

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 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. 2007AP2618

Cir. Ct. No. 2007TP2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

DIANA K. O.,

PETITIONER-RESPONDENT,

v.

RICK D. R.,

RESPONDENT-APPELLANT.

APPEAL from order of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Reversed and cause remanded for proceedings
consistent with this opinion.*

¶1 DYKMAN, J.¹ Rick D.R. appeals from an order terminating his parental rights to his daughter, Lailah E., on grounds of abandonment under WIS. STAT. § 48.415(1)(a)3.² and failure to assume parental responsibility under § 48.415(6).³ Rick argues that he was denied his right to effective assistance of counsel at trial because his attorney (1) prepared a defense to the abandonment count for the wrong six-month period, and therefore failed to present evidence that Rick did have contact with Lailah during the alleged period of abandonment; and (2) failed to present evidence that showed Rick had assumed parental responsibility, including evidence of Rick's relationship with Lailah during the alleged period of abandonment. Rick also argues that the trial court issued erroneous jury instructions, that the doctrines of equitable estoppel and laches bar the petition to terminate his parental rights, and that he is entitled to a new trial in the interest of justice. We conclude that Rick was denied his right to effective assistance of counsel, and therefore reverse.⁴

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.

² WISCONSIN STAT. § 48.415(1)(a)3. provides that abandonment is grounds to terminate parental rights, and is established by proving that “[t]he 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.”

³ WISCONSIN STAT. § 48.415(6) provides that failure to assume parental responsibility is a grounds to terminate parental rights, and “shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.”

⁴ Because we agree that Rick was denied effective assistance of counsel, we need not address Rick's other claims of trial errors.

Background

¶2 The following facts are taken from hearing testimony and exhibits. Additional facts will be set forth as necessary in the discussion. Lailah E. was born to Rick D.R. and Diana K.O. in January 2003. Lailah and Rick's relationship ended at some point during Lailah's first year. In March 2004, Diana and Lailah moved out of Diana's parents' home and relocated to another city.

¶3 In May 2004, Rick filed a motion for an order providing him regular placement with Lailah. The court awarded joint custody of Lailah to Rick and Diana. It awarded primary placement to Diana and set regularly scheduled visits for Rick. The placement order went into effect in September 2004, and Rick visited Lailah from then until October 2006.

¶4 In March 2007, Diana filed a petition to terminate Rick's parental rights to Lailah, alleging Rick abandoned Lailah by failing to have contact with Lailah for a period of six months despite the September 2004 placement order, and that prior to the last contact Rick had not communicated with Lailah for approximately one year. Diana also alleged Rick had failed to assume parental responsibility for Lailah because he was not involved in her supervision, education or care, and had failed to pay child support for a year. Rick objected to the petition and requested a jury trial.

¶5 The jury found grounds to terminate Rick's parental rights based on abandonment and failure to assume parental responsibility. Ten jurors agreed and two dissented as to both counts. At the dispositional hearing, the guardian ad litem recommended terminating Rick's parental rights, and the court did so.

¶6 Rick filed a notice of appeal in November 2007. A month later, he moved for remand to the trial court pursuant to WIS. STAT. § 809.107(6)(am)⁵ for a fact-finding hearing. Rick argued that he had been denied effective assistance of counsel, that the court had erroneously exercised its discretion in terminating his parental rights, and that he was entitled to a new trial in the interest of justice. We remanded to the trial court to allow Rick to file a postjudgment motion. Rick then filed a postjudgment motion to the trial court, which held a *Machner*⁶ hearing on Rick’s claim of ineffective assistance of counsel. The trial court concluded that Rick was not denied his right to counsel.

Standard of Review

¶7 We review a claim for ineffective assistance of counsel under a mixed standard of review. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). “Thus, the trial court’s findings of fact ... will not be overturned unless clearly erroneous. The ultimate determination of whether counsel’s

⁵ WISCONSIN STAT. § 809.107(6)(am) provides:

If the appellant intends to appeal on any ground that may require postjudgment fact-finding, the appellant shall file a motion in the court of appeals, within 15 days after the filing of the record on appeal, raising the issue and requesting that the court of appeals retain jurisdiction over the appeal and remand to the circuit court to hear and decide the issue. If the court of appeals grants the motion for remand, it shall set time limits for the circuit court to hear and decide the issue, for the appellant to request transcripts of the hearing, and for the court reporter to file and serve the transcript of the hearing. The court of appeals shall extend the time limit under par. (a) for the appellant to file a brief presenting all grounds for relief in the pending appeal.

⁶ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

performance was deficient and prejudicial to the defense are questions of law which [we] review[] independently.” *Id.* at 127-28 (citations omitted).

Discussion

¶8 Rick argues that he was denied effective assistance of counsel at trial because his counsel was unprepared to defend against the claim of abandonment for the period from July 2003 to May 2004, yet did not request a continuance, and conducted no discovery to prepare for either count. We agree that Rick was denied effective assistance of counsel as to both counts.

¶9 Under WIS. STAT. § 48.23(2), a parent subject to a petition to involuntarily terminate his or her parental rights is entitled to legal representation. This right includes the right to effective assistance of counsel. *A.S. v. State*, 168 Wis. 2d 995, 1002-03, 485 N.W.2d 52 (1992). The test for ineffective assistance of counsel in termination of parental rights proceedings is the same as in criminal proceedings. *Id.* at 1005. To establish ineffective assistance of counsel, a parent must show first that counsel’s performance was deficient, in that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the [parent] by the Sixth Amendment.” *Id.* (citation omitted). Next, the parent “must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the [parent] of a fair trial, a trial whose result is reliable.” *Id.* (citation omitted). The prejudice prong requires the parent to “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.” *Johnson*, 153 Wis. 2d at 129 (citation omitted).

¶10 The crux of the trial on Diana's petition to terminate Rick's parental rights was whether Rick failed to have contact with Lailah for a six month period, and whether he had a substantial parental relationship with Lailah. Rick and Diana, and their supporting witnesses, gave starkly contrasting testimony as to these issues. Diana, her husband, and her parents testified in support of the petition. They testified that Rick and Diana's relationship began to deteriorate when Diana was pregnant, and that Rick was not very involved in the pregnancy or present frequently after Lailah was born. They testified that Rick did not make contact with Lailah from July 2003 to May 2004, despite their willingness to let him do so and the fact that Rick could have easily located Lailah, or after October 2006, based on his own failure to pay child support and a resulting warrant for his arrest. They testified that Rick did not call or write to make contact with Lailah during those times and that he gave no reason for his absences.

¶11 Rick, his parents, his aunt, and his sister testified in opposition to the petition. They testified that Rick was actively involved in Diana's pregnancy and Lailah's birth, that Rick and Diana lived together for a period of time after Lailah was born, and that Rick continued to see Lailah after his relationship with Diana ended in September 2003. They testified that any periods of time that Rick was not able to see Lailah were because Diana denied him access to her, and that Rick never stopped calling Diana on a regular basis to see Lailah. Rick testified as to his financial constraints and stated that he pays child support to the best of his ability. The trial exhibits consisted of the following: The Wood County placement order; Diana's calendar of when she believed Rick and Lailah had contact; Rick's child support records; Rick's mother's phone records; Rick's certificate for completing a parenting class; and four pictures of Rick and Lailah together in August and September 2006.

¶12 Thus, the defense to the petition consisted of evidence that Rick had assumed parental responsibility for Lailah and did not fail to communicate with her without good cause. See WIS. STAT. § 48.415(1)(a)3., (1)(c)3.b., and (6). Whether grounds existed to terminate Rick's parental rights because he had failed to assume parental responsibility for Lailah turned largely on witness credibility. Whether grounds existed to terminate Rick's parental rights based on a six-month period of abandonment also turned on credibility but, significantly, Rick did not present any testimony or evidence that he had contact with Lailah from November 2003 to May 2004.

¶13 Rick claims that his counsel was ineffective because he was unprepared to defend against the correct six-month period of alleged abandonment. The day of the trial, Rick's counsel noted that Diana's petition alleged Rick's abandonment for failing to have contact with Lailah for six months despite the September 2004 placement order, and requested that Diana specify which six month period after September 2004 was the basis of her petition. Diana's counsel identified two periods of abandonment: July 2003 to May 2004 and another period beginning October 2006. Rick's counsel identified that October 2006 to the March 21, 2007 petition did not amount to six months. The court then instructed Diana's counsel to limit the abandonment argument to the July 2003 to May 2004 time period, but agreed that Rick's conduct after October 2006 would be relevant to the failure to assume parental responsibility allegation.

¶14 At the *Machner* hearing, Rick's trial counsel testified that he learned on the morning of the trial that the alleged period of abandonment was July 2003 to May 2004. He stated that he had prepared to defend against the allegation that there had not been contact for six months immediately prior to the filing of the petition on March 21, 2007. He stated that the defense he prepared was that there

had not been an absence of contact for those six months. He stated that he did not conduct any depositions or ask Diana's counsel for a list of witnesses he would call. He stated that he did not have a strategic reason for not doing so. He testified that the reason he did not request an adjournment to prepare to defend against the allegation of abandonment during the July 2003 to May 2004 time period was because he believed the contact between Rick and Lailah after May 2004 would negate any lack of contact during that period.

¶15 As to the failure to assume allegation, Rick's counsel testified that his focus was the payment of child support.⁷ He stated that he had not obtained Rick's social security work records in preparation of trial, and had no strategic reason for failing to do so. He stated that he did not believe he had been properly prepared for trial.

¶16 Rick also introduced forty-four exhibits at the *Machner* hearing that he claimed his counsel was ineffective for failing to introduce, including: (1) the motion Rick filed seeking placement with Lailah; (2) an invitation to Lailah's baptism with Rick and Diana's last names and only one address on the return envelope; (3) a receipt for a car purchased by Rick and Lailah together in April, 2003, and listing only one address for both; and (4) thirty-three photographs which Rick claimed showed his continuing involvement with Lailah, including during the time of the alleged abandonment.

⁷ A factor that may be considered in determining whether a parent has failed to assume parental responsibility is payment of child support. *See* WIS. STAT. § 48.415(6)(b).

¶17 The photographs show Rick and Diana together during Diana's pregnancy and when Diana was first born. Various photographs show Lailah with Rick's family members, and Rick's mother testified that for most of them Rick was there but not pictured. However, Rick's mother admitted that Rick was not present for the three photographs she claimed were taken between October 2003 and December 2003.

¶18 Rick testified that several photographs showing him with Lailah were taken between September and November of 2003. Three pictures taken on the same day depict Lailah and Rick together; when asked the timing of the pictures, Rick responded: "I would have to say November of 03, somewhere in that area."

¶19 Thus, Rick's attorney failed to introduce evidence that was available at the time of trial that would have supported Rick's version of the events, because he prepared for the wrong six month period and decided to proceed with trial anyway. He had no strategic reason for doing so. He introduced only the testimony of Rick and his family, who were similarly unprepared to testify as to the alleged period of abandonment. While Rick's counsel focused his defense to the failure to assume allegation on the issue of child support, he also did not obtain Rick's work records to validate Rick's testimony that he was not always able to make the required child support payments. Also, the evidence introduced at the *Machner* hearing supported Rick's defense to the allegation that he had not assumed parental responsibility for Lailah, and Rick's counsel had no strategic reason for failing to introduce the evidence to defend against that count. Thus, the record reveals that Rick's counsel's performance was deficient in defending against both counts alleged in the petition to terminate his parental rights.

¶20 Next, we examine whether Rick’s counsel’s deficient performance prejudiced his case. We will find prejudice where “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.” *Johnson*, 153 Wis. 2d at 129 (citation omitted). While the evidence Rick introduced at the *Machner* hearing was not conclusive, it raised a factual question for the jury as to whether Rick had contact with Lailah through November 2003, thus eliminating any six-month period of abandonment. The evidence also offered support for Rick’s version of events: that Rick and Diana lived together after Lailah was born and that Rick was actively involved in Lailah’s life for a period after her birth. Further, much of the trial turned on credibility, and we cannot say that there is not a reasonable probability the jury would have reached a different verdict with all the evidence before it. If Rick had presented photographs and documents in support of his version of events, rather than merely his and his family’s testimony, there is a reasonable probability that his version would have been deemed more credible by a jury. Moreover, the verdict was split ten to two. If one more juror had been swayed to Rick’s version of the events, the jury would not have found grounds to terminate Rick’s parental rights. Taking the facts in their entirety, we conclude that our confidence in the outcome of the trial has been undermined. Thus, we reverse and remand for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for proceedings consistent with this opinion.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

