COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP488 **Cir. Ct. No. 2005TP27**

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

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

OUTAGAMIE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

NICHOLAS S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Nicholas S. appeals an order terminating his parental rights to his son Dammean. Nicholas contends the court erred by not informing the jury about the consequences of its verdict, in light of a jury question on the issue. We affirm the order.

¶2 The grounds for termination of Nicholas's parental rights were that Dammean was a child in continuing need of protection or services. Pursuant to WIS. STAT. § 48.415(2)(a)3, the State was required to prove:

> 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 During jury deliberations, the jury sent a note to the court asking: "Is there a 12 month window following our decision before the judge makes a final ruling?" The court's response to the jury's question was: "You should refer to the instructions provided in answering the verdict questions. What happens after your verdict is returned will be based in accordance with the law in the State of Wisconsin as applied by the court." Defense counsel requested that the disposition process be explained to the jury, along with the fact that the TPR petition would be dismissed and the CHIPS order would remain in effect if the jury did not find grounds for termination.

[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.

¶4 Nicholas contends that the court failed to answer the jury's question and, as a result, the jury was confused about when the court would enter its disposition. Nicholas additionally claims that the court's failure to advise the jury of the consequences of its verdict violated his due process rights.

¶5 How a court responds to a jury inquiry is committed to that court's discretion. ***State v. Lombard***, 2004 WI App 52, ¶11, 271 Wis. 2d 529, 678 N.W.2d 338. We affirm discretionary decisions if the court examined the relevant facts, applied the correct standard of law, and used a rational process to reach a reasonable result. ***Id.***

¶6 The general rule is that a jury is not to be informed of the effect of its answers on the rights or liabilities of the parties. ***State v. Shoffner***, 31 Wis. 2d 412, 428, 143 N.W.2d 458 (1966). However, in ***Shoffner***, our supreme court recognized an exception for cases where the jury is asked to determine whether a defendant is not guilty by reason of mental disease or defect. ***Id.*** The court reasoned that the jury might not understand that the defendant would still be hospitalized, rather than set free, if the jury found him not guilty by reason of mental disease or defect, which could bias the jury against such a finding. ***Id.*** The court concluded, however, that while it preferred such an instruction be given to juries, it was not prejudicial to refuse to give the instruction. ***Id.*** at 429.

¶7 Using the reasoning of ***Shoffner*** as a template, Nicholas argues that the court's failure to inform the jury about the consequences of its verdict likely led the jurors to believe, mistakenly, that not finding grounds for termination would result in the immediate return of Dammean to Nicholas's care. Even if we agreed that this possibility of juror confusion and bias existed, we would not

conclude, just as the ***Shoffner*** court did not conclude, that failing to give such information to the jury was prejudicial error.[2] *See* ***id.*** at 429.

¶8 Moreover, since ***Shoffner***, we have refused to require juries to be advised of the consequences of their findings in cases involving sexually violent persons under WIS. STAT. ch. 980. *See* ***Lombard***, 271 Wis. 2d 529, ¶¶13-21. In ***Lombard***, we concluded that absent any case law or statutes requiring juries to be advised of the consequences of their verdict, the trial court did not apply an incorrect standard of law when declining to do so. ***Id.***, ¶15. We also concluded that the trial court could reasonably conclude that the consequences were not relevant to the question before the jury. ***Id.***, ¶16. As in ***Lombard***, there is no case or statute requiring the jury to be told the consequences of its findings in TPR cases. *See* ***id.***, ¶15. Further, the information sought by the jury's question was not relevant to the issues the jury was tasked with deciding. *See* ***id.***, ¶16. Therefore, the court did not erroneously exercise its discretion by failing to so inform the jury. *See* ***id.***, ¶¶15-16, 21.

¶9 Nicholas's second claim is: "The risk of an erroneous verdict violates Nicholas'[s] right to due process." This argument is premised upon his assertion that the jury was left confused by the court's answer to its question. Nicholas supports his argument by quoting the following language from our supreme court's decision in ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶21, 246 Wis. 2d 1, 629 N.W.2d 768: "Due to the severe nature of terminations of parental

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[2] Since ***State v. Shoffner***, 31 Wis. 2d 412, 143 N.W.2d 458 (1966), WIS. STAT. § 971.165 has apparently been modified to include a requirement that juries be informed of the consequences of their verdict in NGI cases. *See* WIS. STAT. § 971.165(2). Neither party points to any similar statutory requirement for TPR cases.

rights, termination proceedings require heightened legal safeguards against erroneous decisions."

¶10 First, we do not agree with Nicholas's premise that the jury was left confused by the court's direction. Nicholas has presented no evidence that the jury actually resolved the factual questions based on misconceptions about the consequences of its verdict. Nicholas only speculates about what the jury was thinking. While Nicholas speculates that the jury was concerned about whether Dammean would be returned to Nicholas's care immediately if it did not find grounds for termination, there is no indication that this even crossed the jurors' minds. One could just as easily speculate that, for whatever reason, the jury was curious about whether Nicholas would have an opportunity to meet the CHIPS conditions in the twelve months following its verdict. Regardless, the information sought was not relevant to the questions before the jury. The court directed them to follow the instructions they were given, and presumably they did so. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). The court's response to the jurors' question clarified their limited role, and we do not agree they were left confused as a result.

¶11 Finally, the general language quoted from ***Evelyn C.R.*** does not have any application here. For the reasons stated above, we are not convinced that the court's response to the jury's question resulted in an "erroneous decision[]." *See* ***Evelyn C.R.***, 246 Wis. 2d 1, ¶21. Moreover, the quoted language from ***Evelyn C.R.*** is an introductory sentence to a paragraph, which goes on to elaborate that due process requires the petitioner in a TPR case to show by clear and convincing evidence that the termination is appropriate. ***Id.***, ¶21. The court ultimately held that due process and WIS. STAT. §§ 48.31 and 48.424 require a fact-finding hearing to be held to establish grounds for the termination, even where the parent

is in default. ***Id.***, ¶24. Nicholas does not argue that there was insufficient evidence to prove, by clear and convincing evidence, that the termination was appropriate here. *See* ***id.***, ¶21. Therefore, the context of the quoted language also does not apply here.

By the Court.—Order affirmed.

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