COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2007

A. John Voelker
Acting 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. 2007AP77
2007AP78

Cir. Ct. Nos. 2006TP3
2006TP4

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2007AP77

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANTONIO E. G.,

RESPONDENT-APPELLANT,

CARRIE L. W.,

RESPONDENT.

NO. 2007AP78

IN RE THE TERMINATION OF PARENTAL RIGHTS TO SYLVANA E. G., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANTONIO E. G.,

RESPONDENT-APPELLANT,

CARRIE L. W.,

RESPONDENT.

APPEALS from orders of the circuit court for Brown County: JOHN D. McKAY, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Antonio E.G. appeals orders terminating his parental rights. Antonio argues the orders terminating his parental rights must be vacated because the circuit court accepted his no contest plea to the fact-finding portion of the proceeding without taking witness testimony in support of the petition. We disagree and affirm the orders.

[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

BACKGROUND

¶2 Cierra M.G. and Sylvana E.G. were placed outside of the parental home in April 2004. A child in need of protective services order was entered for the children on June 14, 2004. On January 13, 2006, the Brown County Department of Human Services filed a petition to terminate Antonio's parental rights, alleging abandonment, continuing child in need of protective services status and failure to assume parental responsibility. At a final pretrial conference, Antonio informed the court that he did not intend to contest the fact-finding portion of the proceeding. The court then engaged in a colloquy and heard testimony from Antonio to confirm that he understood his rights and was making his decision freely and voluntarily. The court withheld making a finding that Antonio was unfit until the commencement of the dispositional hearing to give Antonio an opportunity to consider how he wished to proceed at that hearing.

¶3 On October 3, 2006, the court concluded the fact-finding portion of the hearing and held the dispositional hearing. The court began by receiving the TPR reports from the social worker in lieu of testimony, although the social worker was present in court and available to testify. After reviewing the report, the court concluded the fact-finding portion of the hearing and found Antonio an unfit parent. During the dispositional portion of the hearing, Antonio testified his last contact with Cierra was two years ago and he had no contact with Sylvana.

DISCUSSION

¶4 Antonio argues the order terminating his parental rights must be vacated because the court accepted his no contest plea without first hearing witness testimony in support of the petition. WISCONSIN STAT. § 48.422(3) states, "[i]f the petition is not contested the court shall hear testimony in support of the

allegations in the petition ….” Construction of a statute and its application to undisputed facts presents a question of law we review without deference. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379.

¶5 In ***Waukesha County v. Steven H.***, 2000 WI 28, ¶56, 233 Wis. 2d 344, 607 N.W.2d 607, the supreme court held “the legislature intended the circuit court to hear testimony in support of the allegations because testimony safeguards accurate fact-finding and protects the parents. WISCONSIN STAT. § 48.422(3) required [the county] to call a witness to testify in support of the allegations in the petition.” However, the supreme court held the circuit court’s order did not need to be reversed even though it failed to take testimony because the record as a whole provided sufficient evidence to support the finding for termination.[2] ***Id.***, ¶57.

¶6 Antonio argues the testimony in the record does not support the abandonment ground.[3] Abandonment is proven if the “child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.” WIS. STAT. § 48.415(1)(a)3. Abandonment is not established if the parent proves by a preponderance of the evidence that he or she had good cause for failing to visit or communicate. WIS. STAT. § 48.415(1)(c). The preponderance of the evidence standard requires the litigant to demonstrate by

[2] Steven H. brought his argument under an ineffective assistance of counsel claim and, therefore, the supreme court reached this result due to lack of prejudice. ***Waukesha County v. Steven H.***, 2000 WI 28, ¶¶1, 59, 233 Wis. 2d 344, 607 N.W.2d 607. While our case is not an ineffective assistance of counsel case, we reach the same conclusion under a harmless error analysis.

[3] Antonio also argues that the TPR reports from the social worker accepted “in lieu” of testimony cannot properly be considered testimony under ***Steven H.*** Because we hold there is sufficient evidence in the record without this report, we need not address this argument.

the greater weight of credible evidence the certainty of his or her claim. *See* ***Carlson & Erickson Bldrs., Inc. v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 657-58, 529 N.W.2d 905 (1995).

¶7 As indicated, at the dispositional portion of the hearing, Antonio testified that his last contact with Cierra was two years ago and he had not had any contact with Sylvana. In addition, the foster mother testified at the dispositional hearing that Antonio had not had any contact with either child for a number of years. While Antonio testified that when he was incarcerated he did not know where the girls were and was not provided with an address or phone number, he did not describe any effort he made to determine their location. Antonio testified that he was released from prison in October 2005. However, Antonio was sent back to prison in December for operating while intoxicated, fifth offense. There is no evidence in the record that Antonio made any effort to locate and contact his children during the time he was not incarcerated.

¶8 Thus, there is sufficient evidence in the record that Antonio abandoned the children without good cause, rendering any error the circuit court made in failing to hear testimony harmless.[4] *See* WIS. STAT. § 805.18(2) (No judgment shall be reversed unless "after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.").

[4] Antonio also argues the other grounds were not proven. Because we conclude the court had sufficient grounds to find Antonio unfit due to abandonment, we need not decide whether there was sufficient evidence in the record to prove the other grounds.

By the Court.—Orders affirmed.

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