COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2985-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

¶1 FINE, J. Brian Armstrong appeals from a judgment entered on a bench-trial verdict convicting him of battery. *See* WIS. STAT. § 940.19(1). He asserts two claims of alleged trial-court error. First, he contends that he did not knowingly and voluntarily waive his right to a jury trial. Second, he argues that his trial lawyer gave him ineffective representation, both in connection with his

giving up of his right to a jury trial and in connection with the lawyer's conduct at the trial. We affirm.

1. Jury-trial waiver.

¶2 A "defendant's right to a jury trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, sec. 7 of the Wisconsin Constitution. It is well established that the right to trial by jury can be completely waived in favor of trial by the court." ***State v. Livingston***, 159 Wis. 2d 561, 565–566, 464 N.W.2d 839, 841 (1991) (footnote omitted); *see also* WIS. STAT. § 972.02(1) ("Except as otherwise provided in this chapter, criminal cases shall be tried by a jury ... unless the defendant waives a jury in writing or by statement in open court ... on the record, with the approval of the court and the consent of the state."). Armstrong does not contend that the trial court did not comply with the procedure set out in either § 972.02(1) or ***Livingston***; rather, he claims, in essence, that he was lying when he told the trial court that he did not want a jury trial. The trial court questioned Armstrong carefully about the rights that Armstrong was giving up:

- Armstrong told the trial court that he had not taken and drugs or alcohol before he came to court that day;
- Armstrong told the trial court that he understood that he had a right to be tried by a jury of twelve persons;
- Armstrong told the trial court that he understood that a jury would hear all of the testimony from the witnesses before deciding whether Armstrong was guilty or not guilty;
- Armstrong told the trial court that he understood that before a jury could find him guilty or not guilty all twelve jurors would have to agree on a verdict;

- Armstrong told the trial court that he understood that by giving up his right to a jury trial he was agreeing to have his guilt or innocence decided by one person—the judge;
- Armstrong told the trial court that he wanted to give up his right to a jury trial;
- Armstrong told the trial court that he wanted a court trial instead of a jury trial;
- Armstrong told the trial court that no one had either pressured him or threatened him to get him to give up his right to a jury trial;
- Armstrong told the trial court that no one had promised him anything to get him to give up his right to a jury trial;
- Armstrong told the trial court that he was giving up his right to a jury trial of his own free will;
- Armstrong told the trial court that he had had enough time to discuss his giving up his right to a jury with his lawyer;
- Armstrong told the trial court that it was his signature on the jury-trial-waiver form, and that by signing the form he was waiving his right to a jury.[1]

Additionally, Armstrong's trial lawyer told the trial court, in response to the trial court's questions, that he was satisfied that Armstrong understood the difference between a jury and a court trial, including the requirement that the jury be unanimous before it could return a verdict. Armstrong's trial lawyer also told the trial court that he was satisfied that Armstrong was giving up his right to a jury trial freely, voluntarily, and intelligently. On the basis of all that the trial court found that Armstrong was waiving his right to a jury trial "freely, voluntarily, knowingly, with the understanding of his right to a jury trial with a unanimous verdict and the difference between a jury and a court trial." Nevertheless,

[1] The form is not in the appellate record.

Armstrong contends that he really did not understand the nature of the rights he was giving up by waiving a jury trial, and that his answers to the trial court were all a charade. He says that his lawyer was also lying, and that the only reason he, Armstrong, went along with the charade was because his lawyer told him that, as phrased by his successor trial counsel, "that the judge would not find him guilty."

¶3 In the law as in life, a person may not have it both ways. In life, it is called making choices; in law, it is called judicial estoppel. The doctrine of judicial estoppel "'protect[s] against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions.'" ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817, 820 (1996) (quoted source omitted). The doctrine, however, has "'never been applied'" to situations where the earlier position was taken because of "'fraud, inadvertence, or mistake.'" ***Ibid.*** (quoted source omitted). But, "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'" ***Id.***, 201 Wis. 2d at 351, 548 N.W.2d at 822 (quoted source omitted).

¶4 In light of the trial court's extensive and intensive questions designed to ensure that Armstrong's decision to give up his right to a jury trial was knowing and voluntary, and Armstrong's unequivocal affirmance that that was what he wanted to do, Armstrong's challenge to that decision *after* the trial court found him guilty, is precisely the type of manipulation that the doctrine of judicial estoppel is designed to thwart. Stated another way and as noted by the Wisconsin Supreme Court in another context, "'[w]e cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge.'" ***Pure Milk Prods. Coop. v. National Farmers Org.,*** 64 Wis. 2d 241, 249, 219 N.W.2d 564, 568-569

(1974) (peremptory challenge to judge that was timely under statute permitting such automatic disqualifications came too late when made after judge decided contested matter). Here, Armstrong "tested the water" by opting for a bench trial. He was found guilty, and "'his interests have changed.'" *See* ***Petty***, 201 Wis. 2d at 351, 548 N.W.2d at 822 (quoted source omitted). No doubt, he would love to have another shot at an acquittal. But he may not now controvert what he so clearly affirmed in his colloquy with the trial court.

2. Ineffective assistance of counsel.

A. Waiver of jury trial.

¶5 As noted, a person is not barred by the doctrine of judicial estoppel from asserting a position at odds with a position taken earlier if the earlier position was taken as the result of "fraud, inadvertence, or mistake.'" ***Id.***, 201 Wis. 2d at 347, 548 N.W.2d at 820. Thus, Armstrong argues that he was lured into lying to the trial court because his lawyer told him to do so. If established, this might relieve him from the consequences of his jury-trial waiver. *See* ***State v. Fritz***, 212 Wis. 2d 284, 569 N.W.2d 48 (Ct. App. 1997) (perjury in reliance on lawyer's unethical advice does not estop defendant from seeking relief based on an ineffective-assistance-of-counsel claim). But Armstrong did not make this argument before the trial court in the context of an infective-assistance-of-counsel claim, and we will generally not consider arguments made for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980). Although Armstrong contends that he sort of raised the alleged ineffective-assistance-of-counsel claim by blaming his lawyer for his dishonest responses to the trial court, he did not seek a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804–805, 285 N.W.2d 905, 908–909 (Ct. App. 1979)

(evidentiary hearing required where ineffective-assistance-of counsel claim turns on "counsel's conduct at trial"), even though he did ask for an evidentiary hearing to show the trial court that he was lying when he said he was voluntarily giving up his right to a jury. The distinction, however, between a claim for relief premised on an alleged constitutional violation on the one hand, and a claim of ineffective assistance of counsel on the other, is significant—even if the claims arise from the same operative facts. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (substantive constitutional claim and a related ineffective assistance claim "have separate identities and reflect different constitutional values.") (quoted source omitted). The trial court was obligated to address Armstrong's postconviction motion in the manner in which it was presented, not to scour the law and the record to see if there was a theory that Armstrong did not argue on which he might have prevailed—that was the job of Armstrong's lawyer. The trial court decided correctly the issue presented to it.

B. Conduct of the trial.

¶6 In addition to arguing on appeal that Armstrong's trial counsel was ineffective for advising him to waive his right to a jury trial and lie to the trial court, Armstrong also argues that his trial lawyer did not give him effective representation during the trial. These arguments, amorphous and conclusuory, were also not made to the trial court and, accordingly, we will not address them here.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.