COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2011

A. John Voelker
Acting 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. 2011AP1138 **Cir. Ct. No. 2010TP32**

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

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

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

LEE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Lee H., the father of Isaiah H., appeals a circuit court order terminating his parental rights to Isaiah H. based on abandonment. Lee H. argues that reversal is warranted because the circuit court erred in directing a verdict on two special verdict questions during the grounds phase of the termination of parental rights (TPR) proceedings. The special verdict questions refer, respectively, to the following two elements of abandonment: (1) whether there was a court order placing Isaiah H. outside the home that contained the required TPR notice to parents, and (2) whether Lee H. failed to visit or communicate with Isaiah H. for a period of three months or longer.

¶2 Lee H. argues that the circuit court erred in directing a verdict on Question 1 because (1) the court incorrectly believed that he stipulated to a directed verdict on Question 1, and (2) absent a stipulation, this element could not be proven because the record is devoid of specific evidence that he actually received the order that contained the required notice. Lee H. argues that the circuit court erred in directing a verdict on Question 2 because, he asserts, a State Department of Corrections (DOC) rule of supervision prohibited him from having contact with Isaiah H. For the following reasons, this court rejects Lee H.'s arguments and affirms.

BACKGROUND

¶3 The Dane County Department of Human Services petitioned for termination of Lee H.'s parental rights to Isaiah H., alleging abandonment under WIS. STAT. § 48.415(1)(a)2. as a ground for termination. Thus, the County needed

[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.

to prove the following at trial: Isaiah H. "[1] has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) … and [2] the parent has failed to visit or communicate with the child for a period of 3 months or longer." Section 48.415(1)(a)2.[2] The "notice required by s. 48.356(2)" refers to notice to the parent of applicable grounds for termination and the conditions the parent must meet for return of the child. *See* WIS. STAT. § 48.356(2).[3]

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[2] The statute governing grounds for involuntary termination of parental rights, WIS. STAT. § 48.415, provides in relevant part as follows:

> At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights…. Grounds for termination of parental rights shall be one of the following:
>
> **(1)** ABANDONMENT. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:
>
> ….
>
> 2. That the child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) …. and the parent has failed to visit or communicate with the child for a period of 3 months or longer.

[3] The duty of the court to provide notice is set forth in relevant part as follows in WIS. STAT. § 48.356:

> **(1)** Whenever the court orders a child to be placed outside his or her home … because the child … has been adjudged to be in need of protection or services under s. 48.345, 48.347, 48.357, 48.363, or 48.365 …, the court shall orally inform the parent or parents who appear in court … of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home ….
>
> **(2)** In addition to the notice required under sub. (1), any written order which places a child … outside the home … shall

(continued)

¶4 In its petition, the County alleged the existence of a June 2009 CHIPS (child in need of protection or services) order placing Isaiah H. outside the home and containing the notice required by WIS. STAT. § 48.356(2). The County further alleged that Lee H. absconded from "probation"[4] in early August 2009 through January 2010, and that during that time Lee H. failed to have contact with Isaiah H.

¶5 The evidence at trial included two CHIPS orders placing, or continuing to place, Isaiah H. outside the home. One order was dated July 2007 and the other was dated June 2009. The June 2009 order contained the required notice.

¶6 Among the witnesses at trial were Lee H. and a state probation and parole agent who oversaw Lee H.'s supervision. Lee H.'s testimony included a concession that he did not visit or communicate with Isaiah H. between August 4, 2009, and January 31, 2010, a period of more than five months. The supervising agent's testimony included that Lee H. absconded from supervision and failed to report as required to the supervising agent during that period, until Lee H. was located in Minnesota and extradited back to Wisconsin on January 31, 2010.

¶7 The special verdict form consisted of six questions. The first two questions, the ones most pertinent here, stated as follows:

> notify the parent or parents … of the information specified under sub. (1).

[4] It appears from the trial evidence that Lee H. was on extended supervision, not probation. Lee H. does not argue that the distinction has any significance here, and there appears to be no reason to conclude that it has any significance to this appeal.

> 1. Was ISAIAH H[.] placed, or continued in a placement, outside of LEE H[.]'S home pursuant to a court order which contained the termination of parental rights notice required by law?
>
> ….
>
> 2. Did LEE H[.] fail to visit or communicate with ISAIAH H[.] for a period of three months or longer?[5]

¶8 The circuit court granted a County motion for a directed verdict on special verdict Questions 1 and 2, answering each question "YES." The other special verdict questions went to the jury, which found that Lee H. did not have good cause for failing to have contact with Isaiah during the alleged abandonment period. After a disposition hearing, the court terminated Lee H.'s parental rights.

