COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP2613 **Cir. Ct. No. 2010TP17**

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

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

CHIPPEWA COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

JAMES A.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Affirmed.*

¶1 PETERSON, J.[1] James A. appeals an order terminating his parental rights to Dakota S. A jury determined James had failed to assume parental responsibility for Dakota, pursuant to WIS. STAT. § 48.415(6). On appeal, James argues that § 48.415(6) is unconstitutionally vague. We affirm.

BACKGROUND

¶2 James and Cassandra S. dated for approximately six months in 2008. In early 2009, Cassandra informed James she was pregnant and he was probably the father. James testified that he offered to attend doctor appointments with Cassandra and provide support if he was the father, but Cassandra allegedly declined his offer.

¶3 In April 2009, Cassandra gave birth to Dakota. James was incarcerated at the Eau Claire County jail from May 20, 2009 until July 29, 2010. In September 2009, DNA testing determined James was Dakota's father, and, in October, he was formally adjudicated Dakota's father.

¶4 In November 2009, Dakota was removed from Cassandra's care and placed in foster care. The Brown County Department of Human Services contacted James at the Eau Claire County jail to inform him that Dakota was placed in foster care and that a petition was filed alleging Dakota was a child in need of protection or services.

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

¶5 According to James, his family was contacted regarding placement of Dakota. However, his family was unable to take Dakota or provide support because they lived in Kansas and were "financially hurting."

¶6 The Chippewa County Department of Human Services took over the case for Brown County. Social worker Constance Fedie met with James at the Eau Claire County jail on December 4, 2009 to discuss the CHIPS proceeding. In January 2010, Dakota was determined to be a child in need of protection or services.

¶7 In April 2010, James received Huber privileges for work release. He explained the child support agency took partial child support payments out of his checks in May, June and July. During this time, Fedie asked James if he wanted Huber privileges to visit with Dakota, and James stated he did. However, when Fedie contacted the jail and requested James be given Huber privileges for visitation, the jail denied this request because James had previously absconded from Huber.

¶8 While incarcerated, James wrote a few letters concerning Dakota. He wrote to Fedie in November and December 2009, and in July 2010. Fedie testified James' letters were in response to letters she had written him. She explained James never asked about Dakota's well-being, and, in one letter, James referred to Dakota as his "so-called son."

¶9 Prior to the filing of the petition to terminate parental rights, James also wrote one or two letters to Dakota's foster family.[2] Kathleen S., Dakota's foster mother,[3] testified she received one letter from James in July 2010. James testified that he also sent a letter to Kathleen sometime between February and May 2010. Kathleen did not receive placement of Dakota until May 2010.

¶10 On cross-examination, when asked about the letters concerning Dakota, James explained he was only permitted to write two letters per week and needed to write to his other child and to other family members. He conceded that before his July 2010 release he had the opportunity to write approximately sixty letters.

¶11 James was released from jail on July 29, 2010. On August 7, he called Kathleen. James testified that during this phone call, he asked how Dakota was doing and tried to get some information. Kathleen stated she discussed Dakota with James for approximately five minutes.

¶12 Also in August, Fedie met with James one time and also scheduled a phone conference with James and his probation agent. The purpose of the phone conference was to discuss visitation with Dakota. James was supposed to meet with his agent and then call Fedie from his agent's office. Fedie testified the phone conference never occurred and she was unable to contact James' probation agent or James. James explained that when he went to the agent's office, the agent

[2] James wrote two additional letters to the foster family after the County filed the petition to terminate his parental rights. At trial, the County objected to testimony concerning these letters because they were sent after the petition had been filed. The court sustained the objection.

[3] Kathleen is also Dakota's great-great aunt.

was not there, and the probation office would not allow him to call Fedie to tell her the meeting was cancelled.

¶13 James was incarcerated for two days in August and the first seventeen days of September 2010. He was incarcerated again on September 21 and remained in jail through the filing of the petition to terminate parental rights.

¶14 On October 22, 2010, the County filed the petition to terminate James' parental rights on the ground of failure to assume parental responsibility. At the trial, James testified he has never met Dakota or seen a photograph of him. A jury determined James failed to assume parental responsibility, and, following a dispositional hearing, the court terminated James' parental rights.

DISCUSSION

¶15 On appeal, James asserts WIS. STAT. § 48.415(6)—failure to assume parental responsibility—is unconstitutionally vague on its face. We independently review the constitutional validity of a statute. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Statutes are presumed to be constitutional, and a party bringing a constitutional challenge must show it is unconstitutional beyond a reasonable doubt. ***State v. Ruesch***, 214 Wis. 2d 548, 556, 571 N.W.2d 898 (1997).

¶16 WISCONSIN STAT. § 48.415(6) provides:

> FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (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 not 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 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 expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

¶17 "[I]f the defendant is not asserting that a First Amendment right is burdened and his conduct plainly falls within the proscriptions of the statute, he cannot challenge the statute on vagueness grounds." ***Ruesch***, 214 Wis. 2d at 561-62 (citing ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 445 U.S. 489, 495 (1982)); *see also* ***State ex rel. Smith v. City of Oak Creek***, 139 Wis. 2d 788, 802-03, 407 N.W.2d 901 (1987) ("[A] plaintiff whose conduct is clearly proscribed by the statute in question cannot complain of vagueness of a law as applied to others; the law must be impermissibly vague in all of its applications.").

¶18 James does not allege WIS. STAT. § 48.415(6) implicates a First Amendment right. Therefore, the threshold question is whether James' conduct plainly falls within the statute's proscriptions. If it does, he is precluded from challenging the statute on vagueness grounds. *See* ***Ruesch***, 214 Wis. 2d at 561-62.

¶19 WISCONSIN STAT. § 48.415(6) provides notice that failure to assume parental responsibility is a ground for termination of parental rights. To establish failure to assume parental responsibility, the County must prove the parent has "not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). In turn, "substantial parental relationship" is defined as "the acceptance and exercise of significant responsibility for the daily supervision,

education, protection and care of the child." WIS. STAT. § 48.415(6)(b). Paragraph (b) also instructs that, when evaluating whether a parent has had a substantial parental relationship with a child, the court may consider various factors, including "whether the person has 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," or "whether … the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy."

¶20 Based on the evidence at trial, James' conduct indisputably falls within the proscriptions of WIS. STAT. § 48.415(6). First, James has never met or even seen a photograph of Dakota, and has been incarcerated for almost all of Dakota's life. Although incarceration by itself is not a sufficient basis to terminate parental rights, *see* ***Kenosha County Department of Human Services v. Jodie W.***, 2006 WI 93, ¶50, 293 Wis. 2d 530, 716 N.W.2d 845, the evidence shows James has failed to maintain any type of relationship with Dakota.

¶21 During James' incarceration, and prior to the filing of the petition to terminate parental rights, James sent only one or two letters to Kathleen, and three letters to Fedie. Fedie testified James' letters were always in response to letters she sent him, he never inquired about Dakota's well-being, and in one letter he referred to Dakota as his "so-called son."

¶22 After James was released from incarceration on July 24, 2010, he made only one telephone call to Dakota's foster family on August 7. Kathleen testified they discussed Dakota for approximately five minutes. Kathleen did not hear from James again until after the petition for termination was filed in October 2010, and that only amounted to two letters in November.

¶23 James' conduct clearly falls within the standards set forth in WIS. STAT. § 48.415(6). A few letters and one phone call throughout the course of Dakota's entire life do not, by any stretch of the imagination, amount to a "substantial parental relationship." *See* WIS. STAT. § 48.415(6)(a). Because James' conduct falls so clearly within the parameters of the statute, he cannot challenge the statute on vagueness grounds. *See* ***Ruesch***, 214 Wis. 2d at 561-62.

By the Court.—Order affirmed.

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