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April 20, 2016

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

2016AP401 State v. S. B.
2016AP402 (L.C. 2014TP103; 2014TP104)

Before Brash, J.[1]

S.B. appeals from trial court orders terminating her parental rights to her son, K.P., and her daughter, K.L.[2] S.B.'s appointed attorney, Eileen T. Evans, has filed a no-merit report. *See* ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct.

[1] These appeals, which were consolidated by order of this court, are 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 fathers, both of whom were unknown, were also terminated. The fathers' rights are not at issue in this appeal and will not be addressed.

App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m) and 809.32. S.B. 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 S.B.'s parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

The children were found to be in need of protection or services on two occasions. *See* WIS. STAT. § 48.13 (governing "CHIPS" cases). The first dispositional orders were allowed to expire in March 2010. In February 2013, the children were again found to be in need of protection or services. The children were placed outside of S.B.'s home and have not been returned to her care.

In April 2014, the State petitioned to terminate S.B.'s parental rights to both children based on WIS. STAT. § 48.415(2) (continuing CHIPS). On May 14, 2014, S.B. appeared in response to the petitions. The trial court began to go over S.B.'s rights with her and stated: "I assume you want a lawyer; correct?" S.B. told the trial court that she did not want a lawyer and wanted instead to represent herself. The trial court then engaged in a lengthy colloquy with S.B., during which it explained her right to counsel (including her right to representation at public expense if she could not afford a lawyer) and her options with respect to the petitions.[3]

S.B. told the trial court that she wanted to consent to the termination of her parental rights to both children. *See* WIS. STAT. § 48.41. The trial court asked S.B.

[3] The entire colloquy spanned thirty-seven pages of the transcript. The Honorable John DiMotto presided over the hearing.

whether she wanted to consult with a lawyer first, including the lawyer present in the courtroom who had represented S.B. in the CHIPS proceedings. S.B. responded: "No, I have nothing to discuss with a lawyer. I already made the decision. Me and the foster parents have already talked. I think that's the best decision for my kids to stay where they at." The trial court conducted an additional inquiry with S.B. and found that she was "competent to represent herself" and was "giving up her right to a lawyer freely, voluntarily, [and] knowingly." The trial court asked S.B. additional questions about her decision and ultimately accepted S.B.'s voluntary consent to terminate her parental rights to both children. The trial court explained the upcoming dispositional phase of the proceedings and asked S.B. whether she would like to attend the dispositional hearing. S.B. indicated that she would like to be excused from attending.

The dispositional hearing could not be held immediately because the social workers needed to have contact with the children again. The hearing was scheduled for June 25, 2014, but was later delayed numerous times due to changes in the potential adoptive homes for both children.

At a December 10, 2014 hearing, the family case manager told the trial court that the dispositional hearing would need to be delayed again because the adoptive resource was no longer available.[4] In addition, S.B. appeared for the first time since voluntarily consenting to the termination of her parental rights in May 2014. S.B. told the trial court

[4] The Honorable Rebecca Bradley presided over this hearing and subsequent hearings through May 2015.

that she had changed her mind and did not want to terminate her parental rights. She was referred to the public defender's office to seek counsel to assist her in seeking relief.

The attorney appointed to represent S.B. concluded that there was no legal basis to seek to withdraw her voluntary consent to the termination of her parental rights to both children. The attorney also indicated that S.B. wanted new counsel. New counsel was appointed for S.B. and she filed a motion on S.B.'s behalf seeking to vacate the voluntary consent with respect to both children. The motion alleged several reasons why S.B. should be allowed to withdraw her consent: (1) she had not consulted with an attorney regarding the termination of her parental rights before voluntarily consenting to do so; (2) she "smoked marijuana and potentially consumed alcohol the morning" that she appeared in court and gave her voluntary consent; and (3) because permanent homes had not yet been established for the children, "[i]t would not unduly delay this case to allow [S.B.] to withdraw her voluntary consent." The State opposed the motion.

On September 11, 2015, the trial court conducted a hearing on S.B.'s motion.[5] S.B. testified that although she told the trial court at the May 2014 hearing that she had not taken any drugs or alcohol the day of the hearing, she had been lying. She said the truth was that she had "[a] couple of pulls off a blunt" and "a shot or two [of cognac] earlier that day when [she] first got up." S.B. said that on the day of the hearing, she was "overwhelmed with just trying to get the case over with not really thinking straight to the long term of the effects."

[5] The Honorable David Swanson presided over the hearing and subsequent proceedings.

On cross-examination, S.B. said she had lied in May 2014 when she testified that there was nothing going on in her life "that is causing [her] to be upset such that [her] ability to make a decision about a lawyer and not having a lawyer is being affected." S.B. also said that the marijuana she consumed was "almost like a normal thing for me" that helps her "be cool, calm and collect[ed]." S.B. said she was "[j]ust a little" high and only "[s]lightly" "tipsy" at the hearing, because she ate a couple of hours before the hearing, which helped her "buzz" wear off. S.B. also acknowledged that she was not rushed by the judge into making a decision at the May 2014 hearing. She said: "I think the judge … kind of wanted me to consult with a lawyer and everything, but here it is me being overwhelmed with everything."

The trial court found that there was no basis to allow S.B. to withdraw her voluntary consent and denied her motion. It noted that S.B.'s testimony was very similar to the statements she offered during the "very lengthy and detailed colloquy" concerning S.B.'s decision to waive counsel and voluntarily consent to the termination of her parental rights. The trial court found that S.B.'s answers at the May 2014 hearing were "quite clear about why you decided to go ahead that day without a lawyer." The trial court further found that there was "just no evidence in the record from the May 14, 2014 hearing date that you were in fact not mentally capable of entering a plea that day." The trial court said that S.B.'s testimony "indicates essentially that [she] kind of changed her mind," which the trial court said was not a basis to withdraw the voluntary consent. The trial court denied the motion and set a date for the dispositional hearing.

