COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2353 **Cir. Ct. No. 2006CF79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA P. BRUST,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Joshua Brust appeals an order denying his motion for sentence modification and an order denying postconviction relief pursuant to

WIS. STAT. § 974.06.[1] He raises four substantive claims: two related to the vacation of a Deferred Guilty Plea Agreement (DGPA) and two related to sentencing, and also argues his postconviction attorney was ineffective for failing to raise these issues. We conclude postconviction counsel did not perform deficiently. In many instances, the law at the time of the relevant event did not support the argument Brust wishes his counsel would have made. In addition, many of counsel's decisions were strategic and are given great deference. *See* ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334, *cert. denied*, 132 S. Ct. 825 (2011).

¶2 Brust also claims recent research about adolescent brain development is a new factor entitling him to resentencing, an argument foreclosed by ***State v. McDermott***, 2012 WI App 14, ¶¶16-22, 339 Wis. 2d 316, 810 N.W.2d 237, *review denied*, 2012 WI 106, 343 Wis. 2d 554, 820 N.W.2d 430. Brust is not entitled to relief, and we affirm.

BACKGROUND

¶3 In case number 2006CF79, Brust, then eighteen, was charged with two crimes: second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(a) (2005-06) (Count 1), and sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.02(2) (2005-06) (Count 2). Both were Class C felonies. He was later charged in a separate Washburn County case, number 2007CF5, with one count of felony bail jumping. Attorney Carol Conklin initially represented Brust in both cases.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 A police report attached to the criminal complaint in 2006CF79 indicated that officers Donald Esser and Gary Amundson had been dispatched to Lakeview Hospital on August 20, 2006, to interview S.G. S.G., then fifteen, asserted she had refused Brust's sexual advances at an outdoor party the night before, but agreed to walk up the road with him. When they were out of earshot from other partygoers, S.G. alleged Brust "threw her on the ground and forced himself on top of her." She resisted, but Brust would not stop and had sexual intercourse with her. The assault lasted approximately forty-five minutes to one hour. The examination of S.G. on August 20 revealed bruising on the insides of her upper legs and scratches on her left forearm.

¶5 Brust entered into a plea agreement with the State. Brust agreed to plead guilty to reduced charges of fourth-degree sexual assault (a misdemeanor) and misdemeanor bail jumping. He would also plead guilty to sexual assault of a child, subject to a Deferred Guilty Plea Agreement. Sentencing for the misdemeanors would occur immediately, but, pursuant to the DGPA, the judgment of conviction for sexual assault of a child would be deferred for twenty-four months.[2] Brust could eventually have the charge dismissed if he complied with numerous conditions, including that he abide by the terms of his pending bail bond; receive sex offender evaluation and, if necessary, treatment; abstain from unsupervised contact with minor females; and abstain from "any further violations of the law during the term of this contract." If breached, the State could have the DGPA vacated, at which time the court would enter a judgment of conviction and proceed to sentencing.

[2] The parties originally agreed to a twelve-month deferral period, but the court insisted on twenty-four months. Brust ultimately accepted this modification.

¶6 The court engaged Brust in an extensive colloquy at the plea hearing, inquiring as to Brust's understanding of his various rights. The court then asked Brust to provide a factual basis for his guilty pleas. Brust denied forcibly raping S.G., but admitted that S.G. performed fellatio on him, and that she was underage and incapable of consenting to the contact at the time.[3] The court accepted the plea and proceeded to sentencing on the misdemeanors. For fourth-degree sexual assault, the court withheld sentence and ordered two years' probation, with six months' jail time as a condition. It also withheld sentencing and ordered two years' probation for bailing jumping, to run concurrently.

¶7 The State subsequently moved to vacate the DGPA. An evidentiary hearing was held on July 16, 2007. The State's motion was based on events that occurred fifteen days after the plea hearing, when Brust was arrested for disorderly conduct. In Brust's earlier appeal, we described the events giving rise to the motion:

> Three high school teachers testified at the evidentiary hearing on the motion. They testified Brust was cursing in the hallway and then outside in the parking lot while classes were in session. Brust then yelled profanities to the teachers and students who, prompted by Brust's conduct, were looking out the classroom windows. After a teacher told Brust to quit swearing and disrupting his class, Brust looked up at him and stated, "I'm fucking coming up there right now[,]" and "started marching right towards the door."

State v. Brust, No. 2008AP2210-CR, unpublished slip op. ¶3 (WI App July 7, 2009).

[3] Brust's admission satisfied the elements of the statute, which required only "sexual contact or sexual intercourse with a person who has not attained the age of 16 years." *See* WIS. STAT. § 948.02(2) (2005-06).

¶8 At the July 16, 2007 hearing, Conklin argued the DGPA could be vacated only if Brust had been convicted of a crime. The circuit court disagreed and concluded Brust materially breached the DGPA because his actions at the school constituted the crime of disorderly conduct. Toward the end of the hearing, it stated that, "at least from what we can tell, he hasn't undergone the assessment and the counseling and those other things" required by the DGPA. The court then vacated the DGPA, ordered a presentence investigation report (PSI), and scheduled a sentencing hearing on Brust's previously entered guilty plea.

¶9 After the DGPA was vacated, Brust remained subject to probation for his misdemeanor crimes.[4] The terms of his probation, like the DGPA, required him to obtain a sex offender assessment and comply with any recommended treatment. Brust appeared for two assessment interviews, the last being held on the same day the DGPA was vacated. During the second interview, Brust reported that even though he pleaded guilty to sexual assault of a child, the encounter was consensual and initiated by S.G. Brust believed S.G. reported a rape only because she felt taken advantage of when she later learned Brust had a girlfriend.

¶10 Brust changed his story at the first meeting of his sex offender treatment group on July 23, 2007. Initially, Brust claimed to the group that the contact was consensual, just as he had during the assessment interview. The treatment provider then read the version of the assault outlined in the complaint, and told Brust he would need to take responsibility for his offense. Several group members talked about how they initially denied their offenses when they began

[4] The Department of Corrections ultimately elected not to revoke Brust's probation for the incident at the high school.

treatment. Toward the end of the session, Brust asked if he could redo his sexual offense layout. He then stated that the victim's version of the offense was mostly true, and admitted that he had thrown the victim to the ground, forced her pants off, and had sex with her.

¶11 Brust was terminated from sex offender treatment on August 27, 2007. On that day, Cliff Kuster, Brust's treatment provider, received a telephone call from Jon Jaedike, Brust's probation officer. Jaedike informed Kuster that Brust was again claiming the encounter with S.G. was consensual. Kuster believed this to be a strategic recantation on the advice of counsel and opined that Brust was "playing games with the system and showing a complete lack of accountability." In a letter to Jaedike, Kuster stated, "I have never had an offender start taking accountability for his offense by admitting it to the treatment provider, sex offender treatment group, probation officer, and all of his family members[,] and then later rescind[] his statement."

¶12 Meanwhile, on July 31, 2007, Conklin had withdrawn from the representation and was substituted with Attorney Eric Nelson. Nelson filed a motion for plea withdrawal, arguing that Conklin was ineffective. On November 26, 2007, the court held a joint hearing on the motion and sentencing for sexual assault of a minor. The court denied Brust's motion for plea withdrawal, concluding Conklin

> has preserved for the defendant's benefit perhaps a very important issue on these deferred guilty plea agreement questions, and that issue is when there is a contractual term that requires a defendant to not commit any more violations of the law before the State can set aside or vacate a [DGPA], the issue is whether that requires a conviction for some other crime occurring [subsequent to the agreement] ….

