

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP765-CR

Cir. Ct. No. 2005CF175

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. WEBB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Webb appeals a judgment, entered upon a guilty plea, convicting him of repeated first-degree sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(a). Webb argues the conviction

unconstitutionally penalizes him for exercising his Fifth Amendment right against self-incrimination. We reject Webb’s arguments and affirm the judgment.

BACKGROUND

¶2 An amended Information charged Webb with one count of repeated sexual assault of a child and four misdemeanor counts of fourth-degree sexual assault. In November 2005, Webb pled guilty to the fourth-degree sexual assault charges and the court ultimately imposed concurrent four-year probation terms on each of the convictions. With respect to the repeated sexual assault of a child count, Webb entered into a deferred acceptance of guilty plea agreement. Under the terms of the agreement, Webb would plead guilty to the felony count but the court would defer acceptance of the plea for forty-eight months. Webb agreed to abide by six conditions during the pendency of the agreement—one of which was “to comply with any and all rules of probation resulting in the successful completion of probation.” If Webb successfully completed probation on the misdemeanor counts, the State would move to dismiss the felony count. If Webb failed to complete probation, the State would seek to have the guilty plea on the felony charge entered and sentence imposed.

¶3 A condition of Webb’s probation arising from the fourth-degree sexual assault cases was that he complete sex offender treatment. During sex offender treatment, Webb denied assaulting his daughter and was ultimately terminated from treatment for noncompliance and lack of progress, becoming belligerent with treatment staff and refusing to participate in treatment. As a result of his termination from treatment, the department of corrections initiated probation revocation proceedings. Webb waived a revocation hearing, his probation was revoked and the court imposed consecutive nine-month jail sentences on his

misdemeanor convictions. Because the revocation of Webb's probation violated a condition of the deferred acceptance of guilty plea agreement, the State petitioned the court to vacate the agreement, accept Webb's guilty plea, and impose sentence. Webb moved to withdraw his plea. After a hearing, the court denied Webb's motion, vacated the agreement, accepted Webb's guilty plea and imposed a fourteen-year sentence consisting of four years' initial confinement and ten years' extended supervision. This appeal follows.

DISCUSSION

¶4 Citing *State ex rel. Tate v. Schwartz*, 2002 WI 127, 257 Wis. 2d 240, 654 N.W.2d 438, Webb argues that revocation of the deferred acceptance of guilty plea agreement violated his Fifth Amendment right against self-incrimination because it was based on his refusal to admit guilt during sex offender treatment. In *Tate*, our supreme court held that “a probationer who is revoked for refusing, during court-ordered sex offender treatment, and before the time for a direct appeal has expired or an appeal has been denied, to admit to the crime of conviction has suffered a violation of his Fifth Amendment privilege.” *Id.*, ¶27. Because the time for direct appeal had not expired on the felony count, Webb argues the agreement should not have been revoked for his refusal to “incriminate himself” during sex offender treatment.¹

¶5 *Tate*, however, is distinguishable on its facts. There, the defendant denied committing the offense at trial and was convicted by a jury. *Id.*, ¶5. In the present case, Webb was not compelled to incriminate himself. Rather, he

¹ Webb did not challenge the revocation of his probation on the underlying misdemeanor convictions.

voluntarily entered into a deferred acceptance of guilty plea agreement, under which Webb agreed to plead guilty and complete sex offender treatment as a condition of probation. Further, in ratifying the deferred acceptance of guilty plea agreement, “[t]he court followed the parties’ joint recommendations, and under such circumstances we do not allow a defendant to cry foul.” *State v. Wollenberg*, 2004 WI App 20, ¶13, 268 Wis. 2d 810, 674 N.W.2d 916; *see also State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (a litigant’s deliberate choice of strategy is binding and claim of error based on litigant’s own choice will not be considered on appeal).

¶6 Moreover, when a defendant agrees to sex offender treatment as part of a plea agreement, the defendant cannot later complain when refusal to admit the offenses in treatment leads to revocation. *State v. Carrizales*, 191 Wis. 2d 85, 96-97, 528 N.W.2d 29 (Ct. App. 1995). The *Carrizales* court noted: “[the defendant] is being asked to admit that he committed a crime in which he has already entered a no contest plea. While [he] may suffer a loss of liberty because of his refusal to comply with his conditions of probation, this is the bargain to which he agreed.” *Id.* at 96. Because Webb voluntarily agreed to plead guilty and comply with the conditions of his probation—including the completion of sex offender treatment—we conclude he was not “compelled” to incriminate himself in violation of his Fifth Amendment rights. The judgment is therefore affirmed.

By the Court.—Judgment affirmed.

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

