

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2002

Cornelia G. Clark
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. 02-0610
STATE OF WISCONSIN

Cir. Ct. No. 01-TP-54

**IN COURT OF APPEALS
DISTRICT IV**

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

LA CROSSE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

STACEY C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Stacey C.'s parental rights to her son, James J., were terminated by an order filed on November 30, 2001, after a jury made a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

finding of abandonment and the circuit court decided it was in the best interests of her son to terminate her parental rights. Stacey moved the court for an order for a new trial based on her assertion that she had been provided with ineffective assistance of trial counsel. The circuit court held a *Machner*² hearing and denied the motion for a new trial after concluding that Stacey had not met her burden of showing ineffective assistance. We affirm the circuit court's orders because the performance of trial counsel was not deficient.

BACKGROUND

¶2 Stacey is the parent of James J., born December 4, 2000. Because Stacey had another child removed due to neglect and abuse, the La Crosse County Department of Human Services (the Department) obtained an order transferring custody to the Department due to the “substantial risk” of neglect and abuse for James if he were left in Stacey's care at that time. Stacey did not contest the finding or the transfer of custody. James was placed with foster parents and conditions were established for his return to Stacey, which conditions included a regularly maintained visitation schedule.

¶3 Initially, Stacey did attend some of the scheduled visits, but soon she was missing half of them. Her social worker, Nichole Eide, worked with Stacey to try to get her to understand the importance of regular visitation and to help her maintain a regular visitation schedule. However, after April 12, 2001, Stacey ceased all visitation with James. Therefore, on August 13, 2001, the Department filed a petition to terminate her parental rights based on abandonment, as stated in WIS. STAT. § 48.415(1)(a)2.

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

¶4 A jury trial was held on October 19, 2001, and the jury found grounds for abandonment. At the dispositional hearing, the circuit court concluded that terminating Stacey's parental rights was in the best interest of James. It also affirmed the finding of abandonment made by the jury and ordered termination of her parental rights.

¶5 Stacey then moved for a new trial, claiming ineffective assistance of trial counsel. The circuit court held a *Machner* hearing at which her trial counsel testified extensively. He indicated his awareness of a past psychological exam conducted on Stacey, although he chose not to use it, and he said that he did not believe her lower functioning ever prevented her from having contact with James. He pointed out that for a period of time, she did attend the scheduled visitations, but seemed to lose interest in them as time progressed. The circuit court concluded that Stacey had not met her burden of showing ineffective assistance of counsel and it denied Stacey's motion for a new trial.

¶6 On appeal, Stacey again contends that she did not have a fair trial before the jury because she has "psychological problems" that include low intellectual functioning, an inability to control aggressiveness and an inability to grasp generalized concepts of parenting. She argues that if her psychological problems had been brought to the jury's attention, the result of the jury trial would have been different because the jury would have believed the Department did not do enough to meet her special needs and therefore, she had good cause for failing to visit James.

DISCUSSION

Standard of Review.

¶7 In a claim of ineffective assistance of counsel, we are presented with a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362, 368-69 (1994). We will not overturn a circuit court's findings of fact unless they are clearly erroneous. *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540, 541 n.2 (1992). However, whether counsel's performance was deficient and whether such deficient performance prejudiced the defendant's rights in the trial are questions of law which we decide without deference to the circuit court. *Flores*, 183 Wis. 2d at 609, 516 N.W.2d at 369.

Ineffective Assistance of Counsel.

¶8 A parent in an involuntary termination of parental rights proceeding has a right to effective assistance of counsel. *A.S. v. State*, 168 Wis. 2d 995, 1004, 485 N.W.2d 52, 55 (1992). *Strickland v. Washington*, 466 U.S. 668 (1984), sets out a two-prong test for deciding whether there has been ineffective assistance of counsel: (1) whether counsel was deficient in his representation; and (2) whether that deficiency prejudiced his client. *Id.* at 687, 692. The Wisconsin Supreme Court has adopted the *Strickland* test. *See, e.g., State v. Harvey*, 139 Wis. 2d 353, 374-75, 407 N.W.2d 235, 244-45 (1987).

¶9 The grounds upon which Stacey's parental rights were terminated were abandonment under WIS. STAT. § 48.415(1)(a), which states in relevant part:

Abandonment, which, subject to par. (c), shall be established by proving any of the following:

....

2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) or 938.356(2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

Based on the grounds asserted, the Department had to prove that Stacey did fail to visit James for a three-month period. As a defense, Stacey could then attempt to prove that she had good cause for this failure. *See Carla B. v. Timothy N.*, 228 Wis. 2d 695, 706, 598 N.W.2d 924, 929 (Ct. App. 1999).

¶10 Stacey argues before us that trial counsel should have attempted to show, through the introduction of a psychological test done some years earlier, that Stacey had psychological problems which were related to her failure to visit her son, that the Department did not provide sufficient services to overcome these problems and therefore, she had good cause for failing to visit James. Trial counsel testified extensively at the *Machner* hearing. He explained that he chose not to bring Stacey's lower level of functioning before the jury because with it came evidence of her inability to control her aggressiveness. He also said that he never observed Stacey's lower level of functioning preventing her from having contact with James. He pointed out that she did have the contact required for a period of time. Trial counsel also said that the defense to the charge of abandonment that he presented was based on Stacey's testimony that she attempted to have contacts with James during the three-month period when the Department said that she did not.

¶11 When reviewing an ineffective assistance of counsel claim, our examination of counsel's choice of defense is deferential to his judgment about that decision. *See State v. Pitsch*, 124 Wis. 2d 628, 637, 369 N.W.2d 711, 716 (1985). The choice Stacey's trial counsel made about what defense to raise was a rational choice and one that a reasonably proficient attorney could have made. *See*

Flores, 183 Wis. 2d at 620, 516 N.W.2d at 373. To engage in that type of trial strategy is not deficient performance by trial counsel. Accordingly, we conclude that Stacey has failed to meet her burden to prove the first prong of her claim of ineffective assistance of counsel,³ and we affirm the orders of the circuit court.

CONCLUSION

¶12 Because we conclude that Stacey has not proved that her trial counsel's performance was deficient, we affirm the circuit court's order terminating Stacey's parental rights and the order denying a new trial based on ineffective assistance of counsel.⁴

By the Court.—Orders affirmed.

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

³ Because Stacey has failed on the first prong, we do not address the second prong, prejudice, of an ineffective assistance analysis.

⁴ Both the guardian ad litem and counsel for the La Crosse County Department of Human Services have cited *Brown County v. Rochelle D.*, 2001 WI App 146, 246 Wis. 2d 671, 630 N.W.2d 277, an unpublished case, as precedent for the arguments they made to this court. Neither attorney indicated to the court or to counsel for Stacey that *Brown County* is unpublished. It was only upon the court's attempt to find the case and read it that its unpublished status became apparent. Therefore, it is necessary for the court to draw counsels' attention to WIS. STAT. § 809.23(3) which states:

UNPUBLISHED OPINIONS NOT CITED. An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

While there is currently a motion before the supreme court to change this rule to a limited extent, even that proposed change would require notice to the court and opposing counsel that the case cited is unpublished and of no precedential value. However, more importantly, the current rule as quoted above is the only operative rule. It must be observed by counsel. Counsel are cautioned to be more careful of their obligations under this rule in the future.

