COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

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. 2013AP619
2013AP620
2013AP621

Cir. Ct. Nos. 2012TP1
2012TP2
2012TP3

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KA'DEJAH P., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EBONY D.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EBONY D.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EBONY D.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Ebony D. appeals the November 20, 2012 orders terminating her parental rights to her three children: Ka'Dejah P., Reniece D., and Maurice D. She alleges that the grounds statute, WIS. STAT. § 48.415(2), continuing need for protection and services, as applied to her, violated her substantive due process rights under the Fourteenth Amendment to the United States Constitution because she was unable to meet the conditions of return due to her cognitive limitations. We disagree and affirm. The record shows that Ebony D. was able to independently care for her children for eight years prior to

[1] This decision is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version.

their detention, and that it was her poor choices, not her cognitive limitations, that prevented Ebony D. from meeting the continuing-CHIPS order's conditions for return.

BACKGROUND

¶2 Ka'Dejah P. was born to Ebony D. on August 10, 2000. Thereafter, twins, Reniece and Maurice D., were born on April 4, 2004. Ebony D. lived with her children alone in her apartment without intervention from the Bureau of Milwaukee Child Welfare ("BMCW") until September 2009. On September 11, 2009, a school bus driver reported to Reniece's school that he observed injuries to five-year-old Reniece, which she said she got from a fall. The BMCW was called in and observed that Reniece had fresh red bruises under her left eye that extended back to her hairline. Reniece told the BMCW worker that her mommy hit her with the heel of her shoe because she was in her closet looking for a shirt to wear to school. The BMCW case worker also observed bruises covering the majority of Reniece's back. Ebony D. initially told the BMCW case worker that Reniece fell, but then admitted to hitting Reniece with her hand and a belt on the child's back. Ebony D. denied hitting Reniece in the face and said she assumed the facial injuries happened because the child moved around as she was being hit with the belt. Criminal child abuse charges were filed against Ebony D., and a CHIPS petition was filed regarding all three children on September 16, 2009.

¶3 A circuit court found the children to be in need of protection and services on January 26, 2010, and they were placed out of the home with conditions imposed for their return to Ebony D.[2] The original January 26, 2010

[2] The Honorable Frederick C. Rosa entered the CHIPS order on January 26, 2010.

CHIPS order was extended and revised at several hearings. At no time did Ebony D. raise any challenge to the conditions for return. On August 4, 2011, after judicial transfer,[3] the circuit court granted the parties' stipulated June 23, 2011 revision to the continuing-CHIPS order, which changed visitation to only those times that the children and mother mutually desire a visit. The stipulation was reached after the BMCW professionals reported that Maurice and Reniece were refusing visits with Ebony D. because they distrusted her, her attendance record at visitations was spotty, and the children feared physical discipline if the visits were unsupervised. The circuit court granted further extensions and changes to the order on October 10, 2011, none of which are challenged here or which are material to the resolution of this appeal.

¶4 A Termination of Parental Rights Petition was filed on January 4, 2012, alleging grounds under WIS. STAT. § 48.415(2), that is, Ebony D.'s failure to meet conditions of return under a continuing-CHIPS order regarding all three children.[4] The matter proceeded to a four-day jury trial, culminating in the jury's verdict on June 28, 2012, finding that Ebony D. had failed to meet the conditions for return of her children.[5] Ebony D.'s trial counsel filed a Motion for Judgment Notwithstanding the Verdict, which included the issue raised in this appeal. The circuit court denied that motion, found Ebony D. unfit, and after a subsequent

[3] The case was transferred to the Honorable Thomas P. Donegan.

[4] The Honorable John J. DiMotto presided over the TPR proceedings.

[5] The TPR Petitions also alleged grounds against Ka'Dejah P.'s father, Steven F., and Reniece and Maurice D.'s father, Gerrard J. and unknown fathers. Subsequently, and in the final TPR order, the court determined that the father of Reniece and Maurice was unknown. Because Ebony D. alone appeals, we do not discuss the fathers further.

disposition hearing, on November 20, 2012, entered the order terminating her rights to these three children. This appeal follows.

DISCUSSION

¶5 Ebony D. challenges the TPR orders on the basis that WIS. STAT. § 48.415(2) is unconstitutional as applied to her. Whether a statute, as applied to a parent, violates the parent's constitutional right to substantive due process presents a question subject to independent appellate review. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶16, 271 Wis. 2d 51, 678 N.W.2d 831. We begin with the presumption of the statute's constitutionality. ***Id.***

¶6 Because termination of parental rights interferes with a fundamental right, strict scrutiny is applied to the statute. *See* ***id.***, ¶¶17, 23. Under this test, we determine whether the statute is narrowly tailored to advance a compelling State interest that justifies interference with the parent's fundamental liberty interest. ***Id.***, ¶17. Because the Wisconsin Supreme Court has already determined that the State's compelling interest in WIS. STAT. § 48.415 is to protect children from unfit parents, *see* ***Kelli B.***, 271 Wis. 2d 51, ¶25, the sole issue here is whether that statute, as applied to Ebony D., is narrowly tailored to meet the State's compelling interest in protecting her children from Ebony D., *see* ***id.***, ¶17.

¶7 Ebony D. argues that her cognitive limitations, as testified to by the independent psychologist at her grounds jury trial, Dr. Kenneth Sherry, made it impossible for her to fulfill the conditions of return. She characterizes Dr. Sherry's testimony as conclusive that she is forever unable to meet the conditions of return due to her mild mental retardation. Thus, she argues, the statute is not "narrowly tailored" as applied to her and is, therefore, a violation of

the parent's right to substantive due process, relying on ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶56, 293 Wis. 2d 530, 716 N.W.2d 845.

¶8 We note that Ebony D. does not argue on appeal that she met the conditions for return or that the BMCW failed to provide services to facilitate her fulfillment of the return conditions. She identifies only two conditions in the CHIPS order that are allegedly impossibilities and relies solely on Dr. Sherry's testimony for her proof of impossibility. Thus, we note that her argument is a narrow one: that her mild mental retardation, as testified to by Dr. Sherry, made it impossible for her to satisfy the general condition and condition three of the original January 26, 2010 CHIPS order.[6]

¶9 The State and guardian ad litem ("GAL") argue that the record demonstrates that the conditions were individually tailored to Ebony D.'s needs, it was not impossible for Ebony D. to meet the conditions of return, but that by her own choices she simply did not meet the conditions. She frequently missed visitation appointments, or yelled at the children so much during the visits that the children were scared of her, and she lied to the children about the reasons for missing visits, which caused them to distrust her. As to the individual counseling and parenting assistance, the State and GAL contend that she failed to show up for the help she needed. Further, the State and GAL argue that the testimony showed that had Ebony D. availed herself of the services offered, she could have met the conditions for return. Finally, the State and GAL argue that the CHIPS and TPR

[6] We note that the January 26, 2010 CHIPS order was revised several times in provisions not material to this appeal. None of the conditions that Ebony D. lists in her appellate brief as impossible for her to fulfill were revised.

statutes involved here are narrowly tailored to provide meaningful process protections to Ebony D. with her mild mental retardation and to effectuate the legitimate State purpose of protecting children from unfit parents.[7]

¶10 To determine whether WIS. STAT. § 48.415(2) survives the strict scrutiny test we must first look at the two conditions Ebony D. complains of and determine whether they were individually tailored to Ebony D.'s cognitive limitations. Then, we examine the record to see if, as Ebony D. argues on appeal, Dr. Sherry's testimony demonstrates that the conditions were impossible for her to meet. We note that although Dr. Sherry testified at the June 26, 2012 TPR trial, the substance of his testimony was his diagnosis and recommendations for Ebony D.'s personal development from his November 11, 2009 psychological evaluation report of Ebony D. prior to the CHIPS trial. Additionally, we examine the entire record to determine whether it supports Ebony D.'s claims that it was impossible for her to comply with the conditions for return of her children.

¶11 The original conditions for return of the children to Ebony D. in the January 26, 2010 CHIPS order included the following two provisions, which form the basis for Ebony D.'s appeal here:[8]

[7] Ebony D. chose not to file a reply brief, and accordingly, we could deem all factual assertions and arguments made by the State and GAL in their response briefs to be unrefuted and therefore admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979) (arguments not refuted are deemed conceded). However, we choose to address Ebony D.'s arguments nonetheless because the parent and child relationship and the finality of TPR orders is so important.

[8] We do not repeat the other unchallenged conditions.

> CONDITIONS OF RETURN/SUPERVISION: THE PARENT(S)/GUARDIAN(S) MUST DEMONSTRATE THE BEHAVIORAL, COGNITIVE AND EMOTIONAL CAPACITY TO CARE FOR THEIR CHILD(REN) SAFELY BY COMPLETEING THE FOLLOWING CONDITIONS:
>
> ….
>
> Condition 3: All parents must demonstrate an ability and willingness to provide a safe level of care for the child. A safe level of care is described as follows:
>
> THE PARENT DEMONSTRATES THE ABILITY TO HAVE A SAFE, SUITABLE AND STABLE HOME.
>
> THE PARENT DOES NOT ABUSE THE CHILD(REN) OR SUBJECT THEM TO THE RISK OF ABUSE…..
>
> THE PARENT DEMONSTRATES THEY ARE ABLE AND WILLING TO CARE FOR THE CHILD(REN) AND THEIR SPECIAL NEEDS ON A FULL-TIME BASIS.
>
> THE PARENT COOPERATES EFFECTIVELY WITH OTHERS NEEDED TO HELP CARE FOR THE CHILD(REN).
>
> THE PARENT MUST COOPERATE WITH THE BMCW BY STAYING IN TOUCH WITH THEIR ONGOING CASEMANAGER, LETTING THE ONGOING CASEMANAGER KNOW THEIR ADDRESS AND TELEPHONE NUMBER, AND ALLOWING THE ONGOING CASEMANAGER INTO THEIR HOME TO ASSESS THE HOME FOR SAFETY.

¶12 Ebony D. argues that the first requirement, that she demonstrate "cognitive capacity" to care for her children safely, is beyond her reach, based on Dr. Sherry's testimony. Likewise, in condition three, she points to three "ability" requirements for a safe, suitable and stable home on a full-time basis, and claims that those requirements are impossibilities for her based on Dr. Sherry's testimony. She further contends that the conditions for return were not tailored in any way to meet the unique needs of a mentally retarded parent and that they were "boiler plate" conditions.

¶13 For support of her impossibility argument, Ebony D. correctly points out that Dr. Sherry testified that she was mildly mentally retarded, had an IQ of 58, a third-grade reading level and that based on her scores he would have expected that she could not live in the community independently. He also testified that he did not expect that she was ever going to be fully functional and independent. And he testified that her cognitive disability created an unsafe environment for her children.

¶14 However, the State points out, correctly, that Dr. Sherry also testified that he was surprised that Ebony D.'s IQ tested at 58 because her verbal IQ was a little bit higher. He noted that contrary to his expectation, she did live in the community independently for eight years, managed her money independently and marginally managed the home and some functional tasks there. He "guess[ed]" that she was probably getting some help. He testified: "[s]o with the information I had, typically somebody with a 55 or 58 IQ wouldn't be out in the community living relatively independently in that regard. So that's why I thought maybe it was a little bit higher actual IQ than what she tested but still limited."

¶15 Dr. Sherry recommended individual counseling for Ebony D. "to help her to kind of understand some of the limitations and be able to function better with the limited capacities that she has" and to also address, on a one-to-one basis, her alcohol and drug usage concerns. He also recommended that she work with a community program, Milwaukee Center for Independence ("MCFI"), that helps individuals with her limitations to improve their capacities to work at their highest level, because he felt that she needed their help to organize and structure her life to manage at the greatest level possible for her. Finally, Dr. Sherry testified that if Ebony had a supportive environment, she could remain involved in

the children's lives. Thus, contrary to Ebony D.'s argument, Dr. Sherry did not testify that it was impossible for her to meet the conditions for return, but rather that she needed help to do so and he made specific recommendations for that help.

¶16 It is important to note that Ebony D. does not argue that any other evidence in the record, other than Dr. Sherry's testimony, supports her impossibility argument, nor could she because the record clearly demonstrates the opposite. Ebony D.'s choices, not her cognitive limitations, caused her to fail to meet the conditions for return.

¶17 For example, Jessica Eckert, the social worker in charge of supervising all three children in foster care and part of the team of professionals who implemented the CHIPS order, testified at the TPR trial that Ebony D. failed to comply with the referrals she made for Ebony D. for an individual visitation assistant to assist her in complying with the condition that she learn appropriate, non-physical, disciplinary techniques, the first condition of the CHIPS order. Because of problems the children were having with visits, and based on Dr. Sherry's recommendations, Eckert arranged for an agency to send a "specialized parenting assistant," whose function Eckert described as "working with individuals who have cognitive limitations" to assist Ebony D. with the visits. Initially, Ebony D. complied, but after three months of no contact with Ebony D., despite the fact that the sessions were set in her own home, the agency discharged Ebony D. for noncompliance.

¶18 Eckert also testified that Ebony D. failed to comply with the condition that required that Ebony D. follow through on all mental health recommendations. Dr. Sherry had recommended that Ebony D. participate in individual counseling to help her compensate for her mild mental retardation and

life skills problems. Eckert referred her to five different therapists and/or agencies. Ebony D. failed to contact some and for others she attended a few sessions but then was discharged for non-compliance. Ebony D. stated that she did not need therapy. Eckert testified that Ebony D. never demonstrated any sort of comprehension problem with regard to the individual therapy, but rather had a "follow-through problem."

¶19 When a second case manager was assigned to her, Ebony D. attended one counseling session and then was discharged for non-compliance. She told the worker that she "[f]orgot. And, her social life caused her to forget." At the time of the jury trial in January 2012, her therapist testified that Ebony D. had been attending some sessions and had missed some. She testified that Ebony D.'s limitations did not interfere with the therapy.

