COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 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 Nos. 2008AP660
2008AP661

Cir. Ct. Nos. 2007TP5
2007TP6

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2008AP660
IN RE THE TERMINATION OF PARENTAL RIGHTS TO NOAH M., A PERSON UNDER THE AGE OF 18:

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

EMERY K. M.

RESPONDENT-APPELLANT.

2008AP661
IN RE THE TERMINATION OF PARENTAL RIGHTS TO EMERY M., A PERSON UNDER THE AGE OF 18:

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

EMERY K. M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Emery K.M. appeals the orders terminating his parental rights to his children, Noah and Emery, Jr.,[2] on the grounds that a stipulation he entered into with respect to one element of the claim against him deprived him of his right to a jury trial and he did not knowingly and voluntarily waive that right. We conclude he did knowingly and voluntarily waive that right. We therefore affirm.

BACKGROUND

¶2 Noah was born on August 24, 2004, and Emery, Jr., was born on June 20, 2003. Emery was incarcerated in late 2005. In May 2006, while Emery was still incarcerated, Noah and Emery, Jr., were found to be children in need of protection and services (CHIPS) on the grounds that their parents were unable or needed assistance to care for them, *see* WIS. STAT. § 48.13(4), and they were placed outside the home. In November of 2006, Emery entered a plea in connection with his criminal case and received a ten-year bifurcated sentence comprised of five-years each of initial confinement and extended supervision.

[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] We refer to the child as Emery, Jr., although "Jr." is not part of his name, in order to distinguish him from his father, whom we refer to as Emery.

¶3 In February 2007, Wood County Department of Human Services (the County) filed petitions for the termination of the parental rights (TPR) of both parents to Noah and Emery, Jr. The children's mother ultimately voluntarily terminated her parental rights. As to Emery, the County relied on the ground of abandonment under WIS. STAT. § 48.415(1)(a)2.[3]

¶4 At the initial appearance by telephone, Emery informed the court that he wished to contest the petitions, a jury trial was scheduled, and an attorney was appointed for him. Before the jury trial began, counsel for the County raised the issue of his discussion with Emery's counsel on

> the first element that the State needs to prove today and that's that there was a Court order placing the child, or children, excuse me, outside of the home and that it contains the TPR warning. I'm not sure if [Emery] agrees with that, and either way, I think we need to put that on the record.

The following interchange then took place:

> THE COURT: Is there a dispute as to the existence of such an order, Attorney Lloyd?

[3] WISCONSIN STAT. § 48.415(1)(a)2. provides:

> Grounds for involuntary termination of parental rights. (1) Abandonment.
>
> (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356 (2) or 938.356 (2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

[EMERY'S ATTORNEY]: No. I discussed it with my client and there is no dispute.

THE COURT: [Emery], for the record, I want to address this matter with you too. And first of all, I want to consider whether you are able to answer these questions and to understand what's being discussed. How far have you gone in school? Did you graduate high school?

[EMERY]: No, sir.

THE COURT: How far have you actually gone in school?

[EMERY]: Tenth grade.

THE COURT: And have you obtained an HSED or GED?

[EMERY]: No, sir.

THE COURT: Are you in the process of doing so?

[EMERY]: Um, yes, sir.

THE COURT: What are you doing about it? Are you attending courses while you're incarcerated?

[EMERY]: Yes, sir.

THE COURT: Can you read and write?

[EMERY]: Yes.

THE COURT: Have you been able to discuss your concerns regarding these petitions with Attorney Lloyd?

[EMERY]: Yes.

THE COURT: And so, then, are you under the influence of alcoholic beverage or drug at this time? Or medication?

[EMERY]: No.

THE COURT: Are you taking medications?

[EMERY]: Yes.

THE COURT: You indicated previously in some telephonic conference that you were taking medications. What are you taking?

> [EMERY]: Um, I take a medication called fluoxetine, otherwise known as Prozac, antidepressant.
>
> THE COURT: Does your use of that medication interfere with your ability to understand our conversation now?
>
> [EMERY]: No.
>
> THE COURT: Has it interfered with your ability to understand your conversations with Attorney Lloyd?
>
> [EMERY]: No.
>
> THE COURT: Or to participate in conversations with Attorney Lloyd? Have you been able to participate, represent all of your own concerns about these matters with Attorney Lloyd?
>
> [EMERY]: Yes.
>
> THE COURT: And so, what I'm being asked to accept here is a stipulation by you and your attorney that there is existing an order indicating that Noah and Emery are children in need of protection or services. And that that order is one that I'm asked to take notice of and in that order, you were also informed of the fact that your parental rights could be terminated, if the conditions imposed upon you were not remedied. So you understand that?
>
> [EMERY]: Yes.
>
> THE COURT: And do you agree that I may consider such an order as being in effect and in existence?
>
> [EMERY]: Yes, I agree.
>
> THE COURT: Are you of the belief that your client's stipulation to that is a knowing and voluntary one, Attorney Lloyd?
>
> [EMERY'S ATTORNEY]: Yes, Your Honor.
>
> THE COURT: So, I'll instruct the jury that indeed there is a Court order which contained the termination of parental rights notice….

¶5 The court then made inquiries of both attorneys on the specific grounds for the prior CHIPS order and the TPR warnings in that order. It

ascertained that the ground for the CHIPS order was the failure of the parents to provide care and supervision of the children and it expressed the view that the contents of the TPR warning complied with the statute.

¶6 In the court's comments to the jury at the beginning of the trial, it explained that the parties had stipulated that Noah and Emery, Jr., had been placed outside their father's home pursuant to a court order that contained the TPR warnings required by law. At the close of evidence the court read the instructions to the jury and the verdict questions, explaining that it had already answered the first question for them.

> One of the questions is, [were the children] … placed, or continued in placement, outside of Emery [M.'s] home pursuant to a Court order which contained the termination of parental rights notice required by law? Answer that "yes," or "no."
>
> I answered the question. Remember the stipulation which I directed to you to consider and which you were told to consider at the outset of the trial? I used that and I answered that first question "yes," so that question doesn't even remain for your consideration.

¶7 On the verdict form the question "[were] Noah [and Emery, Jr.] …, placed, or continued in a placement outside Emery[']s] home pursuant to a court order which contained the termination of parental rights notice required by law?" was answered "yes (by the court)." The jury answered "yes" to the question "Did Emery … fail to visit or communicate with Noah [and Emery, Jr.] … for a period of three months or longer?" and "no" to the question "Did Emery … have good cause for having failed to visit Noah [and Emery, Jr.] … during that period?" One juror dissented on the good cause question.

¶8 At the subsequent disposition hearing the court found that termination of Emery's parental rights was in the children's best interests and ordered that his rights be terminated.

DISCUSSION

¶9 Emery contends on appeal that he is entitled to a new trial because the stipulation as to the first element deprived him of his right to a jury trial on that element and he did not knowingly and voluntarily waive his right to a jury trial.

¶10 The right to a jury trial in a TPR proceeding is statutory, not constitutional. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶34, 271 Wis. 2d 1, 678 N.W.2d 856. WISCONSIN STAT. § 48.422(4) provides that in a TPR proceeding "[a]ny party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition." The court is required to advise parties of their rights under this subsection. Section 48.422(1).

¶11 Two recent cases are central to resolving the issue on this appeal: ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168, and ***Manitowoc County HSD v. Allen J.***, 2008 WI App 137, Nos. 07-1494 and 07-1495.[4]

[4] At Emery's request we stayed the briefing until after the issuance of ***Walworth County DHHS v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168, which was pending before the supreme court when Emery filed this appeal. After that decision was issued and the briefing was completed, Emery requested that we stay further proceedings pending a publication decision in ***Manitowoc County HSD v. Allen J.***, 2008 WI App 137, Nos. 07-1494 and 07-1495, which was released on August 7, 2008. We did so and, after ***Allen J.*** was ordered published, the parties each submitted a supplemental brief.

¶12 In ***Andrea L.O.*** the parent's attorney stated, in response to an inquiry by the county's attorney, that they were willing to stipulate that the child had "been adjudged in need of protection and services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more of the court orders containing the termination of parental rights notice required by law." 309 Wis. 2d 161, ¶¶8, 9. The parent's attorney then asked her whether she understood the issue and whether she was willing to stipulate that the statement was true and she said "yes." ***Id.***, ¶9. During the trial testimony of the social worker who handled the child's case, a copy of the prior court order was marked and received as an exhibit, and the social worker testified that the child had been out of the parent's home pursuant to the order for a total of twenty-four months. ***Id.***, ¶11. There was no evidence controverting the stipulation. ***Id.***, ¶¶11, 12. In spite of the stipulation, the circuit court instructed the jury on all four elements of the ground for termination, including the stipulated element. ***Id.***, ¶13. The circuit court stated that the county had to prove the first element, and it explained the stipulation and stated there was no dispute over the evidence on this question. ***Id.***, ¶14. On the verdict form, the first question had not been answered, and the jury answered "yes" to that question. ***Id.***, ¶16.

¶13 The supreme court in ***Andrea L.O.*** concluded that the stipulation did not constitute a withdrawal of the demand for a jury trial on an element because, despite the stipulation, the jury was presented with ample evidence of the element, was instructed on the element, and answered a verdict question on that element. ***Id.***, ¶3.

¶14 In order to provide guidance to the courts, the supreme court in ***Andrea L.O.*** also considered another issue raised by the parent—whether the circuit court failed to engage her in a colloquy to determine that a withdrawal of

her demand for a jury trial on the element was knowing and voluntary. ***Id.*** at ¶¶28-54. For purposes of the supreme court's discussion on this issue, it presumed the stipulation did constitute a withdrawal of the demand for a jury trial on an element. ***Id.***, ¶28. The supreme court then discussed ***N.E. v. DHSS***, 122 Wis. 2d 198, 361 N.W.2d 693 (1985), *superseded by statute*, WIS. STAT. § 938.31(2), *as recognized in* ***Andrea L.O.***, 309 Wis. 2d 161, ¶31 n.5,[5] and ***S.B. v. Racine County***, 138 Wis. 2d 409, 406 N.W.2d 408 (1987). ***Id.***, ¶¶31-35.

¶15 In ***N.E.***, a juvenile case, the juvenile's counsel appeared without the juvenile to withdraw the jury demand and set the case for trial to the court. 122 Wis. 2d at 200-01. The ***N.E.*** court determined that, once the juvenile had demanded the right to a jury trial pursuant to statute, "this right must be withdrawn personally by the juvenile, either in writing or on the record in open court," and the court must then determine whether the withdrawal was knowing and voluntary. ***Id.*** at 201-02.

¶16 In ***S.B.***, the issue was the withdrawal of a demand for a jury trial in a WIS. STAT. ch. 51 involuntary civil commitment case. 138 Wis. 2d at 410-12. Like WIS. STAT. § 48.422(4), the applicable statute in ***S.B.*** provided for the right to a jury trial upon the individual's request, but was silent on the withdrawal of a demand. ***Id.*** at 412-13. The ***S.B.*** court determined that, because the statute required that the individual be involved with the decision to demand a jury trial, it "implicitly require[d] that the individual be personally involved in the decision to withdraw [the] demand…." ***Id.*** at 413-14. The ***S.B.*** court found that the

[5] As the court in ***Andrea L.O.*** noted, the statutes were amended such that juveniles are no longer entitled to demand a jury trial in a delinquency hearing.

individual's statutory right to a jury trial was violated because the individual "did not participate in the attorney's withdrawal of the jury demand and objected to the withdrawal[.]" ***Id.*** at 415.

¶17 The ***Andrea L.O.*** court distinguished the facts of that case from those of ***N.E.*** and ***S.B.*** 309 Wis. 2d 161, ¶¶34-35. First, the court noted that the attorney in those cases withdrew a prior demand for a jury trial while the defendant was not present; in ***N.E.*** the attorney did not consult the juvenile before withdrawing the demand, while in ***S.B.*** the attorney withdrew the demand without the individual's knowledge or consent. ***Id.***, ¶34. In contrast, the stipulation in ***Andrea L.O.*** took place in the parent's presence; her attorney asked her in open court whether she understood the issue and was willing to stipulate that the child was adjudged in need of protection or services and had been placed out of her home for six months or more; and the parent answered "yes." ***Id.***

¶18 Second, the ***Andrea L.O.*** court noted that ***N.E.*** and ***S.B.*** involved a complete withdrawal of the demand for a jury trial, whereas in ***Andrea L.O.*** the parties agreed to stipulate to one element and the right to a jury trial on the other three elements was not affected. ***Id.***, ¶35. The stipulated element was a "single, undisputed, paper element, and there was ample uncontroverted evidence to support the stipulated element." ***Id.***, ¶54.

¶19 Under these circumstances the ***Andrea L.O.*** court concluded that the circuit court was not required to engage in a personal colloquy in order to ascertain that a withdrawal was knowing and voluntary. ***Id.***

¶20 The parent in ***Andrea L.O.*** argued that two criminal cases, ***State v. Villarreal***, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989), and ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393, supported a conclusion that

the circuit court must personally engage the parent in a colloquy to insure that a stipulation to an element of the ground for termination is knowing and voluntary. ***Andrea L.O.***, 309 Wis. 2d 161, ¶42. The ***Andrea L.O.*** court was not persuaded that ***Villarreal*** and ***Hauk*** supported the conclusion that the circuit court was required to personally engage the parent in a colloquy to determine whether the stipulation was knowing and voluntary, and it declined to "decide … the effect of ***Villarreal*** and ***Hauk*** beyond the facts presented here." ***Id.***, ¶¶50-51.

¶21 After ***Andrea L.O.*** was decided, we were presented in ***Allen J.*** with a different set of facts surrounding a stipulation to the element that "the children have been placed outside the home for a cumulative period of six months or more on court orders finding them to be in need of protection and services." 2008 WI App 137, ¶¶2-3. This stipulation occurred between the parent's counsel and counsel for the county at the beginning of the jury trial, outside of the presence of the jury. ***Id.***, ¶3. At the close of the evidence the court instructed the jury that, with respect to this element "because there is no dispute in the evidence to this question, I have answered this question." ***Id.*** On the verdict form the court typed in the answer "yes" to the question pertaining to this element, and the jury did not answer this question. ***Id.***

¶22 We concluded in ***Allen J.*** that the differences between those facts and the facts in ***Andrea L.O.*** were significant because in ***Allen J.*** the prior court order was never entered into evidence and the testimony on the previous court order was not specific. ***Id.***, ¶14. In addition, while the parent in ***Allen J.*** was present when his attorney agreed to the stipulation, there was nothing in the record suggesting that the parent understood or agreed to it, unlike in ***Andrea L.O.*** ***Id.***, ¶15. For these reasons we decided that ***Andrea L.O.***'s "narrow holding [was] inapplicable …." ***Id.***, ¶16.

¶23 We also concluded in ***Allen J.*** that, "in the absence of a more specific directive from our supreme court, we ought to apply the principals of ***N.E.*** and ***S.B.*** to this case," noting that "[t]he TPR statute allows a parent to demand a jury trial but does not provide a means to withdraw such a demand." ***Id.*** We reasoned that, "[i]n view of the seriousness of the state action involved in a TPR, the courts should ensure that the individual's rights in such a proceeding are not waived involuntarily or without adequate understanding." ***Id.*** We concluded that the parent had not waived his right to a jury trial knowingly and voluntarily. ***Id.*** We rejected the county's argument that any error was harmless because, we stated, there was "sparse evidence in the record on the [stipulated] element." ***Id.***, ¶17. We therefore remanded for a new trial. ***Id.***[6]

¶24 In their initial briefs the County and the guardian ad litem took the position that the stipulation in this case did not constitute a withdrawal of Emery's jury trial demand. However, in the supplemental briefing they conceded that this position was inconsistent with ***Allen J.*** Therefore the issue between the parties has been narrowed to whether the colloquy between the court and Emery was sufficient under ***N.E.*** and ***S.B.*** to establish that Emery knowingly and voluntarily waived his right to a jury trial on the stipulated element.

[6] In Emery's initial brief he relies on ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393, as well as ***N.E. v. DHSS***, 122 Wis. 2d 198, 361 N.W.2d 693 (1985), and ***S.B. v. Racine County***, 138 Wis. 2d 409, 406 N.W.2d 408 (1987), in arguing that the colloquy here was inadequate. In his supplemental brief he refers us to the argument in his initial brief without clarifying whether he is still relying on ***Hauk*** after ***Allen J.*** In view of our statement in ***Allen J.*** that "in the absence of a more specific directive from our supreme court, we ought to apply the principals of ***N.E.*** and ***S.B.*** to this case," 2008 WI App 137, ¶16, and without an argument from Emery that we may nonetheless apply ***Hauk***, we follow ***Allen J.*** and conclude that ***N.E.*** and ***S.B.*** provide the appropriate framework.

¶25 We conclude that the record establishes that Emery did knowingly and voluntarily waive his right to a jury trial on the stipulated issue. After hearing from Emery's counsel that he had discussed the stipulation with Emery and that "there was no dispute," the circuit court addressed Emery personally. The court first ascertained, through a detailed series of questions, that Emery's ability to understand the proceeding was not impaired by illiteracy, alcohol, drugs, or medications and that he had been able to talk to his attorney and represent his concerns to his attorney. The court then explained that it was being asked to accept the stipulation and it explained the terms of the stipulation. In response to the court's question whether he understood that, Emery said he did. In response to the court's question whether Emery agreed that the court could consider that the order that was the subject of the stipulation was "in effect and in existence," Emery said he agreed. The court then confirmed Emery's answers by asking Emery's attorney whether he believed Emery's stipulation was knowing and voluntary and his attorney said he did believe that. The court's next statement—"So, I'll instruct the jury that indeed there is a Court order which contained the termination of parental rights notice"—explains the effect of the stipulation: the jury will be instructed that it is true.

¶26 Emery contends that the court's colloquy with him was inadequate because the court did not explain that he had a right to a jury trial on the element he was stipulating to and did not ascertain that, by agreeing to the stipulation, Emery was agreeing to have this issue taken from the jury. We disagree. Looking at what the court *did* ask and *did* explain and what Emery answered, we are satisfied that the record shows that Emery understood that without the stipulation the jury would decide whether there was such a prior order, that with the stipulation the jury would be told by the court there was such a prior order, and

that he did not have to agree to the stipulation but was choosing to do so. We find nothing in ***Andrea L.O.***, ***Allen J.***, ***N.E.***, or ***S.B.*** that indicates that this personal colloquy was inadequate because the court did not specifically refer to Emery's right to a jury trial on this element and ask if he understood that by entering into the stipulation he was waiving that right.

CONCLUSION

¶27 We conclude Emery knowingly and voluntarily waived his right to a jury trial on the element to which he stipulated. Accordingly, we affirm the orders terminating his parental rights to Noah and Emery, Jr.

By the Court.—Orders affirmed.

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