COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 01-0842

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

IN RE THE TERMINATION OF PARENTAL RIGHTS OF NATHANIEL K., A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SHANNON K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Shannon K. appeals the trial court's order terminating her parental rights to her son, Nathaniel, after a jury found grounds for termination. Shannon contends she was denied her right to meaningfully participate in the trial because her mental illness interfered with her ability to testify and consult with her attorney about the case. This right, she contends, is guaranteed to her by the due process clause of the federal and state constitutions and means that her parental rights may not be terminated as long as she is not able to meaningfully participate in the proceedings. Because she did not raise this contention in the trial court, Shannon requests that we remand to the trial court for an evidentiary hearing on whether her mental illness interfered with her ability to meaningful participate in the trial. We analyze this argument in the context of a claim for ineffective assistance of counsel. We conclude the due process clause does not require that a parent's parental rights may not be terminated as long as mental illness prevents the parent from meaningful participation in the proceedings. We therefore decide that her trial counsel was not ineffective for not raising this issue in the trial court and Shannon is not entitled to a remand.

¶2 Shannon also contends the trial court lost competence to proceed because it did not comply with the time restrictions for holding the depositional hearing in violation of WIS. STAT. § 48.424(4) (1999-2000). We conclude it did comply. Accordingly, we affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). This appeal has been expedited. WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

BACKGROUND

¶3 The petition to involuntarily terminate Shannon's parental rights, filed on August 31, 2000, alleged as grounds abandonment and continuing need for protection and services.[2] A jury trial was held on November 15. Shannon was represented by an attorney and she appeared at trial with her attorney but did not testify. The trial testimony established that Shannon was diagnosed as a paranoid schizophrenic at age seventeen. She also has alcohol and drug problems and has not maintained any period of stability since she was eighteen years old. Shortly after her diagnosis she went to live with a relative in California. In the fall of 1999, while still living in California, Shannon became pregnant. She contacted her family to ask for their support in having the baby, to which they agreed, and she returned to Wisconsin shortly thereafter and moved in with them. Sometime after her return, she saw a psychiatrist to address her mental health issues, and she began taking medication for her mental illness after Nathaniel was born on November 17, 1999.

¶4 In early December 1999, Shannon voluntarily moved into Harmony House, a halfway house, and there she received treatment for her mental illness and drug and alcohol dependency. While there her medication was monitored. Initially, Nathaniel stayed with Shannon's parents while she was in Harmony House. On December 29, 1999, a petition was filed alleging that Nathaniel was a child in need of protective services. He was placed in foster care in January 2000, and was found to be in need of protective services on February 4, 2000. Shannon

[2] Nathaniel's putative father was also a respondent in the petition to terminate parental rights; however, his involvement has no bearing on the issues on appeal.

had periodic visits with Nathaniel while he was in foster care until she left for California in May 2000. She returned in September 2000.

¶5 The jury found abandonment and failure to assume parental responsibility. At the dispositional hearing on December 15, the court terminated Shannon's parental rights.

DISCUSSION

¶6 We consider first Shannon's argument that she has been denied the right secured to her by the due process clause to meaningfully participate at her trial because of her mental illness. She acknowledges that she did not raise this argument in the trial court, and asks for a remand to the trial court for an evidentiary hearing at which she can prove her mental illness interfered with her right to meaningfully participate at her trial. The State responds that Shannon has waived this issue by not raising it in the trial court. Shannon replies that the motion she brought after filing her notice of appeal was to avoid any potential waiver problems. In that motion Shannon asked for a remand for an evidentiary hearing on whether her mental illness prevented her from meaningful participation in the trial or, in the alternative, a clarification by this court that a remand for such a hearing would be an available remedy if we determined on appeal that proceeding against an incompetent parent in a TPR case violated due process. In our order responding to the motion, we stated that Shannon "may raise the due process competency issue on appeal and we will consider what remedy is appropriate when the appeal is decided."

¶7 Our order in response to Shannon's motion did not take a position on whether Shannon waived the right to raise the due process issue by not raising it

before or during the trial. Rather, we simply postponed until this point the decision on whether she was entitled to the remand she sought.

