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DISTRICT I

Amended to correct Respondent's name September 10, 2013
September 9, 2013

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You are hereby notified that the Court has entered the following **amended** opinion and order:

2013AP1330-NM In re the termination of parental rights to Dreshaun B., a person under the age of 18: State of Wisconsin v. Undray B., Shannon T. (L.C. #2011TP145)

Before Fine, J.

Undray B. appeals the order terminating his parental rights to Dreshaun B. Undray B.'s appellate lawyer, Dennis Schertz, Esq., filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam), and WIS. STAT. RULES 809.107(5m) and 809.32. Undray B. was

informed of his right to respond, but he did not respond. After considering the no-merit report and conducting an independent review of the Record, we conclude that further proceedings would lack arguable merit. Therefore, the order terminating Undray B.'s parental rights is summarily affirmed.

Dreshaun B. was born June 28, 2007. He was found to be in need of protection or services on July 1, 2009, and placed outside the home of his mother, Shannon T., with whom he had been living.[1] Dreshaun B. has remained in foster care since that time, except for the period between February 1, 2010, and July 13, 2010, when he lived with his mother at Meta House, a treatment and half-way house. He has also remained in need of protection or services since he was initially placed outside of his mother's home. On May 3, 2011, the State filed a petition to terminate Undray B.'s parental rights, alleging that that Dreshaun B. continued to be in need of protection or services and Undray B. had failed to assume parental responsibility. *See* WIS. STAT. §§ 48.415(2) and (6). Undray B. stipulated that there were grounds for termination because Dreshaun B. continued to be in need of protection or services, and the State dismissed its allegation that Undray B. had failed to assume parental responsibility. Three different evidentiary hearings were held over a period of fourteen months during the disposition phase of proceedings. After considering all of the evidence, the circuit court decided that termination of Undray B.'s parental rights was in Dreshaun B's best interest.

The no-merit report first addresses whether Undray B. knowingly, intelligently, and voluntarily stipulated that there were grounds to terminate his parental rights because Dreshaun

[1] Shannon T.'s parental rights were also terminated. She has filed a separate appeal.

B. continued to be in need of protection and services. Before accepting a stipulation that grounds exist to support a termination petition, the circuit court must explain things to the parent under WIS. STAT. § 48.422(7); *see* ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 497, 762 N.W.2d 122, 124–125. The circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions; (2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the children has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* WIS. STAT. § 48.422(7). The parent must also be aware of the constitutional rights being surrendered with the admission. *See* ***Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d at 498, 762 N.W.2d at 125.

Our review of the Record satisfies us that the circuit court properly followed WIS. STAT. § 48.422(7), and that Undray B. knowingly, intelligently, and voluntarily entered the stipulation. *See* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶¶42, 51, 233 Wis. 2d 344, 364, 367, 607 N.W.2d 607, 617–618. Undray B. appeared by phone from a federal prison in Maryland. The circuit court explained to him what facts the State would have to prove to show that Dreshaun B. continued to be in need of protection or services. The circuit court inquired whether Undray B. was taking any medication or had mental health issues that might impede his ability to understand the proceedings. It inquired about Undray B.'s level of education. It asked whether Undray B. had enough time to review the matter with counsel, and cleared the court room for him to consult with his attorney when Undray B. said he needed to talk to his attorney. The

circuit court confirmed that no promises or threats had been made to secure the stipulation, and that no one had attempted to coerce Undray B. to refrain from exercising his parental rights. The circuit court confirmed that Undray B. understood he was not agreeing to a termination disposition because Undray B. intended to contest whether termination would be in Dreshaun B.'s best interest. The circuit court also confirmed that Undray B. understood he would be found unfit as a result of his stipulation.

At a subsequent hearing, the circuit court heard evidence in support of the factual basis for the stipulation that Dreshaun B. continued to be in need of protection or services. *See* WIS. STAT. § 48.422(7)(c). When a termination petition alleges as grounds for termination that a child is in continuing need of protection and services, the State must prove the following:

> First, the child must have been placed out of the home for a cumulative total of more than six months pursuant to court orders containing the termination of parental rights notice. Second, the [applicable agency] must have made a reasonable effort to provide services ordered by the court. Third, the parent must fail to meet the conditions established in the order for the safe return of the child to the parent's home. Fourth, there must be a substantial likelihood that the parent will not meet the conditions of safe return of the child within the [nine]-month period following the conclusion of the termination hearing.

Walworth County Department of Health & Human Services v. Andrea L.O., 2008 WI 46, ¶6, 309 Wis. 2d 161, 165, 749 N.W.2d 168, 170; *see also* WIS. STAT. § 48.415(2)(a) (footnote omitted). The State has the burden to show that grounds for termination exist by clear and convincing evidence. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶22, 246 Wis. 2d 1, 16, 629 N.W.2d 768, 775.

Dreshaun B.'s case manager, Laura Howitz, testified regarding these factors. Our review of her testimony satisfies us that the State offered sufficient evidence to show that Dreshaun B.

continued to be in need of protection or services. Based on the circuit court's colloquy with Undray B. and the testimony of Dreshaun B.'s case manager establishing that Dreshaun B. continued to be in need of protection and services, there is no arguable merit to a challenge to the circuit court's acceptance of Undray B.'s stipulation in the fact-finding phase.

The no-merit report next addresses whether Undray B.'s trial lawyer's performance was constitutionally deficient. In order to prevail on a claim of ineffective assistance of counsel, Undray B. would be required to show that his lawyer's performance was deficient and that the deficient performance prejudiced him. *See* ***A.S. v. State***, 168 Wis. 2d 995, 1005, 485 N.W.2d 52, 55 (1992). After reading through the transcripts of all the proceedings and reviewing the Record, we agree with the no-merit report that the trial lawyer who represented Undray B. did everything he could have done to assist him. There would be no arguable merit to a claim that Undray B.'s trial lawyer's performance was constitutionally deficient.

Finally, the no-merit report addresses whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating Undray B.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855, 857 (Ct. App. 1996). Bearing in mind that the child's best interests are the primary concern, *see* WIS. STAT. § 48.426(2), the circuit court must also consider factors including, but not limited to:

> (a) The likelihood of the child's adoption after termination.
>
> (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
>
> (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
>
> (d) The wishes of the child.

> (e) The duration of the separation of the parent from the child.
>
> (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

In its extensive oral decision, the circuit court made findings of fact based on the testimony it heard during the dispositional phase, addressing all of the factors set forth in WIS. STAT. § 48.426(3). The circuit court found that it was highly likely that Dreshaun B. would be adopted by his foster parents and that he was thriving in their home despite his special needs as an autistic child that required that he be closely monitored twenty-four hours a day. The circuit court found that Dreshaun B. had become very bonded with his foster family and that he was making great developmental strides under their care, including learning some basic sign language and being trained to use the toilet despite the fact that there had been concern that this might never be possible. The circuit court also found that the foster family had placed Dreshaun B.'s extensive needs first, and his foster mother had quit her job in order to take care of him because she and her husband could not find a suitable daycare for Dreshaun B. given his needs. The circuit court found that termination would allow Dreshaun B. to enter a more stable and permanent relationship with his foster family.

The circuit court found that Undray B. had not seen Dreshaun B. in over three years and, while Undray B. clearly expressed love for his son and testified that he felt bonded to him, bonding was a "two-way street," and Dreshaun B. likely had little or no bond with his father given his developmental delays and the length of time that had passed since he last saw him. The circuit court found that Undray B.'s mother and sister had cared for Dreshaun B. for over

nine months when he was first taken from his mother's care, but that Dreshaun B. was not returned to their care due to concerns about his safety at the home, and that placement was no longer viable due to financial and safety considerations. The circuit court also found that while Dreshaun B. had a significant relationship with his aunt and grandmother when he had been living with them, he had rarely seen them over the past two years, so that relationship was no longer significant. Based on these factors, the circuit court reasonably concluded termination was in Dreshaun B.'s best interest. There is no arguable merit to a challenge to the circuit court's exercise of discretion in terminating Undray B.'s parental rights.

Our independent review of the Record reveals no other potential issues of arguable merit.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Dennis Schertz, Esq., is relieved of further representation of Undray B. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals