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March 18, 2015

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

2015AP38-NM
2015AP39-NM

In re the termination of parental rights to Elijah O. and Sierra W., Persons under the age of 18:
State of Wisconsin v. Bennie O.(L.C. #2013TP34 and 2013TP35)

Before Kessler, J.[1]

Bennie O. appeals from trial court orders terminating his parental rights to Elijah O. and Sierra W.[2] Bennie O.'s appointed attorney, Melinda A. Swartz, has filed a no-merit report. *See* ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998) (per curiam);

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The parental rights of the children's mother were also terminated. The mother's rights are not at issue in this appeal and will not be addressed.

see also WIS. STAT. RULES 809.107(5m) and 809.32. Bennie O. has not filed a response. This court has considered counsel's report and has independently reviewed the record. This court agrees with counsel's conclusion that an appeal would lack arguable merit. Therefore, the orders terminating Bennie O.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Elijah O. was born in September 2008, and Sierra W. was born in December 2009. In May 2010, Sierra W. suffered serious burns on her body after being scalded by hot water during an episode of domestic violence between her mother and her father, Bennie O.[3] The children were temporarily placed with their maternal grandmother under a protective plan while the burn incident was investigated. A CHIPS order was entered in October 2010.

In April 2011, the children were removed from their maternal grandmother's home and placed in a foster home. In January 2013, the State moved to terminate the parental rights of both parents. The State alleged two grounds to terminate Bennie O.'s parental rights: abandonment (no visits or communication for three or more months) and continuing CHIPS. *See* WIS. STAT. § 48.415(1)(a)2. & (2). Bennie O. ultimately pled no contest to the abandonment ground and the continuing CHIPS ground was dismissed. The trial court conducted a personal colloquy with Bennie O., accepted his no-contest plea, and heard testimony from a family case manager that supported the trial court's finding that there was a factual basis for the abandonment ground alleged in the petition.

[3] The shared records reveal that Sierra W.'s mother was subsequently convicted of a felony for the injuries Sierra W. suffered in this incident.

The case proceeded to a contested dispositional hearing. Although Bennie O. did not testify, he made a statement to the court and asked that it take note of all the efforts he was making to comply with the conditions that were required for the return of his children. Bennie O. also explained to the court that on the day Sierra W. was burned, he had a disagreement with the children's mother, left, and "[a]fter that, I don't know what happened." He said that Sierra W. was not burned while the fight was underway, which was the impression that had been given. Ultimately, the trial court determined that terminating Bennie O.'s parental rights was in the children's best interests. This appeal follows.

The no-merit report addresses four issues[4]: (1) the sufficiency of the petition; (2) whether the trial court adhered to statutory time limits; (3) whether Bennie O.'s no-contest plea was knowingly, intelligently, and voluntarily entered; and (4) whether the trial court erroneously exercised its discretion when it decided to terminate Bennie O.'s parental rights. We agree with appellate counsel that there would be no merit to raising these issues in a post-disposition motion or on appeal, and we will briefly address each of the potential issues counsel has identified.

At the outset, this court briefly notes its agreement with counsel's conclusion that the petition was legally sufficient. *See* WIS. STAT. § 48.42(1).

As to the statutory time limits, this court has examined the record and agrees with counsel that at each hearing, the trial court either acted within the applicable deadlines or found good cause to extend them. *See* WIS. STAT. § 48.315(2). Further, Bennie O. did not object to any of

[4] This court does not address the various issues counsel raises in the same order presented in her report.

the extensions. *See* § 48.315(3). There would be no merit to asserting that the trial court failed to follow the statutory rules concerning time limits.

Next we consider Bennie O.'s decision to enter a no-contest plea to a single ground for termination: abandonment. In ***Brown County DHS v. Brenda B.***, our supreme court summarized the applicable legal standards:

> A parent who chooses to enter a no contest plea during th[e grounds] phase is giving up valuable protections and must have knowledge of the rights being waived by making the plea.
>
> The principles and analysis of ***Bangert*** apply.[5] The [trial] court must engage the parent in a colloquy to ensure that the plea is knowing, voluntary, and intelligent. This colloquy is governed by the requirements of WIS. STAT. § 48.422(7) and notions of due process.
>
> If the parent can later show that the colloquy was deficient and also alleges that he or she did not know or understand the information that should have been provided, that parent has made a prima facie case that the plea was not knowing, voluntary, and intelligent. At that point, the burden shifts to the petitioner to demonstrate by clear and convincing evidence that the parent knowingly, voluntarily, and intelligently pled no contest.

Brenda B., 2011 WI 6, ¶¶34-36, 331 Wis. 2d 310, 795 N.W.2d 730 (citations omitted).

Consistent with ***Brenda B.***, the trial court conducted an extensive colloquy with Bennie O. The trial court addressed Bennie O.'s understanding of the rights he was giving up, told him that it would decide at the dispositional hearing—after hearing evidence from the parties—whether to terminate his parental rights or dismiss the petition, and explained that the focus at the

[5] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

dispositional hearing would be on the children's best interests. The trial court established that no threats were made to force Bennie O. to enter a no-contest plea.

As counsel points out, Bennie O. could argue that the trial court's colloquy was deficient because it failed to establish whether a proposed adoptive parent of the children had been identified, and if the proposed adoptive parent was not a relative, the court should have ordered a report containing the information specified in WIS. STAT. § 48.913(7). *See* WIS. STAT. § 48.422(7)(bm). Section 48.913(7) requires that the report "include a list of all transfers of anything of value made or agreed to be made by the proposed adoptive parents or by a person acting on their behalf" to a child's birth parent. Here, Bennie O. was well aware of the proposed adoptive parents and had a positive relationship with them. Based on the record, this court concludes that any error in this regard was harmless. *See* ***Waukesha Cnty. v. Steven H.***, 2000 WI 28, ¶57, 233 Wis. 2d 344, 607 N.W.2d 607.

As part of its compliance with WIS. STAT. § 48.422(7), the trial court heard testimony from the family case manager concerning the factual basis for the abandonment ground. The trial court accepted the manager's testimony that Bennie O. had no contact with the children in May, June, July, and a portion of August 2012 and found that the State had proven the abandonment ground by clear, convincing, and satisfactory evidence. *See* WIS. STAT. § 48.31(1). There would be no merit to challenging Bennie O.'s no-contest plea or alleging that there was no factual basis for the finding that he abandoned the children as outlined in WIS. STAT. § 48.415(1)(a)2.

The last issue is whether there would be any merit to challenging the trial court's decision to terminate Bennie O.'s parental rights. The decision to terminate a parent's rights is

discretionary and the best interests of the child is the prevailing standard. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The trial court considers multiple 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).

Here, there would be no merit to challenging the trial court's exercise of discretion. The trial court made detailed findings, which were set forth in a comprehensive decision. It considered the statutory factors and found that each one weighed in favor of termination.

First, the trial court noted that the likelihood of adoption was "great."

Next, it explained that at the time of removal, Elijah O. was twenty months old and nonverbal; Sierra W. was approximately five months old and was severely burned. The trial court found that "'[h]ome life'" for the children prior to removal "was one of domestic violence, turmoil and danger." At the time of disposition, Elijah O. was approximately five years and nine

months old; Sierra W. was approximately four years and six months old. The trial court noted that while the children had some behavior problems, "they are well cared for and are happy in the [foster] family—a place where they want to continue to stay." In terms of duration, the trial court explained that the children "have lived the vast majority of their lives outside the parental home." For Elijah O., it was calculated that 71% of his life was spent outside the home, and of that, 55% was spent with the foster parents. For Sierra W. , it was calculated that 91% of her life was spent outside of the home, and of that, 71% was spent with the foster parents.

The trial court found that while the children know who their birth parents are, they do not have "a truly 'substantial' relationship with them." The trial court concluded that the lack of a substantial relationship was the result of their birth parents' failure "to live a lifestyle where they put their children above themselves, above their domestic violence and criminal activity." The trial court found that the children did not have a relationship with any paternal relatives and while they do have a relationship with maternal relatives, it is "'visitation based' at best"—not substantial.

As to the effect of severing the children's relationships with their birth parents, the trial court emphasized:

> To not terminate parental rights will only continue the uncertainty and turmoil that these children have suffered over the majority of their lives and will add to their trauma. To not sever these relationships would in fact end the real, true, important, considerable, essential, big, consequential, uneventful, major, material, meaningful and signification relationship Elijah and Sierra have with the entire and extended [foster] family.

The trial court noted that the foster parents were willing to facilitate relationships with the birth parents and maternal relatives so long as the contact was safe and appropriate.

Given their ages, the children were not asked to express their wishes. However, the trial court found that they were very well adjusted to their foster home. The trial court went on to acknowledge the positive steps Bennie O. had taken toward a relationship with the children but found that it did not translate into an expression by the children of a wish to be with him:

> The court is cognizant of the developing relationship between Elijah and Sierra with their father, Bennie O[.], Jr., and the fact that they are happy to see their father and show love for him when they visit with him. However, the court cannot say that this behavior is akin to a wish to be with Bennie O[.], Jr. When they see him, they have a fun time. There is no track record of how they would react to Bennie O[.], Jr. in the real world particularly taking into account the fact that he has never had a safe, suitable and stable home; never lived a domestic violence free life; never been there as a 24/7 parent with any consistency.

If parental rights were terminated, the trial court concluded that the children would be able to enter into a more stable and permanent family relationship with their foster parents, who were approved for adoption.

Ultimately, the trial court found that, having considered the statutory factors, termination of Bennie O.'s parental rights was in Elijah O.'s and Sierra W.'s best interests. The trial court's findings are supported by the record and reflect a proper exercise of discretion. An appellate challenge to the trial court's exercise of discretion would lack arguable merit.

Upon the foregoing,

IT IS ORDERED that Attorney Melinda A. Swartz is relieved of any further representation of Bennie O. on appeal.

IT IS FURTHER ORDERED that the orders terminating Bennie O.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals