

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2008

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 No. 2008AP822

Cir. Ct. No. 2007TP9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

JAMIE P. B.,

PETITIONER-RESPONDENT,

v.

LAWRENCE J. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County:
MICHAEL J. GABLEMAN, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.¹ Lawrence J.B. appeals an order terminating his parental rights. He argues he was denied the right to meaningfully participate in the fact-finding hearing. We agree and reverse and remand for a new trial.

BACKGROUND

¶2 On September 7, 2007, Jamie P.B. filed a petition to terminate Lawrence's parental rights to their son, Patrick L.B. At the time, Lawrence was incarcerated in a federal prison in Pennsylvania. He was not scheduled for release until 2017. A jury trial was held on November 26, 2007. Lawrence appeared by phone. At the close of the hearing, the jury found grounds for the termination of Lawrence's parental rights.

¶3 Before jury selection began, the court asked Lawrence if he could hear and Lawrence replied that he could. During voir dire by Jamie's attorney, Kathryn zumBrunnen, the court interrupted to ask Lawrence whether he was able to hear. He replied, "No. I can barely hear anything that's going on. It's going in and out." The court instructed zumBrunnen to pull the microphone closer and repeat the questions she had asked. During voir dire by Lawrence's attorney, Lester Liptak, the court again asked Lawrence whether he could hear. Lawrence replied, "Yes, your Honor. It keeps going in and out. Even when you spoke earlier, I get like parts of it." The court instructed the clerk to move the microphone in front of the attorneys. The court also asked any juror responding to a question to speak into the microphone. Following the questioning of potential jurors, the court noted:

¹ This appeal is 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.

[H]e has made mention now twice of the fact that our voices have been cutting out.

The record should reflect that I have taken all available means that are possible, including providing potential jurors with the portable microphone, moving the telephone closer to the potential jurors and to counsel, turning the volume up on the sound system; I think I have exhausted every opportunity to make sure that [Lawrence] is able to meaningfully participate in this hearing.

The court then asked Liptak to inquire if Lawrence had been able to “materially and substantially follow these proceedings as to make his participation in it meaningful in the legal sense.” Liptak spoke to Lawrence and informed the court that “he’s indicated there’s been some difficulty but that he understands the proceedings up to this point and has had enough so that he has a grasp today, to this point what’s been going on, and I guess we are going to have to proceed and see where it leads us.” Liptak stated that Lawrence was able to meaningfully participate.

¶4 Following his cross-examination of Jamie, Liptak asked to confer with Lawrence to determine whether Lawrence wished him to address anything else with the witness. After speaking with Lawrence, the court went back on the record and Liptak asked Lawrence whether he could hear. Lawrence replied that he could, and Liptak proceeded to question the witness.

¶5 After a recess, the court stated:

I’ll note that you did not indicate at any point during the last session in court, the opening statements or direct examination of [Jamie], that you could not hear anything. Therefore I have been assuming that and inferring that you have been able to follow everything substantially. And you have been able to follow what’s been happening; is that true?

Lawrence replied that he had been able to hear the proceedings and the court reminded him to advise the court if he was unable to hear at any point during the proceedings. The court then indicated it had a matter to discuss with the parties and Lawrence stated he was unable to hear. The court advised Lawrence that the reason he was unable to hear was because there had been a break in the proceedings.

¶6 At the beginning of Lawrence's testimony, he advised Liptak that he could barely hear. The court then instructed Liptak to take his notepad up to the podium so he could speak into the microphone. Liptak did so, and Lawrence indicated that he could hear Liptak. During his testimony, Lawrence said he had heard all of his cousin's, Carrie Wiggins, testimony and disputed her statement that she had made arrangements "ten plus" times for Lawrence to visit his child. After Jamie presented her case, Liptak asked to speak with Lawrence to ensure that Lawrence did not have any additional witnesses, exhibits, or evidence he wished to present. The court allowed Liptak and Lawrence to confer.

¶7 Lawrence then presented his case, which consisted of his own testimony. zumBrunnen then indicated she wished to recall Jamie for rebuttal testimony. When Jamie returned to the witness stand, the court asked Lawrence whether he could hear and he said that he could. Then, shortly into Jamie's testimony Lawrence informed the court that he could not hear. The court replied, "One moment [Lawrence]." The witness continued to testify and Lawrence again informed the court, "I'm hearing nothing, Your Honor." Jamie continued to testify and there is no indication in the record of what, if any, steps the court took to resolve the issue.

¶8 Shortly after zumBrunnen began her closing argument, Lawrence again indicated he could not hear anything. The court informed Lawrence that zumBrunnen was getting the portable microphone and zumBrunnen continued her argument.

DISCUSSION

¶9 Lawrence argues the court failed to fulfill its obligation to assure his right to meaningfully participate in his fact-finding hearing. Jamie argues Lawrence waived this issue by not objecting to appearing by telephone.

¶10 A parent has a fundamental right to the care and custody of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). However, that right is meaningless without the “opportunity to be heard ... in a meaningful manner.” *State v. Lavelle W.*, 2005 WI App 266, ¶2, 288 Wis. 2d 504, 708 N.W.2d 698. Fundamental rights must be waived in open court and on the record. *State v. Albright*, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980). There is no indication that Lawrence waived his right to meaningful participation in this manner and thus we address this issue on the merits.

¶11 The right to meaningfully participate is a due process right. *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 701-02, 530 N.W.2d 34 (Ct. App. 1995). Whether a parent’s participation has been meaningful is a question of constitutional fact we review without deference. *Lavelle W.*, 288 Wis. 2d 504, ¶8.

¶12 Meaningful participation does not always require a physical presence. *Rhonda R.D.*, 191 Wis. 2d at 701. “[W]hether a respondent in a TPR proceeding can meaningfully participate without being physically present depends on the circumstances of each case.” *Id.* at 701-02.

¶13 In *Rhonda R.D.*, the respondent appeared by telephone. Before trial, the court conducted a number of experiments to determine “whether the telephone system allowed [the respondent] to hear persons on the witness stand, in the jury box, and at counsel table.” *Id.* at 700. The trial court found that the system allowed the respondent to hear counsel, witnesses, and the jury. *Id.* Additionally, “[a]t the beginning of jury selection, the beginning of the first and second days of trial, and at various other times throughout the proceedings, the trial court redetermined that [the respondent] was able to hear the proceedings.” On appeal, we concluded the arrangements afforded the respondent “the opportunity to meaningfully participate in the proceedings.” *Id.* at 703.

¶14 In *Lavelle W.*, the respondent also appeared by telephone. There however, the record revealed “that at times Lavelle W.’s ability to hear the proceedings faded in and out, and, at least at one point, was temporarily interrupted by static.” *Lavelle W.*, 288 Wis. 2d 504, ¶8. We held that any alternative to physical presence at a TPR proceeding must “be functionally equivalent to personal presence: the parent must be able to assess the witnesses, confer with his or her lawyer, and, of course, hear everything that is going on.” *Id.* Although Lavelle was able “to hear significantly more than he was unable to hear, that is not sufficient because periodic or sporadic inaudibility ... significantly truncates a party’s ability to fully comprehend what is going on....” *Id.*, ¶9. Therefore, the court concluded Lavelle was not able to meaningfully participate in the proceedings. *Id.*

¶15 Here, as in *Rhonda R.D.*, the court frequently checked that Lawrence could hear the proceedings. Additionally, Lawrence had multiple opportunities to speak with his attorney. The trial court made a significant effort to ensure that Lawrence was able to meaningfully participate. However, the test is

not the effort exerted by the trial court to ensure meaningful participation but rather whether the effort succeeded.

¶16 The record shows that the trial court's effort was unsuccessful. Unlike in *Rhonda R.D.*, Lawrence's ability to hear faded in and out. During a portion of Jamie's testimony, it is unclear what, if any, steps the court took to correct this problem. From reviewing the record, it appears the court used a telephone and a microphone and the microphone was moved from person to person to allow Lawrence to hear. At times when the microphone was improperly positioned, Lawrence could not hear. Though the problem was generally corrected, there were at least sporadic periods of time where Lawrence did not hear the proceedings. Thus as in *Lavelle W.*, though Lawrence was able to hear significantly more than he did not hear, the sporadic inaudibility truncated his ability to fully comprehend the proceedings and he was unable to meaningfully participate in the fact-finding hearing.

By the Court.—Order reversed and cause remanded for further proceedings.

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

