COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP2220
2005AP2221
2005AP2222

Cir. Ct. Nos. 2004JC132
2004JC133
2004JC134

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

NO. 2005AP2220

IN THE INTEREST OF MARCUS K., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LAURIE M. AND LOONIE M.,

RESPONDENTS-APPELLANTS.

NO. 2005AP2221

IN THE INTEREST OF ELLANA H., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LAURIE M. AND LOONIE M.,

RESPONDENTS-APPELLANTS.

NO. 2005AP2222

IN THE INTEREST OF TONE H., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LAURIE M. AND LOONIE M.,

RESPONDENTS-APPELLANTS.

APPEALS from orders of the circuit court for Brown County: JOHN D. MC KAY and WILLIAM M. ATKINSON, Judges. *Affirmed*.

¶1 PETERSON, J.[1] Laurie and Loonie M. appeal dispositional orders finding their grandchildren in continuing need of protection or services. They also appeal an order denying their motion for plea withdrawal. We affirm the orders.

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

FACTS

¶2 Laurie M. is married to Loonie M., and Laurie is the maternal grandmother of Marcus K., Ellana H., Tone H., and Leah S. At the time of these CHIPS actions, Laurie and Loonie were the legal guardians of three of these children: Marcus, Ellana, and Tone. The fourth child, Leah, lived with Hushtola J., who is the mother of all four children.

¶3 In July 2004, the children's aunt brought Leah to a hospital, where doctors discovered that Leah had a fractured skull and clavicle. An emergency custody hearing was then held, and CHIPS petitions were ultimately filed regarding all four children. At the plea hearing, Hushtola and one of the known fathers, as well as Laurie and Loonie, pled no contest to the allegations that the children were in need of protection or services. Later, Laurie and Loonie filed a motion to withdraw their pleas, alleging they were not knowingly, voluntarily, and intelligently entered. The circuit court denied their motion. At the disposition hearing, the court ordered the children placed with different relatives and imposed conditions upon the parents and Laurie and Loonie.

DISCUSSION

¶4 Laurie and Loonie present two arguments on appeal. First, they contend the circuit court erred by denying their motion to withdraw their pleas. Second, they argue there was insufficient evidence to support the court's disposition insofar as it placed the children outside Laurie and Loonie's home.

¶5 Laurie and Loonie's first claim is that the circuit court erred when it failed to take testimony on their motion for plea withdrawal. They assert their

motion made a prima facie showing under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and therefore the court should have heard testimony at the hearing. In ***Bangert***, our supreme court adopted a procedure for addressing motions for plea withdrawal in criminal cases. ***Id.*** at 272-77. That procedure has also been applied in Children's Code cases. *See, e.g.,* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. The initial burden rested upon Laurie and Loonie, who were required to make a prima facie showing by alleging that the circuit court failed to follow statutorily required procedures and that they did not understand the information the court failed to provide. *See* ***Bangert***, 131 Wis. 2d at 274. If they made a prima facie showing, then the court was required to hold an evidentiary hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14, and the burden would shift to the department to prove by clear and convincing evidence that the pleas were knowingly and voluntarily made. *See* ***Bangert***, 131 Wis. 2d at 275.

¶6 Laurie and Loonie's motion was supported by three allegations. First, they alleged that social workers led them to believe that admitting the allegations of the petition would hasten the children's return to their home. Second, they alleged that neither of them understood they had a right to a jury trial, where the department would have to prove its case by clear and convincing evidence. Third, they alleged that "during a prior hearing held before Judge Bischel, the court inquired as to whether the procedures had been adequately explained to Laurie and Loonie …."

¶7 As noted above, to make a prima facie showing, Laurie and Loonie were required to allege that the court failed to follow mandatory procedures *and* that they did not, in fact, understand the information the court failed to provide.

Their motion was insufficient insofar as it failed to allege noncompliance with any mandatory procedures.[2] Therefore, their motion failed to make a prima facie showing, and the court did not err by declining to hear testimony.[3] *See* ***Hampton***, 274 Wis. 2d 379, ¶¶45-46.

