COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2001

Cornelia G. Clark
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.

Nos. 00-2749
00-2750

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

NO. 00-2749
IN THE INTEREST OF JENNIFER L.W.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

STACEY R.W.,

RESPONDENT-APPELLANT.

NO. 00-2750
IN THE INTEREST OF DAVID R.W.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

STACEY R.W.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Reversed and cause remanded with directions*.

¶1 BROWN, P.J.[1] Stacey R.W. appeals from a dispositional order finding that his two children are in need of protection and services. It is undisputed that at the plea hearing where Stacey admitted the allegations contained in the petitions, he trial court neglected to engage in a colloquy giving notice of certain rights. This colloquy is mandatory pursuant to WIS. STAT. § 48.30(2) and (8) (1999-2000). The question is whether such error was harmless. Wisconsin law establishes that the error is harmless unless the parent shows actual prejudice. Actual prejudice is shown if the parent convinces the trial court that he or she did not know of the right. Here, Stacey claims he did not know of his rights and the State claims he did. That requires a factual finding that only the trial court can make. We reverse and remand for that purpose.

¶2 Petitions for Children in Need of Protection and Services (CHIPS) relating to Stacey's two children were filed on July 26, 2000. The petitions alleged that he neglected, for reasons other than poverty, to provide necessary care so as to seriously endanger the physical health of the children. A dispositional report related some history involving Stacey's actions as a parent. He was jailed in 1998 for domestic violence, and during this time, the children reported that he damaged the home, scaring the children. As a result of an investigation begun on

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version

February 11, 2000, it was determined that abuse and neglect were likely to occur, but that Stacey and his wife refused ongoing services. Although the family was referred to the Family Steps Program for parenting assistance, the parents did not follow through. On April 25, 2000, another investigation ensued and it was reported that Stacey had threatened to kill the children's mother, that there was an arrest warrant for domestic violence and battery to her, that he was buying drugs and that he was "abnormally fixated" on his daughter. The children fear Stacey. The children, it has been determined, have issues of aggressive behavior. Stacey has "significant alcohol, drug and domestic violence issues."

¶3 After the petitions were filed, Stacey, acting pro se, filed several motions with the court on July 21, 2000. His initial motion was one to waive costs and fees. In that motion, he explained that he was detained in jail for his inability to make bail. Although the record does not say so, we presume that this is pertaining to a charge of domestic abuse/battery for which a warrant was reportedly out for him two months earlier. Stacey claimed that he "wishes to litigate matters in this case." He wrote that from past experience, he knew that the jail will "only provide research material, other than Wisconsin Statutes, at cost to the inmate …." He said that he did not have the money to pay for photocopies of legal research that he hoped to harvest in support of his case. He also moved for an order that his daughter's placement be changed to his sister's residence and a further motion asking for a hearing on the matter. Finally, he moved, inter alia, for appointment of counsel.

¶4 Apparently, Stacey also wrote the county corporation counsel requesting discovery of certain materials. He apparently sought police reports and social services materials concerning a third child, not his child, but nonetheless a child of the mother by another man.

¶5 The plea hearing on the CHIPS petitions occurred on August 14, 2000. Of significance, nowhere in the hearing record is there any indication that the notice requirements were followed. The pertinent statutory language is set forth in WIS. STAT. § 48.30:

> **Plea Hearing.**
>
> **….**
>
> **(2)** At the commencement of the hearing … the parent … *shall be advised of [his or her] rights* as specified in s. 48.243 and *shall be informed* that a request for a jury trial or for a substitution of judge under s. 48.29 must be made before the end of the plea hearing or be waived.
>
> ….
>
> **(8)** Before accepting an admission … of the alleged facts in a petition, the court shall:
>
> (a) Address the parties … personally and determine that the … admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit the … admission and alert unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.
>
> (c) Make such inquiries as satisfactorily establishes that there is a factual basis for the … admission of the parent ….

(Emphasis added.)

¶6 Instead of the colloquy mandated above, the court began by acknowledging the motions filed by Stacey. It then gave Stacey an opportunity to speak to the motions. Stacey replied that he was not going to contest physical custody at this time because he understood that he could contest it at a later time. He was asked whether he contested the allegations of the petition and he said, "I

haven't received any discovery material on them or anything, but I suppose not. Not right now." When asked whether he objected to continuing placement of the children in foster care, Stacey said that he would rather see his daughter placed with his sister because she "is really happy with Sharon. She gets a lot of attention and she is familiar there.… [I]t's like another home to her." Stacey said that he thought having two children would be too much for his sister. But the court agreed with the social worker that he did not want the two children—the other being a son—separated. The court then found that the children were in need of protection and services and set a date for the dispositional hearing. The disposition was not to Stacey's liking and he appeals. We concentrate, for purposes of the issue at hand, on the plea hearing.

¶7 On appeal, Stacey cites the statutes we referred to above and observes that the trial court did not follow the statutes. He then correctly cites the case relating to the issue he raises. In ***State v. Kywanda F.***, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996), the supreme court held that the failure to inform is harmless error unless the party establishes actual prejudice resulting from the error. Actual prejudice is shown if it is established that the party was not told of the right and did not know of the right. ***Id***.

¶8 This showing of prejudice must be made in the trial court in a postdispositional hearing. ***Id.*** at 43. Stacey did not bring a motion for a postdispositional hearing where he could attempt to convince the trial court that he did not know of the rights that are contained in the mandated colloquy. He apologizes to this court, but maintains that because he was acting pro se and because his jail status provided only meager legal resource materials, he did not find out the law until a part-time law clerk who works in the Ozaukee County Clerk of Courts Office helped him gain access to the proper materials. He asks

that we review and reverse pursuant to WIS. STAT. § 752.35, the interests of justice statute.

¶9 Not surprisingly, the State argues that the failure to bring this matter before the trial court in the first instance acts as a waiver. The State asserts that Stacey is knowledgeable about his rights and court procedure and therefore should be held to the same standard we reserve for litigants who either have lawyers representing them or have specific knowledge of their procedural responsibilities. We will not hold Stacey to waiver in this instance.

¶10 The question remaining is whether we should do what the supreme court did in ***Kywanda F.*** There, because the factual record was inadequate, the court determined that it could not make a decision about whether Kywanda's plea was knowing and voluntary. Stacey contends that we should likewise remand his matter to the trial court.

¶11 The State maintains that we do not have to send it back for a fact-finding hearing to determine whether Stacey knew about the rights he was waiving. The State maintains that Stacey is savvy about the judicial process, having gone through the system before. The State writes:

> Appellant would have this Court believe he was unaware of his rights. However that assertion is contradicted by the notices sent to appellant, the directions from the court at the plea hearing and the appellant's specific statements at the plea hearing regarding his motions, trials, right to counsel, et cetera. His assertion of lack of knowledge of his rights is further contradicted by his exercise of those rights by motion and appeal culminating in his writing of his brief, or at least his signing the brief submitted. Appellant chose not to have a trial and he agreed to the findings entered into by the court, he chose not to exercise his rights, including those of trial.

¶12 Stacey counters that neither the notice nor the transcripts show that he was advised of or knew of his right to a jury trial, his right to substitution of judge, whether the plea was made voluntarily or knowingly with an understanding of the nature of the potential dispositions, or whether there were any threats or promises. He also claims that the court did not alert him to the fact that there might be a defense that an attorney could discover or mitigating circumstances not apparent to him. He further contends that the trial court did not establish a factual basis for the plea.

¶13 Our independent review of the record shows that no written notice provided any of the rights contained in WIS. STAT. §§ 48.30(2) and (8). Further, just because Stacey was adroit enough to file written motions asking for waiver of costs, demanding a hearing on the physical custody of his daughter and wanting an attorney appointed does not mean, ipso facto, that he knew he had a right to a jury trial in a CHIPS action, or that—like a criminal action—he had a right to substitution.

¶14 The bottom line is that the mandated notice of rights should have been given. They were not. Now the question is whether Stacey knew the rights he was giving up. That is a question of state of mind, which, in turn, is a question for the fact finder, the trial court. We reverse and remand for that purpose.

By the Court.—Orders reversed and cause remanded with directions.

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