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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2022AP1432
BROWN COUNTY CASE NO. 21TP32

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

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

Petitioner-Respondent,

v.

S.K.

Respondent-Appellant.

On Appeal from an Order for Termination of Parental Rights, Entered in the Brown County Circuit Court, the Honorable John P Zakowski Presiding

BRIEF OF PETITIONER-RESPONDENT

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Position on Oral Argument and Publication

Brown County Health and Human Services ("Department") believes that the briefs submitted by counsel will adequately present the issues before this Court and does not request oral argument regarding the same. Further the Department is not requesting publication.

Statement of the Case and Facts

R.M. was born on April 10, 2017, and is the biological child of S.K. R. at 4:1. R.M. was removed from the care of S.K. in May 2017 after a sibling was brought to the hospital and was determined to likely have been deceased for several hours. R. at 54:2. There were further concerns at that time that the sibling had died due to child abuse. R. at 54:2. R.M. was removed from S.K.'s care and adjudicated in need of protection or services. R. at 54:3-4.

S.K. was charged on May 4, 2018, with felony neglecting a child resulting in death – party to a crime and felony failure to act to prevent bodily harm to a child – party to a crime. R. at 24:4-5. These charges were in reference to the death of B.R. that had occurred almost one year prior. R. at 24:4-19.

S.K. then entered a no contest plea on August 6, 2020, to Neglecting a Child (Consequence is Death) under Wis.

Stat. § 948.21(1)(d) as a party to a crime. R. at 30:12. The other charges for Child Abuse – Fail/Prevent Bodily Harm under Wis. Stat. § 948.03(4)(b) as a party to a crime and resisting or obstructing an officer under Wis. Stat. § 946.41(1) were dismissed but read in for purposes of sentencing. R. at 30:13. S.K. was sentenced to a total 20 year sentence with 10 years of initial confinement and 10 years of extended supervision. R. at 30:12.

On June 10, 2021, the department filed a petition for termination of parental rights for S.K. and J.M. R. at 4:1. Specific to S.K. it was alleged that grounds existed under Wis. Stat. § 48.415(9m). R. at 4:1. On July 13, 2021, S.K. was appointed counsel. R. at 18. On July 21, 2021, R.M. filed a consent to termination of parental rights. R. at 19.

S.K. then filed a request to substitute judges and the matter was assigned to the Honorable John P Zakowski. R. at 21, 23.

On August 27, 2021, the department filed a motion for partial summary judgment stating that there were no genuine issues of material fact as to the grounds under Wis. Stat. § 48.415(9m) for S.K. R. at 24. There was a status hearing on September 8, 2021, and a briefing schedule was ordered to respond and reply to the motion. R. at 26. S.K. filed a

response to the departments motion on September 22, 2021, and the department filed their reply on October 5, 2021. R. at 29, 30.

On January 25, 2022, the circuit court entered a decision granting the department's motion for partial summary judgment and the dispositional hearing was scheduled for April 20, 2022. R. at 44, 45. At the dispositional hearing the social worker and S.K. testified and the court terminated the parental rights to S.K. and J.M. R. at 52.

Argument

The issue raised by S.K. in her appeal is whether "a conviction for neglect of a child as a party to a crime a "serious felony" pursuant to Wis. Stat. sec. 48.415(9m) on which summary judgment for prior conviction of a felony against a child can be based." App. Br. At 6. S.K. further asserts that the circuit court was in error when it found that S.K.'s misdemeanor conviction for neglect was a "serious felony" which was relied upon when granting the Department's motion for partial summary judgment. Id.

S.K. was convicted of felony Neglecting a Child (Consequence is Death) (emphasis added) as a party to a crime. R. at 4:10. This distinction is extremely important. S.K.'s conviction was for a felony under Wis. Stat. §

948.21(1)(d) and combined with the resulting death of the child victim provides the basis for the ground to terminate S.K.'s parental rights under Wis. Stat. § 48.415(9m)(b)3.

The issue at hand, which was correctly decided by the circuit court, is whether the conviction for S.K. under Wis. Stat. § 948.21(1)(d) that resulted in the death of her child is somehow disqualified from being utilized as a serious felony under Wis. Stat. § 48.415(9m)(b)3 because it was also charged as party to a crime. S.K. argues that the summary judgment finding based on this conviction was improper as a matter of law. S.K.'s argument is wrong and her conviction, regardless of whether it was as a party to a crime, where the deceased victim was her child is a serious felony. Therefore, as to the grounds phase the circuit court was correct in granting partial summary judgment.

I. THE STATUTORY LANGUAGE IN WIS. STAT. § 48.415(9m) IS UNAMBIGUOUS AND IS CLEAR THAT A CONVICTION UNDER WIS. STAT. § 948.21 AS A PARTY TO THE CRIME MEETS THE DEFINITION OF A SERIOUS FELONY.

a. Standard of Review

This issue requires a statutory interpretation analysis, which is a question of law that this Court should review de novo. St. Croix Cty. HHS v. Michael D. (In re Matthew D.), 2016 WI 35, ¶15, 368 Wis. 2d 170, 880 N.W.2d

107. This Court has repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." State ex rel. Kalal v. Circuit Court for Dane Cty. (In re Criminal Complaint), 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

In analyzing the meaning of a statute, there is an assumption that the ". . . legislature's intent is expressed in the statutory language." Id. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." Id. at ¶46. The test to determine whether a statute is ambiguous is not whether there is a disagreement about the statutes meaning, but to examine the language of the statute to determine whether the statute allows for two or more, equally sensible interpretations. Bruno v. Milwaukee County, 2003 WI 28, ¶21, 260 Wis. 2d 633, 660 N.W.2d 656 (Wis. 2003). In construing or "interpreting" a statute the court is not at liberty to disregard the plain, clear words of the statute. State v. Pratt, 36 Wis. 2d 312, 317, 153 N.W.2d 18, 20 (1967).

b. The statutory language is Wis. Stat. § 48.415(9m) is unambiguous as to the definition of "serious felony."

The statutory language at question in this appeal is Wis. Stat. § 48.415(9m) which states,

> "(9m) Commission of a felony against a child.
> (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction..
> (b) In this subsection, "serious felony" means any of the following:
> 1. The commission of, the aiding or abetting of, or the solicitation, conspiracy or attempt to commit, a violation of s. 940.01, 940.02, 940.03 or 940.05 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 940.01, 940.02, 940.03 or 940.05 if committed in this state.
> 2.
> a. The commission of a violation of s. 940.19 (3), 1999 stats., a violation of s. 940.19 (2), (4) or (5), 940.225 (1) or (2), 948.02 (1) or (2), 948.025, 948.03 (2) (a), (3) (a), or (5) (a) 1., 2., or 3., 948.05, 948.051, 948.06, 948.08, or 948.081, or a violation of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.
> b. A violation of the law of any other state or federal law, if that violation would be a violation listed under subd. 2. a. if committed in this state.
> 3. The commission of a violation of s. 948.21 or a violation of the law of any other state or federal law, if that violation would be a violation of s. 948.21 if committed in this state, that resulted in the death of the victim."

Specific to S.K.'s case is Wis. Stat. § 48.415(9m)(b)3 which defines a serious felony as the commission of a violation of Wis. Stat. § 948.21 against one's own child that resulted in the death of the victim. This definition read in conjunction with 48.415(9m)(a) means that if the conviction for a parent whose parental rights are sought to be terminated is convicted of child neglect against their

own child and that child died, then it is a serious felony under Wis. Stat. 48.415(9m).

The language of this statute is very clear as to what must be proven for a parent to be found unfit. S.K. argues that since she was convicted under 948.21 but as a party to a crime that her conviction does not meet the definition of a serious felony. As discussed in Kalal, when conducting a statutory interpretation analysis on an unambiguous statute, a court can look to the definition or meaning of the language used in the statute. Kalal at ¶ 53. This brief has already discussed the statutory definition of "serious felony", but it is important to also examine the statutory definition of "party to a crime" cited in Wis. Stat. § 939.05.

Wis. Stat. § 939.05 defines parties to a crime as,

> "(1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
> (2) A person is concerned in the commission of the crime if the person:
> (a) Directly commits the crime; or
> (b) Intentionally aids and abets the commission of it; or
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that

> the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw."

The significant language here is that if you are "concerned in the commission of a crime," you are a principal in the crime and may be convicted of that crime. Further, the statute specifically states that you can still be convicted of the crime and concerned in the commission of the crime even if you did not commit the crime or if another party was convicted of different charges.

This is wholly applicable to S.K.'s situation and makes it very clear that she was convicted of a crime under Wis. Stat. § 948.21, specifically 948.21(1)(d). Whether she disagrees with the fact that her actions directly led to the death of her daughter does not negate that conviction. Further, the charges received by J.M. are irrelevant to S.K.'s conviction based on the plain language of the statute under Wis. Stat. § 939.05. This is also consistent with case law which states "a party to the crime is guilty of that crime, whether or not he intended that crime or had the intent of its perpetrator." State v. Stanton, 106 Wis. 2d 172, 178, 316 N.W.2d 134, 138 (Ct. App. 1982).

By looking at the plain language under Wis. Stats. §§ 48.415(9m), 948.21, and 939.05, it is clear that S.K. was convicted of Neglecting a Child (Consequence is Death), and

that the death was of her own child. Her conviction meets the definition of "serious felony." To conclude that this does not include if one was convicted as a party to the crime imparts into the statute language a meaning that is not there and that misconstrues the plain language of Wis. Stat. § 48.415(9m)(b)3.

> c. The statutory language in Wis. Stat. § 48.415(9m) allows for a serious felony under § 48.415(9m)(b)3 to be a conviction for Neglecting a Child (Consequence is Death) even if the parent was a party to the crime.

S.K. argues throughout her brief that the language of the serious felony statute is unambiguous and that a serious felony does not include Neglecting a Child (Consequence is Death) where one is a party to a crime. The argument cited by S.K. is that since the legislature included aiding and abetting to crimes such as homicide and felony murder in Wis. Stat. § 48.415(9m)(b)1, that the absence of the party to a crime language in Wis. Stat. § 48.415(9m)(b)3 means S.K.'s conviction is not a serious felony. This is incorrect.

S.K. cites to the principle of *expression unius est exclusion alterius*, meaning "if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power." State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527, 219 N.W.2d 335,

339 (1974). In the Larson case there was a question as to the court's authority to place a child in a detention home pending another placement. Id. When applying the principle of *expression unius est exclusion alterius* in that case, the court found that since the statute was void of the authority to utilize that placement, the court had no authority to hold the child in a detention home. Id.

S.K.'s case is distinguishable from the analysis in Larson. Here there is a power that the legislature has provided to the courts. This power is that a parent can be found unfit if they have committed a serious felony against their child. It is explained in clear language within the definition of a serious felony. It is very clear that a serious felony, as applied in S.K.'s case, is "The commission of a violation of s. 948.21...that resulted in the death of the victim" and that the victim of the serious felony was a child of the parent whose rights are sought to be terminated. Wis. Stat. § 48.415(9m).

Within this language is the expressed authority and directive as to when a crime is considered a serious felony and what authority the court must utilize that conviction in a termination of parental rights proceeding. S.K.'s argument that Neglecting a Child (Consequence is Death) as a party to a crime does not constitute a serious felony

reads into the statute language that is not there. If this argument had merit it would strip the court of the expressed power given to them by the legislature.

Further S.K.'s argument comparing the aiding and abetting language in Wis. Stat. § 48.415(9m)(b)1 to the lack of party to a crime language in § 48.415(9m)(b)3 is flawed. As seen in Wis. Stat. § 939.05, there are multiple ways to be a party to a crime. S.K.'s argument here assumes that the legislature would only allow for Neglecting a Child (Consequence is Death) to be a serious felony if it is as someone who aided and abetted or was involved in a conspiracy in the commission of the crime. However, that nullifies the other way one can be party to a crime – directly committing the crime. That is a large assumption that is not supported by the statute's plain language.

What is clear is that when one is convicted of Neglecting a Child (Consequence is Death) whether or not it is as a party to a crime, their conviction is for Neglecting a Child (Consequence is Death). The party to a crime statutory definition indicates that all parties are equally culpable and whoever is concerned in the commission of a crime is "a principal that may be charged with a convicted of the commission of the crime although the person did not directly commit it." Wis. Stat. § 939.05(1).

Therefore, the plain language in the definition for serious felony stating that a "commission of a crime under Wis. Stat. § 948.21...that results in the death of the child" does not distinguish between whether the person is a party to the crime or not, because the conviction does not change.

II. THERE IS NO AMBIGUITY IN WIS. STAT. § 48.415(9m)(b)3 AS TO THE DEFINITION OF SERIOUS FELONY SO NO LEGISLATIVE HISTORY IS NECESSARY.

In her brief, S.K. admits that the statute under Wis. Stat. § 48.415(9m)(b)3 is unambiguous but still provides an examination of the legislative history of this statute. The scope, history, context, and purpose of a statute can be reviewed if a statute is unambiguous, but extrinsic evidence of these factors can be examined if the statute is ambiguous. Kalal at ¶48. In her brief S.K. argues that because the legislature did not add the language "party to a crime" to Wis. Stat. 48.415(9m)(b)3 when it was added to 48.415(9m)(b)1, that the legislature did not intend that someone charged with Neglecting a Child (Consequence is Death) as a party to the crime meets the definition of a serious felony. However, this argument could just as easily be used to support the opposite position.

The lack of the "party to a crime" language to the child neglect provision could also mean the legislature did

not believe it was necessary because one would still be convicted of child neglect whether or not a party to the crime.

There is also a reasonable explanation for why the legislature chose to include language concerning conspiracy, aiding and abetting, solicitation, and attempt into the definition of Wis. Stat. § 48.415(9m)(b)1. The definition set forth in Wis. Stat. § 48.415(9m)(b)1 includes only four crimes as a "serious felony": First-Degree Intentional Homicide (Wis. Stat. § 940.01); First-Degree Reckless Homicide (Wis. Stat. § 940.02); Felony Murder (Wis. Stat. § 940.03); and Second-Degree Intentional Homicide (Wis. Stat. § 940.05). Each of these crimes has been included in the definition of a "serious felony" since the inception of Wis. Stat. § 48.415(9m). In 1997 Wisconsin Act 237 the definition of serious felony was changed to what it is today. S.K. argues that this act added the language for aiding and abetting, conspiracy, and solicitation for the four above crimes, but not child neglect, that S.K.'s conviction cannot be a serious felony.

However, there is a reason why the legislature chose to add language to the four crimes in Wis. Stat. §§ 940.01, 940.02, 940.03, and 940.05. Without adding language for aiding and abetting, solicitation, and conspiracy a parent

who was involved but did not directly commit the act of killing their child would not be able to have their rights terminated under the serious felony ground. By including the conspiracy, aiding and abetting, solicitation, and attempt in the definition under Wis. Stat. § 48.415(9m)(b)1, the legislature expanded the definition to include inchoate crimes under Wis. Stat. § 939.30, 939.31, and 939.32.

S.K. was convicted of a crime within the definition of Wis. Stat. § 48.415(9m)(b)3. Her conviction as party to a crime does nothing to change the fact that she was convicted of Neglect of a Child (Consequence is Death) under Wis. Stat. § 948.21(1)(d). If S.K.'s argument was valid, it would create an absurd result. It would allow a mother and father to both be convicted of neglect of their child resulting in death but evade a finding of unfitness under Wis. Stat. § 48.415(9m) simply because they both were convicted as a party to a crime. This would allow many individuals to evade the definition of a serious felony and avoid a finding of unfitness, although they would have committed the very same crime as someone who was not convicted as a party to a crime under Wis. Stat. § 948.21 and later found unfit. This cannot be the intent of the legislature and would be an absurd interpretation of these

statutory definitions. Statutes that are plain on their face are not to be read and interpreted in ways that lead to absurd results. Watton v. Hegerty, 2008 WI 74, ¶14, 311 Wis. 2d 52, 751 N.W.2d 369 (Wis. 2008).

