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January 22, 2014

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

2013AP2468-NM

In re the termination of parental rights to Kaylee S., a person under the age of 18: Pierce County Department of Human Services v. Carrie S. (L.C. # 2013TP1A)

Before Neubauer, P.J.¹

Carrie S. appeals from a circuit court order terminating her parental rights to Kaylee S. Carrie S.'s appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.107(5m) (2011-12). Carrie S. received a copy of the report and has not filed a response to it.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Upon consideration of the report and an independent review of the record, we summarily affirm the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The State of Wisconsin petitioned to terminate Carrie S.'s parental rights on the grounds that Kaylee S. was a child in continuing need of protection or services. WIS. STAT. 48.415(2)(a). A jury found the grounds for termination, and the circuit court thereafter terminated Carrie S.'s parental rights after a dispositional hearing.

The no-merit report addresses: (1) whether Carrie S. received a fair trial, (2) whether the circuit court properly exercised its discretion in determining that it was in the child's best interest to terminate Carrie S.'s parental rights, and (3) whether the record supports any claim of ineffective assistance of trial counsel. The no-merit report contains a correct statement of the law governing these issues and properly applies the law to the facts. We agree with appellate counsel that these issues would not have arguable merit for appeal.

We conclude that the evidence supports the jury's verdict that there were grounds to terminate Carrie S.'s parental rights. "When reviewing a jury's verdict, we consider the evidence in the light most favorable to the verdict." *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶39, 333 Wis. 2d 273, 797 N.W.2d 854. At trial, evidence was taken from child welfare professionals, mental health and medical professionals, a foster parent and a representative of the foster parent agency. The circuit court found that Kaylee S. was a child in need of protection or services who had been placed outside Carrie S.'s home for six months or longer. The jury found that Pierce County Department of Human Services made reasonable efforts to provide court-ordered services, Carrie S. failed to meet the conditions for Kaylee S.'s return, and it was not

substantially likely that Carrie S. would meet those conditions within nine months following the jury trial. The jury's findings are supported in the trial record. We conclude that no arguable merit could arise from a challenge to the sufficiency of the evidence of the continuing CHIPS ground to terminate Carrie S.'s parental rights.

The decision to terminate parental rights is within the circuit court's discretion. *B.L.J. v. Polk Cnty. DSS*, 163 Wis. 2d 90, 104, 470 N.W.2d 914 (1991). The circuit court must consider the statutory factors to determine if termination is in the child's best interests. WIS. STAT. § 48.426(3). The record in this case indicates that the court considered the appropriate factors: the likelihood of the child's adoption after termination, the child's age and health, the child's substantial family relationships and whether it would be harmful to sever those relationships, the duration of the parent-child separation, and future stability for the child as a result of the termination. The court's findings in support of termination were not clearly erroneous, WIS. STAT. § 805.17(2), and all the factors weighed in favor of the court's discretionary determination that it was in the child's best interests to terminate Carrie S.'s parental rights. We agree with counsel's conclusion that an appellate challenge on this basis would lack arguable merit.

We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a posttermination motion in the circuit court. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether the record supports counsel's conclusion that an ineffective assistance of trial counsel claim would lack arguable merit. *State v. Allen*, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were

not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal”).

Our review of the record does not reveal a basis for an ineffective assistance of trial counsel claim. Carrie S. has not alerted this court to any claim regarding trial counsel’s representation. The record indicates that Carrie S.’s counsel vigorously represented her.

We have considered whether there would be any arguable merit to a claim that the court failed to comply with mandatory WIS. STAT. ch. 48 time limits, thereby losing competency to proceed. *See State v. April O.*, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Continuances are permitted “upon a showing of good cause in open court ... and only for so long as is necessary.” WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court’s competency to act during the continuance. Sec. 48.315(3). The record shows that the circuit court found good cause to toll the time limits, and Carrie S. did not object. There would be no arguable merit to a challenge to the circuit court’s competency to proceed based on a failure to comply with statutory time limits.

We note that Carrie S. failed to appear for duly noticed hearings. She did not attend circuit court proceedings until the first day of her grounds-to-terminate jury trial. Although Carrie S. attended the first day of her jury trial, she left the courtroom before the first day ended, and she did not return for the second day of trial. Carrie S. also failed to attend the dispositional hearing. In her absence, Carrie S.’s trial counsel advocated on her behalf and cross-examined witnesses at the jury trial and dispositional hearing. Given that Carrie S. removed herself from the courtroom or otherwise failed to appear at duly noticed hearings, the court did not err in

conducting the proceedings with Carrie S.'s counsel in Carrie S.'s absence. *Dane Cnty. DHS v. Mable K.*, 2013 WI 28, ¶48, 346 Wis. 2d 396, 828 N.W.2d 198.

In addition to the issues discussed above, we independently reviewed the record. Our independent review of the record did not disclose any issues with arguable merit for appeal. Because we conclude that there is no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the order terminating Carrie S.'s parental rights, and relieve Attorney Dennis Schertz of further representation of Carrie S. in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representation of Carrie S. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals