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January 17, 2020

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A. N.

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

2019AP2025-NM In re the termination of parental rights to K.A.N.:
State of Wisconsin v. A.N. (L.C. # 2017TP266)

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).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

A.N. appeals from an order terminating his parental rights to his daughter, K.A.N. Appellate counsel, Gregory Bates, has filed a no-merit report. *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULES 809.107(5m), 809.32. A.N. was advised of his right to file a response, and he has responded. Appellate counsel submitted a supplemental no-merit report and supporting affidavit. *See* WIS. STAT. RULE 809.32(1)(f). Based upon an independent review of the record as mandated by ***Anders***, the no-merit report and supplemental report, and A.N.'s response, this court concludes that there are no arguably meritorious issues that could be pursued on appeal. Therefore, the order terminating A.N.'s parental rights is summarily affirmed.

K.A.N. was born in July 2016. Her mother, A.W., lived with A.N., who was present at the hospital for K.A.N.'s birth. A.W. originally identified A.N. as the father but she later recanted and claimed she did not know who the father was. K.A.N. was removed from her mother's care at three days old, and the child in need of protection or services (CHIPS) process, *see* WIS. STAT. § 48.13, was commenced. Among the reasons for removing K.A.N. from A.W.'s care was a history of alleged domestic violence between A.W. and A.N., as well as the untreated or under-treated mental health issues of both parents, including A.N.'s paranoid schizophrenia. At a temporary physical custody hearing in the CHIPS matter, DNA testing was ordered for A.N., though he was not at the hearing. A.N. never appeared in the CHIPS matter, and K.A.N. was adjudicated a child in need of protection or services in February 2017.

The termination of parental rights petition underlying this appeal was filed in October 2017; as to A.N., it alleged a failure to assume parental responsibility. *See* WIS. STAT. § 48.415(6). DNA testing for A.N. was ordered again. This time it was completed, revealing a 99.9999999% probability of paternity. A.N. eventually agreed to enter a no-contest plea to grounds. Following an evidentiary hearing at which the State presented evidence in support of

the petition, the circuit court accepted A.N.'s no-contest plea and found him unfit. After a contested disposition hearing, the circuit court issued a written opinion in support of its decision to terminate A.N.'s parental rights. A.N. appeals.

Appellate counsel first discusses whether there is any arguable merit to a claim that the circuit court failed to comply with mandatory time limits, thereby losing competency to proceed. *See* WIS. STAT. §§ 48.422(1)-(2), 48.424(4)(a); *see also* ***State v. April O.***, 2000 WI App 70, ¶5, 233 Wis. 2d 663, 607 N.W.2d 927. The statutory time limits cannot be waived, *see* ***April O.***, 233 Wis. 2d 663, ¶5, but continuances are permitted for good cause "and only for so long as is necessary[,]" *see* 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). Our review of the record satisfies us that the time limits were either followed or adjourned for sufficient cause, and that A.N. did not object, so there is no arguable merit to a challenge to the circuit court's competency.

Appellate counsel next discusses whether "the no-contest plea to the unfitness grounds [was] accepted using a procedure in compliance with" statutory and case law. This can be viewed as a question of whether there is any arguable merit to a challenge to the validity of A.N.'s no-contest plea to the ground of failure to assume parental responsibility.

Before accepting a no-contest plea to a termination petition, the circuit court must engage the parent in a colloquy under WIS. STAT. § 48.422(7). *See* ***Oneida Cty. Dept. of Soc. Servs. v. Therese S.***, 2008 WI App 159, ¶5, 314 Wis. 2d 493, 762 N.W.2d 122. Thus, the circuit court must: (1) address the parent and determine that the admission is made voluntarily, with an understanding of the nature of the acts alleged in the petition and the potential dispositions;

(2) establish whether any promises or threats were made to secure the plea; (3) establish whether a proposed adoptive resource for the child has been identified; (4) establish whether any person has coerced a parent to refrain from exercising his or her parental rights; and (5) determine whether there is a factual basis for the admission of facts alleged in the petition. *See* WIS. STAT. § 48.422(7). The circuit court must also ensure that the parent understands the constitutional rights he or she is giving up with the plea, *see* ***Therese S.***, 314 Wis. 2d 493, ¶5, and that the plea will result in a finding of parental unfitness, *see* ***id.***,¶10.

Appellate counsel reports that the circuit court "satisfied the requirements set forth in [WIS. STAT.] § 48.422(7) and prongs 1, 2 and 4" of ***Therese S.***, as set forth above, and "considered and found that the no-contest plea to the unfitness ground was entered knowingly, understandingly and intelligently. Thus, there does not appear to be a basis for an appeal here."

In his no-merit response, A.N. seeks to withdraw his no-contest plea. He asserts that trial counsel "coerced him into pleading [no] contest" while A.N. was on his medication, and that the circuit court failed to adequately inquire about the type of medication A.N. was taking and its side effects. A.N. claims that the side effects of his medication—drowsiness, dizziness, and nausea—"affected me at the time of the entered no contest plea," rendering his plea involuntary. A.N. further asserts that trial counsel knew he was suffering these side effects but "failed to bring this information to the court['s attention] during the plea colloquy." A.N. also claims that trial counsel "didn't fully explain that I would lose my parental rights if I [pled] no contest." In the supplemental report, appellate counsel notes that the circuit court's questions and A.N.'s answers as given during the colloquy generally refute these contentions.

