COURT OF APPEALS DECISION DATED AND FILED

February 19, 2003

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. 02-3009

Cir. Ct. No. 01 TP 303

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

IN RE THE TERMINATION OF PARENTAL RIGHTS TO NICHOLAS S.S., (A/K/A SERGIO L.), A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CYNTHIA S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Cynthia S. appeals from the circuit court order terminating her parental rights to her son Nicholas. She argues that the no contest plea colloquy "fail[ed] to meet the requirements of … an admission to an involuntary termination [of parental rights] petition where … no searching inquiry appears in the record." This court affirms.

I. Background

¶2 The relevant facts are undisputed. In August 2001, the State filed a petition to terminate Cynthia's parental rights to Nicholas, alleging that she had failed to assume parental responsibility for him. *See* WIS. STAT. § 48.415(6) (1999-2000).[2] At the February 20, 2002 plea hearing, Cynthia entered a no contest plea to the allegations in the petition and requested that the case be set over for a dispositional contest. A dispositional contest was held April 25, 2002, and, on

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Under WIS. STAT. § 48.415(6), grounds for involuntary termination of parental rights include:

> FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility, which shall be established by proving that the parent … of the child ha[s] never had a substantial parental relationship with the child.
>
> (b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider … factors[] including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child ….

June 10, 2002, the circuit court issued a written decision terminating Cynthia's parental rights.

II. Analysis

¶3 Cynthia contends that the circuit court failed to comply with the statutory requirements for the acceptance of a no contest plea to the grounds alleged in a petition for termination of parental rights. She claims, therefore, that she is entitled to withdraw her plea, and requests a trial on the merits. This court rejects her contention.

¶4 WISCONSIN STAT. § 48.422 (1999-2000) governs hearings on termination petitions. According to § 48.422(3), "If the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." Pursuant to § 48.422(7), before accepting an admission of facts alleged in a petition, the circuit court shall:

> (a) address the parties present and determine that the admission is made voluntarily and understandingly; (b) establish whether any promises or threats were made to elicit an admission; (c) establish whether a proposed adoptive parent of the child has been identified; and (d) make such inquiries as satisfactorily establish a factual basis for the admission.

Waukesha County v. Steven H., 2000 WI 28, ¶39, 233 Wis. 2d 344, 607 N.W.2d 607 (footnote omitted). To evaluate a challenge to the proceeding mandated by § 48.422, the analysis set forth in ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), must be applied. ***Steven H.***, 2000 WI 28 at ¶42.

¶5 Under ***Bangert***, when statutory procedures or court-mandated duties are not fulfilled at the plea hearing, a defendant may move to withdraw the plea. ***Bangert***, 131 Wis. 2d at 274. The moving party has the initial burden to make a

prima facie showing that the circuit court "violated its mandatory duties and he [or she] must allege that in fact he [or she] did not know or understand the information that should have been provided at the … hearing." ***Steven H.***, 2000 WI 28 at ¶42. If the moving party makes a prima facie showing, the burden shifts to the State to demonstrate by clear and convincing evidence that he or she knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition. ***Id.*** On appeal, a court may examine the entire record and look at the totality of the circumstances to determine whether the circuit court's procedures and determinations were sufficient. ***Id.***

¶6 In the instant case, Cynthia did not file a post-dispositional motion to withdraw her plea in the circuit court. She contends that "no Wisconsin precedent requires a post[-]dispositional motion when a challenge is made to the adequacy of a TPR colloquy." The State and guardian ad litem dispute her contention.

¶7 The law may not be entirely clear. Under WIS. STAT. § 809.107(2) (effective July 1, 2001), following the circuit court's entry of an order or judgment, an appeal may be filed. *See also* WIS. STAT. § 809.107(5). Further, under § 809.107(6)(am), an appellant may ask this court to retain jurisdiction and remand the matter to the circuit court for fact-finding.[3] Still, the supreme court has held that, in termination proceedings, "alleged violations of plea hearing procedures are governed by the remedy adopted in ***Bangert***," thus allowing a parent to file a post-dispositional motion in the circuit court and requiring the

[3] The Judicial Council Note to WIS. STAT. § 809.107(6)(am) explains that the subsection "provides a procedure for ineffective assistance of counsel claims and other claims that require fact-finding after the final judgment or order has been entered." Judicial Council Note, 2001, WIS. STAT. § 809.107.

parent to show that the court violated its mandatory duties and that prejudice resulted from the violation. ***Steven H.***, 2000 WI 28 at ¶42.[4] Commenting on the parent's failure to move for post-dispositional relief and make a prima facie showing, the supreme court observed:

> There has been no post-judgment motion hearing regarding a *Bangert*-type claim in this case, although the *Machner* hearing . . . addressed similar issues. *Neither Steven H.'s brief nor his testimony clearly and affirmatively asserts that he did not know or understand the allegations in the petition or other information that he should have been provided or that he did not understand the waiver of his right to contest the grounds for the termination of parental rights.... Under the Bangert test we should proceed no further since Steven H. has failed to meet his duty to make a prima facie showing*.

Id. at ¶43 (emphasis added).

¶8 Thus, under ***Steven H.***, even assuming that Cynthia, in order to pursue plea withdrawal, was not required to first pursue a post-dispositional motion to withdraw her plea in the circuit court, she still was required to specify the basis for withdrawal and allege her lack of knowledge and understanding of her rights. She failed to do so. Nevertheless, this court, like the supreme court in ***Steven H.***, shall examine the record to determine whether the colloquy established that Cynthia's plea to the allegations in the petition was knowing, intelligent and voluntary.

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[4] Wisconsin courts have repeatedly held that a circuit court's failure to advise a person whose parental rights are sought to be terminated of various procedural safeguards does not invalidate the proceedings unless the person can show that he or she did not know those options. *See* ***Burnett County Dep't of Soc. Servs. v. Kimberly M.W.***, 181 Wis. 2d 887, 892-93, 512 N.W.2d 227, 230 (Ct. App. 1994) (right to request substitution of judge) (relying on ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)).

¶9 Whether Cynthia's no contest plea was made voluntarily and with the requisite understanding of the nature of the acts alleged in the petition and the potential dispositions is a question of constitutional fact. ***Id.*** at ¶51 n.18. On review, the circuit court's findings of historical fact will be upheld unless they are clearly erroneous. ***Id.*** "The circuit court's decision about whether the historical facts meet the constitutional test is a question of law," which we review *de novo*. ***Id.*** Because a circuit court has the opportunity to question and observe witnesses and because public policy favors finality of a circuit court's conclusion regarding a parent's waiver, a circuit court's conclusion about whether a parent's waiver was given voluntarily and understandingly should be given weight, although the decision is not controlling. ***Id.***

¶10 Relying on ***T.M.F. v. Children's Services Society of Wisconsin***, 112 Wis. 2d 181, 332 N.W.2d 293 (1983), Cynthia argues that "[t]he [plea] colloquy was perfunctory." She contends: "[N]one of the questioners 'really probed' to be sure that [she] 'understood that her decision … was final…. Not a single question elicited from [her] … 'in her own words what she understood and what her reasons were' [for] choosing not to contest the grounds phase of this TPR proceeding." (Citations omitted.)

¶11 This court agrees with Cynthia that the plea colloquy should have been more exact. In particular, it is troubling to read a colloquy, as earnest and extensive as this one, that still fails to include two simple, direct questions to the parent: "Do you understand that, by pleading no contest, you give up your right to fight the State's allegation that you failed to assume parental responsibility for Nicholas? And do you understand that, by giving up your right to fight that allegation, you could lose your parental rights to Nicholas forever?"

¶12 Nevertheless, the full record supports the circuit court's determination that Cynthia entered a knowing, intelligent and voluntary no contest plea to the petition to terminate her parental rights. The court advised Cynthia of her rights and the effect of a no contest plea. Cynthia, responding to approximately two dozen separate questions, declared her understanding of her rights and her plea's waiver of those rights.

¶13 The court, as well as the assistant district attorney, also inquired whether Cynthia had consulted with her lawyer:

> THE COURT: Have you had time to talk to your attorney regarding this?
>
> [CYNTHIA]: Yes.
>
> THE COURT: And you're satisfied with the explanation of the rights regarding this?
>
> [CYNTHIA]: Yes.
>
> THE COURT: [Counsel], are you satisfied your client understands her rights in this case?
>
> [CYNTHIA'S COUNSEL]: Judge, I am. Just a little background for the Court. I met with [Cynthia] …. We discussed this particular aspect of the case as a way of potentially proceeding. I confirmed that meeting in writing … and discussed this again with [Cynthia] this morning.
>
> She indicated she received the letter, understood it, and did not have any other questions about it. It's my assessment that she does understand the rights. She's indicated to me no one promised her anything or threatened her in any way to follow the procedure that's been outlined before the Court.
>
> I don't believe she has any questions concerning this, and my opinion based on my contacts with her that I've already described as well as those I had prior to those meetings that I mentioned, she's aware of her rights, and I don't have a question in my mind she understands what she's doing.

> THE COURT: Thank you.
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> Okay, [assistant district attorney].
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> [ASSISTANT DISTRICT ATTORNEY]: Judge, at this point I would ask counsel if he's had an opportunity to review the petition with [Cynthia], and if [Cynthia] would stipulate that paragraph 6 A of the petition[,] which states the grounds of failure to assume parental responsibility[,] and if she will concede that the ground is established by the allegations in paragraph 6 A of the petition and by doing that I think we can eliminate the need for testimony by the worker.
>
> [CYNTHIA'S COUNSEL]: Judge, I did specifically review the petition with [Cynthia] …. I specifically reviewed with her the legal definitions under 48.415(6)(b) of substantial parental relationship.
>
> I think that's an appropriate procedure, and we ask the Court to use that rather than having testimony today.

The guardian ad litem agreed, and the court made the requisite finding under WIS. STAT. § 48.415(6)(b). And finally, the court advised Cynthia that her plea would constitute an admission that the allegations were true, but told her that she was preserving her right to present argument in the "best interests" phase of the proceeding.

¶14 At no time did Cynthia indicate any misunderstanding of the proceedings. In fact, at the dispositional phase, the court learned that Cynthia had waived her right to trial on two previous occasions: in 1991, she pled guilty to possession with intent to deliver cocaine; and in 1995, she pled guilty to four counts of delivery of a controlled substance. Additionally, the record reveals that Cynthia had the maturity and intellectual capacity to understand the proceedings; she was forty-one years old at the time of the termination plea hearing and was nearing the completion of her GED.

¶15 Significantly, even in her belated reply brief to this court,[5] Cynthia does not contend that she did not know or understand the consequences of her plea. *See* ***Steven H.***, 2000 WI 28 at ¶43 (allegation that one "did not understand the waiver of … right to contest the grounds for the termination of parental rights" is prerequisite to plea withdrawal). Indeed, the record would refute any such claim. After all, Cynthia's plea-entry experience, her age and education, her responses to the court's questions, her consultation with counsel, and her stipulation to the petition confirm her knowing, intelligent and voluntary decision to waive her right to contest the grounds for termination of her parental rights.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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[5] Cynthia's appellate counsel moved to extend the deadline for filing his reply brief. He did not, however, offer any reason for his inability to timely file.

This court denies counsel's extension request. This court, like the trial courts and all parties involved in termination proceedings, must respect the legislature's understandable insistence on prompt and expeditious resolution of termination cases. Granting extensions, without clear justification, would undermine efforts to reach such resolution.

Mindful, however, of the gravity of every termination case, this court has perused counsel's reply brief; it contains no authority or argument countering any of the bases on which this court has decided this appeal. While it further exposes the soft sand on which ***Steven H.*** stands regarding the application of ***Bangert***-like *procedural* requirements to post-termination proceedings, it still offers no argument that, in *substantial* fact, Cynthia did not understand her rights.