COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3170
97-3171
97-3172

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

No. 97-3170

IN RE THE TERMINATION OF PARENTAL RIGHTS OF TYLER S.W., A PERSON UNDER THE AGE OF 18:

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

VOLONNA W.,

RESPONDENT-APPELLANT.

No. 97-3171

IN RE THE TERMINATION OF PARENTAL RIGHTS OF ALYSSA P.W., A PERSON UNDER THE AGE OF 18:

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

VOLONNA W.,

RESPONDENT-APPELLANT.

No. 97-3172

IN RE THE TERMINATION OF PARENTAL RIGHTS OF NICHOLAS N.W., A PERSON UNDER THE AGE OF 18:

JEFFERSON COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

VOLONNA W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

DEININGER, J.[1] Volonna W. appeals orders terminating her parental rights to three children. She claims that her trial counsel was ineffective for failing to seek dismissal of the termination proceedings on the grounds that an order extending the out-of-home placement of the children did not comply with statutory notification requirements under §§ 48.356 and 48.415(2)(a), STATS.[2] We

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

[2] The relevant portions of §§ 48.356 and 48.415(2)(a), STATS., are quoted below in the text of this opinion.

conclude that the relevant orders placing Volonna's children outside her home complied with the statutory notification requirements, and we therefore agree with the trial court that her counsel did not perform deficiently when he stipulated to the validity of the orders in question. Accordingly, we affirm the orders terminating parental rights.

BACKGROUND

Volonna's three children were originally found to be children in need of protection or services (CHIPS) on March 20, 1995. The dispositional order entered on April 11, 1995, placed the children with an aunt and uncle. The order set forth six conditions for the return of the children to her home. The order also included the following language:

> WARNING TO PARENTS—TAKE NOTICE:
>
> 1) That if you do not satisfy the return conditions read to you in court, a petition may be filed asking the court to terminate your parental rights to the child who is the subject of this petition. If the child remains outside your home for six (6) months or more, the Department has made a diligent effort to provide ordered services, and if you do not demonstrate substantial progress toward meeting the conditions of return, and if there is a substantial likelihood that you will not meet the return conditions in the twelve (12) month period following the fact-finding hearing, then the legal relationship between you and the child may be terminated by the court, under section 48.415(2)(c), Wis. Stats.
>
> 2) Also, if you fail to visit or communicate with the child for a period of six months or more, such failure could be considered abandonment, which is another ground for termination of your parental rights to the child, under section 48.415(1), Wis. Stats.

Although the placements of the children were subsequently changed, they were not returned to Volonna's home. The original CHIPS dispositional order was continued for an additional twelve months on March 11, 1996. The

extension order, a standard form identified as "JV-29, 1/92," included the following language: "Unless specifically revised, the dispositional order in this case is reconfirmed and incorporated into this order." No revisions were specified in the extension order.

The Jefferson County Department of Human Services filed petitions for the termination of Volonna's parental rights to her three children on January 14, 1997. The petitions alleged, among other things, that the children were in continuing need of protection and services under § 48.415(2), STATS., in that they had been found to be in need of protection and services; had been placed and continued in placements outside the parental home pursuant to court orders which contained the notice required by § 48.356(2), STATS.; and had remained in those placements for longer than one year.[3] The allegations of the petitions were tried to a jury. At the beginning of the trial, Volonna's counsel stipulated "that each of the Orders contained the Termination of Parental Rights Notice required by law." During a post-trial evidentiary hearing, Volonna's counsel explained the basis for the decision to enter into the stipulation as follows:

> We [Volonna and Counsel], together, went through the dispositional orders and the notices that went along with that, that I was provided, and I believe that my copies that I had in my possession had all the written notices….
>
> We did have a full discussion and decided that stipulating might be beneficial to her case simply because there were several dispositional and extension notices and warnings that my records contained, and rather than having the jury hear that over and over again, we stipulated that those warnings were, in fact, given.

[3] The petition regarding the youngest of the three children alleged that his placement had continued for longer than six months. All of the children, however, had been continuously placed outside of Volonna's home since March 20, 1995.

The jury found that the Department had established grounds for the termination of Volonna's rights to all three children. The court subsequently entered termination orders.[4] Volonna filed notices of intent to appeal, and at her request, we remanded for further proceedings regarding her claim of ineffective assistance of counsel.

