OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

October 20, 2015

To:

Hon. Mark A. Sanders
Circuit Court Judge
Children's Court Center
10201 W. Watertown Plank Rd
Milwaukee, WI 53226-3532

Dan Barlich, Juvenile Clerk
Children's Court Center
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226

Jane S. Earle
PO Box 11846
Shorewood, WI 53211-0846

Matt Puthukulam
Assistant District Attorney
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226

Bureau of Milwaukee Child Welfare
Arlene Happach
635 N. 26th St
Milwaukee, WI 53233-1803

Christie A. Christie
Legal Aid Society of Milwaukee
10201 Watertown Plank Rd.
Milwaukee, WI 53226-3532

J. R. 321659
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2015AP1278-NM	In re the termination of parental rights to J. R. Jr. a/k/a J. S., a person under the age of 18: State of Wisconsin v. J. R. (L.C. # 2013TP115)
2015AP1279-NM	In re the termination of parental rights to A. E., a person under the age of 18: State of Wisconsin v. J. R. (L.C. # 2013TP117)

Before Blanchard, J.[1]

[1] These appeals are decided by one judge under WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Attorney Jane Earle has filed a no-merit report seeking to withdraw as appellate counsel for J.R. in these cases concerning the termination of J.R.'s parental rights to J.R., Jr. and A.E.[2] *See* WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to J.R.'s no contest plea to grounds or to the circuit court's exercise of discretion in terminating J.R.'s parental rights. J.R. was sent a copy of the report and has filed a response. Upon our independent review of the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

On March 12, 2013, the State filed petitions to terminate J.R.'s parental rights to J.R., Jr. and A.E. On May 5, 2014, J.R. pled no contest to grounds to terminate because the children were in continuing need of protection or services (CHIPS) under WIS. STAT. § 48.415(2). The court held a dispositional hearing on September 4, 2014. At the conclusion of the dispositional phase, the court determined that termination was in the children's best interest, and terminated J.R.'s parental rights.

First, we agree with counsel's assessment that a challenge to J.R.'s plea to grounds would lack arguable merit. Before accepting J.R.'s no contest plea as to grounds, the circuit court conducted a plea colloquy that established such required information as J.R.'s ability to understand the proceedings, his understanding of grounds based on CHIPS, the result of pleading to grounds, and the constitutional rights he would be waiving through his plea. *See* ***Oneida Cty. Dep't of Social Servs. v. Therese S.***, 2008 WI App 159, ¶¶5-6, 314 Wis. 2d 493, 762 N.W.2d

[2] The Honorable John J. DiMotto presided over the grounds phase, and the Honorable Mark A. Sanders presided over the dispositional phase.

122. The court also established that J.R. had sufficient time to discuss his case with his lawyer, and that no one had promised him anything or threatened him in any way to stipulate to grounds. *See* ***id.*** The court then established that there was a factual basis to support the plea, through the termination petitions, testimony by the case manager for J.R., and the CHIPS records. *See* ***id.*** We discern no basis for a non-frivolous challenge to J.R.'s plea.

Next, we agree with counsel that a challenge to the court's exercise of discretion in terminating J.R.'s parental rights would lack arguable merit. At the dispositional phase, the court heard evidence as to the likelihood of the children being adopted by their current foster parents; the age and health of the children; the relationship J.R., Jr. and A.E. had with J.R and any paternal relatives; the apparent and expressed wishes of the children; the length of time the children had been placed in foster care; and the likelihood that the children would enter a more stable family relationship if termination were granted. *See* WIS. STAT. § 48.426(3). The court considered each of the statutory factors relative to the best interest of the children in exercising its discretion. We discern no basis for a non-frivolous challenge to the court's decision.

In his no-merit response, J.R. argues that his trial counsel was ineffective by failing to present evidence at the dispositional hearing to show that the children had substantial relationships with paternal relatives and that it would be harmful to the children to sever those relationships. *See* WIS. STAT. § 48.426(3)(c). J.R. asserts that his trial counsel should have subpoenaed his family members to testify at the dispositional phase regarding their relationships with the children prior to the children being placed in foster care, and to testify that they were not allowed contact with the children and that they were denied placement of the children without a sufficient reason. In support, J.R. has provided an affidavit from his brother, asserting that he wants custody of the children; that he was never contacted by the case manager regarding

placement; and that he had cared for J.R., Jr. on a consistent basis and cared for A.E. during the short amount of time that she was in her mother's custody. J.R. has also provided an affidavit from his mother, asserting that she wants custody of the children; that she attempted to gain placement of the children but was told by the case manager that she was not considered because she lacked understanding of the charges J.R. had been convicted of; and that she had cared for J.R., Jr. on a consistent basis and cared for A.E. during the short amount of time that she was in her mother's custody. J.R. argues that he informed his trial counsel that the case manager never contacted any of J.R.'s family members and requested that counsel subpoena his family members to testify at the dispositional hearing. He argues that the case manager falsely testified that she attempted to place the children with relatives, and the circuit court wrongly relied on that testimony and the absence of any evidence of the children's relationships with paternal relatives in determining that termination was in the children's best interest.

We disagree that there would be arguable merit to a claim of ineffective assistance of counsel for failing to subpoena J.R.'s family members to testify at the dispositional hearing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense). We conclude, based on our review of the court's decision at the dispositional hearing, that it would be wholly frivolous to argue that J.R. was prejudiced by the lack of testimony by his family members. *See* ***id.*** at 694 (to establish prejudice, the parent "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome"). Thus, even if J.R. could arguably show that his counsel's performance was deficient, his ineffective assistance of counsel claim would be

frivolous based on a lack of arguable merit to a claim that the deficiency was prejudicial. *See* ***id.*** at 697 (ineffective assistance of counsel claim fails if either prong is not met).

The circuit court held a dispositional hearing regarding the parental rights of J.R., the children's mother, R.J., and the fathers of R.J.'s other children. The court considered each of the dispositional factors, including whether the children had a substantial relationship with their parents or other biological family members and whether it would be harmful to sever those relationships. *See* WIS. STAT. § 48.426(3)(c). The court determined that none of the children had a substantial relationship with either parent. The court found that J.R., Jr. and A.E. had a substantial relationship with R.J. prior to being placed in foster care, but that they no longer had a substantial relationship with their mother because R.J. had become disinterested and uninvolved in their lives during the past year. The court found that the children did not have a substantial relationship with J.R. because, while the court deemed credible J.R.'s testimony that he cared for J.R., Jr. and A.E. prior to their placement in foster care, J.R. had had no contact with the children since they were detained in July 2011. The court explained that there had not been enough contact for the children to develop a substantial relationship with J.R. The court also found that "[t]here aren't any … extended family that have had any consistent contact," noting that it "didn't hear testimony about maternal or paternal relatives or aunts or uncles that have had contact with them." The court found that the only consistent contact and substantial relationships the children had was to their other siblings who were placed in a separate foster home, that there could be potential harm to the children by severing those relationships, but that that could be mitigated by the foster families' commitment to continuing contact among the siblings.

The court explained that it determined that termination was in the best interest of the children based on the following: the high likelihood of adoption; the absence of any substantial relationship between the children and their parents and the lack of harm from severing those relationships; the potential to mitigate the harm from severing the relationships among the siblings; the expressed and apparent wishes of the children to remain with their foster families; the duration of the separation; and the clear likelihood that the children would enter more stable and permanent family relationships through termination.

On this record, it would be wholly frivolous to argue that there is a reasonable probability that the court would not have terminated J.R.'s parental rights had trial counsel presented the evidence that J.R. now asserts should have been presented at the dispositional hearing. J.R. argues that his family would have presented testimony as to their relationships with J.R., Jr. and A.E. prior to the children's placement in foster care in July 2011. However, the circuit court expressly considered the relationships the children had with their parents prior to being placed in foster care, as well as their substantial relationships with their mother after being placed in foster care and until about a year before the dispositional hearing. The court determined that, based on a lack of significant contact, the relationships had faded to the point that the children no longer had a substantial relationship with either parent, and thus there would be no harm to severing those relationships. Similarly, nothing in the material J.R. has provided indicates that his family members had any contact with the children after they were placed in foster care. We discern no basis for J.R. to argue that the prior relationships between the children and J.R.'s family would have altered the court's decision.

As to the issue of placement, the case manager testified that she had "done family finding for [A.E.] and [J.R., Jr.]. No one was found safe or appropriate to take placement or full custody

or guardianship." A permanency plan in the TPR records indicates that J.R.'s mother contacted the case manager about placement of A.E. and J.R., Jr., with her and that the case manager informed J.R.'s mother that she was not considered for placement because she had not aligned herself with the children and because she did not believe the claims of sexual assault by the children's half-sibling. Nothing in the material J.R. has submitted indicates the case manager was untruthful in testifying that efforts were made and that no family placement was found suitable. Additionally, the desire and purported availability of a family member to take placement of the children is not a factor for the court to consider in determining whether to terminate parental rights. Rather, as explained above, the court must consider whether the child has a substantial relationship with any biological family members and whether terminating those relationships would be harmful to the child. Here, the court properly considered the lack of relationships with biological family based on the length of separation and lack of ongoing contact.

J.R. also argues that his trial attorney was ineffective by failing to challenge the information in his court-ordered psychological evaluation. J.R. contends that the evaluation "contained information about [a] diagnosis that [was] never a topic during the evaluation about J.R.'s juvenile case." However, nothing in the record or J.R.'s no-merit response indicates that the information in the psychological evaluation had any effect on J.R.'s decision to plead no contest to grounds or the court's decision as to termination. At the grounds phase, the case manager testified that J.R. had met the condition of return requiring him to undergo a psychological evaluation, but did not testify as to the information in the evaluation. The circuit court did not reference the evaluation in its dispositional decision. We discern no arguable merit

to a claim of ineffective assistance of counsel based on counsel's failure to challenge information in the psychological evaluation.

Finally, J.R. also argues that there should have been specific testimony as to direct questioning of J.R., Jr. as to whether he wished to return to his birth family or remain with his foster parents for the rest of his life. However, the case manager testified that J.R., Jr. expressed his wish to remain with his foster family. We discern no arguable merit to a challenge to the court's dispositional decision based on a lack of testimony as to more direct questioning of J.R., Jr. as to his wishes.

Upon our independent review of the record, we have found no other arguable basis for reversing the order terminating J.R.'s parental rights. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Earle is relieved of any further representation of J.R. in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals