COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2008AP2740
2008AP2741
2008AP2742

Cir. Ct. Nos. 2007TP87
2007TP88
2007TP89

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2008AP2740

IN RE THE TERMINATION OF PARENTAL RIGHTS TO JASMINE A.S., A PERSON UNDER THE AGE OF 18:

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

NO. 2008AP2741

IN RE THE TERMINATION OF PARENTAL RIGHTS TO CRISTOS J.S., A PERSON UNDER THE AGE OF 18:

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

NO. 2008AP2742

IN RE THE TERMINATION OF PARENTAL RIGHTS TO MELINA R.S., A PERSON UNDER THE AGE OF 18:

PORTAGE COUNTY HEALTH AND HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

JESUS S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 DYKMAN, J.[1] Jesus S. appeals from orders terminating his parental rights (TPR) to Jasmine A.S., Cristos J.S., and Melina R.S. and denying his postdisposition motion to vacate the TPR orders. Jesus S. argues that he is entitled to withdraw his admission that grounds existed to terminate his parental rights and proceed to trial on the merits of the TPR petitions because (1) he was not warned of the grounds alleged in the TPR petitions when his children were adjudged children in need of protection or services (CHIPS); (2) the trial court lost competency to proceed by violating statutory time frames before Jesus S. admitted grounds; (3) his plea was not knowingly and voluntarily entered because the court failed to establish that he understand admission as to grounds would lead to an automatic finding of unfitness, and he did not in fact understand that; and (4) he did not have the effective assistance of counsel when he admitted grounds.[2]

¶2 Portage County Health and Human Services argues that none of Jesus S.'s arguments have merit. It also argues that even if his motion sets forth facts entitling him to relief, that only entitles him to a hearing on his motion, not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. On the court's own motion, we are extending the deadline in WIS. STAT. RULE 809.107(6)(e) for releasing this opinion by eight days to June 19, 2009.

[2] Jesus S. specifically identifies eight issues: (1) the trial court failed to warn him of the grounds alleged in the TPR petitions; (2) equitable estoppel required the court to dismiss the TPR petitions; (3) the trial court failed to conduct a proper colloquy prior to accepting Jesus S.'s admission as to grounds for the TPR; (4) his trial counsel was ineffective for failing to object to the court's finding that Jesus S. was unfit following his admission as to grounds; (5) the trial court failed to follow statutory requirements in accepting Jesus S.'s plea; (6) his counsel was ineffective for failing to pursue defenses to the grounds alleged in the TPR petitions; (7) the trial court lost competency to proceed because it scheduled the fact-finding hearing outside the statutory time frame; and (8) the trial court erred in denying Jesus S. a hearing on his motion because he asserted facts entitling him to relief. However, several of his arguments are redundant or undeveloped. We therefore consolidate his arguments into the four we have identified as adequately raised in his brief.

relief outright. We conclude that Jesus S. has established a prima facie showing that the trial court colloquy was defective and that he did not understand the information that should have been provided to him. We agree with Portage County that Jesus S.'s claim entitles him to an evidentiary hearing rather than withdrawal of his admission. We reject each of Jesus S.'s other arguments. Accordingly, we affirm in part, reverse in part, and remand for an evidentiary hearing at which Portage County will have the burden to establish that Jesus S.'s admission was knowingly and intelligently entered, despite the deficiency in the plea colloquy.

Background

¶3 The following facts are undisputed. In August 2007, Portage County filed petitions to terminate Jesus S.'s parental rights to Jasmine A.S., Cristos J.S., and Melina R.S.[3] Portage County alleged grounds existed to terminate Jesus S.'s parental rights under WIS. STAT. § 48.415(6)(a), for failure to assume parental responsibility.[4] It claimed Jesus S. "ha[d] not accepted or exercised significant

[3] The petitions also sought termination of the parental rights of the children's biological mother. The mother later voluntarily terminated her parental rights, and is not a party to this appeal.

[4] "Failure to assume parental responsibility" under WIS. STAT. § 48.415(6) requires proof that a parent has not had a "substantial parental relationship" with the child, which is defined as

> the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has

(continued)

responsibility for the daily supervision, education, protection and care of the child[ren]." It cited both Jesus S.'s recurring and ongoing incarceration, and the following:

> Even when he was not incarcerated, the father spent much of his time away from home and rarely involved himself with the children. He would often live or spend time with another woman with whom he had two other children. The little time he was home he and the mother were often fighting, including both verbal and physical abuse. The father's financial support was sporadic and minimal at best. The child[ren] w[ere] often placed in the care of others. The father knows very little about the child[ren] and has nothing resembling a parental relationship.

¶4 The court held the initial hearing on the petitions on September 13, 2007. Jesus S. contested the petitions and requested a jury trial. The court set a jury trial for October 23 and 24, 2007. Jesus S. was then appointed counsel, who wrote the court indicating that Jesus S. waived the right to have a jury trial within forty-five days of his initial appearance, so that his newly appointed counsel could prepare. The court then rescheduled the jury trial for January 28 and 29, 2008. The court held a telephone conference on October 24, 2007, concerning the statutory time limits. At the October 24 conference, Jesus S. stated he wished to waive the time limits for his attorney to prepare for trial, and the court found good cause to continue the trial until January 28, 2008.

¶5 On January 14, 2008, Jesus S. moved to dismiss the TPR petitions. He argued that the TPR notices he received were insufficient because they did not define "substantial parental relationship." The court held a hearing on January 22,

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> expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

2008, during which it denied Jesus S.'s motion, and found good cause to postpone the trial until March 3, 2008. At the March 3 hearing, the court again found good cause to postpone the trial to May 29 and 30, 2008.

¶6 On May 22, 2008, the court received a letter from Jesus S. stating that he was dissatisfied with his counsel and did not believe his counsel was capable of representing his interests. He requested appointment of new counsel. The court denied Jesus S.'s request.

¶7 On May 28, 2008, Jesus S. submitted to the court a signed statement indicating he intended to admit grounds to terminate his parental rights. The court held a hearing on the TPR petitions the next day. At the May 29 hearing, Jesus S.'s counsel stated that Jesus S. was going to admit that grounds existed to terminate his parental rights, "because he's been incarcerated for the last four and a half years and he most likely will not have a release date for another four plus years." The court then asked Jesus S. if he admitted that a factual basis existed to terminate his parental rights, and Jesus S. responded: "I haven't had [a] substantial relationship with them due to my incarceration, so I haven't been able to exercise a significant, you know, responsibility due to my incarceration." Following a colloquy, the court found that Jesus S. voluntarily and intelligently admitted that grounds existed to terminate his parental rights. It therefore found that Jesus S. was unfit and concluded the hearing. On June 4, 2008, the court held a dispositional hearing, and determined that it was in the best interest of the children to terminate Jesus S.'s parental rights.

¶8 Jesus S. filed a postdisposition motion to vacate the orders terminating his parental rights. He argued his trial counsel was ineffective for failing to file a motion to dismiss the TPR petitions because they claimed he failed

to assume parental responsibility based primarily on his incarceration.[5] He also asserted counsel was ineffective for failing to explain and investigate possible defenses to the failure to assume grounds, including

> the fact that the father's history of writing letters to the children and social workers, his signing of releases, his prior visitations with the children while incarcerated, his support of the children's current placement by the execution of releases, and his ongoing litigation to have visitation facilitated by the Department of Social Services between him and [the] children, his cooperation with child support orders, his sending of gifts to the children, and his continued communication with relatives regarding the children's well-being.

He argued counsel should have raised a constitutional challenge to the grounds alleged in the TPR petitions, because they were based solely on Jesus S.'s incarceration. He also asserted counsel should have objected to the trial court's denial of Jesus S.'s request for substitution of counsel. Finally, he argued counsel was ineffective for failing to ensure Jesus S.'s admission was knowing, intelligent, and voluntary, because: "At the time of the plea the father did not understand that the court was mandated to find the father unfit, and that such finding of unfitness could not be set aside at disposition." Jesus S. requested a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979), to determine the effectiveness of trial counsel.

¶9 In a written decision denying Jesus S.'s motion without a hearing, the trial court said:

> None of [Jesus S.'s] allegations demonstrate how, if true, they would have change[d] the outcome of this case which was primarily driven by a complete absence of any

[5] Jesus S. raised several other arguments that are not pertinent to this appeal.

> relationship by the respondent with these children due to his incarceration for a period of at least eight years and potentially longer. As noted by the Court, his incarceration absolutely precluded a relationship with one child, close to absolutely precluded it with a second, and precluded two-thirds or more of the life of the third child. Beyond that, minimally, he will be incarcerated for four more years. There was no evidence to the contrary submitted or suggested. Respondent's claims of relationship rely primarily on reactions to litigation. Nowhere to be found is a description of changing a diaper, feeding a child, handling trips to the doctor, helping with school work or any other function of parental responsibility.

The court also noted that Jesus S. made no claim that the court's colloquy was deficient. It found there was no possibility that any errors by trial counsel prejudiced Jesus S., and therefore declined to hold a hearing on the motion. Jesus S. appeals.

Standard of Review

¶10 This case presents questions of statutory interpretation and application to undisputed facts, which are questions of law we review de novo. *See* ***DOR v. Menasha Corp.***, 2008 WI 88, ¶44, 311 Wis. 2d 579, 754 N.W.2d 95. It also requires that we determine whether case law is to be applied prospectively or retroactively, which we also determine independently. *See* ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶7, 276 Wis. 2d 96, 687 N.W.2d 79. Finally, it requires that we apply constitutional principles to the facts of the case, which we do independently from the trial court's analysis. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

Discussion

¶11 Jesus S. argues that he is entitled to withdraw his admission as to grounds and to have a trial on the merits of Portage County's TPR petitions. He

argues that the trial court should have dismissed the TPR petitions because he was not warned of the grounds alleged in the petitions during CHIPS proceedings; that the court lost competency to proceed by violating statutory time frames before he admitted grounds; that his admission was not knowingly and intelligently entered because the court failed to establish that he understood that his admission would lead to an automatic finding of parental unfitness, and he did not understand that; and that he did not have the effective assistance of counsel when he admitted grounds.

¶12 First, we disagree that the trial court was required to dismiss the TPR petitions based on inadequate warnings to Jesus S. that failure to assume parental responsibility could form grounds to terminate his parental rights.[6] Under WIS. STAT. § 48.356(1) and (2), a written order placing a child outside the home must notify the parent "of any grounds for termination of parental rights under s. 48.415 which may be applicable and of the conditions necessary for the child … to be returned to the home."

¶13 It is undisputed that Jesus S. received TPR notices containing the following language:

> Your parental rights can be terminated against your will under certain circumstances. A list of the potential grounds to terminate a parent's rights is given below. Those that are check-marked are most applicable to you, although you should be aware that if any of the others also exist now or in the future, your parental rights can be taken from you.

[6] Jesus S. also argues that the trial court should have dismissed the TPR petitions on equitable grounds. However, he has not adequately developed this argument, and we therefore decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

The notices then lists each of the statutory grounds for terminating parental rights, including failure to assume parental responsibility under WIS. STAT. § 48.415(6). Only abandonment and continuing need of protection or services, under WIS. STAT. §§ 48.415(1) and (2), are check-marked.

¶14 Jesus S. argues that Portage County improperly sought to terminate his parental rights for failure to assume parental responsibility under WIS. STAT. § 48.415(6), after only check-marking grounds under subsections (1) and (2). He argues that because failure to assume parental responsibility under subsection (6) was not check-marked, he was not adequately notified that subsection (6) could be alleged as grounds in the subsequent TPR proceedings. He cites ***State v. Patricia A. P.***, 195 Wis. 2d 855, 537 N.W.2d 47 (Ct. App. 1995), for the proposition that a TPR petition that is based on grounds different from the grounds for which a parent has been warned is impermissible. While we agree that a TPR petition may not be based on grounds for which the parent has not been warned, we disagree that that is what happened here.

¶15 In ***Patricia A. P.***, after the mother was provided warnings under WIS. STAT. § 48.356 of the potential grounds to terminate her parental rights under WIS. STAT. § 48.415, the legislature modified the applicable grounds under § 48.415 in a manner that changed "the very nature of the acts leading to termination." ***Id.*** at 857-58, 863-64. We reversed the order terminating the mother's rights, explaining that "when the State warns a parent that his or her rights to a child may be lost because of the parent's future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure." ***Id.*** at 863-65. Here, in contrast, Portage County provided Jesus S. with notice of

each of the potential grounds for termination of his parental rights under WIS. STAT. § 48.415, and specifically stated that any grounds (whether or not check-marked) could form the basis for TPR proceedings. Those grounds did not change between the CHIPS and TPR proceedings. ***Patricia A. P.*** is thus clearly distinguishable. Because Jesus S. has not explained why additional notice would be required, we reject his argument that inadequate notice required dismissal of the TPR petitions in this case.[7]

¶16 We also disagree with Jesus S.'s argument that the trial court lost competency to proceed when it scheduled the fact-finding hearing beyond forty-five days from the initial hearing. *See* WIS. STAT. § 48.422(2) (fact-finding hearing must be held within forty-five days of initial hearing when parent contests petition). Jesus S. argues that the trial court lost competency to proceed on October 10, 2007, when it rescheduled the fact-finding hearing for January 28, 2008, because the forty-five day deadline expired on October 28, 2007. He contends that the finding of good cause on the record to continue the hearing was insufficient because it occurred on October 24, 2007, after the court had already rescheduled the hearing.[8] Thus, the crux of Jesus S.'s argument is that the court erred in *scheduling* the fact-finding hearing for a date beyond the statutory forty-

[7] Jesus S. also argues that the trial court erred in finding that WIS. STAT. § 48.356(2) does not require notice of failure to assume parental responsibility as a grounds to terminate parental rights under ***Winnebago County Department of Social Services v. Darrell A.***, 194 Wis. 2d 627, 643-45, 534 N.W.2d 907 (Ct. App. 1995) (holding there is no requirement under § 48.356 to provide notice of homicide of other parent as grounds to terminate parental rights, because condition can never be remedied). Because we conclude that Jesus S. did receive adequate notice, we need not address this argument.

[8] Under WIS. STAT. § 48.315(2), continuances in TPR proceedings must be made on the record in open court and only on a finding of good cause. Jesus S. does not contest that the trial court found good cause on the record, only that it did so belatedly.

five day time frame, and then *subsequently* finding good cause on the record to continue the hearing. He cites ***Sheboygan County Department of Social Services v. Matthew S.***, 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631, and ***State v. April O.***, 2000 WI App 70, 233 Wis. 2d 663, 607 N.W.2d 927, as establishing that the court in this case lost competency to proceed.

¶17 In ***April O.***, we held that the trial court lost competency to proceed when it did not find there was good cause to extend mandatory time limits under WIS. STAT. § 48.315(2) until *after* the time limits expired. ***April O.***, 233 Wis. 2d 663, ¶1. We explained that the court did not "grant[] a continuance at any proceeding before the time limits expired and therefore did not do so in open court and in a timely manner." ***Id.***, ¶10 (citation omitted). Because the time limit had expired before the court made a finding of good cause for a continuance, the court had already lost competency when it granted the continuance. ***Id.*** We explained that "[o]nce a court has lost competency it cannot, in a later proceeding, find good cause for a delay and thereby restore competency." ***Id.***

¶18 In ***Matthew S.***, the supreme court followed our holding in ***April O.***, and held that the trial court lost competency to proceed when it rescheduled a TPR fact-finding hearing for a date beyond the statutory period without a finding of good cause on the record for a continuance. ***Matthew S.***, 282 Wis. 2d 150, ¶2 & n.2. First, the ***Matthew S.*** court rejected Sheboygan County's argument that Matthew S.'s motion to sever his case from the mother's tolled the statutory period under WIS. STAT. § 48.315(1)(a). ***Id.***, ¶¶19-22. Because Matthew S. did not file his motion for severance until after the court rescheduled the fact-finding hearing, the filing of the motion did not cause the delay, and thus did not toll the period under the statute. ***Id.***, ¶22.

¶19 The court then rejected Sheboygan County's argument that the court continued the fact-finding hearing for cause under WIS. STAT. § 48.315(2). ***Id.***, ¶¶23-24. The court explained that "there was no determination of good cause in open court or during a telephone conference on the record …. Therefore, when the time limit expired without a continuance in accord with WIS. STAT. § 48.315(2), the circuit court lost competency to proceed." ***Id.***, ¶24. Thus, ***April O.*** and ***Matthew S.*** do not establish, as Jesus S. argues, that a trial court must find good cause to grant a continuance in open court and on the record before the time limit is *extended*. Instead, they establish that a trial court must find good cause to grant a continuance in open court and on the record before the time limit *expires*.

¶20 Here, there *was* a finding of good cause on the record before the expiration of the forty-five day period. The initial hearing was held September 13, 2007, requiring the court to hold the fact-finding hearing by October 28, 2007. The court rescheduled the fact-finding hearing for a date beyond October 28, 2007, without establishing good cause on the record for doing so. However, it held a hearing on October 24, 2007, before the time frame was set to expire on October 28, and found good cause on the record to grant a continuance. It therefore did not lose competency to proceed.

