COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0414-CR **Cir. Ct. No. 99 CF 1882**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Michael L. Morris appeals from the judgment of conviction, following his guilty plea to sexual exploitation of a child, and from the order denying his motion for postconviction relief. In a series of somewhat vague and disjointed arguments, Morris contends that "ineffective assistance on the part of counsel and abuse of discretion on the part of the court violated [his] due

process right to be sentenced on accurate and permissible considerations." More specifically, he seems to suggest that defense counsel was ineffective for: (1) urging the court to rely on a federal presentence investigation report which, he says, counsel had inadequately reviewed with him; and (2) declining the court's offer to adjourn the sentencing hearing and order a state presentence investigation report. He also argues that "it was ineffective assistance of counsel or, alternatively, an abuse of discretion, to obtain and use any portion of the confidential federal [presentence] whatsoever." He requests that we reverse the postconviction order, vacate the judgment of conviction, and remand for resentencing. We affirm.

I. BACKGROUND

¶2 Morris, a forty-four-year-old man, met the victim, a fourteen-year-old girl, in an internet "chat room." Morris admitted that, in pursuing what he considered a romantic and consensual relationship, he came to Wisconsin four times to see the girl, bought her an entire outfit (including underwear), gave her a ring, took her to restaurants, accepted collect calls from her and gave her phone cards, took her to a hotel where he photographed her in the nude, and took her to his home in Indiana. He estimated that he had had contact with her on about twenty days during the thirty days preceding the date of the state-charged offense.

¶3 Morris pled guilty to two federal charges and one state charge stemming from his conduct with the girl. At the state court guilty plea hearing, defense counsel advised the court of the federal presentence report that had been prepared for Morris's federal sentencing and stated that the defense "would be waiving any further presentence, and [Morris] would continue to use the federal presentence." Prior to Morris's state sentencing one week later, the parties

reviewed the federal presentence and, on the day of sentencing, provided it to the court. At that sentencing hearing, after the prosecutor, the victim's mother and stepfather, Morris's adopted daughter, and Morris's attorney had addressed the court, Morris, in the course of his statement, disputed certain information in the federal presentence and advised the court that he had "submitted a list of corrections" to it, apparently for the federal court sentencing. No one at the state sentencing, however, had that list.

¶4 As a result, the state court indicated its willingness to adjourn the sentencing hearing, "dismiss this entire [federal] presentence," and order a state presentence report. The court then added, "That's the only way to correct this record, unless you have some ideas."[1] After rejecting what it considered an all-too-cumbersome process of eliciting what might have been Morris's line-by-line disputes with the federal presentence, the court further advised, "It's far more efficient to get a [state] presentence that's objective and separate from this [federal presentence] than to go through that [line-by-line] process." The following discussion then took place:

> [DEFENSE COUNSEL]: [Morris] indicates, Your Honor, he would like to proceed at this time.
>
> THE COURT: So how are we going to correct this record?
>
> ….
>
> [MORRIS]: Apparently, there is no way to do so. Any corrections I might make, if you don't believe them then at this point –
>
> THE COURT: It's not a question of whether I believe them, sir. I'm not going to argue with you corrections –

[1] The court also commented, "We've got an absolute appeal here if he does not read that presentence and tell me what the errors are in this presentence and make a record of them."

> [MORRIS]: I'm not trying to argue –
>
> THE COURT: Wait. Let me finish this. I'm not going to argue with you corrections. You tell me you want to correct something, it's corrected, but I can't get the information from you through this [federal presentence] on this record. That's the problem.

¶5 Following further brief discussion, the court then offered to continue the sentencing, relying "on only the letter from the [victim's] mother, [incorporated into the federal presentence report,] and ignor[ing] everything else that's in there, if you want me to, and proceed in that manner." Following a discussion off the record, Morris responded, "We'll proceed."[2] The court then questioned Morris at length about the nature and extent of his relationship with the victim. The court sentenced him to seven years in prison, consecutive to the three-year sentence he had received in federal court, and ordered that he undergo sexual-offender treatment.

¶6 Denying Morris's motion, the postconviction court, which also was the sentencing court, emphasized, "The record clearly shows that the court did not consider the content of the federal presentence report and continued with the hearing on terms that the defendant expressly consented to after an opportunity to confer with his counsel." The court explained that it had relied on: (1) its direct questioning of Morris regarding his contact with the victim and his intention to continue his relationship with her; (2) the information contained in the amended complaint; (3) the prosecutor's remarks at sentencing; and (4) the remarks made by the victim's mother and stepfather at sentencing.

[2] Earlier in the proceedings, when offered an adjournment to obtain the federal presentence report that, initially, had not been presented at the state sentencing, Morris's attorney also had expressed the desire to proceed with the sentencing that day, in part because Morris's adopted daughter had traveled from Indiana to Milwaukee for the hearing.

II. DISCUSSION

¶7 "A defendant has a due process right to be sentenced on the basis of true and correct information." ***State v. Anderson***, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (Ct. App. 1998). "A defendant who requests resentencing must show that specific information in the [presentence investigation report] was inaccurate and that the court actually relied upon the inaccurate information in sentencing." ***Id.*** Here, in two rather obvious ways, the record refutes Morris's claims.

¶8 First, the record establishes that any possible inaccuracies in the federal presentence report were immaterial because the state sentencing court ultimately did not rely on that report. While Morris maintains that "[t]he sentencing court's remarks, and the tenor of its close questioning of [him], reveal that it considered inaccurate and disputed information, notwithstanding that in its postconviction decision the court denied doing so," he offers nothing to support his accusation. Indeed, the sentencing record reflects that the court, explicitly acknowledging that potential appellate problems could result from reliance on disputed information in the federal presentence report, took pains to elicit *Morris's* account of his conduct. And, in its postconviction decision, the court confirmed that it had not relied on the federal presentence (with the exception of the letter from the victim's mother).

¶9 Second, the record establishes that the sentencing court proceeded as Morris implicitly agreed it should. As noted, the court offered Morris a number of options. When it offered to "rely on … only the letter from the [victim's] mother, [incorporated into the federal presentence report,] and ignore everything else that's in there, if you want me to, and proceed in that manner," Morris, after a discussion off the record, responded, "We'll proceed." Thus, he is judicially estopped from

challenging the very procedure he endorsed. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (equitable doctrine of judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position").

¶10 Finally, Morris's ineffective-assistance-of-counsel claims also fail. Our standard of review is well known and need not be detailed here. To prevail on such a claim, a defendant must establish that counsel's performance was both deficient and prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A trial court has discretion to deny a motion for an evidentiary hearing on an ineffective-assistance claim if the motion fails to allege sufficient facts to raise a question of fact regarding whether counsel's performance was deficient and prejudicial, or if the motion presents only conclusory allegations, or if the record establishes that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

¶11 Here, Morris's ineffective-assistance claims—that counsel urged the court to rely on the federal presentence report which, he says, counsel inadequately reviewed with him; that counsel declined the court's offer to adjourn the sentencing hearing and order a state presentence report; and that counsel failed to object to any use of the federal presentence—are all premised on his position that the sentencing court relied on the federal presentence. As we have explained, however, that premise is refuted by the record. Accordingly, even if counsel's

alleged failures constituted deficient performance, they could not have been prejudicial.[3]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

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[3] Morris also presents at least two arguments that are quite confusing, if not wholly frivolous.

First, Morris contends that because Judge Flanagan, who sentenced him, "was a sex-crimes prosecutor in the same office and unit as the [assistant district attorney] handling this case[,] prior to her ascension to the bench," she imposed an unjust sentence. He clarifies that he "is not suggesting any sort of misconduct or improper behavior" by Judge Flanagan but, rather, is contending that her sentencing remarks, "especially in conjunction with her professional background," reflect that "a blurring of the judicial and prosecutorial roles occurred."

Morris offers nothing to substantiate his claim. Many judges are former assistant district attorneys who prosecuted sex crimes. Generally, their professional experience may enhance their understanding of sentencing issues in sex-crimes cases and, specifically, Morris has presented nothing to show that Judge Flanagan was unfair.

Second, in a most puzzling argument, Morris takes exception to a claim made by the victim's mother, at the sentencing hearing, that he violated the federal court's no-contact order, included in the federal sentence, by writing to the child. He contends that the federal court no-contact order would only have taken effect if he had been released and, because he was incarcerated when he wrote to the victim, such contact was improperly considered at sentencing.

Morris was sentenced in federal court on April 12, 1999. He was before the state court on April 15, 1999, when the court commissioner issued a "No Contact Order" providing, in part, that "as a condition of [his] release," Morris was to have "absolutely no contact whatever" with the victim, including "through the mail." At the June 9, 1999 pretrial hearing in the state case, the prosecutor informed the court that Morris had written the victim from prison, leaving the family "extremely upset." The court then admonished Morris, "You do not contact this victim one way or another; do you understand that?"

At the state sentencing, Morris admitted that he had written a letter to the victim, from prison, on May 29 or 30, 1999, in which he stated, in part, "I love you, … I'm trying hard to find a way out of this mess and do the least amount of time so I can be with you." Morris's intention to continue his relationship with the victim, as expressed in the letter, was relevant to sentencing. Nevertheless, the postconviction court observed that it had not "rel[ied] on the mother's characterization and did not consider any violation of a no[-]contact order when it sentenced the defendant." Instead, the court explained, it "focused on the content of the letter and discussed it with the defendant directly."