COURT OF APPEALS DECISION DATED AND FILED

November 21, 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. 2006AP1657
2006AP1658

Cir. Ct. Nos. 2005TP202
2005TP203

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 2006AP1657

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE E., A/K/A MICHELLE J.,

RESPONDENT-APPELLANT.

NO. 2006AP1658

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHELLE E., A/K/A MICHELLE J.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge, and MICHAEL G. MALMSTADT, Reserve Judge. *Orders vacated, order reversed, and cause remanded.*

¶1 FINE, J. Michelle E. appeals the trial court's termination of her parental rights to Dakota J. and Keegan J. As pertinent to this appeal, she claims that her admission that there were sufficient grounds to move to the dispositional stage was not voluntary. We agree and reverse with directions that she be permitted to withdraw her admission.

¶2 Dakota was born in September of 2000, and Keegan was born in December of 2002. Michelle E.'s history, both personally and in connection with her care for the children is horrendous, and if this matter were confined to whether termination of Michelle E.'s parental rights to the children was in the children's best interests, we would uphold the trial court's determination that it was. But termination of parental rights is a two-step process: first, a fact-finder must determine whether there are grounds for the State to intrude upon the parent-child relationship, and, second, if there are, whether termination is in the child's best interests. WIS. STAT. §§ 48.424(1), (4); 48.426(2); ***Richard D. v. Rebecca G.***, 228

Wis. 2d 658, 672–673, 599 N.W.2d 90, 97 (Ct. App. 1999). Here, as noted, Michelle E. stipulated that there were the requisite grounds to let the trial court determine whether termination was in the best interests of Keegan and Dakota. The issue is whether her stipulation was knowing and voluntary, because if it was not, she is entitled to a fact-finding hearing.

¶3 The State alleged that Michelle E.'s parental rights to Keegan and Dakota should be terminated because, *inter alia*, the children were in continuing need of protection or services. *See* WIS. STAT. § 48.415(2). This was the ground to which Michelle E. stipulated at a court hearing on October 17, 2005. Under § 48.415(2) (2001–2002), as material here, it is a ground to terminate a person's parental rights to his or her children if the children have been adjudicated as being in need of protection or services and "there is a substantial likelihood that the parent will not meet [the conditions established for return of the children to the parent] within the 12-month period following the fact-finding hearing under s. 48.424."[1] In October of 2005, Michelle E. was incarcerated with a release date in 2009, although she testified at the March 22, 2006, dispositional hearing that she was possibly eligible for early release in September of 2006.

¶4 On July 25, 2006, this court remanded the matter to the trial court for a determination of whether Michelle E. should be permitted to withdraw her stipulation "based, in part, upon assertions of ineffective assistance of counsel." The trial court held a hearing on remand. Michelle E. testified at the hearing that

[1] This provision was amended effective April 21, 2006, and now reads, as material: "there is a substantial likelihood that the parent will not meet [the conditions established for return of the children to the parent] within the 9-month period following the fact-finding hearing under s. 48.424." WIS. STAT. § 48.415(2)(a)3 (2003–2004); *see* Wis. Act 293, § 10.

her lawyer told her that there was no chance for her to win at the grounds stage because she was locked up and therefore it would be impossible for her to comply with the conditions of return within twelve months of the fact-finding hearing. Michelle E.'s trial lawyer confirmed those discussions.

¶5 On July 11, 2006, the Wisconsin Supreme Court decided that it was a deprivation of due process to base a decision to terminate a person's parental rights to his or her child under WIS. STAT. § 48.415(2) when it would be impossible for the parent to comply with conditions of return solely because the parent was incarcerated. ***Kenosha County Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶¶40–56, ___ Wis. 2d ___, ___, 716 N.W.2d 845, 857–861. The trial court in this case held that Michelle E.'s lawyer was not ineffective because, as the trial court explained in its written decision, it would be unreasonable "to place on trial counsel the burden of predicting future decisions of this State's appellate courts."

¶6 ***Jodie W.*** was the first published Wisconsin decision to deal with the incarceration-based impossibility issue. There were, however, many decisions from other states holding that it violated due process to base a termination-of-parental-rights decision solely on the parent's incarceration. ***Id.***, 2006 WI 93, ¶¶47–48, ___ Wis. 2d at ___, 716 N.W.2d at 859–860. Michelle E.'s trial lawyer testified that she was not aware of the law in that area until she read the ***Jodie W.*** decision.[2]

[2] The lawyer representing Michelle E. at the post-termination hearing and Michelle E.'s trial lawyer mentioned an otherwise unspecified Illinois decision. Michelle E.'s trial lawyer indicated that she was not aware of that decision when Michelle E. stipulated to the continuing-need-of-protection-or services ground in October of 2005.

¶7 A plea by a parent that stipulates to a ground to terminate that parent's parental rights must be knowing and voluntary. ***Id.***, 2006 WI 93, ¶¶24, 24 n.14, ___ Wis. 2d at ___, ___ n.14, 716 N.W.2d at 853, 853 n.14 (relying on criminal cases). A plea is not knowing and voluntary if it is entered as a result of deficient advice by a defendant's lawyer. ***State v. Kelty***, 2006 WI 101, ¶43, ___ Wis. 2d ___, ___, 716 N.W.2d 886, 899; ***State v. Daley***, 2006 WI App 81, ¶20 n.3, ___Wis. 2d ___, ___ n.3, 716 N.W.2d 146, 151 n.3 (ineffective assistance can be "manifest injustice" so as to permit withdrawal of plea after sentencing). Although as recognized by the post-termination trial court, a lawyer need not be clairvoyant, given the significant interests invaded by a termination-of-parental-rights proceeding, it is beyond the pale of effective representation for a lawyer to not realize that there might be significant constitutional problems with terminating a client's parental rights solely because the client is incarcerated.

¶8 As we have seen, Michelle E. testified that she would not have agreed to the stipulation if she had not been told by her lawyer that there was no chance of prevailing at the grounds phase because of her incarceration. Although arguing the merits of whether there were reasons aside from Michelle E.'s incarceration in October of 2005 that made it unlikely that she would prevail at a fact-finding hearing, and also the merits of whether termination was in the children's bests interests, the focus is on Michelle E.'s stipulation and the State has not submitted any evidence that Michelle E.'s testimony was not true. Indeed, as we have seen, that testimony was, in essence, corroborated by Michelle E.'s trial lawyer. Accordingly, the State has not satisfied its burden at the post-termination hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶62, 274 Wis. 2d 379, 408, 683 N.W.2d 14, 28 (A "defendant has the initial burden of showing the basis for a hearing; but if he succeeds, the burden shifts to the state to show by clear and

convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered."). Whatever the results of a fact-finding hearing under WIS. STAT. § 48.424 might be, Michelle E. is entitled to it. Accordingly, we must vacate the orders terminating Michelle E.'s parental rights to Keegan and Dakota, and reverse the order denying Michelle E.'s motion to withdraw her stipulation. This matter is remanded to the trial court for further proceedings.

By the Court.—Orders vacated, order reversed, and cause remanded.

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