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August 29, 2018

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

2018AP1087-NM In re the termination of parental rights to J.N.J.-W.:
Racine County HSD v. L.R.H.-J. (L.C. # 2017TP13)

Before Dugan, 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).

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

L.R.H.-J. appeals from a dispositional order terminating her parental rights to her daughter, J.N.J.-W. Appellate counsel, Diane Lowe, has filed a no-merit report. *See* ***Brown Cty. v. Edward C.T.***, 218 Wis. 2d 160, 161, 579 N.W.2d 296 (Ct. App. 1998) (per curiam); *see also* WIS. STAT. RULES 809.107(5m), 809.32. L.R.H.-J. has not responded to the no-merit report. Upon our review of the record[2] and counsel's report, we conclude that there is at least one arguably meritorious issue that could be pursued. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and set a deadline for filing a new notice of appeal.

On or about July 7, 2005, L.R.H.-J. took her first child, K.S., to the hospital because K.S. was not breathing. Hospital staff, which made an abuse referral to the Racine County Human Services Department ("the County"), observed a large abrasion on K.S.'s left temple, a grab mark on her left wrist, blown retinas, internal bleeding, bruising on K.S.'s back, and a skull fracture. K.S. died from her injuries. Police investigated, and a witness reported that on July 3, 2017, L.R.H.-J. had picked K.S. up by one arm and threw her on a bed, causing K.S. to hit a wall and fall back on the bed. L.R.H.-J. stated that K.S. had been acting up in the bathroom and admitted that she pushed K.S. down forcibly in a bathtub, causing K.S. to hit her head. L.R.H.-J. was charged with one count of first-degree reckless homicide and child abuse. She pled guilty to

[2] By order dated July 9, 2018, we ordered the record supplemented with the transcript of the June 26, 2017 hearing on the petition. Based on a supplemental statement on transcript, the transcript was due by August 2, 2018, and the record supplement by August 9, 2018. To date, no record supplement has been transmitted to this court. We have therefore been unable to review that transcript for potential issues of arguable merit.

However, because there are other grounds on the existing record on which to reject the no-merit report, we decline to continue holding this matter for the record supplement. The clerk of the circuit court is therefore relieved of its obligation under the July 9, 2018 order to transmit a record supplement, but we note that the court reporter should still complete and file the missing transcript.

a reduced charge of neglect of a child causing death and, in September 2007, was sentenced to five years' initial confinement and ten years' extended supervision.

In 2007, while L.R.H.-J. was incarcerated, her second child, D.J., was born. D.J. was taken into custody at birth. L.R.H.-J. agreed to voluntarily terminate her parental rights to D.J. In 2011, L.R.H.-J. was released to extended supervision.

The child in this case, J.N.J.-W., was born in May 2015, nearly ten years after the death of K.S. In November 2015, J.N.J.-W. was adjudicated a child in need of protection or services (CHIPS). In May 2016, the CHIPS dispositional order was extended until 2033, when J.N.J.-W. turns eighteen. The County filed a termination of parental rights (TPR) petition on April 26, 2017, against both of J.N.J.-W.'s parents. As to L.R.H.-J., the petition alleged two grounds for termination: failure to assume parental responsibility and commission of a felony against a child. *See* WIS. STAT. § 48.415(6), (9m).

The County moved for summary judgment against L.R.H.-J. on the prior felony ground. Because the prior felony ground is established "by proving that the child of the person … was the victim of a serious felony and that the person … has been convicted of that serious felony as evidenced by a final judgment of conviction," *see* WIS. STAT. § 48.415(9m)(a), trial counsel acknowledged that there was nothing L.R.H.-J. could offer in response to defeat summary judgment.[3] The circuit court concluded that there was no genuine issue of material fact as to this ground, and granted summary judgment to the County. Following a disposition hearing, the

[3] Contrary to its characterization in the no-merit report, this is neither an admission nor a stipulation by L.R.H.-J.

circuit court terminated L.R.H.-J.'s parental rights to J.N.J.-W.; the order lists only conviction of a felony as the grounds for doing so.[4]

In the no-merit report, appellate counsel identifies as the first issue, "Is the statutory provision [WIS. STAT.] § 48.415(9m) Commission of a Felony Against a Child, constituting automatic grounds for termination[,] unconstitutional as applied to [L.]R.H.-J.?" As counsel explains later in the report,

> It is tempting to feel there might be some due process question as to the constitutionality of allowing a conviction for negligently causing the death of her child [ten] years prior to be an automatic ground for termination. She paid her debt to society. [Five] years in prison. And a lengthy extended supervision sentence. And this is not to argue that there is a constitutional right to a fact-finding jury in all cases even where unfitness is undisputed per statute. Rather the concern is the as applied constitutionality of [subsection] (9m) providing an automatic unending grounds for a finding of unfitness for the lifetime of the parent.

A substantive due process challenge can allege that a statute is unconstitutional on its face or as applied. *See* ***State v. P.P.***, 2005 WI 32, ¶15, 279 Wis. 2d 169, 694 N.W.2d 344. Statutes are presumed constitutional, and the challenger bears a heavy burden to overcome that presumption. *See* ***id.***, ¶¶16-18. The threshold question is whether a fundamental liberty interest is at stake. *See* ***id.***, ¶20. If so, we apply strict scrutiny, requiring a statute to be "narrowly tailored to advance a compelling interest that justified inference" with the liberty interest. *See* ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶17, 271 Wis. 2d 51, 678 N.W.2d 831. A facial challenge must establish beyond a reasonable doubt that the statute is unconstitutional and that

[4] We have located no finding that the County established the failure-to-assume ground as to L.R.H.-J., but the ground was also not expressly dismissed.

there are no possible interpretations or applications that could be constitutional. *See* ***State v. Cole***, 2003 WI 112, ¶30, 264 Wis. 2d 520, 665 N.W.2d 328. An as-applied challenge must establish beyond a reasonable doubt that the statue is unconstitutional as applied to the particular circumstances at hand. *See* ***State v. Joseph E.G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137.

The no-merit report begins by asserting that the State has a compelling interest "to protect children of parents who have previously been convicted of a previous felony act against a child."[5] The report then lays out various standards of review and discusses findings from cases involving constitutional challenges to other grounds for termination, like ***Kelli B.***, 271 Wis. 2d 51, ¶26 (regarding incestuous parenthood under WIS. STAT. § 48.415(7), unconstitutional as applied), and ***State v. Lawana R.***, Nos. 2006AP2603-04 and 2006CP2787-88, unpublished slip op. ¶18 (WI App Sept. 5, 2017) (regarding prior involuntary TPR under WIS. STAT. § 48.415(10), constitutional both facially and as applied). The report then uses these cases as a "framework" for concluding that WIS. STAT. § 48.415(9m) is constitutional as applied to L.R.H.-J.

However, the entirety of counsel's analysis regarding whether WIS. STAT. § 48.415(9m) is sufficiently narrowly tailored to survive an as-applied challenge in this case is:

> Recall [***Lawana R.***, Nos. 2006AP2603-04 and 2006AP2787-88 ¶16,] *supra*: "In an as-applied challenge to the constitutionality of a statute, the challenging party must establish

[5] For this proposition, counsel cites to ***State v. Lawana R.***, Nos. 2006AP2603-04 and 2006CP2787-88, unpublished slip op. (WI App Sept. 5, 2017). However, ***Lawana R.*** does not involve the prior felony ground. Additionally, we note that ***Lawana R.*** is an unpublished opinion, citable only for limited purposes. *See* WIS. STAT. RULE 809.23.

> beyond a reasonable doubt that the statute is unconstitutional as applied to the specific circumstances at hand." ***Id.*** *It does not appear to have reached this level and therefore, the brief argues there is not a valid as applied challenge here.* [Emphasis added.]

This analysis is insufficient, particularly in light of counsel's identification of various other considerations relevant to the issue. For example, counsel notes that it has been ten years since L.R.H.-J.'s felony against a child was committed and that L.R.H.-J. has served five years' confinement during that period. Counsel then asks, "Is 10 years too broad? Or should it be limited to 3 years?" L.R.H.-J. was nineteen years old when K.S. died and, despite identifying it in the issue summary, counsel does not discuss whether it is constitutional, as applied, for WIS. STAT. § 48.415(9m) to work as "an automatic unending grounds for a finding of unfitness for the lifetime" of L.R.H.-J.

Counsel also notes that an as-applied challenge was not raised in the circuit court. An as-applied constitutional challenge is non-jurisdictional and, thus, can be waived[6] by a failure to raise it in the circuit court. *See* ***Cole***, 264 Wis. 2d 520, ¶46. Counsel urges us to ignore any waiver and reach "the merits" of the as-applied constitutional claim. *See, e.g.*, ***State v. Moran***, 2005 WI 115, ¶31, 283 Wis. 2d 24, 700 N.W.2d 883, *overruled on other grounds by* ***State v. Denny***, 2017 WI 17, ¶69, 373 Wis. 2d 390, 891 N.W.2d 144. However, we typically exercise our discretion to overlook waiver where "an issue involves a question of law, has been briefed by the opposing parties, and is of sufficient public interest to merit a decision[.]" *See* ***Moran***, 283 Wis. 2d 24, ¶31. Because this is a no-merit appeal, the constitutional challenge has not been

[6] This would more accurately be described as forfeiture. *See* ***State v. Ndina***, 2009 WI 21, ¶¶28-32, 315 Wis. 2d 653, 761 N.W.2d 612.

briefed by any opposing party. Moreover, a case involving "sufficient public interest to merit a decision" is not likely an appropriate candidate for a no-merit report.

Despite waiver, some issues may be raised in the context of a claim of ineffective assistance of trial counsel for failing to properly raise the issue in the first instance. In this case, however, no such postdisposition motion was pursued.

When we review a no-merit report, our inquiry is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967). The test is not whether counsel should expect the arguments to prevail. Rather, the question is whether the potential issues so lack a basis in fact or law that counsel would act unethically by prosecuting the appeal. In this case, we are not persuaded that an as-applied constitutional challenge to WIS. STAT. § 48.415(9m) or a related claim of ineffective assistance of trial counsel would lack arguable merit.[7]

Because a no-merit report is only appropriate if further proceedings would be wholly frivolous, *see* ***McCoy v. Court of Appeals***, 486 U.S. 429, 437 (1988), we dismiss this appeal and

[7] We also note that the circuit court clerk's stamp, the circuit court judge's electronic signature, and the docket all indicate the dispositional order was entered on December 4, 2017. However, the docket and the transcript indicate that the disposition hearing, while it began on October 3, 2017, was not completed until December 5, 2017: our review of the record indicates that the October date dealt with taking evidence relating to the father's default and the matter was adjourned as to L.R.H.-J.

We are unable to determine why the dispositional order terminating L.R.H.-J.'s parental rights was apparently entered the day before any evidence was taken regarding that disposition. We trust counsel will address this anomaly in some fashion following dismissal.

extend the time for L.R.H.-J. to file a new notice of appeal.[8] Our conclusion regarding the arguable merit of an as-applied challenge does not mean that we have reached a conclusion about the ultimate merit of that or any other potential issues in the case. L.R.H.-J. is not precluded from pursuing any additional issues that counsel may now believe have merit.

Upon the foregoing, therefore,

IT IS ORDERED that the previously imposed hold in this matter is lifted.

IT IS FURTHER ORDERED that the no-merit report is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for L.R.H.-J. Any such appointment shall be made within thirty days of the date of this order.

IT IS FURTHER ORDERED that the public defender shall notify this court within five days after a new lawyer is appointed for L.R.H.-J. or the public defender determines that new counsel will not be appointed.

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[8] In a criminal no-merit appeal brought under WIS. STAT. RULE 809.32, we would dismiss the appeal and extend the time for filing a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30(2)(h). TPR appeals have a modified procedure for seeking postdisposition relief. *See* WIS. STAT. RULE 809.107(5)-(6). We therefore extend only the time for filing a notice of appeal, but L.R.H.-J. is free to pursue a postdisposition motion, as appropriate, in accord with the applicable rules of appellate procedure.

IT IS FURTHER ORDERED that the deadline for L.R.H.-J. to file a notice of appeal in this matter is extended to thirty days after the date on which the State Public Defender makes a determination on whether to appoint successor counsel.

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

Sheila T. Reiff
Clerk of Court of Appeals