COURT OF APPEALS DECISION DATED AND FILED

June 22, 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. 2006AP193
2006AP194
2006AP195

Cir. Ct. Nos. 2004TP64
2004TP65
2004TP66

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

NO. 2006AP193

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JAMES C.P., A PERSON UNDER THE AGE OF 18:

DIANE L. C.,

PETITIONER-RESPONDENT,

V.

MICHAEL D. P.,

RESPONDENT-APPELLANT.

NO. 2006AP194

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MEGAN L.P., A PERSON UNDER THE AGE OF 18:

DIANE L. C.,

PETITIONER-RESPONDENT,

V.

MICHAEL D. P.,

RESPONDENT-APPELLANT.

NO. 2006AP195

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

DIANE L. C.,

PETITIONER-RESPONDENT,

V.

MICHAEL D. P.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] This is a private termination of parental rights (TPR) case. Michael D.P. appeals orders of the trial court terminating his parental rights to his children, James C.P., Megan L.P., and Amber M.P. Michael argues

[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.

that he was denied his due process right to meaningfully participate in his trial because he did not appear personally or by telephone at the trial, dispositional, or post-dispositional phases of the proceedings. Michael also argues that he was denied his due process right to present a defense because the trial court denied his request for a continuance to allow him to prepare and call an expert witness. Finally, Michael argues that his trial counsel was ineffective for various reasons. We reject all of Michael's challenges to the orders and affirm the trial court.

Background

¶2 This case commenced on September 1, 2004, when Diane C. filed private petitions to terminate Michael D.P.'s parental rights to Michael and Diane's three children. On December 6, 2004, the trial court found grounds to terminate Michael's parental rights. Michael appealed to this court and, on February 22, 2005, we remanded for a determination of whether Michael had knowingly, intelligently, and voluntarily waived his right to counsel. The trial court found that he had, and Michael again appealed. On June 2, 2005, we reversed the trial court, concluding that Michael had not properly waived his right to counsel. The case went back to the trial court for a new trial. This appeal stems from that new trial.

¶3 A pretrial conference was held on August 2, 2005. Following that conference, the trial was scheduled for September 7, 2005, and the court issued an order requiring that all witnesses be disclosed to the parties and the court by August 31, 2005. On September 1, Michael filed a motion for a continuance, requesting extra time in order for his expert witness, a forensic psychiatrist, to

examine the family members so that the psychiatrist could possibly testify concerning "parental alienation syndrome."[2] This witness had not been disclosed to the court previously. The trial court denied Michael's request for a continuance.

¶4 The trial court subsequently found grounds to terminate Michael's parental rights, and his parental rights were terminated. Michael appeared by counsel, but did not appear personally at any of the trial court proceedings. Michael appealed to this court. We remanded for a hearing on Michael's ineffective-assistance-of-counsel claim. Following that hearing, the trial court denied Michael's motion. Michael appeals.

Discussion

¶5 Michael makes three arguments on appeal: (1) that he was denied his due process right to meaningfully participate in his trial because he did not appear personally or by telephone; (2) that he was denied his due process right to present a defense because the trial court improperly denied his request for a continuance; and (3) that Michael's counsel was ineffective. We reject each of Michael's arguments and affirm the trial court.

A. Michael's Right To Meaningfully Participate

¶6 The right to meaningfully participate in one's trial is a due process right. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d

[2] Michael's request for a continuance included additional reasons which Michael does not address on appeal. Therefore, we do not address them.

34 (Ct. App. 1995). In ***Rhonda R.D.***, we described the due process rights afforded parents in a TPR case as follows:

> The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976). The respondent in a TPR case has the right to "meaningfully participate" in the hearing. ***In re A.A.L.***, 152 Wis. 2d 159, 167, 448 N.W.2d 239, 243 (Ct. App. 1989).... [W]hether a respondent in a TPR proceeding can meaningfully participate without being physically present depends on the circumstances of each case.

Id., 191 Wis. 2d at 701-02.

¶7 Michael points to case law providing that parents in a TPR action have a due process right to be heard at a meaningful time and in a meaningful manner. He argues that "his right to meaningfully participate … was denied when he was not even allowed to participate by telephone at either his trial or dispositional hearing." But this is not a developed argument; it is a legal conclusion. Michael does not explain why, in the particular circumstances of this case, his absence from the trial or the dispositional hearing denied him due process. More specifically, Michael does not explain what he would have said had he appeared by telephone, much less suggest that he would have said anything that would have affected the proceedings. Michael does not even attempt to show that his absence caused him any prejudice or harm.

¶8 Michael does not argue that a person can never "meaningfully participate" via representation by his or her attorney; that is, he does not argue that his presence, either in person or by telephone, is required as a matter of law. Moreover, it is not apparent why, if a parent in a TPR proceeding chooses to participate by only having his or her attorney appear, such does not constitute

meaningful participation as a matter of law. Because Michael does not develop such an argument, and does not suggest why his particular circumstances constituted a due process denial, we need go no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address inadequately developed arguments).[3]

¶9 We turn our attention to the post-dispositional hearing. Michael asserts that the trial court erred by failing to grant his counsel's request that Michael appear by telephone at a post-dispositional hearing. But, once again, Michael does not present developed argument.

¶10 First, Michael seemingly assumes that if a person is improperly denied the right to appear at a *post-dispositional hearing*, as opposed to the trial or dispositional phases, such a denial violates the party's right to meaningful participation. But Michael presents no authority for this proposition.

¶11 Second, the court concluded that WIS. STAT. § 807.13 applied, and that the statute required a party seeking to present a person by telephone show good cause why the person cannot appear personally.[4] Michael does not challenge

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[3] For the first time in his reply brief, Michael states that "his case is analogous to someone who is incarcerated in prison" to support his argument that he should have been allowed to participate by telephone. Michael cites ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995), for support. Because this argument first appears in Michael's reply brief, we deem it waived. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n. 11, 528 N.W.2d 502 (Ct. App. 1995).

[4] WISCONSIN STAT. § 807.13 provides, in pertinent part:

> **(2)** EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audiovisual means, subject to cross-examination, when:

(continued)

the trial court's application of this statute to his situation. He does not argue that the court wrongly concluded that it needed to determine whether good cause existed to allow Michael to appear by telephone. Michael's only argument is that the court was "aware that [Michael] has lived out of state throughout" the proceedings, and that "[t]his in and of itself could be enough to allow someone to appear by phone, particularly someone who is so poor that he qualifies to have counsel through the Public Defender's Office." Michael does not provide factual or legal support for this argument. Michael fails to address the trial court's conclusion that the court had been presented with no testimony or affidavit demonstrating Michael's need to appear by telephone. Thus, we conclude this argument is undeveloped, and we decline to address it.

B. Michael's Right To Present A Defense

¶12 Following a pretrial conference on August 2, 2005, the trial court issued a pretrial order that all witnesses were to be disclosed by August 31, and that the trial would be held on September 7. On September 1, Michael filed a motion for a continuance to allow an expert witness time to prepare. Michael had retained the expert witness, a forensic psychologist, but the witness had not yet interviewed any of the three children. Michael had not previously identified his expert as a witness with the court because, according to Michael's counsel, the expert told Michael's counsel that "he would not be prepared by the 7th, [so] there was no point in listing him [as a witness]." The court denied the motion for a

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(c) The proponent shows good cause to the court.

continuance because it was untimely, there were not adequate grounds, and it would be a "disservice" to the children involved.

¶13 On appeal, Michael argues that he was denied the right to present a defense because of the court's denial of his motion for a continuance.

¶14 "The decision whether to grant or deny a [continuance] request is left to the trial court's discretion and will not be reversed on appeal absent an erroneous exercise of discretion." ***State v. Leighton***, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. Because the denial of a continuance may implicate a party's due process rights, we employ a balancing test that balances the parties' rights and the State's interest in the prompt and efficient administration of justice. *See* ***id.*** However, "'probing appellate scrutiny of a decision to deny a continuance is not warranted.'" ***Id.*** (quoting ***State v. Fink***, 195 Wis. 2d 330, 338-39, 536 N.W.2d 401 (Ct. App. 1995)). Relevant factors to consider include "the convenience or inconvenience to the parties, witnesses and the court," whether the delay is for a legitimate reason, and any "other relevant factors." ***Leighton***, 237 Wis. 2d 709, ¶28.

¶15 Michael does not address any of the reasons the trial court provided for denying the motion. For example, the court noted that Michael had not objected to the pretrial order, which set the dates at which witnesses were to be disclosed and trial was to commence. The court noted that the proceedings had been ongoing for over a year, and stated the court's concern that dragging the proceedings on would be detrimental to the children's interests. Michael's argument does not address these reasons, and we conclude they are relevant factors to consider in deciding whether to grant the continuance. All that Michael

argues is that his only available defense was "parental alienation syndrome" and he needed an expert to present that defense.

