STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP001476

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

A.G.,

Respondent-Appellant.

On Notice of Appeal from an Order Terminating Parental Rights and Order Denying Postdisposition Motion, Entered in Milwaukee County, the Honorable Ellen R. Brostrom, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. The circuit court erred in denying, without an evidentiary hearing, A.G.'s postdisposition claim that he was entitled to withdraw his no contest plea to the ground of continuing CHIPS because his plea was not knowing, intelligent, and voluntary.

Here, the circuit court erred when it denied A.G. an evidentiary hearing under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986)[1], because A.G. made a *prima facie* case in his postdisposition motion that his no contest plea to the ground of continuing CHIPS was not knowing, intelligent, and voluntary when: 1) the circuit court failed to advise him of the potential dispositions at the no contest plea hearing, and 2) the circuit court improperly explained the statutory standard that it would rely on at disposition during the no contest plea hearing.

[1] The analysis set forth in *Bangert* is applicable to termination of parental rights proceedings. *Waukesha County v. Steven H.*, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W. 2d 607.

A. A.G.'s no contest plea was not knowing, intelligent, and voluntary because the court failed to establish that A.G. understood the potential dispositions at the no contest plea hearing.

Both the State and the Guardian ad Litem (GAL) argue that since the circuit court adequately reviewed the potential dispositions with A.G. at a hearing on June 1, 2020, he failed to make a *prima facie* case for plea withdrawal under *Bangert*. (State's Br. at 10; GAL's Br. at 8). However, the circuit court was required to establish that A.G. understood the potential dispositions *at the plea hearing*, which occurred several months later on October 15, 2020. *See Bangert*, 131 Wis. 2d 246 at 283. As the circuit court acknowledged at a posdisposition hearing on November 12, 2021, it did not review the potential dispositions with A.G. at the plea hearing itself. (111:7; Appellant's Br. App. 17). Therefore, the circuit court's review of the potential dispositions at a hearing several months prior to the plea hearing does not defeat A.G.'s request for a *Bangert* evidentiary hearing.

Further, the GAL asserts that A.G. "makes no meaningful assertion that he did not know that [the circuit court] would either grant or deny the termination of parental rights petition." (GAL Br. at 10). Yet, in his postdisposition motion, A.G. asserted that "the court did not explain to [him] that his parental rights would either be terminated or the petition to terminate his parental rights would be

dismissed at disposition" and, therefore, "A.G. did not otherwise understand that the court's only two options at disposition were to terminate his parental rights or dismiss the petition." (101:8). This statement satisfied the requirement that A.G. allege in his postdeposition motion that he did know or understand information which the circuit court should have provided at the plea hearing. *Id*.; *Waukesha County v. Steven H.*, 2000 WI 28, ¶42, 233 Wis. 2d 344, 607 N.W. 2d 607; *see State v. Hampton*, 2004 WI 107, ¶57, 274 Wis. 2d 379, 683 N.W.2d 14; *State v. Goyette*, 2006 WI App 178, ¶17 n.8, 296 Wis. 2d 359, 722 N.W.2d 731 ("[T]he second *Bangert* prong is satisfied by a conclusory statement that the defendant did not know or understand."). As such, A.G. is entitled to an evidentiary hearing in this matter.

Moreover, contrary to the GAL's argument, A.G. does not claim that the circuit court cannot look to the entire record of this case to determine whether A.G.'s plea was knowing, intelligent, and voluntary. (GAL Br, at 8-9). Instead, A.G. believes the circuit court cannot deny him a *Bangert* evidentiary hearing based on the record outside of the plea hearing. Matters from outside the record of the plea hearing only become relevant at the *Bangert* evidentiary hearing where the State has the burden to show that the parent's plea was knowing, intelligent, and voluntary despite the inadequate plea colloquy.[2] *See Bangert*, 131 Wis. 2d

[2] Relying on *Steven H.*, the GAL appears to claim that a circuit court can deny a *Bangert* evidentiary hearing, despite an Continued.

246 at 274-75. No such evidentiary hearing was held here.

Furthermore, the GAL claims that because A.G. asked for reunification with his daughter at disposition, he understood the potential dispositions in this matter and has not made a *prima facie* case entitling him to an evidentiary hearing. (GAL Br. at 8). Again, the GAL attempts to use matters from outside the plea hearing to justify the denial of a *Bangert* evidentiary hearing in this case. For the reasons discussed previously, a circuit court cannot use information from outside the plea hearing to deny a *Bangert* evidentiary hearing. *See id.* Moreover, even assuming A.G. understood that reunification with his daughter was a possibility here, it does not demonstrate that he understood that the court was required to make an all-or-nothing decision at

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inadequate plea colloquy, based on its review of the record outside of the plea hearing.(GAL Br. at 8-9). The GAL's reliance on *Steven H.* for this proposition is misguided. In *Steven H.*, the Wisconsin Supreme Court found that Steven H. was not entitled to a *Bangert* evidentiary hearing because his postdisposition motion failed to allege that he did not understand information that the circuit court should have provided at his plea hearing. *Id.* at ¶43. Nevertheless, the *Steven H.* court reviewed the record to "ensure the colloquy between the circuit court and Steven H. was sufficient to allow Steven H. to waive his right to contest the grounds for termination of parental rights." *Id.* at ¶44. Unlike Steven H., A.G. properly alleged that he did not understand the potential dispositions in this matter in his postdisposition motion. (101:8). Therefore, he is entitled to a *Bangert* evidentiary hearing.

disposition—either terminate his parental rights or dismiss the petition. *See Oneida County DSS v. Therese S.*, 2008 WI App 159, ¶16, 314 Wis. 2d 493, 762 N.W. 2d 122.

Accordingly, for the reasons discussed above and in A.G.'s initial brief, A.G.'s postdisposition motion sufficiently alleged that the circuit court failed to establish that A.G. understood the potential dispositions in this case at his change of plea hearing and A.G. did not otherwise understand them. Thus, he asks this Court to remand his case for an evidentiary hearing at which the State must show that A.G.'s no contest plea was nonetheless knowing, intelligent, and voluntary. *See Bangert*, 131 Wis. 2d 246 at 274; *Steven H.*, 233 Wis. 2d 344 at ¶42.

B. A.G.'s no contest plea was not knowing, intelligent, and voluntary because the court failed to properly explain the statutory standard it would apply at disposition during the plea hearing.

To be clear, A.G. does not allege that the court only *implied* that the burden of proof at disposition was "clear, convincing, and satisfactory evidence to a reasonable certainty" that termination of A.G.'s parental rights was appropriate. (*See* State's Br. at 11; 67:8-9; Appellant's Br. App. 7-8). Instead, he asserts that the circuit court told him at the plea hearing that there would need to be proof by clear and convincing evidence at disposition for his parental rights to be terminated.

During its plea colloquy, the circuit court informed A.G. that at the trial during the grounds phase he had a "whole bunch" of rights, including the right to make the State prove "grounds by clear, convincing, and satisfactory evidence to a reasonable certainty." (67:8; App. 7). The court then explained that the "second half of the case is where the Court decides is it in the child's best interest to in fact terminate your parental rights" and that A.G. would "have all those same trial rights today for that second half." (67:9; App. 8). The only possible conclusion from the circuit court's comments was that there needed to be clear and convincing evidence for the court to terminate A.G.'s parental rights at disposition.

The State once again claims that since the best interest standard was referenced at a hearing several months before the plea hearing, A.G. cannot make a *prima facie* case for an evidentiary hearing. (State's Br. at 11-12). As before, the circuit court was required to establish that A.G. understood the statutory standard it would use at disposition *at the plea hearing*. *See Bangert*, 131 Wis. 2d 246 at 283. Therefore, references to the statutory disposition standard at hearings other than the plea hearing does not defeat A.G.'s request for an evidentiary hearing under *Bangert*.

Both the State and the GAL rely on an unpublished case—*State v. T.A.D.S.*, 2019 WI App 39,

388 Wis. 2d 258, 932 N.W.2d 193 (unpublished)[3]—to claim that the circuit court's misstatement about the statutory standard it would use at disposition was irrelevant. (State's Br. at 12; GAL Br. at 10-11; Supplemental App. 3-5). In *T.A.D.S.*, the circuit court gave the following description of disposition at the plea hearing:

> [The Court]: And do you understand that at the disposition phase the Court would have to make a finding that *the driving factor*, *the most important* factor at the disposition phase, would be what's in [T.S.'s] best interest.
>
> [T.A.D.S.]: Yes.
>
> ....
>
> [The Court]: And do you understand that at the disposition phase the State would still have that burden of proof of showing what's in [T.S.'s] best interest, but at the end of a trial and a disposition phase, I could decide to terminate your parental rights. Do you understand that?
>
> [T.A.D.S.]: Yes.

Id. at ¶4 (emphasis added) (Supplemental App. 4).

Contrast that with what the circuit court stated here about disposition:

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[3] As required by Wis. Stat, §§809.23(3)(c) and 809.13(4)(b), this unpublished decision is attached in an appendix. (Supplemental App. 3-5).

> *The Court*: Now, you understand that's just the first half of the case? The second half of the case is where the Court decides is it in the child's best interest to in fact terminate your parental rights. Do you understand that distinction?
>
> *A.G.*: I understand.

(67:7-10; Appellant's Br. App. 6-9).

The court of appeals in *T.A.D.S.* determined that the circuit court's comments about the burden of proof at disposition were irrelevant because the circuit court "thoroughly explained T.A.D.S.'s rights at the disposition hearing, explained the potential outcomes and *unequivocally* stated that its *primary* consideration at disposition was T.S.'s best interest." *Id.* at ¶13 (emphasis added) (Supplemental App. 5). Unlike the circuit court in *T.A.D.S.*, the circuit court in this matter did not thoroughly explain the potential outcomes at disposition to A.G. during the plea hearing. (67:7-10; 111:7; Appellant's Br. App. 6-9, 17). Additionally, the court in this case used far weaker language when describing the statutory standard at disposition and did not make it clear that its decision at disposition would be based *primarily* on what it found was in A.G.'s daughter's best interests. (67:7-10; Appellant's Br. App. 6-9).

Oftentimes, in termination of parental rights cases, parents will enter a plea to a ground for termination in hopes of convincing the court not to terminate their rights at disposition. When a court misstates the statutory standard the court will use at

disposition during the plea hearing and inserts a higher burden of proof, as the court did here, the court misadvises a parent on how the court will weigh the evidence it hears at disposition in deciding whether to terminate that parent's rights to their child. The parent's plea is then entered under this misadvice with a complete misunderstanding of their chances of success at disposition. As such, misadvising a parent on the statutory standard, like the court misadvised A.G., is not irrelevant.

Finally, the GAL states that any misstatement at the plea hearing by the court regarding the statutory standard at disposition was harmless because the court used a clear and convincing standard at disposition. (GAL Br. at 11). However, harmlessness is not part of the *Bangert* framework and is not relevant on the issue of whether a parent is entitled to an evidentiary hearing. *See State v. Taylor*, 2013 WI 34, ¶¶40-41, 347 Wis. 2d 30, 829 N.W.2d 482. Moreover, events that occur after the plea hearing—such as disposition—have no influence upon whether a parent had a correct understanding of their plea and, therefore, cannot render a defective plea colloquy harmless. *See Bangert*, 131 Wis. 2d at 201.

Because A.G.'s postdisposition motion sufficiently alleged that the court failed to properly establish that A.G. understood the statutory standard it would rely on at disposition and A.G. did not otherwise understand that standard, he again asks this Court to remand his case for an evidentiary hearing at which the State must show that A.G.'s no

contest plea was nonetheless knowing, intelligent, and voluntary. *See id.* at 274; *Steven H.*, 233 Wis. 2d 344 at ¶42.

CONCLUSION

For the reasons stated in this brief and A.G.'s brief-in-chief, A.G. respectfully requests that this Court reverse the denial of his postdisposition motion, and remand the case for an evidentiary hearing at which the State must prove that A.G. entered his no contest plea knowingly, intelligently, and voluntarily.

Dated this 20th day of January, 2022.

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 s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,156 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of January, 2022.

Signed:

Electronically signed by
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