

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-1291-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**REGIES MUNDY,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Dane County:  
MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Regies Mundy appeals from an order denying his motion for sentence credit under § 973.155, STATS. Because Mundy was sentenced in accordance with a plea agreement that did not contemplate any credit, we conclude that Mundy is estopped from now claiming sentence credit. Therefore, we affirm.

While on parole for bail-jumping, Mundy committed three new offenses. A criminal complaint, charging Mundy with attempted first-degree intentional homicide while using a dangerous weapon, armed robbery and possession of a firearm by a felon, was filed on January 22, 1993. All three counts contained repeater allegations under § 939.62, STATS. Under the criminal complaint, Mundy faced a possible seventy-three years in prison. Mundy was taken into custody on a parole hold on February 22, 1993. An initial appearance was held on February 23, 1993, and cash bail was set. The State does not dispute Mundy's assertion that his parole was revoked on April 15, 1993.

The State and Mundy reached a plea agreement. The State filed an Amended Information that reduced the attempted first-degree intentional homicide charge to first-degree reckless injury and dropped the repeater allegations. Mundy's potential imprisonment was reduced to thirty-seven years. The State and Mundy also reached a joint sentencing recommendation totaling eighteen years, to be served concurrent with Mundy's prior sentence. The parties also recommended that the sentence "begin immediately." On July 7, 1993, Mundy entered no contest pleas to the Amended Information, and bail was revoked pending sentencing.

Mundy was sentenced on September 15, 1993. After stating that it would accept the parties' joint sentencing recommendation, the court inquired into possible sentence credit. The prosecutor stated his belief that Mundy was not entitled to any credit and that the parties had agreed that "the 18 years begin immediately from pronouncement." Defense counsel acquiesced in the prosecutor's statement. The court then sentenced Mundy to twelve years on count 1, six years on count 2, consecutive to count 1, and two years on count 3, concurrent with count 2. The court then stated, "There is as I understand the agreement no credit. Sentence is to commence forthwith ...." Mundy did not disagree with the court's description of the plea agreement.

On appeal, Mundy argues that he is entitled to sentence credit "for all time served subsequent to the setting of cash bail," or in other words, from February 23, 1993 until September 15, 1993. We agree with the State that the

plea agreement provided that Mundy would receive no sentence credit and that Mundy is estopped from now seeking credit.<sup>1</sup>

Judicial estoppel precludes a party from asserting one position before the trial court and a contrary position before this court. See *In re H.N.T.*, 125 Wis.2d 242, 253, 371 N.W.2d 395, 400 (Ct. App. 1985). "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *State v. Gove*, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989).

The parties agreed that the sentence "commence forthwith." The trial court stated that it understood that the parties had agreed that Mundy would not receive any sentence credit. As could be expected in light of the overall favorable nature of the plea agreement, Mundy did not dispute the court's statement. Judicial estoppel has been applied when an otherwise mandatory statutory requirement was waived by agreement. See *State v. Hardwick*, 144 Wis.2d 54, 60-61, 422 N.W.2d 922, 925 (Ct. App. 1988) (parties had agreed to an extension of probation without the statutorily required determination of good cause). Because Mundy agreed that he would receive no sentence credit as part of a plea agreement, he is estopped from arguing to this court that the trial court erred in not awarding credit.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

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<sup>1</sup> We do not address whether Mundy would have been entitled to any sentence credit in the absence of the plea agreement.