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DISTRICT II

August 23, 2017

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

2017AP160-NM	In re the termination of parental rights to R.I.D., a person under the age of 18: Racine County HSD v. T.D. (L.C. # 2015TP24)
2017AP161-NM	In re the termination of parental rights to A.E.D., a person under the age of 18: Racine County HSD v. T.D. (L.C. # 2015TP25)

Before Hagedorn, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

In these consolidated appeals, T.D. appeals from orders involuntarily terminating her parental rights to two daughters. Appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32, ***Anders v. California***, 386 U.S. 738 (1967), and ***Brown County v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 293 (Ct. App. 1998) (per curiam). T.D. received a copy of the report, was advised of her right to file a response, and has elected not to do so.[2] Upon consideration of the no-merit report and an independent review of the record, we conclude that the orders may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

T.D. gave birth to R.I.D. in 2010, and to A.E.D. in 2011. In 2012, R.I.D. was taken to the emergency room after ingesting some of T.D.'s psychotropic medication. An investigation into the family's living situation revealed neglect and unsafe living conditions. The girls were removed from T.D.'s home and adjudicated children in need of protection or services (CHIPS). Both have remained outside the home pursuant to court orders since their July 2012 removal. In January 29, 2015, Racine County filed petitions to terminate T.D.'s parental rights to both girls on the grounds of continuing CHIPS under WIS. STAT. § 48.415(2), and failure to assume parental responsibility under § 48.415(6). Following a jury trial, T.D. was found unfit on both

[2] Counsel's no-merit report was filed on April 13, 2017. Our notice to T.D. was returned as "not deliverable as addressed" on May 19, 2017. On June 2, 2017, appellate counsel informed this court that T.D.'s copy of the no-merit report was returned by the postal service. Counsel resent T.D.'s copy of the no-merit report to two additional addresses and provided those addresses to this court. By order of June 7, 2017, we notified T.D. of counsel's no-merit report and extended the time for T.D. to file a response to June 22, 2017. The June 7, 2017 order was not returned to this court and T.D. did not file a response. Pursuant to WIS. STAT. RULE 809.107(6)(e), an opinion from this court was due on or around July 24, 2017. Conflicts in this court's calendar have resulted in a short delay of the opinion's release. It is therefore necessary for this court to *sua sponte* extend the deadline for a decision in this case. *See* WIS. STAT. RULE 809.82(2)(a) ("[T]he court upon its own motion … may enlarge or reduce the time prescribed by these rules or court order for doing any act."); ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995).

grounds as to each child. After a dispositional hearing, the circuit court terminated T.D.'s parental rights to both girls. This no-merit appeal follows.

We agree with the no-merit report's analysis and conclusion that any challenge to the proceedings based on a failure to comply with statutory time limits lack arguable merit. As detailed in counsel's no-merit report, all of the mandatory time limits were either complied with or properly extended without objection and for good cause. Further, the failure to object to a delay waives any challenge to the court's competency on these grounds. *See* WIS. STAT. § 48.315(3).

Next, the no-merit report addresses the sufficiency of the evidence supporting the jury's verdicts. When we review 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 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). If more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***Poellinger***, 153 Wis. 2d at 504. We agree that there is no arguably meritorious challenge to the jury's verdicts on either unfitness ground.[3]

In order to establish the continuing CHIPS ground, as to each child the county needed to show by clear and convincing evidence that (1) the child was adjudged in need of protection or services and placed outside the home for six months or longer pursuant to a court order containing the TPR notice required by law, (2) the county made reasonable efforts to provide the

[3] While two unfitness grounds were pled in the petition, the jury only needed to find that one was established in order for the circuit court to find T.D. unfit. Regardless, we address both grounds alleged and conclude that each was supported by sufficient evidence.

services ordered by the court, (3) T.D. failed to meet the conditions established for the safe return of the child, and (4) there was a substantial likelihood that T.D. would not meet the conditions within the next nine months. *See* WIS. STAT. § 48.415(2); WIS JI—CHILDREN 324A. On the ground of failure to assume parental responsibility, the county needed to prove by clear and convincing evidence that T.D. did not have a substantial parental relationship with the child, meaning the acceptance and exercise of significant responsibility for the child's daily supervision, education, protection, and care. *See* § 48.415(6).

The jury's verdicts are supported by a reasonable view of the credible evidence. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶30, 259 Wis. 2d 429, 655 N.W.2d 752. The trial took place over several days, numerous witnesses testified, and the County introduced extensive documentary evidence. The no-merit report sets forth the applicable standard of review and the evidence satisfying each special verdict question. The circuit court provided a similar on-the-record analysis when denying T.D.'s motion for a directed verdict at the close of the county's case, and again at the end of trial, in denying T.D.'s request for judgment notwithstanding the verdict. We agree with appellate counsel's analysis and conclusion that there exists no arguably meritorious challenge to the sufficiency of the evidence supporting either unfitness ground.

The no-merit report also addresses the potential issue of whether the circuit court erred in denying T.D.'s motion for a mistrial based on a reference to the children's "best interests" made by the ongoing case manager, Linda Pulice. The County asked Pulice why she referred R.I.D. to a particular therapist. Pulice gave a three-paragraph answer, the last sentence of which was, "Also to have [the therapist] make some recommendations on, I was going to say the best interests. I don't think." T.D. moved for a mistrial based on the circuit court's pretrial order

prohibiting references at trial to the children's best interests.[4] The circuit court considered the reference to be a violation of its pretrial order but determined it did not warrant a mistrial:

> The focus of this trial has not been directed in any other fashion toward what is the best interest for the girls. There has been no other testimony that's been discussed while this case is moving forward from the standpoint of the girls and meeting their particular needs. The focus of the trial has been on [T.D.], [T.D.'s] capacities, insights, behaviors, interactions with the girls. I think the statement was inadvertent. I don't think it was intentional or planned or thoughtful insertion of the phrase best interests in order to sway the jury.
>
> I find that the statement is harmless in the context of the totality of the evidence that's presented here. I will deny the motion for the mistrial.

The circuit court also offered to provide a curative instruction to the jury but trial counsel declined the offer, stating, "We have decided not to do that strategically at this point."

We agree that the circuit court's decision to deny T.D.'s motion for a mistrial presents no issue of arguable merit. Whether to grant a mistrial is within the circuit court's discretion. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The court must determine whether, in light of the proceedings as a whole, the claimed error is sufficiently prejudicial to warrant a new trial. ***Id.*** We will reverse the denial of a mistrial motion "only on a clear showing of an erroneous use of discretion by the circuit court." ***Id***. (internal quotation omitted). In denying T.D.'s motion for a mistrial, the circuit court examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***State v. Bunch***, 191

[4] There was some dispute about whether Pulice uttered the phrase "best interests" or if she stopped her sentence after saying the word "best." Though the transcript indicated that Pulice stopped after saying the word "best," the circuit court found that Pulice said "best interests." The circuit court found that while the phrase was somewhat muted or swallowed, it was "clearly audible" and likely heard by the jury.

Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995). The circuit court was willing to give a curative instruction but T.D. declined. *See* ***id***. at 512 (the law prefers and the circuit court should consider less drastic alternatives, if available and practical). Any challenge to the circuit court's decision would be frivolous.

Next, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion when it terminated T.D.'s parental rights. At disposition, the court correctly applied the best interests of the child standard, *see* WIS. STAT. § 48.426(2), and considered the factors set forth in § 48.426(3). The court found it was likely that the children would be adopted and that though some early bonding occurred between T.D. and the children, severing that relationship "will not be harmful to the girls." In so finding, the court considered that various circumstances prevented T.D. "from consistently being a safe parent" such that the children had been "on a roller coaster of good and bad visits for years now." The court's discretionary decision to terminate T.D.'s parental rights demonstrates a rational process that is justified by the record. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996).

Our independent review of the record has not revealed any other potential issues for appeal. The circuit court properly exercised its discretion in ruling on pretrial motions and on evidentiary objections during trial. Jury selection was completed without any objection from either party with regard to jurors struck or excused for cause. The jury instructions properly stated the law. No improper arguments were made to the jury during opening or closing arguments. There were no jury questions or dissenting jurors and the jurors were polled after delivering their special verdicts. Accordingly, this court accepts the no-merit report, affirms the orders and discharges appellate counsel of the obligation to represent T.D. further in these appeals.

Upon the foregoing reasons,

IT IS ORDERED that the orders terminating T.D.'s parental rights to R.I.D. and A.E.D. are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven W. Zaleski is relieved from further representing T.D. in these matters. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals