COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2631-CR **Cir. Ct. No. 2002CF395**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY ANDREW PIATEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Larry Andrew Piatek appeals from a judgment convicting him of numerous counts arising from an altercation with a police officer during a traffic stop along with possession of cocaine and operating a

motor vehicle after revocation. He also appeals from a circuit court order denying his postconviction motion for a new trial. We affirm.

¶2 The issues on appeal arise from questions regarding Piatek's competency for trial and his drug overdose on the eve of trial. The relevant facts are lengthy but necessary to place the circuit court's competency and bias rulings in context.

¶3 Piatek was arrested in August 2002. Piatek's counsel sought a competency examination in January 2003 because Piatek was delusional and hearing voices. The circuit court ordered a competency examination. Dr. Brad Smith concluded in February 2003 that Piatek was competent, although he suffered from polysubstance dependence and antisocial personality disorder which featured deceitfulness and use of aliases. Dr. Smith opined to a reasonable degree of medical certainty that Piatek was able to understand the criminal proceedings and assist in his defense and that Piatek could choose to interact appropriately with counsel and the court.

¶4 Piatek refused to come to court on March 4 and April 23, 2003. At the next scheduled hearing on pretrial matters, May 1, Piatek claimed that he expected to be sentenced and then demanded to go home. He also claimed not to know the judge, and he alleged that drugs were being put in his food in jail. Piatek continued to have outbursts during the proceedings.

¶5 In June 2003, counsel moved to withdraw, and Piatek sought to proceed pro se. In July, the circuit court held a hearing, reviewed the file, and found that the previous competency report suggested that Piatek was "very well aware of what's going on. Manipulates the situation thoroughly. And does that consistently." After reviewing Piatek's waiver of counsel form, the circuit court

found that Piatek was not competent to proceed pro se, and the state public defender appointed counsel. The court then scheduled another competency hearing.

¶6 Successor counsel sought additional time to prepare for the competency hearing. In addition, counsel informed the court that Piatek previously attempted suicide and was an in-patient at a mental health facility, and this information would not have been included in Dr. Smith's February 2003 competency evaluation. In September 2003, Piatek withdrew his request for a competency evaluation and waived his right to present evidence relating to competency. The court found that Piatek was responsibly handling his obligations in the case.

¶7 In December 2003, the circuit court heard Piatek's motion to recuse due to bias. The court declined to recuse because its rulings against Piatek did not amount to bias.

¶8 With trial scheduled to start on Monday, April 19, 2004, proceedings were held on Friday, April 16. Piatek's counsel filed an emergency motion for a competency hearing because Piatek was planning a disturbance at trial which would result in his death, and he lacked substantial mental capacity to assist in his own defense. The motion cited Piatek's extreme agitation, lack of concentration, depression, history of prior suicide attempts, a suicide letter dated April 8, and a prior adjudication of incompetence in California. The motion also cited a marked increase in these symptoms after Piatek ceased taking Prozac.

¶9 The court found that the matters raised in counsel's motion were before the February 2003 competency examiner who opined that Piatek was competent. The court then heard argument on the request for a competency

examination. The court reviewed the so-called suicide letter and found that it was consistent with Piatek's prior conduct in the case when he made various false claims. The court suspected that Piatek was attempting to manipulate his counsel. During the hearing, the physician who prescribed Prozac for a mood disorder told the court that Piatek's symptoms would be exaggerated after he ceased taking Prozac. Piatek decided on his own to discontinue Prozac because he did not like the side effects. The physician opined that Piatek was "able to understand where he is and who people are." The physician stated that many of Piatek's problems stemmed from voluntary behavior but that if Piatek were actively suicidal, the physician could not reasonably assure that he would be fit for trial the following Monday. The physician further opined that given Piatek's previous behavior and his post-Prozac symptoms, it was not likely that his condition would improve before trial because a significant part of Piatek's conduct was voluntary and the volitional nature of that conduct was not likely to change.

¶10 In declining to order competency proceedings on April 16, the court found that Piatek brought his problems upon himself. He ceased taking Prozac without informing the prescribing physician when he was aware that he was facing a serious trial. The court found that Piatek's current conduct was consistent with his conduct throughout the case. During the hearing, Piatek demonstrated that he was following the proceedings and was alert. The court found that Piatek had been malingering and maneuvering throughout the case, was attempting to manipulate the court, and he wrote the suicide letter to serve that goal. The court did not find a basis to doubt Piatek's competency.

¶11 The parties gathered for trial three days later on Monday, April 19. Piatek refused to come to court, and he was later delivered to court shackled in a wheelchair. The court did not deem Piatek's refusal to appear as proof of

incompetence. Rather, the conduct was consistent with his previous obstreperous conduct. The court again suggested that Piatek was malingering. The State referred to transcripts of Piatek's telephone calls from the jail which established that, at least early in his confinement, Piatek was playing games and fabricating his symptoms to manipulate the court and counsel. The court observed that Piatek had been in custody for nineteen months, and it was time to try the case.

¶12 Piatek appeared in the courtroom shortly after 10:00 a.m. on Monday, April 19. Defense counsel reported that Piatek had just revealed that he had taken thirty-five Trazodone pills, his head was drooping, he appeared sleepy, and his skin was white and pasty. An officer stated that Piatek was alert during transportation to the courtroom from the jail. The court was skeptical that Piatek had actually taken the pills but decided to send Piatek to the hospital for evaluation and treatment, if necessary.[1] Court reconvened after lunch, and the prosecutor reported that the hospital expected Piatek to be ready for trial the next day. The court reiterated that Piatek was manipulating the court and counsel in an attempt to delay the trial.

¶13 On April 20 at 11:00 a.m., court convened. When Piatek joined the proceedings at 1:00, the court noted that defense counsel had conferred with Piatek, and defense counsel stated that they were ready to proceed. Defense counsel mentioned that Piatek's physician thought he should see a psychiatrist. Security concerns prompted the court to deny Piatek the use of a writing implement during trial, and Piatek had to whisper to his counsel. On the last day

[1] The hospital pumped Piatek's stomach.

of trial, the court admonished Piatek for whispering too loudly. The jury convicted Piatek on all but one count.

¶14 Postconviction, Piatek alleged that the circuit court erred in declining a competency examination April 16 and should have ordered an examination sua sponte on April 20 in response to the Trazodone overdose. Piatek also alleged that the court was biased and that he was denied due process and a fair trial because trial commenced while he was withdrawing from the Trazodone overdose. Piatek sought a new trial due to newly discovered evidence of the amount of Trazodone in his system and expert testimony on the effects of Trazodone which was not available on April 20 when Piatek returned to court from the hospital.

¶15 At the postconviction motion hearing, Dr. John Pankiewicz, a forensic psychiatrist, testified that Trazodone is a sleep aid and has sedating effects. The doctor testified that patients experience mental dulling at a Trazodone dose of 25 mg.; the laboratory reports indicated that Piatek had ingested 5000-6000 mg. Piatek's mental status was checked from the evening of the first day of trial, April 19, until he was discharged the following day. Piatek's hospital stay would not have been restful as he was repeatedly awakened for monitoring and mental status checks. The psychiatrist opined that to a reasonable degree of medical certainty, Piatek was not competent for trial when he returned to court on April 20 due to the effects of the Trazodone on his mental alertness and functioning, and Piatek would have had difficulty following the proceedings and conferring with and assisting his counsel. The psychiatrist opined that a person's behavior and outward appearance might not indicate Trazodone-induced cognitive dullness.

¶16 On cross-examination, the psychiatrist opined that the Trazodone would have been metabolized by early in the morning of April 20. Nevertheless, Piatek still would have been affected by the large dosage and would not have been competent for trial on April 20 because he would have been cognitively dull. However, assuming Piatek had adequate rest on the evening of April 20, Piatek likely would have been competent for trial by April 21. The psychiatrist admitted that in preparing his opinion, he did not review the transcripts of the April 20 proceedings, and did not talk to defense counsel, the security officers or the treating physicians about Piatek's demeanor on April 20. His opinion that Piatek would have been incompetent for trial on April 20 was based solely upon the amount of Trazodone Piatek ingested. The psychiatrist conceded that Piatek may not have been as affected by the overdose and subsequent treatment as other patients who might have been rendered incompetent for trial under similar circumstances. The psychiatrist conceded that it was possible Piatek was competent for trial on April 20.

¶17 On redirect, the psychiatrist clarified that a patient is discharged from the hospital once the patient no longer needs hospital-based care; a discharge does not mean that the patient is no longer suffering from the effects of a drug overdose.

¶18 The State called Sergeant Thomas Hausner who was in charge of court security. He spent hours with Piatek during his time in jail. He was at the hospital when Piatek was released, and he followed Piatek back to the courthouse.

Hausner testified that on April 20, Piatek was alert, answered appropriately and seemed to be the same person he was before the overdose.[2]

¶19 The State argued that Piatek was competent for trial because the hospital discharge summary described Piatek as alert, stable and appropriate for discharge. Furthermore, defense counsel did not alert the court on April 20 that Piatek was unable to participate meaningfully at trial.

¶20 The circuit court ruled that the history of Piatek's malingering and manipulative conduct was central to its analysis of the events of April 16-20. The court found that on April 16, there was ample evidence that Piatek was manipulating the court and delaying trial and there was no need for another competency examination. The court found that Piatek intentionally overdosed on Trazodone on the first day of trial, April 19, and the necessary steps were taken to address Piatek's health.

¶21 In determining that Piatek was competent on April 20, the court gave less weight to the psychiatrist's competency opinion because the opinion was incomplete. The psychiatrist did not consult with defense counsel, Piatek's treating physicians or the security officers who were with Piatek on April 19 and April 20 before opining that Piatek was not competent for trial on April 20. The court placed greater weight on Hausner's testimony and noted that the sergeant described what everyone else had witnessed about Piatek's condition on April 20.

[2] At the conclusion of the evidence, the court inquired why postconviction counsel had not presented the testimony of defense counsel; postconviction counsel cited a strategic reason for not presenting such testimony.

The weight of the evidence is for the fact finder. ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988).

¶22 The court found that Piatek had recovered from his overdose by the time he appeared in court on April 20, and he was competent for trial. When he returned to court on April 20, Piatek sat alertly next to counsel and exhibited no signs that he was unable to participate in the trial. Neither counsel nor Piatek suggested to the court on April 20 that Piatek was unable to proceed. In fact, defense counsel stated that Piatek was ready for trial. Defense counsel was a zealous advocate for Piatek, and counsel would have raised concerns about Piatek on April 20 if counsel had any such concerns, particularly since counsel had questioned Piatek's competency at earlier points in the proceeding. In light of the foregoing findings, the court rejected the suggestion that it had a sua sponte duty to determine Piatek's competence for trial on April 20 when he returned to court from the hospital. Finally, the court observed that

> if somebody actually takes medication with the full intent to not be able to help his counsel and to delay the trial, can he be allowed to do that, and under the circumstances has he voluntarily waived his right, at least for that amount of time, to participate? I'm inclined to believe he has.

The court denied the postconviction motion.

¶23 On appeal, Piatek argues that the circuit court erred when it denied his request for a competency evaluation on April 16 and on April 20 after his Trazodone overdose. Our analysis is guided by two principles: (1) an individual's competency for trial is a legal, not a medical, determination and (2) the circuit court is generally better equipped to observe and evaluate a party's conduct and condition than is this court relying on a paper record.

¶24 A court shall order competency proceedings "whenever there is reason to doubt a defendant's competency to proceed." WIS. STAT. § 971.14(1) (2005-06).[3] "A reason to doubt competency can arise from the defendant's demeanor in the courtroom, colloquies with the court, or by a motion from either party." ***State v. Byrge***, 2000 WI 101, ¶29, 237 Wis. 2d 197, 614 N.W.2d 477. Whether a defendant is competent to stand trial is a judicial inquiry, not a medical determination. ***Id.***, ¶31. "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." ***Id.*** (citation omitted). "[T]he court considers a defendant's present mental capacity to understand and assist at the time of the proceedings." ***Id.***

¶25 The role of the trial court in making competency decisions is well understood:

> The trial court is in the best position to decide whether the evidence of competence outweighs the evidence of incompetence. Although the court could make precise findings of fact about the skills and abilities the defendant does and does not possess, the court must ultimately determine whether evidence that the defendant is competent is more convincing than evidence that he or she is not. The trial court is in the best position to make decisions that require conflicting evidence to be weighed. Although the court must ultimately apply a legal test, its determination is functionally a factual one: either the state has convinced the court that the defendant has the skills and abilities to be considered "competent," or it has not.
>
> The trial court's superior ability to observe the defendant and the other evidence presented requires deference to the trial court's decision that a defendant is or is not competent to stand trial.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

State v. Garfoot, 207 Wis. 2d 214, 222-23, 558 N.W.2d 626 (1997).

¶26 The circuit court's findings of fact relating to competency will not be upset unless they are clearly erroneous, particularly "because the circuit court is in the best position to apply the law to the facts." ***Byrge***, 237 Wis. 2d 197, ¶4.

¶27 With regard to the circuit court's April 16 determination that a competency evaluation was not necessary, we conclude that the court's findings of fact are not clearly erroneous. The court found that Piatek's suicide letter was consistent with his prior conduct in the case, including false claims, Piatek was attempting to manipulate his counsel, and whatever problems Piatek was having, he brought them on himself by ceasing Prozac without consulting a physician and when his trial was imminent. During the April 16 hearing, Piatek demonstrated that he was following the proceedings and was alert. The court found that Piatek was malingering and maneuvering and has been doing so throughout the case. The court did not find a basis to doubt Piatek's competency on April 16. The court's findings of fact are not clearly erroneous, and the court applied the proper legal standards.

¶28 Piatek next argues that the court erred on April 20 when it failed to order a competency examination sua sponte to determine his competency after the Trazodone overdose. Again, we disagree. Postconviction, the circuit court noted there were no indications on April 20 that Piatek had to be evaluated for competency. The court's observations of Piatek, the failure of Piatek's counsel to raise the competency issue and counsel's assertion that Piatek was ready for trial, the lack of weight the court gave to the psychiatrist's testimony about Piatek's alleged impairment on April 20, the testimony of the officer who was with Piatek that day, and the hospital discharge summary all support the circuit court's finding

that Piatek was competent for trial on April 20. We reject Piatek's argument that the court should have engaged him in a colloquy to assess his condition on April 20. The court's findings of fact are not clearly erroneous, and the court applied the proper legal standards.

¶29 Piatek next contends that the circuit court erroneously believed that the February 2003 competency evaluator was aware of his prior suicide attempt. Knowledge or lack thereof of the alleged prior suicide attempt does not change our analysis. "Although a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial." ***Id.***, ¶31. After considering Piatek's conduct, his demeanor in court, the voluntariness of his actions and the physician's opinion, the circuit court properly declined to order a competency evaluation on April 16 or April 20.

¶30 Piatek claims that he had a due process right to be present at trial in an unsedated condition. *See* ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983) (defendant has a right to be present at trial). The premise of Piatek's argument is flawed. The record before this court does not indicate that Piatek attended his trial in a sedated condition. As noted above, there was no indication that Piatek was anything other than alert and ready for trial on April 20 upon his return from the hospital. The circuit court was in the best position to determine this, and the court's postconviction rationale for permitting trial to go forward on April 20 is supported by the record, including its findings of fact and its credibility determinations. Piatek's claim that he appeared "before the jury in an extremely drugged condition" is not borne out by the record.

¶31 Finally, Piatek argues that Judge Kennedy was biased against him. Postconviction, Judge Kennedy ruled that he was not biased against Piatek. The

court found that it took numerous steps to insure that Piatek had a fair trial, including granting continuances and insuring that the security measures to counter Piatek's threat to disrupt proceedings were not visible to the jury.

¶32 Alleged judicial bias has two components: subjective and objective. The subjective component is based upon the judge's own determination of whether he or she can act impartially. ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). The objective bias component focuses on actual bias or the appearance of bias and whether a reasonable person could question the judge's impartiality. ***State v. Gudgeon***, 2006 WI App 143, ¶21, 295 Wis. 2d 189, 720 N.W.2d 114, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204. We presume that the judge was fair and impartial unless Piatek rebuts that presumption. ***Id.***, ¶20.

¶33 Judge Kennedy rejected Piatek's subjective bias claim. We are bound by that decision. ***State v. Santana***, 220 Wis. 2d 674, 686, 584 N.W.2d 151 (Ct. App. 1998) (judge's assessment of subjective bias is final).

¶34 Piatek points to specific instances of objective bias: the judge reviewed the record upon being assigned to the case, the judge failed to allow argument on Piatek's December 2003 motion that he recuse himself due to bias, the judge chastised him for whispering too loudly to counsel after the judge deprived him of a writing implement, the judge did not deem Piatek's letter a suicide note although the judge took extra security precautions in response to the letter, Piatek overdosed but the judge did not conduct a colloquy with Piatek about his condition when he returned to court and did not order a competency examination after the overdose. We have affirmed Judge Kennedy's rulings.

None of these matters bespeak objective bias and would not cause a reasonable person to question Judge Kennedy's impartiality.

¶35 Although Judge Kennedy ruled a number of times against Piatek, a scorecard or tally of judicial decisions does not amount to evidence of bias. *Cf.* ***United States v. International Bus. Machs. Corp.***, 618 F.2d 923, 929 (2nd Cir. 1980) ("Judicial independence cannot be subservient to a statistical study of the calls [the trial court] has made during the contest."). "A trial judge must be free to make rulings on the merits without the apprehension that if he [or she] makes a disproportionate number in favor of one litigant, he [or she] may have created the impression of bias." ***Id.***

¶36 Because we do not agree with Piatek that reversible error occurred, we reject his request for a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.