State of Wisconsin

Supreme Court

Case No. 2023AP2068 and 2023AP2069

In re the termination of parental rights to R.A.C., a person under the age of 18:
In re the termination of parental right to R.M.F., Jr., a person under the age of 18:

State of Wisconsin,

Petitioner-Respondent-Respondent
v.

Kenosha County Cases
2022TP59 and 2022TP60

M. A. C.,

Respondent-Appellant-Petitioner

On appeal from the decision of the
Wisconsin Court of Appeals, District II, and from the
Kenosha County Circuit Court,
the Honorable Bruce Schroeder, presiding

Mother's Petition for Review

Kimberley K. Bayer
State Bar No. 1087900
6100 W. Bluemound Rd.
Wauwatosa, WI 53213
(414) 975-1861
bayerlaw3@gmail.com

Statement of the Issues

When appointed counsel in a termination of parental rights case is so inept that he pointlessly directs his client to admit a disputed element of the grounds in pretrial discovery, is this the sort of very serious error that results in fundamental unfairness without the need to prove specific prejudice?

The circuit court, on remand, found that the error was not all that serious.

The court of appeals agreed with the circuit court.

Table of Contents

Criteria for Granting Review

Wis. Stat. § 809.62(1r)(c)(3): *The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Supreme Court.*

The court of appeals' decision reads as though this was a fact-intensive case in which MAC tried to argue she was prejudiced by her attorney's error. But MAC never argued specific prejudice.

MAC's only argument is legal: Whether an attorney who helps the State prove grounds by advising a client to admit a disputed element of the TPR ground has committed error so serious that it renders the proceedings fundamentally unfair.

This is likely to recur unless there is clear guidance to petitioners that taking eager advantage of glaring deficient performance by counsel may not be the best course of action.

Wis. Stat. § 809.62(1r)(d): *The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the Supreme Court or other Court of Appeals' decisions.*

The Court of Appeals said that the attorney's error here was "materially less significant" than the complete denial of counsel in *Shirley E.,* 298 Wis. 2d 1, ¶62. (Opinion, ¶21, App. 112). Assuming that prejudice must be shown unless counsel was totally absent contradicts the *Strickland* analysis as elaborated in *Weaver v. Massachusetts*. In *Weaver,* the United States Supreme Court made it clear that, under *Strickland,* attorney error so serious that it resulted in fundamental unfairness is an alternative way to satisfy the prejudice prong of an ineffective assistance of counsel claim. 137 S. Ct. 1899, 1910-11 (2017).

Statement of the Case

MAC did not want her parental rights terminated. So, when the State petitioned on behalf of the Kenosha County Department of Human Services ("KCDHS"), she signed up for an attorney with the State Public Defender's Office. The SPD appointed William Michel to represent MAC.

The State served William Michel with pretrial requests for admission. It asked MAC to "admit that KCDHS "made a reasonable effort to provide the services ordered by the court." (R. 63:7).

Mr. Michel advised MAC that she should admit. (R. 119:182). To wit: Mr. Michel, who had been appointed to assist MAC in contesting the termination of her parental rights, advised her to concede the only element of continuing CHIPS that she had any chance of winning at trial.

Mr. Michel knew perfectly well that MAC did not believe that she received all services, stating at opening "there are some services she does not believe she received" (R. 119:140) and bringing out in her testimony that visits were not increased when she thought they should have been and case management was not adequate because they did not consider a family placement for the two children. (R. 119:172-74).

Mr. Michel seemed totally unprepared when the State responded to this gift-wrapped concession of a disputed element by moving for a directed verdict that KCDHS had, in fact, made reasonable efforts. At that point he tried to withdraw the answer by stating, not that he had made a mistake, but that MAC "basically changed her mind." (R. 121:3).

The State argued that MAC must have been having "buyer's remorse" and was changing her mind "on a whim" and "willy-nilly." (R 121:12-17.) The court also blamed MAC, assuming, with no evidence, that she had been "slovenly in her preparation" and had not spent enough time with her attorney. (R. 121:16). (Her attorney never came to see her in prison and went over the requests for admission with her on the phone. (R. 121:9).)

MAC has never tried to prove prejudice. Instead, she has argued that the error by her counsel was so serious that it was structural error, at least as serious as not having counsel at all.

The circuit court and the court of appeals both found that, since trial counsel existed and was present, any errors in the quality of the representation require a showing of prejudice.

MAC now petitions for review.

Argument

1. The attorney's error here was catastrophic and totally unreasonable.

No attorney who had any basic level of competence in defending parents at TPR would have dreamed of formally conceding that the Department made reasonable efforts. But the circuit court and the court of appeals both shrugged at this, finding that this was an error on the level of seriousness of a missed objection or failure to call a witness on some point—the usual ineffective assistance thing—and that there was no reasonable probability that, if a jury had been able to consider the reasonable efforts question, they would have returned a different verdict.