¶13 The court then proceeded to sentencing. It acknowledged that Brust admitted to having S.G. perform oral sex, but observed he had subsequently "changed [his] story a number of times." The court found the victim's version of the offense more credible. It then considered Brust's sexual history and concluded he needed sex offender treatment. Recognizing that Brust's previous treatment attempt was unsuccessful, the court stated, "If he hadn't had the opportunity for community sex offender treatment once already, indeed this would be probation. He had the opportunity, and he failed." Brust was ultimately sentenced to sixteen years' imprisonment, consisting of eight years' initial confinement followed by eight years' extended supervision.

¶14 Nelson filed numerous postconviction motions on Brust's behalf. The court held an evidentiary hearing at which it determined Brust was entitled to resentencing because the record failed to reflect that it considered the applicable sentencing guidelines.

¶15 Brust was resentenced on August 12, 2008. At the hearing, the court stated it had reviewed materials from the earlier proceeding, including the PSI and hearing transcript. The State emphasized that "what originally was admitted to by Joshua to be simply oral sex later on became an admission that there was intercourse with this juvenile victim and also there was an admission that there was a forced sexual intercourse …." Brust argued he merely told treatment providers what they wanted to hear, and that his admission should not be deemed credible.

¶16 The court characterized the conflicting stories as essentially a case of "he-said/she-said." It observed that Brust's admission of forcible rape was consistent with the medical evidence uncovered during S.G.'s examination. It is

undisputed that the court considered Brust's admission to rape during sex offender treatment when determining the gravity of the offense. The court ultimately imposed the same sentence: eight years' initial confinement followed by eight years' extended supervision.

¶17 Brust, through Nelson, appealed. We affirmed the judgment. *See* ***Brust***, No. 2008AP2210-CR, unpublished slip op.

¶18 On May 17, 2012, Brust, through new counsel, filed motions for sentence modification and postconviction relief pursuant to WIS. STAT. § 974.06. Brust's motions collectively argued that: (1) at the vacation hearing, the court relied on unproven and inaccurate information when it stated that Brust "hasn't undergone the assessment and the counseling" required by the DGPA; (2) the court failed to consider lesser alternatives to vacating the DGPA; (3) at both sentencing hearings, the court considered statements compelled during sex offender treatment; (4) at the initial sentencing, the court relied on inaccurate information that Brust "failed" sex offender treatment; and (5) Nelson was ineffective for failing to raise these issues in postconviction motions and on direct appeal.[5] An evidentiary hearing was held at which Nelson was the sole witness to testify. The court rejected each of Brust's arguments and denied his motions.

[5] Brust raised additional issues that the circuit court ruled were decided by the prior appeal and barred by the law of the case doctrine. Brust has abandoned those issues on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised in the trial court, but not raised on appeal, are deemed abandoned).

DISCUSSION

¶19 Ordinarily, Brust's WIS. STAT. § 974.06 claims would be procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Brust did not raise them in his earlier postconviction motion or on direct appeal. However, to raise the present issues in those forums, the State concedes Nelson would have had to challenge his own alleged failures. ***Escalona-Naranjo*** does not bar Brust from raising the present claims under those circumstances. *See* ***State v. Hensley***, 221 Wis. 2d 473, 476, 585 N.W.2d 683 (Ct. App. 1998).

¶20 With one exception, we will review Brust's claims under the ineffective assistance of counsel framework. Brust acknowledges he has forfeited review as of right, but argues we should take up his arguments as if properly raised as a matter of fairness. However, "the normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel." ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Brust has not supplied a compelling reason to depart from this standard practice.

¶21 The one exception we make is for Brust's request for sentence modification based on the new factor of adolescent brain development research. As Brust recognizes, this claim is forestalled by ***McDermott***, 339 Wis. 2d 316, ¶¶16-22, where we construed ***State v. Ninham***, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, as barring new factor arguments based on adolescent brain research regarding impulsiveness. Brust believes this is an erroneous interpretation of ***Ninham***, but acknowledges we are bound by the ***McDermott*** decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only supreme court has authority to overrule, modify, or withdraw language from published court of

appeals opinions). Brust represents that he merely raises this issue to preserve it for supreme court review. We therefore decline to address it further.

