COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2012

Diane M. Fremgen
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. 2012AP578
2012AP579

Cir. Ct. Nos. 2011TP25
2011TP26

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2012AP578

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANGELA M. K.,

RESPONDENT-APPELLANT.

NO. 2012AP579

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANGELA M. K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Angela M.K. appeals orders of the circuit court terminating her parental rights to her children, Adrianna K. and Gabriel K. Angela pled no contest to the CHIPS termination ground as to both children. Angela argues that the circuit court should have allowed her to withdraw that plea because it was not knowingly entered. More specifically, she asserts that she did not correctly understand the time component of a CHIPS element. Angela also complains that the circuit court violated a statute by not taking testimony in conjunction with her plea. I reject Angela's arguments and affirm.

Background

¶2 The County petitioned to terminate Angela's parental rights to Adrianna and Gabriel. The termination ground was continuing need of protection or services under WIS. STAT. § 48.415(2). In July 2011, at the hearing on the termination ground, Angela entered a no contest plea as to both children. In conjunction with this plea, the circuit court conducted a colloquy with Angela.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 Several months later, in October 2011, Angela moved to vacate her no contest plea. She alleged that the circuit court's colloquy was deficient because the court did not confirm that Angela understood one of the CHIPS elements: whether there was a substantial likelihood that Angela would not meet her conditions for the children's return within nine months of the grounds hearing. The circuit court held an evidentiary hearing, and concluded that the County had shown by clear and convincing evidence that Angela understood the element. Accordingly, the court denied Angela's motion.

¶4 After a dispositional hearing, the circuit court entered orders terminating Angela's parental rights to both children. Angela appeals.

Discussion

A. Plea Knowingly Entered

¶5 Angela argues that the circuit court incorrectly concluded that she knowingly entered her plea. Angela asserts that she did not understand the "substantial likelihood" CHIPS element: that "there is a substantial likelihood that the parent will not meet [the conditions established for the children's return] within the 9-month period *following the fact-finding hearing*." *See* WIS. STAT. § 48.415(2)(a)3. (emphasis added). Angela's specific complaint is that she did not understand that the nine months ran *from the hearing*. I reject Angela's argument.

¶6 Angela's complaint implicates a two-step analysis. Consistent with the circuit court, I will assume the first step in Angela's favor. That is, I will assume for purposes of this opinion that Angela made a prima facie showing that the circuit court's colloquy was deficient, and that an affidavit from Angela sufficiently alleged that she did not understand the "substantial likelihood"

element. *See* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607 (describing a prima facie showing).

¶7 The focus here is on the second step: "If [the parent] makes this prima facie showing, the burden shifts to the county to demonstrate by clear and convincing evidence that [the parent] knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." ***Id.*** According to Angela, the County failed to prove that she understood the time-frame component of the "substantial likelihood" CHIPS element. I disagree.

¶8 As the circuit court explained, ample evidence supports the proposition that Angela entered a knowing plea. The record reveals that, approximately two weeks prior to the plea, Angela was deposed. At the deposition, an attorney stated to Angela:

> I don't know if it's been explained to you, but one of the elements of this case is a determination of whether there is a substantial likelihood that you'd meet the conditions of return *within nine months of the fact-finding hearing*, all right.

(Emphasis added.) The attorney then proceeded to ask a series of questions about whether Angela would be able to meet the specific conditions of return within the nine months. So far as this exchange reveals, Angela understood those questions and their significance because she answered them and did not indicate confusion.

¶9 On the topic of the deposition, Angela asserts that it is improper to infer that she understood the deposition questions as "legal advice" and that nothing in the deposition provides "an affirmative demonstration of [Angela's] understanding." If Angela means to suggest that, as a matter of law, the County was required to point to an affirmative statement from Angela that she understood,

Angela provides no support for this proposition.[2] Although there is no affirmative statement from Angela that she understood, the deposition transcript supports the inference that Angela did understand.

¶10 The circuit court also observed that, prior to the hearing, Angela had the termination petitions, and those petitions correctly stated the "substantial likelihood" time frame. When pleading no contest, Angela agreed that she "had a chance to look at the petition[s]" and that the court could "rely on the facts that are stated in [the petitions] as being true and not incorrect in any way." Yet, at the subsequent evidentiary hearing, Angela denied having read the petitions in full, and instead testified that she "skimmed" them and, in particular, she denied having read and understood the "substantial likelihood" element.

¶11 The circuit court found that Angela's evidentiary hearing testimony lacked credibility. In particular, the court observed that Angela's evidentiary hearing testimony "was hesitant, vague, at times inconsistent and marked by a somewhat selective recollection." Thus, at least partially underlying the circuit court's conclusion was the determination that Angela's credibility was lacking when she asserted that she did not read and understand the "substantial likelihood" element in the petitions. I defer to the circuit court's credibility determinations.

¶12 On appeal, Angela complains: "It was her reliance on her attorney's advice that the nine-month period had begun four months earlier, that led to her non-understanding." Angela refers to her attorney's advice that the nine-month

[2] Angela points to a case when discussing this topic, but Angela's cite relates to a different topic, namely, whether a court satisfied its mandatory duties for purposes of a prima facie case. *See* ***State v. McKee***, 212 Wis. 2d 488, 491-92, 569 N.W.2d 93 (Ct. App. 1997). I have already assumed in Angela's favor that she made a prima facie showing.

"substantial likelihood" period ran from the time of *filing* of the termination petitions. The nine-month period in fact runs from the grounds hearing, *see* WIS. STAT. § 48.415(2)(a)3., which was approximately four months after the petitions were filed.

¶13 However, in her evidentiary hearing testimony, at no time did Angela assert that she misunderstood the time frame's start date. Angela simply agreed that, "I guess I didn't understand that," referring to the "substantial likelihood" element in general, and agreed that she did not know what the terms "element" and "substantial likelihood" meant. Thus, Angela's assertion that the circuit court erred in finding that she entered a knowing plea is based solely on testimony from her attorney. At the hearing, her attorney testified that, "[t]o the best of my recollection," she told Angela that the time frame ran from "the filing of the petition." The circuit court, however, was under no obligation to accept as factually true that Angela misunderstood the time aspect when Angela herself never made that assertion.

¶14 In sum, the circuit court relied on evidence that Angela was affirmatively told the correct time frame at a deposition and on the fact that Angela was not credible when asserting that she did not read and understand the correct information. And, again, Angela did not specifically testify that she relied on the incorrect advice from her attorney. Under these circumstances, I am not persuaded that the circuit court erred when concluding that the County had met its burden.

¶15 Finally, Angela makes a different complaint with respect to her plea. She asserts that, when the circuit court rejected her plea withdrawal motion, the

court improperly considered the children's best interests. Angela points to the italicized portion from the concluding comment in the court's oral decision:

> I don't find a reason to upset this verdict. *I think, to the level of clear and convincing proof and, frankly, in the interest, as petition says – or as the caption says, in the interest of Adrianna K[] and Gabriel K[], I find that the proof is adequate*. It is clear and convincing that this was a knowing and voluntary choice of a no contest plea…. [I]t simply has not been shown that she didn't understand what she was doing. So I deny the motion to vacate the plea.

(Emphasis added.) Referring to the italicized portion, Angela asserts: "The circuit court's consideration of the best interests of the children in reaching its decision on plea withdrawal, was error." I do not agree that this statement demonstrates that the circuit court mistakenly believed that, in determining whether Angela understood, a factor to consider was the best interests of the children.

¶16 First, to accept Angela's view would be to assume, from what appears to be an offhand comment, that the circuit court illogically believed that the consideration of the best interests of the children somehow was relevant to Angela's understanding of the substantial-likelihood-period element. Second, in the quoted text, it is plain that the circuit court's bottom line is that there was clear and convincing evidence that Angela did understand the substantial-likelihood-period element. The court's written order and other surrounding comments, which I chose not to quote here, also confirm that the court applied the correct standard.

B. Testimony In Support Of The Allegations In The Petitions

¶17 Angela complains that the circuit court failed to take testimony required by WIS. STAT. § 48.422(3), which states, as pertinent here: "If the petition is not contested the court shall hear testimony in support of the allegations in the petition …." Angela relies on ***Steven H.***, 233 Wis. 2d 344, a case in which

a parent pled no contest and the court concluded that § 48.422(3) was not satisfied. *See* ***id.***, ¶¶52-56, 60. For the reasons that follow, I conclude that Angela fails to show that ***Steven H.***'s conclusion applies to the particular facts here. Further, Angela does not show prejudice.

¶18 In ***Steven H.***, the supreme court addressed circumstances in which, like here, the only testimony presented at a grounds hearing was a parent's plea colloquy. *See* ***id.***, ¶¶46-49. The colloquy responses did not satisfy WIS. STAT. § 48.422(3). ***Id.***, ¶¶54, 56. Notable here is another aspect of the supreme court's discussion that differs from the present case. The supreme court observed that the circuit court took *judicial notice* of a social worker's report at the dispositional hearing. ***Id.***, ¶53. That report "set forth information supporting the factual allegations," but did not satisfy the testimony requirement of § 48.422(3). *See* ***id.***, ¶¶53, 56. The court explained that, under § 48.422(3), the county was required "to call a witness to testify in support of the allegations in the petition." ***Id.***, ¶56. And, the court observed that "[t]he Report *standing alone* is not testimony." ***Id.***, ¶53 (emphasis added). Thus, so far as that discussion explained, the proceeding was deficient for purposes of § 48.422(3) because the report was not testimony and there was no other evidence satisfying the testimony requirement.

¶19 The circumstances here are different. At the dispositional hearing, the social worker assigned to Gabriel's and Adrianna's cases testified. As part of that testimony, the social worker confirmed that she had prepared two reports, one for each child, and that "all of the information" in those reports was "true and correct." Those reports were then admitted as exhibits. Among other things, those reports contain detailed facts about the circumstances underlying the termination allegations. Angela does not dispute that the facts in the reports adequately support the allegations in the petitions.

¶20 Thus, the reports here were not "standing alone" in the sense discussed in ***Steven H.***, where the court simply took judicial notice of a report. Angela acknowledges this difference, but asserts it is only "marginally different" and that ***Steven H.*** requires more than a social worker's testimony. However, this is merely an assertion. Angela does not point to a place in ***Steven H.*** where the court states that more is required.

¶21 Further, Angela's argument fails for another reason—she does not develop a prejudice argument. In ***Steven H.***, after concluding that WIS. STAT. § 48.422(3) was violated, the supreme court nonetheless affirmed the termination order because there was no prejudice to the parent. *See* ***id.***, ¶¶57-61. Even if, for argument's sake, I were to assume that § 48.422(3) was not satisfied here, I also would affirm based on a lack of prejudice.

¶22 In concluding that there was no prejudice warranting reversal, the ***Steven H.*** court explained that the parent did not challenge the factual allegations in the petition. *See* ***id.***, ¶59. Angela does not address this aspect of ***Steven H.***'s discussion. More to the point, Angela does not assert that the factual allegations in the petitions here were not accurate. Thus, Angela provides no reason to think that further testimony would have mattered.

Conclusion

¶23 For the reasons stated, the circuit court's orders are affirmed.

By the Court.—Orders affirmed.

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