COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1477

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

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

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHYLISS K. T.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Phyliss T. appeals the order terminating her parental rights to Kassandra T., and the order denying her claim of ineffective

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

assistance of counsel. Because Phyliss has failed to meet her burden of demonstrating trial counsel was ineffective, we affirm the trial court's orders.

BACKGROUND

¶2 Phyliss gave birth to Kassandra on June 13, 1996. On September 4, 1998, Rock County Human Services Department (department) removed Kassandra from Phyliss's home. Ten days later the court ordered the child to be temporarily placed outside the home of her parents. On June 10, 1999, Kassandra was adjudged a child in need of protection and services (CHIPS), and on March 22, 2000, the department filed a petition to involuntarily terminate Phyliss's parental rights to Kassandra under WIS. STAT. § 48.415(2).[2] The petition alleged that Phyliss failed to meet the "return conditions" of the June 10, 1999 order.

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[2] WISCONSIN STAT. § 48.415(2) provides in part:

> CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by providing any of the following:
>
> (a) 1. That the child has been adjudged to be a child … in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345 … containing the notice required by s. 48.356(2) or 938.356(2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child …, the level of cooperation of the parent … and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family … has made a reasonable effort to provide the services ordered by the court.

(continued)

¶3 The June 10, 1999 order required the department to provide the following services to Phyliss: (1) assist the mother in finding an appropriate "criminal thinking" class,[3] and (2) provide case management services to the family. The return conditions of the June 10, 1999 order required Phyliss to:

> A. Learn and use consistently appropriate parenting skills, including but not limited to identifying appropriate child behavior and growth, having age-appropriate expectations of the child, utilizing consistent, appropriate, and effective discipline, providing adequate supervision at all times, and focusing on the child's needs rather than the mother's needs;
>
> B. Be able to protect the child and herself from being victimized by other individuals, including not allowing individuals who are known to be abusive to live with the mother or to otherwise have access to the child or herself;
>
> C. Be able to meet the physical, emotional, and social needs of the child; and
>
> D. Establish a consistent routine that provides the child with predictability.

> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

WISCONSIN STAT. § 48.424 provides in part:

> **Fact-finding hearing. (1)** The purpose of the fact-finding hearing is to determine whether grounds exist for termination of parental rights in those cases where the termination was contested at the hearing on the petition under s. 48.422.

[3] As will be discussed later in this opinion, the purpose of this course was to deal with "thinking errors" in which the individual failed to take responsibility for their actions and it was unrelated to criminal conduct on Phyliss's part.

¶4 Prior to the fact-finding hearing, all parties agreed that Phyliss would undergo psychological evaluation. The court appointed psychologist Dr. Michael Kaye, Ph.D., to render a professional opinion regarding Phyliss's psychological state, ability to care for Kassandra, and the best techniques to remedy her problems.

¶5 At the fact-finding hearing, Dr. Kaye testified that Phyliss exhibited a chronic degree of depression and that she had a verbal IQ of 76. However, he was of the opinion that Phyliss had received the proper services over the years and he was uncertain what more could be done to correct her problems. He testified that Phyliss demonstrated very limited parenting skills. According to Dr. Kaye, it was very unlikely that she was going to develop and be able to handle her children in the future and it was unlikely Phyliss would be able to meet the return conditions within the next twelve months.

¶6 Linda Sime, Phyliss's therapist, testified on Phyliss's behalf. Sime testified that Phyliss has demonstrated remarkable improvement in her parenting skills over the past two years. She believed that Phyliss had already met the return conditions or would meet them within the next twelve months.

¶7 Phyliss testified that her three other children were removed from her home at the same time Kassandra, her youngest child, was removed. Her three other children were returned within seven months. However, testimony also established that all but her oldest child had since been removed from her home through separate CHIPS actions and that the oldest child has had a juvenile probation officer since July 1999.

¶8 Phyliss admitted that the department had been "very diligent and reasonable in their efforts." The parties agreed that the court could answer in the

affirmative the first five of the seven questions to be answered as part of the fact-finding proceedings.[4] Thus, the only questions presented to the jury were whether

[4] The questions to be answered as part of the fact-finding hearing were:

> QUESTION 1: Has Kassandra … been found to be in need of protection and services which can be ordered by the court ("CHIPS")?
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> ….
>
> QUESTION 2: Has Kassandra … been continued in placement outside her home pursuant to a court order made in the CHIPS proceeding?
>
> …..
>
> QUESTION 3: Did the court order made in the CHIPS proceeding contain a notice to Phyliss … about the conditions necessary for Kassandra … to be returned to the home and about grounds for termination of parental rights?
>
> ….
>
> Question 4: Has Kassandra … been placed outside her home for longer than six months pursuant to the court order made in the CHIPS proceeding?
>
> …..
>
> QUESTION 5: Since June 10, 1999, has the Rock County Human Services Department made a reasonable effort to provide the services ordered by the Court in the CHIPS proceeding?
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> ….
>
> Question 6: Has Phyliss … failed to meet the conditions established by the Court in the CHIPS proceeding for the safe return of Kassandra … to the home?
>
> ….
>
> QUESTION 7: Is there a substantial likelihood that Phyliss … will not meet the return conditions within the next 12 months?