¶9 Additional facts are referenced as relevant to discussion below.

DISCUSSION

¶10 "'A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion.'" ***Door Cnty. Dep't of Health & Family Servs. v. Scott S.***, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999) (quoting ***Liebe v. City Finance Co.***, 98 Wis. 2d 10, 18-19, 295 N.W.2d 16 (Ct. App. 1980)). Lee H. makes only an unsupported argument that a directed verdict is not an available procedure in a termination of parental rights case. This argument is incorrect. *See* ***Scott S.***, 230 Wis. 2d at 465; ***D.B. v. Waukesha Cnty.***

[5] The remaining special verdict questions asked: whether, if Lee H. had failed to visit or communicate with Isaiah H during the alleged abandonment period, Lee H. had good cause for doing so; whether Lee H. communicated about Isaiah H. with the County during the alleged abandonment period; and whether, if Lee H. did not communicate about Isaiah H. with the County during the alleged abandonment period, Lee H. had good cause for failing to do so.

Human Servs. Dep't, 153 Wis. 2d 761, 765, 451 N.W.2d 799 (Ct. App. 1989) (A TPR proceeding is civil in nature and Wisconsin civil procedure allows a directed verdict.).

¶11 In addition, Lee H. argues that it was error for the circuit court to direct verdicts on Questions 1 and 2 here. Lee H.'s arguments are different with respect to each directed verdict question. The following discussion begins with his arguments regarding Question 1, then addresses his arguments regarding Question 2.

A. Special Verdict Question 1

1. Additional Factual Background for Question 1

¶12 Before trial, Lee H.'s counsel informed the circuit court and the County in the following terms that Lee H. was unwilling to stipulate to a directed verdict on any special verdict question:

> I erred I believe in representing to the court [at an earlier point in time] that [Lee H.] agrees to the Court answering Questions No. 1 and No. 2. I think that that's his personal right to enter into that stipulation to take those questions away from the jury and, quite honestly, he has been insistent from the beginning that he wants a jury determination of all of the questions that are asked in the form of the verdict, and I know the Court didn't conduct a colloquy with him to see that it was something that he was doing knowingly, voluntarily and intelligently, and the Court may well plan to do that at a later point, but I did advise [the County] before we came in here today and before—I'm advising the Court now, that he does not wish to enter into that stipulation removing those questions from the jury and I think he's got a right to do that.
>
> THE COURT: Certainly he does ….

¶13 The next day, after the close of evidence, Lee H.'s counsel made the following statement, in apparent anticipation of the County's motion for a directed verdict on Questions 1 and 2: "I don't have a problem with [Question 1], and based on the evidence I think that the Court can fairly answer that question." As anticipated, the County moved for a directed verdict on Questions 1 and 2, noting, "I think they've conceded Question No. 1." Lee H.'s counsel reiterated his position: "I would agree … that the answer to the first question should be yes." Ruling on the County's motion, the circuit court stated: "There's no dispute as to Question No. 1 by the parties" and "I will grant the motion for directed verdict …. No. 1 is by stipulation of the parties …."

2. Analysis of Lee H.'s Arguments on Question 1

¶14 As indicated above, Question 1 asked: "Was ISAIAH H. … placed, or continued in a placement, outside of LEE H.[]'S home pursuant to a court order which contained the termination of parental rights notice required by law?" Lee H. argues that the circuit court erred in directing a verdict on Question 1 because the court incorrectly believed that he stipulated to a directed verdict on Question 1, and, in addition, the evidence does not support a directed verdict on Question 1 because there was no evidence that he received the order with the required notice. This court begins with Lee's stipulation argument then turns to his argument regarding actual receipt of the order.

a. Stipulation

¶15 Lee H. asserts that he did not stipulate to a directed verdict on Question 1. This is true, in the sense that Lee H. did not enter a personal

stipulation upon which the court could rely in deeming the element proven.[6] Instead of stipulating in this manner, Lee H.'s counsel conceded that the evidence already adduced at the trial supported a directed verdict on Question 1. Counsel said that "*based on the evidence* I think that the Court can fairly answer that question." (Emphasis added.) However, in focusing on the mode of concession, Lee H. fails to explain why it is meaningful whether he personally stipulated to a directed verdict on Question 1, or meaningful whether the circuit court erroneously believed there was a personal stipulation. With or without a personal stipulation, the circuit court was presented with the County's motion for a directed verdict, requiring the court to evaluate it under the correct standard of law based on the facts adduced at trial and the positions articulated by the parties. Although the court at one point referred to the parties' "stipulation," it is apparent in context that the court agreed that the evidence supported a directed verdict on Question 1.

