COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2006

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 Nos. 2005AP3078
2005AP3079
2005AP3080
2005AP3081

Cir. Ct. Nos. 2004TP119
2004TP121
2004TP122
2004TP123

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

NO. 2005AP3078

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TODD S.,

RESPONDENT-APPELLANT.

NO. 2005AP3079

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TODD S.,

RESPONDENT-APPELLANT.

NO. 2005AP3080

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TODD S.,

RESPONDENT-APPELLANT.

NO. 2005AP3081

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TODD S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Todd S. appeals orders that terminated his parental rights to four of his children. He contends the circuit court lost competence to exercise its jurisdiction in these cases when it failed to complete, first the plea hearing, and later the dispositional hearing, within statutorily mandated time limits "without a proper continuance" in each instance. Todd also claims the circuit court erred in denying, without an evidentiary hearing, his post-disposition motion for a new trial grounded on ineffective assistance of trial counsel. We reject Todd's claims of error and affirm the appealed orders.

BACKGROUND

¶2 The Dane County Department of Human Services petitioned for the termination of parental rights of both Todd S. and his wife, Susan S., to four of their five children. The circuit court conducted proceedings against both parents jointly, including the plea, fact-finding and dispositional hearings. Both parents have separately appealed the orders terminating their respective rights to these four children. This court has recently affirmed the orders in Susan's appeal. *See* ***Dane County Dep't. of Human Servs. v. Susan S.***, Nos. 2005AP3155-3158 (WI App Apr. 26, 2006, recommended for publication).

¶3 A jury found that the County had met its burden to establish that Todd had abandoned the children, and thus, grounds existed for terminating his

[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.

parental rights under WIS. STAT. § 48.415(1). At a dispositional hearing held fifty-eight days following the jury verdicts, the court ordered his rights terminated. Todd moved postdisposition for a new trial on the grounds that his trial counsel had been ineffective in not moving to sever his case from that of the children's mother. The trial court concluded there was no reasonable probability of a different outcome for Todd if his case had been tried separately from Susan's. Accordingly, the court denied his motion for a new trial without hearing testimony from his trial counsel. Todd appeals the orders terminating his parental rights and denying a new trial. Additional relevant facts will be presented in the analysis that follows.

ANALYSIS

I. Delays in Completing the Initial Hearing on the Petitions

¶4 WISCONSIN STAT. § 48.422(1) provides that the initial hearing on a petition to terminate parental rights, at which parents are informed of their rights and asked whether they wish to contest the petition, "shall be held within 30 days after the petition is filed." The County filed the petitions in this case on November 1, 2004, but a hearing in accordance with § 48.422(1) did not occur until February 15, 2005, some 106 days after the filing of the petitions. Several things did occur between the two dates, however.

¶5 On November 30th, the judge initially assigned to the cases, Circuit Judge Angela Bartell, convened the initial or "plea" hearing on the petitions. Both parents appeared without counsel, and the court, finding good cause to do so, continued the plea hearings to December 10, 2004 to allow the parents to obtain counsel. No hearing was held on December 10th, however, because, on that date,

Susan filed a request for substitution of judge. Judge Bartell approved the request the same day, and the chief judge, in an order dated January 14, 2005, assigned Circuit Judge Sarah O'Brien to the cases. Judge O'Brien convened a hearing on the petition on January 19th, and, at the request of counsel for both parents, continued the plea hearing to February 15, 2005, finding good cause to do so.

¶6 Todd acknowledges that "[m]uch of the 106 day time period can be excluded" because of the court's finding good cause for continuances from November 30th to December 10th and from January 19th through February 15th. *See* WIS. STAT. § 48.315(2).[2] He contends, however, that "there was a 40[-]day period where time limits were not properly tolled." The period he cites is between December 10th, when Susan S. requested a substitution of judge, and January 19th, when the newly assigned judge first convened a hearing on the petitions.

¶7 The County contends that the forty days between December 10th and January 19th must also be excluded from consideration under WIS. STAT. § 48.315(1)(c), which provides that "[a]ny period of delay caused by the disqualification of a judge" "shall be excluded in computing time requirements within [WIS. STAT. ch. 48]." It notes that Susan's substitution request was filed

[2] WIS. STAT. § 48.315(2) provides as follows:

> A continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference under s. 807.13 on the record and only for so long as is necessary, taking into account the request or consent of the district attorney or the parties and the interest of the public in the prompt disposition of cases.

and approved by the original judge on December 10th, the chief judge assigned a new judge on January 14th, and the new judge convened a hearing five days later. Todd would have us reject the County's attempt to exclude the delay as attributable to the judicial substitution request and assignment of a new judge because of an entry on a form in the record captioned "CHIPS Dane County Circuit Court Juvenile Judge Substitution/Self-Disqualification Form." Below the dated ("12/10/04") signature of the original judge approving the substitution request, the form contains a blank labeled "New Judge:" on which someone has written "O'Brien." In Todd's view, this means that the new judge was effectively assigned to the case on the same date that the substitution request was filed and approved, and the form in question was file-stamped into the record.[3]

¶8 We reject Todd's contention that Judge O'Brien was assigned to his cases before the date of the chief judge's order, January 14, 2005. WISCONSIN STAT. § 751.03(3) authorizes the chief judge of a circuit court administrative district to assign judges within that district, and SCR 70.23(4) (2003-04) specifies the following procedure:

> In cases of substitution, mandatory disqualification or self-disqualification, the judge shall direct the clerk of courts or

[3] The form in question appears to have been filled out by Judge Bartell through the line bearing her signature and its date. The insertion of Judge O'Brien's name is in a different handwriting, and as noted, is below the date and signature lines. The County posits that Judge O'Brien's name was inserted on the form, perhaps by a juvenile court clerk, after the chief judge assigned her to the case on January 14th. In his reply brief, Todd argues that, for a number of reasons, that is an implausible scenario, and again asserts that the identity of the judge to be assigned the case was known as of December 10th. We find it unnecessary to resolve the factual disputes over who inserted Judge O'Brien's name on the form in question, when this was done or when the fact that Judge O'Brien would be assigned the case was known by court personnel. As we discuss, the relevant record fact is the chief judge's assignment of Judge O'Brien on January 14, 2005, before which she would not have been authorized to act in these cases.

> register in probate of his or her county promptly to notify the chief judge. The chief judge shall assign another judge to preside in the case.

Thus, even if it was generally known by the parties and court personnel on December 10th that Judge O'Brien would be assigned these cases, the fact remains that the assignment did not occur, and Judge O'Brien was thus not empowered to act in the cases, until January 14th. Accordingly, this means that the "period of delay" between December 10th and January 14th was "caused by the disqualification" of Judge Bartell. *See* WIS. STAT. § 48.315(1)(c). We further conclude that, because Judge O'Brien promptly convened a hearing on the petitions within five days of her assignment to the cases, these five days may also be attributed to the change in judges.[4]

¶9 Because all of the delays after November 30, 2004 in completing the initial hearing on the petitions were either pursuant to continuances for good cause under WIS. STAT. § 48.315(2) or caused by the disqualification of the original judge, the 30-day time limitation of WIS. STAT. § 48.422(1) was not exceeded and the circuit court did not lose competency to proceed.

[4] In his reply brief, Todd notes that, in addition to directing that the "chief judge shall assign another judge to preside" following a proper substitution request, SCR 70.23(4) also provides that a chief judge "may direct assignment of judges under this section by lot under a tab system." He relies on this language to argue that what happened in this case is that the clerk of court randomly assigned Judge O'Brien to Todd's case "without any involvement by the chief judge." Not only do we generally not consider arguments first made in a reply brief, Todd points to nothing in the record that would support his theory. Neither does he explain why, if Judge O'Brien had been randomly assigned by a court clerk on an earlier date, the record would contain an order from the chief judge assigning Judge O'Brien to the case on January 14, 2005. In short, were we to consider this novel but belated argument, we would reject it for lacking any evidentiary support in the record.

II. Delay in Completing the Dispositional Hearing

¶10 Todd also argues the circuit court lost competency to order his parental rights terminated when it failed to conduct the dispositional hearing on the petitions within forty-five days of the completion of the fact-finding as required under WIS. STAT. § 48.424(4). Specifically, Todd contends the circuit court's finding of good cause to conduct the dispositional hearing more than forty-five days after the fact-finding is infirm because the court's reasons were "inadequate and speculative." Susan made the same claim in her appeal but we rejected it. *See* ***Dane County Dep't. of Human Servs. v. Susan S.***, Nos. 2005AP3155-3158, ¶¶63-75. We adopt the cited paragraphs of our prior opinion and incorporate them by reference in this decision as our rationale for denying Todd's identical claim of error.

III. Denial of Ineffective Assistance Claim without a ***Machner***[5] *Hearing*

¶11 Todd claims his trial counsel provided ineffective assistance by failing to timely move to sever his case from that of the children's mother.[6] 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). To

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] "[P]roceedings to terminate parental rights against the father and mother [may be] brought against them in a single action." ***S.D.S. v. Rock County Dep't of Social Servs.***, 152 Wis. 2d 345, 361, 448 N.W.2d 282 (Ct. App. 1989). Whether proceedings against the parents should be tried together or separately is a matter within the discretion of the trial court. ***Id***. at 362.

prevail on his claim of ineffective assistance of counsel, Todd must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In analyzing an ineffective assistance claim, a court may choose to address either the "deficient performance" component or the "prejudice" component first. *See* ***id.*** at 697. If a party fails to meet his or her burden to establish either component, a court need not address the other. *See* ***id***.

¶12 The circuit court did not hear evidence from Todd's trial counsel as to why she did not bring a motion to sever as Todd now claims she should have. Thus, we are unable to decide in this appeal that Todd is entitled to a new trial because his attorney performed deficiently, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), and the only relief to which Todd may be entitled in the present posture of the case is a remand for an evidentiary hearing on his postdisposition motion. A circuit court may deny an ineffective assistance claim without an evidentiary hearing when, among other things, "the record conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. That is what the circuit court concluded in this case: "[R]egardless of whether [Todd] would be able to show an error due to ineffective assistance of counsel, he is unable on this record to show prejudice…."

¶13 Relevant precedents explain that we are to apply a mixed standard of review to a circuit court's decision to deny a motion alleging ineffective assistance of counsel without an evidentiary hearing. *See* ***State v. Bentley,*** 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Specifically, whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law to be reviewed

de novo. ***Id***. Here, however, the circuit court denied Todd's motion, not because his motion was deficient, but because the court determined the record conclusively demonstrated he was not entitled to relief, another of the three reasons that permit denial of the motion without taking evidence. *See* ***Allen***, 274 Wis. 2d 568, ¶12.

¶14 Our standard for reviewing that determination is not entirely clear from prior case law. Although we often defer to a trial court's evaluation of the evidence presented before it at trial, the question whether a party suffered prejudice from any actions or omissions of counsel is plainly one of law that we must decide de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Accordingly, we will determine de novo whether the record before us conclusively demonstrates that Todd was not prejudiced by having his case tried jointly with Susan's. If we conclude that is the case, we must then review the trial court's denial of the motion without a hearing under the deferential erroneous exercise of discretion standard. *See* ***Bentley***, 201 Wis. 2d at 310-11.[7]

[7] It would seem that, once it is determined whether the record conclusively demonstrates that Todd suffered no prejudice from the joint trial, little room remains for the exercise of discretion. If we conclude the circuit court erred in determining that the record conclusively demonstrates no prejudice, then it had no discretion to not conduct an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). On the other hand, if we conclude the circuit court correctly decided that question of law, the court could then, in its discretion, have conducted an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 12, 274 Wis. 2d 568, 682 N.W.2d 433. But, why would a circuit court ever proceed to an evidentiary hearing after determining that the record conclusively demonstrates a movant is not entitled to relief? And, because the question can only arise before us when a circuit court has denied a motion *without* an evidentiary hearing, how could this court ever conclude that a circuit court, having correctly determined that the record conclusively precludes the granting of relief, nevertheless erroneously exercised its discretion in failing to conduct an arguably useless evidentiary hearing? In short, even though the established standard of review for the denial of an ineffective assistance claim without an evidentiary hearing points to a two-step standard of review, our answer to the threshold legal question essentially ends our inquiry in this case.

¶15 To demonstrate that he suffered prejudice from his attorney's failure to seek severance, Todd must show that having his case tried with Susan's had an actual, adverse effect on his defense. *See* ***Strickland***, 466 U.S. at 693. Put another way, he 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. As applied here, this means that Todd must prove that the failure to sever his case from Susan's deprived him of a "fair trial, a trial whose result is reliable." *See* ***id***. at 687. After reviewing the record, we come to the same conclusion as did the circuit court—had counsel successfully moved for separate trials, there is no reasonable probability that a jury would have found the County had not established Todd's abandonment of the children within the meaning of WIS. STAT. § 48.415(1).

¶16 Todd devotes several pages of argument in his opening brief to describing why his and Susan's cases need not and should not have been tried together. For purposes of the prejudice analysis, we will accept that to be the case. That is, we must consider whether a reasonable probability exists that the result in Todd's case would have been different had a timely severance motion been made and granted. We do not wish to suggest, however, that Todd's trial counsel performed deficiently in failing to timely move for severance, or that, had she done so, the circuit court should have granted the motion. These are questions we need not and do not decide.

¶17 Todd claims he suffered prejudice from a joint trial with Susan in the following three ways: (1) Susan's "extremely disruptive" conduct during the

trial;[8] (2) the parents' interests were not aligned, in that Todd's defense was that he planned to separate from Susan and regain custody of the children and Susan testified that she and Todd would work together to regain their children; and (3) the testimony "regarding whether Todd … had abandoned his children had little to do with Susan …'s case."

¶18 We first observe that the County proceeded against Todd on two grounds, abandonment under WIS. STAT. § 48.415(1) and continuing need of protection or services under § 48.415(2), the latter ground also being the basis of the County's petition against Susan. The jury concluded that, with respect to Susan, the County had established that the children were in continuing need of protection or services, but that it had *not* proven that ground for termination against Todd. Specifically, jurors found that the County had not established that, with respect to Todd, it had made "a reasonable effort to provide the services ordered by the court." Thus, the jury plainly did not tar both parents with the same brush—its verdicts on the continuing need for protection or services questions shows that it treated the parents as individuals and answered the various verdict questions based on its perceptions of the evidence introduced regarding each parent's circumstances. We thus conclude that, to the extent that Susan engaged in disruptive conduct during the trial, her conduct did not result in prejudice to Todd's defense.[9]

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[8] *See* ***Dane County Dep't. of Human Servs. v. Susan S.***, Nos. 2005AP3155-3158 (WI App Apr. 26, 2006, recommended for publication).

[9] We note that on the fourth day of the jury trial, Todd moved the court for a mistrial on account of Susan's behavior in the courtroom that allegedly undercut his defense. The circuit court denied the motion and Todd does not claim the court erred in denying the motion.

¶19 As for the parents' contrary testimony regarding their joint or separate future plans for parenting the children, Todd does not explain how he could have prevented Susan from being called to testify at his separate trial, and there is no reason to believe she would not have been called as a witness and given the same or similar testimony in a separate trial on the petitions against Todd. More significant, as the circuit court noted, is the fact that Todd's future plans to parent the children were relevant to only the continuing need of protection or services grounds, where jurors were asked whether there was "a substantial likelihood that Todd will not meet the[] conditions [for safe return of the children to his home] within the twelve-month period following the conclusion of this hearing?"[10] To establish abandonment under WIS. STAT. § 48.415(1), the County needed to convince jurors that each of his children had been left with a relative "or other person"; that Todd knew or could have discovered their whereabouts; that he failed to visit or communicate with the children (or their physical custodians) for six months or longer; and that he lacked "good cause" for such failures. The jury's answers to these verdict questions required jurors to evaluate historical facts relating to Todd's past conduct, not his plans for the future.

¶20 Thus, regardless of whether jurors disbelieved Todd's stated intention to establish a separate household for himself and his children because of Susan's contrary testimony, their answers to the abandonment verdict questions would have been unaffected. We also note our agreement with the circuit court's observation that Todd's defense to the abandonment allegations may well have

[10] Jurors answered this question "yes" with respect to Susan but did not answer the question with respect to Todd because they had answered "no" to a prior question regarding the County's reasonable efforts to provide Todd court-ordered services.

benefited from being tried jointly with Susan's case, because, as the trial court noted in its postdisposition ruling, Susan's "behavior based on her mental illness gave him a very good reason to want to keep his distance and to the extent contact with his children meant contact with her … a jury would certainly understand why he might want to keep clear of it."

¶21 Todd's final point, that the testimony regarding his abandonment of the children "had little to do with Susan's case," while perhaps a reason to justify severing the cases, does not describe any prejudice to Todd's defense from not having severed them. In fact, if anything, the argument supports the conclusion of the circuit court, and now this court, that there is no reasonable probability that the jury's verdict on the abandonment allegations would have been different had the cases been separately tried. We thus agree with the circuit court's determination that the record conclusively demonstrates that Todd was not entitled to a new trial on the grounds of ineffective assistance of counsel. We also conclude the circuit court did not erroneously exercise its discretion in denying Todd's motion without conducting an evidentiary hearing. (See footnote 7.)

CONCLUSION

¶22 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.