The court answered the first five questions in the affirmative and the remaining questions went to the jury.

Phyliss failed to meet the conditions established by the court in the CHIPS proceeding for the safe return of Kassandra to the home and whether there is a substantial likelihood that Phyliss will not meet the return conditions within the next twelve months. At the conclusion of the fact-finding hearing, the jury answered questions six and seven in the affirmative. At the subsequent dispositional hearing, the court terminated Phyliss's parental rights.

¶9 Phyliss filed a motion asserting that her trial counsel was ineffective. After a ***Machner*** hearing,[5] the trial court concluded that her counsel had provided effective representation.

DISCUSSION

¶10 On appeal, Phyliss claims, as she did in the trial court, that trial counsel was ineffective for: (1) failing to hire a psychologist or psychiatrist to evaluate and present evidence on her behalf; (2) failing to argue that the Americans with Disabilities Act (ADA) brought into question the reasonableness of the department's efforts to meet the requirements of the CHIPS order; (3) allowing evidence of Phyliss's relationship with her other children to be

[5] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

admitted; and (4) allowing the use of the term "criminal thinking" to describe the class she was ordered to take as a return condition.[6]

¶11 To prevail on a claim for ineffective assistance of counsel, Phyliss must prove both that trial counsel's performance was deficient and the deficient performance prejudiced her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the movant fails to meet either the deficient performance or prejudicial component of the test, we need not address the other. ***Id.*** at 697.

¶12 Deficient performance means that the identified acts or omissions of counsel fell below the objective standard of reasonableness and, in light of all the circumstances, "the identified acts or omissions were outside the wide range of professionally competent assistance." ***Id.*** at 690. Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** The burden is upon the party asserting ineffectiveness to overcome the strong presumption that counsel acted reasonably. ***State v. Brunette***, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998). Strategic decisions "made after thorough investigation of law and

[6] In her reply brief Phyliss argues, for the first time, that her conduct was not sufficiently egregious to warrant a TPR. We do not, as a general rule, consider arguments raised for the first time in a reply brief, ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989), and we decline to do so here. Also for the first time in her reply brief, Phyliss argues that having a six-person jury violated the "jury trial guarantee of Article I, Section 7 of the Wisconsin Constitution [which] would apply in a TPR." Her first brief contained a brief summary of why she requested a six-person rather than a twelve-person jury; that summary was located in the section on trial counsel's failure to hire a psychologist or psychiatrist. However, nowhere in her first brief did she develop an argument on her right to have a twelve-person jury. We therefore do not consider this issue. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690.

¶13 Whether trial counsel provided ineffective assistance is a mixed question of fact and law. ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The trial court's determinations of what counsel did and did not do and the basis for the challenged conduct are factual findings, which we uphold unless clearly erroneous. ***Id.*** The ultimate determinations of whether trial counsel's performance was deficient and prejudicial are questions of law, which this court reviews de novo. ***Id.***

¶14 Phyliss first argues that she was unable to dispute Dr. Kaye's testimony because trial counsel failed to seek the evaluation of another psychologist or psychiatrist. Phyliss argues that "it could very well have been that the results in this matter would have been different" had an expert psychologist or psychiatrist been hired to testify on her behalf. She also asserts that because of her limited IQ, she should not have been allowed to make the decision as to whether another expert should have been hired.

¶15 Prior to the fact-finding hearing, trial counsel reported to the trial court that Phyliss had no objection to a psychological evaluation being conducted by Dr. Kaye. At the ***Machner*** hearing, trial counsel testified that he did consider having a separate psychologist or psychiatrist hired after receiving the report of Dr. Kaye; however, he discussed this with Phyliss and she decided she did not want a second evaluation and was comfortable with Linda Sime testifying on her behalf. Trial counsel also testified that Dr. Kaye is the type of doctor who "would call it as he saw it" and was considered independent, neutral, and competent, and that there were no major surprises in his report.

¶16 Phyliss testified that she agreed to Dr. Kaye because it was the only choice presented to her and she felt that one psychological evaluation would be enough; however, she also testified that she did not understand that she could have her own psychological evaluation performed.

¶17 The trial court determined that trial counsel was not ineffective because there was no evidence that Phyliss had any objection to the use of Dr. Kaye. The court also found that Dr. Kaye was a highly professional person who is fair-minded, would not mislead any of the parties, and performed his usual professional job in this case.

