COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 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 Nos. 02-3119
02-3120
02-3121
02-3122

Cir. Ct. Nos. 97-JC-107
97-JC-109
97-JC-110
97-JC-111

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

NO. 02-3119

IN THE INTEREST OF JARQUITA E.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORNELIUS F.,

RESPONDENT-APPELLANT.

NO. 02-3120

IN THE INTEREST OF WILLIAM C.F.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORNELIUS F.,

RESPONDENT-APPELLANT.

NO. 02-3121

IN THE INTEREST OF DRENA F.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORNELIUS F.,

RESPONDENT-APPELLANT.

NO. 02-3122

IN THE INTEREST OF BRIDGETTE F.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CORNELIUS F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: MARY K. WAGNER, Judge. *Affirmed.*

¶1 BROWN, J.[1] While the appeal directly concerns a CHIPS[2] disposition relating to his four children, Cornelius F. is in reality collaterally attacking dispositions in all the prior CHIPS proceedings because there is currently a cognate petition to terminate his parental rights. Cornelius's argument appears to be that void judgments and orders may be collaterally attacked at any time, that orders entered contrary to due process are void, and that a void judgment may not be validated by consent, ratification, waiver or estoppel. Cornelius contends that because the Kenosha county district attorney and his wife were the foster parents of some of these children at the time certain of these CHIPS determinations were extended, there was an actual or apparent conflict of interest when the Kenosha county district attorney's office appeared on behalf of the public during the extension proceedings. Therefore, there was a due process violation, the prior CHIPS orders are void and should be declared so by this court. The law, however, is that a litigant is denied due process if he or she is *in fact* treated unfairly. Cornelius cannot meet this standard. He also loses on the issue of whether one of the CHIPS actions was invalid because he was improperly defaulted. No due process violation occurred there either. We affirm.

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

[2] CHIPS is an acronym for a Child in Need of Protection or Services as set forth in Wisconsin's Statutes. *See* WIS. STAT. § 48.345.

¶2 The pertinent facts of this case begin on September 24, 1997, when Jarquita E., William C.F., Drena F., and Bridgette F. were taken into protective custody by the Kenosha County Department of Social Services. An emergency custody hearing was held, followed by petitions, alleging that all the children were in need of protection or services. At the time, Cornelius was the adjudicated father of William and the alleged father of the other three. On October 8, 1997, Cornelius pled no contest to the petitions. He also indicated several times to the court commissioner hearing the plea that he wanted his children to remain in foster care until further notice. He was given actual notice of further proceedings but did not appear at the disposition hearing on December 10, 1997. The court found him in default, entered dispositional orders and issued a capias for Cornelius so that conditions for return and termination warnings could be given to him. Cornelius eventually appeared before the court, the conditions for return were read to him, as were the termination warnings, and Cornelius did not move to vacate its default finding, did not request an attorney and did not object in any way to the proceedings.

¶3 On December 9, 1998, the orders were extended. Cornelius was present and did not object to the extension.

¶4 In February 1999, Cornelius was apparently adjudicated the father of the remaining three children.[3]

[3] The specific date on which Cornelius was adjudicated the father of the remaining three children is not included in the record; however, at the December 6, 2000 hearing, the State informed the trial court that Cornelius previously had been adjudicated the father of the children. Because neither party disputes that Cornelius is the father of the four children, we include this fact.

¶5 On December 7, 1999, and January 4, 2000, the State moved to revise and extend the dispositional orders. Cornelius appeared at the December 7, 1999 hearing, but not on January 4, 2000. A capias was again issued and again Cornelius appeared in court where he received the dispositional orders. For the first time, the Kenosha county district attorney and his wife were listed as foster parents—for Bridgette. Cornelius did not object to this disposition in any way.

¶6 In September 2000, Cornelius was arrested, taken into custody and charged with sexually abusing Drena. He has been in custody since.

¶7 On December 6 and 21, the dispositional orders were extended without objection by Cornelius. Jarquita joined Bridgette in the Kenosha county district attorney's home.

¶8 In the summer of 2001, the Kenosha county district attorney's office requested that a special prosecutor be appointed to pursue a termination of parental rights and in September filed the petition.[4] Cornelius was appointed an attorney to represent him. The same counsel was also appointed to represent him regarding any further CHIPS proceedings.

¶9 On December 3 and 17, 2001, and January 9 and 10, 2002, the court heard the State's motion to extend the orders. Cornelius's attorney asked that a special prosecutor be appointed for the CHIPS proceedings, which was so ordered. On January 10, the orders were extended until December 10, 2002. On

[4] The State's request and subsequent petition are not contained in the record. However, neither party contests the fact that this occurred.

January 16, Cornelius moved to vacate all previous CHIPS orders based on a perceived conflict of interest by the Kenosha county district attorney. The motion was denied. Cornelius filed a notice of intent to pursue relief based on the conflict issue. This motion was heard on November 20, 2002, and denied. Cornelius then filed this appeal.

¶10 Correlatively, on November 27, 2002, a Racine county circuit judge entered an order terminating Cornelius's parental rights.[5] Also, correlatively, throughout the CHIPS proceedings, the Kenosha county district attorney and his wife were the foster parents of a half-sister of the four children, Pamela. Cornelius is not the father of this child.

¶11 The law is that orders or judgments entered contrary to due process are void. ***Neylan v. Vorwald***, 121 Wis. 2d 481, 488, 360 N.W. 2d 537 (Ct. App. 1984), *aff'd*, 124 Wis. 2d 85, 368 N.W.2d 648 (1985). A void judgment or order is something very different from a valid one. ***Id***. at 496. "[I]t is legally ineffective…. [It] may also be collaterally attacked at any time in the proceeding, state or federal, [and] it should be treated as legally ineffective in the subsequent proceeding." ***Id***. (citation omitted). A void judgment cannot be validated by consent, ratification, waiver or estoppel. ***Id***. at 495.

¶12 Due process requires a neutral and detached judge. ***State v. Washington***, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978). Lack of neutrality affects the right to a fair trial and is a due process violation. *See* ***State v. Walberg***,

[5] The order is not contained in the record, but neither party disputes this fact and so it is included.

109 Wis. 2d 96, 105, 325 N.W.2d 687 (1982), *rev'd on other grounds by* ***Walberg v. Israel***, 766 F.2d 1071 (7th Cir. 1985). While there is no case law in Wisconsin applying these same principles to district attorneys, it logically follows that district attorneys be subject to the same rules. As an integral member of the body politic, the district attorney's obligation is to pursue the full measure of fairness. The ends of justice demand a just result. Thus, a conflict of interest by the district attorney that affects the right to a fair trial is a due process violation.

¶13 Here, the Kenosha county district attorney and his wife were the foster parents of two of the children whose orders were extended during the time the Kenosha county district attorney's office appeared on behalf of the public. Moreover, from the beginning, the Kenosha county district attorney and his wife were the foster parents of the half-sister. The question is whether this situation, in and of itself, is a due process violation rendering all prior CHIPS orders void.

¶14 The answer is "no." In ***State v. Hollingsworth***, 160 Wis. 2d 883, 894, 467 N.W.2d 555 (Ct. App. 1991), we said that a litigant is denied due process only if the judge, in fact, treats him or her unfairly. Citing ***Margoles v. Johns***, 660 F.2d 291, 296 (7th Cir. 1981), in support, the ***Hollingsworth*** court wrote that a litigant is not deprived of fundamental fairness guaranteed by the Constitution either by the appearance of a judge's partiality or by circumstances which might lead one to speculate as to his or her partiality. ***Hollingsworth***, 160 Wis. 2d at 894. We cited ***Margoles*** as saying: "A litigant is denied due process only if the judge, in fact, treats him or her unfairly." ***Hollingsworth***, 160 Wis. 2d at 894.

¶15 We apply the same rule here. In doing so, we can find nothing to show that Cornelius has, *in fact*, been treated unfairly. Cornelius not only

consented to placement outside the home originally, he wanted it so. He was given notice of and could have objected to any disposition made by the court. He never did. Even after the Kenosha county district attorney and his wife became foster parents to one and then two of the children, he assented to the extensions. This was done with full warnings each time that such extensions could result in an eventual action to terminate his parental rights. From the record, there is nothing to show that he was treated unfairly. He cannot make his case.

¶16 Cornelius has one other issue. He claims that the trial court had no authority to order a default judgment as to the original CHIPS orders in 1997 because he was entitled to notice of default which he never got. There are several reasons to reject this argument, all of which we will touch on briefly. First and foremost, the objection is procedural in matter. This is not a due process issue because it does not affect "fundamental fairness." Nor is it a jurisdiction question. As such, the collateral attack on the original CHIPS order, based on this issue, cannot stand. Second, while it is true that the trial court did enter a "default judgment," this is in name only. Cornelius had notice of the CHIPS action and appeared in person and pled no contest to it. He affirmatively stated at that time that he wanted the children placed out of the home. That is exactly what occurred. He later did not show up at the disposition hearing despite being given actual notice of the time and place. So, it can hardly be said that he did not get notice. Third, the court did not simply issue a default judgment. It ordered a capias for Cornelius's apprehension. Later, he appeared in court pursuant to the capias where he was read the dispositional order and conditions for return as well as a warning that termination proceedings could eventually result. It can hardly be said that he did not have an opportunity at that time to object or bring into issue

anything that he might have been bothered about. He did nothing of the sort. There has been no violation of the law here. His claim fails.

By the Court.—Orders affirmed.

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