**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 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. 2006AP3032
2006AP3033**

**Cir. Ct. Nos. 2006TP3
2006TP4**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID K.,

RESPONDENT-APPELLANT.

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DAVID K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed*.

¶1 WEDEMEYER, J.[1] David K. appeals from an order terminating his parental rights to Joanne K. and Paul K. David argues that the trial court erred when it entered default judgment at the grounds hearing and erred when it denied David's motion to re-open the default judgment. In the alternative, David argues that counsel provided ineffective assistance for failing to provide sufficient evidence to the trial court to support the motion to re-open the default hearing. Because the trial court did not erroneously exercise its discretion when it entered default judgment against David and when it denied the motion to vacate, this court affirms. This court is further not convinced that trial counsel provided ineffective assistance with respect to the motion to re-open.

BACKGROUND

¶2 On November 28, 2004, Joanne and Paul, together with their half-siblings, Damone and Latricia, were removed from the home where the four children lived with David and their mother, Lawana R. They were removed after Milwaukee Police responded to the residence due to reports from neighbors that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

Damone was heard screaming "It's too cold! It's too cold!" Upon arrival, the police found Damone standing naked and soaking wet in front of a fan. David stated that he was punishing Damone for taking candy from a cousin by making him take an ice bath and then forcing him to stand in front of the fan. Damone reported that punishment such as this was not unusual. That day, as a result of the reports of abuse and the fact that no food was found in the home,[2] the four children were removed from the home. Probable cause for the removal was found on November 30, 2004, as required by WIS. STAT. § 48.21(1)(b) (2005-06).[3]

¶3 On June 16, 2005, the Honorable Judge Carl Ashley, found the children to be Children In Need of Protection or Services (CHIPS).[4] Specifically, all children were deemed CHIPS due to neglect, WIS. STAT. § 48.13(10), and Joanne and Paul were also deemed CHIPS due to risk of neglect, § 48.13(10m).

¶4 On January 9, 2006, the State filed petitions to terminate David's and Lawana's parental rights to Joanne (dob April 3, 2003) and Paul (dob July 14, 2004). David appeared for the initial plea hearing on February 6, 2006, but the hearing was adjourned to allow counsel to be appointed for David. David was ordered by the trial court to personally appear at the next court date or risk having judgment rendered against him. Attorney Patrick Flanagan was appointed to represent David and both appeared at the plea hearing on March 10, 2006. Due to

[2] At the time, Lawana and David were facing eviction. They had no plans to find subsequent housing or care for their children.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[4] The CHIPS order for Latricia was stayed until July 11, 2005 due to an issue with service on Hugh A., her adjudicated father. This difference in dates has no effect on the subsequent ruling.

a building-related evacuation of the courthouse, however, the hearing was adjourned to March 20, 2006. Again, the trial court ordered David to personally appear at the next hearing or be found in default. On March 20, 2006, David appeared with counsel and the court explained his rights. David requested a jury trial. The trial court set a final pretrial date of May 31, 2006 and a jury trial for the grounds phase of the TPR on June 5, 2006. A motion hearing was set for May 4, 2006 at the State's request. The trial court ordered David to appear at all of the hearings, cooperate with his lawyers, and cooperate with discovery or the court would rule without David's input.

¶5 David appeared at the May 4, 2006 hearing and was reminded about the final pretrial and trial dates. On May 31, 2006 David failed to appear for the pretrial. The court was advised that David had missed two deposition dates, the latter due to the fact that he was hospitalized for a burn injury. The court was also told that communication was a problem as counsel only had a phone number of a friend of David's where he would leave a message. At the conclusion of this hearing, the court indicated it would take a default finding under advisement and discussed what type of proof David would need to provide an excuse for his absences. The court changed the original June 5, 2006 trial date to a status date and stated that David would have to provide hospital records in order to justify his failure to appear.

¶6 On June 5, 2006, David failed to appear for the scheduled status conference (original trial date). David's counsel advised the court that he had not been able to contact David and had no idea where he was. The State moved for default, and the court granted the motion, finding that David's conduct was either egregious or in bad faith:

> There is no question in this case that his conduct is protracted.… Either he's doing this intentionally or by not staying in touch with his lawyer and informing us what's going on, he's repeatedly and persistently affecting the way that this case is going on. So I'm going to find him in default.

¶7 The State presented its case to obtain a default judgment on the grounds phase of the TPR. The court allowed the State to proceed in proving allegations against David. The social worker testified that David failed to comply with a number of the conditions for the return of his children and that she believed he would not be able to complete conditions for the return of his children within the next twelve months. David's counsel was permitted to participate in the hearing. At the conclusion of the hearing, the trial court found that David was unfit based on WIS. STAT. § 48.415(2). A dispositional hearing was set for June 22, 2006.

¶8 David appeared for the dispositional hearing with counsel and moved to vacate the default judgment, presenting a discharge summary from Columbia St. Mary's hospital. Counsel advised the court that David was hospitalized from May 11 to May 25, 2006, and received daily outpatient care for one-and-one-half hours until some time in June 2006. David stated that he lost his attorney's card with contact information. The trial court denied the motion to vacate the default judgment, but ruled that David could participate in the dispositional phase of the TPR, which was scheduled for August 10, 2006.

¶9 Although late, David did appear for the dispositional hearing on August 10. At the conclusion of the hearing, the trial court found that it was in the best interests of Joanne and Paul to terminate David's parental rights. Lawana's parental rights were also terminated.

¶10 Post-judgment, David appeared for his deposition and testified with respect to his absences. He said he had no way to get to the deposition on May 4, 2006, that he did not appear in court on May 31 because he was on "bed rest" and he did not come to court on June 5 because he was "heavily medicated." The court then heard a post-termination motion to vacate the termination judgment. The trial court reviewed the medical records, which David had submitted. The court also heard testimony from the social worker, David and David's appointed trial lawyer. David indicated he did not come to court on May 31 based upon doctor's advice not to put too much pressure on his leg until it was halfway healed. When asked who he called to advise them of this limitation, David said "[N]obody … I had simply forgot." David stated that he did not come to the court on June 5 because he was in too much pain. When asked who he called to advise he would not be coming, David said "I didn't call anybody." David also stated that when he tried to call his attorney, the attorney never called him back. The trial court found David's testimony to be incredible and found:

> You violated all three of my orders. You didn't come to court, you didn't cooperate with the discovery process, you didn't cooperate with your lawyer.
>
> And your substantial and persistent … conduct … in violating my orders rises to the level of egregiousness in my opinion …
>
> ….
>
> Because there's no question in my mind that you did not cooperate with your attorney from March 20th through June 22nd, and you missed two dates in court, and a deposition date without a justifiable excuse, and your conduct in violating those three orders was substantial and persistent and therefore egregious.

The trial court denied the post-termination motion. Both David and Lawana filed appeals with this court. Each case is being decided by separate opinion.

DISCUSSION

A. Default Judgment

¶11 David claims the trial court erroneously exercised its sentencing discretion when it found him in default and when it failed to vacate the default judgment. This court rejects his claims.

¶12 This court's review of a decision to grant a default judgment is based upon whether the trial court erroneously exercised its discretion. ***Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.***, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 530, 634 N.W.2d 544. This court will affirm the trial court's decision as long as it considered the pertinent facts, applied the correct law and reached a reasonable determination. ***Id.*** Here, the trial court's decision did not constitute an erroneous exercise of discretion.

¶13 WISCONSIN STAT. §§ 805.03 and 804.12(2)(a)3 provide the trial court with the authority to enter a default judgment as a sanction when a party fails to obey a court order. In addition, WIS. STAT. § 806.02(5) permits the trial court to enter a default judgment when a previously appearing party fails to appear for the trial. In order for the trial court to impose default judgment as a sanction, the offending party must have engaged in "egregious conduct." Egregious conduct includes unintentional conduct that is "extreme, substantial and persistent." ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995). Even when the conduct is egregious, however, a trial court should not impose a default judgment sanction if the party presents a "clear and justifiable excuse." ***Johnson v. Allis Chalmers Corp.,*** 162 Wis. 2d 261, 275-76, 470 N.W.2d 859 (1991).

¶14 In reviewing what took place in this case, we note that David appeared for some court dates, but not others. He failed to appear for his deposition and he failed to appear for the final pretrial or trial date. David had been personally advised by the court of these dates and he was ordered to appear. He had been warned that his failure to attend would result in the court deciding the case without any input from David.

¶15 David attempted to offer a "clear and justifiable excuse" for failure to appear at the final pretrial on May 31, 2006 and the trial date on June 5, 2006. He indicated that after he was discharged from the hospital on May 25, 2006, he was ordered to stay on bed rest and that's why he missed the pretrial. The record, however, does not support David's claim. The discharge summary from the hospital indicates David was released in good condition and recommended daily follow-up for "wound care." There was no reference to or mention of suggested bed rest.

¶16 David claims he failed to appear for the June 5, 2006 trial date because of his medication. The record, however, indicates David did travel back and forth to the hospital approximately three times per week for about two weeks after his discharge. Thus, if he could travel back and forth to the hospital, he could also travel back and forth to court.

¶17 The trial court found that David's explanations were not believable and that there was no justifiable excuse for his failure to appear at the pretrial or trial. The trial court's findings are not clearly erroneous. David's explanations are inconsistent with established facts and unreliable. Thus, in reviewing the record, this court cannot hold that the trial court erroneously exercised its discretion. The trial court reviewed the pertinent facts and the explanations offered by David and

reached a reasonable conclusion. That is, David knew about the trial dates and was capable of attending based on the other information in the record. He simply chose not to appear, nor did he contact his attorney to explain that he could not or would not appear. The justice system only works when parties abide by the rules. Court appearances cannot be taken lightly or simply ignored. David's failure to appear in court, together with his failure to communication with his counsel and cooperate with discovery certainly constitutes a blatant disrespect for the court's authority and order. David argues in his reply brief that the delays were not significant and defaults are vacated in other cases for much less serious excuses than a hospitalization, which occurred here. This court is mindful of David's position. However, this court is limited by the discretionary standard of review. Based upon the review of the facts and circumstances in this case this court cannot hold that the trial court erroneously exercised its discretion in granting the default or in denying the motion to vacate.

B. Ineffective Assistance

¶18 In the alternative, David contends his trial counsel provided ineffective assistance for failing to present sufficient information to the trial court in order to convince it to vacate the default judgment. This court rejects this contention.

¶19 A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings. ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984);

State v. Sanchez, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶20 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis. 2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶21 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548

N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶22 David argues that trial counsel should have obtained his medical records to present to the court. As the State points out in its brief, however, such would require the cooperation and authorization by David. Given the circumstances regarding the lack of communication between David and his counsel, counsel cannot be faulted for not obtaining this information. The only contact counsel had was a phone number of David's friend. Counsel would leave a message and wait for David to contact him. David claims the lack of contact was due to the fact that he lost his counsel's card/phone number and did make several attempts to contact his counsel. The trial court did not believe David's testimony and this credibility determination is left to the trial court's discretion. A reasonably skilled attorney should not be expected to hunt down his client in order to talk to him to prepare his case for trial. Rather, it was David's responsibility to stay in contact with his attorney.

¶23 Moreover, the record reflects that counsel attempted to stave off default judgment when David failed to appear, provided the court with the little information it had and moved to vacate the default once David was finally

contacted. In addition, the trial court ruled that even if it had had the medical information presented at the disposition hearing at the time of the grounds trial, it still would have found David in default as there was no justifiable reason for him to not appear in court. Accordingly, David has failed to establish he was prejudiced by the conduct of his counsel and therefore, counsel did not provide ineffective assistance.

By the Court.—Order affirmed.

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