COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP1357
2009AP1358

Cir. Ct. Nos. 2008TP30
2008TP31

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

NO. 2009AP1357

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

EAU CLAIRE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRANDY H.,

RESPONDENT-APPELLANT,

NICHOLAS M.,

RESPONDENT.

NO. 2009AP1358

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

EAU CLAIRE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

BRANDY H.,

RESPONDENT-APPELLANT,

NICHOLAS M.,

RESPONDENT.

APPEALS from orders of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

¶1 PETERSON, J.,[1] Brandy H. appeals orders terminating her parental rights and an order denying her request to withdraw her no contest plea. Brandy argues her plea was not knowing and intelligent. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This decision was not released within the thirty days of the date the reply brief was filed. *See* WIS. STAT. RULE 809.107(6)(e). Therefore, we extend the deadline for deciding the case until today's date. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995) (we may extend the time to issue a decision in a TPR case). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 In September 2008, the Eau Claire County Department of Human Services (the County) filed petitions to terminate Brandy's parental rights to Dominik M. and Shyanna M. As grounds, the petitions alleged Brandy abandoned the children and the children were in continuing need of protection or services. At a hearing the day before the grounds hearing was scheduled, the County amended the petition to add one more ground—continuing denial of visitation—and proposed dropping the other grounds if Brandy pled no contest to this ground.

¶3 After a recess, Brandy's attorney informed the court Brandy would plead no contest to the continuing denial ground. The court then recessed again to permit Brandy to complete a plea questionnaire and waiver of rights form. Following the second recess, the court conducted a plea colloquy. It explained the continuing denial ground, asked if Brandy understood what was being alleged, and if she understood that by pleading no contest she was giving up the right "to force the County to prove [that ground]." She responded that she understood.

¶4 The court asked Brandy if she reviewed the plea questionnaire and waiver of rights form with her lawyer and if she understood it. She responded that she did. The court then explained, "Now, ultimately, by pleading no contest, this may lead to a basis for terminating your parental rights as to your children. Do you understand that?" Brandy said she did. The court continued, "And that's part of this process but it hasn't occurred yet. This is just the first part. But once we get over this hurdle, then there's going to be an issue regarding whether there's a termination, alright?" Brandy again replied in the affirmative. The court reiterated: "And I may make the decision that it's appropriate to terminate your

parental rights to one or both of these children. Do you understand that?" Brandy replied that she did.

¶5 The court accepted Brandy's plea, and then found there were grounds to terminate her parental rights. On March 3, 2009, the court held a dispositional hearing and terminated Brandy's parental rights to both children.

¶6 After the court terminated her parental rights, Brandy moved to withdraw her no contest plea. At an evidentiary hearing on the motion, Brandy testified her trial attorney did not explain the plea to her, hurried her into making a decision, and made her sign the plea questionnaire and waiver of rights form without explaining it to her. Her attorney testified to the contrary. He testified he informed her that if she pled no contest to the continuing denial grounds, the judge would likely find grounds to terminate her parental rights and that at the dispositional hearing the judge would then look to the children's best interests when determining whether to terminate her rights. He also testified he went through the plea questionnaire and waiver of rights form line by line with her and answered any questions she had.

¶7 The court denied Brandy's motion. It acknowledged the plea colloquy did not strictly comply with requirements established by case law. However, it concluded Brandy's attorney's postdisposition testimony, combined with the initial colloquy, established Brandy's plea was knowing and intelligent.

DISCUSSION

¶8 Before accepting a parent's plea of no contest in the grounds stage of a termination proceeding, the court must engage the parent in a personal colloquy to "determine that the admission is made voluntarily with understanding of the

nature of the acts alleged in the petition and the potential dispositions." WIS. STAT. § 48.422(7); ***Oneida County v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122. We recently held this includes ascertaining whether the parent understands: (1) acceptance of the plea will result in a finding of parental unfitness, (2) the potential dispositions specified under WIS. STAT. § 48.427, and (3) that the dispositional decision will be governed by the child's best interests. ***Therese S.***, 314 Wis. 2d 493, ¶22.

¶9 When a parent alleges a plea was not knowing and intelligent, the ***Bangert***[2] analysis applies. ***Therese S.***, 314 Wis. 2d 493, ¶6. Therefore, the parent must "make a prima facie showing the circuit court violated its mandatory duties and allege he or she in fact did not know or understand the information that should have been provided at the hearing." ***Id.*** If the parent makes a prima facie showing, the burden then shifts to the county "to demonstrate by clear and convincing evidence that the parent knowingly and intelligently waived the right to contest the allegations in the petition." ***Id.***

1. Whether Brandy made a prima facie showing

¶10 Neither Brandy nor the County are clear as to whether Brandy made a prima facie showing that the court violated its mandatory duties. Although the circuit court did not specifically state Brandy made the requisite prima facie showing, we conclude the record demonstrates she did. First, the court held an evidentiary hearing on whether her plea was knowing and intelligent; this is only necessary if a parent first makes a prima facie case. *See* ***State v. Bangert***, 131

[2] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (plea may be withdrawn if court's mandatory duties are *not* fulfilled). Second, although the County later argued the colloquy was adequate, it acknowledged at the beginning of the evidentiary hearing it had the burden of proof "to establish [Brandy] adequately knew what she was doing when she entered her no contest plea …." Finally, the circuit court conceded it did not strictly comply with the requirements set forth in ***Therese S***.

2. Whether the County proved Brandy's plea was knowing and intelligent

¶11 The only remaining question, then, is whether the County proved by clear and convincing evidence that Brandy understood the consequences of her plea. Brandy's argument on appeal is that the circuit court never proceeded to this step of the ***Bangert*** analysis. Accordingly, she focuses on the deficiencies of the plea colloquy and argues the court never made "any findings on whether there was evidence outside the plea colloquy to establish Brandy [understood] the consequences of her plea." This is simply incorrect. Indeed, it is inconsistent with Brandy's recognition that the court held an evidentiary hearing.

¶12 Rather, Brandy's mischaracterization of the circuit court's findings appears to be based on her confusion about how the court used her attorney's testimony. The court acknowledged it could not find Brandy understood her plea based only on her attorney's testimony that he discussed the plea consequences with her. From this, Brandy argues the court did not consider her attorney's testimony. That is not the case. Brandy's claim she did not understand the consequences of her plea was based heavily on her assertion her attorney did not explain certain things to her. Her attorney's testimony rebutted these allegations. When there is conflicting testimony, the fact finder "resolves these conflicts and weighs the credibility of witnesses." ***Skrupky v. Elbert***, 189 Wis. 2d 31, 51, 526

N.W.2d 264 (Ct. App. 1994). Here, the circuit court found Brandy was not credible and her attorney was. While evidence Brandy was told about the consequences of her plea did not prove she understood these consequences, it undermined her claim that she did not understand the consequences of the plea *because* she had not been told about them.[3]

¶13 As a result of her incorrect claim that the circuit court did not proceed to the second step of ***Bangert***, Brandy does not fully develop an argument that the court erroneously concluded she understood the consequences of her plea. We, however, conclude the court correctly ascertained she understood: (1) that she would be found unfit as a result of her plea, (2) what the potential dispositions were, and (3) that the dispositional decision will be governed by the children's best interests. *See* ***Therese S.***, 314 Wis. 2d 493, ¶22.

¶14 First, although the court acknowledged it did not use the term "unfit," it nevertheless reasonably concluded Brandy understood the essence of

[3] In her reply brief, Brandy contends the court's disbelief of her testimony she did not understand the consequences of her plea was not sufficient to meet the County's burden. The problem with this argument is that Brandy's postdisposition testimony contradicts earlier statements she made. Brandy would have us conclude that once she established the plea colloquy was defective, the court was required to take at face value the testimony she gave at the postdisposition hearing—or at the very least, that it could not rely on it to evaluate the truthfulness of her earlier claims to understand certain things. The point of proceeding to the second step in the ***Bangert*** analysis, however, is to determine whether, despite a defect in the plea colloquy, the plea was knowing and intelligent. This necessarily includes determining whether a person who earlier professed to understand something meant it.

this finding.[4] A finding of unfitness provides the basis for a court to terminate a parent's rights and "concludes the first step of the termination process, where the burden is on the government and the parent's rights are paramount." ***Id.***, ¶6. During the initial colloquy, the court confirmed Brandy understood her plea would conclude the first step of the termination process, that she was giving up the right to have the County prove grounds existed to terminate her parental rights, and that the court would later hold a dispositional hearing at which it could terminate those rights. Brandy's postdisposition testimony confirmed she understood this. When asked whether she understood her parental rights could be terminated if the court found one of the grounds alleged, she responded, "I mean, that's like common sense right there, yeah."

¶15 Second, the circuit court concluded—and we agree—the plea colloquy itself established Brandy understood the potential dispositions. As relevant here, the potential dispositions were to either dismiss the petition or terminate Brandy's parental rights. *See* WIS. STAT. § 48.427(2)-(3). During the colloquy, Brandy repeatedly confirmed she understood the court could terminate her parental rights after the dispositional hearing.

¶16 Third, the circuit court conceded it did not directly inform Brandy its ultimate dispositional decision would be based on the children's best interests. However, it concluded Brandy understood this standard because her attorney

[4] For its part, the County argues the court's failure to advise Brandy about unfitness did not matter. This is based on the County's assertion that ***Oneida County v. Therese S.***, 2008 WI App 159, ¶6, 314 Wis. 2d 493, 762 N.W.2d 122, was wrongly decided. The County rather brazenly makes this argument without acknowledging ***Therese S.*** is a published decision and we are bound by it. In any event, we need not address this issue because we conclude the County proved by clear and convincing evidence Brandy understood she would be found unfit as a result of her plea.

wrote it on the plea questionnaire form and likewise testified he specifically discussed this part of the form with her. While Brandy is correct that evidence the plea questionnaire contained the best interests standard would not alone be sufficient to assure her understanding of this, it does support the court's conclusion.[5] Brandy's claim not to understand the standard hinged on her own contradictory claims about whether she reviewed the plea questionnaire and her allegation her attorney did not explain it to her. Her attorney's testimony rebutted these assertions. Therefore, the court could reasonably conclude Brandy did understand the plea questionnaire—including that the standard at the dispositional hearing would be the children's best interests—as she initially said she did.

By the Court.—Orders affirmed.

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

[5] The parties disagree about the application of ***State v. Hoppe,*** 2009 WI 41, 317 Wis. 2d 161, 765 N.W.2d 794, here. ***Hoppe*** holds that "[a] circuit court may not … rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy." ***Id.***, ¶31. There is no doubt the court could not satisfy its mandatory duties, here, simply by relying on the questionnaire. That, however, resolves only the first step in the ***Bangert*** analysis. The second step requires discerning whether, *despite* the colloquy defect, the parent understood the consequences of the plea. This may include evaluating testimony about how the questionnaire was completed and what the parent earlier claimed to understand. Indeed, ***Hoppe*** acknowledged, "The Plea Questionnaire/Wavier of Rights Form provides a defendant and counsel the opportunity to review together a written statement of the information a defendant should know before entering a guilty plea. A completed Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea." ***Id.***, ¶32.