In September 2015, the trial court held the dispositional hearing. S.B. was excused from attending because she had voluntarily consented to the termination of her

parental rights. The trial court found that it was in each child's best interests that parental rights be terminated. These appeals follow.

The no-merit report addresses a single issue: whether S.B.'s consent to the voluntary termination of her parental rights to both children was entered knowingly, voluntarily, and intelligently. We agree with appellate counsel that there would be no merit to an appeal based on that issue, as we will briefly explain below. In addition, we will address two additional issues: whether there would be any merit to assert that the trial court failed to follow the statutory rules regarding time limits or erroneously exercised its discretion when it decided to terminate S.B.'s parental rights.

We begin our analysis with the statutory time limits. If grounds for termination are established, the court is to proceed with an immediate dispositional 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. ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. Continuances, however, 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. *See* § 48.315(3).

We have carefully examined the record. After S.B. consented to the termination of her parental rights, the dispositional hearing was delayed several times. With one exception, every time the trial court scheduled dates it either acted within the applicable deadlines or explicitly found good cause to extend the time limits. In each case where the

trial court found good cause, the record supported that finding. For instance, the dispositional hearing was delayed several times so that adoptive homes could be identified and, after S.B. reappeared in the case, so that she could consult counsel.

The only time the trial court did not explicitly say that it was finding good cause to extend the time limits was on February 19, 2015. At that hearing, the attorney who was appointed to represent S.B. with respect to a potential motion to withdraw her voluntary consent told the trial court that she needed to review the transcript of the May 2014 hearing. Counsel also said that she did not know why S.B. had failed to appear in court that day and asked the trial court not to penalize S.B. for her non-appearance. The trial court set a date for a status hearing and also invited counsel to file a motion and seek an earlier hearing date if she was in a position to do so. Trial counsel did not object to the continuance, so any challenge was waived. *See* ***id.*** Further, the record demonstrates good cause for the delay: counsel needed time to review the transcript, consult with her client, and potentially file a motion. For these reasons, there would be no merit to alleging that the trial court lost competency during the pendency of the cases.

Next, we consider S.B.'s decision to consent to the voluntary termination of her parental rights. With the assistance of counsel, S.B. has already asserted that her May 2014 consent to the termination of parental rights to both children was not knowing, intelligent, and voluntary. As noted above, the trial court conducted an evidentiary hearing and ultimately rejected S.B.'s arguments. We agree that there would be no basis to challenge the trial court's findings and conclusions or to allege that the voluntary consent was inadequate.

As the no-merit report discusses, case law requires trial courts to ascertain specific information in order "to determine on the record whether consent is voluntary and informed." *See* ***In the Interest of D.L.S.***, 112 Wis. 2d 180, 196, 332 N.W.2d 293 (1983). ***D.L.S.*** requires trial court to ascertain:

> 1. the extent of the parent's education and the parent's level of general comprehension;
>
> 2. the parent's understanding of the nature of the proceedings and the consequences of termination, including the finality of the parent's decision and the circuit court's order;
>
> 3. the parent's understanding of the role of the guardian ad litem (if the parent is a minor) and the parent's understanding of the right to retain counsel at the parent's expense;
>
> 4. the extent and nature of the parent's communication with the guardian ad litem, the social worker, or any other adviser;
>
> 5. whether any promises or threats have been made to the parent in connection with the termination of parental rights;
>
> 6. whether the parent is aware of the significant alternatives to termination and what those are.

See ***id.*** at 196-97. Having reviewed the transcript of the May 2014 hearing, we agree with the no-merit report that the trial court satisfied the requirements of ***D.L.S.*** Further, the trial court's findings that S.B.'s waiver of the right to counsel and her voluntary consent to terminating her parental rights were supported by S.B.'s answers to the trial court's questions. In addition, we discern no basis to challenge the trial court's findings and conclusions at the September 2015 motion hearing. S.B.'s testimony did not establish that she was impaired or rushed at the May 2014 hearing. There would be no merit to challenging S.B.'s consent to the termination of her parental rights.

Finally, we turn to the issue of whether there would be any merit to challenging the trial court's decision to terminate S.B.'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, 152-53, 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 heard testimony from the family case manager, and the guardian ad litem also offered his opinion that termination of parental rights was in the best interests of both children. The trial court made findings on the record and discussed the statutory factors, finding that each one weighed in favor of termination. The trial court noted that the children were in different placements and discussed their individual situations. The daughter was placed in a potential adoptive home and the case manager

had indicated that the daughter was "very likely" to be adopted by her foster parent. The son was in a group home, and while an adoptive resource had not yet been identified, the trial court noted that finding adoptive parents would be easier if the child was immediately available for adoption, rather than if S.B.'s parental rights remained intact.

The trial court also noted that both children had a relationship with S.B., but it found that "[i]t does not appear to be a substantial relationship and certainly is not a positive relationship based on all of the testimony and the records in these cases." Finally, the trial court noted that both children wished to be adopted.

The trial court's findings on all six statutory factors 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.

This court's independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing,

IT IS ORDERED that Attorney Eileen T. Evans is relieved of any further representation of S.B. on appeal.

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

Diane M. Fremgen
Clerk of Court of Appeals