COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1457 **Cir. Ct. No. 2005CF71**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KODY J. CONGDON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LLOYD CARTER, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Kody Congdon appeals an order that denied his postconviction motion for plea withdrawal. The issues raised on appeal are whether there was a factual basis for the plea and whether trial counsel provided ineffective assistance leading up to the plea by arranging for Congdon to take a polygraph test and by advising Congdon that he could not take the stand and perjure himself. We conclude that Congdon is judicially estopped from challenging the factual basis for the plea, and that the facts adduced at the postconviction hearing do not support a conclusion that trial counsel provided ineffective assistance. Accordingly, we affirm.

BACKGROUND

¶2 The State initially charged Congdon with two Class C felonies of sexual assault of a child under the age of 16 based on allegations that, when he himself was 16, Congdon had held a 13-year-old girl on a couch and forced her to touch his penis under a blanket until he ejaculated, and that he pulled her top down and sucked the girl's breast. Congdon denied the charges, asserted that he had an alibi for the date the girl initially claimed the assault had occurred, submitted a DNA sample that excluded him as the donor of DNA on the blanket (which was not turned over to police until more than a month after the alleged assault), and indicated that he wanted to proceed to trial.

¶3 A few days before trial, trial counsel had Congdon take a polygraph test, hoping that she could use the results to persuade the district attorney to dismiss the charges. Up until that point, Congdon had repeatedly denied to trial counsel that he had committed the offenses, and she believed that they had a strong case. However, Congdon failed the polygraph test and then, without prompting, admitted to trial counsel for the first time that he had, in fact, engaged

in sexual contact with the victim, just not on the dates she had claimed. Counsel then advised Congdon that he could not get on the stand and testify that he did not do it, or that she could not continue to represent him if he did so testify, because it would constitute perjury.

¶4 Congdon's admission changed trial counsel's view of the strength of the case because she had been planning to put him on the stand. Also, the State had just obtained a pretrial ruling allowing it to present other acts evidence that Congdon had been adjudicated delinquent for assaulting another 13-year-old girl. After discussing with Congdon how difficult it would be to prevail at trial without testifying, particularly given the other acts evidence and the amount of prison time Congdon would be facing if he was convicted, trial counsel obtained Congdon's agreement not to go to trial and then negotiated with the district attorney for a single, reduced charge of third-degree sexual assault, with a joint recommendation for probation.

¶5 At the plea hearing, Congdon admitted only to nonconsensual sexual contact with the victim similar to that described in the complaint. Nonetheless, both trial counsel and the State urged the court to find a factual basis for the amended charge of third-degree sexual assault—consisting of nonconsensual intercourse—based upon ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994). ***Harrell*** holds that, in a plea bargain situation, the court may rely upon a factual basis for an originally charged offense that is related to a lesser offense for which a plea is offered, even if the described conduct does not precisely match the amended charge. ***Id.*** at 418-19. After conducting a colloquy, the court made a finding that there was a factual basis for the more serious original charge, and accepted Congdon's plea to the reduced charge.

STANDARD OF REVIEW

¶6 This court will independently determine whether the criteria for judicial estoppel have been satisfied. ***State v. Johnson***, 2001 WI App 105, ¶9, 244 Wis. 2d 164, 628 N.W.2d 431.

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for counsel's actions unless those findings are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *See* ***id.***

DISCUSSION

Factual Basis for Plea

¶8 Congdon contends that the circuit court erred in relying upon ***Harrell*** to find a factual basis for his plea because an earlier decision by this court explicitly rejected the proposition that when a complaint provides a factual basis for a more serious offense it also supports a lesser charge, even though the complaint does not address a necessary element of the lesser offense. *See* ***State v. Harrington***, 181 Wis. 2d 985, 991, 512 N.W.2d 261 (Ct. App. 1994). The State responds that Congdon is barred from raising this issue by the doctrine of judicial estoppel.

¶9 Judicial estoppel is an equitable doctrine that prevents a party from taking a position in one court that is inconsistent with a position the party has

previously taken in another court on the same issue, after the party successfully convinced the first court to adopt the inconsistent position. *See* ***Johnson***, 244 Wis. 2d 164, ¶¶9-10.

¶10 Congdon first asserts that the State waived the issue of judicial estoppel by not raising it in the circuit court. However, a respondent may advance for the first time on appeal any argument that would sustain the circuit court's ruling. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

¶11 Congdon next argues that "basic principles of justice" preclude application of the doctrine of judicial estoppel in the context of a challenge to the factual basis for a plea. He quotes ***State v. Mendez***, 157 Wis. 2d 289, 459 N.W.2d 578 (Ct. App. 1990), where we stated that "'[t]he purpose of the statutory requirement for a court inquiry as to basic facts is to protect the defendant who pleads guilty voluntarily … but not realizing that his conduct does not actually fall within the statutory definition of the charge.'" ***Id.*** at 294 (quoted source omitted). Here, however, Congdon was entirely aware that his conduct did not match the intercourse element of the charge to which he pled. Congdon asked the circuit court to accept his plea anyway, in reliance on ***Harrell***, and now contends that the circuit court erred in relying on ***Harrell***.

¶12 In sum, this case presents a textbook example of a party repudiating on appeal a position that he or she has taken in a lower court after convincing the lower court to adopt that position. We agree with the State that Congdon is judicially estopped from arguing that the circuit court erred in relying on ***Harrell***.

Assistance of Counsel

¶13 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably and show that his or her attorney made errors so serious that counsel was not providing representation guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** In evaluating counsel's conduct, we must be careful to avoid the "'distorting effects of hindsight.'" ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted). To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. *See* ***Swinson***, 261 Wis. 2d 633, ¶58. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶14 Congdon first argues that trial counsel provided ineffective assistance by having him take a polygraph test days before trial. However, we are satisfied that counsel's performance was not deficient in this regard because she had a sound strategic reason for her actions—that is, seeking to obtain additional leverage for dismissal of the charges. Given that Congdon had been consistently denying to counsel that he had committed the charged offenses, that he had an alibi for the first alleged date of the offenses, and that his DNA was not present on the blanket, counsel had good reason to anticipate that Congdon could pass a polygraph test.

¶15 Congdon next argues that trial counsel provided ineffective assistance by telling him that she could not put him on the stand to testify that he had not had sexual contact with the victim after he had admitted to counsel that he did. We will assume for the sake of argument that counsel's advice constituted deficient performance because counsel did not advise Congdon that he could have testified in narrative format or sought successor counsel. However, we conclude that Congdon has failed to establish prejudice because his assertion that he would not have pled and, instead, would have insisted on going to trial does not survive the circuit court's credibility determination.

¶16 Congdon testified that he would have gone to trial because he was in fact innocent, and, in this regard, denied ever having admitted to trial counsel that he had sexual contact with the victim. But the circuit court deemed trial counsel's testimony to have been "substantially more credible" than Congdon's, and explicitly found that Congdon had admitted to trial counsel that he had sexual contact with the victim. Additionally, the State drew the circuit court's attention to the fact that Congdon described the sexual contact he had with the victim to the PSI author.

¶17 Because Congdon's postconviction assertion that he would have insisted on going to trial was tied to his false innocence assertions, it does not provide grounds to believe that he would have proceeded to trial, especially on two alleged Class C felonies after the circuit court had ruled that other acts evidence would come in and when he had been offered a chance to plead to a single Class G felony with a probation recommendation.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).