

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 22, 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. 2011AP1659**

**Cir. Ct. No. 2010TP34**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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

**DANE COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**JOHNNY S.,**

**RESPONDENT-APPELLANT.**

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

¶1 VERGERONT, J.<sup>1</sup> Johnny S. appeals the order terminating his parental rights to Kavon S. and the order denying postdisposition relief. He contends he is entitled to a new trial on two grounds: (1) his constitutional right to a fair trial was violated because he was not able to meaningfully participate in the jury trial; and (2) he was denied effective assistance of counsel. We conclude Johnny was able to meaningfully participate in the trial and did not receive ineffective assistance of counsel. Accordingly, we affirm the order terminating his parental rights to his son and the circuit court's order denying his postdisposition motion for a new trial.

#### BACKGROUND

¶2 On March 29, 2010, Dane County Department of Human Services (the Department) filed a petition to terminate the parental rights (TPR) of Johnny S. to his son, Kavon S. The petition alleged two grounds for termination of his parental rights: abandonment under WIS. STAT. § 48.415(1) and failure to assume parental responsibility under WIS. STAT. § 48.415(6). Johnny was an inmate at the Dixon Correctional Center in Dixon, Illinois, during the course of the TPR proceedings.

¶3 The State Public Defenders Office appointed counsel for Johnny. Johnny appeared by telephone at seven pretrial hearings. He did not appear by phone or in person at three hearings; however, his counsel appeared at these.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Johnny appeared by telephone at his two-day jury trial. The jury found that Johnny had failed to assume parental responsibility for Kavon and that Johnny had abandoned Kavon. Johnny again appeared by telephone at the subsequent disposition hearing, after which the court issued an order terminating Johnny's parental rights.

¶5 Johnny filed a notice of appeal asserting that he is entitled to a new trial because he was denied the right to meaningfully participate in the trial and because he received ineffective assistance of counsel. On Johnny's motion, this court remanded the matter for an evidentiary hearing on his postdisposition motion for a new trial. Johnny appeared by videoconference at the hearing. The circuit court heard testimony from Johnny, Johnny's trial counsel, and the attorney who represented Johnny before trial counsel took over Johnny's case. The circuit court determined that Johnny had not been denied the right to meaningfully participate in the trial and that trial counsel's representation of Johnny had not been ineffective. Accordingly, the circuit court denied Johnny's motion for a new trial.

## DISCUSSION

¶6 On appeal Johnny contends the circuit court erred in concluding he was not entitled to a new trial. He asserts he was denied the right to meaningfully participate in the trial because he was required to participate by telephone, he could not hear what was being said during trial, and he was not given enough time to speak with his attorney during trial. He also asserts he received ineffective assistance of counsel because trial counsel did not arrange for him to appear by videoconference throughout the TPR proceedings. The Department responds that the circuit court correctly determined that Johnny was not denied the right to

meaningfully participate in the trial and did not receive ineffective assistance of counsel.

#### I. Meaningful Participation in Trial

¶7 Johnny contends he was not able to meaningfully participate at the trial for three reasons. First, he appeared by telephone, not videoconference, and he did not waive his right to appear by videoconference. Second, he could not hear what was being said during trial. Third, he was not given enough opportunities to speak with his attorney. In the following paragraphs, we address each contention and conclude Johnny’s right to meaningfully participate in the trial was not violated on any of these grounds.

¶8 The respondent in a TPR case has a right to meaningfully participate in the proceedings. *Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 701, 530 N.W.2d 34 (Ct. App. 1995) (citation omitted). Whether a respondent in a TPR proceeding can meaningfully participate without being physically present depends on the circumstances of each case. *Id.* at 701-02. Whether participation has been “meaningful” is a constitutional fact subject to our independent review. *State v. Lavelle W.*, 2005 WI App 266, ¶2, 288 Wis. 2d 504, 708 N.W.2d 698 (citation omitted). However, we defer to the circuit court’s factual findings on historical facts unless they are clearly erroneous. WIS. STAT. § 805.17(2); *Waukesha Cnty. Dep’t of Health & Human Servs. v. Teodoro E.*, 2008 WI App 16, ¶10, 307 Wis. 2d 372, 745 N.W.2d 701 (citation omitted).

¶9 We first address Johnny’s argument on videoconferencing. Johnny’s trial counsel testified at the evidentiary hearing on remand that, for tactical reasons, he had advised Johnny to appear via telephone. Trial counsel also testified that he and Johnny discussed whether Johnny should appear by telephone

or videoconference, and that Johnny chose to appear by telephone. Johnny's testimony contradicted the testimony of his counsel. Johnny testified that he had always requested videoconference.

¶10 The circuit court assessed trial counsel's credibility and determined that counsel's testimony was credible based upon his demeanor during his testimony, as well as his lack of any motive to falsify information and the possible professional implications for doing so. The circuit court also assessed the credibility of Johnny and found that Johnny was not credible based upon his past criminal convictions, his direct interest in the outcome of the proceedings, the contradiction between certain portions of Johnny's testimony and other testimony the court found credible, and other portions of Johnny's testimony the court found implausible. Therefore, the circuit court accepted trial counsel's testimony and found that Johnny had chosen to appear by telephone. Based on this finding, the court concluded he waived his right to appear by videoconference.

¶11 When a circuit court sits as a fact finder, it is the circuit court's role to assess the credibility of witnesses, *Fidelity & Deposit Co. v. First National Bank of Kenosha*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980), and the weight to be given to each witness's testimony, *Milbauer v. Transport Employee's Mutual Benefit Society*, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). We will not overrule a circuit court's credibility determination absent a finding that it is "inherently or patently incredible," or "in conflict with the uniform course of nature...." *Nicholas C.L. v. Julie R.L.*, 2006 WI App 119, ¶23, 293 Wis. 2d 819, 719 N.W.2d 508 (citation omitted).

¶12 Here, the circuit court carefully considered each witness's testimony and explained its credibility assessment. The court's credibility determinations are

not implausible and are supported by the record. We therefore accept the circuit court's factual determination that Johnny chose to appear by telephone as not clearly erroneous. Based on this factual determination, we agree with the circuit court that Johnny waived any right to appear by videoconference.

¶13 We next address Johnny's contention that he was unable to meaningfully participate because he could not hear what was being said during trial.

¶14 The circuit court found that each time Johnny could not hear, he interrupted the proceedings and asserted that he wanted a question repeated. This finding is supported by the record. The record shows that, at various times throughout the proceedings, Johnny notified the court that he was unable to hear what was being said in the courtroom and the statements that Johnny said he could not hear were then repeated. For example, during assistant corporation counsel's opening statement, Johnny interrupted to inform the court that he could not hear counsel's statement. The court reminded counsel to be more aware of his microphone, and counsel asked Johnny if he could now hear him. After Johnny answered that he could, counsel repeated the sentence he had said prior to Johnny's interruption.

¶15 There was no evidence on the record regarding Johnny's inability to hear statements during trial other than Johnny's testimony. The circuit court assessed Johnny's credibility and concluded he was not credible for reasons we have already noted. There is no basis for disturbing this credibility determination.

¶16 Finally, we address Johnny's contention that he was not given sufficient opportunities throughout the trial to speak with his attorney. The circuit court found that he was, and we conclude this finding is supported by the record.

¶17 The record reflects that, during breaks throughout the proceedings, Johnny was given opportunities to speak with his trial counsel. Trial counsel testified that the amount of time provided to him was sufficient for him to communicate with Johnny. The court found that the testimony of trial counsel was credible for reasons we have already explained. In addition, after stating that Johnny had interrupted the court multiple times when he had trouble hearing what was being said in the courtroom, the circuit court found that, if Johnny wanted to speak with his attorney, he would have also interrupted the court to indicate this. This finding is not clearly erroneous.

¶18 Johnny contends that the circumstances in this case are similar to those in *Lavelle W.*, 288 Wis. 2d 504. We disagree. In *Lavelle W.*, we held that a father who appeared by telephone in a TPR case did not have the opportunity to meaningfully participate in his trial because of the lack of a good telephone connection during trial. *Id.*, ¶9. The father’s ability to hear the proceedings “faded in and out, and, at least at one point, was temporarily interrupted by static.” *Id.*, ¶8. In contrast, as we have already explained, the circuit court found that Johnny was generally able to hear what was said in the courtroom and, when he said he did not hear something, the statement was repeated to ensure he heard the entire statement.

## II. Ineffective Assistance of Counsel

¶19 Johnny contends he was denied his Sixth Amendment right to effective assistance of counsel because trial counsel did not arrange for him to appear by videoconference instead of by telephone throughout the TPR proceedings. Johnny also contends that the circuit court’s finding that Johnny’s testimony was not credible was clearly erroneous.

¶20 Whether trial counsel provided ineffective assistance of counsel is a mixed question of law and fact. *State v. Guerard*, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12 (citation omitted). We uphold the circuit court’s factual findings unless they are clearly erroneous. *Rhonda R.D.*, 191 Wis. 2d at 710 (citation omitted). However, whether the attorney’s conduct constituted ineffective assistance is a question of law, which we decide de novo. *Id.* To prevail on his ineffective assistance of counsel claim, Johnny must establish that his trial counsel’s performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 710-11 (citation omitted).

¶21 We conclude trial counsel’s performance was not deficient. The circuit court credited trial counsel’s testimony that he discussed appearance by videoconference versus appearance by telephone with Johnny, that he advised Johnny for tactical reasons to appear by telephone, and that Johnny chose this option. We have already concluded that the circuit court’s credibility assessments of Johnny and his counsel are not clearly erroneous. Johnny does not explain why, accepting the circuit court’s factual findings, there was any deficiency in counsel’s performance. Accordingly, we reject his argument that he was denied effective assistance of counsel on the basis that his trial counsel did not arrange for him to appear by videoconference.

## CONCLUSION

¶22 We affirm the order terminating Johnny’s parental rights and the order denying his postdisposition motion for a new trial.

*By the Court.*—Orders affirmed.

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

