COURT OF APPEALS DECISION DATED AND FILED

September 5, 2012

Diane M. Fremgen
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. 2011AP2416

Cir. Ct. No. 2011TP1

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

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

DUNN COUNTY HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

ERIC R.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Eric R. appeals an order terminating his parental rights to his daughter, Autumn H-R., and an order denying postdisposition relief. Eric argues his trial counsel violated SCR 20:1.12 and had an actual conflict of interest. He asserts that, because of the conflict, counsel is considered per se ineffective and he is entitled to a new trial. We conclude counsel did not violate SCR 20:1.12 and there was no conflict of interest. We affirm.

BACKGROUND

¶2 Autumn was born to Eric and Ashley H. on September 12, 2008. On June 17, 2009, Dunn County Human Services took custody of Autumn, and the circuit court subsequently found Autumn to be a child in need of protection or services.

¶3 On February 9, 2011, the County petitioned to terminate Eric's parental rights.[2] The petition alleged that Eric abandoned Autumn, *see* WIS. STAT. § 48.415(1), and that he failed to assume parental responsibility, *see* WIS. STAT. § 48.415(6). Eric contested the petition, and a jury found both grounds existed. The circuit court terminated Eric's rights following a dispositional hearing.

¶4 Eric filed a postdisposition motion, alleging he was denied the effective assistance of counsel because his trial counsel served as a family court commissioner before representing Eric in the termination of parental rights proceedings and, while serving as a family court commissioner, had entered a

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[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.

[2] Ashley agreed to voluntarily terminate her parental rights.

child support order against him. At the postdisposition hearing, Eric argued counsel had violated SCR 20:1.12, representing him with an actual conflict of interest, and, because of the conflict, was per se ineffective.

¶5 The circuit court determined counsel did not have a conflict of interest because, pursuant to SCR 20:1.12, the child support case and the termination of parental rights case did not involve the same "matter." It denied Eric's postdisposition motion.

DISCUSSION

¶6 Eric renews his argument that counsel's representation violated SCR 20:1.12 and that this violation created an actual conflict of interest that causes counsel to be considered ineffective. *See* ***State v. Love***, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999) ("Counsel is considered per se ineffective once an actual conflict of interest has been shown."). On appeal, we uphold a circuit court's factual findings unless clearly erroneous. ***State v. Kalk***, 2000 WI App 62, ¶13, 234 Wis. 2d 98, 608 N.W.2d 428. However, "the ultimate question of whether an actual conflict of interest existed is a conclusion of law that we decide without deference to the trial court's ruling." ***Id.***

¶7 Supreme Court Rule 20:1.12(a) provides, in relevant part, "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge …." Here, neither party disputes that Eric's counsel "participated personally and substantially as a judge" in the child support case, and therefore, our issue is whether the termination of parental rights case is connected to the child support case. Put another way, we must determine whether the termination of parental rights case and the child support case involve the same "matter" for purposes of SCR 20:1.12(a).

¶8 Neither the language of SCR 20:1.12 nor its comment explains how to determine whether two cases involve the same "matter." Instead, ABA Comment [1] to SCR 20:1.12 states that SCR 20:1.12 "generally parallels Rule 1.11." The comment to SCR 20:1.11, in turn, explains that "a 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed."

¶9 Eric argues the termination of parental rights case and the child support case should be considered the same matter for purposes of SCR 20:1.12. He contends the parties are essentially the same because the government agencies in both cases were represented by the district attorney's office. He also asserts "the facts from the child support case are the same as the TPR case except the TPR hearing contains newer facts," and he argues the nineteen-month gap between the two cases was insufficient to ameliorate the supposed conflict.

¶10 We reject Eric's arguments. First, to the extent the parties' similarity bears on who provided representation, the circuit court determined that corporation counsel appeared in the child support case and the district attorney appeared in the termination of parental rights case. Our review of the record confirms this determination. Because the district attorney's office did not represent both parties, we will not consider Eric's similarity of the parties' argument any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider arguments unsupported by the record or legal authority.).

¶11 Second, Eric offers no legal argument or record citation in support of his assertion that "the facts from the child support case are the same as the TPR

case except the TPR hearing contains newer facts." As a result, we will not consider this argument. *See* ***id.*** However, on the merits, we note that the circuit court found that the facts presented at both hearings were "substantially different." Specifically, the court found that, at the child support hearing, "no finding on issues of custody and/or placement were made," and "none of Eric R.'s character traits, the quality of his parenting skills, or his level of involvement in the minor child's life were considered." As for the termination of parental rights case, the court found Eric's "qualities as a parent were a central consideration" and the jury was required to determine whether Eric abandoned Autumn and/or failed to assume parental responsibility. We agree with the circuit court that the child support case and the termination of parental rights case involved substantially different facts.

¶12 Third, in support of his argument that the nineteen-month time gap between the child support order and his counsel's appearance in the termination of parental rights case was insufficient, Eric contends "there is nothing in that gap that disconnects the child support order from the TPR proceeding. Instead, the trial court has found that the child support order 'affects' the rights of the parties involved."

¶13 While we agree with Eric that the circuit court found the child support order affected the rights of the parties, Eric does not explain how this determination has any bearing on the time lapse between cases and whether the cases should be considered the same "matter." *See* ***id.*** Moreover, we observe this finding was made to support the court's determination that counsel had "participated personally and substantially as judge" in the child support case; it had no relation to the court's determination that the two cases were not the same matter.

¶14 Further, the court found the nineteen-month time gap between the cases was significant because of counsel's limited appearance in the child support case and the short amount of time necessary to make a child support determination. Eric does not explain why these determinations are erroneous. *See* ***id.*** We affirm the circuit court's determination that, based on the parties, facts, and time elapsed, the cases are not the same matter for purposes of SCR 20:1.12.

¶15 Eric, however, argues that if we determine the facts, parties, and time gap do not make the two cases the same matter, we "should still find a conflict of interest because the two [cases] are so entwined that there exists a conflict of interest." In support, he cites an advisory opinion from the State Bar's Standing Committee on Professional Ethics. *See* Wisconsin Ethics Opinion E-09-04: Conflicts arising from dual roles as Family Court Commissioner and Guardian ad Litem (Dec. 26, 2009), *available at* http://www.wisbar.org/am/templateredirect.cfm?template=/cm/contentdisplay.cfm §ion=wisconsin_ethics_opinions&contentid=89035.

¶16 Ethics Opinion E-09-04 addressed, in relevant part, how to determine, "when two cases are the same 'matter' for purposes of … SCR 20:1.12(a)." It cautioned that "[w]hether or not two actions are the same 'matter' is always driven by specific facts" and "there may be circumstances in which the issues, facts and parties … are so entwined with a subsequent [case] that they would be the same 'matter.'" ***Id.*** at 7. However, it stated that:

> While different cases can be the same matter for purposes of SCR 20:1.12(a), the mere fact that cases are related does not, without more, mean that the separate cases are the same matter …. [I]n order for different cases to be considered the same matter, they must involve the same parties and largely the same facts and issues.

Id. at 6.

¶17 Eric argues this advisory opinion created an "entwinement test" and the child support and termination of parental rights cases are "entwined." However, we do not agree that the advisory opinion created an "entwinement test," and, even if it did, we see no appreciable difference between the alleged test and the SCR comment explaining that to determine whether two cases are the same we should compare similarity of parties and facts, and the time elapsed. Moreover, Eric's argument in support of entwinement has, for the most part, already been advanced and continues to lack development. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶18 However, Eric does advance a new argument that could have bearing on the similarity of facts between the cases. Specifically, he points out that the jury instruction for the failure to assume parental responsibility ground allows the jury to consider various factors including, "whether the parent offered to pay child support and the parent's financial ability or inability to do so." *See* WIS JI—JUVENILE 346B (2012). He argues that, because the child support order was a factor that the jury could consider in the termination of parental rights case, the two cases are connected and are therefore the same matter for purposes of SCR 20:1.12.

¶19 In its written decision, the circuit court acknowledged this instruction and determined that the jury was not required to consider the child

support order; any conclusions about child support were not outcome determinative; and, based on all the other facts presented in the case to prove the abandonment and the failure to assume parental responsibility grounds, any child support payment was only a minor part of the jury's overall consideration. It iterated that the basic facts in each case were substantially different and did not involve the same matter.

¶20 Although Eric objects to the instruction and argues that because of the instruction the cases should be considered the same matter, he does not address the circuit court's factual determinations or reasoning. *See* ***Pettit***, 171 Wis. 2d at 646-47. We agree with the circuit court that, based on the totality of the facts, the child support case and the termination of parental rights case were separate matters.

¶21 Finally, because we conclude counsel's representation did not create a conflict of interest, we do not need to determine whether a violation of SCR 20:1.12 constitutes an actual conflict of interest that causes counsel to automatically be deemed ineffective. *See* ***State v. Cobbs***, 221 Wis. 2d 101, 107, 584 N.W.2d 709 (Ct. App. 1998) ("An actual conflict of interest exists only when the attorney's advocacy is somehow adversely affected by the competing loyalties."); *see also* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

By the Court.—Orders affirmed.

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