COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1997

NOTICE

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

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

Nos. 96-3470
96-3471
96-3472

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

NO. 96-3470

IN THE INTEREST OF YOLANDA K., A CHILD UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESUS R.,

RESPONDENT-APPELLANT.

NO. 96-3471

IN THE INTEREST OF VICTOR K., A CHILD UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESUS R.,

RESPONDENT-APPELLANT.

NO. 96-3472

IN THE INTEREST OF ALEXANDER K., A CHILD UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JESUS R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Reversed and cause remanded with directions.*

NETTESHEIM, J. Jesus R. appeals from trial court orders terminating his parental rights and denying his motion for a new trial based on ineffective assistance of counsel. Jesus contends that his counsel was deficient for failing to request answers to previously filed interrogatories prior to the entry of his no contest pleas. Jesus additionally contends that he was prejudiced by counsel's performance because the interrogatory answers may have provided him with information affecting his decision to enter a plea.

We conclude that counsel's performance was deficient for failing to request answers to the previously filed interrogatories. We further conclude that the trial court erroneously denied Jesus access to the interrogatory answers during the ***Machner***[1] proceedings. As a result of this error, we are unable to determine whether Jesus suffered any prejudice as a result of counsel's deficient performance. Accordingly, we remand with directions that the interrogatories be answered so that the trial court can determine at the ***Machner*** hearing whether Jesus was prejudiced by counsel's failure to pursue the answers prior to his plea.

FACTS

The underlying facts of this appeal are undisputed. In October 1995, the State filed a petition for the termination of Jesus' parental rights to Victor K., Yolanda K. and Alexander K., as children in continuing need of protection and services. *See* § 48.415(2), STATS., 1993-94. Attorney Jodi Meier was appointed to represent Jesus. On February 15, 1996, Meier filed interrogatories and requests for other documents seeking information from the social worker who handled the case. When this information was not forthcoming, Meier filed a motion to compel answers and documents. The trial court held a hearing on the motion to compel and denied the motion based on an appellate court decision, ***State v. Tammy F.***, 196 Wis.2d 981, 986-87, 539 N.W.2d 475, 477 (Ct. App. 1995), which had declined to extend civil discovery rights to ch. 48, STATS., proceedings.

Thereafter, on July 1, 1996, a legislative amendment to § 48.293, STATS., became effective. This amendment extended civil discovery rights to

[1] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

parties involved in termination of parental rights cases.[2] The amendment applied to actions pending or commenced on its effective date, July 1, 1996. After the law became effective, Meier failed to renew her request for the answers to the interrogatories. Jesus pled no contest to the TPR petitions on July 8, 1996, and his parental rights were terminated in due course.

Shortly thereafter, Jesus filed a motion for a ***Machner*** hearing alleging that Meier was ineffective for failing to renew her request for answers to the interrogatories following the amendment to § 48.293, STATS. The trial court held a ***Machner*** hearing and concluded that trial counsel's performance was not deficient. Jesus appeals.

DISCUSSION

The principles of effective assistance of counsel apply in a termination of parental rights setting. *See* ***A.S. v. State***, 168 Wis.2d 995, 1004-05, 485 N.W.2d 52, 55 (1992). The general rule is that a guilty or no contest plea waives the right to raise nonjurisdictional defects and defenses, including claims of constitutional dimension. *See* ***State v. Olson***, 127 Wis.2d 412, 418, 380 N.W.2d 375, 378 (Ct. App. 1985). However, a plea may be withdrawn if the respondent establishes by clear and convincing evidence that the plea was not knowingly and voluntarily made and that withdrawal is necessary to prevent manifest injustice, as may be indicated in a situation of ineffective assistance of

[2] This amendment was enacted by 1995 Wis. Act 275, § 43. This amendment created § 48.293(4), STATS., which allows parties to employ discovery procedures permitted under ch. 804, STATS. Pursuant to 1995 Wis. Act 275, § 9310, "The treatment of section 48.293(4) of the statutes first applies to any proceeding under chapter 48 of the statutes pending or commenced on the effective date of this subsection." The Act was effective on July 1, 1996. *See* 1995 Wis. Act 275, § 9400.

counsel. *See* ***Birts v. State***, 68 Wis.2d 389, 392-93, 228 N.W.2d 351, 353-54 (1975).

To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and prejudicial. *See* ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

Jesus argues that Meier's performance was deficient for failing to obtain answers to the interrogatories after such discovery was permitted pursuant to the amendment to § 48.293, STATS. The State responds that Jesus failed to establish that Meier's performance was deficient because (1) Jesus "does not state how the answers to interrogatories would have changed his circumstances or how those answers would have affected his plea of no contest," and (2) Meier had the complete social services file prior to the date on which Jesus entered his no contest plea. We are unpersuaded by the State's arguments.

Meier filed a pretrial motion to compel answers to interrogatories. She made this motion in spite of the fact that under the controlling case law at the time, civil discovery was not available in ch. 48, STATS., proceedings. *See* ***Tammy F.***, 196 Wis.2d at 986-87, 539 N.W.2d at 477. In this regard, we commend Meier's lawyering. Although the law was against her on this point, she attempted to persuade the juvenile court to allow discovery, arguing that she could not obtain all of the information she needed through the open file policy of the Department of Health and Social Services (DHSS). In addition, Meier preserved the record for possible appeal.

However, as a result of Meier's failure to renew the discovery request after the change in the law, Jesus' plea was entered without the benefit of this information. Although Meier testified at the ***Machner*** hearing that she was unaware of the change in the law, she was seriously impeached based upon her argument to the juvenile court at the motion to compel proceeding when she advised the juvenile court about the pending amendment, even citing to the number of the bill. In addition, when asked at the ***Machner*** hearing whether she would have renewed her request for discovery had she been aware of the legislative changes, Meier stated, "I suppose I would, because I made the issue out of it earlier." An attorney's obligation includes the duty to stay informed of the applicable law. This is especially so when the matter impacts on the client's decision to admit to a termination of parental rights. We conclude that Meier was ineffective for failing to pursue discovery after the change in the law.

The State's arguments really focus on the prejudice prong of the analysis. The State contends that Jesus was not prejudiced because Meier had access to the complete social services file. However, this argument flies in the face of Meier's argument at the motion to compel proceeding where she explained that she was seeking information *not available in the files.* We fail to understand how the State can say that the undiscovered material did not prejudice Jesus when neither we nor the State knows what the material reveals.

We have the same observation regarding the State's next argument. The State contends that Jesus has failed to show deficient performance because he has failed to reveal how the answers to the interrogatories would have changed the circumstances relating to his plea entry. But the State overlooks that Jesus again sought to obtain the discovery as part of the ***Machner*** hearing after the law had

changed. At the ***Machner*** hearing, Jesus' appellate counsel attempted to obtain the answers to the original discovery request in order to demonstrate that Jesus had been prejudiced. The trial court denied Jesus' request, concluding that "we are now looking backward to a record that was created, and we're determining whether an attorney acted in a professional manner or harmed your client as a result of incompetence, basically.… And so it's my opinion that there was no need for [DHSS] to answer any interrogatories at this point." The court appears to have only viewed the assessment of Meier's performance and the prejudice factor before the change in the law. But Jesus' complaint is about counsel's performance after the change in the law. Therein lies the court's error.

Thus, the lack of a showing of prejudice is not due to any failing on Jesus' part. Rather, it is due to the State's argument against the discovery and the juvenile court's ruling barring this effort at the ***Machner*** hearing.

Jesus testified at the ***Machner*** hearing that his decision to enter no contest pleas was based on his distress over recent deaths in the family and his understanding that he had a poor chance of succeeding at trial. Jesus argues on appeal that he was prejudiced by counsel's performance because there was a reasonable probability that the interrogatories would have provided him with favorable information. Had Jesus been aware of any favorable information indicating that he had a chance of succeeding at trial, he may not have entered the no contest pleas. However, in the absence of the interrogatory answers, Jesus is unable to state with any degree of certainty whether he was prejudiced. Indeed, it is possible that the interrogatory answers would reveal that Jesus was not prejudiced at all.

That brings us to the question of the appropriate appellate remedy. In some situations, the law will presume prejudice once deficient performance has been proven. *See* ***State v. Smith***, 207 Wis.2d 259, 279, 558 N.W.2d 379, 388 (1997). However, we conclude that this is not such a case. Instead, we conclude that the appropriate remedy is to remand for a continuation of the ***Machner*** hearing at which the material sought to be discovered can be produced. Armed with that information, the juvenile court can then make an informed determination as to whether Jesus was prejudiced.

By the Court.—Orders reversed and cause remanded with directions.

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