COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2778 **Cir. Ct. No. 2008TP105**

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO NA'KEYSHIA C., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRITTANY W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J. [1] Brittany W. appeals orders terminating her parental rights to her daughter, Na'Keyshia C., and denying her post-termination motion to withdraw her plea of no contest as to grounds for termination. Brittany contends that the circuit court erred when it determined that her no-contest plea was made knowingly, intelligently, and voluntarily because the court's plea colloquy was inadequate and Brittany did not understand the direct consequences of her plea. Brittany further argues that, because her plea was not actually knowing, intelligent and voluntary, plea withdrawal is necessary to prevent a manifest injustice. We reject these arguments and affirm.

¶2 Dane County filed a petition to terminate Brittany's parental rights to her daughter, Na'Keyshia, based on Brittany's alleged failure to meet the conditions for return in an order finding Na'Keyshia to be a child in need of protection or services (CHIPS). In alleging Brittany had failed to meet the conditions for return, the petition asserted that Brittany had, among other things, failed to maintain a safe, stable home; failed to secure a legal source of income; and failed to abstain from the use of illegal drugs. Brittany entered a plea of no contest to the allegations in the petition and was consequently found to be an unfit parent. The court engaged in a plea colloquy with Brittany, and Brittany was then examined on the record by the guardian ad litem, the County's assistant corporation counsel Mr. Rehfeldt and by her trial attorney. Details from this proceeding are provided later in this opinion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.21(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Brittany's parental rights were terminated at a subsequent disposition hearing. Following a timely appeal, we remanded to the circuit court to permit Brittany to file a postdisposition motion seeking withdrawal of her plea of no contest to the alleged grounds to terminate her parental rights. ***Dane County Dep't of Human Servs. v. Brittany W.***, No. 2009AP2778, unpublished order (January 11, 2010). An evidentiary hearing was held on the motion and testimony taken from Brittany and trial counsel. The court denied Brittany's postdisposition motion.

¶4 On appeal, Brittany contends that her no-contest plea as to grounds for termination was not knowing and intelligent because the court's colloquy was defective and she did not understand the direct consequences of her plea. Courts must ascertain that criminal defendants are aware of the constitutional rights that they are waiving by entering a plea, ***State v. Bangert***, 131 Wis. 2d 246, 265-66, 389 N.W.2d 12 (1986), and of the direct consequences of the plea, ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998). A ***Bangert*** analysis is used to evaluate the knowingness of a parent's no-contest plea in a termination proceeding. *See, e.g.* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607.

> Under th[is] analysis, the parent must make a prima facie showing that the circuit court violated its mandatory duties and must allege the parent did not know or understand the information that should have been provided at the hearing. If a prima facie showing is made, the burden then shifts to the county to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition.

Oneida County Dep't of Social Servs. v. Therese S., 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122 (citations omitted).

¶5 Here, the trial court found that Brittany made her *prima facie* showing and sufficiently alleged that she did not understand the information that should have been provided to her at the hearing. The County does not dispute this determination. We therefore examine whether the County met its burden of showing by clear and convincing evidence that Brittany's no-contest plea was knowing and intelligent. In making our determination we accept the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. ***Steven H.***, 233 Wis. 2d 344, ¶51 n.18. We independently determine whether those facts demonstrate that Brittany's plea was entered knowingly and intelligently. ***Id.***, ¶51. We may examine the entire record, not merely one proceeding, to determine whether the evidence supports the court's conclusion that the County met its burden to show that Brittany's plea was knowing and intelligent. *See* ***id.***, ¶42.

¶6 To show that Brittany's no-contest plea was entered knowingly and intelligently, the County was required to prove that she understood at the time of her no-contest plea (1) that she would be found unfit as a parent as a result of her plea; (2) the potential dispositions set forth in WIS. STAT. § 48.422(7)(a), namely the County's petition may be dismissed at the dispositional hearing (WIS. STAT. § 48.427(2)), or the court may terminate her parental rights (§ 48.427(3)); and (3) that the best interests of the child will be the prevailing factor at the disposition hearing (WIS. STAT. § 48.426(2)). *See* ***Oneida County***, 314 Wis. 2d 493, ¶¶10, 16.

¶7 Brittany argues that her plea was not knowing and intelligent because both she and her trial attorney believed that, by entering a plea of no contest and showing herself to be a more responsible person in the months leading up to the dispositional hearing, she might prove to the judge that she was not unfit and consequently avoid having her parental rights terminated. This belief, Brittany

contends, was based on a misunderstanding of the law. Brittany argues that she and her attorney did not understand that the dispositional hearing would be focused on the child's best interests, and not on Brittany's fitness to be a parent. *See* ***Therese S.***, 314 Wis. 2d 493, ¶22 (parent must understand that disposition phase is focused on best interests of child for no-contest plea to be knowing and intelligent). Brittany further argues that she misunderstood that, as a direct consequence of her plea, she made it easier for the County to prove its case, and this misunderstanding was demonstrated by an unrealistic view of her chances of success at disposition.

¶8 In response, the County contends that it met its burden of demonstrating that Brittany made a knowing and intelligent waiver of her right to contest the allegations in the petition. Specifically, the County argues that Brittany was informed of the direct consequences of her no-contest plea, as required by ***Oneida***. The County also argues that Brittany's plea was the product of a strategic decision to deflect attention from her failure to meet the conditions for return, and to give her the opportunity to get her life back on track and to strengthen her parental bonds with Na'Keyshia in the months leading up to the disposition hearing.[2] Upon our review of the record, we conclude that the evidence supports the court's determination that Brittany's no-contest plea was made knowingly and intelligently.