¶16 Lee H. argues, somewhat confusingly, that if he *had* stipulated to a directed verdict on Question 1, then under ***Walworth County Department of Health & Human Services v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168, the circuit court would have been required to conduct a personal colloquy with him before accepting the stipulation, in order to take a valid waiver of his jury trial rights as to that element of abandonment. This argument is confusing because ***Andrea L.O.*** involved a stipulation and, as Lee H. asserts, this case does not.[7] *See* ***id.***, ¶¶2, 9, 18. If Lee H. means to argue that ***Andrea L.O.***

[6] There is some ambiguity as to what Lee H. means by a "stipulation," but it seems clear at a minimum that he means a *personal* stipulation by the parent, not a stipulation through an attorney.

[7] In ***Walworth County Department of Health & Human Services v. Andrea L.O.***, 2008 WI 46, 309 Wis. 2d 161, 749 N.W.2d 168, the supreme court urged circuit courts in future TPR proceedings to "consider personally engaging the parent in a colloquy explaining that a (continued)

requires a colloquy or reversal in his situation, where the County moved for a directed verdict on a jury question after trial and Lee H.'s counsel conceded that the evidence supported a directed verdict, then Lee H.'s argument is insufficiently developed and we do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not consider issues that are inadequately briefed).

b. Receipt of Order Containing Notice

¶17 Turning now to Lee H.'s second argument regarding the directed verdict on Question 1, he contends that it was improper for the additional reason that there was no evidence at trial that he ever received the June 2009 order that contained the required TPR notice to parents. However, this argument raises a new legal issue that he failed to raise at trial: whether WIS. STAT. §§ 48.415(1)(a)2. and 48.356(2) required the County to prove not only the *existence* of an order placing the child outside the home and containing the required notice but also that he *received* a copy of that order.

¶18 Because Lee H. failed to raise this legal issue in a timely manner at trial, this court concludes that Lee H. forfeited direct review of it. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (right to make an argument on appeal is forfeited when not raised in trial court); *see also* ***Scott S.***, 230 Wis. 2d at 466 (failure to object to a directed verdict forfeits the parent's right

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stipulation to an element withdraws that element from the jury's consideration and determining that the withdrawal of that element from the jury is knowing and voluntary." ***Id.***, ¶55 (emphasis added); *see also* ***Manitowoc Cnty. Human Servs. Dep't v. Allen J.***, 2008 WI App 137, ¶¶1-3, 16-17, 314 Wis. 2d 100, 757 N.W.2d 842 (reversing a TPR order when there was a stipulation before trial, no colloquy, and evidence to support directed verdict was "sparse").

to direct review of whether directed verdict was proper); ***D.B.***, 153 Wis. 2d at 766 (same). However, a parent is entitled to the effective assistance of counsel in termination of parental rights proceedings. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1004–05, 485 N.W.2d 52 (1992). Thus, this court will consider Lee H.'s argument in that context. Indeed, in a postdisposition hearing before the circuit court, Lee H. framed trial counsel's concession to the directed verdict on Question 1 as an ineffective-assistance-of-counsel issue.

¶19 To show ineffective assistance of counsel, the parent must demonstrate both that trial counsel's performance was deficient and that the deficiency prejudiced the parent's defense. *See* ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. Whether counsel's actions constitute ineffective assistance presents a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). This court will uphold the trial court fact findings regarding counsel's actions unless the findings are clearly erroneous. ***Id.*** at 634. Whether counsel's performance was deficient or prejudiced the defense are questions of law for de novo review. ***Id.***

¶20 Courts may decide ineffective assistance claims based on prejudice without considering whether counsel's performance was deficient. ***Roberson***, 292 Wis. 2d 280, ¶28. To establish prejudice, the parent must show that there is a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. ***Id.***, ¶29. "A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted).

¶21 This court concludes that Lee H. has failed to show prejudice because, even assuming without deciding that the County was required to prove receipt of the order,[8] Lee H. has failed to articulate any reason to conclude, much less to show the required "reasonable probability," that the result at trial would have been different. To the contrary, the record appears to reflect that, if his attorney had raised the issue, the County would have readily shown beyond any reasonable dispute that Lee H. received the order.

¶22 The County at a postdisposition hearing on Lee H.'s ineffective-assistance-of-counsel claims produced a transcript of a June 24, 2009 hearing providing strong evidence that Lee H. received a copy of the June 2009 CHIPS order at the conclusion of the hearing. That transcript shows that the Lee H. was present for that hearing and the following exchange occurred:

> [THE COUNTY]: Your Honor, just one final thing then, too. I had prepared an extra copy of the [June 2009 CHIPS] order for [Lee H.] to get today …. And when your clerk is done with it, I will provide it to him.… [H]e should be able to carry it with him.
>
> THE COURT: She's dating it, and we'll give it to you right now.
>
> Is there anything else, anybody?

[8] Lee H. points to no authority in support of his argument that proof of receipt is required other than ***D.F.R. v. Juneau County Department of Social Services***, 147 Wis. 2d 486, 433 N.W.2d 609 (Ct. App. 1988), *overruled by* ***Cynthia E. v. La Crosse County Human Services Department***, 172 Wis. 2d 218, 229-30, 493 N.W.2d 56 (1992), *and by* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶29, 233 Wis. 2d 344, 607 N.W.2d 607. The County argues that there is no such requirement. Without addressing the merits, we note only that, putting aside the question of whether ***D.F.R.*** retains precedential value, ***D.F.R.*** does not on its face directly address whether WIS. STAT. §§ 48.415(1)(a)2. and 48.356(2) require the petitioner (here the County) to prove that the parent received the order used to satisfy this element of abandonment.

In addition, the County produced an affidavit of mailing showing that an additional copy of the order was mailed to Lee H.

¶23 Lee H. points to nothing to suggest that he could have overcome the above evidence by testimony or otherwise. Lee H. testified at the postdisposition hearing, and the circuit court made extensive findings that he was not credible, including specific findings that Lee H. was not credible in testifying that he did not receive the order. The court made a specific fact finding that Lee H. received the order. In making its findings, the court relied on the paper evidence and also on Lee H.'s lack of credibility as shown by his testimony on other issues. The court noted that there were numerous times that Lee H. would "flatly deny" a given fact, but then change his testimony when confronted with contrary evidence. The court gave specific examples of this, including that Lee H. initially denied being present at the June 24, 2009, hearing but then changed his testimony when confronted with the hearing transcript.

¶24 Lee H. provides no reason to conclude that the jury could have reasonably viewed the available evidence regarding receipt of the order any differently than the circuit court did at the postdisposition hearing. Indeed, Lee H. fails to respond to an argument by the County that the paper evidence and circuit court's findings conclusively show that Lee H. received the order. Accordingly, we could take this point as conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (court may take as a concession the failure in a reply brief to refute a proposition asserted in a responsive brief).[9] Regardless, this court concludes that Lee H. fails to show that he was prejudiced by his

[9] Lee H. did not file a reply brief.

counsel's failure at trial to advance a position that the County could not show that Lee H. received the order.

¶25 As a final matter pertaining to Question 1 of the special verdict, Lee H. may be making an additional argument that the County had to prove that both the June 2009 CHIPS order and the July 2007 CHIPS order contained the notice required by law. If that is Lee H.'s argument, it fails. What matters is that a CHIPS order that was in effect for the alleged abandonment period contains the notice, and Lee H. does not dispute that the June 2009 order was in effect for the alleged abandonment period. *See* ***Heather B. v. Jennifer B.***, 2011 WI App 26, ¶¶14, 18, 331 Wis. 2d 666, 794 N.W.2d 800 (abandonment period needs to fall within duration of CHIPS-based placement); ***Rock Cnty. Dep't of Social Servs. v. K.K.***, 162 Wis. 2d 431, 435, 438-39, 469 N.W.2d 881 (Ct. App. 1991) (only one CHIPS order need contain the required notice for purposes of the abandonment ground).

B. Special Verdict Question 2

¶26 The court now turns to Lee H.'s argument that the circuit court erred in directing a verdict on Question 2. As indicated above, Question 2 asked, "Did LEE H[.] fail to visit or communicate with ISAIAH H[.] for a period of three months or longer?," and the court answered that question "YES." As also indicated above, the evidence showed that Lee H. did not visit or communicate with Isaiah H. during the alleged abandonment period, and had absconded from supervision and failed to report during that period.

