COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 02-2843
02-2844
02-2845
02-2846

Cir. Ct. Nos. 01TP324
01TP325
01TP326
01TP327

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

NO. 02-2843
CIR. CT. NO. 01TP324

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

YOLANDA L.,

RESPONDENT-APPELLANT.

NO. 02-2844
CIR. CT. NO. 01TP325

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

YOLANDA L.,

RESPONDENT-APPELLANT.

NO. 02-2845
CIR. CT. NO. 01TP326

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

YOLANDA L.,

RESPONDENT-APPELLANT.

NO. 02-2846
CIR. CT. NO. 01TP327

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

YOLANDA L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed*.

¶1 CURLEY, J.[1] Yolanda L. appeals the order terminating her parental rights to her children, Kiheem L., Heather L., Roy L., and Casey L. She contends: (1) she was denied her due process right to participate in the termination of the parental rights (TPR) proceedings due to her mental incompetence and she had no GAL at trial; (2) her trial counsel was ineffective for failing to object to the trial proceeding; (3) her mental incompetence is a complete defense to her failure to assume parental responsibility; and (4) there was insufficient evidence of abandonment as defined in WIS. STAT. § 48.415(1)(a)3 (2001-02)[2] as grounds for the termination. Because: (1) she was not denied due process; (2) her attorney was not ineffective; (3) mental incompetence is not a defense to failing to assume parental responsibility; and (4) there was sufficient evidence, this court affirms.

I. BACKGROUND.

¶2 Due to Yolanda L.'s mental condition, the State removed her children, Kiheem, born November 14, 1992; Heather, born June 3, 1994; Roy, born January 21, 1998; and Casey, born May 5, 1999, from her at the hospital within days of their respective births. The children were subsequently found to be

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

in need of protection and services. In 1993, a court-ordered psychological evaluation revealed Yolanda L. was mildly mentally retarded with an I.Q. of 67 and had a personality disorder.

¶3 On August 10, 2001, a petition was filed seeking termination of Yolanda L.'s parental rights to these four children.[3] As grounds for the termination, the petition claimed Yolanda L. had failed to assume parental responsibility for her children and had abandoned them pursuant to WIS. STAT. §§ 48.415(6) and 48.415(1)(a)3. On September 6, 2001, Yolanda L. appeared without counsel. She was appointed counsel as well as a guardian ad litem (GAL). On October 19, 2001, the court ordered a psychological evaluation of Yolanda L.'s condition to determine if she was competent to proceed. On February 7, 2002, the court found that Yolanda L. was not competent to assist counsel. The court then set a trial date. On April 8, 2002, Yolanda L.'s GAL filed a motion to withdraw for personal reasons. On April 15, 2002, the GAL's motion to withdraw was granted and the court decided not to appoint another GAL for trial.

¶4 At the jury trial, Yolanda L. was called as a witness and testified. At the conclusion of the evidence, the trial court decided it would submit an extra verdict question to the jury on Yolanda L.'s failure to assume parental responsibility. The jury ultimately found that she had abandoned her children and did not have good cause for her failure to visit or communicate. The jury also

[3] Yolanda L. has other children not subject to these proceedings.

found that she had failed to assume parental responsibility for her children and that the failure was caused by her mental condition.

¶5 On June 6, 2002, at the dispositional hearing before the trial court, the trial court found Yolanda L. an unfit parent because she "does not have the capacity to parent." The trial court then proceeded to terminate Yolanda L.'s parental rights.

II. ANALYSIS.

A. Due Process Rights

¶6 Yolanda L. contends she was denied her due process right to participate in the proceedings. She argues the court should not have continued the proceedings because she was incompetent, and no ameliorative efforts were taken to assist her in regaining her competence or to protect her rights. This court disagrees.

¶7 A parent's interest in the companionship, care, custody, and management of his or her child is cognizable and substantial, and the integrity of the family is subject to constitutional protections through the due process clause of the state and federal constitutions. ***T.M.F. v. Children's Serv. Society***, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983). Even though this judicial duty is not expressly documented in the statutes, the trial court has an obligation to protect a parent's right to meaningfully participate in a TPR proceeding. ***D.G. and R.G. v. F.C.***, 152 Wis. 2d 159, 167-68, 448 N.W.2d 239 (Ct. App. 1989). Where the facts are undisputed, the application of the U. S. Constitution to those facts is a question

of law reviewed *de novo*. ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶8 Yolanda L. first argues that the trial court should not have continued the proceedings until after she regained her competency. However, to delay a TPR proceeding in such a manner would defeat the stated interest of ch. 48, which is that the "best interest of the child should always be of paramount consideration." WIS. STAT. § 48.01(1). Furthermore, nowhere in the statutes is this type of delay approved. Moreover, ch. 48 provides for the voluntary termination of parental rights of incompetent parents and implicitly approves the involuntary termination of the parental rights of an incompetent person. WISCONSIN STAT. § 48.41(3) provides, in relevant part:

