

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 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. 03-1030
03-1031
03-1032**

**Cir. Ct. Nos. 02TP000204
02TP000205
02TP000206**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

03-1030

CIR. CT. NO. 02TP000204

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO DALE H., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

FELICIA J.,

RESPONDENT-APPELLANT.

03-1031

CIR. CT. NO. 02TP000205

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO RAQUAL H., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

FELICIA J.,

RESPONDENT-APPELLANT.

03-1032

CIR. CT. NO. 02TP000206

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

FELICIA J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL G. MALMSTADT, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Felicia J. appeals from the order terminating her parental rights to her children, Dale H., Raqual H., and Tizell J. She contends that there was insufficient evidence to establish, as grounds for the termination of her parental rights, that: (1) she never assumed parental responsibility within the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

meaning of WIS. STAT. § 48.415(6) (2001-02);² and (2) there was a substantial likelihood that she would not meet the court-ordered conditions for the safe return of her children within twelve months under § 48.415(2). Because there was sufficient evidence to establish both, the trial court's determination that grounds for termination existed was not clearly erroneous. This court affirms.

I. BACKGROUND.

¶2 In January 2000, Dale and Raqual were taken into protective custody by Milwaukee County social service workers. On April 20, 2000, both children were subsequently found to be children in need of protection or services of the court, pursuant to WIS. STAT. § 48.13(10). Tizell J. was taken into protective custody by Milwaukee County social service workers upon his birth on or about January 16, 2001. On April 17, 2001, he was also found to be a child in need of protection or services of the court, pursuant to § 48.13(10) and (10m). By court orders, the three children were placed outside of the home of their mother. In 2001, the original dispositional orders for Dale and Raqual were extended for a year. Pursuant to WIS. STAT. § 48.356(2), the courts' orders provided to Felicia were in writing, signed by the court, and contained written warnings regarding the possibility of the termination of Felicia J.'s parental rights to her children.

¶3 On March 27, 2002, a petition was filed seeking termination of Felicia J.'s parental rights to these children.³ As grounds for termination, the petition claimed that the children remained in continuing need of protection or

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

³ The father's parental rights were also terminated in this case, but he has not appealed the order.

services and it was unlikely that Felicia J. would meet the conditions established for their return within twelve months, pursuant to WIS. STAT. § 48.415(2), and that Felicia J. failed to assume parental responsibility for her children, pursuant to WIS. STAT. § 48.415(6). In September 2002, a three-day jury trial was held to determine whether grounds existed to terminate the parental rights of Felicia J. The jury found that evidence existed to support the above-mentioned grounds for the termination of Felicia J.'s parental rights. A dispositional hearing was held, and the trial court ordered the termination of Felicia J.'s parental rights as the court found, by "evidence that is clear, satisfactory and convincing, that it is in the best interest of the child[ren] to terminate the parental rights of [Felicia J.]"

II. ANALYSIS.

¶4 Felicia J. argues that there is insufficient evidence to establish that she never assumed parental responsibility within the meaning of WIS. STAT. § 48.415(6). She also argues that there is insufficient evidence to establish that there was a substantial likelihood that she would not meet the court-ordered conditions for the safe return of her children within twelve months. *See* § 48.415(2). This court disagrees.

¶5 "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." *Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). Thus, "[i]f we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." *Id.*, ¶39 (quoting *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). Accordingly, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but

did not.” *Id.* (citation omitted). Moreover, “[o]nly when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the factfinder.” *State v. Saunders*, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citation omitted).

¶6 As one ground for the termination of Felicia J.’s parental rights, the State alleged, under WIS. STAT. § 48.415(2), that Felicia J.’s children were in continuing need for protection or services, and, under § 48.415(2)(a)3:

[t]hat the [children had] been outside the home for a cumulative total period of 6 months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the [children] to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under s. 48.424.

The State also claimed that grounds for termination could be met under § 48.415(6). Section 48.415(6) states:

(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have 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 such 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 and whether, with respect to a person who is or may be the father of the child, the person has ever expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶7 Felicia J. argues that she fed, clothed and brought Dale and Raqual to doctor's appointments "at the beginning of their lives[,]” that the children hugged and kissed her on supervised visits and called her "mama,” and that "the State never presented any evidence to show Ms. J.'s drug use had prevented her from forming a 'substantial relationship' with her children for the entire time they were in her custody.” Further, she argues insufficient evidence was presented to the jury with respect to Tizell, as she "cannot be penalized for failure to do something ... she is prohibited from doing[,]” in light of the fact that he was taken from her at birth.

¶8 During the trial, the jury heard testimony that: (1) Felicia failed to conquer her drug addiction and to show she could safely care for her children, thus not meeting the conditions set for the return of her children; (2) the children had lived in foster care for most, if not all, of their lives; (3) while the children were living with her, Felicia J. would spend almost half of her social security income on drugs; (4) Felicia J. failed to complete at least four drug programs; and (5) although her visits with the children were suspended almost a year prior to the trial, she never completed the requirements to have them reinstated. The jury found, based on this evidence, that the above-mentioned grounds existed to terminate Felicia J.'s parental rights to her three children.

¶9 With respect to the reference to drug use, Felicia J. testified that she has used cocaine for approximately ten or more years, including times while she was pregnant with at least two of the children and while breast-feeding Raqual. In fact, she admitted to having an addiction to cocaine to social workers. Evidence was presented, in the form of deposition testimony, that while receiving food stamps, WIC checks, and social security, she would bring the children to the St. Benedict's food program and donate plasma to buy diapers, while at the same

time spending, at times, up to one-half of her social security income on cocaine. Evidence was presented to show that she has been in and out of drug treatment programs while her children were sent to live in foster care. Further, the State proved that, when allowed to bring Raqual to the Meta House drug treatment program, Felicia J. left before completing the program and left without Raqual. Evidence was also presented that shortly before Tizell was born, she tested positive for drug use. Her caseworker further testified that a little over one year later, in January 2002, “[Felicia J.] told me she was still using cocaine, she was an addict....”

¶10 With respect to her role as the children’s “mama,” Felicia J. admitted that she was reported to social services for beating and shouting profanities at her son, Dale. Visitation documentation also detailed a visit during which Felicia J. “drill[ed] Dale on her being his only mother. She drilled him [until] the caseworker intervene[d].” During that same visit, “Felicia then told [Dale] that she was going to teach him how to fight[,]” and subsequently discussed gangs.

¶11 Additionally, a psychologist testified that a psychological evaluation of Felicia J. indicated that she has an IQ of 61, a quotient that is in the mentally retarded range. The psychologist further testified that “[i]n terms of coping with any kind of situation that’s presented, [Felicia J.] has very limited capacities in that regard, so she has a marginal capacity to manage herself in an independent fashion.” He also testified that “[s]he is not going to have the capacity, intellectually, to summon the resources she needs to manage the children.”

¶12 In April 2000, after her children had already been removed from her home, Felicia J. failed to make an appearance in court, which resulted in the court entering a dispositional order establishing the conditions for the return of the

children without her presence. A caseworker testified that although she attempted to contact Felicia J. at least three times, she failed to make an appearance because “she told me she was out of town that weekend, and just had forgotten about court.” Even with the assistance of social workers in scheduling visitation dates and times, Felicia J. admitted to having missed as many as six visits with her children in a ninety-day period, and she admitted that social workers spoke to her about her inappropriate behavior during several of the visits that she did make. In fact, her visits were suspended as a result of this inappropriate behavior and poor attendance. She was told that her visits could be reinstated if she provided documentation indicating that she had attended three parenting classes. She failed to do so.

¶13 Felicia J. also failed to meet the trial court’s conditions necessary for her to have the required extended, overnight visits. One of the visitation documents indicated that during a supervised visit in Felicia J.’s home, a social worker saw four or five cockroaches on the table in the kitchen and a used condom on the floor.

¶14 With regard to the finding that there was a substantial likelihood that Felicia J. would not meet the court-ordered conditions within twelve months, she argues that “jurors cannot properly assess this probability without any expert opinion testimony[.]” However, no such expert testimony is required, as the record is replete with evidence rising to a substantial likelihood that Felicia J. would fail to meet the court-ordered conditions. In addition to the evidence noted above, there was evidence presented, in the form of a CHIPS dispositional order filed on December 27, 2001, that indicated that placement of the children in Felicia J.’s home would be contrary to the children’s health, safety, and welfare because of the “mother’s AODA ... [and] mental health issues.” It also indicated

that reasonable efforts were made to assist Felicia J. in meeting the conditions in the form of “providing appropriate referrals [and] services, including AODA assessment and treatment, parenting classes, and a psychological evaluation.” However, according to the evidence, Felicia J. had not: (1) changed the reasons for the limitation of the visits; (2) completed the programs recommended in the psychological evaluation; (3) completed a psychiatric evaluation and completed the recommended programs; (4) completed the recommended AODA (Alcohol or Other Drug Abuse) programs; (5) showed that she can care for and supervise the children properly and that she understands their special needs; (6) completed individual therapy; or (7) had successful, extended visits with her children, and shown that she has the desire and ability to take care of the children on a full-time basis.

¶15 Thus, using common sense, a jury could reasonably find, based on all of the evidence presented, that there was a substantial likelihood that Felicia J. would not meet the court-ordered conditions within twelve months. Considering that Felicia J. has had a problem with cocaine for over ten years, her children have been in foster care for most of their lives, she has failed to successfully complete a drug treatment program, and she failed to have her visits reinstated after having almost an entire year to do so, a jury could reasonably find, using its collective common sense, that Felicia J. would not meet the court-ordered conditions within twelve months. Expert testimony was neither necessary nor required to make that finding.

¶16 Further, Felicia J. has been assisted by social workers in her attempts to stop using drugs, visit her children, and to otherwise fulfill the court-ordered conditions, yet her attempts have been unsuccessful. In response to a question concerning how she planned to take care of the children should they be returned to

her, she testified that “first we’ll go to the museum look around, and then we’ll play games together, and we’ll go out to eat, and then Dale got this park he likes to go to, and we just go there to the park and just play, sit down and stuff like that.” After reviewing the record, it is clear that the jury’s finding that there is a substantial likelihood that Felicia J. would not meet the court-ordered conditions is not clearly erroneous and will thus be upheld.

¶17 A “substantial parental relationship” means “the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child.” WIS. STAT. § 48.415(6)(b). Further, in determining whether Felicia J. has had a substantial parental relationship with her children, the jury was to consider “whether the person has ever expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child.” *See id.* After reviewing the record, this court concludes that the jury’s finding in this regard was not clearly erroneous. Among other things, Felicia J.: (1) left her daughter at Meta House; (2) has failed to successfully complete a drug treatment program; (3) used her social security income to buy drugs; (4) used cocaine and alcohol while pregnant; (5) used cocaine while breast feeding her daughter; (6) failed to attend scheduled visits with her children; (7) often acted inappropriately during the visits she did attend; and (8) failed to attend the parenting classes necessary to reinstate her visits. It was reasonable to conclude that Felicia J. expressed little concern for or interest in the well-being of her children and that she neglected to provide care or support for them.

¶18 Further, with regard to Tizell, WIS. STAT. § 48.415(6) does not require a showing that the parent “had the opportunity and the ability to assume parental responsibility for the child.” *Ann M.M. v. Rob S.*, 176 Wis. 2d 673,

683-84, 500 N.W.2d 649 (1993). Thus, parents' rights may be terminated under § 48.415(6) even if they lacked the ability to establish a parental relationship. *See id.* at 684. Regardless, Felicia J. was not prohibited from seeing Tizell. She was allowed to visit him, that is, until her visits were suspended as a result of her poor attendance and inappropriate behavior. Accordingly, Felicia J.'s argument that there was insufficient evidence to sustain the ground under WIS. STAT. § 48.415(6) because Tizell was taken from her at birth does not hold water. The fact that Tizell was taken away does not outweigh Felicia J.'s failure to express an interest in or concern for Tizell's well-being or to provide care and support for him.⁴ Thus, based on all of the evidence provided in the record, the jury's finding that Felicia J. failed to assume parental responsibility is not clearly erroneous and must be upheld.

¶19 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

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

⁴ Felicia J. argues that the State conceded its argument in regard to Tizell because it was not refuted in the State's brief. However, this court concludes that the State addressed this argument indirectly through the identification of a great deal of evidence directly bearing on Felicia J.'s failure to assume parental responsibility.

