COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1320 **Cir. Ct. No. 2004TP285**

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

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BOBBY G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Bobby G. appeals from an order terminating his parental rights to Marquette S. on the grounds that his trial counsel was ineffective for failing to raise an objection to WIS. STAT. § 48.415(6) as unconstitutional as applied to him.[2] Bobby first argues that the statute deprived him of his constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because, as he characterized it, he was given no opportunity to know or parent his child before his rights were terminated. Next he argues that his trial counsel was ineffective for failing to object to the termination of his parental rights on these constitutional grounds.

¶2 The State argues that the statute is not unconstitutional as applied to Bobby because Bobby's actions, not the State's, caused Bobby to fail to develop a parental relationship with Marquette. The State contends Bobby's trial counsel was not ineffective for failing to raise the constitutional issue because it is without merit.

¶3 We agree with the State that Bobby failed to establish a relationship with his child. As a result, he had no fundamental liberty interest in his child that would implicate the protections of due process and equal protection. We conclude

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We note that Bobby's statement of the issue lacks clarity. He never specifically stated *which* statute he contends is unconstitutional. This created confusion because two grounds were established for terminating Bobby's parental rights: failure to assume parental responsibility under WIS. STAT. § 48.415(6) and prior termination of parental rights within three years, under § 48.415(10). Bobby failed to address, in either his brief-in-chief or his reply brief, the fact that there were *two* distinct grounds found to terminate his parental rights. He neglected to do so even after the State and guardian *ad litem* raised the question. Bobby never clarified whether his constitutional argument applied to one or both grounds. Based on our review of his arguments, we conclude that his constitutional claim addresses the failure to assume ground only.

that the statute is not unconstitutional as applied to Bobby because terminating his parental rights under the circumstances here is rationally related to the goal of the statute, which is the protection and nurturing of children in a stable home. We further conclude that Bobby's trial counsel was not ineffective for failing to make a meritless argument. Accordingly, we affirm.

BACKGROUND

¶4 Bobby met Denise W. when both were being transported to the Milwaukee Children's Court Center for hearings involving other children. Both were incarcerated at the Milwaukee County Jail at the time. In December 2002 both were released from incarceration. In January 2003, after his release from custody, Bobby contacted Denise. He was living then with his girlfriend, Jacqueline Brown, in her house.[3] Bobby and Denise got together in January 2003, their one and only meeting, and engaged in unprotected sexual intercourse. Bobby testified he made three trips to Denise's home after that, all during January 2003, never finding anyone at home. On the last trip, a neighbor told him that Denise had moved.

¶5 After his January 2003 attempts to find Denise at her home, Bobby made no other attempts. When Bobby and Denise had unprotected sex in January 2003, Bobby was out of jail on a signature bond relating to a retail theft charge. That one sexual encounter with Denise led to the conception of Marquette. During

[3] In his answers to interrogatories, Bobby listed his residences and the dates he resided in them as follows: December 2002 to January 2002 [sic], Fox Lake Correctional; December 2002 to September 2003, 28th and Chambers in Milwaukee (which was Jacqueline Brown's residence); September 2003 to April 2004, 4030 28th Street in Milwaukee; and April 28, 2004 to the date he signed the answers to the interrogatories, June 2, 2005, Fox Lake Correctional Facility.

Denise's pregnancy, Bobby failed to report to the House of Correction for the start of his sentence on the retail theft charge, causing him to be jailed on the commitment. During that same time period prior to Marquette's birth (January 2003 to summer of 2003), Bobby was on parole[4] from an earlier charge (not the retail theft), and was initially placed in a temporary living program by his parole agent, but was kicked out for rule violations. He started using marijuana again sometime in the summer of 2003, just prior to Marquette's birth.

¶6 Meanwhile, Denise gave birth to Marquette on August 31, 2003. He was born six to eight weeks premature, with serious medical conditions and was detained by social workers immediately upon his release from the hospital, on September 12, 2003, due to Denise's history of child abuse of her other children. Her rights were later terminated. Marquette was immediately placed in the foster home that he has remained in ever since.

¶7 A few weeks before Marquette's birth, Bobby was charged with battery involving domestic violence of Jacqueline Brown. On August 14, 2003, he was ordered to have no contact with Brown. Yet, he continued to live with her until September 2003.[5] Bobby failed to appear for court dates twice, was returned to the court on the warrants and was in and out of jail. He picked up a new charge of bail jumping for having contact with Brown on January 30, 2004 in violation of the no contact order in the pending battery case. On February 6, 2004, Bobby pled

[4] At some points in the testimony, the State and Bobby refer to him being on "parole," and at other times refer to him being on "probation." This discrepancy is not pertinent to our disposition of this case.

[5] In Bobby's interrogatory answers, he reported that he lived at 28th and Chambers until September 2003 and then lived at 4030 North 28th Street from September 2003 until April 2004. It is unclear whether or not these are the same residences.

guilty to a reduced charge of disorderly conduct and bail jumping and was sentenced to sixty days in the House of Correction. He was released from jail on April 14, 2004.

¶8 While Bobby was entangled in his battery and bail jumping cases, on September 12, 2003, the Bureau of Milwaukee Child Welfare started the CHIPS case regarding Marquette. On April 13, 2004, the trial court found Marquette to be a child in need of protection or services under WIS. STAT. § 48.13 (2003-04).

¶9 Bobby testified that after being released from jail following the domestic violence cases on April 14, 2004, he started selling drugs. He was arrested fourteen days later, on April 28, 2004, for delivery of cocaine. While he was in jail awaiting trial on the cocaine charge in August 2004, he was advised by a social worker from the Bureau of Milwaukee Child Welfare that he was a potential father of Denise's child. After first naming two men who were later excluded as the fathers of Marquette in June 2004, Denise finally identified "Bobby" whose last name she did not know. The petition for termination of parental rights (TPR) was filed on June 16, 2004 as to Denise, "Bobby" and "any unknown father." By August 24, 2004, which was the second court appearance on the petition, the social worker had figured out Bobby's last name and had located him at the House of Correction. Bobby was brought to court where the termination of parental rights summons was served on him. This first TPR petition alleged only one ground for termination, that of WIS. STAT. § 48.415(6) (2003-04), failure to assume parental responsibility. A genetic test was ordered on September 21, 2004, and the test later revealed that Bobby was the father of Marquette.

¶10 Just before his August 24, 2004 appearance in court on the TPR, Bobby pled guilty to delivery of cocaine on August 16, 2004. He remained in custody awaiting his sentencing. On October 1, 2004, Bobby was sentenced to thirty months in prison for delivery of cocaine. Meanwhile, on November 24, 2004, Bobby was adjudicated the father of Marquette and the TPR case was adjourned to allow Bobby to obtain counsel.

¶11 On September 1, 2005, while Bobby was serving his delivery of cocaine prison sentence, the first trial court[6] granted the State's partial summary judgment motion on the ground that Bobby failed to establish a parental relationship. The trial court had admitted evidence of Bobby's efforts only up to the time of the filing of the TPR on June 16, 2004. On October 25, 2005, the trial court held the first dispositional hearing and on November 4, 2005, the trial court ordered Bobby's parental rights terminated.

¶12 Bobby's testimony at the October 25, 2005 dispositional hearing about his attempts to establish a relationship with Marquette was that after he was told he was a father, while he was in jail and prison, he sent a total of about nine letters to social workers trying to see Marquette. He also sent Marquette a pair of shoes in May 2005 and a $25.00 money order two months before the October 25, 2005 dispositional hearing.

[6] The Honorable Thomas R. Cooper was the judge originally assigned to this case. After the supreme court reversed and remanded the matter, the Honorable William S. Pocan was assigned due to judicial substitution. He kept the case through disposition. The Honorable Christopher R. Foley was the judge assigned for the postdisposition motion due to regular judicial rotation.

¶13 Bobby's trial counsel testified at the second dispositional hearing that she had asked the first trial court, at Bobby's request, if he could see Marquette. She made this request without any formal motion, off the record, at a status appearance in chambers. The trial court indicated to counsel that a visit was unlikely since the child had never seen Bobby and Bobby was in custody. Neither Bobby nor counsel pursued it further by filing a visitation motion. At the postdispositional ***Machner***[7] hearing, Bobby's counsel testified that Bobby asked her if he could have a "drive-by" view of Marquette, but counsel told him they would need to file a formal visitation motion and Bobby never asked that such a motion be filed.

¶14 Bobby's appellate attorney filed a no-merit report, which we accepted on April 25, 2006. We affirmed the TPR order. On May 23, 2006, Bobby filed a letter with the supreme court, which was treated as a petition for review. The supreme court granted the petition, and in a decision dated June 22, 2007, reversed the court of appeals, ruling that the trial court had erred in granting summary judgment on the failure to assume parental responsibility grounds by limiting the evidence of Bobby's efforts at establishing a relationship to the time period that ended with the filing of the petition for termination of parental rights. ***State v. Bobby G.***, 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81. The supreme court held that, on remand, at the new grounds trial under WIS. STAT. § 48.415(6), the trial court must consider the father's efforts to establish a relationship all the way to the start of the new grounds trial. ***Id.***, ¶5. Although constitutional arguments were made to the supreme court, it did not reach the constitutional

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

issue. ***Id.***, ¶3. Additionally, the supreme court held that there were material factual disputes. ***Id.***, ¶5.

¶15 After the supreme court remanded the case, the State filed a petition for termination of parental rights on July 10, 2007, alleging two grounds this time, WIS. STAT. § 48.415(6) (failure to assume parental responsibility) and WIS. STAT. § 48.415(10) (prior involuntary termination of parental rights to another child within three years). From October 22 to 24, 2007, the trial court held the grounds trial on the new petition. After the close of the testimony, the State asked for a directed verdict on the prior termination within three years ground. The guardian *ad litem* joined in the request. The court granted a directed verdict on that ground. On October 24, 2007, the jury returned a verdict finding that Bobby had failed to assume parental responsibility.

¶16 Bobby's testimony at the grounds trial in October 2007 as to his attempts to establish a relationship with Marquette was similar to his previous testimony from two years earlier, but he added some new attempts at contact. He testified that from October 25, 2005 to October 2007, although he made no further attempts to contact any of the social workers, he sent five or six letters to the foster parents after finding their address. He repeated his testimony from the first dispositional hearing that he had sent gifts, but this time he said he sent three pairs of tennis shoes (two more than he testified to in October 2005) and an outfit.

¶17 As to his efforts to make himself physically, emotionally and psychologically available to assume a relationship with Marquette, Bobby testified that he completed a twelve-week parenting class and a drug and alcohol abuse class while in prison. He admitted that although he had been given a chance to complete his prison sentence early through the Earned Release Program, he was

terminated from the program for noncompliance with expectations. He was eventually released from prison in October 2006 when the petition for review was pending before the supreme court.

¶18 After his release from prison in October 2006, he testified that he was placed in transitional living, where he stayed for three hours before he left to get a haircut and never came back. He was subsequently arrested when the car he was riding in was stopped by police. He gave the police a false name, but after fingerprinting, his identity was discovered and he was re-incarcerated. While he was in absconder status, he admitted that he used cocaine and marijuana, which he purchased with his prison savings.

¶19 After his re-arrest, Bobby was given an alternative to revocation at a halfway house. He testified that while there he did participate in four or five group sessions of a fatherhood initiative. But he testified that he got tired of being at the halfway house and, in a signed statement for his agent, admitted he left to "get high." By the time of the October 2007 grounds trial, Bobby was again out of custody,[8] on an alternative to revocation.

¶20 On February 15, 2008, the trial court held the dispositional hearing and on February 28, 2008, it found Bobby unfit and concluded that it was in Marquette's best interests to terminate Bobby's parental rights. Bobby appealed and his appointed counsel requested that the case be remanded to the trial court for a ***Machner*** hearing. By the time of the September 3, 2008 ***Machner*** hearing, Bobby was again in custody. At the ***Machner*** hearing, Bobby argued that trial

[8] Bobby was incarcerated at the Milwaukee County Jail ten times from Marquette's conception in January 2003 to the October 23, 2007 grounds trial.

counsel was ineffective on several grounds, including the failure to object to termination on the grounds that the statute was unconstitutional. On September 11, 2008, the trial court denied the postdispositional motion in a written decision and order. Bobby appeals that decision only with respect to trial counsel's failure to object to termination on constitutional grounds.

¶21 During all of this time since his birth, Marquette has lived with the same foster family. When Marquette was born, he was six to eight weeks premature and had many medical problems. It was later determined that he had significant developmental problems as well. The guardian *ad litem*, in her brief, describes his many continuing challenges:

> He was born with bronchiolitis reactive airway disease, a significant respiratory condition, as well as pneumonia. For his first six months, he needed around-the-clock medical care, including nebulizer treatments every two or three hours. He needed outpatient treatment at least monthly. At nine months, he could not maintain his nutrition and he regressed developmentally. He was hospitalized and found to have problems with food aspiration; severe reflux; allergies to many foods, including soy, eggs, peanuts and milk; and an intolerance for lactose. After this hospitalization, Marquette was enrolled in a Birth-to-Three Program where he began physical, occupational and speech therapies. Marquette continued to battle chronic medical conditions, including his environmental and food allergies, his susceptibility to infection and his ongoing nutritional issues.
>
> Marquette's medical and developmental challenges have persisted. As of the October 2007 TPR trial, Marquette continued to have cognitive and speech delays as well as serious behavioral issues. His foster parents tried to arrange treatment by a behavioral therapist. By then, at age four, Marquette was in an early childhood program, a special education class, and continued to receive speech and physical therapy. He was still not toilet-trained. Testing indicated he was about a year behind in his speech and cognitive abilities. Marquette still needed treatment by a psychiatrist or psychologist specializing in pediatric

> behavioral issues as of February, 2008.[9] His speech disability continued, along with his limited ability to understand and communicate. (Record citations omitted; footnote in original.)

Marquette is now over five years old.

DISCUSSION

I. Whether Wis. Stat. § 48.415(6) is unconstitutional as applied to Bobby G.

¶22 Bobby argues on appeal that his constitutional rights were violated because he was never allowed an opportunity to parent Marquette before his rights were terminated. He argues that he never knew he was Marquette's father until months after the petition for termination was filed and by then he was incarcerated. He claims that the State and the court never allowed him to see Marquette, never allowed him to participate in the CHIPS action, and never offered him services. He argues that he repeatedly tried to contact Marquette's mother, Marquette's caseworkers and Marquette's foster parents requesting visitation and photos. He states that he enrolled in a drug and alcohol abuse class and parenting classes in prison. And he claims he sent Marquette a pair of shoes and a $25.00 money order. Despite his attempts, he states that he was prevented from ever seeing Marquette or establishing a relationship with him. For that reason, Bobby argues that WIS. STAT. § 48.415(6) is unconstitutional as applied to him under the Due Process and Equal Protection Clauses.

¶23 The State and the guardian *ad litem* respond that it was not the State's actions that prevented Bobby from establishing a relationship with

[9] Bobby G. refused to sign a consent form for such treatment.

Marquette, rather it was Bobby's actions and inactions that did so. The State and guardian *ad litem* point out that Bobby became a father because he, not the State, chose to have unprotected sexual intercourse with Marquette's mother, Denise. Afterwards, Bobby did little or nothing to find Denise to determine if he had conceived a child. They point out that Bobby never enrolled on the Wisconsin Registry of Paternal Interest. Bobby repeatedly chose to engage in criminal behavior causing him to be charged, convicted and incarcerated several times after Marquette's conception and birth, and as the TPR case worked its way through the courts. Bobby repeatedly used drugs and violated rules of probation or parole even after he knew he was the father of Marquette and did nothing other than a twelve-week parenting class in prison to learn how to parent Marquette, a child with significant medical and developmental problems. Finally, the State and guardian *ad litem* note that Bobby never filed a visitation motion.

¶24 After his October 2007 jury trial resulted in a verdict that Bobby had failed to assume a parental relationship with his child, the trial court found him unfit and concluded it was in Marquette's best interest to terminate Bobby's rights. Bobby filed a postdisposition motion asking for a ***Machner*** hearing on various claimed deficiencies of trial counsel, only one of which was appealed here. The ***Machner*** claim, which forms the basis for this appeal is that his trial counsel was ineffective for failing to object to the constitutionality of WIS. STAT. § 48.415(6), as applied to Bobby. At the postdisposition evidentiary hearing, the trial court found that Bobby's trial counsel was not deficient because there was no constitutional violation. The trial court found that Bobby had no fundamental liberty interest in his relationship with Marquette due to the fact he had never established a parental relationship.

A. Standard of Review

¶25 Whether a statute is unconstitutional is "a question of law that this court reviews de novo." ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. In reviewing the constitutionality of a statute, there is a strong presumption that it is constitutional. *See* ***Bachowski v. Salamone***, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987). In a challenge that a statute is unconstitutional as applied, the challenger must show that the legislative presumption of constitutionality is void given the particular facts of his case and must do so beyond a reasonable doubt. *See* ***State v. Joseph E.G.***, 2000 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W. 2d 137.

B. Due Process Claim

¶26 The constitutional right to substantive Due Process under the Fourteenth Amendment protects against State actions "that are arbitrary and wrong, 'regardless of the fairness of the procedures used to implement them.'" ***Monroe County DHSS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831 (citation omitted). The test of whether a statute violates substantive due process depends on whether a liberty interest is implicated. If so, the test is the "strict scrutiny" test, that is, whether the statute is "narrowly tailored to advance a compelling state interest that justifies interfering with a [person's] fundamental liberty interest." ***Id.***, ¶17. If a fundamental liberty interest is not implicated, then the test is the "rational basis" test, that is, whether the statute "bears a rational relation to some legitimate end." ***Id.*** The parties do not agree as to whether a liberty interest is implicated here.

¶27 The first question here then is whether Bobby has a fundamental liberty interest in his relationship with Marquette. Because Bobby's challenge to

the statute is, *as applied*, we review the facts in this record to determine whether under the facts here, Bobby has shown that he has a fundamental liberty interest that implicates constitutional protection. Bobby does not challenge any of the facts in this record, nor does he challenge the sufficiency of the evidence to support the jury or the trial court's findings. The factual findings consist of the jury's verdict that Bobby failed to establish a relationship with his child and the trial court's finding that Bobby was unfit. The trial court concluded that under the facts in the record, termination was in Marquette's best interest. We accept the trial court's underlying findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Here, there is no challenge to the findings of fact. If the facts are undisputed, this court is not bound by the findings of the trial court. *See* ***State v. Williams***, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981). Accordingly, we review the facts in the entire record to determine whether the statute is constitutional as applied.

¶28 Here Bobby claims that he, as a biological father, has a fundamental liberty interest in establishing a parental relationship with his biological son, citing ***Stanley v. Illinois***, 405 U.S. 645 (1972). The State and guardian *ad litem* respond that under ***Lehr v. Robertson***, 463 U.S. 248 (1983) and other cases, biology alone does not convey a liberty interest. ***Id.*** at 261. It attaches only where a biological father has established a relationship with his child. ***Id.*** at 256-63. In his reply brief, Bobby states he is not challenging the holding of ***Lehr***; rather, he is distinguishing his case from ***Lehr*** because the State *prevented* him from establishing a relationship with his child.

¶29 The thrust of his argument is that because the State did not tell him he was a father until he was incarcerated and because he claims he was then never allowed to see Marquette, the State has prevented him from establishing a

relationship with Marquette. Resolution of this question turns on whether the facts in the record support his view that the State *prevented* him from knowing he was a father and then *prevented* him from establishing a relationship with Marquette. We conclude, for the reasons following, that the record does not support Bobby's characterization of the facts.

¶30 The United States Supreme Court has determined that biology alone does not create a fundamental liberty interest. ***Id.*** In ***Lehr***, the United States Supreme Court, after citing ***Caban v. Mohammed***, 441 U.S. 380, 392 (1979), held that the "mere existence of a biological link does not merit equivalent protection [under the Due Process Clause]." ***Lehr***, 463 U.S. at 261. Additionally, the Supreme Court in ***Lehr*** held that the putative father's equal protection rights were not violated because he had never established a substantial relationship with his child, ***Lehr***, 463 U.S. at 267, (citing ***Quilloin v. Walcott***, 434 U.S. 246 (1978)). The Court noted that the rights of parents to their children are a counterpart to their responsibilities for care, custody and nurturing their children. ***Lehr***, 463 U.S. at 257. While acknowledging that the Constitution affords protection to the relationship between a natural parent and their child born out of wedlock, the Court stated, "When an unwed father demonstrates a *full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child*,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause." ***Id.*** at 261 (citations omitted; emphasis added).

¶31 ***Lehr*** was an adoption case where the putative father of a child born out of wedlock was not given notice of the adoption proceedings and objected that his rights under the Due Process and Equal Protection Clauses of the Fourteenth

Amendment were violated. ***Id.*** at 250. Although the putative father knew he was a father (as contrasted with Bobby here), he never supported the child, never married the child's mother, and never entered his name on New York's Putative Father Registry. ***Id.*** at 250-52. The Supreme Court noted that after its decision in ***Stanley***, the New York legislature created a putative father registry to allow putative fathers an opportunity to demonstrate their commitment to establishing a relationship with their child. ***Id.*** at 263-64. The Court stated, "By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." ***Id.*** at 264. Because he had not demonstrated a full commitment to the responsibility of parenthood, the ***Lehr*** court found the father's interest in his child did not acquire substantial protection under due process. ***Id.*** at 260-62.

¶32 Following ***Lehr***, the Wisconsin Supreme Court, in ***L.K. v. B.B.***, 113 Wis. 2d 429, 335 N.W.2d 846 (1983), affirmed the trial court's termination of a father's parental rights, despite the fact that the father registered on the State's registry of paternal interest and had filed a petition for adjudication of paternity. ***Id.*** at 432, 436. The trial court found he had failed to establish a parental relationship because he: (1) did not provide child support or medical expense support; (2) had asked the child's mother to smuggle marijuana into the prison for him; (3) had abused the mother while she was pregnant; and (4) had not tried to contact the child. ***Id.*** at 440. These findings were affirmed by our supreme court. ***Id.***

¶33 The Wisconsin Supreme Court noted that the purpose of the statute is:

> to promote the best interest of a child while insuring that the rights of a father who has established a substantial parental relationship with the child will not be terminated. Both the state and the unwed mother may have substantial interests in terminating the parental rights of a father who had no substantial relationship with the child. The statute gives fathers incentive to provide care and support for the mother and child during pregnancy and infancy. Further it allows for a prompt determination of the status of the child so that, if desired, the child might be adopted into a family that wants a child.

Id. at 450. The court rejected the father's argument that his rights could not be terminated because he had been in prison since the child's mother's fifth month of pregnancy. ***Id.*** at 432. The court held that "the mere fact that the father of a child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under [§] 48.415(6)(a)2, Stats." ***Id.*** Although incarceration did not make it impossible for a father to demonstrate substantial relationship with his child, the court did note that it could not ignore the circumstances of the father's physical unavailability from the fifth month of pregnancy on. ***Id.*** at 442. The court noted that he chose to commit a burglary. ***Id.*** He was not absent for military duty, illness or the demands of a job. ***Id.*** Similarly, in the instant case, Bobby's physical unavailability to Marquette was largely due to his choices to commit crimes and rule violations.

¶34 Likewise, in ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 500 N.W.2d 649 (1993), the Wisconsin Supreme Court found the father's actions were insufficient to establish a parental relationship and rejected his claim that he was prevented from doing so by the court's no contact order. ***Id.*** at 681-83. In ***Ann***

M.M., the baby had been conceived when the mother was fourteen years old and the father was twenty one years old. ***Id.*** at 676. The father was charged with sexual assault and ordered to have no contact with the mother. ***Id.*** at 683. The supreme court found the record sufficient to support the trial court's finding that the father failed to assume a parental relationship where it showed that he never offered to marry the mother after he found out she was pregnant, he never offered a plan for how he was going to keep and raise the baby, did not offer the mother or child any financial support either during the pregnancy or after the birth, never responded to Ann's father's calls, and never had seen the child. ***Id.*** at 682.

¶35 The court in ***Ann M.M.*** noted that WIS. STAT. § 48.415(6)(a)2 and (b) had recently been amended and no longer required proof that the father had an opportunity and ability to assume parental responsibility for the child. ***Ann M.M.***, 176 Wis. 2d at 684 & n.5. Nonetheless, the court noted that there were "innumerable ways" the father could have demonstrated "'a full commitment to the responsibilities of parenthood'" and accepted "'some measure of responsibility for the child's future.'" ***Id.*** at 684, (citing ***Lehr***, 463 U.S. at 261-62).

