COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2819 **Cir. Ct. No. 2005TP286**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LISA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

¶1 FINE, J. Lisa B. appeals the trial court's order terminating her parental rights to Rachael B. She contends that her trial lawyer was ineffective

because the lawyer advised her to waive her right to contest the grounds part of the termination-of-parental-rights proceeding. After an evidentiary hearing, the trial court rejected her contention. We affirm.

I.

¶2 Rachael was born in February of 2000. She was, according to the Record, Lisa B.'s fourth and youngest child. The three older children were removed from Lisa B.'s custody. Two were adopted, and the third remains estranged from Lisa B., who at the hearing on her contention that her trial lawyer gave her ineffective representation disputed the State's assertion that the third child was still in foster care, but admitted that the boy "didn't want to be returned to my home."

¶3 Rachael was removed from Lisa B.'s home in August of 2002, and was found to be a child in need of protection or services in April of 2003. The petition seeking termination of Lisa B.'s parental rights to Rachael was filed in July of 2005. It asserted grounds under WIS. STAT. §§ 48.415(2) (continuing need of protection or services) and 48.415(6) (failure to assume parental responsibility). When the trial court declined to accept Lisa B.'s admission to the failure-to-assume-parental-responsibility allegation, she admitted the continuing-need-of-protection-or-services ground, thus letting the trial court determine whether terminating her parental rights to Rachael was in Rachael's best interests. *See* WIS. STAT. §§ 48.424(4), 48.427.

¶4 Lisa B.'s troubles raising her children apparently stem from her endemic alcoholism. Indeed, the most recent removal of Rachael from Lisa B.'s custody in August of 2004 was because Lisa B. led the police on a drunken-driving chase with Rachael in the car's back seat. Lisa B. was convicted of

driving while drunk as a fifth offense and was sent to prison, where she was during the termination-of-parental-rights proceedings.

¶5 Lisa B. claims that she would not have agreed to waive her right to a grounds hearing under WIS. STAT. § 48.424 if her lawyer had not told her, according to Lisa B., that Lisa B.'s incarceration would make it impossible for her to satisfy the conditions set for Rachael's return to her custody during the then requisite "12-month period following the fact-finding hearing under s. 48.424." *See* WIS. STAT. § 48.415(2)(a)3 (2003–2004).[1] She relies on ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, which held that a finding that there are grounds to go to the best-interests phase of a termination-of-parental-rights proceeding may not rest solely on the fact that the parent is incarcerated. *See* ***id.***, 2006 WI 93, ¶¶49, 51, 293 Wis. 2d at 560–561, 716 N.W.2d at 860. Lisa B. thus asserts that her trial lawyer represented her ineffectively. We, as did the trial court, disagree.

II.

¶6 Parents from whom the State seeks to take children by terminating the parent's parental rights must have effective legal representation. ***A.S. v. State***, 168 Wis. 2d 995, 1004–1005, 485 N.W.2d 52, 55 (1992). The standard is the one established for criminal defendants by ***Strickland v. Washington***, 466 U.S. 668 (1984). ***A.S.***, 168 Wis. 2d at 1005–1006, 485 N.W.2d at 55. Under ***Strickland***, a defendant must show both deficient performance and prejudice. ***A.S.***, 168 Wis. 2d at 1005, 485 N.W.2d at 55. To prove deficient performance, the person must point

[1] The twelve-month period was reduced to nine months by 2005 Wis. Act 293, § 20, effective April 21, 2006. *See* ***id.***, § 71. The reduced period does not apply to matters raised by this appeal.

to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). To satisfy the prejudice aspect of ***Strickland***, the person seeking relief must demonstrate that the lawyer's errors were sufficiently serious to deprive the person of a fair proceeding and a reliable outcome, ***Strickland***, 466 U.S. at 687, and "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.***, 466 U.S. at 694.

¶7 An ineffective-assistance-of-counsel claim presents mixed questions of law and fact for appellate review. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Conclusions by the circuit court whether the lawyer's performance was deficient and, if so, prejudicial, present questions of law that we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** aspects if the person asserting an ineffective-assistance-of-counsel claim does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶8 As noted, the trial court held an evidentiary hearing on Lisa B.'s contention that her trial lawyer gave her ineffective representation by advising her to accept the continuing-need-of-protection-or-services ground, and thus move to the best-interests disposition phase without a fact-finding hearing under WIS. STAT. § 48.424. As we have seen, she contends that the only reason that she agreed to waive the § 48.424 fact-finding hearing is that her lawyer told her that in

light of her incarceration she stood no chance of prevailing. ***Jodie W.*** was decided after Lisa B. agreed to waive her rights under § 48.424.

¶9 ***Jodie W.*** recognized, based on out-of-state cases that it adopted, that "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, WIS. STAT. § 48.415(2) requires that the court-ordered conditions of return are tailored to the particular needs of the parent and child." ***Jodie W.***, 2006 WI 93, ¶¶48–51, 293 Wis. 2d at 560–561, 716 N.W.2d at 860. Lisa B.'s lawyer admitted that she did not know at the hearing at which Lisa B. agreed to waive her right to a grounds hearing that ***Jodie W.*** was pending before the supreme court or that there were out-of-state cases that held that it was unconstitutional to terminate a person's parental rights solely because the person was in prison. She testified, however, that she had two reasons for advising that Lisa B. waive her right to a trial under WIS. STAT. § 48.424: "My own conclusion was that a jury was likely to find that she was unlikely to meet the conditions within the next twelve months for two reasons: One, that she was incarcerated; and two because of her past history." The lawyer explained what she meant by "past history":

> There was substantial documentary evidence indicating that [Lisa B.] had a [child-in-need-of-protection-or-services] history dating back about 10 years. That she had had three other children who had been removed from her home in the mid 90s--1996, I believe. Don't quote me on these dates, but I believe it was 1996, two of those three children had subsequently been terminated. One child remained in foster care since '96. In addition to that, there was an extensive criminal history.

On her redirect-examination by Lisa B.'s post-termination lawyer at the hearing, she reiterated:

> Q Is that what you told her? That the reason that you are recommending stipulation [to the continuing-need-of-protection-or-services ground] is because not only because of incarceration, but because of your analysis of the previous ten years?
>
> A I believe that's what I told her.

The significance of Lisa B.'s history in relation to her incarceration status was pointed out by the testimony of Rachael's case worker during the waiver hearing: "Lisa hasn't been able to prove an extended period of sobriety. She is incarcerated until 2007. *And even if she's released tomorrow*, you know, she would need to prove that she can stay sober for an extended period of time, and she hasn't been able to do that." (Emphasis added.)

¶10 Lisa B.'s lawyer also testified Lisa B. told her "very strongly" at the waiver hearing that "I don't want to go to trial" and that it was the lawyer's impression that testifying would be "very traumatic" for Lisa B. Indeed, although she could have testified at the best-interests disposition hearing, Lisa B. "refused" to do so.

¶11 In denying Lisa B.'s motion to vacate the order terminating her parental rights to Rachael, the trial court found that "the record is absolutely clear that [Lisa B.'s incarceration status] was only one of several considerations that [Lisa B.'s trial lawyer] took into play in discussing this matter with Ms. B[]." Although Lisa B. contends that the Record supports her argument that her incarceration was either the only or, at the very least, the predominant reason her trial lawyer advised her to give up her right to a grounds hearing, the trial court found to the contrary and this finding is not clearly erroneous. The trial court's finding supports the trial court's legal conclusion that ***Jodie W.*** did not apply because, as the trial court found, Lisa B.'s incarceration status was not the "sole"

reason her lawyer advised that she waive her right to a grounds trial. In considering whether a lawyer gave a client ineffective assistance, we give great deference to the strategy decisions made by that lawyer. ***Strickland***, 466 U.S. at 689. Lisa B.'s trial lawyer was not ineffective. Accordingly, we affirm.

By the Court.—Order affirmed.

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