 19, 2014, indicated that A.C. was residing in Texas and was "not available for the child," and that T.G. Sr. was incarcerated until June 2014. The CHIPS order also set forth several conditions for T.G. Sr. to meet before T.G. Jr. would be returned, including refraining from drug and alcohol use and participating in family visits with T.G. Jr., where he was to demonstrate that he was able to provide for T.G. Jr.'s needs. Additionally, T.G. Sr. was to resolve all of his criminal charges and follow all of the conditions of his probation.

¶6 In October 2014, T.G. Jr. was returned to his father's custody. However, in May 2015, T.G. Sr. tested positive for cocaine and opiates. Later that month his girlfriend called the police after he stole money from her to buy heroin and came home intoxicated and high. He was again taken into police custody, remaining in jail until November 2015. BMCW resumed custody of T.G. Jr.

¶7 Upon his subsequent release from custody, T.G. Sr. failed to meet the conditions of the CHIPS dispositional order. He participated in an Alcohol and Other Drug Abuse (AODA) program; however, he then tested positive for

alcohol in April 2016. Furthermore, it took T.G. Sr. several months after his release from jail before he set up visits with T.G. Jr.

¶8 As a result, a petition for the Termination of Parental Rights (TPR) of T.G. Sr. with regard to T.G. Jr. was filed on June 13, 2016. In the petition, the State alleged two grounds for termination: (1) continuing need of protection or services, pursuant to WIS. STAT. § 48.415(2); and (2) failure to assume parental responsibility, pursuant to WIS. STAT. § 48.415(6). A.C. voluntarily consented to the termination of her parental rights.

¶9 T.G. Sr. initially contested the TPR petition and reserved his right to a jury trial. However, at the permanency plan hearing on October 5, 2016, the trial court was advised that T.G. Sr. had been arrested on a charge of sexually assaulting a mentally challenged adult. At the final pretrial on February 22, 2017, the court was informed that T.G. Sr. had entered a plea to those charges, and had been sentenced to three years of incarceration and five years of extended supervision.

¶10 At that February pretrial conference, the parties advised the trial court that T.G. Sr. intended to enter a no-contest plea to the grounds of failure to assume parental responsibility. However, when the trial court attempted to conduct the plea colloquy, T.G. Sr. did not respond. The court noted the possibility that T.G. Sr. was having emotional issues due to his recent criminal conviction or was on some type of medication, because at times during that hearing it appeared that he was sleeping. In any event, that hearing was adjourned. The proceedings were then resumed on March 13, 2017, and T.G. Sr. entered a no-contest plea to the grounds of failure to assume parental responsibility. At the dispositional hearing on May 31, 2017, the trial court

determined that it was in the best interests of T.G. Jr. to terminate T.G. Sr.'s parental rights.

¶11 T.G. Sr. appealed. In September 2017, he filed a motion with this court to remand this matter back to the trial court for a ***Machner***[3] hearing regarding his wish to withdraw his no-contest plea on grounds that his mental health issues precluded his understanding of the proceedings so his plea was not knowingly, intelligently, and voluntarily given. He further asserted that his trial counsel was ineffective regarding his explanation of the waiver of T.G. Sr.'s right to a jury trial.

¶12 A hearing was held on that motion on January 11, 2018. T.G. Sr., who is currently incarcerated at Fox Lake Correctional Institution, was not present because he refused transport to attend the hearing. Nevertheless, the trial court, which had reviewed the transcript of the plea colloquy, heard the arguments of the parties and discussed its recollection of the proceedings, although it did not take further evidence.

¶13 During that discussion, the trial court recognized that T.G. Sr. has significant ongoing mental health issues and that he had not received his medication at the time of the plea hearing because he was in custody. However, based on the statements T.G. Sr. made regarding his understanding of the proceedings, along with several questions he asked relating to the proceedings that demonstrated his comprehension, the court concluded that the record was clear that T.G. Sr. "knew exactly what he was doing when he offered this plea."

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶14 Moreover, the trial court determined that because T.G. Sr. failed to demonstrate that his plea was not knowingly, intelligently, and voluntarily entered, he thus had failed to make any showing that he had received ineffective assistance of counsel. As a result, the court denied the motion in its entirety. The matter is now back before this court for review.

DISCUSSION

¶15 On appeal, T.G. Sr. asserts that the trial court erred in denying his motion to withdraw his no-contest plea without holding a ***Machner*** hearing, that he should be allowed to withdraw his plea because his mental health issues precluded him from entering his plea knowingly, intelligently, and voluntarily, and that his trial counsel was ineffective because he did not properly explain to T.G. Sr. that he was waiving his right to a jury trial. In denying T.G. Sr.'s motion for plea withdrawal, the trial court noted that the issues T.G. Sr. raises are "wholly interrelated." We agree, and proceed with our analysis accordingly.

