STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001151

In re the termination of parental rights to E.W., a person under the age of 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

J.T.,

Respondent-Appellant.

On Notice of Appeal from an Order Terminating Parental Rights, Entered in Milwaukee County, the Honorable Gwendolyn G. Connolly, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. J.T.'s no contest plea to the ground of failure to assume parental responsibility was not knowing, intelligent, and voluntary because the court did not fully explain the meaning of a "substantial parental relationship" to him.

"Terminations of parental rights affect some of parents' most fundamental human rights." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶20, 246 Wis. 2d 1, 629 N.W.2d 768. In consideration of the substantial rights involved, at the plea hearing in a termination of parental rights case, the court must "[a]ddress 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." Wis. Stat. §48.422(7)(a) (emphasis added).

The Guardian ad Litem (GAL) suggests that the court in a termination of parental rights case is not required to specifically ensure that a parent understands the elements of the ground they are admitting to. (GAL's Br. at 4). However, in order to understand the *nature* of the acts alleged against a parent, the parent must understand all the elements of the grounds they are pleading no contest to. *See State v. Bangert,* 131 Wis. 2d 246, 267-68, 389 N.W. 2d 12 (1986).

Here, the court's summary of the failure to assume parental responsibility ground failed to

inform J.T. of the nature of that ground because, within its explanation, the court did not fully explain the meaning of a "substantial parental relationship." And, contrary to the State's assertion, the court did more than just fail to use the term "substantial parental relationship" at the plea hearing. (State's Br. at 12). Instead, the court failed to tell J.T. that in evaluating whether a parent has had a "substantial parental relationship" with a child, "the court [or jury] may consider such factors, including, but not limited to, whether [the parent] has expressed concern for or interest in the support, care or well-being of the child, whether [the parent] has neglected or refused to provide care or support for the child, [and] whether [the parent] exposed the child to a hazardous living environment." Wisconsin JI-Juvenile 346; Wis. Stat. §48.15(6)(a) and (b). Additionally, the court neglected to tell J.T. that whether he had a "substantial parental relationship" with [E.W.] is assessed based on the "totality of the circumstances throughout the child's entire life." Wisconsin JI-Juvenile 346.

Therefore, the court's partial instruction did not accurately reflect the nature of the failure to assume parental responsibility ground and the entire meaning of a "substantial parental relationship."

The deficiency in the plea colloquy, in combination with J.T.'s assertion that he did not understand the failure to assume parental responsibility ground and the meaning of a "substantial parental relationship" established a *prima facie* case for plea withdrawal. *See Waukesha County v. Steven H.*, 2000 WI 28, ¶42, 233 Wis. 2d

344, 607 N.W. 2d 607. Accordingly, the burden shifted to the State to attempt to prove that J.T. was somehow otherwise properly informed of the nature of the failure to assume parental responsibility ground. *Id*.

In this case, the State did not meet its burden to show by "clear and convincing evidence that [J.T.'s] plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the pleas acceptance." *Bangert*, 131 Wis. 2d 246, 274 (1986).

During the postdisposition motion hearing, Attorney Brooks testified that she had no "specific recollection" of whether she discussed or read the elements of failure to assume responsibility with J.T. or if she explained the meaning of a "substantial parental relationship" to him. (84:8-10; Appellant's Br. App. 126-128). J.T., however, testified that his lawyer did not explain these things to him before he entered his no contest plea. (84:22-23; Appellant's Br. App. 140-141).

Although Attorney Brooks testified that she generally discusses the term "substantial parental relationship" when she represents parents in a termination of parental rights case involving the failure to assume ground, mere speculation that she discussed the concept of a "substantial parental relationship" at some earlier point in the case is not clear and convincing evidence that she did so and that J.T. understood the explanation. (84:8-17; Appellant's Br. App. 126-135). *See State v. Van*

Camp, 213 Wis. 2d 131, 146-49, 569 N.W.2d 577 (1997).

Accordingly, the record in this matter indicated that J.T. did not have complete information about the meaning of a "substantial parental relationship," he alleged and testified that he did not understand that concept, and the State has not met its burden to show that his no contest plea was somehow otherwise knowing, intelligent and voluntary. Thus, J.T. should be allowed to withdraw his no contest plea to the ground of failure to assume parental responsibility.

II. J.T. received ineffective assistance of counsel when his lawyer neglected to discuss with him how a jury would assess whether he failed to assume parental responsibility for his daughter.

At the postdisposition hearing in this case, Attorney Brooks testified that she had no "specific recollection" of the conversations she had with J.T. about the meaning of a "substantial parental relationship" or how a jury would consider J.T.'s incarceration in determining whether he failed to assume parental responsibility for his daughter. (84:8-10; Appellant's Br. App. 126-128). She also could not recall if she read J.T. the jury instruction for failure to assume parental responsibility—which contains the meaning of "substantial parental relationship" and, in this matter, would have described how a jury is to consider a parent's incarceration. (84:8-10; Appellant's Br. App. 126-128). Attorney Brooks testified that, generally, she

discusses these things with a parent. (84:8-17; Appellant's Br. App. 126-135).

Differently, J.T. specifically testified that Attorney Brooks did not discuss the term "substantial parental relationship" with him, did not read him the jury instruction for failure to assume parental responsibility, and did not tell him his incarceration could not in itself establish that he failed to assume parental responsibility for his daughter. (84:22-24; Appellant's Br. App. 140-142).

Even though the court found Attorney Brooks' testimony credible, it did not specifically conclude that Attorney Brooks discussed the term "substantial parental relationship" with J.T. or explain how a jury would consider his incarceration. (84:55; Appellant's Br. App. 173). As such, based on J.T.'s testimony—that his lawyer did not discuss the term "substantial parental relationship" with him or adequately explain how a jury would consider his incarceration—and Attorney Brooks' lack of "specific recollection" whether she discussed these matters with J.T., J.T. established at the postdisposition hearing that Attorney Brooks performed deficiently.

J.T. also established he was prejudiced by his counsel's deficient performance. Prejudice is established if, but for counsel's errors, J.T. would not have entered the no contest plea and instead would have taken the case to trial. *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50 (1996).

J.T. testified that, had his attorney properly advised him on the term "substantial parental

relationship" and how a jury would consider his incarceration, he would have went to trial:

> *Appellate Counsel*: Okay. Now, I read to you that definition of the substantial parental relationship a couple of minutes ago, do you think if your attorney had read that to you, you might have decided to go to trial in this case and not enter a no contest plea?
>
> *J.T.*: Yes.
>
> *Appellate Counsel*: And why is that?
>
> *J.T.*: Because she only focused on what was going wrong as far as the trial when she never really told me anything other than that. She just told me all of the things that were – like what I was up against given the fact I was incarcerated in a majority of my daughter's life at that time I was away to just like speak on that and how the jury will look at that.
>
> *Appellate Counsel*: If she told you that your incarceration in itself isn't a reason to terminate your parental rights under this ground, do you think you would have potentially gone to trial?
>
> *J.T.*: Yes.
>
> *Appellate Counsel*: And for what reason?
>
> *J.T.*: Because it wouldn't be a factor whether or not that I'm – that I'm doing what I need to do to get my child back, like my incarceration for my conviction wouldn't be used against me, that they would just see me as a father and not a convicted felon so I would have went forward with the trial if I had known that.

(84:25-26; Appellant's Br. App. 143-144). J.T.'s testimony satisfied the prejudice prong.

Because J.T. would have gone to trial had his lawyer adequately discussed with him how the court would instruct the jury to assess whether he failed to assume parental responsibility for E.W., J.T. was prejudiced by his lawyer's deficient performance. Therefore, he asks this Court to withdraw his no contest plea.

III. The circuit court infringed on J.T.'s right to hire counsel of his choosing.

If a parent wishes to hire his own counsel, "he must be afforded a fair opportunity and reasonable time to secure counsel of his own choice." *Phifer v. State*, 64 Wis. 2d 24, 30, 218 N.W.2d 354 (1974). Otherwise, a parent's statutory and constitutional right to counsel of their choosing is meaningless. *See id*.

Here, J.T. was not afforded a fair opportunity to hire his own counsel because the court indicated it would not adjourn his trial for him to do so. (73:8-15; Appellant's Br. App. 110-117). Because J.T. was not afforded a realistic opportunity to hire counsel of his choosing, his right to do so was infringed upon and he should be permitted to withdraw his no contest plea. *See State v. Shirley E.*, 2006 WI 129, ¶¶3, 65, 298 Wis. 2d 1, 724 N.W.2d 623 (when parent's rights were infringed upon, termination of parental rights order was vacated).

Even if a court can, under some circumstances, restrict a parent's right to hire counsel of their

choosing in a termination of parental rights proceeding, the factors a court should consider in deciding whether to grant a continuance for a parent to hire counsel are:

> 1. The length of the delay requested;
>
> 2. Whether the 'lead' counsel has associates prepared to try the case in his absence;
>
> 3. Whether other continuances had been requested and received by the defendant;
>
> 4. The convenience or inconvenience to the parties, witnesses and the court;
>
> 5. Whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory;
>
> 6. Other relevant factors.

Phifer, 64 Wis. 2d 24, 30.

In denying J.T.'s request for substitution of counsel, the court stated:

> All right. So this case has been pending since July of 2018. There have been a variety of counsel who have been appointed to assist you, [J.T.], through the pendency of this case.
>
> You are certainly free to retain new counsel if that is what you wish to do for the trial which will be next Monday, but the new counsel you retain, whether it's Mr. Tishberg or someone else, will need to be prepared to proceed with trial on Monday.
>
> I am not going to relieve Ms. Brooks because based on what you told me thus far, there isn't a

> basis for me to conclude that indeed there has been a breakdown in counsel, that she has not -- that is Ms. Brooks essentially represented your interests here in court such that I would be able to grant her leave to not proceed with trial.
>
> But certainly if you wish to proceed pro se for next week, I am prepared to have a colloquy with you if that's what you wish to do, but we're going to proceed with trial on Monday.
>
> So I guess if you want to have an attorney, Ms. Brooks, Mr. Tishberg is unable to represent you on Monday, I'm prepared to let her stay on the case.
>
> If in the alternative you wish to essentially at this time proceed pro se on Monday, you can do that. That means that you proceed without a lawyer or if you can retain a lawyer who will proceed on Monday, you can bring them with you.

(71:11-12; Appellant's Br. App. 113-114).

Accordingly, the circuit court denied J.T.'s request to hire a new lawyer because it believed that Attorney Brooks was providing adequate assistance to him and did not cite any other reason. On appeal, the State and GAL now discuss some of the reasons they believe the court's decision to deny J.T.'s request to hire a new lawyer was appropriate, such as the passage of time. (State's Br. at 17-19; GAL's Br. at 11-13). Yet, when J.T. made the request to hire a new lawyer, the State and GAL did not cite to any specific inconvenience a delay would cause the parties or witnesses. (71:4; Appellant's Br. App. 106). Moreover, the court did not discuss any specific inconvenience a

delay would cause the court or its calendar when J.T. made the request to hire new counsel.

Since the court failed to properly consider all of the relevant factors when it denied J.T.'s request to hire a new lawyer, it abused its discretion. Thus, J.T. asks this Court to order that his plea be withdrawn.

CONCLUSION

For these reasons and those stated in J.T.'s brief-in-chief, J.T. respectfully requests that this Court vacate the order terminating his parental rights and order that his plea be withdrawn.

Dated this 10th day of December, 2020.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.1(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,216 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 10th day of December, 2020.

Signed:

Electronically signed by Christopher D. Sobic
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