COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 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. 03-1320

Cir. Ct. No. 02TP000325

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JESSICA S.-C., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANNETTE S.,

RESPONDENT-APPELLANT.

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

¶1 SCHUDSON, J.[1] Annette S. appeals from the trial court order terminating her parental rights to Jessica S.-C. She argues: (1) "[t]he evidence was insufficient, as a matter of law, to sustain the jury's verdict finding that [she] was unlikely to meet the conditions of return within the next twelve months"; and (2) "the trial court [erroneously exercised] its discretion at the dispositional hearing when it unreasonably inferred that [her] cocaine use was egregious enough that it was in Jessica's best interest to terminate [her] parental rights." This court affirms.

I. BACKGROUND

¶2 In February 2001, two-month-old Jessica was taken into protective custody by the Bureau of Milwaukee Child Welfare because she was born cocaine positive and the conditions of her home were uninhabitable.[2] Jessica was subsequently found to be in need of court protection or services, pursuant to WIS. STAT. § 48.13(10), and placed outside Annette's home.

¶3 On May 3, 2003, the State petitioned for termination of Annette's parental rights to Jessica, alleging that: (1) Annette had failed to assume parental responsibility for Jessica, under WIS. STAT. § 48.415(6); (2) Annette abandoned Jessica, under WIS. STAT. § 48.415(1)(a)2; and (3) Jessica continued to be in need of protection or services, under WIS. STAT. § 48.415(2). The jury found that

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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] The home had no heat, electricity, or operable bathroom plumbing. The home smelled strongly of urine, the bathroom floors were covered with feces, and other floors were covered with grease, old food and garbage. None of Annette's eight children was in school at the time of the Bureau's investigation and the three youngest children had no clean clothes to wear.

Jessica continued to be in need of protection or services, that Annette had abandoned her, and that there was a substantial likelihood that Annette would not meet the conditions established for Jessica's safe return to her home. The jury did not find, however, that Annette had failed to assume parental responsibility for Jessica. The court held a dispositional hearing and concluded that Jessica's best interests required the termination of Annette's parental rights.

II. DISCUSSION

A. Sufficiency of the Evidence

¶4 Annette argues that the trial evidence did not establish a "substantial likelihood," *see* WIS. STAT. § 48.415(2)(a)3, that she would not meet the conditions required for Jessica's safe return to her home within the twelve months following trial. This court disagrees.

¶5 Terminations of parental rights are civil in nature; thus, "[g]rounds for termination must be proven by clear and convincing evidence." *See* ***Ann M.M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993); *see also* WIS. STAT. §§ 48.31(1), 48.424(2). "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. If this court finds "'any credible evidence in the record on which the jury could have based its decision,'" the verdict will be affirmed. *See* ***id.***, ¶ 39 (citation omitted). 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.*** Moreover, the credibility of witnesses and the weight afforded the evidence are left to the jury. ***Fehring v. Republic Ins. Co.***, 118 Wis. 2d 299, 305, 347 N.W.2d 595 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life***

Ins. Co. 200 Wis. 2d 599, 547 N.W.2d 592 (1996). "Only when the evidence is inherently or patently incredible will [the court] substitute [its] judgment for that of the fact finder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

¶6 As one ground for the termination of Annette's parental rights, the State alleged, under WIS. STAT. § 48.415(2), that Jessica was in continuing need of protection or services, and, in the terms of §48.415(2)(a)3:

> the child has been outside the home for a cumulative total period of 6 months or longer … and that the parent has failed to meet the conditions established for the safe return of the child 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[.]

¶7 Annette argues that it was illogical for the jury to conclude that she was substantially unlikely to fulfill the court's conditions for Jessica's safe return to her home because, she claims, she was making good-faith efforts to meet those conditions. She testified that at the time of trial she was living in a three-bedroom home, employed as a property rehabilitator, enrolled in a drug treatment program, and recently had begun having contact with the Bureau. She states that the jury's apparent reasoning—that because she had failed to meet conditions of return in the past she would fail in the future—was necessarily flawed given evidence that she was "*attempting* to succeed and where it is shown that success is within the person's *ability*." She argues that "it is logically possible to predict failure in the future, to a substantial likelihood, *only* where the person is not attempting to succeed or where, despite the attempt, success is not within the person's ability." While interesting, Annette's argument is unconvincing.

¶8 At trial, caseworker Mary Ra'ad testified that Annette had failed to satisfy the conditions for Jessica's safe return to her home because Annette: (1) never completed drug and alcohol treatment even though she (Ms. Ra'ad) had enrolled her in three treatment programs; each time, she was discharged after a few weeks for failure to attend and for positive cocaine tests; (2) never maintained a stable living environment—her living arrangements were sporadic and she was frequently homeless; (3) had not had regular, successful visits with Jessica, and had had no contact with her for eight months; (4) never completed child-care nurturing classes; and (5) had not maintained stable employment.

¶9 Angela Arbogast, a second caseworker assigned to Annette's case, also testified. She told the jury that she had enrolled Annette in two drug and alcohol treatment programs from which she was discharged for failure to attend, and in a third treatment program eight days prior to trial. She testified that Annette had admitted using cocaine twenty-five days before trial and consuming alcohol thirteen days before trial, and that Annette admitted that the longest period of time that she had been free from drugs or alcohol was one month. Ms. Arbogast testified that, in her opinion, Annette would not be able to comply with the court-ordered conditions for Jessica's return to her home within twelve months because she "has had a significant problem with drugs and it's her pattern, … she starts out well, wonderful intentions[,] and ends up not completing the program which is required." Annette's testimony confirmed Ms. Ra'ad's and Ms. Arbogast's accounts; she admitted to a fourteen-year history of cocaine addiction, cocaine use during five of her pregnancies, and weekly cocaine use while pregnant with Jessica.

¶10 Thus, based on her conduct, the jury could reasonably find that Annette was not going to be able to complete essential treatment. As the State

fairly asks, "Why would the jury have any reason to believe [Annette] might complete her court condition in the next 12 months, when she hadn't made any progress whatsoever in the 20 months that [Jessica] was living in foster care?" Clearly, ample evidence supports the jury's finding that Annette would not meet the court-ordered conditions within twelve months.

B. Disposition

¶11 Annette argues that the trial court erroneously exercised its discretion in terminating her parental rights because "the evidence presented at trial did not establish that it was in Jessica's best interest … [and t]here was no showing that [her] behavior was in any way egregious." She contends the trial court terminated her parental rights because it considered her cocaine use egregious and it inferred that her use prevented her from properly parenting Jessica. She maintains, "It simply does not follow that it is in the best interest of every child whose parent uses illegal drugs to terminate that parent's parental rights." This court is not persuaded.

¶12 Whether a trial court has applied the proper legal standards governing termination of parental rights is a legal issue subject to *de novo* review. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862-63, 537 N.W.2d 47 (Ct. App. 1995). Notwithstanding a finding of statutory grounds for termination of parental rights, a juvenile court still must exercise discretion to determine whether parental rights should be terminated. *See* ***Rock County DSS v. C.D.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). "The exercise of discretion requires a rational thought process based on examination of the facts and application of the relevant law." ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). This court will not overturn a juvenile court's decision to terminate

parental rights absent an erroneous exercise of discretion. ***Jerry M. v. Dennis L.M.***, 198 Wis. 2d 10, 21, 542 N.W.2d 162 (Ct. App. 1995). This court will not reverse a trial court's discretionary decision unless the record shows that it failed to exercise discretion, the facts fail to support the trial court's decision, or the trial court applied the wrong legal standard. *See* ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986).

¶13 Annette contends that a court cannot terminate parental rights if the evidence of unfitness is not so egregious as to warrant termination. She concedes, however, that a parent's behavior may be considered as it relates to the child's best interest. As the supreme court recently explained:

> At the dispositional hearing, the court may enter an order terminating the parental rights of one or both parents, Wis. Stat. § 48.427(3), or it may dismiss the petition if it finds the evidence does not warrant the termination of parental rights. Wis. Stat. § 48.427(2). Either way, *"[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition"* under section 48.427. Wis. Stat. § 48.426(1) and (2) (emphasis added). "The court shall decide what disposition is in the best interest of the child." Wis. Stat. § 48.424(3).

Sheboygan County v. Julie A.B., 2002 WI 95, ¶28, 255 Wis. 2d 170, 648 N.W.2d 402.

¶14 In determining whether termination is appropriate, the trial court shall consider any report submitted by an agency under WIS. STAT. § 48.425, and it shall consider, but not be limited to, the six factors set forth in WIS. STAT. § 48.426(3):

> (a) The likelihood of the child's adoption after termination.
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
> (c) Whether the child has substantial relationships with the

> parent or other family members, and whether it would be harmful to the child to sever these relationships.
> (d) The wishes of the child.
> (e) The duration of the separation of the parent from the child.
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

"The court should explain the basis for its disposition, on the record, by alluding specifically to the factors in WIS. STAT. § 48.426(3) and any other factors that it relies upon in reaching its decision." ***Julie A.B.***, 255 Wis. 2d 170, ¶30. Further, "[i]n every case the factors considered must be calibrated to the prevailing [best-interests-of-the-child] standard." ***Id.***

¶15 Here, after examining the required report and holding the required dispositional hearing, the trial court explained the basis for its decision; it incorporated the facts presented at trial and, alluding to each of the WIS. STAT. § 48.426(3) criteria, the court concluded:

> The adoption is the only viable course [for] Jessica for a permanent, stable, loving, nurturing supportive familial relationship." She has been away from her mother's care … [and the court does] not view Jessica's relationship with any of the biological family members as being a substantial relationship. Age, health of Jessica, at the time of her removal. I think both of these considerations are strongly supported [by] my decision that the only answer for Jessica is adoption.

The record supports the trial court's decision to terminate Annette's parental rights to Jessica.

By the Court.—Order affirmed.

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