¶21 We also reject Jesus S.'s argument that he is entitled to a ***Machner*** hearing on his claim of ineffective assistance of counsel. Jesus S. argues that his counsel was ineffective because he did not identify or pursue Jesus S.'s potential defenses to the allegation of failure to assume parental responsibility; specifically, that there was evidence that he did establish a substantial parental relationship

with his children, despite his incarceration.[9] He argues that Portage County based the failure to assume allegation on the fact that he was incarcerated, which is impermissible under ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, and that he entered his admission, and the court accepted it, based on the fact that his incarceration prevented him from forming a substantial parental relationship with his children. Thus, Jesus S. argues, his counsel was ineffective for failing to identify that incarceration cannot form the basis for failure to assume parental responsibility, and to advise him that he had a basis to contest that allegation despite his incarceration.

¶22 Portage County responds that Jesus S. waived this argument by entering his admission that he failed to establish a substantial parental relationship with his children. It also argues that Jesus S. failed to make a prima facie case in his postdisposition motion that he did not know that evidence he had contacts or attempted to have contacts with his children could form the basis for a defense, or that he would not have admitted grounds if he had so known. Finally, it argues that it is undisputed that Jesus S. never played a significant parental role in his children's lives, and therefore there is no possibility any deficient performance by

[9] Under this heading, Jesus S. actually argues that the trial court erroneously exercised its discretion in denying his request for substitution of counsel. We construe this argument as attempting to support his argument that his trial counsel was ineffective. Also, Jesus S. raised the issue of ineffective assistance of counsel for failing to identify and pursue defenses in his postdisposition motion, and the County responds to it in its response brief. We will therefore address it. Because we conclude that Jesus S.'s counsel was not ineffective, we discern no error in the court's denying his request for substitution of counsel.

Additionally, Jesus S. argues that his trial counsel was ineffective for failing to object to the trial court's accepting his admission as to grounds. First, as Portage County points out, Jesus S. did not raise this specific argument in his postdisposition motion. Moreover, this argument is in effect a reframing of his argument that the trial court's colloquy was defective. Because we address that argument separately below, we do not address it further here.

Jesus S.'s counsel could have prejudiced him. We agree with Portage County that Jesus S. failed to make a prima facie showing of ineffective assistance of counsel under ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and therefore need not reach the parties' other arguments on this issue.

¶23 Under ***Nelson***, a postdisposition motion must "allege[] facts which, if true, would entitle the [parent] to relief" to entitle the parent to an evidentiary hearing. ***Id.*** at 497. A postdisposition motion claiming ineffective assistance of counsel must allege both prongs of the ***Strickland v. Washington***, 466 U.S. 668 (1984), test for ineffective assistance of counsel claims: "[T]hat counsel's performance was both deficient and prejudicial." ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To show that counsel's errors were prejudicial, the motion "must allege facts to show that there is a reasonable probability that, but for the counsel's errors, [the parent] would not have [admitted grounds] and would have insisted on going to trial." ***Id.*** at 312 (citation omitted). The motion must set forth specific facts, and "cannot rely on conclusory allegations, hoping to supplement them at a hearing." ***Id.*** at 313. Thus, a parent "must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." ***Id.***

¶24 Here, Jesus S. alleged in his postdisposition motion that his trial counsel was ineffective for failing to explain that he had defenses to the allegation that he had failed to assume parental responsibility, including

> the fact that the father's history of writing letters to the children and social workers, his signing of releases, his prior visitations with the children while incarcerated, his support of the children's current placement by the execution of releases, and his ongoing litigation to have visitation facilitated by the Department of Social Services between him and [the] children, his cooperation with child

> support orders, his sending of gifts to the children, and his continued communication with relatives regarding the children's well-being.

The motion also alleges that Jesus S.'s admission "was primarily due to the father's incarceration," and that parental rights may not be terminated solely based on a parent's incarceration under ***Jodie W.*** It also stated that Jesus S. "had repeatedly written the court during the pendency of the CHIPS action, had requested to be present either in person or telephone at every hearing, had retained counsel for the purposes of enforcing an order requiring visits between the father and children," and that "at the time of the dispositional hearing [Jesus S.] had a relationship with the child[ren] Jasmine and Cristos, and indicat[ed] that he wanted to maintain and have a relationship with his children, and requested visitation with his children."

¶25 The initial problem with Jesus S.'s argument is that the TPR petitions do not rely solely on his incarceration. Instead, they say that in addition to his incarceration:

> Even when he was not incarcerated, the father spent much of his time away from home and rarely involved himself with the children. He would often live or spend time with another woman with whom he had two other children. The little time he was home he and the mother were often fighting, including both verbal and physical abuse. The father's financial support was sporadic and minimal at best. The child[ren] w[ere] often placed in the care of others. The father knows very little about the child[ren] and has nothing resembling a parental relationship.

Jesus S.'s postdisposition motion does not dispute these allegations. Rather, it sets forth facts showing that he did have some contact or attempted to have contact with the children while he was incarcerated. However, it does not explain why it is that Jesus S. would not have admitted grounds if he had known that he could

have asserted those contacts and attempts at contact to defend against the allegation of failure to assume parental responsibility. There is no basis in the motion for a trial court to assess whether Jesus S. would not have made the decision to admit grounds and focus on contesting disposition if he had known that evidence that he contacted or attempted to contact his children could have been considered in addition to the allegations set forth by Portage County.

¶26 Moreover, Jesus S. does not argue that the court was not allowed to consider his incarceration as a factor in deciding whether he had failed to assume parental responsibility. *See* ***Jodie W.***, 293 Wis. 2d 530, ¶52 (recognizing that a parent's incarceration is a proper factor to consider, among other factors, when determining whether grounds exist to terminate parental rights). He has not asserted facts showing that counsel's error in failing to explain to him that his contacts with the children could be considered by the court in determining whether he had a substantial relationship with his children would have likely changed his decision to admit grounds. The trial court therefore did not err in denying his motion without a hearing.

¶27 We turn, then, to Jesus S.'s most persuasive argument: that he is entitled to an evidentiary hearing on his claim that the trial court colloquy was defective and he did not understand the information that should have been provided to him.[10] *See* ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12

[10] Jesus S. argues that his plea was not knowingly and intelligently entered, and he therefore is entitled to withdraw his plea and proceed to trial on the merits of the TPR petitions. Based on the procedural posture of this case, we conclude that the proper relief is not plea withdrawal, but rather a remand for an evidentiary hearing on Jesus S.'s claim that he did not in fact understand the information that should have been provided to him.

(1986). Jesus S. argues that the colloquy was deficient because the court did not establish that Jesus S. understood that his admission to grounds would result in a finding of parental unfitness. He cites ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, ¶10, 314 Wis. 2d 493, 762 N.W.2d 122, for the proposition that "in order for no contest pleas at the grounds stage to be entered knowingly and intelligently, parents must understand that acceptance of their plea will result in a finding of parental unfitness." Here, he argues, the court did not establish that he understood his admission would lead to a finding of unfitness, and he did not in fact understand that when he entered his admission.

¶28 Portage County responds that Jesus S. forfeited this argument because he did not raise it in his postdisposition motion. It argues that under ***Bangert***, 131 Wis. 2d at 274-75, Jesus S. was required to allege in his postdisposition motion that the colloquy was deficient and that he did not in fact understand the information that the court should have provided to him. Here, it is undisputed that Jesus S. did not allege in his postdisposition motion that the plea colloquy was deficient. Thus, Portage County asserts, Jesus S. has not met his burden under ***Bangert*** necessary to entitle him to a hearing. Additionally, Portage County contests that Jesus S. may not rely on ***Therese S.*** because that case was not decided until after the plea colloquy occurred in this case. Finally, it argues that even if ***Therese S.*** applies, its requirements have been met because Jesus S. acknowledged on the record his understanding that the court would have to conduct a hearing to determine the best interest of the child.

¶29 In ***Therese S.***, Oneida County filed a petition to terminate Therese's parental rights to her daughter, alleging Therese had failed to assume parental responsibility and the daughter was in continuing need of protection or services.

Therese S., 314 Wis. 2d 493, ¶2. Therese agreed to plea no contest to the continuing need ground. ***Id.*** Before accepting Therese's plea, the court engaged her in a colloquy and determined her plea was knowingly and intelligently entered. ***Id.***, ¶3. Therese contested disposition, and after a hearing, the court terminated her parental rights. ***Id***.

¶30 Therese filed a postdisposition motion arguing that the plea colloquy was deficient. ***Id.***, ¶4. The motion alleged the colloquy was deficient because it failed to inform Therese she would be found unfit based on her plea, what the potential dispositions were and that the dispositional phase would focus on the best interest of the child, and that her plea waived her constitutional right to parent her child. ***Id.*** The court denied the motion without taking evidence, and Therese appealed, arguing that she had presented a prima facie case that she did not knowingly and intelligently admit grounds under the TPR petition. ***Id.***, ¶¶1, 4.

¶31 We first reiterated that a court must conduct a personal colloquy with a parent before accepting a plea of no contest to a TPR petition. ***Id.***, ¶5 (citing WIS. STAT. § 48.422(7)). The colloquy must ensure the admission is made voluntarily, the parent understands the nature of the allegations in the petition, and the potential dispositions of the case. ***Id.*** (citing WIS. STAT. § 48.422(7)(a)). The court must "[e]stablish whether any promises or threats were made to elicit an admission," and "[m]ake such inquiries as satisfactorily establish that there is a factual basis for the admission." ***Id.*** (quoting § 48.422(7)(b) and (c)). We also reiterated that "the parent must have knowledge of the constitutional rights given up by the plea." ***Id.*** (citing ***Jodie W.***, 293 Wis. 2d 530, ¶25).

¶32 We then looked to whether Therese had made a prima facie showing that the plea colloquy was deficient and that she did not understand the

information that should have been provided. ***Id.***, ¶6 ("When a parent alleges a plea was not knowingly and intelligently made, the ***Bangert*** analysis applies."). The parties agreed that the court "never established on the record whether Therese understood she would be found unfit to parent as a result of her plea," but disputed whether a finding of unfitness was a direct consequence of the plea and therefore a required part of the colloquy. ***Id.***, ¶¶8-9. We concluded "that in order for no contest pleas at the grounds stage to be entered knowingly and intelligently, parents must understand that acceptance of their plea will result in a finding of parental unfitness," because that finding is a direct consequence of the plea. ***Id.***, ¶¶10-11.

¶33 We explained that "[b]ecause the [trial] court's colloquy failed to demonstrate that Therese understood her plea would result in a finding of parental unfitness and because her motion alleged she did not understand that result, she presented a prima facie case that her plea was not entered knowingly and intelligently." ***Id.***, ¶12. Thus, "[t]he burden … shift[ed] to the County to prove otherwise." ***Id.*** We also held that "at the very least, a court must inform the parent that at the second step of the process, the court will hear evidence related to the disposition and then will either terminate the parent's rights or dismiss the petition if the evidence does not warrant termination," and that the focus will be the best interest of the child. ***Id.***, ¶16. Thus, we remanded for a hearing for the County to bear the burden of proving that when Therese admitted grounds, she did so with an understanding of the following: "(1) she would be found unfit to parent as a result of the plea, (2) the potential dispositions specified under WIS. STAT. § 48.427, and (3) that the dispositional decision would be governed by the child's best interests." ***Id.***, ¶22.

¶34 ***Therese S.*** does not specify whether the rule it established is prospective or retroactive. In ***State v. Thiel***, 2001 WI App 52, ¶7, 241 Wis. 2d 439, 625 N.W.2d 321, we explained that

> Wisconsin generally adheres to the "Blackstonian Doctrine," which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively. In spite of this, an appellate court may employ the technique of prospective application—"sunbursting"—to mitigate hardships that may arise with the retroactive application of a new rule of law. "Sunbursting" is an approved method of dealing with both changes within the common law as well as changes in the way that courts interpret statutes. Whether to limit a new rule of law to prospective application is a policy question for the appellate courts that we review de novo.

(Citations omitted.)

¶35 We undertake a three-pronged analysis to determine whether a new rule of substantive or procedural civil law is to be applied retroactively or prospectively. ***Id.***, ¶¶8-10. We consider whether

> (1) the decision creates a new principle of law, either by overruling clear past precedent on which parties have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retrospective application will promote or retard the operation of the rule recognized or established by the decision; and (3) retrospective application could produce substantial inequitable results.

Id., ¶10. All three factors must be met for a new rule to be applied prospectively only. ***Browne v. WERC***, 169 Wis. 2d 79, 112, 485 N.W.2d 376 (1992).

¶36 We use the civil law retroactivity test when determining whether new TPR case law is applied retroactively or prospectively.[11] ***Thiel***, 241 Wis. 2d 439, ¶9. Thus, we must determine whether all three of the above factors are met, so as to allow the ***Therese S.*** rule to be applied prospectively only.

¶37 We first consider whether "the decision creates a new principle of law, either by overruling clear past precedent on which parties have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." ***Thiel***, 241 Wis. 2d 439, ¶10. This inquiry focuses on whether "the new rule or new statutory interpretation is a clear break from prior law." ***Id.***, ¶12 (citation omitted). This first step in our analysis, "referred to as the 'clear break' principle, is the threshold test for determining whether or not a decision should be applied retroactively." ***Browne***, 169 Wis. 2d at 112 (citation omitted).

¶38 In ***Therese S.***, we did not purport to overrule prior law, but rather clarified well-established prior case law to reach our conclusion that a TPR grounds colloquy must include assessment of the parent's understanding that the admission will lead to an automatic finding that the parent is unfit. We first flatly rejected the County's assertion that admissions to grounds would not lead to an automatic finding of parental unfitness, citing the language in WIS. STAT. § 48.422(7) and ***Sheboygan County v. Julie A.B.***, 2002 WI 95, ¶26, 255 Wis. 2d 170, 648 N.W.2d 402. ***Therese S.***, 314 Wis. 2d 493, ¶9. We then recognized that WIS. STAT. § 48.422(7), setting forth the colloquy requirements before a court accepts a parent's admission to grounds in a TPR petition, is "nearly identical" to

[11] There is a different test in the criminal context, which we have held does not apply in TPR cases. *See* ***State v. Thiel***, 2001 WI App 52, ¶¶8-9, 241 Wis. 2d 439, 625 N.W.2d 321.

WIS. STAT. § 971.08(1), the statute codifying case law requiring that criminal defendants are aware of the direct consequences of their pleas. ***Therese S.***, 314 Wis. 2d 493, ¶11. This led to the necessary conclusion that parents in TPR proceedings must be aware of the automatic finding of unfitness following admission as to grounds as a direct consequence of that admission. ***Id.***, ¶¶10-11. Thus, because ***Therese S.*** was not a "clear break" from prior law, it must apply retroactively. *See* ***Browne***, 169 Wis. 2d at 112-13.

¶39 Portage County argues that even if ***Therese S.*** applies, Jesus S. forfeited this argument by not specifically arguing that the colloquy was defective in his postdisposition motion. We disagree. In ***Thiel***, 241 Wis. 2d 439, ¶¶1-4, 19, we applied the new rule established by the supreme court in that case to the defendant and "all cases on direct appeal that have not been finalized as of the date of the release" of the supreme court decision. We held that an appellant seeking retroactive application of the ***Thiel*** rule must have either specifically raised the issue in the trial court, or "prominently raised [it] in a direct appeal." ***Id.*** ¶19. Here, ***Therese S.*** was released after Jesus S. filed his postdisposition motion but before Jesus S. filed his appeal. Jesus S. did not raise this issue specifically in his postdisposition motion, but does so prominently on his direct appeal. He therefore may raise this argument in this appeal.

¶40 Finally, we reject Portage County's argument that the colloquy in this case satisfied the ***Therese S.*** requirement that a parent understand the direct consequences of his or her admission, including that a parent will be found unfit following an admission as to grounds. It is undisputed that in this case, the court did not establish that Jesus S. understood that his admission would lead to an

automatic finding of unfitness.[12] Portage County argues that the fact that Jesus S. acknowledged that the court would next hold a dispositional hearing to determine the best interest of the child satisfies this requirement. Portage County's position is contrary to the language in ***Therese S.***, requiring that the parent understand *both* that an admission will lead to an automatic finding of unfitness *and* that the dispositional hearing will focus on the best interest of the child. They are separate requirements; knowledge of one cannot establish knowledge of the other. The burden thus shifts to Portage County to prove that Jesus S. did in fact understand that entering an admission to grounds would lead to an automatic finding of unfitness. We therefore affirm in part, reverse in part and remand for an evidentiary hearing on Jesus S.'s claim that his plea was not knowingly and intelligently entered.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[12] The trial court did not have the benefit of ***Oneida County Department of Social Services v. Therese S.***, 2008 WI App 159, 314 Wis. 2d 493, 762 N.W.2d 122, at the time of Jesus S.'s admission as to grounds.