> **Voluntary consent to termination of parental rights.**
>
> ….
>
> (3) If in any proceeding to terminate parental rights voluntarily a guardian ad litem has reason to doubt the capacity of a parent to give informed and voluntary consent to the termination, he or she shall so inform the court. The court shall then inquire into the capacity of that parent in any appropriate way and shall make a finding as to whether or not the parent is capable of giving informed and voluntary consent to the termination. If the court finds that the parent is incapable of knowingly and voluntarily consenting to the termination of parental rights, it shall dismiss the proceedings without prejudice. That dismissal shall not preclude an involuntary termination of the parent's rights under s. 48.415.

Therefore, because ch. 48 specifically provides that a trial court may proceed with involuntary termination proceedings pursuant to WIS. STAT. § 48.415 against a parent who has been found incompetent, it is reasonable to infer that such litigation may proceed without that person gaining his or her competency.

Accordingly, this court concludes that the trial court did not err in proceeding with the TPR proceedings against Yolanda L. before she "regained her competency."[4]

¶9 Yolanda L. asserts the trial court should not have proceeded to fact-finding without appointing a second GAL. Yolanda L. submits that the trial court's refusal to appoint a second GAL for her was an erroneous exercise of its discretion. It is well-established that 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). Yolanda L. urges an extension of this holding to include TPR proceedings. However, despite Yolanda L.'s arguments to the contrary, no Wisconsin case has extended this ruling to a parent involved in a TPR proceeding. *See* ***E.H. v. Milwaukee County***, 151 Wis.2d 725, 736, 445 N.W.2d 729 (Ct. App. 1989).

¶10 While courts dealing with the competency of a parent in a TPR proceeding should be concerned with the appointment of a GAL for the parent in addition to adversary counsel, *see* ***I.P. v. State***, 157 Wis. 2d 106, 114-15, 458 N.W.2d 823 (Ct. App. 1990), failure to appoint a GAL for an incompetent parent is not automatic grounds for overturning a verdict absent proof of prejudice. For example, in ***E.H.***, we held that while WIS. STAT. ch. 48 provides for the appointment of both an adversary counsel and a GAL for a parent who is incompetent, the appointment of a GAL does not necessarily enhance or diminish

[4] There is no evidence in the record indicating that Yolanda L. was on the verge of regaining her competence or that she could do so in the near future. How long would the trial court be required to wait and keep her children in limbo before it could proceed? This court concludes that the trial court acted reasonably in light of the circumstances.

the adversary counsel's duty to provide the parent with an independent and vigorous defense. *See* ***E.H.***, 151 Wis. 2d at 734-37.

¶11 Additionally, in ***I.P.***, the trial court denied the adversary counsel's request for appointment of a GAL for a parent whom counsel believed to be incompetent because appointment of a GAL would have interrupted a jury trial and perhaps would have harmed the parent's defense. *See* ***I.P.***, 157 Wis. 2d at 116-17. Although we concluded that the denial of the appointment of the GAL was not based on a proper standard, we ultimately held the error was harmless because the trial court's failure to appoint a GAL did not contribute to the decision terminating parental rights. *See* ***id.*** at 114. We reasoned that, because adversary counsel had vigorously and competently defended against the petition seeking termination, that even if the GAL had been appointed, his or her presence would not have added to the defense provided by adversary counsel. *See* ***id.*** at 115-16. Thus, the failure to appoint a GAL is subject to the harmless error analysis. ***Id.*** at 114. WISCONSIN STAT. § 805.18(2) provides an error is harmless unless it affects the substantial rights of the party seeking reversal:

> **805.18 Mistakes and omissions; harmless error**.... **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Accordingly, an error is harmless when there is no reasonable possibility that the error contributed to the termination of the parent's rights. ***I.P.***, 157 Wis. 2d at 114.

¶12 Here, the failure to appoint a GAL was harmless because adversary counsel vigorously and competently contested the TPR petition. *Cf.* ***id.*** at 115-16.

> This court has recognized that adversary counsel and a GAL may pursue independent and sometimes competing responsibilities in ch. 48, Stats., proceedings. Thus, had the court conducted a hearing, found [the parent] incompetent and appointed a GAL, the GAL could have either acquiesced in the decision to contest the matter, in which case his or her presence would have added nothing, or, alternatively, the GAL could have decided it was contrary to [the parent's] best interests to contest the matter, in which case the GAL's position would be adverse to that of [the parent] on this appeal. The trial court's inaction thus does not serve as a basis for a new trial because it did not contribute to the TPR decision that she seeks to overturn.

