COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2007

A. JOHN VOELKER
Acting Clerk of Court of Appeals

Appeal No. 2006AP1319 **Cir. Ct. No. 2001CF3069**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES CIANCIOLA,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KITTY K. BRENNAN and MEL FLANAGAN, Judges. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Charles Cianciola was convicted by a jury in 2001 of sexually assaulting and committing incest with his eight-year-old daughter, C.M.C., in March of 1997. We affirmed on his direct appeal. ***State v. Cianciola***, No. 02-3203-CR, unpublished slip op. (WI App Nov. 11, 2003). The supreme

court denied review. He now appeals *pro se* from orders: (1) denying his WIS. STAT. § 974.06 motion alleging that his trial and postconviction lawyers were ineffective, and (2) denying his motion to reassign the § 974.06 motion to a different judge. We affirm.

I.

¶2 Cianciola's daughter testified at his trial that in 1997 she went to a hockey game in Milwaukee with Cianciola, her sister, her brother, and her brother's friend. After the game they walked to their hotel. His daughter testified that her father left the hotel room and the children went to sleep. Later, however, she woke up and discovered that Cianciola was kissing her neck. She told the jury that he then rubbed her breasts and vagina before she was able to push him away and crawl into the bed in which her sister was sleeping. According to his daughter, she smelled liquor on Cianciola's breath, and, after she went into her sister's bed, Cianciola fell asleep on the cot.

¶3 Cianciola's WIS. STAT. § 974.06 motion, the denial of which underlies this appeal, claimed that his trial and postconviction lawyers were ineffective. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be a sufficient reason for failing to have previously raised the issues). He wanted the motion to be assigned to his sentencing judge, the Honorable John J. DiMotto, who was no longer assigned to the felony division as a result of judicial rotation. *See* Milwaukee County Cir. Ct. R. 214 (rotation of judicial assignments). The Milwaukee County Circuit Court Chief Judge, the Honorable Kitty K. Brennan, denied Cianciola's motion for reassignment, "find[ing] no reason why Judge DiMotto's successor cannot address the issues presented."

Cianciola's § 974.06 motion was assigned to the Honorable Mel Flanagan. Judge Flanagan denied Cianciola's § 974.06 motion without a hearing.

II.

A. *Assignment of judge.*

¶4 In asserting that his WIS. STAT. § 974.06 motion should have gone to Judge DiMotto, Cianciola recognizes that the assignment of his motion to Judge Flanagan comports with Milwaukee County Circuit Court Rule 428(D) ("If the post conviction motion involves a homicide or sexual assault case and the trial and/or sentencing judge is no longer in the felony division, the motion shall be assigned to the judge who currently has the same homicide or sexual assault calendar."). He contends, however, that the rule is inconsistent with the Director of State Courts Uniform Rules of Trial Court Administration TCA 2(a), *available at* http://www.wicourts.gov/opinions/docs/circuitrules.pdf, which provides that, "*[w]here practical*, postjudgment matters shall be assigned to the trial judge who entered judgment." (Emphasis added.) Milwaukee County has forty-seven circuit-court judges, assigned, by rotation, to five divisions. The judges are spread over four buildings: the Milwaukee County Court House, the Milwaukee County Safety Building, and the Criminal Justice Facility, all in downtown Milwaukee, and the Children's Court Center in Wauwatosa. Rule 428(D) reasonably reflects a determination that in Milwaukee County when the judge who presided over the trial is no longer handling felony cases, it is more practical to assign postconviction motions to that judge's successor. Accordingly, Chief Judge Brennan properly denied Cianciola's motion for judicial reassignment.

B. *Allegations of ineffective-assistance-of-counsel.*

¶5 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Cianciola's claims fail on both aspects.

¶6 First, Cianciola claims that his trial lawyer should have "rais[ed] the issue of [his] competency" to stand trial. Cianciola contends that he has permanent amnesia due to his alcohol abuse and could not remember assaulting his daughter. He thus claims that his alleged amnesia rendered him incompetent to help his defense. Cianciola does not allege facts sufficient to support this claim.

¶7 To trigger review of this claim, Cianciola must adduce medical evidence that he suffers from permanent amnesia, or, at the very least, had amnesia when he was tried. *See* ***State v. McIntosh***, 137 Wis. 2d 339, 348–349, 404 N.W.2d 557, 561–562 (Ct. App. 1987) (whether defendant received a fair trial despite amnesia is considered where the "amnesia has been medically established"); *see also* ***Muench v. State***, 60 Wis. 2d 386, 392–393, 210 N.W.2d 716, 719 (1973) (defendant has the burden of establishing amnesia "by a clear preponderance of the credible evidence").

¶8 The only "medical evidence" to which Cianciola points is the testimony at his sentencing hearing by a clinical psychologist who interviewed Cianciola after the trial to assess Cianciola's risk of recidivism and amenability to treatment. Although purporting to offer "medical evidence," Cianciola quotes his own contention, albeit *via* the psychologist. According to the psychologist's report, Cianciola told the psychologist:

> "*If I touched my daughter that night, I have no recollection of it.* I had two beers at the game, one at the end of the first quarter (sic) and another at the end of the second quarter. When we got back to the hotel, I went down to the bar, smoked some cigarettes, and had three or four drinks. I was gone about 30-40 minutes. At that time, when I drank, it was to get drunk.
>
> When I got back to the room, I went into the bathroom, closed the door, turned on the light, and took my contacts out. When I was done, I opened the door to glance at the room, then turned off the light. I remember walking toward the (far side of the second) bed … but I banged into a chair. I remember that because I hurt my toe. There was a dresser along the wall. Actually, it was like a table and chair that you sit at.
>
> I remember walking between the cot and the bed, and plopped in the bed. It was dark … and no lights were on. *If I did any touching, it would have happened there.* I remember crawling into the (far side) of the bed because [C.M.C.'s sister] was the closest to the end table."

(Emphasis added; parentheses and ellipses in original.)

¶9 The psychologist testified at the sentencing hearing that "because there's some question about whether there might be an alcoholic blackout" he administered a test designed to assess whether Cianciola was malingering or "faking some kind of illness." When asked by Cianciola's lawyer whether the test results could be interpreted to mean that "it would be safe to say that when [Cianciola] said he drank to the point that he had blackouts and might have had a blackout on the night of the Milwaukee incident, he -- he is not someone who is exaggerating symptoms," the psychologist answered, "perhaps [a] more accurate way" to interpret the results "is to say at -- in the testing situation, that he's putting forth a good effort on this test." Cianciola's "good effort" on a test designed to assess whether he was malingering is not sufficient to show that he had alcohol-induced amnesia.

¶10 Second, Cianciola contends that his trial lawyer should have presented the defense of voluntary intoxication. *See* WIS. STAT. § 939.42 ("An intoxicated or a drugged condition of the actor is a defense only if such condition: … **(2)** Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24 (3)."); *see also* WIS. STAT. § 948.01(5) ("'Sexual contact' means … intentional touching.").[1] Cianciola's argument is conclusory and undeveloped because Cianciola has presented nothing that shows that there *was* evidence that he was intoxicated to the extent necessary to fall within § 939.42(2). As ***State v. Strege***, 116 Wis. 2d 477, 486, 343 N.W.2d 100, 105 (1984), notes:

> There must be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. A bald statement that the defendant has been drinking or was drunk is insufficient—insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing.

¶11 Cianciola points to the following evidence to show "his state of intoxication at the time of the alleged crime": (1) his statement to the psychologist that he "plopped in the bed"; (2) his son's trial testimony that when Cianciola came back to the hotel room, he heard Cianciola trip and stumble; and (3) his

[1] WISCONSIN STAT. § 939.24(3) is not material here. It provides:

> A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

daughter's testimony that she could smell liquor on Cianciola's breath.[2] This does not show mental impairment making Cianciola incapable of forming intent. It merely shows that Cianciola may have been drunk. This, alone, is not sufficient. *See* ***ibid.***

¶12 Third, Cianciola claims that his trial lawyer should have presented expert testimony to show that he did not have a sexual disorder, such as pedophilia. This claim is also conclusory and undeveloped. Cianciola does not point to any evidentiary material, by affidavit or otherwise, to show that an expert witness on this point was available or what the witness would have said if he or she would have been called to testify. *See* ***State v. Allen***, 2004 WI 106, ¶24, 274 Wis. 2d 568, 586, 682 N.W.2d 433, 442 (postconviction motion must contain sufficient material facts, that is, the name of the witness, the reason the witness is important, and the facts that can be proven).

¶13 Finally, Cianciola contends that his trial lawyer did not impeach his daughter with her prior inconsistent statements. This claim is contradicted by the Record. At the trial, his daughter testified, as material, that: Cianciola was lying

[2] Cianciola also cites to matters appended to his WIS. STAT. § 974.06 motion that appear to be from a different case brought against him for sexually assaulting his daughter: a prosecutor's remark during opening statements that the assaults were "motivated" by Cianciola's alcohol use; and a police officer's testimony that during an interview with Cianciola the officer could smell liquor and Cianciola told the officer that he had been in an alcohol treatment program. Additionally, Cianciola points to what appear to be various medical records from 1998, including: an "intake/preliminary treatment plan" from the "Nova Treatment Center" indicating a "preliminary diagnosis" of "chemical dependency" and an "intake sheet" indicating that Cianciola experienced "blackouts"; a "diagnostic" form indicating "temporary loss of memory"; and an "emergency department record" indicating that Cianciola reported "memory loss" after Cianciola fell and hit his head. (Some capitalization and uppercasing omitted.) None of this meets the requisite threshold showing under ***Strickland*** that Cianciola received ineffective assistance of counsel in connection with the "intent" element of the crime. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Strege***, 116 Wis. 2d 477, 486, 343 N.W.2d 100, 105 (1984).

on his side during the assault, and after the assault Cianciola did not get up from the cot to "go to the bathroom or anything." During cross-examination, Cianciola's lawyer pointed to portions of her preliminary-examination testimony that were inconsistent with her trial testimony, including her preliminary-examination testimony that during the assault: Cianciola was lying on his stomach, and Cianciola went to the bathroom after she pushed him off of the cot.

¶14 Cianciola has not shown that his postconviction lawyer was arguably ineffective; Judge Flanagan properly denied Cianciola's WIS. STAT. § 974.06 motion without a hearing. *See* ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437 (If a "motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.").

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.