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DISTRICT II/I

September 2, 2014

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

2014AP1231-NM	In re the termination of parental rights to Saryah M. M., a person under the age of 18: State of Wisconsin v. Johnny E. M., Jr. (L.C. #2013TP17)
2014AP1232-NM	In re the termination of parental rights to Sunai M. M., a person under the age of 18: State of Wisconsin v. Johnny E. M., Jr. (L.C. #2013TP18)

Before Brennan, J.[1]

Johnny E. M., Jr., appeals from orders terminating his parental rights to daughters Saryah M. M. and Sunai M. M. Appellate counsel, Paul G. Bonneson, has filed a no-merit report. *See* ***Brown Cnty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App.

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

1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) & 809.32. Johnny M. was advised of his right to file a response, but has not responded. Based upon an independent review of the records and the no-merit report, this court concludes that any appeal would lack arguable merit. Therefore, the orders terminating Johnny M.'s parental rights are summarily affirmed.

On November 16, 2010, a teacher called authorities because Saryah and Sunai's older sister, Stazia M., had marks on her face consistent with a belt or electrical cord. It was determined that the children's mother, Latasia M.,[2] had given Stazia a "whoopin'" for misbehaving in school. Stazia, Saryah, and Sunai were detained on an emergency basis. On December 9, 2010, Saryah and Sunai were placed with Johnny M. based in part on a report that Latasia M. was no longer living with him. Ten days later, however, the children were removed again when Johnny M. and Latasia M. had a physical altercation in which Latasia M. was injured. The children were placed with Latasia M.'s grandmother, who lived nearby. The children were subsequently adjudicated to be children in need of protection or services (CHIPS) on March 28, 2011.

In June 2011, Johnny M. and Latasia M. reunited after being separated since March 2011 and obtained a new residence. On September 7, 2011, the ongoing case manager determined the residence was suitable for visitation with the children, after earlier rejecting the location. However, on September 29, 2011, the residence was raided by the Racine Police Department based on a tip alleging drug sales from the home. Johnny M. was arrested and charged with five felonies and a misdemeanor. He pled guilty to possession with intent to deliver between ten and

[2] Though Johnny M. and Latasia M. have the same last name, it is not clear whether they are or ever were married; both Saryah and Sunai are listed as non-marital children in the petitions.

fifty grams of heroin and possession of a firearm by a felon. He was given consecutive sentences totaling nine years' initial confinement and five years' extended supervision. The children's CHIPS orders were extended on November 1, 2011, and October 26, 2012.

Termination-of-parental-rights petitions were filed as to both children against both parents on May 29, 2013. As grounds against Johnny M., the State alleged abandonment, continuing CHIPS, and failure to assume parental responsibility. *See* WIS. STAT. § 48.415(1), (2), & (6). The matter was tried to a jury, which found the State had proven all three grounds. After a disposition hearing, the circuit court terminated Johnny M.'s parental rights to Saryah and Sunai.[3]

I. Mandatory Timelines and Competency

Counsel addresses two grounds in the no-merit report: sufficiency of the evidence to support the jury verdicts and whether the circuit court properly exercised its discretion in deciding to terminate Johnny M.'s parental rights. Before we address those issues, we first address whether there is any arguable merit to a claim the court failed to comply with mandatory 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.

After a petition to terminate parental rights is filed, the trial court has thirty days to hold an initial hearing and ascertain whether any party wishes to contest the petition. *See* WIS. STAT. § 48.422(1). If a party contests the petition, the court must set a fact-finding hearing to begin

[3] The jury also found grounds as to Latasia M., and the circuit court terminated her parental rights as well, but those matters are not before us in these appeals.

within forty-five days of the initial hearing. *See* § 48.422(2). If grounds for termination are established, the court is to proceed with an immediate disposition hearing, although that may be delayed up to "no later than [forty-five] days after the fact-finding hearing" if all the parties agree. *See* WIS. STAT. § 48.424(4)(a).