¶9 At issue are whether Brittany was informed and understood that she would be found unfit as a parent as a result of her no-contest plea and that the

[2] The County also focuses much of its argument on Brittany's post-plea behavior and how this behavior "doomed her chances at disposition." We agree with Brittany that this evidence is not relevant to the issue presented on this appeal.

focus of the dispositional hearing would be on her child's best interests. The record demonstrates that Brittany understood her no-contest plea would result in a finding of unfitness and that the court would focus on the child's best interest at the dispositional hearing. At the plea hearing, Brittany was made aware that, as a result of her plea, she would be found unfit, and that the best interests of the child standard would govern at disposition. At the evidentiary hearing, Brittany admitted that she knew what the potential dispositional outcomes were, specifically that the court could dismiss the petition or terminate her parental rights. Brittany also testified that her attorney explained to her that the fact-finding hearing came before disposition. Brittany's trial attorney testified at the evidentiary hearing that she discussed with Brittany the difference between fact-finding and disposition, and that based on these discussions, she believed Brittany understood that the dispositional hearing would be about Na'Keyshia's best interests. The attorney also testified there was no indication that Brittany did not understand the information provided to her.

¶10 While Brittany testified at the evidentiary hearing that she mistakenly believed the second phase of the proceeding would focus on whether she was an unfit mother, the court found this testimony to be not credible. The court noted that it had observed Brittany's demeanor and body language at the hearing, and found that "[Brittany's] confusion expressed during the testimony … seems to have been brought on not by true confusion but instead was germinated as a result of losing at the dispositional hearing." The court contrasted Brittany's performance at the evidentiary hearing with her "clear and unequivocal" responses to the court's questions at the plea hearing. The court's comments suggest that the court believed that Brittany was dissembling at the later hearing, and was telling

the truth at the first hearing. We cannot say that these findings of the trial court are clearly erroneous.

¶11 Brittany argues that her counsel misled her about what would occur at the dispositional hearing by focusing on Brittany's ability to meet the conditions for return nine months after the dispositional hearing. The County argues that counsel's trial strategy was reasonable. We agree. Indeed, Brittany appeared to agree with this strategy. Counsel testified at the evidentiary hearing that the aim of their strategy was to prevent the court from learning the details of Brittany's poor parenting by having her enter a no-contest plea and then present positive evidence at the dispositional hearing regarding the improvements Brittany had hopefully made during the time between the plea hearing and the dispositional hearing. Brittany even testified that she believed her chances of prevailing at the fact-finding hearing were less than at the dispositional hearing because she could not challenge the facts provided in the petition. Counsel testified that she conveyed to Brittany that Brittany had an "uphill battle" at trial and that having the jury find her unfit would set the stage for a reduced opportunity of having the court dismiss her petition if Brittany had shown improvement. Under the circumstances, we cannot conclude that the decision to concede grounds and focus Brittany's efforts on improving her bond with Na'Keyshia and on turning her life around was an unreasonable one.

¶12 We reject, moreover, Brittany's suggestion that the adoption of this strategy under the circumstances reflects her trial attorney's misunderstanding of the purposes of the two phases of the termination proceeding. While the second phase of the proceeding is concerned with the child's best interests, many factors may impact a best-interests determination, including circumstances favorable to the parent, "including prognosis for the parent's markedly changed behavior."

Sheboygan County D.H.H.S. v. Julie A.B., 2002 WI 95, ¶29, 255 Wis. 2d 170, 648 N.W.2d 402. WISCONSIN STAT. § 48.426(3) states that, "[i]n considering the best interests of the child … the court shall consider *but not be limited to*" six statutory items. (Emphasis added.) Among these factors is "[w]hether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships." Section 48.426(3)(c). This factor is directly related to one of Brittany's objectives in focusing on the second phase of the proceeding, strengthening the bond between her and Na'Keyshia in the months prior to disposition. And, while Brittany's other stated goal of becoming sober from drugs and making other positive lifestyle changes during that time is not a factor listed in § 48.426(3), it is clearly among those non-specified reasons relevant to the issue of whether it would be in the child's best interest to have his or her relationship with the parent terminated.

¶13 Moreover, although Brittany may have had unrealistic expectations of success, even she represented that she had, at best, a 50/50 chance. Nor does Brittany's asserted belief that her no-contest plea would help her necessarily reflect a lack of understanding of the consequences of her plea. As noted, Brittany had failed to meet the conditions of return, and, thus, her decision to plead no contest reflected a realistic assessment of her chances of prevailing in the grounds phase, and a rational strategic decision to focus on the things she could change in the months prior to disposition that might influence the court's decision on whether termination was in Na'Keyshia's best interest.

¶14 Brittany also contends that her plea was premised on an affirmative material misunderstanding about its consequences, and plea withdrawal is necessary to prevent a manifest injustice. *See* ***Nelson v. State***, 54 Wis. 2d 489,

195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Brittany contends that, even if her attorney adequately explained the concepts of the unfitness and "best interest" standards, she actually misunderstood these concepts, and therefore withdrawal is necessary to prevent a manifest injustice.[3] We reject this argument. As noted, the trial court found not credible Brittany's stated confusion about the purpose of the disposition phase of the proceeding. Accordingly, Brittany's assertion that she actually did not understand the concepts of "best interests" and unfitness is not supported by the evidence, and we conclude that she has failed to meet her burden to prove that plea withdrawal is necessary to prevent a manifest injustice.

By the Court.—Orders affirmed.

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

[3] The County argues that Brittany failed to raise this argument below, and has therefore waived it. We need not address the issue of waiver because, assuming the argument was not waived, we conclude she has failed to meet her burden to show a manifest injustice.