COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2011
A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2946 **Cir. Ct. No. 2010TP5**

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

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

SHEBOYGAN COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

WESLEY M.,

RESPONDENT-APPELLANT,

ANGELA M.,

RESPONDENT.

APPEAL from orders of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Wesley M. appeals a trial court order involuntarily terminating his parental rights to his daughter, Hannah M., and from an order denying his motion for a new trial. Wesley contends that he received ineffective assistance from his trial counsel and that the trial court erred in denying his request to be appointed new counsel or to represent himself. Wesley also contends that he is entitled to a new trial in the interest of justice. We reject Wesley's arguments. We affirm the orders.

BACKGROUND

¶2 On February 8, 2010, the Sheboygan County Department of Health and Human Services filed a petition for the termination of Wesley's parental rights to Hannah under WIS. STAT. § 48.415(2)(a).[2] According to the grounds for the petition, Hannah was first found to be a child in need of protection and services in March 2008 after Wesley neglected her on the night of January 26, 2008, until the morning of January 27, 2008, due to his intoxication. The petition then documents the Department's involvement with Wesley's ongoing alcohol treatment and abuse beginning in February 2008 and ending with a conviction for operating while intoxicated in February 2010, shortly before the filing date of the TPR petition. The documented incidents of alcohol abuse are numerous, often involved contact with the police, and on at least three occasions impacted his supervised visits with Hannah, causing him to, among other things, fall asleep, stagger, slur and vomit in the presence of supervising social workers. The Department maintained that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Hannah's mother, Angela M., joined in the petition and consented to the termination of her parental rights.

despite its efforts to provide services to Wesley, he had not made adequate progress for suspending supervised visitation, "much less returning Hannah to his home." The Department alleged that Wesley had failed to meet the conditions of return over a twenty-two month period and that there is a substantial likelihood that Wesley would not meet the conditions of return within a nine-month period following any fact-finding hearing.

¶3 After the filing of the petition, Wesley was appointed counsel by the public defender's office and a four-day jury trial was scheduled to begin June 1, 2010. However, the trial was adjourned until August 10, 2010, to allow Wesley the time necessary to obtain an independent psychological examination. In the interim, the court received numerous requests from Wesley for the appointment of new trial counsel, the appointment of a different guardian ad litem, the removal of the deputy district attorney, and the recusal of the assigned judge. The court also received motions from Wesley's attorney requesting withdrawal from the case. The court denied all requests. At the close of a four-day trial in August, the jury found that the requirements for the TPR petition had been met by the Department. The trial court subsequently found Wesley unfit and that termination of his parental rights would be in Hannah's best interest.

¶4 Post-termination, Wesley moved for a new trial in the interest of justice. Wesley argued that the trial court erred in its denial of his requests for new counsel or permission to represent himself. He also argued that he received ineffective assistance of counsel. The trial court held a post-termination hearing on February 17, 2011, and issued a written decision in which it rejected Wesley's arguments and denied his request for a new trial. Wesley appeals.

¶5 Additional facts will be set forth as they pertain to the appellate issues.

DISCUSSION

I. *Ineffective Assistance of Counsel*

¶6 Wesley first contends that the trial court erred in denying his request for a new trial on grounds of ineffective assistance of counsel. Wesley contends that his trial counsel's performance was deficient in failing to object to the admission of preliminary breathalyzer test (PBT) results during the trial without first providing an adequate foundation. Wesley contends that because his "continued use of alcohol was the main condition for return he had not met by the time of trial," permitting the Department to "quantify [his] intoxication in such a tangible way undermine[s] confidence in the outcome." We disagree.

¶7 A parent is entitled to the effective assistance of counsel in termination of parental rights proceedings, and the applicable standards are those which apply in criminal cases. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). To prevail, Wesley must show both that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense against the Department's TPR petition. *See* ***A.S.***, 168 Wis. 2d at 1005. The trial court's findings regarding what counsel did and did not do, and counsel's reasons for the challenged conduct, are factual matters that we will uphold unless clearly erroneous. ***Johnson***, 133 Wis. 2d at 216. Whether the attorney's performance was deficient and prejudicial, however, are questions of law we decide de novo. ***Id.***

¶8 Here, the trial court agreed with Wesley that, given the lack of a strategic reason for his decision, trial counsel's performance was deficient in failing to object to the admission of the PBT results without the requisite foundation for reliability. The Department does not dispute that determination on appeal. However, the trial court disagreed with Wesley in finding that, while the elevated PBT results would have had some degree of negative impact on Wesley, there is no reasonable probability that the jury's verdict would have been different in light of the overwhelming and objective evidence of Wesley's alcohol abuse. In its written decision, the trial court noted testimony at trial that Wesley was found incapacitated in a public place with empty bottles of vanilla extract around him; evidence of several police contacts including an arrest and conviction for operating while intoxicated; and the playing of a tape-recorded call from Wesley to the Department in which his speech is noticeably slurred. The court also noted additional incidents of Wesley's alcohol consumption that came into evidence "which so obviously depicted his alcohol abuse" that the jury would not have required assistance in evaluating the evidence.

¶9 We agree with the trial court that Wesley failed to demonstrate prejudice. Wesley argues on appeal that the PBTs "documented a high level of intoxication" which "certainly could have influenced the jury decision to a substantial degree as to whether [he] could have gotten control of his alcohol

usage during the next nine months to demonstrate his ability to care for Hannah."[3] Based on our review of the record, there was ample evidence of Wesley's "high level of intoxication" even absent mention of PBT results. When the first PBT result was admitted, the officer had already testified that Wesley "was highly intoxicated"; he "was unable to stand up straight, and … almost fell." Wesley also testified that on the date of the PBT he was "extremely intoxicated," "pretty much blind intoxicated." When the second PBT result was referenced, the testifying officer stated that he was called to the public library to attend to an individual who was "passed out" or asleep on the second floor. He and his partner arrived to find Wesley "passed out snoring" and "lying on the floor next to a plastic bottle." Although they were eventually able to wake Wesley, they had already called for an ambulance "thinking [they] had an incapacitated person."

¶10 When the third PBT result was referenced, the arresting officer recounted two separate contacts with Wesley on May 31, 2009. The officer was first dispatched for a welfare check on an individual "passed out on the grass" at the 2200 block of North 13th Street. She identified the individual as Wesley, testified that he was "intoxicated" but able to get up and head home. She was called approximately an hour later for another welfare check on an individual (Wesley) lying "passed out" in the grass approximately one block away from the

[3] Wesley challenges the admission of PBT results that "came up 6 times in the trial." However, the record reflects that PBT results were referenced at least nine times during testimony. Wesley does not specify particular PBT test results in support of his argument, but does reference "high test results" as being the source of influence over the jury. We note that Wesley participated in a Pretrial Intoxicated Driver Program, a requirement of which was that Wesley submit to daily or twice daily PBTs. Two of Wesley's case managers from this program testified to PBT results obtained during that time period. These PBTs were scheduled and, while they did show evidence of intoxication, they did not evidence the "high levels of intoxication" that Wesley complains of on appeal. Thus, we focus our discussion on the admission of the four PBT results which "documented a high level of intoxication."

location she had last seen him. Wesley voluntarily went by ambulance to the hospital; however, the officer was later called to the hospital after Wesley kicked a member of the hospital staff in the head, urinated in a hospital room and then again on a vehicle in the parking lot after leaving against medical advice. Wesley was arrested for disorderly conduct and returned to the hospital for medical clearance. Finally, the fourth reference to blood alcohol levels occurred in conjunction with testimony regarding the investigation of a hit-and-run accident and Wesley's subsequent arrest for OWI on August 9, 2009.

¶11 Given the testimony heard by the jury both as to the circumstances surrounding the PBTs, not to mention relating to numerous other incidents of alcohol abuse, we are unconvinced that allowing the Department to "quantify" Wesley's intoxication through the admission of PBT results undermines confidence in the outcome. Contrary to Wesley's contention that the PBT results informed the jury of his high level of intoxication, the record reflects that the PBT results were cumulative to what was already apparent from the testimony. Nor did the PBT results permit the County "to argue that Wesley's failure to maintain absolute sobriety was not just technical in nature but a condition likely to persist." Again, the record is replete with testimony as to Wesley's alcohol use. We conclude, as did the trial court, that Wesley failed to demonstrate that counsel's deficient performance with respect to the admission of the PBT results prejudiced his defense against the Department's TPR petition. *See* ***A.S.***, 168 Wis. 2d at 1005.

II. *Denial of Request for New Counsel and/or Self-Representation*

¶12 Wesley next contends that the trial court erred in denying his request for a new attorney and his request to represent himself. Wesley's correspondence

to the court began on April 2, 2010, when he requested that a new guardian ad litem be appointed for Hannah and also expressed concern regarding the deputy district attorney's handling of his case. Soon thereafter, on April 20, 2010, Wesley's appointed attorney, Marcus Falk, filed a motion for adjournment of trial based on Wesley's belief that "falsehoods have been spread about him that have been [sic] prejudiced his case" and that the district attorney "has had a part in spreading these falsehoods." The motion requested additional time to take depositions "to determine if falsehoods were perpetrated and if they influenced the department and sabotaged [Wesley's] efforts to meet his conditions for the return of his child." The matter was set for a May 3, 2010 motion hearing. However, prior to the motion hearing, Wesley sent a letter to the trial court requesting that Falk withdraw as his attorney because Falk failed to follow up on information regarding the Department's mishandling and mismanagement of his case. In this motion, Wesley also alleged: "I never received a CHIPS hearing or Trial: I was present, but the previous Guardian ad Litem … had the case heard by the Court when I went to the restroom." Falk then filed a motion to withdraw.

¶13 At the May 3, 2010 motion hearing, the court addressed Wesley's request for a new attorney and Falk's motion to withdraw. Although Falk acknowledged that he had been able to address Wesley's concerns in the past, he indicated that he and Wesley had "differences of opinion on how best to proceed." Wesley agreed, stating: "There's a lot I don't understand. We never had a CHIPS hearing or a CHIPS trial…. [T]his is the first time I've ever gone through anything like that. I really don't understand a lot of these things that are happening, and they're just trying to rush this through." The guardian ad litem informed the court of Falk's efforts to obtain records from the Department on Wesley's behalf and of Falk's satisfactory representation of Wesley in a previous

criminal matter. The deputy district attorney opposed the request for new counsel/withdrawal, stating his belief that Wesley was confused about the TPR procedure: "[Wesley] says he's never been through a CHIPS trial. There was a CHIPS proceeding." The court denied Falk's motion to withdraw based on concerns that (1) an adjournment to appoint new counsel would result in a significant delay contrary to the child's best interest and (2) Wesley did not understand the proceedings.

¶14 On June 6, 2010, Wesley sent a letter to the trial court stating: "I feel I have been misrepresented by Attorney Falk, and will be representing myself from this point on." Wesley requested the court to appoint an attorney who would represent his interests but indicated that he would represent himself if the court refused. By letter dated, June 10, 2010, the court advised the parties of Wesley's request and advised that it would not be providing a new attorney. The matter then arose at a status conference on June 21, 2010. There, Falk referenced Wesley's letters and requested that the court grant Wesley's request while permitting Falk to serve as standby counsel. The guardian ad litem opposed Falk's request.[4] The court permitted Wesley to make a statement and then asked a series of questions regarding Wesley's education, employment, understanding of the law, and mental health history. Wesley acknowledged a mental health diagnosis of alcohol dependence and schizoaffective disorder, and having had four convictions for driving while intoxicated. The court stated that it would take the matter under advisement.

[4] The guardian ad litem's position on appeal remains that Wesley was not capable of meaningful self-representation and that his request for new counsel would have been contrary to Hannah's best interest. He asks this court to affirm the orders.

¶15 In a letter dated June 30, 2010, the court explained its decision:

> At the status conference on June 21, 2010, the question arose as to whether I would allow [Wesley] to represent himself in this matter. Section 48.23(2) allows a parent to waive counsel if the court is satisfied that the waiver of the right to counsel is made knowingly and voluntarily. At the hearing, [Wesley] advised the court that he had been convicted of a fourth offense OWI in March 2010, he also advised the court that he was diagnosed in 2006 with having schizoaffective disorder and he also advised the court that he does not understand the rules of civil procedure. Given the importance of this matter and given the answers [Wesley] gave to my questions, I am not satisfied that he knowingly and freely waiving [sic] his right to an attorney. Therefore, Mr. Falk will still represent [Wesley].

¶16 Falk subsequently filed a motion to withdraw on July 20, 2010, acknowledging the court's finding that Wesley was not competent to represent himself, but nevertheless representing that a fundamental conflict existed in the attorney/client relationship. Wesley also contacted the court directly several times in July and August requesting the removal and replacement of both Falk and the district attorney and also requesting the court's recusal. The court held a motion hearing on July 29, 2010, to address Falk's request to withdraw. The Department opposed the request; the GAL took no position other than to note "it's in Hannah's best interest that the matter be resolved as quickly as possible."

¶17 In considering Falk's motion, the court observed:

> The problems that Mr. Falk has with [Wesley] I have no doubt are real. And the question I have is whether those problems would trump the need to get a TPR trial done as quickly as possible. There's already been one adjournment. I've continued the time limits once already. If the time limits were to be continued again, it would be months again before this case could be heard.
>
> I don't see allowing [Wesley] to represent himself in any way, shape, or form is an acceptable alternative as I have mentioned before that I doubt his competence. When this issue came up once before, he advised the court that he had been

> previously diagnosed with schizoaffective disorder. I know in 2008 there were three Chapter 51 commitments that were started. They were dismissed—I'll note that for the record—but they were started.
>
> And, [Wesley], I do not believe, is competent to represent himself.

After hearing arguments from counsel, the court denied Wesley's motion. The court restated its finding that Wesley could not represent himself and cited concern about the time limits.

A. Request for New Counsel

¶18 Wesley contends that the trial court erred in denying his request for new counsel as it was made well in advance of trial and demonstrated a lack of trust in and failure to communicate with his appointed counsel. He argues that the trial court failed to set forth adequate reasons for denying his request. Whether counsel should be relieved at a client's request and a new attorney appointed is a matter within the trial court's discretion. *See* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). "A discretionary determination 'must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (citation omitted).

¶19 In determining whether withdrawal of counsel and the appointment of new counsel were warranted under the circumstances of this case, we employ the factors set forth in ***Lomax***. ***State v. McDowell***, 2004 WI 70, ¶72, 272 Wis. 2d 488, 681 N.W.2d 500. These factors include:

> (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that

> prevented an adequate defense and frustrated a fair presentation of the case.

Lomax, 146 Wis. 2d at 359 (citation omitted). Here, the court adequately inquired into Wesley's complaint; however, Wesley did not timely provide the trial court with adequate reason to appoint new counsel. When asked to make a statement at the June 21, 2010 hearing, Wesley failed to address his request for new counsel, instead informing the court that he would like to represent himself with Falk serving as his "advisor" during trial. The very next day, June 22, 2010, the court received a letter from Wesley informing it that Falk's representation would no longer be provided by the public defender and stating, "I do NOT want the Court to appoint Mr. Falk at County expense." Wesley provided no reason for his request other than his belief that Falk was "working for the other side." In further correspondence to the court in July, Wesley alleged more specific shortcomings in Falk's representation but then failed to appear at the July 29 hearing on Falk's motion to withdraw despite having been informed of the hearing by Falk. The trial at that point was scheduled to begin August 10.

¶20 In its postdisposition decision, the trial court addressed its denial of Wesley's request for new counsel. The court stated:

> The Court knew that the situation between Wesley and Mr. Falk was not good. But the Court also knew that Mr. Falk was certified by the State Public Defender to handle [TPR] cases; that he was experienced in defending these types of cases; and that despite his problems with Wesley, [Falk] would do his best for Wesley.

It is clear from the court's decision that, consistent with ***Lomax***, it considered Wesley's concerns, it did not view the requests as timely in light of the strict time limits under WIS. STAT. ch. 48, and it did not view the relationship between Falk and Wesley as preventing Falk from providing an adequate defense and fair

presentation of the case. *See* ***Lomax***, 146 Wis. 2d at 359. We conclude that the trial court did not err in denying Wesley's request for new counsel.

B. Request for Self-Representation

¶21 As an alternative to the appointment of new counsel, Wesley requested on more than one occasion that he be permitted to represent himself in the TPR. Parents in TPR actions, like defendants in criminal actions, have the right to self-representation. ***DHS v. Susan P.S.***, 2006 WI App 100, ¶13, 293 Wis. 2d 279, 715 N.W.2d 692. However, the self-representation competency standards developed in criminal case law apply to parents in TPR actions. ***Id.***, ¶16. The general framework of these standards is well established:

> "When a defendant seeks to proceed pro se, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." If these conditions are not satisfied, the trial court must prevent the defendant from self-representation because to do otherwise would deny the defendant the constitutional right to counsel. If these conditions are satisfied, the trial court must allow the defendant to represent himself or herself, because to do otherwise would deny the defendant the constitutional right to self-representation.

Id., ¶17 (quoting ***State v. Ruszkiewicz***, 2000 WI App 125, ¶26, 237 Wis. 2d 441, 613 N.W.2d 893). In determining self-representation competency, the court must assess whether a person is able to provide himself or herself with "meaningful" self-representation. ***Susan P.S.***, 293 Wis. 2d 279, ¶18. This does not require technical legal knowledge, but rather the ability to make arguments, present evidence, and ask effective questions. ***Id.***

¶22 The key issue is whether the record reflects an identifiable problem or disability that may prevent meaningful self-representation. ***Id.***, ¶19. Some considerations in assessing self-representation competency are education, literacy,

the ability to communicate effectively, the complexity of the case, experience with the legal system, a person's actual handling of the case, whether the person is unruly or unmanageable, psychological disabilities and mental illness. ***Id.*** A court may consider other factors if they have an effect on meaningful self-representation. ***Id.*** In reviewing a trial court's self-representation competency determination, we give "deference to the judgment, experience and better position of the trial judge." ***Id.***, ¶22.