¶36 The court rejected the father's argument that the no contact order unfairly prevented him from forming a relationship with his child: "Finally, we cannot ignore the fact that any roadblock to establishing a relationship with SueAnn caused by Rob's arrest, bond, and conviction was produced by Rob's own conduct." ***Id.*** at 685 (citation omitted). The same can be said for Bobby in the instant case with regard to his criminal behavior and repeat incarcerations. To whatever extent they were roadblocks to him establishing a relationship with Marquette, they were entirely Bobby's doing, not the State's.

¶37 Bobby's argument is that these cases are all distinguishable because those fathers all knew that they were fathers. He argues that the statute as applied to him is unconstitutional because he did not know he was a father until he was incarcerated and then he was prevented from seeing his child from that point on. While it is true that he learned of Marquette's birth when he was incarcerated in August 2004, he could have learned of Marquette's existence sooner and should have taken steps to do so. Also, he could have and should have taken steps while incarcerated and when released to see his child. He did not. Thus, he failed to meet his burden of demonstrating facts in the record to support his claim that the State prevented him from seeing his child.

¶38 Our review of the facts in this record shows that from the time Bobby and Denise had unprotected sex in January 2003 until the time Bobby learned he was Marquette's father on August 24, 2004, when he was served with the TPR Petition naming him as the father, Bobby had done three acts to determine if he had impregnated Denise. He went to her house three times. When a neighbor said Denise had moved, he stopped looking.

¶39 When a person has unprotected sex, there is a possibility that a child will be conceived. Bobby had an obligation to look harder to see if there was a pregnancy that resulted from his act of sex with Denise. He did not look hard in the nineteen months before he was contacted by the social worker. For example, there was no testimony from Bobby that he attempted to find Denise's address in the phone book, on the internet, through his parole agent or through CCAP. Because they met when both were incarcerated, and because of Bobby's long criminal history, he was presumably familiar with probation and parole rules and had contact with his agent. He could have sought to locate Denise that way. Similarly, he would have been familiar with and could have checked CCAP

through the public library or some other public access computer location. He looked just three times for her and then gave up.

¶40 During that nineteen months between conception and notice that he was a father, Bobby engaged in a consistent pattern of crime, rule violations, missed court and jail appearances, drug use, and drug sales. He was incarcerated at the Milwaukee County Jail seven times, charged with two new misdemeanor domestic violence cases, and one drug felony. All of these were consequences of his choices, not the State's. None of these actions were aimed at finding out whether he had fathered a child. And indeed, even with all of this, he still could have continued his search for Denise or registered on the Wisconsin Paternal Interest Registry maintained by the Wisconsin Department of Health and Family Services, *see* WIS. STAT. § 48.025, 48.27(3)(b)(1)(a) (2003-04). He did not. In the meantime, Marquette was born and developing, unaided by his biological father. A child does not stop growing and wait for a parent to have the time and inclination to find and nurture them.

¶41 On August 24, 2004, when Bobby was informed that he had fathered a child, he continued to do little or nothing to assume a parental relationship. Although the registry filing can be done up until the order terminating the father's rights, and could be done from prison, he still did not register. And even though he was in custody awaiting trial on the delivery of cocaine charge, he could have filed a motion for visitation. He did not. He wrote some letters to social workers and he asked his lawyer to ask the judge informally if he could see Marquette. But when his lawyer told him the judge was not receptive to the idea, he did nothing further. He also could have provided child support, educated himself about his child's significant medical and developmental problems, and written letters to Marquette through the caseworkers. He could have modified his behavior so that

he could have been released from jail and prison earlier. He could have obeyed the rules of the Earned Release Program and gotten out of prison sooner. And when his prison sentence was over, he could have obeyed the law and rules of parole so that he could have stayed out of jail and prison and been available to visit, support and parent his child. He did not display the "full commitment to the responsibilities of parenthood" that the Supreme Court in ***Lehr*** held is a requirement before due process attaches. ***Lehr***, 463 U.S. at 261.

¶42 Bobby had been released from prison on the drug charge in October 2006, then was in and out of prison for rule violations up until the time of the grounds trial in October 2007. During that time frame, the Wisconsin Supreme Court, on June 22, 2007, reversed and remanded his first TPR. That gave Bobby more time and a great opportunity to demonstrate efforts at establishing a relationship. Due to the remand, his rights were no longer terminated and given the holding, it was clear he had until the new grounds trial to make efforts to establish a relationship. Bobby did not take advantage of this opportunity. Instead, three hours after he was released from prison in October 2006, he walked away from the transitional living center his agent had placed him in and never came back. That was not a choice that a father makes if he is interested in establishing a relationship with his child. He was re-arrested and later was given an alternative to revocation.

¶43 In short, Bobby's actions prevented him from knowing of Denise's pregnancy and the birth of Marquette. His choices of committing crimes, violating rules, skipping court dates, and using drugs made him largely unavailable to see, support, parent or even visit his child. It was not his incarceration *alone* that prevented his relationship with Marquette, but his choices while incarcerated and on release. He never filed a motion for visitation, never sent child support, never

established a residence or a concrete realistic plan for parenting Marquette. Bobby complains that the postdispositional trial court unfairly commented on his incarceration and argued that such commentary "seem[ed] to imply that any parent who is in jail for some periods of time has no rights to know or parent their children." But he misconstrues the trial court's point. The trial court made appropriate observations of Bobby's choices, priorities and availability to his child as did both courts in ***L.K.*** and ***Ann M.M.*** referenced above. We conclude that the record shows that Bobby, through his own actions and omissions, failed to establish a substantial parental relationship with Marquette and because of that there is no fundamental liberty interest implicated here and thus no due process or equal protection violation.

¶44 Where there is no fundamental liberty interest involved, the next step in our constitutional analysis is to determine whether the statute, as applied, bears a "rational basis" to a legitimate end. The purpose of the statute, as set forth in ***L.K.*** "is to promote the child's best interest and protect a father from termination of his rights where he has formed a substantial relationship with the child. It gives the father an incentive to establish that relationship quickly in the life of the child or give the child a chance at adoption into a family willing and able to care and nurture the child." ***Id.***, 113 Wis. 2d at 450.

¶45 We conclude that terminating the rights of a father who has failed to establish a relationship bears a rational basis to the best interest of the child in proper care and nurture. Here, Bobby failed to form that substantial relationship. Bobby has never seen Marquette, never provided support, a home, or dealt with his significant medical and developmental needs. He has never offered a realistic plan for how he could parent Marquette. Marquette is now five years old and there is a family who has cared for him since his birth that is willing to adopt him.

Under these circumstances, termination of Bobby's parental rights under this statute as applied, bears a rational basis to a legitimate end, the best interest of Marquette. We conclude, therefore, that WIS. STAT. § 48.415(6) is not unconstitutional as applied.

C. Equal Protection

¶46 Bobby makes an underdeveloped equal protection argument that: "The denial of the opportunity to parent to the father where the opportunity was provided to the mother is a violation of the constitutional right to Equal Protection."[10] In ***Lehr***, the Supreme Court found that equal protection is not implicated where the father has not established a substantial relationship with the child. ***Lehr***, 463 U.S. at 267. Bobby's reply brief states that he is not disputing the holding in ***Lehr***. The facts here demonstrate that Bobby did not establish a relationship with his child. Accordingly, there is neither a due process nor an equal protection violation.

II. Whether Bobby's trial counsel was ineffective.

¶47 We next reach the second issue raised on appeal, whether Bobby's trial counsel was ineffective for failing to object to the order terminating his parental rights on the grounds that the statute was unconstitutional as applied. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were

[10] Bobby offers no facts for his implicit statement that the mother was given an "opportunity to parent," nor does he offer any authority for his equal protection argument. Although we are not required to review an inadequately briefed issue, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), we will do so here because the issue is easily resolved by the holding in ***Lehr v. Robertson***, 463 U.S. 248 (1983).

prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Bobby raises only one basis for finding trial counsel deficient: the failure to object to the termination on the grounds of a violation of his constitutional due process and equal protection rights. Because of our conclusion above that WIS. STAT. § 48.415(6) is not unconstitutional as applied, we conclude trial counsel was not deficient. Failing to raise a meritless argument does not constitute ineffective assistance of counsel. Accordingly, we affirm.

By the court—Order affirmed.

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