¶18 We conclude Phyliss has failed to demonstrate that trial counsel's failure to hire another psychologist or psychiatrist prejudiced the outcome of her case. She does not offer any evidence that another evaluation would be favorable to her abilities as a parent or her ability to meet the return conditions within the next twelve months. Her assertion that another evaluation "could very well have" resulted in a different outcome is not sufficient to meet her burden. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶19 Second, Phyliss asserts counsel was ineffective because he did not object to the court answering question 5 in the affirmative—whether the department made a reasonable effort to provide the required services. Counsel should have objected, Phyliss asserts, because the services were inadequate under the ADA. However, an alleged violation of the ADA is not a basis for challenging a TPR proceeding; rather whether the department's efforts were sufficient under WIS. STAT. § 48.415(2)(b) must be determined in light of a parent's alleged

disability. ***State v. Raymond C.***, 187 Wis. 2d 10, 12, 522 N.W.2d 243 (Ct. App. 1994).[7] Section 48.415(2)(b) requires that the department show by clear and convincing evidence that "the agency responsible for the care of the child and the family … has made a reasonable effort to provide the services ordered by the court."

¶20 At trial Phyliss admitted that the department had been "very diligent and reasonable in their efforts." She also testified that she did not fault the department for removing her children, she understood that it was trying to help her, and she did not have any problem working with it. At the ***Machner*** hearing, trial counsel stated that he believed the TPR was based upon whether Phyliss was substantially likely to meet the return conditions and that he did not consider an ADA defense. Trial counsel also stated that he would not have the department do anything differently even considering the ADA because there was no expert telling him there was any need to change how services were provided.

¶21 We conclude that trial counsel did not perform deficiently in allowing the court to answer question 5 in the affirmative. Phyliss agreed that the services were reasonable and she has presented no evidence to dispute that conclusion.

¶22 Third, Phyliss argues trial counsel was ineffective for allowing and presenting evidence regarding her other children. At the ***Machner*** hearing, trial counsel testified that he told Phyliss he felt that the fact that her older children had

[7] Phyliss argues on appeal that the decision of ***State v. Raymond C.***, 187 Wis. 2d 10, 522 N.W.2d 243 (Ct. App. 1994), is incorrect. However, we may not overrule, modify, or withdraw language in our prior decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

been removed and subsequently returned was favorable to her defense because it demonstrated a substantial likelihood that she would be able to meet the return conditions for Kassandra within the next twelve months. He did not consider filing a motion in limine, he explained, because testimony regarding these older children was the "absolute heart of our defense." When asked at the ***Machner*** hearing if she had wanted the information about her older children presented at trial, Phyliss responded that she had felt it was "probably good" to bring it up, but she had not understood that it could "go against" her. The trial court determined that the decision to allow testimony regarding the older children was a strategic decision by trial counsel and was not deficient performance.

¶23 We conclude that Phyliss has not demonstrated that trial counsel's decision regarding evidence of her older children was deficient performance. That evidence was mixed in terms of what it showed regarding Phyliss's ability to parent. Counsel's decision to use the positive aspects of it, even though there were also negative aspects, is the type of strategic decision courts do not attempt to "second guess." *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). We cannot say counsel's decision on this point fell below an objective standard of reasonableness.

¶24 Finally, Phyliss contends trial counsel was ineffective because he failed to object to the use of the term "criminal thinking" and this term was prejudicial because the "logical conclusion [to a jury] was that the TPR was because she did something criminal to her children."

¶25 We see no reasonable probability that the use of the term "criminal thinking" affected the outcome of the trial in any way. A department social worker testified that the department's "criminal thinking" class was renamed

"Parenting with Alternative Choices in Thinking" because the term "criminal thinking" sounded punitive. She explained that the "criminal thinking" class was a class to help individuals become responsible for their actions. Phyliss's therapist testified that the class was now called "thinking errors," "barriers in thinking," or "corrective thinking." Phyliss's own testimony stated that Kassandra was originally removed from the home because of physical abuse by her father and that no physical abuse had been attributed to Phyliss. There was no evidence the TPR proceeding was due to any criminal conduct by Phyliss. We are satisfied that the jury understood the content of the course and did not assume Phyliss had engaged in any criminal conduct simply because of the name of the course.[8]

By the Court.—Orders affirmed.

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

[8] Phyliss also claims that the trial court erroneously exercised its discretion by allowing the term "criminal thinking" to be used because the trial court, at the ***Machner*** hearing, offered an explanation that the term "criminal thinking" was "copyrighted" and was being used without permission, and that caused the county to change the name of the course. Whether the term "criminal thinking" was "copyrighted" and was being used without permission is wholly irrelevant to this appeal.