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December 13, 2017

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

2017AP2059-NM In re the termination of parental rights to T.S.:
State of Wisconsin v. S.H. (L.C. # 2016TP227)

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.

S.H. appeals from an order terminating his parental rights to his daughter. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULES 809.107(5m) and 809.32. S.H. was served with a copy of the report and advised of his right to file a response. He has not filed a response. Upon consideration of the no-merit report and an independent review of the circuit court record, this court concludes that no issue of arguable merit could be raised on appeal and affirms the order.

S.H.'s child was removed from her mother's home and taken into care by the Division of Milwaukee Child Protective Services at the end of May 2015, when the child was two and one-half years old. S.H. was incarcerated at that time, as he had been since shortly after the child's birth. The petition for the termination of parental rights was filed July 14, 2016, and alleged that S.H. had failed to assume parental responsibility and that the child was in continuing need of protection or services (CHIPS). *See* WIS. STAT. § 48.415(2), (6). On March 7, 2017, S.H. entered a no contest plea to the CHIPS ground alleged in the petition for the termination of parental rights. After hearing testimony at the disposition hearing held June 27, 2017, the circuit court issued a written decision terminating S.H.'s parental rights.

The no-merit report observes that the fact-finding hearing at which S.H. entered his no contest plea did not occur within forty-five days of the initial hearing on the petition as required by WIS. STAT. § 48.422(2), that the disposition hearing was not held within forty-five days of the plea taking as required by WIS. STAT. § 48.424(4), and that the circuit court did not specifically toll the statutory time limits for good cause shown. *See* WIS. STAT. § 48.315(2) ("A continuance shall be granted by the court only upon a showing of good cause in open court ….") . The failure to act within any time period did not deprive the circuit court of jurisdiction or competency to proceed. Sec. 48.315(3). Further, S.H.'s failure to object to a period of delay waived any

challenge to the court's competency to act during the continuance. ***Id.*** There is no viable claim that S.H.'s trial counsel was ineffective for not objecting because S.H. could not establish prejudice from counsel's failure to object. Not only did good cause exist for the scheduling of the hearings beyond the forty-five day time limits because of scheduling difficulties, delay was favorable to S.H. as he sought to have his mother considered as a potential placement and he got closer to his release date.[2] There is no arguable merit to any claim related to the failure to comply with the statutory time limits.

The no-merit report addresses whether S.H.'s no contest plea to the continuing CHIPS ground was properly accepted. Unfortunately, the no-merit report does not recite the applicable law as set forth here.[3] To be constitutionally sound, a no contest plea in a TPR proceeding must be entered knowingly, voluntarily, and intelligently. *See* ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845. Under WIS. STAT. § 48.422(3), "[i]f the petition is not contested the court shall hear testimony in support of the allegations in the petition, including testimony as required in sub. (7)." The parent must also have knowledge of the constitutional rights being given up by the plea. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶25. These

[2] S.H. moved for a continuance of the disposition hearing because he wanted to see whether his release date would be moved up as a result of a pending motion for sentence adjustment in his criminal case. The circuit court, in a proper exercise of its discretion, denied the continuance. No issue of arguable merit arises from the circuit court's decision to not further delay disposition.

[3] Appointed counsel is reminded that the no-merit report should set forth the applicable standard of review and law applicable to potential appellate issues. Doing so serves at least two purposes. It gives the appellant information and a frame of reference for formulating a response to the no-merit report. More importantly, a meaningful discussion of the standard of review and legal principles "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability," and to help courts make "the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." ***Penson v. Ohio***, 488 U.S. 75, 82 (1988) (citation omitted).

rights include: (1) the right to counsel; (2) the right to a jury trial; (3) the right to have the State prove the parent's unfitness by clear and convincing evidence; and (4) the right to a fact-finding hearing on fitness. *See* ***Brown County DHS v. Brenda B.***, 2011 WI 6, ¶¶42 n.12, 43-44, 331 Wis. 2d 310, 795 N.W.2d 730. The parent must understand that the acceptance of the plea will result in a finding of parental unfitness. ***Oneida Cty. DSS v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122. Additionally, the circuit court has mandatory duties under WIS. STAT. § 48.422(7).[4]

The circuit court conducted a colloquy with S.H. that satisfied the constitutional and statutory requirements. S.H. confirmed that he understood he was giving up his right to trial and all associated rights, including the State's burden to prove grounds for unfitness by clear, satisfactory and convincing evidence. The elements the State was required to prove were recited and acknowledged by S.H. S.H. was told that upon acceptance of the plea, the court was required by law to make a parental unfitness finding. The alternatives to termination were listed and the court emphasized that the best interest of the child was the controlling consideration.

[4] WISCONSIN STAT. § 48.422(7) requires that a circuit court:

> (a) Address the parties present and determine that the admission is made voluntarily with understanding of the nature of the acts alleged in the petition and the potential dispositions.
>
> (b) Establish whether any promises or threats were made to elicit an admission ....
>
> (bm) Establish whether a proposed adoptive parent of the child has been identified....
>
> (br) Establish whether any person has coerced a birth parent [into making an admission].
>
> (c) Make such inquiries as satisfactorily establish that there is a factual basis for the admission.

See ***Therese S.***, 314 Wis. 2d 493, ¶16. S.H. confirmed that no promises or threats were made in exchange for his no contest plea. A social worker testified to the factual basis for the CHIPS ground for termination. There would be no arguable merit to a claim that S.H.'s plea was not knowingly and voluntarily entered.[5]

The no-merit report correctly concludes there is no arguable merit to a claim that the circuit court erroneously exercised its discretion when it terminated S.H.'s parental rights. The decision to terminate parental rights lies within the circuit court's discretion. ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). The best interest of the child is the prevailing factor considered by the circuit court in making this decision. WIS. STAT. § 48.426(2). In determining the best interest of the child, the circuit court is required to consider the agency report and the factors enumerated in § 48.426(3). ***Sheboygan Cty. DHHS v. Julie A.B.***, 2002 WI 95, ¶4, 255 Wis. 2d 170, 648 N.W.2d 402. It is also entitled to consider other factors, including factors favorable to the parent. ***Id.***

Here, the circuit court applied the best interest of the child standard and considered the factors set out in WIS. STAT. § 48.426(3). The court heard testimony at the dispositional hearing that the child has been placed with her foster parents for one-half of the child's life, that she is placed there with a biological half-sister with whom she is bonded, and that the foster parents are an adoptive resource. The court was skeptical of the foster mother's testimony suggesting she

[5] The circuit court did not inquire whether an adoptive parent had been identified. *See* WIS. STAT. § 48.422(7)(bm). However, at a permanency plan hearing at which S.H. appeared telephonically, adoption was discussed as the plan with the child's foster parents identified as the adoptive resource. S.H. could not assert he was not aware that the child's foster parents were identified as adoptive parents. ***Kenosha Cty. DHS v. Jodie W.***, 2006 WI 93, ¶26, 293 Wis. 2d 530, 716 N.W.2d 845 (to challenge a no contest plea, the parent must allege he or she did not in fact know the missing information).

would facilitate contact between the child and S.H. or S.H.'s mother. It found that assurance was not necessary because the child needed structure, predictability, and nurturance which S.H. had not been able to provide. The court found that the child had no relationship with S.H. or his family. There is no arguable merit to a claim that the court erroneously exercised its discretion in concluding that termination of S.H.'s parental rights was in the child's best interest.

The no-merit report also discusses whether there is arguable merit to a claim that S.H. was denied the effective assistance of counsel. It concludes there is no possible ineffective assistance of counsel claim based on the examination of counsel's vigorous requests to facilitate visitation between the child and S.H. and S.H.'s mother, counsel's request that S.H.'s mother be considered as a placement resource, counsel's cross-examination of the State's witnesses at the disposition hearing, and counsel's presentation of testimony opposing termination. Indeed, the record does not suggest any viable claim of ineffective assistance of counsel.

Our review of the record discloses no other potential issues for appeal. Accordingly, we accept the no-merit report, affirm the order terminating S.H.'s parental rights, and discharge appellate counsel of the obligation to represent S.H. further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of S.H. in this matter. *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