We agree with appellate counsel that the circuit court conducted an appropriate colloquy with A.N., such that there is no arguable merit to a challenge to the validity of the plea. Although appellate counsel does not discuss the circuit court's omission of the third ***Therese S.*** prong—identification of an adoptive resource—that is not a question to be asked of the pleading parent and, in any event, it is clear from the record that A.N.'s foster placement was established as an adoptive resource at the time of the plea.

With respect to A.N.'s claims, we note that he does not explain how his symptoms prevented him from understanding the colloquy or how trial counsel supposedly used them to coerce a plea. Further, there is no requirement for the circuit court to inquire about the specifics of a parent's medication or its effects; rather, the circuit court must make sufficient inquiry to satisfy itself that the plea or admission to grounds is made voluntarily and with an understanding of the potential dispositions. *See* WIS. STAT. § 48.422(7)(a).

The record here reflects that the circuit court inquired whether A.N. was on medication; A.N. responded that he was. The circuit court then asked A.N., "Are you comfortable and confident that with that assistance of that medication that you understand what's happening in this court today?" A.N. answered, "Yes, I understand because I'm on my medication." After asking whether A.N. was under the influence of illegal drugs or alcohol, the circuit court asked, "Are you comfortable and confident you understand what you are doing here today?" A.N. replied, "Yes." At multiple points during the colloquy, when A.N. indicated to the circuit court that he did not understand something, the circuit court took care to re-explain concepts until A.N. expressed his understanding.

Regarding A.N.'s claim that trial counsel failed to "fully explain that I would lose my parental rights if I [pled] no contest," we note that termination of parental rights is not the only possible disposition following a plea or admission to the grounds of a termination petition. During the colloquy, the circuit court explained to A.N. that with a plea, "you're not agreeing that your parental rights should be terminated." At the disposition hearing, the circuit court would consider K.A.N.'s best interests and decide how to proceed. Termination of parental rights so K.A.N. could be adopted was one option, but the circuit court also explained that it could dismiss the termination petition and return K.A.N. to her parents' care, continue the foster care arrangement and provision of services to the parents, or set up a guardianship instead of termination and adoption. A.N. acknowledged his understanding of these potential dispositions.

Thus, we are satisfied that the record in this matter clearly demonstrates A.N. would not be entitled to relief on his claim of an involuntary plea, *see* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433, and that there are no arguably meritorious challenges to the validity of A.N.'s no-contest plea to the ground of failure to assume parental responsibility.

The third issue appellate counsel addresses in the no-merit report is the fifth ***Therese S.*** prong: the sufficiency of the evidence to support the facts alleged in the petition or, as appellate counsel frames it, whether there was "sufficient evidence to support a finding that A.N. was an unfit parent."

Failure to assume parental responsibility is "established by proving that the parent … [has] not had a substantial parental relationship with the child." WIS. STAT. § 48.415(6)(a). A substantial parental relationship "means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." *See* § 48.415(6)(b). When

the factfinder evaluates whether a person has had such a relationship with the child, the factfinder may consider such factors including but not limited to "whether the person has expressed concern for or interest in the support, care or well-being of the child, [and] whether the person has neglected or refused to provide care or support for the child[.]" ***Id.***

Here, there was testimony that A.N. lived with A.W. for a portion of her pregnancy and at the time of K.A.N.'s birth. He had notice of the CHIPS proceeding but never appeared and, as a result, his DNA was not tested until December 2017. Excluding her birth, A.N. did not meet K.A.N. until she was eighteen months old. In the fourteen months between the DNA testing in December 2017 and the plea hearing in February 2019, A.N. had spent approximately twenty total hours with K.A.N. He did not inquire about or attend her doctor or dentist appointments, he made no decisions or inquiries about her schooling, he never lived with K.A.N., he did not provide her with any level of support, he never acted as her caregiver beyond supervised visits, and he was never responsible for her daily supervision, protection, or care. The record contains adequate factual support for the ground alleged in the petition to which A.N. pled. There is no arguable merit to a contrary claim.

Finally, appellate counsel discusses whether there was "sufficient evidence to determine that termination of A.N.'s parental rights was in K.A.N.'s best interest." We reframe this issue as whether the circuit court properly exercised its discretion in terminating A.N.'s parental rights. *See* ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). Bearing in mind that the child's best interests are the primary concern, *see* WIS. STAT. § 48.426(2), the circuit court must also consider 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).

Upon our review of the dispositional hearing transcript, the circuit court's written decision on termination of parental rights, and the no-merit report, we agree with the analysis in the primary no-merit report and appellate counsel's conclusion that there does not appear to be any arguably meritorious claim that the circuit court erroneously exercised its discretion in terminating A.N.'s parental rights.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of further representation of A.N. in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals