COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-3331

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO PATRICK L.W., A PERSON UNDER THE AGE OF 18:

MELANIE A.W.,

PETITIONER-RESPONDENT,

V.

PATRICK L.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Patrick W. appeals from an order terminating the parental rights to his minor son. The petition for termination of his parental rights alleged as grounds for parental unfitness that Patrick had been convicted of soliciting to commit first-degree intentional homicide of the child's mother, Melanie.[2] The mother's petition was filed on March 27, 2000, and the matter proceeded to a jury trial on May 23.

¶2 Patrick argues the trial court erred by: (1) not dismissing the petition because an appeal of his conviction was still pending since he had filed a WIS. STAT. § 974.06 postconviction motion challenging his criminal conviction; and (2) refusing to continue the dispositional hearing stage of the termination of parental rights (TPR) proceedings until after his § 974.06 motion was decided. This court concludes that because Patrick's appeal of right had lapsed, the court properly considered the conviction as grounds for unfitness and reasonably exercised its discretion when denying the request for a continuance.

¶3 At trial, the undisputed evidence established that Melanie was the mother of the minor child and that Patrick was the child's father. The court admitted into evidence a certified copy of Patrick's conviction showing that on

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

[2] The applicable statute in the present case, WIS. STAT. § 48.415(8), provides as grounds for termination of parental rights:

> HOMICIDE OR SOLICITATION TO COMMIT HOMICIDE OF PARENT. Homicide or solicitation to commit homicide of a parent, which shall be established by proving that a parent of the child has been … the intended victim of a solicitation to commit first-degree intentional homicide in violation of s. 939.30 … and that the person whose parental rights are sought to be terminated has been convicted of that … solicitation … as evidenced by a final judgment of conviction.

December 18, 1996, he had been convicted of solicitation to commit first-degree intentional homicide of Melanie and that he had been sentenced to ten years in prison for this crime.

¶4 Based on this undisputed evidence, Melanie moved the court to grant a directed verdict establishing grounds for Patrick's unfitness. Patrick objected to the motion, arguing that the court should wait until he presented his evidence. He also noted that he might possibly appeal the conviction based on ineffective assistance of counsel. The trial court granted the motion for directed verdict and in response to Patrick's objection observed: "[Y]ou also have an opportunity to appeal or at least start an appeal based on the new evidence that you have in the original conviction in St. Croix County. But that's not before this court and that's not an issue that this court can decide on."

¶5 The trial court scheduled the dispositional hearing for July 17-18, 2000. However, prior to the scheduled dispositional hearing, Patrick filed a motion for a continuance of the TPR's dispositional phase until after the court in St. Croix County decided his recently filed WIS. STAT. § 974.06 motion to withdraw his plea in the criminal case. At that time, the Circuit Court in St. Croix County had not yet scheduled a hearing on Patrick's motion.

¶6 On July 13, 2000, the court held a hearing on Patrick's motion to continue the dispositional phase of the TPR proceedings. Patrick's attorney advised the court that a hearing on the motion to withdraw Patrick's no contest plea was scheduled for August 3 in St. Croix County. Patrick again renewed the request for a continuance of the dispositional phase hearing until after the decision on his motion in St. Croix County. The trial court denied Patrick's motion,

concluding that Patrick's appeal of right had lapsed and, therefore, there was no basis for the continuance.

¶7 The matter proceeded on July 17, and the trial court heard testimony for the entire day. Upon returning to court the following day, the parties informed the court that they had reached an agreement regarding disposition. As part of that agreement, Patrick agreed to not contest the disposition phase of the TPR proceedings, while reserving his right to appeal the trial court's decision not to grant a continuance for the dispositional hearing. Pursuant to the agreement, the trial court was to decide whether to terminate Patrick's parental rights.

¶8 After reviewing the prior day's testimony, offers of proof submitted by all the parties as to what they would have said at the second day of the hearing and other evaluation reports, the trial court concluded that it would be in the best interest of the child to terminate Patrick's paternal rights. Ultimately, the court entered an order terminating Patrick's parental rights to his child.

¶9 Patrick relies on ***In re Kody D.V.***, 200 Wis. 2d 678, 548 N.W.2d 837 (Ct. App. 1996), for the proposition that in order to establish grounds for parental unfitness based on a criminal conviction, the right to appeal the conviction must have been exhausted. Patrick reasons that the trial court had no basis to conclude there was clear and convincing evidence of a conviction once it learned that he had filed a WIS. STAT. § 974.06 motion, which he equates with an appeal of right. Consequently, Patrick insists that the trial court should have dismissed the petition to terminate his parental rights.

¶10 The mother does not dispute that in order to establish grounds for parental unfitness based on a criminal conviction, the right to appeal the conviction must have been exhausted. *See* ***id.*** at 690-91. However, she reasons

that in Patrick's case, the appeal of right had expired and, therefore, evidence of the conviction was sufficient to establish grounds of Patrick's unfitness. This court agrees.

¶11 In ***Kody***, the court explained that "The appeal as of right, is limited to the right to appeal to the court of appeals under § 808.03, STATS."[3] ***Id.*** at 690. Here, Patrick's date of conviction was December 18, 1996, and there is no dispute that his right to appeal under this statute had long since expired.[4]

¶12 It was only after the fact-finding phase had taken place, and before the dispositional hearing phase, that Patrick filed his WIS. STAT. § 974.06 motion. Postconviction procedures such as a § 974.06 motion[5] are not substitutes for an

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[3] WISCONSIN STAT. § 808.03(1) provides:

> APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding, and that is one of the following:
>
> (a) Entered in accordance with s. 806.06 (1)(b) or 807.11(2).
>
> (b) Recorded in docket entries in ch. 799 cases.
>
> (c) Recorded in docket entries in traffic regulation cases prosecuted in circuit court if a person convicted of a violation may be ordered to pay a forfeiture.

[4] *See* WIS. STAT. §§ 808.04, 809.30 and 974.02.

[5] WISCONSIN STAT. § 974.06 provides in part:

> **(1)** After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral

(continued)

appeal. *See* ***State v. Langston***, 53 Wis. 2d 228, 232, 191 N.W.2d 713 (1971). This is a collateral attack to the conviction and not an appeal of right under WIS. STAT. § 808.03.

¶13 If this court were to accept Patrick's argument, there could never be a finding of unfitness based on a conviction of this type until every possible appellate remedy had been exhausted. This could take years. This delay would be inconsistent with the legislative purpose of allowing termination at the earliest possible time after rehabilitation and reunification efforts are discontinued, and after termination is found to be in the best interest of the child. *See* ***Kody***, 200 Wis. 2d at 687. By limiting the appellate remedy to the appeal of right under WIS. STAT. § 808.03, the court in ***Kody*** selected a middle ground in balancing a parent's rights and the legislature's intent in promoting a reasonable time for terminating parental rights. Because the trial court correctly concluded that Patrick's appeal of right had long since lapsed, the conviction was final for purposes under WIS. STAT. ch. 48 and sufficient to establish Patrick's unfitness.

¶14 Next, Patrick argues that it was unreasonable for the trial court to deny a continuance of the dispositional hearing until after his WIS. STAT. § 974.06 motion was decided. The trial court held that because the issue of whether an appeal was pending was relevant only to the establishment of unfitness at the first phase of the TPR proceeding, and because Patrick's right to appeal that conviction had long since lapsed, it was unnecessary to continue the dispositional phase. Reasoning that his appeal of right had not yet been exhausted, Patrick contends the trial court's decision not to grant the continuance for the dispositional hearing was based on an error of law and, therefore, was an erroneous exercise of discretion.

> attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

¶15 Both sides agree that the decision to grant a request for a continuance is left to the trial court's discretion and will not be reversed absent an erroneous exercise of discretion. *See* ***State v. Oswald***, 2000 WI App 3, ¶31, 232 Wis. 2d 103, 606 N.2d 238. Where a discretionary decision rests upon an error of law, the decision exceeds the limits of the court's discretion. ***State v. Wyss***, 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). Similarly, the trial court's determination of an appropriate disposition is also within its reasoned discretion. ***J.K. v. State***, 68 Wis. 2d 426, 435-36, 228 N.W.2d 713 (1975) (disposition of juvenile case within trial court's discretion). The exercise of discretion requires a process of reasoning, which should be stated by the trial court on the record. ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971). If the trial court fails to elucidate its reasoning, on appellate review this court may nevertheless affirm if an independent review of the record supports the trial court's result. *See* ***id.*** at 282.

¶16 Here, the trial court correctly concluded that Patrick's appeal of right had lapsed and, therefore, its decision was not based on any legal error. This court cannot say that it was unreasonable for the trial court to proceed with the dispositional phase. Consistent with the legislative purpose of allowing the termination of parental rights at the earliest possible time after termination is found to be in the best interest of the child, the trial court could reasonably conclude that the matter should proceed with the dispositional phase once the grounds for unfitness had been established.

By the Court.—Order affirmed.

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