COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-3477, 00-3478
00-3479, 00-3480

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

NO. 00-3477

IN RE THE TERMINATION OF PARENTAL RIGHTS TO KATARINA R.C., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

ROCHELLE D.,

RESPONDENT-APPELLANT,

GERARDO M.C.,

RESPONDENT-CO-APPELLANT.

NO. 00-3478

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CARLOS C., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

ROCHELLE D.,

RESPONDENT-APPELLANT,

GERARDO M.C.,

RESPONDENT-CO-APPELLANT.

NO. 00-3479

IN RE THE TERMINATION OF PARENTAL RIGHTS TO LEILA M.C., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

ROCHELLE D.,

RESPONDENT-APPELLANT,

GERARDO M.C.,

RESPONDENT-CO-APPELLANT.

NO. 00-3480

IN RE THE TERMINATION OF PARENTAL RIGHTS TO HECTOR C., A PERSON UNDER THE AGE OF 18:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

ROCHELLE D.,

RESPONDENT-APPELLANT,

GERARDO M.C.,

RESPONDENT-CO-APPELLANT.

APPEALS from orders of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Gerardo M.C. appeals orders terminating his parental rights.[2] He argues that: (1) he was denied effective assistance of counsel because counsel did not move to dismiss two of the three alleged grounds that did not have a factual basis, thereby resulting in a plea that was not knowingly and intelligently entered; (2) the circuit court did not properly notify him of his right to substitution of a judge; and (3) the circuit court violated his due process rights by relying on inaccurate information at disposition. We disagree and affirm the orders.

BACKGROUND

¶2 On July 6, 1999, Gerardo's children, Katarina, Carlos, Leila and Hector, were removed from his home. All four children were subsequently adjudicated in need of protection or services, pursuant to WIS. STAT. § 48.13(3)

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] On remand, the trial court vacated the order terminating Rochelle D.'s parental rights to all four children. Therefore, her appeal is moot.

and (3m). At the dispositional hearing, the circuit court ordered out-of-home placements for the children, warned Gerardo of possible grounds for termination of parental rights, and established a list of conditions for him to meet before the children would be returned.

¶3 On May 5, 2000, the County filed petitions requesting termination of Gerardo's parental rights of the four children. The petition alleged that grounds for termination of parental rights existed under WIS. STAT. § 48.415(1), (2) and (4).

¶4 On the date scheduled for trial, Gerardo waived his right to a jury trial and entered no contest pleas to the three grounds alleged in the petition. However, Gerardo reserved the right to contest disposition. The circuit court conducted a colloquy with Gerardo and found a factual basis to accept the pleas.

¶5 At the dispositional hearing, the circuit court found it was in the children's best interests to terminate Gerardo's parental rights. Gerardo appealed. We granted Gerardo's motion for a remand to the circuit court for postjudgment motions.

¶6 On remand, Gerardo moved the circuit court to withdraw his no contest pleas. The court vacated the portion of the termination orders finding legal grounds for termination under WIS. STAT. § 48.415(1) abandonment and (4) continuing denial of periods of physical placement or visitation because there was no factual basis to sustain these allegations. The court additionally found Gerardo's counsel deficient for failing to move to dismiss the unsupported grounds in the petition. However, the court found that the deficiency was not prejudicial to Gerardo.

¶7 The circuit court denied Gerardo's motion to vacate the portion of the termination orders finding legal grounds for continuing need of protection or services. *See* WIS. STAT. § 48.415(2).[3] This appeal followed.

[3] WISCONSIN STAT. § 48.415(2) reads as follows:

> CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services, which shall be established by proving any of the following:
>
> (a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).
>
> 2. a. In this subdivision, "reasonable effort" means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.
>
> b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.
>
> 3. That the child has been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.
>
> (am) 1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).
>
> 2. That the conditions that led to the child's placement outside his or her home under each order specified in subd. 1. were caused by the parent.

DISCUSSION

I. Ineffective Assistance of Counsel

¶8 Gerardo argues that he was denied effective assistance of counsel because his counsel failed to move to dismiss two of the three petition grounds that did not have a factual basis. Consequently, he claims he did not understand that he was pleading to three separate grounds rather than making one plea. Had he known that two of the three grounds lacked a factual basis, Gerardo claims he would have contested the remaining ground at trial. As a result, Gerardo concludes that he did not knowingly and intelligently enter his plea.

¶9 To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's actions constituted deficient performance and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must demonstrate "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." ***Id.*** at 694. Whether counsel's actions, if deficient, prejudiced the defense, is a question of law this court reviews independently. ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992).

¶10 The circuit court concluded that Gerardo's counsel was deficient for his failure to move to dismiss the two grounds in the petition that lacked a factual basis. At the postjudgment hearing, counsel testified that failure to move to dismiss was an oversight on his part. Because the State does not dispute that Gerardo's counsel was deficient, we address whether the deficiency was prejudicial.

¶11 As in criminal cases, parents subject to termination of their parental rights are entitled to fundamental due process. ***In re D.L.S.***, 112 Wis. 2d 180, 184, 332 N.W.2d 756 (1983). A defendant is entitled to withdraw a plea as a matter of constitutional right if it is demonstrated that the defendant did not understand the elements of the crime to which he or she pled. ***State v. Garcia***, 192 Wis. 2d 845, 864, 532 N.W.2d 111 (1995). In considering whether a plea is knowingly and intelligently made, the court can consider the record as a whole to show that the defendant understood the waiver of his or her constitutional rights. ***State v. Bangert***, 131 Wis. 2d 246, 282, 389 N.W.2d 12 (1986). Whether a plea was knowingly and intelligently made is a question of law we review independently. ***Id.*** at 267-72.

¶12 Here, the issue is whether Gerardo knew he was making three separate pleas or whether he thought he was making one plea to the entire petition. Gerardo does not cite any authority to support his argument that his pleas were not severable. He simply argues that because there was not a sufficient factual basis for him to enter a plea on the grounds of abandonment and continuing denial of periods of physical placement, the order finding grounds to terminate parental rights based upon continuing need of protection and services should be vacated.

¶13 This argument assumes that if the facts do not exist for two grounds, the facts for the third ground are invalid. Here, it is undisputed that the circuit court properly found a factual basis for the continuing need of protection and services allegation. We conclude the record establishes that Gerardo understood he was pleading to each ground alleged in the petition.

¶14 Through his counsel, Gerardo told the circuit court that after "consideration of strategy and review of the facts" of the case, he decided not to

proceed with a jury trial. In addition, while conducting a plea colloquy with Gerardo, the court listed the elements of the allegations in the petition by stating:

> THE COURT: [Y]ou heard me describe to you that the grounds for these petitions were the CHIPS grounds which would be that the children have been outside the parental home for six consecutive months under an order that the Brown County Human Services Department made reasonable efforts to provide services for you as to – as set forth in the order, that you have failed to meet the juvenile court's conditions for the return of the children to you, and the fourth question would be is there a substantial likelihood that you would not meet the conditions within one year after the termination of parental rights. That's what the first grounds would be all about, and do you understand that, Mr. Colon?
>
> GERARDO: Yes, I do.
>
> THE COURT: The second grounds would be that they have been placed outside your home pursuant to court order. The second grounds would be that for a period of three months or longer that you failed to communicate with them. That's the abandonment grounds. Do you understand those gounds?
>
> GERARDO: Yes, I do.

¶15 While the circuit court did not inquire of Gerardo regarding the continuing denial of periods of physical placement or visitation ground, we are convinced that Gerardo understood that each of the grounds alleged in the petition were separate. His counsel stated they had discussed strategy and Gerardo stated to the court that he understood the elements of two of the grounds.

¶16 Gerardo does not contest that a factual basis existed for the continuing need of protection and services ground. Nor does he argue that he did not understand the elements of the continuing need of protection and services ground. Because the record establishes that Gerardo was aware that he was entering separate pleas to separate grounds, we conclude from the record as a whole that Gerardo's plea was knowingly and intelligently made. Accordingly,

we conclude that counsel's failure to move to dismiss two of the three grounds did not prejudice Gerardo.

II. Right to Substitution

¶17 Gerardo next argues that he was not properly informed of his right to substitution of a judge pursuant to WIS. STAT. § 48.422(5).

¶18 In ***In re Kywanda F.***, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996), the supreme court held that a circuit court's failure to inform an alleged delinquent of the right to substitution is harmless error unless the party establishes actual prejudice. Relying on a termination of parental rights case, ***In re Robert D.***, 181 Wis. 2d 887, 891-92, 512 N.W.2d 227 (Ct. App. 1994), the supreme court held that "[i]n the case of the right to substitution, we conclude that actual prejudice is shown if it is established that the juvenile was not told of the right and did not know of that right." ***Kywanda***, 200 Wis. 2d at 37. The court concluded that the prejudice suffered by the juvenile is the lost opportunity to substitute the judge due to ignorance of the right. ***Id.***

¶19 When determining whether failing to inform of the statutory right to substitution was reversible error, the parent must first make a prima facie showing that the court violated its mandatory statutory duties and allege that he or she in fact did not know of the information that the court was statutorily required to provide. *See* ***id.*** at 38. If a prima facie showing is made, the burden shifts to the County to demonstrate by clear and convincing evidence that the person knew of the statutory right and therefore was not prejudiced. *See* ***id.*** The County may utilize any evidence to substantiate knowledge of the right, including testimony from the person's counsel. *See* ***id.***

¶20 It is uncontested that the circuit court did not inform Gerardo of his right to request a substitution of judge at the initial appearance. Gerardo's counsel testified at the postjudgment hearing that he did not have a specific recollection of advising Gerardo about his right to substitution of a judge. However, counsel testified that it is his customary practice and habit to tell "the client of their right to substitute the judge and advising the client that they have to exercise that right at the time of the initial appearance."

¶21 Gerardo's counsel additionally testified that he has been taking these types of cases since 1995 and that he takes many public defender appointments concerning termination of parental rights. The circuit court found that counsel's testimony and experience supported a finding that he followed his regular habit of instructing clients regarding their right to substitution of a judge and that he followed this practice with Gerardo. *See* WIS. STAT. § 904.06. We conclude that the record supports a finding Gerardo was timely notified of his right to substitution of a judge.

III. Due Process

¶22 Last, Gerardo argues that he was denied due process because the dispositional decision to terminate his parental rights was based in part upon inaccurate information. He contends that the grounds for which there did not exist a factual basis was relevant to the determination of whether there was a substantial relationship between the parent and the child. WIS. STAT. § 48.426(3)(c).

¶23 It is well established that the determination of the child's best interests is committed to the circuit court's discretion. ***In re Brandon S.S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). The court properly exercises its

discretion when it employs a rational thought process based on an examination of the facts and application of the correct standard of law. ***Id.***

¶24 The circuit court must apply the standard and factors set forth in WIS. STAT. § 48.426 when determining the disposition. The best interests of the child are paramount. WIS. STAT. § 48.426(2). The best interests of the child are determined by examining, among other things, the likelihood of the child's adoption after termination, the child's age and health, whether the child has substantial relationships with the parent or other family members and if it would be harmful to sever those relationships, the wishes of the child, how long the child has been separated from the parent, and whether a new environment will provide a more stable and permanent family relationship. WIS. STAT. § 48.426(3).

¶25 Here, the circuit court applied the best interests standard and the above factors in reaching its decision. The court informed Gerardo that application of WIS. STAT. § 48.426 was not about him, rather it was about what was best for the children. The court found that the children would be adoptable. It also found that the children were young and that they were in a stage in their life that termination was "good for them." The court additionally found that the children were in a chaotic and abusive relationship with Gerardo and were too young to express their wishes. Last, the court determined that the children would be able to enter into a more stable and permanent family relationship.

¶26 The record establishes that the various grounds stated in the petition for which there was not a factual basis did not enter in to the court's decision under WIS. STAT. § 48.426. The circuit court correctly concluded that the children's best interests were to be "the prevailing factor" in determining a disposition. WIS. STAT. § 48.426(2).

¶27 We conclude that the circuit court applied the correct law to the relevant facts, engaged in a process of reasoning, and reached a determination which a reasonable judge could reach. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Gerardo's due process rights were not violated, and the court did not erroneously exercise its discretion in terminating his parental rights.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.