But this was not a normal attorney error. Normal attorney errors are not so serious that they result in total loss of the right to a trial on disputed grounds.

This case presents an opportunity for this court to protect the rights of parents to competent counsel in TPR cases. As it currently stands, if a lawyer is physically present in court, and the case against the parent is strong enough, the parent's attorney can function as an assistant to the petitioner by advising the client to unnecessarily admit an element of the TPR grounds. It is unreasonable that this should be considered effective assistance of counsel.

2. Errors of this magnitude can satisfy *Strickland* without the need to prove specific prejudice.

The *Strickland* analysis, with its requirement that prejudice normally be proven, comes from criminal law, and does not perfectly map onto termination of parental rights proceedings. As damaging as attorney error or oversight can be in criminal cases, there is, in criminal cases, no mechanism by which an attorney's pretrial mistakes can result in the total loss of a right to trial on an element of a charge. *State v. Evjue*, 254 Wis. 581, 589 (Wis. 1949) ("there can be no direction of a verdict against defendant in a criminal case").

Therefore, if, in criminal cases, it was possible for a single attorney error to waive a defendant's right to a trial on one of the elements of a charge, that error would almost certainly be considered the sort of "fundamental unfairness" that would be an alternative way to satisfy the prejudice prong of the Strickland analysis. *See Weaver v. Massachusetts,* 137 S. Ct. 1899, 1910-11 (2017). *See also State v. Shirley E.,* 2006 WI 129, ¶61 (stating, in criminal cases, reversal is automatic in situations where no one can reliably determine the level of prejudice). Because in such a case the lawyer would have harmed, rather than helped, his or her client, a lawyer who makes such a mistake would not be "functioning as the 'counsel' guaranteed by the Sixth Amendment" *Strickland,* 466 U.S. at 687.

Clarifying this will help develop the law on termination of parental rights, distinguishing it from criminal law in a situation where *Strickland* and its precedents are controlling but do not neatly fit.

Conclusion

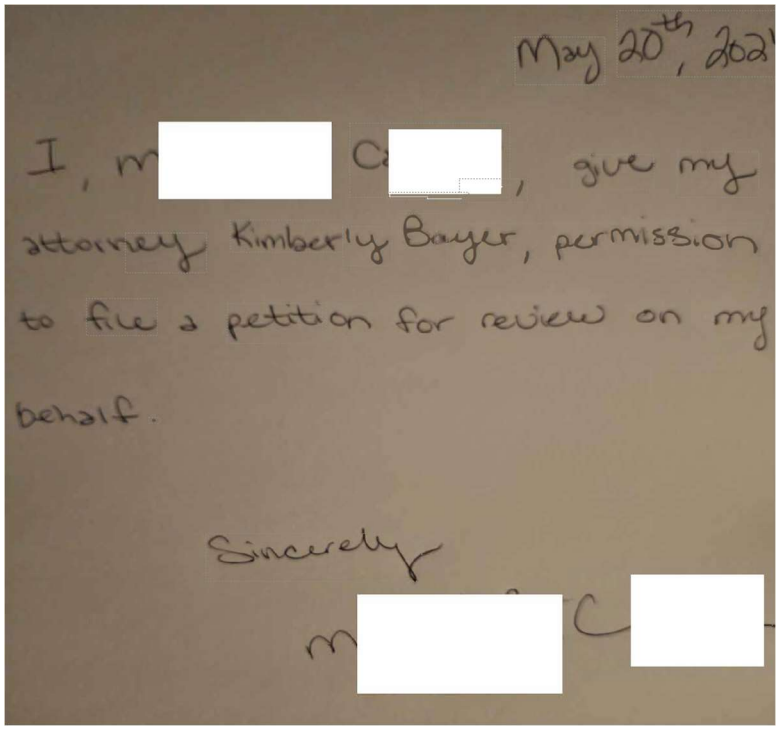
For these reasons, MAC asks this court to grant review.

Dated this 13th day of June, 2024.

Respectfully submitted,

Electronically signed by Kimberley Bayer
State Bar No. 1087900
6100 W. Bluemound Rd.
Wauwatosa, WI 53213
(414) 975-1861
bayerlaw3@gmail.com

Attorney for MAC


May 20th, 202
I, m [redacted] C [redacted], give my attorney Kimberly Bayer, permission to file a petition for review on my behalf.
Sincerely
m [redacted] C [redacted]

Certification

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 1,163 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, which complies with the requirements of § 809.19(12) and § 809.62(4)(b). I further certify that the electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

I hereby certify that filed with this petition, either as a separate document or as part of this brief, is an appendix that complies with § 809.62(2)(f) and that contains at minimum: (1) the decision and opinion of the court of appeals; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the court's reasoning regarding those issues.

I further certify that 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 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 13th day of June, 2024.

Electronically signed by Kimberley Bayer
State Bar No. 1087900
6100 W. Bluemound Rd.
Wauwatosa, WI 53214
(414) 975-1861
kimberley.bayer@hey.com