COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2005

Cornelia G. Clark
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. 2005AP1582 Cir. Ct. No. 2004TP92

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

KENNETH M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Kenneth M. appeals orders that terminated his parental rights to his three-year-old daughter and denied post-disposition relief from the termination orders. He claims the circuit court erred in concluding that his trial counsel was not ineffective for failing to object to the admission of testimony from a psychologist and an AODA[2] counselor on the grounds of privilege under WIS. STAT. § 905.04. We conclude that the challenged testimony from the two professionals, who were ordered during a prior CHIPS[3] proceeding relating to Kenneth's daughter to evaluate Kenneth's need for psychological and AODA treatment, did not encompass confidential communications amenable to a claim of privilege under the cited rule. Accordingly, we affirm the appealed orders.

BACKGROUND

¶2 Because her parents were unable to provide "adequate care and supervision due to mother's continued alcohol abuse and father's incarceration," Kenneth's daughter, Amanda, was placed outside her home in May 2003 under a CHIPS order. That order directed, among other things, that Kenneth undergo an AODA evaluation. The child's mother died in July of 2003, and the CHIPS order was thereafter revised to include a requirement that Kenneth also undergo a psychological evaluation. Both evaluations were completed late in 2003 and reports of each were promptly filed with the CHIPS court.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Alcohol and Other Drug Abuse (AODA). *See* WIS. STAT. § 51.47.

[3] Child In need of Protection or Services (CHIPS). *See* WIS. STAT. § 48.13.

¶3 Early in 2004, Kenneth's probation was revoked and he was sentenced to prison, where he remained incarcerated until May 2, 2005. In August 2004, the Dane County Department of Human Services petitioned the court to terminate Kenneth's rights to Amanda, alleging that Amanda was in continuing need of protection or services and that Kenneth had failed to assume parental responsibility. *See* WIS. STAT. § 48.415(2) and (6). A jury heard evidence regarding the grounds for termination in December and delivered a verdict concluding that the Department had established both grounds for termination. The court subsequently entered an order terminating Kenneth's parental rights, as well as a second order containing supplemental findings in support of termination.

¶4 Kenneth filed a postdisposition motion requesting a new trial on the grounds that his trial counsel had been ineffective for failing to object to the testimony at the TPR[4] trial given by the psychologist and AODA counselor who had evaluated him pursuant to the orders in the CHIPS case. He argued that the testimony of these witnesses revealed confidential communications and information that were privileged under WIS. STAT. § 905.04. The circuit court concluded that Kenneth could claim no reasonable expectation that his communications with the court-appointed evaluators would not be "disclosed to a court which was making long-term plans and permanency decisions with respect to the welfare of a child." The court noted that the evaluators' reports were not privileged in the CHIPS case, given that the reports were shared with the court and interested parties in the CHIPS proceeding, and concluded that the

[4] Termination of Parental Rights (TPR). *See* WIS. STAT. §§ 48.40-48.435.

communications at issue could not thus attain a privileged status for purposes of the TPR proceeding.

¶5 Accordingly, the circuit court denied Kenneth's motion for relief from the TPR orders. Kenneth appeals that denial as well as the TPR orders.

ANALYSIS

¶6 Kenneth renews on appeal his claim that his trial counsel was ineffective for failing to object to the testimony of the psychologist and the AODA counselor on the grounds that their testimony disclosed confidential communications and information that are privileged under WIS. STAT. § 905.04. A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings, and the applicable standards are those which apply in criminal cases. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

¶7 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 (1986). To prevail, Kenneth must show both that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense against the Department's TPR petition. *See* ***A.S.***, 168 Wis. 2d at 1005. The circuit court's findings regarding what counsel did and did not do, and counsel's reasons for the challenged conduct, are factual matters that we will uphold unless clearly erroneous. ***Johnson***, 133 Wis. 2d at 216. Whether the attorney's performance was deficient and prejudicial, however, are questions of law we decide de novo. ***Id***.

¶8 We first consider whether Kenneth's trial counsel performed deficiently by not claiming the statutory privilege with respect to matters divulged

and discussed during Kenneth's psychological and AODA evaluations ordered in the CHIPS case.[5] WISCONSIN STAT. § 905.04(2) provides as follows:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

The statute defines a "confidential communication" as one that is "not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview." Section 905.04(1)(b).

¶9 Kenneth acknowledges the exception to the privilege under WIS. STAT. § 905.04 for "[e]xamination[s] by order of [a] judge." *See* § 905.04(4)(b).[6]

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[5] We note that Kenneth does not argue in his opening brief that his attorney's failure to assert the WIS. STAT. § 905.04 privilege prejudiced his defense. That is, he does not explain how or why trial counsel's alleged error had an actual, adverse effect on the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 693 (1984). In order to prevail on his ineffective assistance claim, Kenneth must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694. Although Kenneth's omission would allow us to conclude that he has abandoned any claim of prejudice, thereby conceding the ineffective assistance claim, we choose to address the privilege question that both parties have briefed in this appeal.

[6] WIS. STAT. § 905.04(4)(b) provides as follows:

> If the judge orders an examination of the physical, mental or emotional condition of the patient, … communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular

(continued)

He asserts, however, that the psychological and AODA evaluations at issue "were ordered in a different case that had a different purpose than the instant TPR case." Thus, he contends that the evaluators should not have been allowed to testify as to their observations and conclusions at the TPR trial. He notes that the Department justified its request for a psychological evaluation in the CHIPS case by saying that the psychological and AODA evaluations would help determine Kenneth's treatment needs and identify services necessary to help him establish a proper parental relationship with his daughter. Kenneth also points to a colloquy between the court and him when the psychological evaluation was ordered wherein the court encouraged Kenneth to be "cooperative and open" with the evaluator in order to "help you in what you say you want to accomplish, which is to get your daughter back."

¶10 Kenneth contends that, because he "had good reason to think that his discussions with [the psychologist] and [the AODA counselor] were intended for his benefit and would only be used in the context of the ongoing CHIPS case," his TPR trial counsel should have objected to the testimony of the two evaluators on the basis of the WIS. STAT. § 905.04 privilege, and the court should have barred their testimony. We disagree.

¶11 The evaluations were ordered under WIS. STAT. § 48.295(1), which provides that a juvenile court may order a parent "whose ability to care for a child is at issue before the court" to be examined by "personnel in an approved treatment facility for alcohol and other drug abuse, by a physician, psychiatrist or

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> purpose for which the examination is ordered unless the judge orders otherwise.

licensed psychologist, or by another expert appointed by the court holding at least a master's degree in social work or another related field of child development." Reports to the court and interested parties under § 48.295 must include a description of "the nature of the examination"; identification of "the persons interviewed, the particular records reviewed and any tests administered"; and a statement "in reasonable detail [of] the facts and reasoning upon which the examiner's opinions are based." Section 48.295(2). Thus, examinations conducted pursuant to WIS. STAT. § 48.295 no doubt routinely involve communications and information that might be deemed privileged under WIS. STAT. § 905.04(2), were it not for the fact that the results of the examinations are expressly intended to be shared with third persons "other than those present to further the interest of the patient." *See* § 905.04(1)(b).

¶12 Any information and communications Kenneth shared with the two evaluators were not "confidential" within the meaning of WIS. STAT. § 905.04 because a report of the information gathered during the evaluations, and the evaluators' conclusions based thereon, was statutorily required to be provided to the ordering juvenile court, "the district attorney or corporation counsel, ... counsel or guardian ad litem for the child and … the court-appointed special advocate for the child." WIS. STAT. § 48.295(2). Because the content and results of examinations conducted under WIS. STAT. § 48.295 are intended to be shared with numerous non-qualifying third persons (i.e., persons "other than those present to further the interest of the patient"), information gleaned and communications divulged during them are not "confidential." In short, § 905.04 simply does not apply on the facts before us.

¶13 Our conclusion that the evidentiary privilege granted by WIS. STAT. § 905.04(2) does not apply in a TPR proceeding to information and

communications obtained by court-appointed psychologists and counselors who conduct evaluations under WIS. STAT. § 48.295 finds additional support in the exception set forth in § 905.04(4)(b) (see footnote 6). The purpose of the evaluations at issue was to (1) assess the nature and extent of any psychological or AODA issues Kenneth might have that would interfere with his ability to assume parental responsibilities with respect to his daughter, and (2) identify any treatment or services that might assist Kenneth in addressing those issues. Although the immediate goals of the CHIPS and TPR proceedings may have differed, we conclude that the "particular purpose for which the [evaluations were] ordered," § 905.04(4)(b), did not change between the two proceedings, and the results of the evaluations were equally relevant to both proceedings.

