

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2007

David R. Schanker
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. 2007AP1516
2007AP1517**

**Cir. Ct. Nos. 2006TP35
2006TP36**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2007AP1516

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO MALAIKA B., A PERSON
UNDER THE AGE OF 18:**

WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

ANGELA M. I.,

RESPONDENT-APPELLANT.

No. 2007AP1517

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

WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ANGELA M. I.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Angela M.I. appeals from orders terminating her parental rights to two of her daughters. She contends that the circuit court erred when it found her unfit during the grounds phase of the termination proceedings. Angela asserts that the court improperly relied on her incarceration to make its ruling. Our review of the record indicates that the court considered multiple factors related to Angela's failure to meet the conditions for return of her children. We ascertain no error in the circuit court's analysis and therefore affirm the orders for termination.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted

BACKGROUND

¶2 Angela's daughter, Malaika B., was born July 3, 2002, and her other daughter, Koryiana J., was born December 31, 2003. On October 12, 2004, Koryiana nearly drowned in the bathtub and Angela called 911 for help. When the police arrived, they discovered that Angela had outstanding warrants and, due to her failure to report to her probation agent the next day, Angela was taken into custody. The Waukesha County Department of Health and Human Services removed both girls from the home and placed them in foster care on October 13, 2004.

¶3 At a hearing on March 21, 2005, the court found both Malaika and Koryiana to be children in need of protection or services (CHIPS). The court set conditions for return of the girls to Angela. These conditions included Angela showing an interest in the children, having regular and successful visits with them, providing a safe and stable home, staying in touch with her social worker, completing a parenting assessment, completing a parenting education program, resolving all criminal charges and cooperating with her probation officer, completing any recommended AODA assessments and programs, and completing a psychological evaluation and any recommended programs. The conditions were modified after Angela was incarcerated; the court added the condition that Angela comply with the rules of the prison.

¶4 A petition for termination of parental rights was filed on July 18, 2006. At that time, Angela was incarcerated at Taycheedah Correctional Institution. In the petition, the County alleged that grounds for involuntary termination of Angela's parental rights to Malaika and Koryiana existed under WIS. STAT. § 48.415(2), the CHIPS statute. Angela had failed to meet several

conditions of return. First, the petition noted that Angela had discontinued visits with her daughters when she was incarcerated in December 2005. She was serving a four-year prison sentence following conviction for delivery of cocaine and maintaining a drug trafficking place. Next, the petition alleged that Angela had not provided a safe and stable home, specifically observing that she had been convicted of drug trafficking out of her home after the March 21, 2005 dispositional order and corresponding conditions for return were in place. The petition also asserted that Angela had failed to meet the condition of resolving all criminal charges and cooperating with her probation agent. She was on probation and under supervision when she committed the crimes indicated above. Angela did make progress toward the condition that she complete an AODA assessment and receive treatment. Her assessment recommended intensive outpatient treatment for alcohol addiction, which Angela began but did not finish. She similarly discontinued mental health treatment, which was against the recommendation in a January 17, 2005 psychological evaluation. Finally, the petition alleged that Angela failed to follow the rules in the correctional facility while incarcerated.

¶5 Angela waived her right to a jury and the fact-finding hearing on grounds for termination ensued. The hearing took three sessions, on November 29, 2006, January 12, 2007, and February 14, 2007. Ultimately, the court determined that sufficient grounds to terminate Angela's parental rights existed under WIS. STAT. § 48.415(2) and that Angela was an unfit parent under WIS. STAT. § 48.424(4). A dispositional hearing followed on March 28-29, 2007, and the court granted the petition for termination of Angela's parental rights to Malaika and Koryiana. Angela appeals.

DISCUSSION

¶6 Angela raises one issue on appeal. She asks, “Did the trial court err during the grounds phase when it found Angela M.I. unfit based on her incarceration?” She argues that the trial court’s finding of unfitness was based on her inability to meet impossible conditions for return of her children and that the DHHS did not make a reasonable effort to provide court-ordered services. The resulting order, she contends, is founded on a violation of her constitutional right to due process.

¶7 The trial court held that grounds for termination existed under WIS. STAT. § 48.415(2), the CHIPS statute. Grounds to terminate parental rights under this section exist if: (1) the child has been adjudged a child in need of protection or services and placed outside the home, (2) the agency responsible for the child has made a reasonable effort to provide the services ordered by the court, (3) the child has been outside the home for at least six months and the parent has failed to meet the conditions for return of the child to the home, and (4) there is a substantial likelihood that the parent will not meet those conditions within the next twelve months. Sec. 48.415(2).

¶8 To successfully challenge a statute’s constitutionality as applied, the proponent must “prove, beyond a reasonable doubt, that as applied to him [or her] the statute is unconstitutional.” *State v. Joseph E.G.*, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. Whether WIS. STAT. § 48.415(2), as applied to Angela, violates her right to substantive due process, presents a question of law that this court reviews de novo. *See Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶22, 293 Wis. 2d 530, 716 N.W.2d 845.

¶9 In *Jodie W.*, our supreme court provided significant guidance to courts assessing unfitness where a parent is incarcerated. It stated that “a parent’s incarceration does not, in itself, demonstrate that the individual is an unfit parent.” *Id.*, ¶49. Furthermore, “a parent’s failure to fulfill a condition of return due to his or her incarceration, standing alone, is not a constitutional ground for finding a parent unfit.” *Id.* Termination of a parent’s fundamental right to parent his or her child requires an “individualized determination of unfitness.” *Id.* Therefore, the trial court must evaluate the “particular facts and circumstances relevant to the parent and the child involved in the proceeding.” *Id.*, ¶50.