¶27 Lee H. nonetheless argues that a directed verdict on Question 2 was improper. His argument is based on WIS. STAT. § 48.415(1)(b) and a rule of

supervision imposing conditions that Lee H. had to meet in order to have contact with Isaiah H.

¶28 WISCONSIN STAT. § 48.415(1)(b) provides that, when abandonment under § 48.415(1)(a)2. or 3. is alleged as the ground for termination of parental rights, the period of abandonment "shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child." The rule of supervision on which Lee H. relies stated:

> You shall have no contact with anyone under the age of 18 without prior agent approval and unless accompanied by an adult sober chaperone approved by your agent. This includes face-to-face, telephone, mail, electronic, third party, or "drive by" contact.

¶29 Lee H. argues that a directed verdict on Question 2 was improper because the rule of supervision is by judicial order and "prohibited" him from having any contact with Isaiah H.[10] Lee H. preserved this issue for direct review by raising it at trial. The County does not dispute that this rule was in effect during the relevant time period and that both state and County officials were prepared to follow its terms to prohibit contact if its terms were not met. However, the County argues that the rule is not a "judicial order" and, therefore, WIS. STAT. § 48.415(1)(b) does not apply. The County argues in the alternative that, even if the rule is considered part of a judicial order, Lee H.'s argument fails under ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 598 N.W.2d 924 (Ct. App. 1999).

[10] The record reflects that the County was prepared to provide a "social service specialist" to fill the role of "an adult sober chaperon," so Lee H.'s argument understandably focuses on the requirement that he obtain his supervising agent's approval.

¶30 This court will assume, without deciding, that the rule of supervision could be considered to be imposed "by judicial order" within the meaning of WIS. STAT. § 48.415(1)(b). Having made that assumption, the court agrees with the County's alternative argument, because there is no evidence that the rule prohibited Lee H. from visiting or communicating with Isaiah H., and there is powerful evidence to the contrary that Lee H. decided not to pursue DOC approval and contact. Lee H. fails to support, by reference to facts adduced at trial, his claim on appeal that "it was impossible for Lee H. to obtain the approval of his agent to visit with his son Isaiah."

¶31 In ***Carla B.***, this court interpreted WIS. STAT. § 48.415(1)(b) to mean that "a parent cannot be penalized for failure to do something which he or she is prohibited from doing." ***Carla B.***, 228 Wis. 2d at 704. However, the court's decision also made clear that a judicial order creating a condition precedent to contact does not prohibit contact within the meaning of § 48.415(1)(b), at least not as long as it is within the parent's power to meet the condition. *See* ***id.*** at 704-06 & n.3. In ***Carla B.***, the condition was that the parent had to see a therapist, and visitation could not occur until the therapist believed that visitation would not be harmful to the child. ***Id.*** at 706. The court held against the parent because the parent quit counseling and, therefore, "did not even finish the first step toward reinstating visitation." ***Id.***

¶32 Lee H. asserts that, unlike the parent in ***Carla B.***, he could not by his own actions ensure that his agent would exercise the agent's "unfettered discretion" to permit Lee H. to have contact with Isaiah H. This is not a persuasive argument. There is no reason to conclude that the agent supervising Lee H. had any more discretion to refuse contact than did the therapist in ***Carla B.*** And, because the evidence clearly showed that Lee H. absconded and failed to

report during the alleged abandonment period, the strong inference from the evidence is that Lee H. did not take even the first step to meet the condition precedent for contact with Isaiah H.

¶33 Confirming this strong inference, Lee H.'s supervision agent stated in unrebutted testimony that, even though he had explained to Lee H. how to make a formal request for approval of a chaperon, Lee H. never put in such a request. Lee H. argues that his agent never gave him approval to have contact with Isaiah H., but that argument is beside the point when there is no evidence that Lee H. requested approval. Lee H. fails to point to any evidence to support a finding that the agent would have withheld approval had Lee H. requested it.

¶34 Lee H. does point to evidence suggesting that his supervision agent was aware that Lee H. wanted to have contact with Isaiah H. before Lee H. absconded. However, this evidence is insufficient to support a finding that Lee H. made any effort to seek approval during the alleged abandonment period, or that the agent would have rejected a request for approval of chaperoned contact.

¶35 In sum, this court concludes that a directed verdict on Question 2 was proper.

CONCLUSION

¶36 For the reasons stated, the order terminating Lee H.'s parental rights to Isaiah H. is affirmed.

By the Court.—Order affirmed.

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