¶22 A criminal defendant alleging ineffective assistance of counsel bears the burden of proving that counsel's performance was both constitutionally deficient and that he or she suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Determining whether a defendant has satisfied this burden is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***Id.*** "However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law" that this court reviews independently. ***Id.*** at 236-37.

¶23 To prove deficient performance, the defendant must show that counsel committed errors that were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Our review of an attorney's performance is highly deferential; "[t]he defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms." ***State v. Smith***, 207 Wis. 2d 258, 273-74, 558 N.W.2d 379 (1997). The reasonableness of counsel's actions is to be judged by the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636, 369 N.W.2d 711 (1985) (citing ***Strickland***, 466 U.S. at 690).

¶24 "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no

effect on the judgment." ***Strickland***, 466 U.S. at 691. Evidence that the deficient performance merely had some conceivable effect on the outcome of the proceeding is insufficient. ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695. "Rather, the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 694).

¶25 Brust alleges four instances of ineffective assistance: two related to the vacation of the DGPA and two related to sentencing. With respect to the DGPA, Brust claims he received ineffective assistance because Nelson failed to argue that the court relied on unproven and factually inaccurate information when vacating the DGPA, and that the court was constitutionally required to consider lesser alternatives to vacation. With respect to sentencing, Brust argues Nelson failed to object to the court's consideration of compelled and incriminating statements, and to the court's reliance on allegedly inaccurate information. We consider each argument separately.

I. DGPA claims

A. Failure to object to unproven and factually inaccurate information

¶26 Brust asserts the circuit court erroneously relied on unproven and factually inaccurate information when vacating the DGPA. Specifically, Brust challenges the court's statement that, "at least from what we can tell, [Brust] hasn't undergone the assessment and the counseling and those other things" required by the DGPA. He contends Nelson was ineffective for failing to raise this issue.

¶27 Brust has not presented sufficient evidence to prevail on this claim. *See* ***Smith***, 207 Wis. 2d at 273 (defendant has burden of showing deficient performance and prejudice). Brust believes Nelson should have challenged the court's assessment and counseling statement on due process grounds because the court's *sua sponte* observation deprived him of notice and an opportunity to be heard, and relieved the State of its burden of proof on that issue. However, Nelson testified that, in his opinion, the court vacated the DGPA because of the incident at the high school, not because Brust had failed to satisfy the DGPA's assessment and counseling requirements. As we shall explain, this was a reasonable construction of the court's oral decision.

¶28 Brust has also failed to demonstrate prejudice. At the vacation hearing, the court adopted the State's argument that Brust had committed a violation of the law contrary to the DGPA's terms. The court described the "core facts" of the violation as Brust's "profan[ity]-laced conversation with his mother that started in the school and progressed to the parking lot." It then observed that the disorderly conduct statute prohibits "profane, loud, boisterous language." We are not persuaded the court relied on its offhand remark, which came at the conclusion of the hearing and after extensive analysis of the high school incident, as a basis for its decision to vacate the DGPA.

B. Failure to propose that the court consider lesser alternatives

¶29 Brust argues the court was constitutionally required, but failed, to consider lesser alternatives to vacating the DGPA. Analogizing vacation of the DGPA to revocation of probation or parole, Brust claims his attorney should have argued that there were legitimate alternatives to vacation. *See* ***Morrissey v. Brewer***, 408 U.S. 471 (1972); ***State ex rel. Plotkin v. DHSS***, 63 Wis. 2d 535, 217

N.W.2d 641 (1974). In Brust's view, his attorney's failure to make this argument rendered the entire proceeding constitutionally deficient.

¶30 In ***Morrissey***, the Supreme Court considered whether due process protections generally apply to parole revocations. It concluded that, at a minimum, the parolee "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." ***Morrissey***, 408 U.S. at 488. However, it did not hold that the revocation hearing is constitutionally deficient if the court does not consider alternatives to revocation. Rather, the court merely set forth a "few basic requirements" to satisfy the parolee's right to procedural due process. ***Id.*** at 490.

¶31 In ***Plotkin***, a probationer argued, based on ***Morrissey***, that in order to revoke probation, there had to be a specific finding that the defendant was not a good risk. *See* ***Plotkin***, 63 Wis. 2d at 542. Though the court declined to endorse the "good risk" terminology, it did adopt Standards Relating to Probation adopted by the American Bar Association, which set forth criteria for revocation over and above a simple probation violation. ***Id.*** at 544-45. A court considering revocation resulting in imprisonment must find that confinement is necessary to protect the public, the offender is in need of correctional treatment in an institutional setting, or it would unduly depreciate the seriousness of the offense if probation were not revoked. ***Id.***

¶32 The fundamental problem with Brust's reliance on ***Morrissey*** and ***Plotkin*** is that neither involved proceedings vacating a DGPA. In ***State v. Barney***, 213 Wis. 2d 344, 570 N.W.2d 731 (Ct. App. 1997), we explicitly reserved the question of whether a court must consider reasonable and appropriate alternatives

to revocation of a DGPA when the defendant is alleged to have violated a condition of the agreement.[6] Brust concedes this is an unsettled area of the law,[7] but argues that "***Morrisey*** [sic] as explained in ***Plotkin*** rationally applies to community supervision in the form of a DGPA." Regardless of whether the logical underpinning of those cases can be extended to proceedings vacating a DGPA, Nelson was not ineffective for failing to raise the issue. "Counsel is not required to object and argue a point of law that is unsettled." ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994).

¶33 As the State observes, there are numerous other problems with Brust's reliance on ***Morrissey*** and ***Plotkin***. Neither case holds that due process requires a court to consider lesser alternatives to parole or probation revocation. *See* ***Black v. Romano***, 471 U.S. 606, 611 (1985) (due process does not require court to consider alternatives to revocation or expressly reject such alternatives); ***State v. Burris***, 2004 WI 91, ¶¶29-30, 273 Wis. 2d 294, 682 N.W.2d 812 (***Plotkin*** adopted Standards Relating to Probation not as a requirement of due process, but as a "prescription of good policy.").

¶34 Further, unlike the ***Morrissey*** and ***Plotkin*** defendants, vacation of the DGPA did not automatically result in Brust's incarceration. Brust had yet to be sentenced on Count 2. When Nelson was asked at the WIS. STAT. § 974.06 hearing to confirm his belief that ***Morrissey*** and ***Plotkin*** did not apply, he

[6] The agreement in ***State v. Barney***, 213 Wis. 2d 344, 570 N.W.2d 731 (Ct. App. 1997), included a provision requiring the court to consider reasonable alternatives to revocation. Accordingly, we declined to rule whether due process or public policy required the inclusion of such "reasonable and appropriate alternatives" clauses in those agreements. ***Id.*** at 362.

[7] At the WIS. STAT. § 974.06 postconviction hearing, counsel conceded that "there is no case directly on point …."

responded, "That's not entirely correct." Rather, Nelson intended to reserve such arguments about lesser punishments, including alternatives to prison, for sentencing. As Nelson explained, Brust was trying to avoid a felony adjudication, so Nelson focused his postconviction efforts toward arguing that no material breach occurred. He believed the argument that a conviction was required to vacate the DGPA was a better argument than the notion that the court was required, but failed, to consider alternatives to prison.

¶35 Moreover, Nelson stated he did raise the factors articulated in ***Plotkin***, albeit in an indirect fashion. Nelson testified that if the court deemed the breach material, he intended to argue prison was not an appropriate punishment:

> So my strategy in this particular case was to … attempt to raise the ***Plotkin*** factors in the context of sentencing, because those factors ultimately go to sentencing. If … there is a need for incarceration, the Court finds there's a need for incarceration, whether it finds it in the context of the revocation of the DGPA or in the context of sentencing, the ultimate factor and consideration is the same.

Nelson's opinion was that it made no sense to consider alternatives to imprisonment at the vacation hearing, and then again at sentencing. This was a reasonable strategy.

II. Sentencing claims

A. Failure to object to allegedly compelled and incriminating statements

¶36 Brust next claims the sentencing court's consideration of statements Brust made during sex offender treatment violated his right to be free from self-incrimination. These statements included his admission, later recanted, that he had ignored the victim's protests, threw her on the ground, and forced himself on her. Brust primarily relies upon ***State v. Peebles***, 2010 WI App 156, 330 Wis. 2d 243,

792 N.W.2d 212, to argue that any incriminating statements made during sex offender treatment are compelled and cannot supply a basis for a later-imposed sentence.

¶37 To prevail on his claim, Brust must demonstrate that Nelson rendered deficient performance by failing to object to, or seek resentencing based on, the court's consideration of allegedly compelled statements. This he cannot do. ***Peebles***, released in 2010, was not yet decided at the time of Brust's resentencing in 2008. Counsel cannot be deemed constitutionally ineffective for failing to anticipate our holding in that case. *See* ***McMahon***, 186 Wis. 2d at 84-85.

¶38 In any event, ***Peebles*** is not directly on point. As we alluded to, that case involved a probationer's admission during sex offender treatment to being a pedophile and having more than twenty undiscovered child victims. ***Peebles***, 330 Wis. 2d 243, ¶7. This information was "significantly new information" to the sentencing court, which was "shaken to [its] roots" by the revelation and imposed a lengthy sentence. ***Id.***, ¶8. We determined Peebles's statements were compelled because his supervision rules required him to be truthful, cooperate fully with his counselors, and submit to lie detector tests. ***Id.***, ¶20. We further determined the statements regarding other offenses were incriminating because they were used to increase his prison sentence. ***Id.***, ¶21.

¶39 A statement is not incriminating, however, if it is solely related to a charge to which the defendant has already been convicted. In ***State v. Mark***, 2006 WI 78, ¶7, 292 Wis. 2d 1, 718 N.W.2d 90, Mark verbally admitted to prior sexual activity with his stepson, conduct for which he had been convicted in 1994. We held his oral admission was admissible at a subsequent WIS. STAT. ch. 980 hearing

because the admitted conduct "related to the offenses for which Mark was already charged and convicted [and] … could not subject Mark to future criminal prosecution." ***Id.***, ¶31. Moreover, as we made clear in ***State v. Carrizales***, 191 Wis. 2d 85, 97, 528 N.W.2d 29 (Ct. App. 1995), a defendant has no right against self-incrimination with regard to admitting the facts surrounding a crime for which he or she has already been convicted. Even ***Peebles*** recognized that a defendant's refusal to admit a crime of conviction is not privileged because the defendant "effectively admitted the crime when he entered his plea." ***Peebles***, 330 Wis. 2d 243, ¶26.

¶40 Nor does it matter that Brust's admissions during treatment differed from the factual predicate for the sexual assault of a child charge accepted by the court at the plea hearing. "In Wisconsin, sentencing courts are obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 (quoting ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980)). A sentencing court may consider uncharged and unproven offenses. ***Id.*** Even offenses for which the defendant has been acquitted may be considered. ***State v. Prineas***, 2009 WI App 28, ¶28, 316 Wis. 2d 414, 766 N.W.2d 206.

¶41 Brust relies heavily on the fact that DGPA had been vacated before Brust admitted to forcible rape in treatment. In Brust's view, his admissions were made solely during his probationary term on the misdemeanor offenses, and the court's reliance on them could not be justified by his agreement under the DGPA to undergo sex offender treatment. However, Nelson testified that Brust "agreed to undergo a sex offender evaluation as part of the overall plea negotiations which included both the DGPA and the benefit of having other charges reduced to

misdemeanor offenses." That Brust's statements were made after the DGPA had been vacated is therefore of no consequence.