¶16 Michael's interest here is clearly important, and is to be given great weight. But Michael's interest in maintaining parental rights must be weighed against the interests of the children, and the interest in the fair and efficient administration of justice, taking into account the reasons the court gave for denying the continuance. We conclude that the balance weighs in favor of the trial court's decision to deny Michael's continuance.

¶17 The trial court has the authority to provide the efficient and effective administration of justice. It is especially important in TPR cases for the proceedings to move along efficiently and as swiftly as possible for the benefit of the children. *See* ***Brown County v. Shannon R.***, 2005 WI 160, ¶60, 286 Wis. 2d 278, 706 N.W.2d 269 ("The State has an urgent interest in a termination of parental rights proceeding to protect the welfare of the children.").

¶18 Michael does not address any of the court's reasons for not allowing the continuance, but offers only the conclusory argument that he was denied the opportunity to put on a defense. To the contrary, we conclude that Michael had the opportunity to put on a defense, but did not do so in a timely fashion. His due process rights cannot be used as leverage to the detriment of the other interests in this case, i.e., the interests of the children and the State. In other words, the right to put on a defense is subject to the rules and procedures employed by the court.

The court properly took these factors into account. Thus, we conclude that the court did not abuse its discretion in denying Michael's request for a continuance.[5]

C. Ineffective Assistance Of Counsel

¶19 In an argument closely related to the previous argument, Michael asserts that his counsel was ineffective because he failed to "timely look into expert witnesses" and failed to "develop any sort of defense."

¶20 A party alleging ineffective assistance of counsel has the burden of showing that his counsel's performance was deficient and that he suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The ***Strickland*** analysis applies to TPR cases. ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992).

¶21 Under the ***Strickland*** analysis, we may reverse the order of the test and, if we determine the party alleging ineffective assistance has failed to show prejudice, we may decline to address whether counsel's performance was

[5] Michael cites ***Brown County v. Shannon R.***, 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269, for the proposition that a trial court's improper exclusion of expert testimony constitutes reversible error because it violates a party's right to present a defense. Michael's reliance on ***Shannon R.*** is misplaced. The court in ***Shannon R.*** dealt with issues entirely divorced from the issues Michael raises here. In ***Shannon R.***, the issue was whether the trial court had improperly excluded an expert witness from testifying based on a failure of the offering party to lay the proper foundation that the witness was an "expert" and whether that acted to deprive the party of the due process right to be heard. ***Id.***, ¶¶38-39, 53. The court concluded that the trial court had erroneously exercised its discretion in that determination. ***Id.*** The court then balanced the interests involved to determine whether that error violated the party's due process rights. ***Id.***, ¶58-66. The court concluded that it had, and concluded that the error was reversible error. ***Id.***, ¶72. Here, Michael has not demonstrated that the court erroneously exercised its discretion. Furthermore, the issue here is not whether the court properly excluded evidence, but whether the court properly denied Michael's request for a continuance.

deficient. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Because we conclude that Michael fails to show prejudice here, we decline to address whether counsel's performance was deficient.

¶22 Showing prejudice means showing that Michael's counsel's alleged errors actually had some adverse effect on Michael. ***Strickland***, 466 U.S. at 693. Michael must show that the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. Michael cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. *See* ***id.*** at 693. Instead, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694; ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The requisite reasonable probability must be sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694; ***Moats***, 156 Wis. 2d at 101. This prejudice determination involves consideration of the totality of the evidence. ***Strickland***, 466 U.S. at 695-96.

¶23 Michael's arguments that he was prejudiced by counsel's performance are entirely, and admittedly, speculative. For example, Michael argues that if trial counsel "had looked into getting an expert in a timely fashion without relying on her client to advise her, she would have been able to develop a defense based on parental alienation." Directly following that argument is the concession that "[i]t is true that this is speculative, but that is all we are left to do since [Michael] was completely denied an expert witness and the opportunity to have any sort of defense theory for his case." This acknowledged speculation is fatal to Michael's argument.

¶24 If Michael wanted to show that his counsel was infective because she failed to present an expert witness, Michael needed to show that such a witness could have been procured, what admissible testimony the witness could have presented, and why such testimony would have affected the outcome of the proceeding. Michael has done none of these things. Consequently, he has failed to satisfy the prejudice portion of the ***Strickland*** test.

¶25 Michael's argument that he was denied effective assistance of counsel because trial counsel failed to request that Michael appear by telephone at the trial or dispositional stages of the proceeding fails for the same reason. As explained above, Michael never asserts how he was affected by not having appeared personally or by telephone.

By the Court.—Orders affirmed.

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