¶20 Eckert also referred Ebony D. for parenting classes, based on Dr. Sherry's recommendation. Eckert made specialized referrals for Ebony D. to attend one-on-one parenting sessions, because Dr. Sherry had said that one-on-one sessions would make it easier for Ebony D. to grasp the material and reach the goal of learning proper disciplinary techniques. Ebony D. was referred to MCFI. Belying her appellate claim of inability to meet this condition for return, one of the MCFI workers testified that she observed that when she attended, Ebony D. would ask questions when she did not understand something, and had adequate reading and writing skills to take notes. Ebony D. was given a standing appointment at her own home for these parenting classes. All she had to do was be there at the appointed time. The record shows she missed thirteen of the thirty appointments. Her MCFI file was closed for noncompliance.

¶21 But Ebony D.'s bad choices about her visits with her children provide the most telling rebuttal of her claim that she was cognitively unable to meet the "successful visitation with her children" condition. Although the BMCW set up visitation immediately after the CHIPS dispositional hearing at Ebony D.'s own home, she missed nine visits in a two month period of Spring/Summer 2010. These were situations where the children were picked up and brought to Ebony D.'s home and she would not be there. So then the BMCW put a "call-ahead" system in place requiring her to contact the visitation worker two hours before a visit to confirm that she would be available so that the children would not be transported only to be disappointed. She continued to miss visits.

¶22 Even during the visits that she did attend, Ebony D.'s choice of behavior was frightening to the children. At a visit in August 2010, Ebony D. yelled so much at her children that they were in tears. The children reported feeling unsafe at the visits in her home, so the visits were moved to a visitation agency. Ebony D. continued to miss visits.

¶23 The children's psychotherapist, Tricia Wollin, testified that she asked Ebony D. to come to the children's once-monthly family therapy sessions because the children were having so many problems in Spring 2010. Ebony D. attended four months out of twelve. When Wollin asked Ebony D. why she missed so many appointments, the most consistent explanation Ebony D. gave was that she had to write out and pay her bills. The children also told Wollin that their mother told them she missed sessions because she was visiting her boyfriend "Willie" at college in Texas.

¶24 Wollin testified that, over a period of months, she, the other BMCW case workers and foster parents grew to realize that because Ebony D. was on

probation at the time for the criminal child abuse conviction involving Reniece, she could not leave the state. The case manager investigated and determined that Willie was actually in prison in Wisconsin. The worker determined that Ebony D. received a traffic ticket in the Fond du Lac area while she was traveling to visit Willie, which confirmed that she was able to travel to locations such as the visitation agency if she wanted to and that she chose to visit her boyfriend over her children. The degree of intent and planning Ebony D. employed to visit her boyfriend contradicts her claims that her cognitive ability left her unable to attend visits with the children or counselors in her own home.

¶25 Eventually, the children figured out from looking at photos on Ebony D.'s phone that Ebony D. was really visiting Willie in prison. They asked Ebony D. why she lied to them, but Ebony D. continued to insist that Willie was in college in Texas. The children finally grew so distrustful of her that they told the case manager they did not want to visit her until she came to family therapy with them to discuss this and other lies. She never attended another family therapy session.

¶26 Ebony D.'s own testimony at her trial shows that her choices, not her limitations, caused her failure to meet the conditions of return. She testified that she has been able to independently manage her finances, that she has lived independently for eight years, both before and after the children were detained, that she alone got the children to their doctor's appointments when they lived with her, she supervised them getting their immunizations on time, and she knew who her children's therapist was and was able to talk to the therapist about the children's progress on a few occasions. Despite Ebony D.'s appellate claims that

she was unable to comply with the CHIPS conditions, her own position and testimony at trial was that she was able and did comply.

¶27 Finally, Ebony D.'s reliance on ***Jodie W.*** is misplaced. There, the Wisconsin Supreme Court held that WIS. STAT. § 48.415(2) requires that the conditions of return be tailored to the particular needs of the parent and child. ***Jodie W.***, 293 Wis. 2d 530, ¶51. The court reversed the circuit court's order terminating Jodie W.'s parental rights because, although the circuit court properly considered her incarceration, it did not consider other relevant facts and circumstances particular to Jodie W. ***Id.***, ¶52.

¶28 The same cannot be said here. The circuit court fully examined Ebony D.'s needs, considering testimony from Dr. Sherry about Ebony D.'s needs and his recommendations for addressing them, and considering testimony from the BMCW professionals about Ebony's failures to follow through with the particularized help given and the visitations offered. The record also shows Ebony D.'s own testimony on the subject. The full inquiry found lacking in ***Jodie W***. was undertaken here.

¶29 We conclude that the conditions for return were narrowly tailored to the children's safety needs and to Ebony D.'s cognitive limitations. The record shows that the conditions were not impossible for Ebony D. to attain and that she simply made choices not to comply with the conditions for return. Accordingly, we conclude that the statute, as applied to Ebony D., is not unconstitutional and affirm.

By the Court.—Orders affirmed.

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