¶16 In criminal cases, before accepting a plea the trial court is required to conduct a colloquy with the defendant to ascertain that the defendant understands the elements of the crime to which he is pleading guilty, the constitutional rights he is waiving by entering his plea, and the maximum potential penalty that can be imposed. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). This colloquy with the defendant helps to ensure that the defendant is knowingly, intelligently, and voluntarily waiving the rights being given up by entering a plea. *See* ***State v. Brown***, 2006 WI 100, ¶23, 293 Wis. 2d 594, 716 N.W.2d 906. This same analysis is used to evaluate pleas entered in TPR cases. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

¶17 Under the ***Bangert*** analysis, the parent seeking plea withdrawal "must make a prima facie showing that the [trial] court violated its mandatory duties and he must allege that in fact he did not know or understand the information that should have been provided at the [TPR petition] 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 showing, the trial court may deny the motion without an evidentiary hearing. *See* ***id.***, ¶43.

¶18 Whether a parent has made this prima facie showing 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 our review, we look to the totality of the circumstances and the entire record to determine the sufficiency of the trial court's colloquy. *See* ***Steven H.***, 233 Wis. 2d 344, ¶42.

¶19 T.G. Sr. also asserts that his plea was not knowingly, intelligently, and voluntarily entered into because he did not understand that he was giving up his right to a jury trial. He contends that his trial counsel was ineffective for failing to properly explain this. However, a claim of ineffective assistance of counsel "does not automatically trigger a right to a ***Machner*** testimonial hearing." ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157 (citing ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)). The trial court has the discretion to deny a motion without a hearing if it does not allege sufficient facts, if it provides nothing more than conclusory allegations, or "if the record conclusively demonstrates that [the movant] is not entitled to relief." ***Phillips***, 322 Wis. 2d 576, ¶17. We will overturn such a decision by the trial court only if it erroneously exercised its discretion. ***Id.***

¶20 To prove ineffective assistance of counsel, a defendant must show that his trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Wisconsin applies the two-part test described in ***Strickland*** for evaluating claims of ineffective assistance of counsel." ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted).

¶21 "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted). If a defendant fails to satisfy one component of the analysis, a court need not address the other. ***Strickland***, 466 U.S at 697.

¶22 Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). However, findings of fact made by the trial court will not be overturned unless they are clearly erroneous. ***Id.*** at 127.

¶23 Our review of the record shows that the colloquy was not deficient. The trial court thoroughly described and explained all of the rights that T.G. Sr. would give up as a result of the plea. The trial court also took into account T.G. Sr.'s mental health issues and the fact that he was not receiving his medication at that time. The court compared T.G. Sr.'s demeanor at the time the plea was

entered to the previous hearing on February 22, 2017, when T.G. Sr. was unresponsive: the court stated that it had "dramatic concerns" about T.G. Sr.'s mental state at the February hearing, but at the subsequent hearing on March 13, 2017, when the court took T.G. Sr.'s plea, he was "fully responsive" and "clearly oriented." Additionally, the court noted that the sexual assault case against T.G. Sr. had recently been resolved by plea, and that the court in that case "must have been satisfied that he was able to offer a valid plea in the criminal proceeding."

¶24 Furthermore, the trial court engaged in a dialogue with T.G. Sr. in which T.G. Sr. explained to the court in his own words his understanding of what a jury does; he then told the court that he understood he was giving up his right to have a jury decide the grounds of the TPR petition. In fact, T.G. Sr. asked several questions regarding the proceedings that the trial court noted demonstrated "a more sophisticated ability both to understand and to verbalize some of the more complex nuanced issues in a plea colloquy" than most parents that the court encounters.

¶25 This dialogue indicates that T.G. Sr. had a full and complete understanding of the information relayed to him by the trial court during the colloquy, including the waiver of his right to a jury trial. As a result, the trial court determined that the plea colloquy "established with certainty" that "despite his mental health struggles" T.G. Sr. had a firm understanding of the ramifications of entering the plea. In fact, the court stated that "[n]o reasonable fact-finder … could reasonably reach the conclusion" that he had not understood. We agree.

¶26 Therefore, we find that T.G. Sr. has not made a prima facie showing that there was a deficiency in the plea colloquy, nor has he demonstrated that he did not know or understand the information provided by the trial court, as is

required to establish that his plea was not knowingly, intelligently, and voluntarily made. *See* ***Steven H.***, 233 Wis. 2d 344, ¶¶42-43. On the contrary, the record conclusively shows that T.G. Sr. is not entitled to relief on his motion to withdraw his plea. *See* ***Phillips***, 322 Wis. 2d 576, ¶17. Thus, T.G. Sr.'s claim of ineffective assistance of counsel necessarily fails, because he has demonstrated neither a deficiency in his trial counsel's representation nor prejudice to his case. *See* ***Love***, 284 Wis. 2d 111, ¶30. Accordingly, we affirm the trial court's denial of T.G. Sr.'s motion to withdraw his plea without an evidentiary hearing.

By the Court.—Order affirmed.

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