COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2017

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 No. 2015AP2179 **Cir. Ct. No. 2014TP29**

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

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

KENOSHA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

C.D.K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: DAVID P. WILK, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] C.D.K. appeals a circuit court order terminating her parental rights and an order denying post-disposition relief.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Asserting that she was not advised of, and did not understand, her right to require Kenosha County to prove the allegations in the TPR petition by clear and convincing evidence and that 10 of 12 jurors would have to agree in order for a verdict to be accepted by the court, C.D.K. argues that the circuit court erred in concluding that her admission to grounds for the TPR was entered, to use her phrase, "intelligently and understandingly." C.D.K. also argues that the circuit court erred in concluding that she received effective assistance of counsel when her counsel encouraged her to admit grounds and to focus on the disposition phase instead of contesting the grounds. For reasons set forth below, I reject both arguments and affirm.

BACKGROUND

¶2 In 2014, the County filed a petition for the termination of C.D.K.'s parental rights on behalf of C.D.K.'s daughter, Z.M.K., who was 2 years old at the time. On the day of the scheduled trial on the petition, C.D.K. appeared in court with counsel and entered an admission to grounds. The County made what it called an "unprecedented request," based on the County's "understanding that [C.D.K.] will be entering a plea to the continuing CHIPS ground," asking that the court adjourn the disposition phase of the proceedings beyond the typical 45 days to allow C.D.K. additional time to try to meet the conditions of return. The County explained that it made this request, with the consent of C.D.K., in part based on the County's belief that there was "some potential" that the matter would not proceed to disposition because the County would drop the petition.

¶3 After placing C.D.K. under oath, the circuit court conducted an admission colloquy, during which C.D.K. testified, in the course of personal discussion with the court, to the following: (1) she had seen the admission form

and her signature was on the back page of the form; (2) she intended to enter an admission to the alleged continuing CHIPS ground supporting termination; (3) she had read the TPR petition and there were enough facts in the petition for the court to find that there are grounds to terminate C.D.K.'s parental rights; (4) she understood that if the court accepted her admission, her parental rights could be terminated at the dispositional hearing; (5) she understood the rights that she was giving up, including the right to require the County to prove each part or element of the statute to establish grounds for TPR; (6) she did not need more time to decide whether to enter her admission and declined the court's offer for more time; (7) she had discussed this with trial counsel and was satisfied with his representation of her; (8) she did not have any questions of the court or of her counsel; (9) she understood the elements of the continuing CHIPS ground, which the court personally reviewed with her, and she believed that the County could prove each element of the continuing CHIPS ground; (10) she did not have any questions regarding the elements of the continuing CHIPS ground; (11) she was entering her admission freely, voluntarily, intelligently, and understandingly, after consulting with counsel; and (12) she wanted the court to accept her admission. C.D.K.'s trial counsel informed the court that he had gone through the admission colloquy with C.D.K. prior to the hearing.

¶4 Both C.D.K. and her counsel signed a document entitled "Termination of Parental Rights Plea Questionnaire/Waiver of Rights/Appeal Rights." I refer to this document as the "admission form." The admission form contained all of the rights that C.D.K. was waiving as a result of her admission, including the burden of proof and the jury agreement requirement of 10 of 12 jurors. However, the single box on the admission form that described two rights—the burden of proof and the jury agreement requirement—was not checked.

C.D.K. signed the "Parent's Acknowledgment" at the end of the admission form. The parent's acknowledgment states as follows:

> I have read, or have had read to me, this entire questionnaire, and I understand the contents. Upon completing each item, I am indicating that I understand it. I enter this admission or no contest plea freely, voluntarily, and without any threats being made against me.

In addition, C.D.K.'s counsel signed the "Attorney's Acknowledgment," indicating that counsel had discussed and explained the entire contents of the admission form with C.D.K., and that counsel believed that C.D.K. understood each item in the form and entered the admission or no contest plea freely and voluntarily.

¶5 The court accepted C.D.K.'s admission as to grounds, finding that C.D.K. "freely, voluntarily, intelligently[,] and understandingly entered her plea" and that C.D.K. "freely, voluntarily, intelligently[,] and understandingly" waived her rights. The court set the matter over for the dispositional phase.

¶6 The County did not drop the petition, as it had suggested that it might do, and the circuit court conducted the dispositional hearing over the course of three non-consecutive days. At the close of the evidence, the court terminated the parental rights of C.D.K. to Z.M.K.[2]

¶7 After retaining a new attorney, C.D.K. filed in the circuit court a motion to withdraw her admission of grounds. C.D.K. argued that her admission was not entered voluntarily and with understanding, and that her trial counsel

[2] Although not pertinent to any issue raised on appeal, we note for context that the circuit court also terminated the rights of Z.M.K.'s father at that time.

during the TPR proceedings was ineffective in failing to provide competent advice to C.D.K. regarding her chances of prevailing in a trial at the grounds phase.

¶8 The circuit court held post-dispositional hearings on C.D.K.'s motion to withdraw her admission over the course of four days, at the end of which the court issued an oral decision denying C.D.K.'s motion for post-disposition relief. The court made the following pertinent findings and conclusions in its decision.

¶9 The court found that "in total," C.D.K.'s "testimony [was] not credible." More specifically, the court made the following additional findings. "[E]ither [C.D.K.] lied under oath [at the admission hearing], or she lied under oath when she was in court on the motion [to withdraw her admission] because the testimony that she has provided under oath is mutually exclusive. It cannot be both." The court indicated that it had evaluated C.D.K.'s "demeanor and character" and found that C.D.K.'s post-disposition testimony was "opportunistic" in that C.D.K. displayed "intricate knowledge of portions of the proceedings that benefited her," but displayed a purported "complete and utter lack of recollection of any factors that may inure to her detriment."[3] In sum, C.D.K. was "selective in [her] recollection. And the Court can't reconcile that testimony."

[3] The court noted that C.D.K.'s testimony was inconsistent in at least two respects. She testified that her counsel "did not discuss with her the right to a jury trial, but then testified that [counsel] told her that a jury would look at her past bad acts and that she should enter a plea." Separately, C.D.K. testified that she had not read the TPR petition, depending on counsel to read the TPR petition to her, but later testified that she had read the TPR petition.

In a similar vein, the court noted that during the post-dispositional hearings C.D.K. testified that she "had no recollection of the questions that this Court asked in its [plea colloquy] examination and that she had no recollection of the [County] asking her questions about the elements. When asked about these elements, she would either slightly recall, would recall or would not recall being asked those questions."

¶10 In contrast, the court credited the testimony of C.D.K.'s trial attorney at the post-dispositional hearings that, before the admission: (1) he spoke with C.D.K. about her right to a jury trial; (2) he discussed the options that C.D.K. had at a meeting in his office; (3) he went over the admission form with C.D.K. in his office; (4) C.D.K. understood the rights that she was giving up by entering the admission; and (5) he went over the burden of proof and the jury agreement requirement with C.D.K. In a similar vein, the court accepted the attorney's testimony that he "went over the entire TPR plea questionnaire with [C.D.K.], that he discussed the rights that she was waiving by entering her plea and that she understood what she was doing in this matter."

¶11 In addition, the court observed that C.D.K. acknowledged in the post-dispositional hearings that she had read petition documents that would have informed C.D.K. of her "right to a jury of 12 jurors and to have the allegations proven by clear and convincing evidence."

¶12 Based on the evidence and testimony taken at the admission hearing and at the post-dispositional hearings, and its findings and conclusions as set forth above, the circuit court denied C.D.K.'s motion to withdraw her admission as well as her claim that trial counsel had provided ineffective assistance. C.D.K. appeals.[4] I reference additional pertinent facts below.

[4] The guardian ad litem for Z.M.K. has not filed a brief on appeal, but informs this court by letter that the GAL supports affirmance of the circuit court's decision.

DISCUSSION

Sufficiency of the Admission

¶13 C.D.K. argues that the circuit court was obligated to allow her to withdraw her admission to the continuing CHIPS ground because she demonstrated in the post-dispositional hearing that she had not "intelligently and understandingly" entered the admission.

¶14 When a parent enters an admission in the grounds phase of a TPR proceeding, WIS. STAT. § 48.422(7) requires the trial court to:

> (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 the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission ….
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified….
>
> (br) Establish whether any person has coerced a birth parent [into making an admission].
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

Id.

¶15 To be constitutionally sound, an admission or no contest plea in a termination of parental rights proceeding must be entered knowingly, voluntarily, and intelligently. ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. The parent must have knowledge of the constitutional rights being given up by the admission or no contest plea. ***Id.***, ¶25. These rights include: (1) the right to counsel; (2) the right to a jury trial; (3) the right to have

the State prove the parent's unfitness by clear and convincing evidence; and (4) the right to a fact-finding hearing on fitness. ***Brown Cty. DHS v. Brenda B.***, 2011 WI 6, ¶¶42 n.12, 43-44, 331 Wis. 2d 310, 795 N. W.2d 730.

¶16 When reviewing a claim that an admission in a TPR proceeding was not knowing, voluntary, and intelligent, the court is to follow the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). The parent must make both parts of a two-part prima facie case that (1) the trial court violated its mandatory duties under WIS. STAT. § 48.422(7) and (2) the parent did not understand the information that the trial court should have provided. ***Oneida Cty. DSS v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122.

¶17 If the parent fails to present a prima facie case, the court need go no further and may deny the motion for admission or no contest plea withdrawal. *See* ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶43, 233 Wis. 2d 344, 607 N.W.2d 607, *modified on other grounds by* ***St. Croix Cty. DHHS v. Michael D.***, 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107. If the parent makes a prima facie showing, the petitioner (in this case, the County) must then show by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently waived the right to contest the allegations in the petition. *See* ***id.***, ¶42. The court may consider the entire record and the totality of the circumstances to determine whether the parent's admission or no contest plea was "knowingly, voluntarily[,] and intelligently" entered. *See generally*, ***id.***

¶18 Whether the County established that C.D.K. knowingly, voluntarily, and intelligently admitted that grounds existed to terminate her parental rights raises a question of constitutional fact. *See* ***Bangert***, 131 Wis. 2d at 283. Appellate courts review constitutional questions independent of the circuit court,

id., but "will uphold the circuit court's findings of evidentiary or historical facts unless the findings are 'contrary to the great weight and clear preponderance of the evidence.'" ***Jodie W.***, 293 Wis. 2d 530, ¶28 (quoting ***Bangert***, 131 Wis. 2d at 283-84).

¶19 As referenced above, C.D.K. argues that she did not understand the burden of proof in a TPR case or that 10 of 12 jurors would have to agree on a verdict before the court could accept it. Therefore, C.D.K. argues, she should be permitted to withdraw her admission to the TPR petition.

¶20 As it must, the County concedes that, at the time of the admission hearing, the trial court did not engage C.D.K. in a personal discussion regarding the burden of proof and the jury agreement requirement. However, the County denies that C.D.K. has shown that she did not understand the rights that she was giving up in entering her admission.

¶21 I first make a general observation about C.D.K.'s briefing. In arguing that she must be allowed to withdraw her admission, C.D.K. fails to address the circuit court's strong findings that C.D.K.'s testimony was inconsistent and self-serving, more generally that C.D.K. was not a credible witness, and that her counsel was credible in testifying contrary to C.D.K. Instead, in the main, C.D.K.'s briefing on appeal appears to re-argue the factual issues considered by the circuit court in the post-dispositional hearings, but without developing any argument as to why I should conclude that any of the court's findings are clearly erroneous.

¶22 Having made that general observation, I turn to the facts. As described in detail in the background section above, the court made a finding that C.D.K.'s testimony at the admission hearing was more credible than her testimony

at the post-dispositional hearings, based in part on inconsistencies between C.D.K.'s testimony at the admission hearing and the post-dispositional hearings and in part on trial counsel's testimony. In sum, the circuit court made detailed findings that C.D.K.'s testimony at the post-dispositional hearings was self-serving and suspect, and that she understood the pertinent rights.

¶23 For example, C.D.K. asserted that she did not know the rights she was giving up in entering her admission and denied familiarity with the court processes. However, C.D.K. had at least six prior cases in which she entered a plea to criminal charges or to CHIPS petitions. C.D.K.'s trial counsel, who had represented her in each of the prior six cases, testified that he discussed with C.D.K. the differences in the burden of proof during his representation of C.D.K. in the prior six cases—beyond a reasonable doubt in the criminal cases, and clear and convincing evidence in the CHIPS cases. Consistent with this testimony, C.D.K. acknowledged that she had filled out plea forms in the past with assistance from counsel and that counsel had gone over the plea forms with her prior to plea hearings. C.D.K. also testified that the courts, in the prior criminal and CHIPS cases, had discussed with her the rights she was giving up in entering her pleas to the petitions or criminal complaints, including the burden of proof and the jury agreement requirement.

¶24 Moreover, as the County correctly points out, there was apparently no reasonable room for confusion to the disadvantage of C.D.K.: none of the burdens of proof discussed by the courts in C.D.K.'s criminal and CHIPS cases were lower than the burden in the TPR case, and none of the jury agreement requirements were lower than the TPR requirement either. If C.D.K. had mistakenly believed that the County was required to prove its TPR case beyond a reasonable doubt or that the jury had to be unanimous in its decision, that mistaken

belief would have constituted harmless error, because she would have understood a higher than actual, not lower than actual, burden on the County. In any case, the circuit court found that C.D.K. knew of the pertinent burden of proof and jury agreement requirements at the time she entered her admission in this TPR case, and C.D.K. has not provided us with any reason to upset this finding, or for that matter any of the court's findings.

¶25 For all of these reasons, I conclude that C.D.K. has failed to overcome the evidence showing that, at the time of her plea hearing and colloquy with the circuit court, she knowingly, voluntarily, and intelligently entered the plea and she understood the rights she was waiving by entering her admission.

Ineffective Assistance of Counsel

¶26 C.D.K. alleges that her trial counsel provided deficient assistance in that he failed to provide competent advice to C.D.K. regarding her chances of prevailing in a trial at the grounds phase.[5] I reject this argument because, based on factual findings of the circuit court that are not clearly erroneous, C.D.K. fails to establish deficient performance.

¶27 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). An appellate court will not overturn the circuit court's findings of fact unless they are clearly erroneous and must give due regard to the circuit court's judgment

[5] C.D.K. makes a confusing argument, which is completely unsupported by citation to legal authority, to the effect that the County's offer to defer the dispositional hearing beyond the typical 45-day time frame at the time of her entry of the admission was in some sense only a vague or illusory benefit to C.D.K., and therefore her admission was invalid. Because I do not discern even the starting point for a legal argument on this topic, I reject it as undeveloped.

regarding the credibility of witnesses. *See* WIS. STAT. § 805.17(2); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶28 To obtain relief based on ineffective assistance of counsel, C.D.K. has the burden to show both deficient performance and resulting prejudice. *See* ***Strickland***, 466 U.S. at 687. If C.D.K.'s argument falls short with respect to either, her claim of ineffective assistance fails. *See* ***State v. Smith***, 2003 WI App. 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.").

¶29 After holding an evidentiary hearing on C.D.K.'s post-dispositional motion, the circuit court made findings of fact and conclusions of law with regard to the claim of ineffective assistance of counsel. The court accepted the testimony of trial counsel that: (1) he was thoroughly familiar with the facts of this case, because he was C.D.K.'s attorney in the CHIPS case that preceded the filing of the TPR petition at issue here; (2) he had attended numerous hearings in the CHIPS case, including semi-annual permanency plan hearings; (3) he was in possession of the pertinent court materials and had reviewed the materials with C.D.K.; and (4) he had discussed C.D.K.'s progress in meeting the conditions of return of Z.M.K. with C.D.K. on many occasions. As discussed above, the court assessed C.D.K.'s testimony and determined that she was not a credible witness.

¶30 The circuit court found that trial counsel "engaged in a thorough investigation of law and fact and made strategic choices regarding the procedural posture of this case." The court concluded that counsel

> provided [C.D.K. with] his professional judgment. He believed that strategically, a jury trial was an unwise choice. He believed that strategically, he had a better

> defense on behalf of [C.D.K.] at disposition and he believed that her best opportunity was [delaying] disposition so that she could continue to work on meeting her conditions of return [before the disposition hearing]. According to his testimony, all of these strategic decisions were discussed with [C.D.K.].

For all of these reasons, the circuit court found that counsel "acted reasonably and within professional norms." The court therefore denied C.D.K's claim for ineffective assistance of counsel in connection with the TPR proceedings.

¶31 A court is to give great deference to counsel's professional decisionmaking when reviewing his or her performance. A party alleging ineffective assistance must overcome a strong presumption that counsel acted reasonably within professional norms. ***Strickland***, 466 U.S. at 687-88. Strategic decisions rationally based on the facts and the law are not deficient. ***Id.*** at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]"). As explained above, the court concluded, based on all of the testimony at the post-dispositional hearings, that counsel made reasonable, strategic choices in advising C.D.K. to enter the admission, and C.D.K. provides no viable challenge to the court's conclusions.

¶32 As I have already suggested, at bottom, C.D.K. appears to disagree with the court's assessment of the testimony and argues that the court erroneously accepted some of her trial counsel's testimony while overlooking other testimony. C.D.K. contends that the circuit court "ignored almost all of the relevant testimony pertaining to ineffective assistance of counsel," yet concedes that "[s]ome facts were cited to justify the [court's] conclusions of law." C.D.K. essentially asks that I weigh the evidence differently from the circuit court. However, the weight and credibility of the evidence are solely for the circuit court to determine. *See* ***State v. Jenkins***, 2014 WI 59, ¶64 n.31, 355 Wis. 2d 180, 848 N.W.2d 786 (at a post-

trial hearing, a circuit court may weigh the credibility of the witnesses, including trial counsel, and make credibility findings in assessing the deficiency and reasonableness of the trial counsel's performance); ***Bonstores Realty One, LLC v. City of Wauwatosa***, 2013 WI App. 131, ¶6, 351 Wis. 2d 439, 839 N.W. 2d 893; ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665-66, 586 N.W. 2d 1 (Ct. App. 1998).

¶33 C.D.K. provides me with no basis on which to conclude that the circuit court's findings of fact pertinent to the ineffective assistance of counsel claim were clearly erroneous. *See* WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous ...."). The court was within its discretion to place greater weight on the testimony of C.D.K.'s counsel than on that of C.D.K. and to conclude that counsel made reasonable, strategic choices in advising C.D.K.

CONCLUSION

¶34 For the foregoing reasons, I conclude that the circuit court did not err in concluding that C.D.K.'s admission to the termination of parental rights petition was entered "intelligently and understandingly," and that C.D.K. received effective assistance of counsel regarding the entry of her admission to the TPR petition.

By the Court.—Orders affirmed.

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