COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1568 **Cir. Ct. No. 03TP000134**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

AMBROSE W.,

RESPONDENT-APPELLANT.

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

¶1 DYKMAN, J.[1] Ambrose W. appeals from an order terminating his parental rights to Huey R.W. Ambrose requests a withdrawal of his no contest plea as to grounds for termination because he contends that his admission was not made "with understanding" as required by WIS. STAT. § 48.422(7). Specifically, he asserts that he was not informed during the plea colloquy of the Dane County Department of Human Services' burden to prove that certain placement orders contained written termination of parental rights warnings pursuant to WIS. STAT. § 48.356(2). Because we conclude that the trial court's summary of the elements of WIS. STAT. § 48.415(2) complied with the requirements of § 48.422(7) and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), we affirm.

BACKGROUND

¶2 The Dane County Department of Human Services filed a petition for termination of the parental rights (TPR) of Ambrose W. and Stephanie C. to their son, Huey R.W. Upon the advice of counsel, Ambrose entered a plea of no contest as to the grounds portion of the proceeding. The trial judge conducted a plea colloquy to ascertain if Ambrose's plea was knowing and voluntary. Relevant portions of the plea hearing are excerpted below:

> THE COURT: I'm going to ask you a series of questions…. If at any time there is any question I ask you that you do not understand, ask me to rephrase it or consult with [your lawyer] Mr. Benavides so that you don't guess at a question when you're unsure as to what it is I'm trying to find out.
>
> AMBROSE: Yes, sir.
>
> ....

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

THE COURT: Based upon [conversations with your lawyer], you've come here this morning saying judge, I'm not going to contest the grounds for TPR. I will participate in the second phase of the case as to whether or not you terminate my parental rights.

AMBROSE: Yes, sir.

THE COURT: Has Mr. Benavides explained to you that it's a two-part system, the jury determines if there is grounds and that it's my decision if there is a termination.

AMBROSE: Yes, sir.

....

THE COURT: You're going to say judge, I concede there are grounds, I will come here with a position with my lawyer on termination.

AMBROSE: Yes, sir.

....

THE COURT: Okay. I'm going to make it a little more detailed than that, sir. [Corporation counsel] has to show that your son has been placed outside of your home as a child in need of protection and services for more than six months. Do you concede that?

AMBROSE: Yes.

THE COURT: He has to show that the Department of Human Services made reasonable efforts to provide services to your child after the child was placed outside the home. Do you concede that?

AMBROSE: Yes.

THE COURT: He has to show that you failed to meet the conditions established for the safe return of the child to your parental home. Any question about that?

AMBROSE: No.

THE COURT: You concede that?

AMBROSE: Yes.

THE COURT: And he has to establish that there is a substantial likelihood.…

> ....
>
> ... that you will not meet the conditions [of return] within the next twelve months.
>
> AMBROSE: I understand that.
>
> THE COURT: Do you have any questions of your attorney at this time?
>
> AMBROSE: No.
>
> THE COURT: Any questions of me?
>
> AMBROSE: No, sir, Your Honor.
>
> ....
>
> THE COURT: …. Has anyone coerced you into doing this?
>
> AMBROSE: No, sir, Your Honor.

Corporation counsel John Talis and guardian ad litem Janet Rassmussen also asked several questions of Ambrose to ascertain the sufficiency of his plea. At the conclusion of the plea colloquy, the trial court determined that Ambrose made a knowing and voluntary decision to enter a plea of no contest as to grounds. For her part, Stephanie C. contested the grounds portion of the petition, and a jury found grounds to terminate her parental rights. Following a determination hearing, the court ordered the termination of the parental rights of both parents.

¶3 Ambrose appealed, asserting that his plea was not voluntary and knowing because he was not aware that the department was required to prove that the order placing Huey out of the home contained a termination warning, or that it had to prove its case by clear and convincing evidence to at least ten members of a jury of twelve. He also claimed his counsel was ineffective for failing to convey this information to him before he pled no contest, and for not filing a motion to sever his case from Stephanie C.'s case. Ambrose filed a motion to remand to the

trial court for a hearing on these issues, which we ultimately granted. The trial court held a hearing and issued a written order denying Ambrose's motion to withdraw his plea. The trial court transmitted the written order and hearing transcript to us, and we requested and received supplemental briefs of the parties.

DISCUSSION

¶4 Having abandoned all other previously raised issues, Ambrose now disputes only whether the trial court, in ascertaining if his plea was entered knowingly and voluntarily, was required to inform him during the plea colloquy of the department's burden to prove that he received the applicable warnings of termination. The trial court answered this question in the negative. Whether an admission of grounds in a TPR proceeding was made knowingly and with understanding of the facts alleged in the petition is a matter of constitutional fact. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51 n.18, 233 Wis. 2d 344, 607 N.W.2d 607.

> The circuit court's decision about whether the historical facts meet the constitutional test is a question of law that an appellate court determines independent of the circuit court, benefiting from a prior court's analysis. Nevertheless, because the circuit court has the opportunity to question and observe witnesses and because public policy favors finality of the circuit court's conclusion about the nature of a parent's waiver, the circuit court's conclusion about whether [the parent's] waiver was given voluntarily and understandingly should be given weight, although the decision is not controlling.

Id.

¶5 A court accepting a plea of no contest as to grounds for a petition to terminate parental rights must "[a]ddress the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged

in the petition and the potential dispositions." WIS. STAT. § 48.422(7)(a).[2] To evaluate challenges to a plea proceeding in a TPR case, courts have adopted the analysis of ***State v. Bangert***, 131 Wis. 2d at 274-75, interpreting WIS. STAT. § 971.08(1), the criminal code's analogue to § 48.422(7)(a). *See, e.g.,* ***Steven H.***, 233 Wis. 2d 344, ¶¶42-51. In its initial brief, the department argued that following the supreme court's decision in ***Steven V. v. Kelly H.***, 2004 WI 47, 271 Wis. 2d 1, 678 N.W.2d 856, ***Bangert*** no longer applies to post-dispositional challenges of no contest pleas in TPR proceedings. We resolved this issue in our order remanding to the trial court for a hearing:

> ***Kelly H.*** held that a court did not have a duty to inform a parent of the right to a continuance to consult with an attorney provided by [WIS. STAT.] § 48.422(5), overruling ***Burnett County Dep't of Soc. Servs. v. Kimberly M.W.***, 181 Wis. 2d 887, 892, 512 N.W.2d 227 (Ct. App. 1994). Kelly H., 271 Wis. 2d 1, ¶52, n. 9. The ***Kelly H.*** court rejected application of ***Bangert*** to § 48.422(5). It did not address the continued applicability of ***Bangert*** to § 48.422(7), nor did it comment on the court's own application of ***Bangert*** to § 48.422(7) in ***Waukesha County v. Steven H.***, 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607. We therefore direct the circuit court to apply a ***Bangert*** analysis when determining the sufficiency of Ambrose's plea.

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[2] WISCONSIN STAT. § 48.422(7) reads in pertinent part:

> Before accepting an admission of the alleged facts in a petition the court shall:
>
> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

Dane County Dep't of Human Servs. v. Ambrose W., No. 04-1568, unpublished slip order at 2 (WI App Oct. 6, 2004).

¶6 To demonstrate that grounds exist to terminate the rights of a parent, the following four elements must be shown by clear and convincing evidence: (1) that the child was adjudged to be in need of protection or services and placed outside the home for six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law; (2) that the county social services department made a reasonable effort to provide the services ordered by the court; (3) that the parent failed to meet the conditions established for the safe return of the child to the parent's home; and (4) that there is a substantial likelihood that the parent would not meet these conditions within the twelve-month period following the conclusion of the hearing. WIS. JI—JUVENILE 324 (2001); *see* WIS. STAT. § 48.415(2).

¶7 We look to the plea colloquy and the entire record to determine if the plea was entered knowingly and voluntarily, ***Bangert***, 131 Wis. 2d at 274-75, giving some weight to the trial court's determination. ***Steven H.***, 233 Wis. 2d 344, ¶51 n.18. The trial court engaged Ambrose in an extensive colloquy. The court repeatedly gave Ambrose the opportunity to ask questions of the court or his attorney. The guardian ad litem and corporation counsel also questioned Ambrose to ascertain his understanding of the charge. After confirming that Ambrose intended to plead no contest as to grounds, and that he was aware of the two-step TPR procedure, the court stated, "I'm going to make it a little more detailed than that, sir." The court then outlined for Ambrose the elements necessary to prove the existence of grounds to terminate his parental responsibilities under WIS. STAT. § 48.415(2).

¶8 Ambrose's only complaint with the trial court's exposition of the elements of proof was that it omitted a portion of the first element of the statute, that the department prove that the court orders contained the required warning to the parents. Ambrose asserts that because he did not otherwise know of this requirement,[3] he could not have entered a plea that was "knowing and voluntary."

¶9 The uncontroverted evidence shows that Ambrose received these statutory warnings on three separate occasions in court orders dated June 22, 2001, August 2, 2002, and September 19, 2003, respectively. At the November 17, 2004 hearing, the court questioned Ambrose's appellate attorney, Phillip Brehm, about these notices:

> THE COURT: …. Mr. Brehm, is there an issue, if you know, as to whether the order placing Huey outside the home contained the required TPR warning?
>
> MR. BREHM: There is no issue that the order contained that, but I think there is an issue as to whether or not he knew what the proof was during the trial.
>
> ....
>
> MR. BREHM: … I would agree that [corporation counsel] will be able to present some CHIPS orders that contain the termination warning ….
>
> THE COURT: Well, I can't let—I can't let go of this issue. I'm having trouble with the allegation in paragraph ten [of Ambrose's affidavit in support of his motion to withdraw

[3] The November 17 hearing testimony of Ronald Benavides, Ambrose's attorney for the TPR proceeding, supports Ambrose's claim that he did not otherwise know of this part of the first element of proof:

> MR. BREHM: Do you specifically recall whether you told him one of the elements of proof was that the order placing the child outside the home contained a termination warning?
>
> MR. BENAVIDES: I don't recall that I advised him of that.

> his plea] that "I would not have entered my no contest plea had I been aware of the facts alleged in paragraphs 6-9." So if he had been told that the orders contained the required warnings, i.e., that that part of the case was going to be impossible to contest, how does that match with his statement that he wouldn't have entered his admission to the facts?
>
> MR. BREHM: I understand what the Court is saying. I guess I'm saying that in conjunction with paragraph 6-9, each of these factors, when they are put together, were such that had he known that information, he would not have entered his no contest plea.

¶10 ***Bangert*** does not require a verbatim recitation of the elements of the statute from the jury instructions or statute, but a "summar[y] of the elements." ***Bangert***, 131 Wis. 2d at 268. ***Bangert***'s object was not to "establish[] inflexible guidelines which a trial court must follow in ascertaining a defendant's understanding of the charge." ***Id.*** at 267. Rather, it was to ensure that trial courts "take great care in ascertaining the defendant's understanding of the nature of the charge." ***Id.*** at 266.

¶11 Under the facts of this case, we conclude that the trial court's summary of the elements was sufficient to meet the requirements of ***Bangert***. The court explained the element of proof at issue as follows: "[Corporation counsel] has to show that your son has been placed outside of your home as a child in need of protection and services for more than six months." Though the court's exposition was not a verbatim recitation of the jury instruction or statute, it was adequate to ensure that Ambrose's plea was entered knowingly and voluntarily. Given that Ambrose had received the required warnings on three separate occasions, recitation of the department's obligation to prove this fact would have done nothing to change Ambrose's awareness of the issues relevant to his decision not to contest grounds for termination. The trial court's omission only denied

Ambrose the opportunity to make what would have been a meritless claim that he did not receive the required warnings. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.