



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 8, 2017

To:

Hon. Jason A. Rossell
Circuit Court Judge
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Michael J. Backes
Law Offices of Michael J. Backes
P.O. Box 11048
Shorewood, WI 53211

Michael D. Graveley
District Attorney
Molinaro Bldg.
912 56th St.
Kenosha, WI 53140-3747

Donald V. Latorraca
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2016AP644-CR

State of Wisconsin v. James R. Todd (L.C. #2011CF1030)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

James R. Todd was convicted following a multi-day jury trial of one count of first-degree sexual assault of a child under age thirteen and sentenced to prison.¹ Todd seeks resentencing on (1) the “new factor” that he recanted his trial testimony claiming innocence and now admits that he did sexually assault the child and (2) that his trial counsel was constitutionally deficient for

¹ Todd was acquitted on a second count alleging sexual assault of the same child. Todd was sentenced to eighteen years’ initial confinement and twenty years’ extended supervision. Todd was thereafter extradited to Arizona where he pled guilty to sexually assaulting the same child in Arizona and received a prison sentence concurrent to his Wisconsin sentence.

persuading him to go to trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).² We summarily affirm the judgment of conviction and order denying the postconviction motion as Todd’s recantation of his perjured testimony is not a “new factor,” and Todd’s trial counsel was not deficient when Todd repeatedly asserted his innocence pretrial.

New Factor

In order to prevail on a motion to modify a sentence based on a new factor, a defendant must demonstrate the existence of a new factor and that the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. Whether a set of facts constitutes a new factor is a legal question that we review de novo. *Id.*, ¶33. We consider whether that new factor justifies sentence modification under the erroneous exercise of discretion standard. *Id.* Todd’s recantation of his perjured testimony is not a new factor and does not justify sentence modification. The trial court rightly noted that accepting responsibility for one’s crime is not a new factor. We likewise summarily dismiss any argument that a recantation is a basis for seeking sentence modification on the ground that the court had “inaccurate information.” The court sentenced Todd on accurate information—the jury’s finding that Todd sexually assaulted the child.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Deficient Performance of Trial Counsel

A defendant alleging ineffective assistance of counsel must prove that trial counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Todd failed to prove any deficient performance on the part of trial counsel as Todd told his counsel during pretrial preparation that he was innocent.³ A decision on whether to go to trial ultimately rests with a defendant. See *State v. Gordon*, 2003 WI 69, ¶21, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Albright*, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980). Trial counsel explained all the positives and negatives of taking a plea as well as positives and negatives of going to trial with Todd prior to trial. Todd made the decision to go to trial, he executed his constitutional right to testify, and he swore under oath that he did not sexually assault the child. Trial counsel was not deficient.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order denying the postconviction motion are summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ Todd also did not implicate himself in phone calls to his family prior to trial.