During proceedings on remand, it was established that the trial court did not give the oral warning required under § 48.356(1), STATS., during the CHIPS extension hearing on March 11, 1996. Section 48.356(1) provides as follows:

> Whenever the court orders a child to be placed outside his or her home or denies a parent visitation because the child has been adjudged to be in need of protection or services under s. 48.345, 48.357, 48.363 or 48.365, the court shall orally inform the parent or parents who appear in court of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child to be returned to the home or for the parent to be granted visitation.

It was also established at the hearing on remand that the juvenile court files for the three children contained only a one-page "Order to Extend Dispositional Order" resulting from the March 11, 1996 hearing, with no attachments. The court files did contain, however, an affidavit of mailing, executed by a secretary from the district attorney's office, stating under oath that on March 14, 1996, "she mailed a true and correct copy of the original Order To Extend Dispositional Order and Order To Revise Dispositional Order with Termination Grounds Attached" to the interested parties, including Volonna.

[4] The orders also terminate the rights of the fathers of Tyler S.W. and Alyssa P.W. Neither has appealed the orders.

Volonna's counsel testified that he had determined "that the written warnings were, in fact, given." The basis for this statement is that counsel had received from the district attorney's office, pursuant to a discovery request, along with numerous other documents, a copy of the March 11, 1996 extension order, to which was stapled a second page containing a "Warning To Parents" similar to the warning quoted above from the original dispositional order. Also stapled together with the order and warning page was a copy of the affidavit of mailing by the district attorney's secretary. Counsel further testified that although Volonna was perhaps not sure whether she had received all of the notices from the various court proceedings involving her children, she never indicated that she had not received the notice in question following the March 11, 1996 extension hearing.

The secretary who prepared the affidavit of mailing for the March 11, 1996 extension order and warning notice testified that she had in fact mailed both documents on the date indicated in the affidavit. In its oral findings at the conclusion of the hearing, the trial court found there was "clear and credible evidence that was subject to cross-examination, [which] would cause me to reach the conclusion that, in fact, that warning was given." In its written order, the court included a finding that the testimony of the district attorney's secretary was "credible that the document entitled Notification to Parents was mailed to Volonna W." Finally, the court also found in its written order that "Trial Counsel testimony was credible and [he] was effective in his representation of Volonna W. as he relied upon documents received in discovery from the District Attorney's office."

ANALYSIS

Volonna initially argues in her brief that the trial court "erred in refusing to dismiss the termination of parental rights case because sufficient

warnings had not been … given in the CHIPS proceeding." Volonna cites nothing in the record that would indicate a motion to dismiss on this basis was ever presented to, or ruled on by, the trial court. In fact, as we have noted, trial counsel stipulated at trial that the orders contained sufficient warnings. Thus, the only issue properly before us is whether trial counsel rendered ineffective assistance by entering into the stipulation instead of challenging the termination proceedings on the basis of the allegedly defective warnings.

A parent in termination of parental rights proceedings is entitled to effective assistance of counsel, and the applicable standards are those which are applicable in criminal cases. *See* ***A.S. v. State,*** 168 Wis.2d 995, 1005, 485 N.W.2d 52, 55 (1992). To prevail on a claim of ineffective assistance of counsel, a parent must establish that counsel's actions constituted deficient performance, and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986). The trial court's determination of what the attorney did and did not do, and the basis for the challenged conduct, are factual matters that we will uphold unless clearly erroneous. ***Id.*** Whether the attorney's conduct constituted ineffective assistance is a question of law, however, which we decide de novo. ***Id.*** To prevail, Volonna must show both that her trial counsel's performance was deficient and that this deficient performance prejudiced her defense. *See* ***A.S.,*** 168 Wis.2d at 1005, 485 N.W.2d at 55.

Section 48.415(2)(a), STATS., provides that to establish a "continuing need of protection or services" as the grounds for the termination of parental rights, the petitioner must show, among other things, the following:

> That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363, 48.365 … containing the notice required by s. 48.356(2) ….