¶23 Here, the court addressed Wesley's desire to represent himself at both the June 21, 2010 status conference and the July 29, 2010 motion hearing. The trial court rejected Wesley's request based on concerns about his competence, including his mental health and alcohol use. The basis for the court's decision is set forth at length in its post-termination decision. It cites to Wesley's comment at the May 3, 2010 hearing that there had never been a CHIPS hearing as illustrative of Wesley's lack of understanding of the legal process. As further support, the court cited to Wesley's statement in his April 25, 2010 correspondence that the CHIPS hearing had been heard by the court "when [he] went to the restroom." The trial court found Wesley's allegations "disconcerting," stating:

> They ignore the fact that he participated in the CHIPS proceeding (Sheboygan County case number 08JC16), and his comments appear irrational. It's absurd to believe that a Guardian ad Litem convinced a judge to conduct a CHIPS case while one of the participants was in the bathroom. The Court is also concerned about [Wesley's] comment that the prosecutor provided "false and misleading information to the Court." There was no evidence ever presented that any false information was ever presented by anyone. His accusation against [the deputy district attorney] is completely unfounded and reflects more irrational thinking.

The court then observed, "the record contains several reasons which may explain why Wesley would not adequately represent himself." The court cited:

(1) Wesley's diagnosis of schizoaffective disorder, (2) four hospitalizations in 2008 for mental health or alcohol-related issues, (3) many instances of alcohol abuse throughout the course of the Department's supervision, and (4) the complexity of the case, including the number of witnesses (thirty-seven), the length of the trial (four days), and the quantity and type of evidence presented (police reports, social worker reports, psychological evaluations and alcohol and drug assessments).

¶24 Finally, we observe, as did the trial court in its post-termination decision:

> [T]he question of whether a defendant is capable of self-representation *is uniquely a question for the trial court to determine*. It is the trial judge who is in the best position to observe the defendant, his [or her] conduct and his [or her] demeanor and to evaluate his [or her] ability to present at least a meaningful defense.
>
> ….
>
> We realize of course, that the determination which the trial court is required to make must necessarily rest to a large extent upon the judgment and experience of the trial judge and [its] observation of the defendant. For this reason, the trial court *must be given sufficient latitude to exercise its discretion* in such a way as to insure that substantial justice will result. On review, therefore, its determination that the defendant is or is not competent to represent himself *will be upheld unless totally unsupported by the facts apparent in the record*.

Susan P.S., 293 Wis. 2d 279, ¶22 (quoting ***Pickens v. State***, 96 Wis. 2d 549, 568-70, 292 N.W.2d 601 (1980), *overruled in part, but affirmed as to the standard of competency*, ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)) (emphasis in original). Here, the trial court determined that "Wesley demonstrated a lack of understanding about the proceedings that was so significant that had he represented himself, he could not have presented a meaningful defense, and

substantial justice would not have been done." Based on our review of the record, we are satisfied that the trial court's concerns regarding Wesley's self-representation competency are amply supported by the facts therein. We therefore conclude that the court did not err in its denial of Wesley's request for self-representation.

III. *Denial of New Trial in the Interest of Justice*

¶25 Wesley contends that the trial court erred in failing to grant his request for a new trial in the interest of justice under WIS. STAT. § 805.15(1).[5] "This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice, and thus we exercise our discretion only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). For the reasons set forth above, we conclude that Wesley is not entitled to a new trial based on his claims of ineffective assistance of counsel or trial court error in denying his requests for new counsel and/or self-representation. Although Wesley submits that even if those arguments fail, he is nevertheless entitled to a new trial because the real controversy has not been fully tried or there was a miscarriage of justice, he fails to develop any argument in support of his assertion. Thus, we are left with the claimed errors already addressed, none of which has convinced us that Wesley is entitled to a new trial in the interest of justice.

[5] WISCONSIN STAT. § 805.15(1) provides in relevant part:

> MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

CONCLUSION

¶26 We conclude that Wesley received effective assistance of counsel. We further conclude that the trial court properly exercised its discretion in denying Wesley's requests for both new counsel and self-representation. Wesley is not entitled to a new trial in the interest of justice. We therefore affirm the trial court orders terminating Wesley's parental rights to Hannah and denying his request for post-termination relief.

By the Court.—Orders affirmed.

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