COURT OF APPEALS DECISION DATED AND FILED

November 1, 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. 2007AP1074-AC
2007AP1075-AC
2007AP1076-AC

Cir. Ct. Nos. 2005JC64
2005JC65
2005JC66

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2007AP1074-AC

IN THE INTEREST OF DANIEL J. E., A PERSON UNDER THE AGE OF 18:

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E. AND TRACY L. E.,

RESPONDENTS-APPELLANTS.

NO. 2007AP1075-AC

IN THE INTEREST OF MICHELLE L. E., A PERSON UNDER THE AGE OF 18:

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E. AND TRACY L. E.,

RESPONDENTS-APPELLANTS.

NO. 2007AP1076-AC

IN THE INTEREST OF SERA M. E., A PERSON UNDER THE AGE OF 18:

WAUPACA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

PHILLIP J. E. AND TRACY L. E.,

RESPONDENTS-APPELLANTS.

APPEAL from orders of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Phillip J.E. and Tracy L.E. appeal circuit court orders finding their three children, Daniel, Michelle, and Sera, in need of

[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 2003-04 version unless otherwise noted.

protection or services (CHIPS). Phillip and Tracy pled no contest in the CHIPS proceedings but now seek to withdraw their pleas on a number of grounds. We affirm the circuit court's orders.

Background

¶2 The three children that are the subject of this appeal are triplets born to Phillip and Tracy on June 13, 2005. Within days of the triplets' birth, the Waupaca County Department of Health and Human Services petitioned to have the children adjudicated CHIPS and for an order for temporary physical custody.[2] The petitions alleged that the court had jurisdiction over the children under WIS. STAT. § 48.13(10) and (10m). As relevant here, that statute provides as follows:

> The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:
>
> ….
>
> **(10)** Whose parent … neglects, refuses or is unable … to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child;
>
> **(10m)** Whose parent … is at substantial risk of neglecting, refusing or being unable … to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent … has neglected, refused or been unable … to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home ….

[2] The circuit court held a hearing the same day the Department filed the petitions, and ordered that the children be placed in a foster home.

¶3 The allegations in the CHIPS petitions included the following:

- Phillip and Tracy had a "long-standing history" with the Department, including contacts with the Department dating back to 1994.

- In the intervening years, Phillip and Tracy had four different children removed from their home and, in all four cases, their parental rights to the children were ultimately terminated.

- In each case, it was alleged that Phillip and Tracy had been unable to meet the conditions of return, and in each case there was evidence that Phillip and Tracy were unable to maintain a household in a safe, habitable, and sanitary condition.

- The most recent termination of parental rights occurred on February 15, 2005, only four months before the triplets were born. At that time, the Department "had [again] been attempting to work with the parents to try and provide them with the necessary skills to provide basic care and shelter for the children. Yet again, the parents were unable to do so, and their house remained in an extremely unsanitary condition."

- Upon admission to the hospital to give birth to the triplets, Tracy's personal hygiene was so poor that hospital staff had to request that she bathe, offering as a pretext that everyone was required to submit to this procedure.

- There were indications that Tracy was not cooperating with the triplets' prenatal care in an attempt to avoid contacts with the Department.

- The Department had received a report that, in the winter and up to a few months before the petitions were filed, Phillip and Tracy were living in a tent and using a small electric heater.

- Although Phillip and Tracy had secured an apartment, their "situation in that apartment [was] unclear," and they had refused to allow the Department in to the apartment to check its condition.

- Phillip and Tracy had "constantly and consistently maintained their housing in a state of total disarray and uninhabitability. In many instances … [it was] not only unsafe, but … totally unsanitary."

- Phillip and Tracy had shown themselves to be "completely incapable of providing for even the simplest care for their children" despite the fact that the Department had spent "many years and significant resources attempting to impart … the basic ability to care for their children." Phillip and Tracy had the benefit of home health aids, parent aids, and various social workers who had worked with them "intensively" to show them how to care for their children. This included significant hands-on training, which Phillip and Tracy were unable to grasp.

¶4 The circuit court appointed counsel for Phillip and Tracy, and they initially entered denials to the petitions. Approximately one week before the date scheduled for trial, however, Phillip and Tracy appeared at a pretrial conference and informed the court, through their attorney, that the parties had reached an agreement. More specifically, their attorney explained as follows:

> [T]here would be an admission on the part of the parents that protective services are appropriate, that the county would be asking for one year of protective services, that as of now the children would not be placed at the home but would remain placed in foster care.
>
> The department would continue to monitor the home … and the anticipation is that over time, the [parents] will be able to [] either prove themselves or not to the satisfaction of the department; and that they understand there are some issues and do not dispute the validity of the inquiry and just feel that if given some time and some assistance, they're going to be able to meet or exceed the expectations of the department ….

¶5 The Department indicated that it had the same understanding, adding that: "Essentially they will not be contesting the petition or admitting, however you want to phrase it." The parents' attorney clarified that Phillip and Tracy had decided not to contest the allegations in the petitions.

¶6 In conducting the plea colloquy, the circuit court paused to ask if the parties had discussed whether the CHIPS finding would be based on both grounds

alleged in the petitions or on only one of the grounds. The Department indicated that the parties had not discussed that, but that the Department would "prefer" a finding based on WIS. STAT. § 48.13(10). The parents' attorney did not object. The court proceeded to conduct the plea colloquy based on § 48.13(10), and found the children in need of protection or services.

¶7 The circuit court subsequently entered a written CHIPS dispositional order for each child effective September 27, 2005, including conditions for return. The orders showed that the children were found in need of protection or services under both WIS. STAT. § 48.13(10) and (10m).

¶8 A little over six months later, the Department petitioned for the termination of Phillip's and Tracy's parental rights to the triplets. As one of the grounds for termination, the Department alleged prior involuntary termination of parental rights to another child under WIS. STAT. § 48.415(10). The requirements for that ground are as follows:

> (a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13 (2), (3) or (10).
>
> (b) That, within 3 years prior to the date the court adjudged the child who is the subject of the petition to be in need of protection or services as specified in par. (a), a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

WIS. STAT. § 48.415(10). Thus, based on the September 2005 CHIPS orders and the February 2005 termination of Phillip's and Tracy's parental rights to another child, the Department appeared to possess indisputable grounds under

§ 48.415(10) for seeking termination of Phillip's and Tracy's parental rights to the triplets.

¶9 Phillip and Tracy moved to withdraw their CHIPS pleas and to vacate or revise the CHIPS orders. They argued, among other things, that their pleas were not knowing, intelligent, and voluntary because they were not fully informed of the consequences of entering a CHIPS plea based on WIS. STAT. § 48.13(10).

¶10 After conducting a ***Machner***-type hearing, the circuit court denied the parents' motions but amended the CHIPS orders to clarify that there was only one ground for the orders, WIS. STAT. § 48.13(10). The court reasoned that the amendment was necessary because, during the plea colloquy, the court had proceeded only under § 48.13(10).

¶11 Phillip and Tracy renew their request for plea withdrawal on appeal.[3] The TPR proceedings are stayed pending this appeal.

[3] We refer to the relief Phillip and Tracy seek as plea withdrawal even though they request, as alternative relief to plea withdrawal, amended CHIPS orders based only on WIS. STAT. § 48.13(10m). To simply amend the CHIPS orders in this fashion seems problematic at best because the circuit court conducted the plea colloquy based only on § 48.13(10). Thus, before amending the CHIPS orders to show only § 48.13(10m) as grounds for the orders, the circuit court would have to redo the plea proceeding, including the plea colloquy. Accordingly, the parents' request to amend the CHIPS orders is, in effect, a request for plea withdrawal.

Discussion

A. Ineffective Assistance Of Counsel

¶12 Phillip and Tracy argue that they received ineffective assistance of counsel in the CHIPS proceedings. We will assume without deciding that when, as here, the circuit court appoints counsel for parents in a CHIPS proceeding, counsel must be effective. We nonetheless reject the parents' ineffective assistance of counsel claim for the reasons that follow.

¶13 As we understand Phillip's and Tracy's argument, their claim for ineffective assistance of counsel is based on the premise that their CHIPS pleas were not knowing, intelligent, and voluntary because their attorney failed to fully inform them of the consequences of a plea under WIS. STAT. § 48.13(10). In particular, they assert that their attorney failed to inform them of the difference between a plea under § 48.13(10) and a plea under § 48.13(10m), namely that a CHIPS disposition under § 48.13(10) would allow the Department to later seek a termination of parental rights based on WIS. STAT. § 48.415(10) and would relieve the Department of any need to prove a failure to meet conditions of return.

¶14 We will assume that Phillip and Tracy did not know or understand the information they assert was necessary. The question thus becomes whether Phillip and Tracy needed to know and understand this information for their pleas to be knowing, intelligent, and voluntary. Obviously, parents need not be aware of every possible consequence of a CHIPS plea in order for the plea to be knowing, intelligent, and voluntary.

¶15 In arguing that the parents' pleas were knowing, intelligent, and voluntary, the guardian ad litem analogizes to the criminal plea context.

Specifically, the guardian ad litem asserts that TPR proceedings under WIS. STAT. § 48.415(10) are a collateral consequence of the parents' pleas. Phillip and Tracy fail to directly respond to this collateral consequence argument. Indeed, in at least one section of their briefing, they appear to concede that the effect of their CHIPS pleas on later TPR proceedings can be considered a collateral consequence.

¶16 "Lack of knowledge of the collateral consequences of a guilty plea does not affect the plea's voluntariness because knowledge of these consequences is not a prerequisite to entering a knowing and intelligent plea." ***State v. Santos***, 136 Wis. 2d 528, 532-33, 401 N.W.2d 856 (Ct. App. 1987). Thus, "courts are not required to inform defendants of consequences that are merely collateral to the plea." ***State v. Yates***, 2000 WI App 224, ¶6, 239 Wis. 2d 17, 619 N.W.2d 132. Similarly, "defense counsel's failure to advise a defendant of collateral consequences is not a sufficient basis for an ineffective assistance of counsel claim." ***State v. Brown***, 2004 WI App 179, ¶7 n.3, 276 Wis. 2d 559, 687 N.W.2d 543; *see also* ***Santos***, 136 Wis. 2d at 533.

¶17 "Direct consequences of a plea have a 'definite, immediate, and largely automatic effect on the range of the defendant's punishment.' Collateral consequences do not automatically flow from the plea, but rather *will depend upon a future proceeding, or may be contingent on a defendant's future behavior*." ***Yates***, 239 Wis. 2d 17, ¶7 (emphasis added; citations omitted).

¶18 Here, TPR proceedings under WIS. STAT. § 48.415(10) did not automatically flow from the parents' CHIPS pleas under WIS. STAT. § 48.13(10). While plainly related to the CHIPS proceedings, the TPR proceedings were separate, future proceedings. Moreover, as we discuss below in Section C of this opinion, the commencement of TPR proceedings depended on whether the

Department determined that Phillip and Tracy met the conditions of return in the CHIPS orders. At the time of their CHIPS pleas, termination of Phillip's and Tracy's parental rights to the triplets was contingent on the parents' future behavior.

¶19 Given the guardian ad litem's persuasive collateral consequence argument and the parents' lack of a response to that argument, we reject the parents' assertion that their pleas were not knowing, intelligent, and voluntary because their attorney was ineffective in failing to fully inform them of the consequences of their CHIPS pleas under WIS. STAT. § 48.13(10).

B. Adequacy Of Circuit Court's Plea Colloquy

¶20 Phillip and Tracy argue that the circuit court was required, but failed, to perform their plea colloquy in accordance with WIS. STAT. § 48.30(8). That statute specifies that, when taking a no contest plea in proceedings under WIS. STAT. ch. 48, the circuit court shall, among other things, address each party and determine that he or she has an understanding of the "potential dispositions." WIS. STAT. § 48.30(8)(a). Phillip and Tracy appear to be arguing that this statutory language required the circuit court to explain to them that one potential "disposition" of their CHIPS pleas under WIS. STAT. § 48.13(10) was "immediate" termination of their parental rights under WIS. STAT. § 48.415(10) with no right to an evidentiary hearing on whether they met the conditions of return.

¶21 We find this argument unpersuasive for a number of reasons, but suffice to say it does not comport with the obvious meaning of the word "disposition" in the statute. The readily apparent meaning of that term is that it refers to the possible ways that a circuit court might dispose *of the proceeding at*

hand, here, the CHIPS proceedings. It is simply not true, as Phillip and Tracy appear to be arguing, that one possible "disposition" of a CHIPS proceeding is a termination of parental rights. Absent more developed argument by Phillip and Tracy in this area, we decline to address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

¶22 Phillip and Tracy also attempt to analogize to ***State v. Baeza***, 174 Wis. 2d 118, 496 N.W.2d 233 (Ct. App. 1993). There, a criminal defendant was permitted to withdraw his plea after the circuit court failed to advise him that his immigration status could be affected. ***Id.*** at 121, 130. Crucial to the decision in ***Baeza***, however, is that WIS. STAT. § 971.08 expressly requires this particular advice and specifies the remedy of plea withdrawal when that advice is not given and the plea is likely to result in a change of immigration status. Accordingly, the parents' reliance on ***Baeza*** is misplaced.[4]

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[4] WISCONSIN STAT. § 971.08 provides, in pertinent part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
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> ….
>
> (c) Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."
>
> ….
>
> (2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission

(continued)

¶23 In sum, we reject the parents' argument that the circuit court failed to comply with WIS. STAT. § 48.30(8) in performing the plea colloquy.

C. Due Process And Other Fairness Arguments

¶24 Phillip and Tracy make a variety of related arguments under the auspices of due process, "fundamental fairness," and equitable estoppel. To the extent these arguments depend on other arguments we have already rejected, we do not revisit them. What remains of the parents' due process and other fairness arguments is this: They assert that their understanding of their CHIPS pleas was that the Department agreed that they would have an opportunity to comply with the conditions of return. They argue that it was unfair for the Department to promise them such an opportunity but to now seek a finding of unfitness in TPR proceedings pursuant to WIS. STAT. § 48.415(10), which does not require the Department to prove that Phillip and Tracy failed to meet the conditions of return.

¶25 We observe that our review is limited to whether Phillip and Tracy should be permitted to withdraw their CHIPS pleas. The TPR proceedings are not before us. To the extent the parents' arguments are directed at the fairness of the TPR proceedings, those arguments should be made in the context of those proceedings.[5] To the extent that the parents' arguments are directed at the fairness

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> to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea.

[5] Phillip and Tracy inform us that they first addressed their arguments to the circuit court in the TPR proceedings, but then, upon the TPR court's suggestion, brought those claims before the circuit court in the CHIPS proceedings. Still, we fail to see how this court or the circuit court in the CHIPS proceedings has jurisdiction to address the fairness of the TPR proceedings.

of the CHIPS proceedings, those arguments essentially amount to an assertion that the Department breached a plea agreement. We are not persuaded.

¶26 We will assume Phillip and Tracy are correct that there was an understanding among all parties that Phillip and Tracy would have the opportunity to meet the conditions of return to the Department's satisfaction. Still, Phillip and Tracy point to nothing demonstrating that they did not receive exactly this opportunity. The Department did not file petitions to terminate Phillip's and Tracy's parental rights until April 18, 2006, more than six months after the CHIPS orders. Phillip and Tracy do not dispute that, following the CHIPS orders, the Department continued to make reasonable efforts to provide services ordered by the circuit court. They also do not assert that the Department's decision to seek termination was based on something other than the Department's good faith determination that they were failing to meet, and would continue to fail to meet, the conditions of return. In short, Phillip and Tracy point to nothing in the record demonstrating that the Department intended to initiate TPR proceedings regardless whether they made acceptable progress in meeting the conditions of return.[6]

¶27 Admittedly, once the Department determined that the parents' progress was, in the Department's judgment, unsatisfactory and decided to seek termination of parental rights, the Department sought to use the CHIPS orders under WIS. STAT. § 48.13(10) to its advantage in the TPR proceedings. But Phillip

[6] The Department's attorney conceded at the ***Machner***-type hearing that he made a "strategic" decision in requesting that the court take the pleas and enter the CHIPS orders under WIS. STAT. § 48.13(10) instead of § 48.13(10m), but that does not establish that the Department intended to seek termination regardless whether Phillip and Tracy made acceptable progress in meeting the conditions of return.

and Tracy point to nothing establishing that, at the time of the CHIPS pleas, the Department promised anything different.

¶28 In sum, Phillip and Tracy provide no basis for us to conclude that their CHIPS pleas were unfairly extracted or that the Department breached any plea agreement that the parties may have had.[7]

D. Factual Basis For The Pleas

¶29 Phillip and Tracy make a final argument that the CHIPS petitions do not provide a sufficient factual basis for a finding under WIS. STAT. § 48.13(10). The guardian ad litem contends that Phillip and Tracy waived this argument by failing to raise it within ten days of the plea hearing as required by WIS. STAT. § 48.297(2). That statute provides, in pertinent part:

> Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition or invalidity in whole or in part of the statute on which the petition is founded shall be raised not later than 10 days after the plea hearing or be deemed waived.

¶30 Phillip and Tracy do not address WIS. STAT. § 48.297(2), nor do they argue that counsel was ineffective for failing to object to the sufficiency of the allegations in the petitions within ten days of their plea hearing. Accordingly, we decline to further address their assertion that the petitions did not provide a sufficient factual basis for a finding under WIS. STAT. § 48.13(10). *See* ***State v. Mikkelson***, 2002 WI App 152, ¶16, 256 Wis. 2d 132, 647 N.W.2d 421 ("An

[7] Phillip and Tracy point to a permanency plan, dated two and a half months after the CHIPS orders, in which the Department proposed a goal of adoption. However, the plan also listed reunification as a concurrent goal.

argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.”).

Conclusion

¶31 For the reasons stated, we reject the parents’ arguments for plea withdrawal and affirm the circuit court’s orders finding the triplets in need of protection or services pursuant to WIS. STAT. § 48.13(10).

By the Court.—Orders affirmed.

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