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May 15, 2013

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

2013AP598-NM
2013AP599-NM
2013AP600-NM

State of Wisconsin v. Eddie A.
(L. C. Nos. 2012TP11, 2012TP12, 2012TP13)

Before Hoover, P.J.[1]

Counsel for Eddie A. has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[2] concluding there is no arguable merit to any issue that could be raised on appeal

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

from orders terminating Eddie's parental rights to his children, Ramona J., Mystic J. and Auset J. Eddie was informed of his right to file a response to the report and has not responded. Upon this court's independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), no issues of arguable merit appear. Therefore, the orders terminating Eddie's parental rights are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Ramona (born 06/11/99), Mystic (born 10/18/00) and Auset (born 10/29/02) were removed from their parents' home on August 20, 2010, after their father killed their mother. Eddie is currently serving a life sentence following his conviction for first-degree intentional homicide. On October 6, 2010, the children were found to be in need of protection or services and placed outside their parental home. Eddie failed to meet the conditions necessary to have the children returned to his care. On January 19, 2012, the State petitioned for termination of his parental rights, alleging the continuing need for protection or services, and a failure to assume parental responsibility. After voluntarily consenting to the termination of his parental rights, Eddie withdrew that consent, contested the allegations and requested a jury trial. After failing to appear for a pretrial hearing or participate at a rescheduled pretrial hearing, the court found Eddie in default; determined that grounds for termination were proven after a hearing; and found Eddie to be unfit. After a dispositional hearing, the court concluded it was in the children's best interest to terminate Eddie's parental rights.

Any challenge to the proceedings based on a failure to comply with statutory time limits lacks arguable merit. All of the mandatory time limits were either complied with or properly

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

extended for good cause, without objection, to accommodate the parties' varying schedules. The failure to object to a delay waives any challenge to the court's competency on these grounds. *See* WIS. STAT. § 48.315(3). Moreover, scheduling difficulties constitute good cause for tolling time limits. *See* ***State v. Quinsanna D.***, 2002 WI App 318, ¶39, 259 Wis. 2d 429, 655 N.W.2d 752.

Any challenge to the default finding entered against Eddie would lack arguable merit. In a termination of parental rights case, it is within the trial court's discretion to find a party in default as a sanction for failing to comply with a court order. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶18, 246 Wis. 2d 1, 629 N.W.2d 768. Here, the court warned Eddie that his failure to participate would result in default. When Eddie failed to appear for the final pretrial hearing, the State moved for default judgment. The court took the motion under advisement and continued the hearing to the next day to give Eddie's counsel the opportunity to re-warn Eddie that he could be found in default for failing to appear. Although Eddie appeared at the rescheduled hearing, he ultimately refused to participate after a lengthy colloquy in which the court strongly urged his participation. Any claim that the trial court erroneously exercised its discretion by finding Eddie in default would lack arguable merit.

Although a trial court may find a party in default, the court may not enter a judgment as to grounds without holding an evidentiary hearing and finding the alleged grounds for termination by clear and convincing evidence. ***Id.***, ¶24. Here, the petition alleged the continuing

need for protection or services and a failure to assume parental responsibility.[3] The continuing need for protection or services is established if: (1) the children were adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer; (2) the bureau made a reasonable effort to provide court-ordered services; (3) Eddie failed to meet the conditions established for the children's safe return; and (4) it was substantially unlikely that Eddie would meet these conditions within the nine-month period following the conclusion of the fact-finding hearing. *See* WIS. STAT. § 48.415(2).

Jennifer Mosher, a Bureau of Milwaukee Child Welfare case manager, testified that the children had been placed outside their parental home for almost two years, living with their maternal aunt and her husband. Mosher noted that the bureau attempted to assist Eddie in meeting court-ordered conditions for the children's return by writing to Eddie about "programs and making efforts" so that the programs would be available to him in prison. Mosher, however, could not confirm whether Eddie had participated in programming with the prison system because he failed to sign a release. Apart from two letters Eddie wrote to the bureau after the children were detained, he had not demonstrated any further interest in his children.

According to Mosher, the children reported that there was ongoing domestic violence between their parents until the time of their mother's death. Mosher testified that Eddie had not demonstrated that he could ensure his children's safety or meet their needs on a daily basis. Mosher further opined that even if released immediately, Eddie would not be able to meet all the

[3] Amended petitions for termination of Eddie's parental rights also alleged a continuing denial of visitation. Although the court granted both summary and default judgment as to this ground for termination, the court later granted the State's motion to dismiss the continuing denial of visitation as a (continued)

court-ordered conditions within the next nine months based on his ongoing mental health needs and his lengthy history of domestic violence problems.

Turning to the alternate ground for termination, a failure to assume parental responsibility is established by proving that Eddie has not had a substantial parental relationship with the children. WIS. STAT. § 48.415(6)(a). "[S]ubstantial parental relationship means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." WIS. STAT. § 48.415(6)(b). Failure to assume parental responsibility is determined by consideration of the totality of the circumstances. ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶¶3, 27-35, 333 Wis. 2d 273, 797 N.W.2d 854.

Mosher testified that Eddie had never voluntarily acknowledged his paternity and had taken steps to avoid paying child support. Mosher also reiterated that Eddie had "habitually physically and emotionally abused" the children's mother in front of them, ultimately killing her while the children were in another room of the house. Eddie then fled, leaving the children in the home. He has not paid child support nor has he been involved with decisions regarding their medical care or education since their removal from the home. Based on Mosher's testimony, the court found the State had established by clear and convincing evidence both that the children were in continuing need of protection or services and that Eddie had failed to assume parental responsibility. Any challenge to these findings would lack arguable merit.

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ground for termination. Any possible issue arising from this particular ground for termination therefore lacks arguable merit.

There is likewise no arguable merit to a claim that the trial court erroneously exercised its discretion when it terminated Eddie's parental rights. The court correctly applied the best interests of the child standard and considered the factors set out in WIS. STAT. § 48.426(3). The court considered the children's adoptability, age and health, noting the likelihood of adoption by their maternal aunt and her husband. Although the court acknowledged that Eddie had a substantial relationship with the children prior to their mother's death, he has had no relationship with them since then and the children want no contact with him. The court also emphasized the children's need for a stable and permanent family relationship and their expressed wish to be adopted. The court's discretionary decision to terminate Eddie'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).

Finally, the no-merit report addresses whether there is any arguable merit to challenge the order quashing subpoenas that would have required the children to testify at the dispositional hearing. While the children's wishes were a factor for the court to consider at dispositional pursuant to WIS. STAT. § 48.426(3)(d), the statute does not require that a child give testimony to the court. At a hearing on the motion to quash the subpoenas, the State recounted that the children had already experienced the trauma of hearing their mother scream and beg for her life while their father stabbed her over thirty times. Although two of the children expressed interest in seeing the courtroom, none of the children wanted to testify. The court, in the proper exercise of its discretion, quashed the subpoenas, observing that during a proceeding at which the focus is on the children's best interests, the court would not bring further trauma to the children by forcing them to testify. The court also indicated that the social worker and the guardian ad litem

could adequately convey the children's wishes to the court. Any challenge to the order quashing the children's subpoenas would lack arguable merit.

This court's independent review of the record discloses no other potential issues for appeal. Therefore,

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Carl W. Chesshir is relieved of further representing Eddie A. in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals