COURT OF APPEALS DECISION DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1582

Cir. Ct. No. 2006TP38

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN RE THE TERMINATION OF PARENTAL RIGHTS TO BRELL B.J., A PERSON UNDER THE AGE OF 18:

RACINE COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

BRYANT A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed.*

¶1 ANDERSON, P.J.[1] Bryant A. claims his trial counsel was ineffective for multiple reasons and the circuit court erred when it refused to vacate a partial summary judgment holding that he had failed to assume parental responsibility for his son Brell J. and order a fact-finding hearing. We disagree and affirm.

¶2 A petition to terminate Bryant's parental rights to Brell, born February 2, 2006, was filed on May 31, 2006, asserting Bryant's failure to establish a parental relationship with Brell.[2] WIS. STAT. § 48.415(6). Bryant

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[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 states in part:

> **Grounds for involuntary termination of parental rights.** At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(6)** FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which 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.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

entered an appearance and filed a demand for a jury trial for the fact-finding hearing to determine if grounds exist for termination of his parental rights.

¶3 Racine County filed a motion for partial summary judgment accompanied by affidavits from the case managers responsible for Brell, setting forth evidentiary facts establishing the grounds for the termination of Bryant's parental rights. Bryant filed a response to the motion, but it was not accompanied by any evidentiary affidavits. The circuit court granted the County's motion; it found that Bryant had failed to establish any factual dispute that would justify a jury trial.[3] The court then scheduled the dispositional hearing.

¶4 The dispositional phase was conducted over a number of different days. During the dispositional hearing, Bryant filed a motion for reconsideration of the decision granting partial summary judgment. He relied upon ***State v. Bobby G.***, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81, released after the court granted the County's partial summary judgment motion and while the dispositional hearing was being conducted. ***Bobby G.*** established the proposition that

> [i]n examining whether grounds for termination of parental rights exist[s] … under Wis. Stat. § 48.415(6), the circuit court [must] consider [the parent's] efforts to assume parental responsibility for [the child] after [the parent] learned he was the biological father but before the grounds for termination were adjudicated.

Bobby G., 301 Wis. 2d 531, ¶4. Bryant argued that the partial summary judgment was granted on evidence of his attempts to establish a relationship up to the date of the filing of the termination of parental rights (TPR) petition, and he had relevant

[3] A default judgment was entered against Brell's biological mother, Roseanna J., on July 13, 2006.

evidence, learned during the ongoing dispositional hearing, that he made attempts to establish a relationship with Brell after he had been placed with a foster family, and that evidence should have been considered.

¶5 The circuit court ruled that it would continue the dispositional hearing and permit additional testimony on the grounds for termination of parental rights from the County and Bryant to be presented during the dispositional hearing. The court stated that at the conclusion of the dispositional hearing, it would revisit the partial summary judgment motion and decide if the grounds for termination of Bryant's parental rights existed.

¶6 After all the testimony had been completed in the dispositional phase, the court held a hearing for it to deliver an oral decision. At that hearing, the court explained why, because of ***Bobby G.***, it would first address the grounds phase.

> The [Supreme] Court … held that in determining whether a party seeking a termination of parental rights has proven by clear and convincing evidence that biological father has failed to assume parental responsibility under [WIS. STAT. §] 48.415(6), a court must consider biological father's efforts undertaken after he discovers that he is the father, but before the Court adjudicates the grounds in the termination proceeding.
>
> The [Supreme] Court further held that as a matter of sound judicial administration a circuit court should make determinations on parental rights with access to the fullest information concerning biological parents, and children, including information on whether the parent has assumed parental responsibility up to the hearing on the grounds for termination.

¶7 The court went on to provide a comprehensive summary of the evidence relevant to the grounds supporting termination. Included was evidence of Bryant's attempts to assume responsibility up to the dispositional phase of the

proceedings. At the conclusion of this synopsis, the court proceeded to carefully consider the factors found in WIS. STAT. § 48.415(6)(b) and additional factors that it believed were significant. The court concluded:

> Applying the undisputed facts to the law, I find that the State has met its burden of proof. The clear and convincing evidence is that [Bryant] has failed to assume parental responsibility and that he has not had a substantial relationship with Brell.

The court then thoroughly reviewed the evidence relevant to disposition and concluded that it was in the best interest of Brell to terminate the parental rights of Bryant and his biological mother.

¶8 Bryant filed a motion to vacate the judgment asserting that he received ineffective assistance of counsel. Specifically, he claimed that trial counsel was ineffective for (1) not filing evidentiary affidavits in opposition to the County's motion for partial summary judgment; (2) not filing evidentiary affidavits when she filed the motion for reconsideration; (3) failing to argue that the County prevented Bryant from assuming parental responsibility; and (4) not objecting to the court's decision to hear additional testimony relevant to the grounds phase during the dispositional phase hearings.

¶9 After a ***Machner***[4] hearing was conducted, the court addressed all of trial counsel's alleged errors. First, the court found counsel was deficient for not filing affidavits in opposition to the partial summary judgment motion, but Bryant was not prejudiced because as soon as ***Bobby G.*** was released, counsel filed a motion for reconsideration. Second, because the court allowed additional

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

testimony relevant to the grounds for termination when it granted the motion for reconsideration, counsel was not ineffective for failing to file affidavits. Third, the court held there was no evidence that the County blocked Bryant's attempts to have a relationship with Brell. Finally, the court found no prejudice to Bryant by the procedure of hearing additional testimony on the grounds for termination during the dispositional phase of the proceedings. The court denied Bryant's motion to vacate the judgment.

¶10 Bryant appeals, pursuing his claim that trial counsel was ineffective. He also asserts the circuit court erred as a matter of law when it failed to vacate the partial summary judgment it granted and order a new trial on the grounds for termination.

¶11 Because the circuit court's hearing evidence on the grounds during the dispositional phase impacts on Bryant's ineffective assistance of counsel claim, we will consider the issues he raises in reverse order. As we understand his argument, he is complaining that the "hybrid" hearing conducted by the court after concluding that ***Bobby G.*** required it to consider Bryant's efforts to establish a parental relationship up to the hearing denied him a right to a jury trial in the grounds portion of the proceeding.

¶12 We believe that our decision is guided by ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768. In ***Evelyn C.R.***, the circuit court entered a default judgment against Tykila as a sanction for not appearing, without taking any evidence on the grounds asserted for TPR, abandonment. ***Id.***, ¶¶9, 16. Midway through the dispositional hearing, Tykila appeared by telephone and other than uttering a few words, she contributed nothing to the proceedings. ***Id.***, ¶12. At the conclusion of the dispositional hearing, the circuit court made a specific

finding reaffirming that the ground of abandonment was proven. ***Id.***, ¶13. The circuit court went on to order the termination of Tykila's parental rights and we affirmed on appeal. ***Id.***, ¶¶13-14.

¶13 A single issue was raised for review in the supreme court: "Did the circuit court err in entering a default judgment on the issue of abandonment without first taking evidence sufficient to support a finding of abandonment by clear and convincing evidence?" ***Id.***, ¶16. The supreme court agreed with Tykila that the circuit court erred in entering the default judgment against her without first taking evidence. ***Id.***

¶14 However, the supreme court did not reverse the TPR order. It applied the harmless error analysis to the case, holding:

> [B]ecause the record—when examined in its entirety—reveals that prior to reaffirming the default judgment and issuing the order terminating Tykila's parental rights, the circuit court had taken and considered evidence sufficient to support its finding of abandonment, the circuit court's procedural error was harmless. Therefore, we affirm the decision of the court of appeals, which upheld the circuit court order terminating Tykila's parental rights to Jayton.

Id., ¶36.

¶15 In the present case, the circuit court erred in finding that Bryant had failed to assume parental responsibility for Brell at partial summary judgment. Although partial summary judgment is permitted at the grounds phase of TPR proceedings, the supreme court has cautioned:

> [I]n many [termination of parental rights] cases, the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child.

Bobby G., 301 Wis. 2d 531, ¶40 (citation omitted). The court has further explained that partial "summary judgment will ordinarily be inappropriate in [termination of parental rights] cases premised on these fact-intensive grounds for parental unfitness." ***Id.*** (citation omitted). The court has identified WIS. STAT. § 48.415(6) as a fact-intensive ground probably not suited for partial summary judgment, but the court has not held that this ground could never form the basis for partial summary judgment. ***Id.*** The court has instead stressed that "[t]he propriety of partial summary judgment is determined case-by-case." ***Bobby G.***, 301 Wis. 2d 531, ¶40 (citation omitted).

¶16 However, the circuit court recognized its error when Bryant brought ***Bobby G.*** to its attention. And, as the court in ***Evelyn C.R.***, the circuit court attempted to correct its error by giving the parties wider latitude to present evidence on the ground for TPR during the dispositional phase. We will follow ***Evelyn C.R.*** and apply a harmless error analysis to determine if we have to reverse because the circuit court erroneously exercised its discretion when it granted partial summary judgment.

¶17 An erroneous exercise of discretion does not result in reversal or a new trial unless "the error complained of has *affected the substantial rights* of the party seeking to reverse or set aside the judgment, or to secure a new trial." ***Evelyn C.R.***, 246 Wis. 2d 1, ¶28 (citation omitted).

> For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. If the error at issue is not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless.

Id. (citations omitted).

¶18 In the present case, the circuit court did not simply reaffirm partial summary judgment; rather, it made a specific finding, "The clear and convincing evidence is that [Bryant] has failed to assume parental responsibility and that he has not had a substantial relationship with Brell." And it only made this finding after a painstaking review of the evidence. The record contains sufficient facts to support this finding that Bryant failed to establish a parental relationship with Brell. First, Bryant only visited Brell two or three times during his two and one-half weeks in the hospital after being born prematurely. Second, Bryant stopped contacts with Brell after the baby's biological mother said Bryant was not the father. Third, Bryant did not voluntarily take steps to establish paternity and was only declared the biological father after a court proceeding. Fourth, Bryant was incarcerated for a significant period of time from Brell's birth to the dispositional phase of these proceedings. Fifth, while Bryant wrote letters to the case managers, foster parents and Brell, it was over a period of twenty months. Sixth, there is no evidence that Bryant bought toys, clothing, formula or diapers for the case managers to give to Brell or the foster parents.

¶19 In addition, the circuit court weighed these facts in a detailed and lengthy bench decision—that represents a careful exercise of discretion—before finding that there was clear and convincing evidence that Bryant failed to assume parental responsibility. Therefore, we hold that the circuit court's granting of partial summary judgment, followed by taking additional evidence on the grounds for termination during the dispositional phase fails to undermine our confidence in

the outcome of these TPR proceedings. Accordingly, we conclude the circuit court's procedural errors were harmless.[5]

¶20 Next, we turn to the ineffective assistance of counsel issue. Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). To prevail, Bryant must show both that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense against the County's TPR petition. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992). The circuit court's findings regarding what counsel did and did not do, and counsel's reasons for the challenged conduct, are factual matters that we will uphold unless clearly erroneous. ***Johnson***, 133 Wis. 2d at 216. Whether the attorney's performance was deficient and prejudicial, however, are questions of law we decide de novo. ***Id.***

¶21 We agree with the circuit court that trial counsel performed deficiently when she failed to file any evidentiary affidavits in opposition to the County's summary judgment motion. We also agree with the circuit court that Bryant was not prejudiced because after ***Bobby G.*** was brought to the court's attention, the court gave him wide latitude to introduce evidence on the ground for termination. The reconsideration motion was based on a new statement of law in ***Bobby G.***; therefore, it did not have to be supported with evidentiary affidavits and

[5] Bryant contends that the procedure the circuit court adopted deprived him of his right to a jury trial. However, Bryant fails to develop this argument or cite to legal authority in support of the argument; therefore, we decline to address this issue because it is inadequately briefed. ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

counsel was not deficient for failing to file such affidavits along with the motion for reconsideration.

¶22 We agree with the circuit court that in the third instance of ineffective assistance—failing to argue the County prevented Bryant from establishing a parental relationship—the record does not support such an argument. Therefore, counsel did not provide ineffective assistance of counsel. Finally, because we have concluded that the procedural errors committed by the circuit court are harmless errors, there is no prejudice to Bryant; therefore, there is no ineffective assistance of counsel.

¶23 In summary, Bryant has failed to establish ineffective assistance of counsel. And we remain confident that the outcome of these proceedings was not effected by the procedural errors of the circuit court and will not reverse the order terminating parental rights.

By the Court.—Order affirmed.

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