As we have indicated above, § 48.356(1), STATS., requires a court when placing a child outside his or her home under a CHIPS disposition to orally inform a parent of "any grounds for termination of parental rights under sec. 48.415 which may be applicable and of the conditions necessary for the child to be returned to the home or for the parent to be granted visitation." Section 48.365(2), STATS., requires this same information to be included in "any written order which places the child outside the home …." Section 48.415(2)(a), STATS., makes reference only to the latter requirement. The fact that the CHIPS court failed to give the oral warning required under 48.356(1), STATS., at the March 11, 1996 disposition hearing is not relevant in the context of termination of parental rights proceedings. *See* ***M.P. v. Dane County Dep't of Human Services,*** 170 Wis.2d 313, 327, 488 N.W.2d 133, 139 (Ct. App. 1992).

The written notice required under § 48.356(2), STATS., applies "only to orders removing children from placement with their parent or denying parental visitation." *See* ***Marinette County v. Tammy C.***, 219 Wis.2d 206, 209, 579 N.W.2d 635, 636 (1998). The Department argues that we should interpret the holding in ***Tammy C.*** to mean that an extension order which merely continues an existing out-of-home placement need not contain the warning. We do not agree that the court's holding in ***Tammy C.*** must necessarily be read so broadly. The court stated that the language of both §§ 48.415(2)(a) and 48.356(2), STATS., "show that the legislature has chosen to require a notice warning parents of the potential for termination of their parental rights only when their children are taken from the home under a dispositional order or its extension or revision." ***Id.*** at 217,

579 N.W.2d at 639. It distinguished dispositional and extension orders from "temporary physical custody orders," ***id***. at 219, 579 N.W.2d at 640, and also noted that "[o]rders extending a condition of the dispositional orders, such as allowing supervision by the department, but issued while the children were placed with one or both parents, did not require the Wis. Stats. § 48.356(2) warning." ***Id***. at 224-25, 579 N.W.2d at 642. Nowhere in the opinion, however, does the court distinguish an original dispositional order placing a child outside the home from an extension order continuing such a placement. Moreover, the court specifically noted that one of the orders before it which extended a placement outside the mother's home had included the statutory warning. ***Id***. at 219, 579 N.W.2d at 641-42.

We are hesitant to extend the holding of ***Tammy C.*** beyond its facts, and we need not do so to affirm the present termination orders. Even if the March 11, 1996 order, which extended existing out-of-home placements of the children, was required to contain the written notice under § 48.356(2), STATS., Volonna has failed on this record to establish that it did not do so. The trial court specifically found that the March 11, 1996 extension order did contain the required warning notice. Given the testimony from Volonna's trial counsel and the district attorney's secretary, which we have summarized above, this finding is not clearly erroneous. The extension order expressly incorporated the initial dispositional order by reference, thereby incorporating into the extension order the same conditions for return which had originally been ordered at the time of the removal of the children from Volonna's home. That reference and the attachment of the warning notice setting forth the applicable grounds for termination of parental rights satisfied the requirements of § 48.356(2), STATS.

The trial court also found that Volonna's trial counsel had reviewed and relied on the discovery materials received from the district attorney, which, as we have noted, indicated that the March 11, 1996 extension order that was mailed to Volonna contained the attached warning notice. Given counsel's testimony, this finding is also not clearly erroneous. We conclude, as did the trial court, that trial counsel's performance was not deficient for entering into a stipulation which precluded the potentially prejudicial repetition before the jury of the several warnings Volonna had received that her failure to remedy parenting deficiencies could lead to a termination of her rights.

The guardian ad litem for the children, who filed a brief in support of the Department's position, noted that there is no dispute that the original dispositional hearing on March 20, 1995, and the written order which followed it, complied in all respects with the requirements of § 48.356, STATS. The guardian ad litem then argues that the duration of continuous out-of-home placements necessary for termination was met at the end of the first twelve months following the entry of the initial order, and that any defect in the March 11, 1996 proceedings would not preclude a jury from finding that grounds for termination under a valid order had been established. Given our conclusion that the record does not support Volonna's claim that the March 11, 1996 extension order was defective, we do not address this argument.

In conclusion, the only question properly before us is whether Volonna's trial counsel rendered ineffective assistance to her by entering into the stipulation regarding the sufficiency of the underlying CHIPS orders and notices. We conclude, as did the trial court, that Volonna has not established that her counsel performed deficiently, given that he obtained and reviewed the relevant

documents, discussed them with her, and entered into the stipulation for valid strategic reasons. We therefore affirm the orders terminating Volonna's parental rights.

By the Court.—Orders affirmed.

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