COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3128

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JA'TWAN W., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SANDRA W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Sandra W. appeals from an order terminating her parental rights ("TPR") to Ja'Twan W. Sandra claims that she received

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

ineffective assistance of trial counsel, and that the trial court erred when it refused to allow her to withdraw her admission that grounds exist to terminate her parental rights. Because Sandra has failed to prove that she received ineffective assistance of trial counsel, and because the trial court did not err when it denied her motion to withdraw her admission, this court affirms.

I. BACKGROUND

¶2 Ja'Twan was born on March 27, 1999, while Sandra was confined in a juvenile detention center. Over the next several months, Sandra absconded from numerous treatment homes for girls, became involved in selling illegal drugs, and was arrested in November 1999, for possession of cocaine with intent to deliver. Because of Sandra's confinement, Ja'Twan was placed in foster care upon his release from the hospital. During the first six months of Ja'Twan's life, Sandra had supervised visits with him about four times, changed his diaper once or twice, and gave him a bottle once or twice. She had no visits with him after September 1999.

¶3 On December 13, 1999, a petition seeking to terminate Sandra's parental rights was filed, alleging that she failed to assume parental responsibility under WIS. STAT. § 48.415(6) (1997-98).[2] After consulting with her attorney, Sandra agreed not to contest the petition, but to focus on the dispositional hearing.

¶4 At a hearing on March 14, 2000, the trial court told Sandra to "keep in contact with your lawyer because they're asking to terminate your parental rights to your child." At a status hearing on May 31, 2000, Sandra's counsel

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

advised the court that she wanted to stipulate that grounds exist, and then contest disposition. During this hearing, the trial court questioned Sandra directly if this was what she wanted to do. She said, "yes." The trial court engaged in a colloquy with Sandra, explaining the TPR two-phase procedure and whether or not she understood that she was agreeing that grounds exist to terminate her rights. She said "yes" that she was agreeing to stipulate to grounds and contest disposition. She told the court that is what she wanted to do. The court asked Sandra if she had enough time to talk to counsel about the case, and she answered affirmatively. The court then went on to ask Sandra whether she had been threatened, and whether she understood the rights she was giving up by admitting grounds for TPR. Sandra responded to the court that she had not been threatened and that she understood what she was doing. She did not have any questions for the court.

¶5 The trial court then asked counsel whether or not he believed she was acting freely, voluntarily, and intelligently. Counsel indicated that he had gone over the case in detail with Sandra, and he believed that she was freely, voluntarily, and intelligently waiving her right to contest phase one of the TPR proceeding. The trial court accepted the stipulation as to grounds and set a dispositional hearing date for August 15, 2000.

¶6 Sandra arrived at the hearing with documentation that she was participating in drug treatment, parenting classes, and was also taking a high school diploma course. She arrived for the hearing two minutes before it was supposed to start. Counsel and a social worker, Amy Peterson, advised the trial court that they had not had any contact with Sandra since the previous hearing. Therefore, counsel requested an adjournment. The trial court denied the request, ruling that Sandra was responsible for failing to communicate with her attorney and failing to provide him with the documentation.

¶7 The hearing proceeded. The trial court heard testimony from Sandra and Peterson. At the conclusion of the hearing, the trial court found that termination of parental rights was in the best interests of the child.

¶8 Appellate counsel for Sandra filed a motion to allow Sandra to withdraw her admission to the grounds, and for a new trial based on ineffective assistance of trial counsel. The trial court denied both motions. Sandra appeals.

II. DISCUSSION

A. Ineffective Assistance.

¶9 Sandra claims she did not receive the effective assistance of trial counsel. Specifically, Sandra contends her counsel was ineffective because: (1) he spent less than two hours with her during the course of the representation; (2) he failed to determine whether or not she had compromised intelligence; (3) he failed to provide her with a copy of the discovery materials; (4) he spoke with only one witness; (5) he failed to contact her; and (6) he was deficient in preparing for the dispositional hearing. The trial court determined that even if trial counsel was deficient, Sandra failed to establish that the deficiency prejudiced her. We agree.

¶10 In order to establish that she did not receive effective assistance of counsel, Sandra must prove two things: (1) that her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Sandra can show that her counsel's performance was deficient, she is not entitled to relief unless she can also prove prejudice; that is, she must demonstrate 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶11 In assessing Sandra's claim, we need not address both the deficient performance and prejudice components if she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶12 This court needs to only address the second prong—whether Sandra's alleged instances of deficient performance were so serious that had her counsel acted otherwise, the result of the proceeding would have been different. Sandra has failed to prove prejudice.