S.K. argues against this by stating that "prosecutors can avoid this problem by not charging dangerous and undeserving parents as a party to a crime." App. Br. at 20. While it appears that S.K. is conceding that she is dangerous, this argument is irrelevant because the civil jurisdiction of termination of parental rights case has no control over criminal jurisdiction. These types of cases are not even handled by the same office in many counties across the state. S.K. continued this argument by stating that the termination of parental rights petition could be filed under a different ground, such as continuing need. Id. However, there are circumstances where other grounds might not be applicable for several reasons and a petitioner should not be restricted when requesting jurisdiction in a case when it is believed that grounds exist. It appears that S.K. may not have been notified by her criminal attorney of the consequences of her no contest plea to the charge of Neglect of a Child (Consequence is Death) to her parental rights of her children, but that is not a reason for her unfitness finding to be overturned.

III. THE CIRCUIT COURT APPROPRIATELY GRANTED THE DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS S.K. WAS CONVICTED UNDER WIS. STAT. § 948.21 THAT RESULTED IN THE DEATH OF HER CHILD.

"Wisconsin has a two-part statutory procedure for the involuntary termination of parental rights." Steven V. v. Kelley H. (In re Alexander V.), 2004 WI 47, ¶24, 271 Wis. 2d 1, 678 N.W.2d 856. In the first phase, or the "grounds" phase, the petitioner must prove by clear and convincing evidence to a jury or the court that the elements of at least one of the grounds under Wis. Stat. § 48.415 have been met. Id; see also Wis. Stat. § 48.31(1). Partial summary judgment in the grounds phase of a TPR proceeding is available when the requirements of Wis. Stat. § 802.08(2) are met in conjunction with the applicable legal standards of Wis. Stats. §§ 48.415 and 48.31(1). Steven V. at ¶5.

To make a finding of unfitness for S.K. under Wis. Stat. § 48.415(9m), the court must find that a child of S.K. was the victim of a serious felony; and that S.K. had been convicted of that serious felony as evidenced by a final judgment of conviction. As to these two questions there is no genuine issue of material fact. There is no question that the victim was S.K.'s daughter and that she tragically passed away. There is no issue of fact that S.K.

was then convicted of Neglecting a Child (Consequence is Death) as evidenced by the judgment of conviction that was filed with the Department's original petition for termination of parental rights and the motion for partial summary judgment. R. at 4, 24. With no genuine issue of material fact, the circuit court was correct in granting partial summary judgment and finding S.K. unfit.

Any mitigating factors that S.K. believes are relevant that would not be presented to the finder of fact for the grounds phase can be presented at the dispositional hearing. When "factors are relevant to the TPR proceeding and it goes without saying that there will be circumstances specific to each TPR case, we find that these factors may be addressed during the disposition phase where the court determines what is in the best interests of the child under the totality of the circumstances." Racine Cty. Human Servs. Dep't v. L. R. H.-J. (In re J.N.J.-W.), 2019 WI App 21, 386 Wis. 2d 631, 927 N.W.2d 935.

For S.K., the fact that she was only a party to a crime, or as to her specific involvement is best to be argued at disposition. S.K. was given that opportunity at the contested dispositional hearing on April 20, 2022. R. at 52. At the conclusion of the dispositional hearing, the

circuit court considered all the factors and terminated S.K.'s rights to R.M.

Conclusion

For the reasons stated above, the department respectfully contends that the statutory language under Wis. Stat. § 48.415(9m)(b) 3 is not ambiguous; meaning the definition of serious felony does include a parent who has been convicted of Neglecting a Child (Consequence is Death) as a party to a crime. This would mean that S.K. was convicted of a serious felony for the purposes of her termination of parental rights case and the circuit was therefore correct in granting the department's motion for partial summary judgment.

Date this 22 day of November, 2022
Respectfully submitted,

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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 23 pages and 4,710 words.

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