

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2466

Cir. Ct. No. 2007TP102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

JAYVONNE S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Reversed and caused remanded for further
proceedings.*

¶1 HIGGINBOTHAM, P.J.¹ Jayvonne S. appeals an order terminating her parental rights to her son, Jayquan J.S., following a no-contest plea to grounds for the petition and the circuit court's conclusion that termination of Jayvonne's parental rights was in Jayquan's best interest. Jayvonne seeks to withdraw her no-contest plea to grounds because her attorney provided ineffective assistance. Specifically, Jayvonne contends that her attorney provided erroneous legal advice regarding the effect contesting the petition would have upon her rights to parent her future children and that she relied on the advice in deciding to plead no contest to the grounds for the petition.

¶2 We agree that counsel's legal advice was erroneous, and therefore constituted deficient performance. Further, we conclude that counsel's deficient performance was prejudicial because Jayvonne relied on the erroneous advice in deciding to plead no contest. Because the plea was entered as a result of ineffective assistance, refusal to allow Jayvonne to withdraw her no-contest plea would be manifestly unjust. Accordingly, we vacate the termination order to allow Jayvonne to withdraw her no-contest plea and remand for further proceedings.

BACKGROUND

¶3 In November 2007, Dane County Department of Human Services petitioned to terminate Jayvonne S.'s parental rights to Jayquan. At the time, Jayvonne had two children: Jayquan, and a daughter, Ja'Marrhea. Jayvonne discovered she was pregnant with a third child sometime before March 2008.

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

¶4 The grounds for termination alleged in the petition were that Jayquan was the product of incest, under WIS. STAT. § 48.415(7), and that he was in continuing need of protection or services, under § 48.415(2). The County moved for partial summary judgment solely on the incest ground. Jayvonne opposed the motion, contending that she was the victim of the incest, and therefore § 48.415(7) did not provide grounds for the termination under *Monroe County DHS v. Kelli B.*, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831.

¶5 In an affidavit opposing the summary judgment motion, Jayvonne admitted that Jayquan was the product of incest with her half-brother. However, she further attested that, from the age of 9 to 15, she was forced to perform sex acts with her half-brother and four cousins by an uncle, who also raped her numerous times. The intercourse that produced Jayquan occurred shortly after the uncle's abuse had ended. It appears that Jayvonne was 15 or 16 at the time of the intercourse. Unbeknownst to her attorney, Jayvonne sent a letter to the court restating the averments contained in the affidavit, including the admission of incest and her history of sexual abuse.²

¶6 In March 2008, the court held a hearing that was to address the summary judgment motion. Jayvonne's attorney informed the court at the beginning of the hearing that Jayvonne had decided to enter a plea of no contest to grounds. After engaging in a colloquy with Jayvonne, the court accepted her plea. The court then asked defense counsel if it could "rely on the allegations in the

² This letter is referred to by Jayvonne's attorney in the postdisposition hearing. A copy of the letter is apparently not in the record.

petition for a factual basis” to establish grounds under WIS. STAT. § 48.415(7). Defense counsel agreed.

¶7 Jayvonne contested the petition in the dispositional phase of the proceeding. Following a hearing, the court concluded that termination of Jayvonne’s parental rights was in Jayquan’s best interest, and entered the termination order.

¶8 Jayvonne filed a postdisposition motion to vacate the termination order and to withdraw her plea, contending that the plea was based on erroneous legal advice from her attorney. The court held an evidentiary hearing on the motion. Jayvonne’s attorney testified that, immediately prior to the March 2008 summary judgment motion hearing, she gave Jayvonne a copy of a letter advising her about possible outcomes of the case. The letter urged Jayvonne to plead no contest to grounds, and included the following warning:

If you do not voluntarily agree to give [assistant corporation counsel] grounds you will be found unfit as a parent and your future children will be taken at birth. Your last chance to parent your unborn child is before the hearing on Wednesday. If you do not choose to voluntarily give [assistant corporation counsel] grounds before Wednesday, you will most likely not be able to keep any future children.

Upon reading the letter, Jayvonne told her attorney that she wanted to change her plea to no contest. Jayvonne’s attorney also testified that she had reached an agreement with assistant corporation counsel that Jayvonne would not be found unfit in exchange for her no-contest plea. Additional facts from the evidentiary hearing are provided in the discussion section.

¶9 The trial court denied Jayvonne’s postdisposition motion to withdraw her plea. In a written decision, the court rejected Jayvonne’s claim of

ineffective assistance, concluding that the performance of Jayvonne’s attorney was not deficient because her legal advice was not erroneous, and, even if it were, the error was not prejudicial because Jayvonne’s affidavit established incest, and the court would have ruled against her at the motion hearing. Jayvonne appeals.

DISCUSSION

¶10 “Although they are civil proceedings, termination of parental rights proceedings deserve heightened protections because they implicate a parent’s fundamental liberty interest.” *Brown County v. Shannon R.*, 2005 WI 160, ¶59, 286 Wis. 2d 278, 706 N.W.2d 269. The right to counsel in termination of parental rights proceedings is provided in WIS. STAT. § 48.23(2).³ This statutory right to counsel includes the effective assistance of counsel. *Oneida County Dep’t of Social Servs. v. Nicole W.*, 2007 WI 30, ¶33, 299 Wis. 2d 637, 728 N.W.2d 652.

¶11 A no-contest plea waiving a parent’s right to contest the allegations in a termination petition must be made knowingly, intelligently and voluntarily. *See Waukesha County v. Steven H.*, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W.2d 607. A motion to withdraw a no-contest plea to grounds for termination is subject to the same principles and methodology as a motion to withdraw a plea in a criminal proceeding. *See Kenosha County DHS v. Jodie W.*, 2006 WI 93, ¶¶25-26, 293 Wis. 2d 530, 716 N.W.2d 845. A person may withdraw a plea after sentencing (here, after disposition) upon a showing of “manifest injustice” by clear and convincing evidence. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50

³ As pertinent, WIS. STAT. § 48.23(2) provides that in a proceeding involving the “involuntary termination of parental rights, any parent 18 years old or older who appears before the court shall be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made.”

(1996). The manifest injustice test is rooted in constitutional concepts, requiring a showing of a serious flaw in the fundamental integrity of the plea. *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995). The right to effective assistance of counsel applies to advice regarding acceptance or rejection of a plea agreement. *State v. Fritz*, 212 Wis. 2d 284, 293, 569 N.W.2d 48 (Ct. App. 1997). Denial of the right to effective assistance of counsel when entering a no-contest plea satisfies the “manifest injustice” test. *Bentley*, 201 Wis. 2d at 311.

¶12 In examining whether counsel rendered effective assistance in an involuntary termination proceeding, we apply the two-part test set forth in *Strickland v. State*, 168 Wis. 2d 995, 1005, 485 N.W.2d 52 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the first prong of the analysis, we consider whether the attorney’s performance was deficient. *Strickland*, 466 U.S. at 687. Under the second prong, we consider whether the attorney’s performance, if deficient, prejudiced the defense. *Id.*

¶13 We review the trial court’s denial of Jayvonne’s ineffective assistance claim under a mixed standard of review, applying the clearly erroneous standard to the court’s factual findings and de novo review to the court’s conclusion that counsel did not render ineffective assistance. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

A. Deficient Performance

¶14 Jayvonne contends that her attorney rendered deficient performance in counseling her to enter a no-contest plea to grounds for the petition by giving her advice that was legally erroneous. Her attorney’s advice concerned the application of WIS. STAT. § 48.415(10) to her unborn children. Jayvonne contends that her attorney’s assertion that her “future children w[ould] be taken at birth” if

she did not enter a plea of no contest is contrary to a plain reading of § 48.415(10). We agree.

¶15 “[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” *Id.*, ¶46 (citation omitted).