¶8 In criminal cases the normal procedure when an attorney does not raise an objection to trial court error is to address that failure within the framework of ineffective assistance of counsel. ***State v. Erickson,*** 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). In this case it does not even appear Shannon is claiming that the trial court erred, perhaps because no one asked the court to consider whether Shannon's mental illness affected any due process right she had to participate in the trial. In these circumstances we are persuaded that the proper framework for analyzing Shannon's claim is that of ineffective assistance of counsel.[3] Accordingly, Shannon is entitled to a remand for a post-judgment evidentiary hearing only if the facts she is asserting, if they are found to be true, establish that her counsel was deficient in not making the due process argument to the trial court, and if the deficiency prejudiced Shannon. *See* ***In re M.D. (S),*** 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). To decide this question we first examine the merits of Shannon's contention that the guarantee of due process accorded to a parent facing a petition for involuntary termination of parental rights precludes proceeding on the petition if the parent is not able by reason of mental illness to meaningfully participate. Obviously, if this is not a correct statement of the law, then Shannon's trial counsel was not deficient in not making this argument to the trial court and requesting a hearing on Shannon's mental condition.

[3] A parent in a TPR proceeding has the right to effective assistance of counsel, and we use the test established in ***Strickland v. Washington***, 466 U.S. 668 (1984), as we do in criminal proceedings. ***In Interest of M.D. (S),*** 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

¶9 Convicting an accused person of a crime while he or she is incompetent is a violation of due process. ***Pate v. Robinson***, 383 U.S. 375, 378 (1966). Shannon recognizes that no Wisconsin case has extended this ruling to a parent in a TPR proceeding, and that the existing Wisconsin case law referring to the competency of a parent in a TPR proceeding is concerned with the appointment of a guardian ad litem for the parent in addition to adversary counsel. *See* ***E.H. v. Milwaukee County***, 151 Wis. 2d 725, 736, 445 N.W.2d 729 (Ct. App. 1989). ***I.P. v. State***, 157 Wis. 2d 106, 114-15, 458 N.W.2d 823 (Ct. App. 1990).[4]

¶10 Shannon premises her argument on ***In re Christopher D.,*** 191 Wis. 2d 680, 701-03, 530 N.W.2d 34 (Ct. App. 1995), in which we held that the parent's procedural due process right to meaningfully participate in a TPR proceeding does not necessarily require that the parent has the right to be physically present, and that participation by telephone in that case afforded the parent the opportunity to meaningfully participate in the proceeding. We rejected the parent's argument that due process required that the court postpone the trial fifteen months until he was released from custody.

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[4] ***In G.H. v. Milwaukee County***, 151 Wis. 2d 725, 734-36, 445 N.W.2d 729 (Ct. App. 1989), we held that WIS. STAT. ch. 48 provides for the appointment of both an adversary counsel and a guardian ad litem (GAL) for a parent who is incompetent, and the appointment of a GAL does not diminish the adversary counsel's duty to provide the parent with an independent and vigorous defense. ***In I.P. v. State***, 157 Wis. 2d 106, 116-17, 458 N.W.2d 823 (Ct. App. 1990), the trial court denied the adversary counsel's request for appointment of a GAL for a parent who counsel believed to be incompetent because appointment of a GAL would interrupt a jury trial and perhaps harm the parent's defense. We concluded this was not based on a proper standard for resolving the competency issue; but we went on to hold the error was harmless because the trial court's failure to appoint a GAL did not contribute to the decision terminating parental rights. We reasoned that, since adversary counsel had vigorously and competently defended against the petition, as the parent wished, if the GAL had taken the position that the petition should be contested, his or her presence would not have added to the defense provided by adversary counsel; and if the GAL had decided it was contrary to the parent's best interests to contest the petition, that would not have made termination a less likely outcome. We do not understand Shannon to be arguing that she is entitled to relief because a GAL was not appointed.

¶11 We do not view ***Christopher D.*** as providing persuasive support for Shannon's position. That case, and the case on which we relied for the "meaningful participation" language, concerned the State's obligation to provide the opportunity for the parent to actually participate in the proceeding in order to satisfy the "opportunity to be heard" component of procedural due process. Shannon is not contending that she did not have the opportunity to participate because of any limitation imposed by the State or the court, but instead is asserting that whatever the procedural safeguards offered her, no proceeding will satisfy her right to due process as long as her mental illness interferes with her ability to meaningfully participate in the proceeding.

¶12 We readily agree with Shannon that TPR proceedings implicate the liberty interest of a family unit, and therefore the parent is entitled to procedural protections through the due process clause of the state and federal constitutions before parental rights may be terminated. ***D.G. v. F.C.***, 152 Wis. 2d 159, 166-67, 448 N.W.2d 239 (Ct. App. 1989). In addition, the due process clause prohibits the termination of a parent's rights unless the parent is found unfit. In ***Mrs. R. v. Mr. & Mrs. B.***, 102 Wis. 2d 118, 136, 306 N.W.2d 46 (1981). However, we are not persuaded by Shannon's arguments and the cases she cites that the substantive and procedural protections of the due process clause require that her rights not be terminated unless she is mentally capable of meaningfully participating in the proceedings. Moreover, there are fundamental differences in a TPR proceeding and a criminal proceeding that persuade us against importing the competency requirement and proceedings from criminal cases into TPR cases.

¶13 Unlike a criminal proceeding, the purpose of a TPR proceeding is not to punish parents, but to protect their children, and that includes not subjecting children to instability and impermanence because their parents do not or are not

able to remedy the situations that have caused the children not to be living with their parents. *See* WIS. STAT. § 48.01(1)(a). In a criminal proceeding the interests of the victim and the community in being safe from an accused can be fully protected for however long the criminal proceedings are postponed or suspended while the accused is incompetent: the accused either remains in custody for a specified period of time under WIS. STAT. § 971.14(5) or, if released from that commitment, may be immediately taken into custody under § 971.14(6). In a TPR proceeding there is no way to protect the interest of the child in permanency and stability during postponements due to a parent's mental illness: the delay itself is adverse to the child's interests. The logical result of Shannon's position is that there could be indefinite postponements, since a parent who is not competent might not become competent for months or years, and, possibly, never. Thus, although WIS. STAT. § 48.415(3) contemplates a continuing disability, including a mental illness, as a ground for a termination, the logical import of Shannon's argument is that precisely those parents who meet that ground could not have their parental rights terminated. We are unwilling, in the absence of any persuasive authority, to conclude that due process requires this result.[5]

[5] We observe that although the TPR proceedings are governed by very definite time limits, there is a provision for extending those. WISCONSIN STAT. § 48.315(2) provides:

> Delays, continuances and extensions.
>
> ….
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> (2) A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

(continued)

¶14 Because we conclude that Shannon did not have a constitutional right not to have her parental rights terminated if her mental illness interfered with her ability to meaningfully participate in the proceedings, there is no need to remand for a factual determination whether her mental illness did interfere. Even if it did, her trial counsel was not deficient in failing to make this argument and request a hearing on her mental condition in the trial court.

¶15 Shannon next argues the trial court lost competency because it did not hold the dispositional hearing immediately after the trial on November 15, but instead held it on December 15. WISCONSIN STAT. § 48.424(4) in part provides:

> If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit…The court shall then proceed immediately to hear evidence and motions related to the dispositions enumerated in s. 47.427. The court may delay making the disposition and set a date for a dispositional hearing no later than 45 days after the fact-finding hearing if: (a) All parties to the proceeding agree….

¶16 In this case, after the jury returned its verdict, the court proceeded to schedule the dispositional hearing, stating that it could hold the hearing either December 8 or December 15. Shannon's attorney and the attorney for Nathaniel's father both said that December 15 was better for them, and the GAL and attorney for the county agreed with that date. Shannon argues this does not constitute an agreement by the parties, but rather is a waiver; and she refers to this quotation in

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We see no reason a parent with a mental illness may not request a continuance under this statute for a time period necessary to improve his or her mental condition, through, for example, medication. However, we recognize this opportunity to have the court consider whether there is good cause under this statute is not the equivalent of the right Shannon advocates—a due process right not to have parental rights terminated as long as mental illness interferes with a parent's ability to meaningfully participate in the proceedings. We do not understand Shannon to be claiming her trial counsel should have asked for a continuance under this section.

State v. April O., 2000 WI App 70, 233 Wis. 2d 663, 668, 607 N.W.2d 927 (quotation source omitted): "'The Children's Code contains no provisions for the waiver of time limits, and the only provision for delays, continuances, and extensions are set forth in sec. 48.315.'" However, ***April O.*** and the case from which it took this quotation made this statement in the context of reviewing situations where the applicable statutory time limits had not been complied with and the conditions for extensions under WIS. STAT. § 48.315 had not been satisfied. This quoted statement was not made in the context of applying WIS. STAT. § 48.424(4)(a).

¶17 We conclude that the parties did agree to have the dispositional hearing on December 15, and, since this date was within forty-five days of the fact-finding hearing, the court complied with the statute.

By the Court.—Order affirmed.

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