¶13 The six instances of alleged deficient conduct do not alter the harsh, but undisputed, facts in this case. Sandra had no defense for her actions—for her failure to assume responsibility for her child. She admitted that she only spent four hours with her son during the first six months of his life, changed his diaper only once or twice, and fed him a bottle only once or twice. She indicated that her own behavior, including running away, refusing help, and engaging in the illicit drug business, negatively affected her ability to enjoy a relationship with her son. Sandra suggested that she could have presented the "lack of opportunity" defense because she was confined when the baby was born. This defense is not available in Wisconsin. ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 683-84, 500 N.W.2d 649 (1993). The only other defense available was jury nullification. This defense, too,

would have been futile. Given Sandra's own conduct, her own admissions, and the legal standard of failure to assume parental responsibility, there was no defense to the grounds for termination. Therefore, Sandra cannot prove that anything her counsel did would have resulted in a different result in phase one of the TPR. Based on this record, Sandra would not have succeeded in phase one.

¶14 Similarly, given Sandra's own conduct, there is no probability that but for her counsel's failures, she would have had a different outcome at the dispositional phase. As the trial court put it, even if counsel had met with Sandra a dozen times, he could not have "made the silk purse out of the sow's ear." The standard applied at the dispositional phase is the best interests of the child. It was Sandra's own conduct that dictated the outcome in this case. Her conduct of running from shelters and group homes made it impossible for her to demonstrate that it would be in Ja'Twan's best interest to be placed with his mother. The child is entitled to permanence and stability in his life. Sandra failed to demonstrate that she was capable of providing such a life.

¶15 Accordingly, this court agrees with the trial court that Sandra has failed to demonstrate that trial counsel's conduct prejudiced her. The amount of time counsel spent with Sandra, whether or not he ascertained her level of intelligence, whether or not he failed to provide Sandra with her discovery materials, whether or not he spoke to additional witnesses, whether or not he maintained greater contact with her, and whether or not he prepared better for the dispositional hearing would not have altered the outcome of this case.

B. Withdrawal of Admission to Grounds.

¶16 Sandra also contends that the trial court erred when it denied her motion seeking to withdraw the stipulation that grounds existed as alleged in the

petition to terminate her parental rights. She claims that her admission was not made knowingly, intelligently, and voluntarily because she did not understand the nature of the case, what a jury trial was, and what constitutional rights she was giving up. The record belies these assertions.

¶17 The record reflects that counsel explained to Sandra the nature of the proceedings and advised her about the two separate phases of the TPR proceeding. The trial court specifically warned Sandra that this case involved trying to terminate her parental rights to her child. Trial counsel explained what "failure to assume parental responsibility" means, and whether Sandra had any defense to the allegation. Counsel discussed the types of evidence that would be introduced.

¶18 When Sandra stipulated that grounds existed to terminate her parental rights, the trial court addressed her personally. Sandra affirmed her counsel's representations, indicated that she wanted to admit to grounds and contest the disposition, and stated that she did not have any questions. At no time did she indicate that she did not understand the legal proceedings, or that her attorney failed to explain the grounds to her. She did not ask any questions or assert that she did not understand the concept or implications associated with a jury trial. She agreed with her attorney that based on the undisputed facts, she had no defense to the grounds phase of the proceeding. Moreover, she admitted that her criminal attorney in the drug charge case also explained to her the meaning of a jury trial.

¶19 Even if we assume that the trial court's plea colloquy failed to satisfy the requisites of ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), which applies to WIS. STAT. § 48.422, ***Robert D. v. Kimberly M.W.***, 181 Wis. 2d 887, 892, 512 N.W.2d 227 (Ct. App. 1994), the record demonstrates that Sandra's admission was knowingly, intelligently, and voluntarily made. ***Id.***

¶20 Sandra's testimony reveals that she understood the nature of the acts alleged. She admitted that she had run away from numerous treatment facilities, that she refused to accept help, and that her behavior limited her contact with her son. Also, Sandra admitted that she had discussed the discovery materials with her trial attorney, and that she understood the potential dispositions of a TPR case. She also consciously began treatment and education programs in an effort to get her son back.

¶21 Sandra understood what she needed to do to fight the disposition; she gathered documentation on her own and brought that information to court. Sandra had an eleventh grade education and could read and write. Moreover, the trial court found her testimony claiming that she did not understand the meaning of a jury trial to be incredible. All the evidence in the record prior to and including the dispositional hearing, demonstrates that Sandra's admission to grounds was knowingly, intelligently, and voluntarily entered. It was not until the trial court's dispositional ruling that Sandra's strategy changed from fighting disposition—by trying to turn her life around—to a strategy of claiming she was a confused young woman who did not understand what the TPR proceeding was all about.

By the Court.—Order affirmed.

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