¶16 WISCONSIN STAT. § 48.415(10) establishes that prior involuntary termination of parental rights to another child may serve as grounds for termination in a subsequent proceeding. Grounds are established under this subsection by proving all of the following:

(a) That the child who is the subject of the petition has been adjudged to be in need of protection or services under s. 48.13(2), (3) or (10); or that the child who is the subject of the petition was born after the filing of a petition under this subsection whose subject is a sibling of the child.

(b) That, within 3 years prior to the date the court adjudged the child to be in need of protection or services as specified in par. (a) or, in the case of a child born after the filing of a petition as specified in par. (a), within 3 years prior to the date of birth of the child, a court has ordered the termination of parental rights with respect to another child of the person whose parental rights are sought to be terminated on one or more of the grounds specified in this section.

Sec. 48.415(10).

¶17 The County argues that the trial court properly concluded that the advice Jayvonne’s attorney provided was legally correct.⁴ The trial court concluded that Jayvonne’s attorney “did understand the provisions of [WIS. STAT.] § 48.415(10).” We disagree.

¶18 WISCONSIN STAT. § 48.415(10)(b) provides that the termination of parental rights to one child “on one or more grounds specified in this section,” i.e., § 48.415, starts a three-year time period in which the termination may, if one of two possible conditions specified within § 48.415(10)(a) are also met, be used as grounds for termination to another child. WIS. STAT. § 48.415(10). The first of the conditions specified in § 48.415(10)(a) is that the child who is the subject of the petition must have been adjudged to be in need of protection or services under WIS. STAT. § 48.13(2), (3) or (10). The second of these conditions is that, if the child who is the subject of the petition is born after the filing of a petition under this subsection, i.e. § 48.415(10), that petition may be used to establish grounds to terminate as to the child born after the filing of the petition.

¶19 Jayvonne’s attorney testified at the evidentiary hearing that the warnings given to Jayvonne in the March 10, 2008 letter were based on her interpretation of WIS. STAT. § 48.415(10) and how it would likely be applied to Jayvonne’s future children, including the unborn child she was carrying at the time. In the letter, counsel warned Jayvonne that an involuntary termination of her parental rights would lead to a finding of unfitness, which would likely be used to terminate her parental rights to her future children. At the hearing, Jayvonne’s

⁴ The County mistakenly characterizes the circuit court’s conclusion that the advice of Jayvonne’s attorney was legally correct as a factual finding. It is a legal conclusion based on the court’s interpretation of WIS. STAT. § 48.415(10), a question of law we review de novo.

attorney explained that this view was based on her understanding of § 48.415(10). Specifically, counsel testified that a child whose parent has been previously found to be unfit “could be taken without proving ... that there was reasonable grounds for it.” In counsel’s view, under § 48.415(10), Jayvonne’s parental rights to her future children could be terminated “with very little basis for the [termination].” Counsel also interpreted subsection (10) to provide that the County could file a termination petition of a newly born child without first filing a CHIPS petition.

¶20 Counsel’s construction of WIS. STAT. § 48.415(10) is contrary to the plain language of the statute. In this case, Jayquan’s termination under WIS. STAT. § 48.415(7) started the three-year period running under § 48.415(10). Taking the second condition specified in § 48.415(10)(a) first, this condition was not fulfilled by Jayquan’s termination because it was not “under this subsection,” i.e. § 48.415(10), but under § 48.415(7). Neither does Jayquan’s termination satisfy the first condition, which requires a subsequent adjudication under WIS. STAT. § 48.13(2), (3) or (10). Thus, contrary to Jayvonne’s attorney’s interpretation of § 48.415(10), the termination of Jayvonne’s rights to Jayquan, standing alone, would not be sufficient to permit the County to initiate proceedings “to take [Jayvonne’s] future children at birth.”

¶21 Additionally, we find no legal support for the apparent view of Jayvonne’s attorney that a decision not to contest grounds for termination would confer some advantage to Jayvonne in future termination proceedings involving other children. An uncontested petition resulting in termination has the same legal effect for purposes of WIS. STAT. § 48.415(10) as a contested petition resulting in termination. Moreover, the agreement that Jayvonne’s attorney asserts she reached with assistant corporation counsel—that, in exchange for Jayvonne’s no-contest plea, assistant corporation counsel would not recommend that Jayvonne be

found to be an unfit parent—would have had no effect upon future terminations brought under § 48.415(10). Section 48.415(10) says nothing of “unfitness,” a term that has become synonymous with a finding of a statutory ground for termination. *Nicole W.*, 299 Wis. 2d 637, ¶11 (“The first step, the grounds or unfitness phase, includes a fact-finding hearing.”).

¶22 We therefore conclude that counsel’s legal advice to Jayvonne regarding the consequence of her no-contest plea was erroneous, and thus her attorney’s performance was deficient. *See State v. Rodriguez*, 221 Wis. 2d 487, 498-99, 585 N.W.2d 701 (Ct. App. 1998) (provision of legally erroneous advice constitutes deficient performance).

¶23 The County contends that Jayvonne cannot demonstrate that denial of her request to withdraw her plea would result in a manifest injustice. Specifically, the County points out that the termination of Jayvonne’s rights to Jayquan could be used as partial grounds under WIS. STAT. § 48.415(10) to terminate her rights to other children is a collateral consequence of her plea and that she need not understand the collateral consequence of her plea for it to be knowing, intelligent and voluntary. *State v. Santos*, 136 Wis. 2d 528, 532-33, 401 N.W.2d 856 (Ct. App. 1987). But the issue here is not that Jayvonne was not made aware of a collateral consequence of her no-contest plea; the issue is that Jayvonne was *misled* about a collateral consequence (the impact of a termination upon her rights to other children) of her plea by counsel’s erroneous legal advice. Courts have repeatedly found that provision of erroneous legal advice about a collateral consequence of a plea constitutes ineffective assistance of counsel. *See Rodriguez*, 221 Wis. 2d at 498-99.

¶24 The County also contends that counsel’s advice to enter a no-contest plea to grounds was a reasonable strategic decision based on her determination that Jayvonne’s best opportunity to prevail was at the dispositional hearing. This suggests that Jayvonne had to pick between contesting the grounds for the petition or contesting the disposition of the petition. Of course, she was entitled to contest the petition in both phases of the termination proceeding. And, as we noted, entering a plea of no contest to grounds would not have given Jayvonne any advantage in the dispositional phase of the proceeding. It therefore does not follow that, because counsel believed Jayvonne had a better chance of prevailing at disposition, it was reasonable trial strategy for her to plead no contest to grounds.

B. Prejudice

¶25 The parties dispute what the proper focus of the prejudice inquiry should be. The trial court concluded that counsel’s performance, even if deficient, was not prejudicial because, in essence, the trial court would have granted the State’s motion for summary judgment based on Jayvonne’s affidavit admission that Jayquan was the product of incest.⁵ The County contends that the trial court

⁵ The court distinguished the present case from *Monroe County DHS v. Kelli B.*, 2004 WI 48, 271 Wis.2d 51, 678 N.W.2d 831. In *Kelli B.*, the supreme court concluded that application of termination of parental rights on grounds of incestuous parentage under WIS. STAT. § 48.415(7) violated the mother’s right to substantive due process where the children were born of an incestuous relationship with her father, and the mother was a minor at the time of the intercourse. The court concluded that *Kelli B.* did not apply because Jayvonne’s affidavit established that (1) the uncle’s abuse had stopped; and (2) “[t]he respondent voluntarily engaged in sexual intercourse with her brother.” We highlight the court’s analysis only to observe that its determination that the sex act was “voluntary” does not address the question of whether application of the statute would violate Jayvonne’s right to substantive due process, given her status as a minor at the time of the intercourse (if Jayvonne was fifteen years old at the time of intercourse, she was not legally competent to consent to the act) and the specific circumstances of her abuse (whether the sex act with her half-brother was a product of the previous sexual abuse).

(continued)

properly focused its prejudice analysis on the question of whether Jayvonne was likely to prevail on the merits, and reached the correct result. Jayvonne argues that the trial court erred in determining prejudice by considering how it was likely to rule on the summary judgment motion, and instead should have confined the prejudice inquiry to whether a reasonable probability exists that, but for counsel's deficient performance, Jayvonne would not have pled no contest to the incest grounds. Jayvonne is correct.

¶26 When addressing a motion to withdraw a plea within the context of a claim of ineffective assistance, the prejudice analysis does not focus on whether the parent is likely to prevail on grounds. Rather,

[t]he “prejudice” requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the “prejudice” requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 59 (1985). Therefore, the trial court's focus on Jayvonne's likelihood of prevailing on the merits of the petition was erroneous. In assessing whether counsel's deficient performance prejudiced Jayvonne, we must determine whether there is a reasonable probability that, but for Jayvonne's erroneous legal advice, Jayvonne would not have pleaded no contest and would have insisted on contesting the petition.

¶27 The trial court made no factual findings relevant to this question. However, the uncontroverted testimony of Jayvonne and of her attorney

Jayvonne's affidavit states that she was sexually abused by her uncle from age 9 -15, and that the abuse included being forced to perform sex acts with her half-brother.

established that Jayvonne decided to plead no contest to grounds as a result of the erroneous legal advice of her attorney. The attorney testified that, prior to the March 2008 hearing, Jayvonne was “adamant[.]” about contesting the grounds for the petition. The attorney expressed “surprise” when, after reading her letter containing the erroneous legal advice, Jayvonne changed her mind and decided to enter a plea of no contest. The attorney testified that she believed Jayvonne decided to change her plea because she understood her advice about the consequences of the plea. Jayvonne testified that, after reading her attorney’s letter, she understood “that if I didn’t give grounds right then, I could lose any other children that I had.” Based on this uncontroverted testimony, we conclude that the deficient performance of Jayvonne’s attorney in providing erroneous legal advice was prejudicial because it resulted in Jayvonne’s decision to enter a plea of no contest to the incest grounds in the petition.

¶28 Finally, the County makes two arguments lacking any reasonable basis in law, which we address only for the sake of completeness. First, it contends that Jayvonne has failed to demonstrate prejudice because her attorney “stipulated” to the facts alleged in the petition as a part of entering her no-contest plea, and these facts provide an “independent basis” for a determination of grounds. The assent of counsel to the court’s use of the petition as a factual basis for a plea is not a “stipulation” constituting an “independent basis” for determining grounds. The court, as required by WIS. STAT. § 48.422(7),⁶ sought to ascertain

⁶ As pertinent, WIS. STAT. § 48.422(7) provides:

(7) Before accepting an admission of the alleged facts in a petition, the court shall:

(continued)

that a factual basis existed for Jayvonne’s plea, and asked counsel’s permission to use the facts in the petition for this purpose. Counsel agreed, and counsel’s permission to use the facts for this purpose cannot be used to defeat the plea withdrawal motion.

¶29 Second, the County asserts that Jayvonne cannot establish prejudice because “it was not the plea [in the grounds phase] that resulted in the termination of Jayvonne’s parental rights; it was her failure to prevail at the dispositional phase.” To terminate a parent’s rights to his or her child, the court must determine that grounds exist and that termination is in the child’s best interest. Both of these determinations are necessary. It is therefore frivolous to argue that the court’s determination as to one—but not the other—“resulted” in Jayvonne’s termination.

CONCLUSION

¶30 In sum, we conclude that counsel’s legal advice regarding the entry of a plea to grounds was erroneous, and therefore constituted deficient performance. Further, we conclude that counsel’s deficient performance was prejudicial because Jayvonne relied on counsel’s erroneous advice in deciding to

(a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit an admission and alert all unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

....

(c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

plead no contest. Because the plea was entered as a result of ineffective assistance, refusal to allow Jayvonne to withdraw her no-contest plea would be manifestly unjust. Accordingly, we vacate the termination order to allow Jayvonne to withdraw her plea and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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