These statutory time limits cannot be waived. ***April O.***, 233 Wis. 2d 663, ¶5. However, continuances are permitted "upon a showing of good cause in open court … and only for so long as is necessary[.]" *See* WIS. STAT. § 48.315(2). Failure to object to a continuance waives any challenge to the court's competency to act during the continuance. *See* § 48.315(3). Here, any continuances were granted for cause—and in at least one case, at Johnny M.'s request—and without objection. There is no arguable merit to a claim that the circuit court lost competency for failure to comply with mandatory timelines.

II. Sufficiency of the Evidence

The first issue counsel addresses in the no-merit report is whether there is sufficient credible evidence to support the jury's verdicts finding grounds for termination. We independently review whether the evidence is sufficient. *See* ***Tammy W.-G. v. Jacob T.***, 2011 WI 30, ¶17, 333 Wis. 2d 273, 797 N.W.2d 854. When reviewing the verdicts, we consider the evidence in the light most favorable to those verdicts. *See* ***id.***, ¶39. Credibility determinations are the exclusive province of the jury. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. The State must make its case by clear and convincing evidence. *See* ***Ann M. M. v. Rob S.***, 176 Wis. 2d 673, 682, 500 N.W.2d 649 (1993).

a. Abandonment

Abandonment can be established by proving that the child is placed outside the parent's home pursuant to the appropriate court order "and the parent has failed to visit or communicate with the child for a period of 3 months or longer."[4] *See* WIS. STAT. § 48.415(1)(a)2. Incidental contact does not preclude a finding of abandonment. *See* § 48.415(1)(b). Abandonment is not shown if the parent has good cause for the failure to visit or communicate with the child. *See* § 48.415(1)(c). If "good cause" is premised on evidence that the children's age is such that communication is "rendered … meaningless," then there is also no abandonment if the parent has communicated with the foster parents or has good cause for not doing so. *See* § 48.415(1)(c)3.b. At the time of the jury trial, Saryah was about five and one-half years old, while Sunai was almost three and one-half years old.

Because of his incarceration, there was no visitation with the children from September 2011 on, and there was also testimony to suggest that Johnny M. had no contact by letter or by phone with the children from about September 2011 through January 2013. The jury found that Johnny M. had no good cause for failing to visit with the children. After answering that question on the verdict, the jury was not required to determine whether Johnny M. had good cause for lack of communication. *See* WIS JI—CHILDREN 313.

We acknowledge that there was some evidence presented to the contrary: Johnny M. attempted to fault the case managers, one of whom conceded she never went to visit Johnny M.

[4] We note that there is no question about the validity of the court order placing the children outside their home.

while he was incarcerated, for his lack of visitation. However, at least one case manager testified that they expected parents to take the initiative in some aspects, and there was testimony that Johnny M., while incarcerated, made sure he contacted his own relatives and Latasia M. to ask for their intercession in various ways on his behalf, but he never attempted to contact the case managers to ask about how to have visitation with the children.

However, although there was competing evidence and inferences to be drawn therefrom, we view the evidence in the light most favorable to the verdicts and we leave credibility determinations to the jury. Thus, there was sufficient evidence presented from which the jury could conclude that Johnny M. abandoned his children because he failed to visit them for three months or more without good cause for the failure.

b. Continuing CHIPS

When a termination petition alleges as grounds for termination that a child is in continuing need of protection or 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 county department] 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.

See ***Walworth Cnty. DHHS v. Andrea L.O.***, 2008 WI 46, ¶6, 309 Wis. 2d 161, 749 N.W.2d 168; *see also* WIS. STAT. § 48.415(2)(a) and WIS JI—CHILDREN 324A.

The circuit court answered the first question with a "yes" for both children. This was well-established by the evidence and is not debatable. As for the department's reasonable efforts, there was testimony about the services provided to Johnny M. prior to his incarceration, including supervised visitation, referrals for parenting and anger management classes, referrals for counseling services, and monthly meetings with the case manager. As for whether Johnny M. met the conditions of the children's return, there was testimony that prior to his incarceration, Johnny M. had failed to complete individual therapy or anger management classes. Further, one of the conditions was to have a safe and suitable home for the children, which Johnny M. clearly did not meet by virtue of having guns and drugs present in the home. Finally, Johnny M.'s incarceration, which will last for several more years, is evidence that he will be unable to meet the conditions for the children's safe return. Thus, there was sufficient evidence from which the jury could conclude that the children were in continuing need of protection or services.

c. Failure to Assume Parental Responsibility

Failure to assume parental responsibility "shall be established by proving that the parent … [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). A substantial parental relationship "means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." § 48.415(6)(b). When the fact-finder evaluates whether a person has had such a relationship with the child, the fact-finder 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, [and] whether the person has neglected or refused to provide care or support for the child[.]" ***Id.***

At the time of the jury trial, the children had been out of their parents' home or homes for about three years, since November 2010. Johnny M. had, at the time of the jury trial, been incarcerated for more than two years. Johnny M. was, therefore, by his own actions unable to accept and exercise "significant responsibility for the daily supervision, education, protection, and care" of the children or to provide them with support. In addition, a jury may consider whether a parent exposed the children to a "hazardous living environment." *See* ***Tammy W.-G.***, 333 Wis. 2d 273, ¶3. Violence against the children's mother and the fact of guns and drugs in the house could fairly be considered a "hazardous living environment." Further, there was testimony regarding Johnny M.'s minimal contacts with the children, case workers, or foster parents—as noted, he ostensibly had little or no contact with the children or foster parents for at least sixteen months—indicating he had little opportunity to "express concern for or interest in" the children. Thus, there was sufficient evidence from which the jury could conclude that Johnny M. had failed to assume parental responsibility for Saryah and Sunai.

Based on the foregoing, there is no arguable merit to a challenge to the sufficiency of the evidence to support the jury's verdicts.

III. Termination of Parental Rights

The other issue appellate counsel discusses is whether there is any arguable merit to a claim that the circuit court erroneously exercised its discretion in terminating Johnny M.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Bearing in mind that the child's best interests are the primary concern, *see* WIS. STAT. § 48.426(2), the 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.

§ 48.426(3).

Multiple people testified at the disposition hearing, including the case manager, the foster mother, the case manager from Kenosha where the foster family was located, Johnny M., and Latasia M. At the close of testimony, the circuit court found that the children were likely to be adopted—the foster family was approved as the adoptive resource. With regard to the children's health, the circuit court found that the foster family had "gone well beyond what most people would do" to address issues, including Saryah's behavioral difficulties and Sunai's extreme allergies. Additionally, Sunai, who had been about one year old when she was placed in the current foster home, arrived at the home unable to crawl or walk. Within a week of her arrival, she had begun walking.

The circuit court noted that Sunai, because she was an infant at the time she was removed from her parents' care, "really has not had a substantial relationship" with either parent and that continuing contact with Johnny M. by both children was "really limited." The circuit court did comment that Johnny M. may have had a relationship with the children early on, but that had faded away over time. The circuit court additionally noted that although other relatives had

expressed interest in caring for Saryah and Sunai, none had come forward or taken the necessary steps to become approved placements for the children.

The circuit court agreed with the case manager that the children were too young to ask for their preferences, though the guardian *ad litem* indicated his opinion that termination was in their best interest. In addition, the circuit court noted that the children had taken to calling the foster parents "mommy" and "daddy" despite the foster parents not encouraging those terms, commenting that children do not just make up those terms. Finally, the circuit court noted that the children were in a very stable environment that has become their home and where they appear to be happy.[5] In short, the record reveals an appropriate exercise of the court's discretion.

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

Upon the foregoing, therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved of further representation of Johnny E. M., Jr., in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] The circuit court did not expressly determine whether it would be harmful to sever any relationships the children had with Johnny M., but the finding is implicit in the court's observation that, because of his incarceration, Johnny M. is "not going to be there" for his children. There is also nothing in the records that suggests any substantial relationship with any of Johnny M.'s relatives. The circuit court also did not expressly consider the duration of the separation of the children and Johnny M., but that duration had been well-established throughout the trial as more than half of Saryah's life and nearly all of Sunai's. There are no issues of arguable merit stemming from the circuit court's failure to expressly articulate its consideration of these points, because the records support the ultimate decision. *See* ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.