¶8 Laurie and Loonie's second claim is that the court "failed to require the department, by clear and convincing evidence, to overcome the presumption in both [WIS. STAT.] Chapter 48 and the Indian Child Welfare Act which favored maintaining the children in [their] home." They refer to WIS. STAT. § 48.355(1), which states that children should only be placed outside the home when there is no less drastic alternative. They also cite 25 U.S.C. § 1912(e) of the Indian Child Welfare Act, which requires clear and convincing evidence, including testimony of a qualified expert witness, that continued placement with the parents or guardians is likely to result in serious emotional or physical damage to the children.[4]

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[2] The relevant procedures in this case are found in WIS. STAT. § 48.30(8).

[3] Laurie and Loonie ask us to review the record independently to find support for a prima facie showing. They cite no case where an appellate court has performed such a review and reversed based upon a review of a plea colloquy, where no defect in the plea colloquy was alleged in a motion to the circuit court. They cite ***State v. Kywanda F.***, 200 Wis. 2d 26, 39, 546 N.W.2d 440 (1996), where our supreme court reviewed a colloquy after a defect had been alleged in a motion to the circuit court, and ***Waukesha County v. Steven H.***, 2000 WI 28, ¶¶43-44, 233 Wis. 2d 344, 607 N.W.2d 607, where our supreme court performed an independent review in support of its conclusion that no prima facie showing had been made. Because the prima facie showing requirement is designed to trigger the rest of the ***Bangert*** analysis, Laurie and Loonie were required to make such a showing before the circuit court. *See* ***State v. Hampton***, 2004 WI 107, ¶¶45-46, 274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). We decline to ignore or minimize that requirement.

[4] Laurie and Loonie also cite 25 U.S.C. § 1912(d), which requires a court to be satisfied that active efforts have been made to provide remedial services to the family. However, Laurie and Loonie make no arguments respecting the court's compliance with this section.

¶9 Much of the testimony at the disposition hearing centered around the night Leah was injured. On July 5, 2004, Laurie went to a bar to celebrate her birthday. Loonie later arrived at the bar, having left Tone and Marcus with Hushtola and their aunt, Napakali.[5] Leah was also with Hushtola. Hushtola and Napakali, along with the children, later arrived at the bar. It is undisputed that Hushtola was breastfeeding Leah at the bar while drinking alcohol. Loonie claimed not to have witnessed this, and Laurie claimed she was too drunk to remember anything. Later, Laurie attempted to leave the bar on a motorcycle, but was unable to operate it. Loonie testified that he drove the motorcycle home and told the others to wait for him to come back and pick them up. After Loonie left, Laurie got into Loonie's truck and attempted to drive home. Along the way, she crashed the truck and was arrested for operating while intoxicated. Back at the bar, Hushtola allegedly sat Leah on the hood of a car, from which she fell face first onto the ground and sustained her injuries. Apparently, a bystander dialed 911 and reported the incident. Hushtola, Napakali, and the children then took a taxi home. As a result, everyone was gone when Loonie returned to pick them up.

¶10 Laurie and Loonie argue there was no evidence that Tone, Marcus, or Ellana were harmed in their care. They also stress that neither of them were present when Leah was injured. While it is true that Laurie and Loonie were not present when Leah was injured, Tone and Marcus were. Further, the circuit court viewed Laurie and Loonie's absence as part of the problem and was troubled by their apparent lack of concern for Leah's welfare, noting that they left Leah with her drunken mother. Given that Leah is their grandchild, just as Tone, Marcus,

[5] Ellana was out of town with another relative at the time.

and Ellana are, the court viewed their poor judgment respecting Leah as indicative of the "standard of care" being provided to their other children.

¶11 This concern was further supported by Laurie and Loonie's conduct during the investigation into Leah's injuries. The department described the whole family as uncooperative and Laurie and Loonie as deceitful. There was testimony that Marcus revealed how the injury to Leah occurred and also made comments about having to keep secrets. The court also questioned Laurie and Loonie's truthfulness at the disposition hearing, especially regarding their drinking.

¶12 An expert witness testified that if things continued as they were, the children would be at risk of emotional or physical harm. The court agreed, concluding they were most at risk of physical harm. We conclude that the court's disposition was not erroneous.

By the Court.—Orders affirmed.

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