¶14 We acknowledge that the immediate goals of the CHIPS proceeding in this case (protecting Amanda; identifying conditions necessary for Kenneth to assume a parental role; providing services toward that end) arguably differed from the goal of the TPR proceeding, which was to sever the parental relationship in order that Amanda could obtain a permanent adoptive placement. In a larger sense, however, the purpose of both the CHIPS and TPR proceedings was the same—to serve and promote Amanda's best interests. *See* WIS. STAT. §§ 48.355(1) and 48.426(2). Given the elements of proof necessary to the Department's petition to terminate Kenneth's parental rights, the purpose of the evaluations and their results, and hence the testimony of the evaluators, were central to both proceedings. Put another way, the purpose for which the evaluations were ordered in the CHIPS case—an assessment of Kenneth's

capacity to parent Amanda—was also at issue in the TPR case.[7] We thus conclude that, even if the information and communications obtained during the evaluations had been "confidential" within the meaning of WIS. STAT. § 905.04, the exception specified in § 905.04(4)(b) would apply to the testimony in question.

¶15 Finally, we note that both parties cite our opinion in ***State v. Joseph P.***, 200 Wis. 2d 227, 546 N.W.2d 494 (Ct. App. 1996). We held in ***Joseph P.*** that confidential information and communications shared during an evaluation performed by a prison psychologist for the purpose of determining an inmate's placement and treatment needs within the institution were subject to the WIS. STAT. § 905.04 privilege. ***Id***. at 234. Thus, the psychologist should not have been permitted to testify, over the inmate-parent's objection, regarding her prison-related evaluation in a proceeding to terminate the inmate's parental rights. ***Id***. We concluded that the record in ***Joseph P.*** established that the inmate had an objectively reasonable belief that the information he provided during his prison intake evaluations would not be divulged to other than the "team" involved in assessing his treatment needs during his incarceration. ***Id***. at 234-35.

¶16 Given the express language of WIS. STAT. § 48.295, however, no one ordered to undergo evaluations under that section could reasonably believe

[7] One of the grounds alleged by the Department for terminating Kenneth's parental rights to his daughter was that she was in "continuing need of protection or services." *See* WIS. STAT. § 48.415(2). In order to establish this ground for termination, the Department was obliged to prove in the TPR proceeding that Kenneth had failed to meet the conditions established for Amanda's placement with him, that he was substantially unlikely to meet those conditions with the ensuing twelve months, and that the Department had made reasonable efforts to provide Kenneth with court-ordered services. *See* § 48.415(2)(a)2 and 3. One of the conditions Kenneth was required to meet in order to be allowed to assume a parental role was that he cooperate with the evaluators and follow any recommendations made by them. The use made of the evaluators' reports or testimony in the TPR proceeding was thus premised on the "particular purpose" for which the evaluations had been ordered in the CHIPS proceeding.

that the substance and results of the evaluations would not be provided to numerous persons who were empowered to affect or determine the future course of the subject's parental relationship with his or her children. Moreover, as the Department points out, Kenneth's evaluations, unlike those in ***Joseph P.***, were court-ordered, thus triggering the exception under WIS. STAT. § 905.04(4)(b). We note again that, even if one could conclude that Kenneth might have reasonably believed that the information and communications he provided during his § 48.295 evaluations would not be used in a subsequent TPR proceeding, the privilege under § 905.04 would not have applied because of the cited exception for court-ordered examinations.

¶17 In sum, if Kenneth's trial counsel had objected on the basis of the privilege set forth in § 905.04(2) to the testimony of the psychologist and AODA counselor who evaluated him pursuant to court orders entered under WIS. STAT. § 48.295, the circuit court would have been correct in rejecting Kenneth's claim of privilege. Counsel cannot be deemed ineffective for failing to make an objection that lacks merit. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Accordingly, the circuit court did not err in denying Kenneth's motion for a new trial premised on his claim of ineffective assistance of counsel.

CONCLUSION

¶18 For the reasons discussed above, we affirm the appealed orders.

By the Court.—Orders affirmed.

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