¶10 Essentially, Angela argues that the trial court did not make the required individualized finding of unfitness, but rather relied on Angela’s incarceration to determine that she could not meet the conditions for return and that her children would remain in need of protection or services. The County asserts that the trial court did indeed evaluate the particular facts and circumstances relevant to whether Angela had met or would meet the conditions of return and reached the reasonable conclusion that she had not and would not. After our independent review of the record, we agree with the County.

¶11 In *Jodie W.*, the parent’s rights were terminated after she entered a plea admitting she could not meet one condition of return due to her incarceration. *Id.*, ¶¶10-11. In reviewing the case, the supreme court noted that Jodie had made “significant progress toward meeting many of the other conditions of return.” *Id.*, ¶54. The supreme court concluded that WIS. STAT. § 48.415(2) was unconstitutional as applied to Jodie because the trial court found grounds to terminate Jodie’s parental rights “based on an impossible condition of return, *without consideration of any other relevant facts and circumstances*” *Id.*, ¶56 (emphasis added). The supreme court stated that a parent’s incarceration was

relevant, but provided the following context for consideration: (1) the parent's relationship to the child both before and during incarceration, (2) the nature of the crime committed by the parent, (3) the length and type of sentence imposed, (4) the parent's level of cooperation with the responsible agency and the Department of Corrections, and (5) the best interests of the child. *Id.*, ¶50.

¶12 Our review of the hearing transcripts convinces us that the trial court considered Angela's incarceration in the proper context. Much of the trial court's reasoning rests on the fact that Angela failed to meet conditions even before she was incarcerated. For example, it observed that:

[Since] May of 2005 all the way up until the raid and the arrest in [June 2005]² she was in a place where drugs were being sold, kept ... which led to the final incarceration; however, as Angela's department of corrections worker ... testified ... there were four other violations that [Angela] was locked up for. So she had periods of violations of her probation during the time before she was convicted and spent any time in prison.

The repeated violations are counter to the condition that Angela resolve all criminal charges and cooperate with her probation agent. Further, Angela's offenses of delivery of cocaine and maintaining a drug house weigh directly on the condition that she provide a safe and suitable home for her daughters.

¶13 The trial court properly considered the nature of Angela's crimes and the length and type of sentence imposed. The court stated that selling drugs and maintaining a drug house was "dangerous to her and her kids, illegal, unstable, unhealthy, [and] harmful to the community." The court noted that Angela faced

² In the transcript, the trial court first refers to the arrest in June 2006, but subsequently corrects the date to June 2005.

four years in prison and, even if released early, would again face supervision by the department of corrections, a situation in which she had established “a terrible track record.” We further observe that after Angela was taken to prison, her conditions for return were modified to require her to comply with the prison rules. She was subsequently cited for four conduct violations while in prison.

¶14 The trial court also considered Angela’s level of cooperation with her social worker, specifically with regard to seeking out and participating in mental health services. Much of Angela’s argument stems from her perception that the department of corrections stood in the way of her attempts to meet the conditions placed upon her. She argues that the prison would not allow her children to visit and that prison staff determined she did not need psychiatric services even though a previous mental health assessment indicated that she did. The testimony at the fact-finding hearing on this issue included the following exchange between Angela’s attorney and the DHHS social worker:

COUNSEL: Since [Angela] has been incarcerated, have the conditions been tailored to her as a parent incarcerated to meet her needs?

SOCIAL WORKER: To the best of our abilities, we do add in there that she continue to cooperate with all treatment and services as recommended by the assigned social worker. [Angela] was often encouraged to seek out social worker and psychiatric staff in her correctional facility. In addition, we did also take out the conditions that she had successfully completed.

COUNSEL: You have no information that she did not seek out a social worker; correct?

SOCIAL WORKER: [Angela] and I often talked, and when we did speak I asked her about additional treatment and services. Her honest response to me was, quote, “I’m cool,” end quote.

COUNSEL: Did you ever ask [Angela] what she meant by cool?

SOCIAL WORKER: Yes.... Her response is that she was fine at the time and didn't need any additional services.

¶15 The trial court noted that Angela had focused on her possible admission to the Challenge Incarceration Program, or “boot camp,” to help her change her life. The court stated:

[Angela] says she's grown-up, but ... she's taken the attitude, which is basically something that I guess [her social worker] wasn't able to talk her out of, “That I'm gonna not do anything because boot camp is the answer to everything. I'm not gonna seek resources ... I'm not gonna ask for them.”

....

Angela, you're a woman [who] still has important needs that you do not address, and you haven't addressed them and you've run counter to those needs.

....

The most important things for [Angela] are her psychological condition and her controlled substances situation.

The court characterized Angela's decision not to actively pursue services, but rather to pin her hopes on boot camp, as “setting her own plan, her own conditions of return.” The court concluded that the possibility of boot camp did not create a substantial likelihood that Angela would meet her conditions of return.

¶16 Angela has failed to show that her incarceration was the sole reason she did not meet all of the conditions for return. She did not provide a safe and suitable home for her children before she went to prison. She did not resolve all of her criminal matters or cooperate with her probation agent prior to her incarceration. Once in prison, she did not comply with the rules and was cited for conduct violations, including fighting. Angela's own testimony, together with that of her social worker, sufficiently supports the trial court's determination that

grounds for termination under WIS. STAT. § 48.415(2) exist and the courts finding of unfitness was proper.

By the Court.—Orders affirmed.

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