Id. at 116 (citation omitted). Here, the trial court's refusal to appoint a second GAL did not contribute to the TPR decision; thus, this court concludes that any error was harmless.

B. Ineffective Assistance of Counsel

¶13 Yolanda L. next argues that because of her mental incompetence, her trial counsel was ineffective for failing to request a stay in the proceedings. This court disagrees.

¶14 The standard of review is well-settled. The familiar two-pronged test for ineffective assistance of counsel claims requires proof of: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To

prove deficient performance, one must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, one must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687. In other words, "[t]he [party] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶15 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The party claiming ineffective assistance has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687. If he or she fails to establish prejudice, we need not determine whether counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 697 (stating that if the party fails to prove one prong, we need not address the other prong).

¶16 Here, Yolanda L. fails to establish prejudice. Because this court has already concluded that: (1) the trial court did not err in continuing with the TPR proceedings before Yolanda L. "regained her competency" (if that was even possible), this court further concludes that there is not a "reasonable probability" that there would have been a different result had a request for a continuance been made; and (2) the trial court did not err in proceeding without appointing a second GAL. *See* ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990)

(citation omitted). As a result, because Yolanda L. fails to establish prejudice, this court need not determine whether counsel's performance was deficient.

C. Mental Incompetence as a Defense

¶17 Additionally, Yolanda L. asserts mental incompetence is a defense for failure to assume parental responsibility under WIS. STAT. § 48.415(6). The State argues that Yolanda L.'s mental incompetence was not a statutorily recognized defense to a TPR proceeding based on the failure to assume parental responsibility under WIS. STAT. § 48.415(6). This court agrees.

¶18 The trial court's interpretation of WIS. STAT. § 48.415(6) is a question of law that is reviewed *de novo*. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 703, 530 N.W.2d 34 (Ct. App. 1995). WISCONSIN STAT. § 48.415(6) states:

> (a) Failure to assume parental responsibility … shall be established by proving that the parent … never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. In evaluating whether the person has had a substantial relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child….

¶19 As noted, the statutes make specific reference to the termination of an incompetent person's parental rights. *See* WIS. STAT. § 48.41(3). Nowhere in WIS. STAT. § 48.415(6) (failure to assume parental responsibility) is mental incompetence listed as a defense to an involuntary termination. Parents' rights

may be terminated under § 48.415(6) even if they lacked the ability to establish a parental relationship. *See* ***SueAnn M.M. v. Rob S.***, 176 Wis. 2d 673, 684, 500 N.W.2d 649 (1993).

¶20 A defense such as that asserted by Yolanda L. is reserved for a finding of abandonment under § 48.415(1). These defenses include "good cause" for "having failed to visit with the child" or "having failed to communicate with the child." *See* WIS. STAT. § 48.415(1)(c). However, Yolanda L. has failed to raise this issue on appeal, and therefore, we decline to address it. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground….").

¶21 Accordingly, because Yolanda L.'s mental incompetence is not a statutorily recognized defense to a charge of failing to assume parental responsibility, the trial court is affirmed.

D. Insufficient Evidence

¶22 Finally, Yolanda L. argues that there was insufficient evidence of an abandonment as defined in WIS. STAT. § 48.415(1)(a)3. This court disagrees.[5]

¶23 "Only when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted). "[I]n reviewing the sufficiency of the evidence … an appellate court may not substitute

[5] Although this court's decision regarding Yolanda L.'s failure to assume parental responsibility under WIS. STAT. § 48.415(6) is sufficient to sustain the verdict, we address this issue for completeness.

its judgment for that of the trier of fact unless the evidence viewed most favorable to the state… is so lacking in probative value and force that no trier of fact, acting reasonably, could have [reached the verdict]." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶24 Witness testimony established that, at the time of the hearing, Yolanda L. had not seen Kiheem, who was then nine years old, and Heather, who was then eight years old, since they were two years old; and that she had not seen Roy, who was then four years old, and Casey, who was then three years old, since their births. Additionally, witness testimony supported the fact that Yolanda L. had not even attempted to contact her children by telephone or letter, even though she knew where they were living. This evidence is sufficient to sustain the jury's decision. *See* WIS. STAT. § 48.415(1)(a)3; *see also* ***Bittner v. American Honda Motor Co.***, 181 Wis. 2d 93, 511 N.W.2d 325 (Ct. App. 1993) (stating that the credibility of the witnesses and the weight afforded their individual testimony is left to the jury).

¶25 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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