COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2010

A. John Voelker
Acting 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 Nos. 2010AP1646
2010AP1647
2010AP1648

Cir. Ct. Nos. 2009TP39
2009TP40
2009TP41

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

NO. 2010AP1646

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TIERRA M.,

RESPONDENT-APPELLANT.

NO. 2010AP1647

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TIERRA M.,

RESPONDENT-APPELLANT.

NO. 2010AP1648

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

TIERRA M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Tierra M. appeals orders of the circuit court terminating her parental rights to her children, Cecilia M., Travion M., and Destiny M. She argues that ***Sheboygan County Department of Health & Human Services v. Tanya M.B.***, 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369, decided

[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.

after the termination trial and disposition hearing, clarified the services that the Department of Human Services must provide to help her satisfy the conditions for her children's return. She contends that reversal is merited to apply this new approach. I disagree and affirm.

Background

¶2 In September 2007, the Dane County Department of Human Services filed petitions alleging that three of Tierra's children, Cecilia, Travion, and Destiny, were in need of protection or services. The children were placed in foster care. The circuit court issued a dispositional order for each child, stating a need for protection or services for reasons of neglect and inadequate care. The dispositional orders set out conditions that Tierra had to meet for the children's return. Those conditions included establishing "a safe, suitable and stable home" and "a legal source of income." The revised dispositional orders also listed certain services that the Department was required to provide to Tierra, such as "case management and coordination" and "referrals for services."

¶3 In April 2009, the Department petitioned for the termination of Tierra's parental rights as to each child pursuant to WIS. STAT. § 48.415(2). A jury found grounds to terminate for each child, and the circuit court found that termination was in the children's best interests. Accordingly, the circuit court issued orders terminating Tierra's parental rights. Tierra appeals. I discuss additional facts as needed below.

Discussion

¶4 Tierra did not allege at trial and does not allege on appeal that, as the law was then understood, her termination proceedings were flawed. Rather, her

argument is that "the real controversy has not been fully tried" based on the retroactive application of ***Tanya M.B.*** *See* WIS. STAT. § 752.35 (stating grounds for discretionary reversal). In particular, she asserts that the "reasonable effort" element of termination was not fully tried. This element requires the fact finder to find that "the agency responsible for the care of the child and the family … has made a reasonable effort to provide the services ordered by the court." *See* WIS. STAT. § 48.415(2)(a)2.b.[2]

¶5 Tierra points out that here both parties assumed that all of the required departmental services were explicitly listed in the dispositional orders. For example, Tierra's dispositional orders stated that "the Department is ordered to provide … case management and coordination." She argues that ***Tanya M.B.***, decided after her termination trial, imposes more.

¶6 Specifically, Tierra argues that now, in addition to the explicitly listed services, the Department must provide services that are implied from court-ordered conditions that parents must meet for their children's return. *See* ***Tanya M.B.***, 325 Wis. 2d 524, ¶34 ("The detailed conditions directed at changing the parents' conduct establish the specific services that the Department is to provide, either directly or through arrangements with others."). Tierra asserts that reversal is proper for a full consideration of the implied services and whether the Department made a "reasonable effort" to provide them.

[2] "Reasonable effort" is defined as "an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case." WIS. STAT. § 48.415(2)(a)2.a.

¶7 The State, for its part, argues that ***Tanya M.B.*** should not apply to Tierra's case. The State does not clearly demonstrate, however, that ***Tanya M.B.*** is inapplicable, and I choose not to address these arguments further.[3] Even assuming, without deciding, that ***Tanya M.B.*** applies in the way Tierra suggests, reversal is not warranted. In the following paragraphs, I discuss and reject each of Tierra's specific arguments that the real controversy has not been fully tried.

A. Evidentiary Issues

¶8 Tierra argues that "the trial strategy and evidence introduced in this case" might have "differed" in light of ***Tanya M.B.***, and she suggests that reversal is proper in light of these potential differences. I am not persuaded.

¶9 This court may reverse in the interest of justice under WIS. STAT. § 752.35 when "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." When, as here, it is argued that the real controversy was not fully tried, there does not need to be a showing that there is a probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). The real controversy is not fully tried when "the jury was precluded from considering 'important testimony that bore on an important issue' or ... certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted).

[3] The State, for example, argues that ***Sheboygan County Department of Health & Human Services v. Tanya M.B.***, 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369, only applies where there are *no* explicit departmental services in a dispositional order, but the State does not point to clear support for this distinction. The State also asserts that ***Tanya M.B.*** should not be applied retroactively, but does not explain why.

We exercise this power of discretionary reversal "only in exceptional cases." ***Vollmer***, 156 Wis. 2d at 11.

¶10 I first observe that Tierra provides no specific details to support her assertion that "the jury did not hear all of the relevant facts." She does not point to any omitted facts or, put another way, does not identify what additional evidence she would submit if she had a new trial. Accordingly, I have no basis on which to reverse based on omitted facts.

¶11 With similar vagueness, Tierra suggests that, although "impossible" to pinpoint how, "the case would have been tried differently." The pertinent question is not, however, whether another trial would contain some differences. Instead, the question is whether the real controversy was fully tried in the first trial. And, although Tierra contends that "the parties did not have the correct view of the Department's obligation" in the first trial, she does not demonstrate that this mistaken view caused evidence to be improperly "precluded" or "received."[4] *See* ***Darcy N.K.***, 218 Wis. 2d at 667.

¶12 Tierra's only specific allegation of a misunderstanding relates to certain social worker testimony. Tierra finds fault because there was no testimony specifically drawing a connection between departmental services and the conditions for the return of her children. In this regard, Tierra highlights conditions requiring "a safe, suitable and stable home" and "a legal source of income." But my review of the record reveals that evidence about services and

[4] Tierra points out that this incorrect view appeared in a motion in limine offered by the State. As Tierra recognizes, however, the circuit court did not grant this motion, and Tierra does not argue that she was in fact precluded from offering any evidence.

referrals related to these topics was presented. For example, a social worker testified that she spoke with Tierra about housing options, provided Tierra with contact numbers for community programs, shelters, and other people with knowledge of housing options, and attempted to help Tierra into temporary YWCA housing. A second social worker testified that she discussed Tierra's housing issues with Tierra and her landlord, that she brought Tierra to a job center on multiple occasions to apply for benefits and an emergency housing grant, and that she tried to mitigate the impact of an eviction. Yet another social worker testified to referring Tierra to an organization for employment and housing support.

¶13 I am not persuaded that the mere fact that this testimony did not explicitly connect the services to particular conditions of return renders this an "exceptional" case where the real controversy was obscured. *See* ***Vollmer***, 156 Wis. 2d at 11. Rather, at best, Tierra points to ways in which this evidence might be presented more effectively. But, as the following section discusses in greater detail, Tierra does not demonstrate that this "'clouded a crucial issue.'" *See* ***Darcy N.K.***, 218 Wis. 2d at 667 (citation omitted).

B. Jury Instructions And Special Verdict

¶14 In a related argument, Tierra contends that the real controversy was not fully tried because the jury was "left to guess" at what services were relevant to a "reasonable effort." In particular, she suggests that the jury instructions provided insufficient guidance and that a special verdict question was misleadingly "truncated." I disagree.

¶15 Tierra's contention turns on the premise that there is a difference between what the jury likely did consider and what the jury should have considered. I am not persuaded, however, that the potential difference means the real controversy was not fully tried.

¶16 To illustrate, I first observe that Tierra does not challenge and, thus, essentially concedes, that the jury properly considered the Department's "reasonable effort" to perform the *explicit* services in the dispositional orders. These explicit services were "case management and coordination including monitoring case progress, reasonable transportation assistance, referrals for services and review of the Conditions of Return with the parents."

¶17 Tierra's argument is that the jury ignored the requirement for additional implied services, in particular, those related to housing and employment. She reasons that this is likely because the jury instructions and verdict questions did not specifically mention these implied services. For example, the relevant special verdict question simply asks whether the Department made "a reasonable effort to provide the services ordered by the court."

¶18 Tierra does not explain, however, why the broad *explicit* services of "case management and coordination" and "referrals for services" do not encompass the services and referrals related to housing and employment, and so on. It follows that Tierra fails to show that the jury did not address the real controversy.

¶19 Tierra relies on several cases for support, but they are all inapposite in that they involve situations where the jury was affirmatively misled or where verdict questions clearly misstated the applicable law. *See* ***Vollmer***, 156 Wis. 2d

at 22 (reversed where an "erroneous special verdict question led the jurors to focus their attention on the defendant's negligence in maintaining the premises, when the crux of plaintiff's case was that the defendant was negligent in his operation of [a] power mower"); ***Waukesha Cnty. Dep't of Soc. Servs. v. C.E.W.***, 124 Wis. 2d 47, 49, 368 N.W.2d 47 (1985) (reversed where "the circuit court erroneously instructed the jury that it, the jury, determines whether parental rights are terminated"); ***Air Wis., Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 327, 296 N.W.2d 749 (1980) (reversed where jury instruction was based on inapplicable statutory language); ***First Nat'l Bank & Trust Co. of Racine v. Notte***, 97 Wis. 2d 207, 224-26, 293 N.W.2d 530 (1980) (reversed where the case was submitted to the jury on tort theories rather than the applicable contract theory); ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617-20, 292 N.W.2d 630 (1980) (reversed where special verdict question asked whether negligence was "the" cause rather than "a" cause of injury).

¶20 Finally, Tierra suggests that a different termination element was affected. That element asks whether there was a substantial likelihood that Tierra would continue not meeting her conditions for the following nine months. *See* WIS. STAT. § 48.415(2)(a)3. She suggests the jury might have seen things differently if it had known that the Department had to provide the implied services. Apart from this statement, however, Tierra does not develop a separate argument. And, as already discussed, her general argument fails because she does not demonstrate that the jury was misled.

Conclusion

¶21 For the reasons stated above, I affirm the circuit court.

By the Court.—Orders affirmed.

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