COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP917 **Cir. Ct. No. 2004TP81**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DELILAH S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Delilah S. appeals the denial of her post-judgment motion and the underlying judgment terminating her parental rights to her son, Dayshawn S. She argues that her trial attorney's failure to bring a motion to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04).

dismiss the action based on the doctrine of claim preclusion constituted ineffective assistance of counsel. Because ***Brown County v. Terrance M.***, 2005 WI App 57, 280 Wis. 2d 396, 694 N.W.2d 458, the case confirming that claim preclusion applies to termination of parental rights cases was decided after the trial on this matter, Delilah's trial attorney was not ineffective for failing to bring such a motion. Consequently, this court affirms.

I. BACKGROUND.

¶2 On May 13, 2003, the State filed a termination of parental rights petition against Delilah regarding her son, Dayshawn, alleging that grounds for termination existed. First, the State claimed that under WIS. STAT. § 48.415(2)[2]

[2] WISCONSIN STAT. § 48.415(2) provides:

> **(2)** CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child 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, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

(continued)

(2003-04),[3] the child was in a continuing need of protection or services (CHIPS), and that under § 48.415(6)[4] Delilah had failed to assume parental responsibility.

¶3 A jury heard the matter, and on February 7, 2004, the jury returned a verdict in favor of Delilah. The jury found that the Bureau of Milwaukee Child Welfare had not made reasonable efforts to provide services, a necessary finding under the statute to grant a termination on the basis of continuing CHIPS. The jury also found that Delilah had not failed to assume parental responsibility. As a consequence, Delilah's parental rights could not be terminated on either ground.

¶4 On February 16, 2004, nine days after the jury returned its verdict, the State filed another termination of parental rights petition against Delilah regarding Dayshawn, this time alleging abandonment as grounds for termination under WIS. STAT. § 48.415(1)(a)2.[5] The State asserted in its petition that Delilah

---

> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[4] WISCONSIN STAT. § 48.415(6)(a) provides:

> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have never had a substantial parental relationship with the child.

[5] WISCONSIN STAT. § 48.415(1)(a)2. states:

(continued)

had failed to visit or communicate with her son, when her son was five years old and living with his foster mother in California, from January 13, 2003 until April 28, 2003, a three-month period that occurred before the filing of the State's first petition.

¶5 At a hearing held on April 8, 2004, Delilah appeared with an attorney appointed by the Office of the State Public Defender. Her counsel informed the court that he intended to move to dismiss the action based on claim preclusion, stating "here we are set to try the same case over." In response, the State argued "[w]e're not setting to try the same case. Facts in the case are different. The grounds in this case are different regardless of whether or not the State would have brought this ground at that time. The State did not do so. State was not required to do so."

¶6 On the date scheduled for the hearing on the dismissal motion, Delilah's counsel informed the court that he had decided against bringing the motion because he had "searched for authority and looked for authority, I couldn't

---

> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside of the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

find none that would provide me a basis for successfully getting a dismissal, so I did not bring what I found at that time to be a frivolous motion."

¶7 The second jury trial began on July 28, 2004. Delilah's case manager testified that she was not aware of Delilah having had any contact with Dayshawn from January 13, 2003 through April 28, 2003. With a verdict of ten to two, the jury determined that Delilah abandoned her son, finding that Delilah had failed to visit or communicate with Dayshawn, and that although she did have good cause not to visit him, she did not have good cause not to communicate with him. The trial court then held a dispositional hearing pursuant to WIS. STAT. § 48.424. At the conclusion, the trial court determined that it was in Dayshawn's best interest to have his mother's parental rights terminated.

¶8 Delilah filed a notice of appeal on March 31, 2005. Delilah then moved this court to remand the matter to the circuit court for a determination of whether the underlying proceeding was barred by issue or claim preclusion, and this court granted the motion on May 4, 2005.[6] As a result, on May 23, 2005, Delilah filed a post-judgment motion with the trial court seeking to vacate the judgment and dismiss the petition. The crux of the motion was that the verdict should be set aside and the petition dismissed with prejudice because the State's second petition seeking to terminate Delilah's parental rights was barred by the doctrine of claim preclusion. Because no motion based on claim preclusion was

[6] The record is unclear as to when the motion to remand the matter to the circuit court on the basis of preclusion was filed, but an order by this court denying a motion for reconsideration by Dayshawn's guardian ad litem shows that the motion was granted by this court on May 4, 2005.

ever filed before trial, the motion claimed that trial counsel was ineffective. The parties filed briefs and the trial court ordered an evidentiary hearing.

¶9 On July 29, 2005, a ***Machner***[7] hearing was held on the ineffective assistance of counsel claim, at which Delilah's trial attorney testified. Delilah's trial counsel testified that he did not bring the motion to dismiss because he thought that the doctrine of claim preclusion did not apply to termination of parental rights cases. After hearing the testimony and the arguments of counsel, the trial court denied Delilah's motion to dismiss, finding that the claim preclusion doctrine was not applicable because the causes of action were different. The trial court reasoned that because the issue of abandonment was not raised in the first action, "either under 'failure-to-assume' or 'Continuing CHIPS'" causes of action, a necessary element of claim preclusion, was not met.

> To say that [the first and second actions are] the same transaction because the same people were involved during the same time period, I think, stretches the boundaries of the transactional analysis…. We all live in time and space. But the motivation, the origin of the claim, it is clearly distinguishable.

¶10 The court also found that Delilah's counsel was not ineffective because

> even if he had found law that he thought could possibly be interpreted to say that the issue of the preclusion doctrine could be raised, since the facts in his case didn't support it, he should not have raised it.
>
> In addition, …the doctrine had not yet been applied to [termination of parental rights] cases by our Appellate branch.

[7] ***State v. Machner***, 101 Wis. 2d 79, 303 N.W.2d 633 (1981).

Delilah now appeals the denial of her post-judgment motion and the underlying judgment terminating her parental rights.

II. ANALYSIS.

¶11 On appeal, Delilah again argues that her trial attorney's failure to bring a motion seeking a dismissal of the termination of parental rights action was ineffective assistance of counsel. She again submits that the State's decision to commence another termination of parental right suit against her for alleged conduct that predated the first termination proceeding required dismissal on claim preclusion grounds.

¶12 In order to be found ineffective, a defendant must first show that counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, the defendant must prove that counsel's deficient performance prejudiced his or her defense, which entails showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, [one] whose result is reliable." ***Id.*** The defendant can meet this second requirement by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. A defendant must meet both parts of the ***Strickland*** test to prevail. ***Id.*** at 687. The standard of review of the performance and prejudice prongs of ***Strickland*** is a mixed question of law and fact, and the trial court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The ultimate determination whether the conduct of an attorney constitutes ineffective assistance of counsel is a question of law we review de novo. ***Id.*** at 128, 449 N.W.2d at 848. In ***A.S. v. State***, 168 Wis.

2d 995, 1005, 485 N.W.2d 52 (1992), our supreme court determined that the ***Strickland*** test for ineffective assistance of counsel applied to involuntary termination of parental rights cases.

¶13 The doctrine of claim preclusion is designed to balance the need to bring litigation to a final conclusion against each party's right to have a judicial determination made as to his or her contentions. ***Shanee Y. v. Ronnie J.***, 2004 WI App 58, ¶18, 271 Wis. 2d 242, 677 N.W.2d 684. Claim preclusion makes a final adjudication on the merits in a prior action a bar to later actions between the same parties as to all matters that were or could have been litigated in the earlier action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Claim preclusion has three elements: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity of the causes of action in the two suits; and (3) a final judgment on the merits by a court of competent jurisdiction. ***Id.*** at 551. There is also an issue of overriding fairness. The law of claim preclusion is not an ironclad rule to be doggedly applied, even if literally appropriate, without regard to countervailing considerations. ***Patzer v. Board of Regents of the Univ. of Wis. Sys.***, 763 F.2d 851, 856 (7th Cir. 1985). "Claim preclusion may be disregarded in appropriate circumstances when the policies favoring preclusion of a second action are trumped by other significant policies." ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 236, 601 N.W.2d 627 (1999). In ***Brown County***, 280 Wis. 2d 396, this court confirmed that claim preclusion applies to termination of parental rights cases. The court observed: "Further, claim preclusion is 'designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand.'" ***Id.***, ¶5 (citing ***Northern States Power***, 189 Wis. 2d at 550).

¶14 This court then went on to explain that, like child custody cases, which permit claim preclusion defenses:

> The same can be said for applying claim preclusion to repeated TPR proceedings that are not supported by a change in the underlying facts. However, because the interests of children are involved in a custody proceeding, claim preclusion should not be as strictly applied to TPR cases as it is in other cases. And, for these same reasons underlying application of claim preclusion to TPR cases, we conclude issue preclusion may also be applied when the facts so require.

Id. (citation omitted).

¶15 However, in this case, this court need not decide whether claim preclusion barred the State from commencing a second termination of parental rights suit against Delilah for conduct that occurred prior to the first termination of parental rights suit. This court will assume, without deciding, that the elements of claim preclusion were met. Nevertheless, Delilah's attorney was not ineffective for failing to file such a motion because the case law supporting such a motion did not exist at the time of Delilah's trial attorney's representation.

¶16 Because the ***Brown County*** case was not published until after Delilah's jury trial, the law was unsettled at the time that Delilah's trial attorney was responsible for her defense. As was noted in ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994), "[c]ounsel is not required to object and argue a point of law that is unsettled" in order to avoid an ineffective assistance of counsel charge. Although it might have been ideal for Delilah's attorney to assert that claim preclusion barred the second suit, as that may have benefited Delilah, not doing so did not result in her attorney's representation being deficient. This court concludes that, while a future court may well hold the doctrine of claim preclusion applies in a different termination of parental rights

suit, and the failure to raise it may constitute ineffective assistance of counsel, "ineffective assistance of counsel cases are limited to situations where the law or duty is clear, such that reasonable counsel should know enough to raise the issue." *See* ***id.*** at 84-85. Since Delilah's trial attorney was faced with unsettled law, he was not ineffective for failing to file a motion concerning claim preclusion.

¶17 For the reasons stated, this court affirms.

By the Court.—Order affirmed.

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