¶42 Under these circumstances, we cannot conclude Nelson performed deficiently by failing to object to, or seek resentencing based on, the court's consideration of statements Brust made related to the crime of conviction. Not only was the case on which Brust relies not decided at the time of sentencing, but it is inapplicable. It was permissible for the sentencing court to consider Brust's changing versions of the crime.

¶43 Brust also argues the circuit court impermissibly considered his prior sexual history during sentencing, which apparently included seven different partners, some underage, and "a number of other incidents." However, he concedes this history was reflected in the PSI, which the circuit court may properly consider. Rather, Brust's claim appears to be that the PSI author either compelled Brust to provide the information or derived the history from prior compelled statements during sex offender treatment. This is utter speculation, as Brust concedes he cannot identify when the statements were supposedly compelled, or by whom. We therefore deem this argument undeveloped, and will not consider it further. *See* ***State v. Butler***, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46.

B. Failure to object to allegedly inaccurate information

¶44 Finally, Brust claims the sentencing court relied on inaccurate information when it stated at the initial hearing that Brust "failed" sex offender treatment. Brust argues he "did not fail [treatment]; he was unlawfully terminated

because he did not admit to allegations of force in the criminal complaint that he repeatedly denied, were not supported by the physical evidence,[8] and that did not form the basis for his convictions." (Record citations omitted.) He maintains Nelson rendered ineffective assistance by failing to challenge the court's statement.

¶45 A defendant has a constitutional right to be sentenced on the basis of accurate information. *See* ***Townsend v. Burke***, 334 U.S. 736, 740-41 (1948). A defendant who requests resentencing because the sentencing court used inaccurate information must show that the information was inaccurate and that the court actually relied on the inaccurate information at sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

¶46 Brust's argument is hair-splitting at its finest. He did fail to complete sex offender treatment; the reason for his failure was not addressed by the sentencing court, and is therefore immaterial. The court's statement was factually accurate, and counsel was not deficient for failing to object. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (counsel's failure to bring a meritless motion does not constitute deficient performance).

¶47 In any event, Brust seems to believe that the DOC and treatment providers had no authority to require him to admit to facts outside those that

[8] As authority for this assertion, Brust directs us to a transcript of the plea hearing, at which Conklin opined that the physical evidence did not support Count 1. However, in Brust's earlier appeal we observed the physical evidence was "consistent with the use of force, and Brust at one point admitted the crime was brutal." *See* ***State v. Brust***, No. 2008AP2210-CR, unpublished slip op. ¶20 (WI App July 7, 2009). Regardless of what Conklin believed, *see* ***State v. Eugenio***, 210 Wis. 2d 347, 358, 565 N.W.2d 798 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998) (attorney arguments are not evidence), our ruling is the law of the case, *see* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82.

served as the basis for his plea. He again relies on ***Peebles***, but nothing in that decision suggests that treatment providers cannot require, as a condition of treatment, that a defendant admit to conduct related to the conviction but outside the factual basis for an already entered guilty plea.[9] Indeed, even in an ***Alford***[10] situation—where a defendant pleads guilty but nonetheless maintains that he or she is innocent—it is constitutional for the State to revoke probation for the defendant's failure to admit the offense during sex offender treatment. ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 632, 579 N.W.2d 698 (1998). "A defendant's protestations of innocence under an ***Alford*** plea extend only to the plea itself." ***Id.***

¶48 In addition, the disputed comments came during the initial sentencing hearing. Nelson successfully obtained a resentencing hearing for his client, at which the court did not explicitly hold Brust's failure in treatment against him. A resentencing is, effectively, a do-over for mistakes made when imposing the initial sentence. *See* ***State v. Sturdivant***, 2009 WI App 5, ¶16, 316 Wis. 2d 197, 763 N.W.2d 185 (recognizing prior sentence as invalid where resentencing court took accountability for its mistake and conducted resentencing hearing). Because Nelson was successful in undoing the sentence at which the allegedly improper statement was made, we cannot conclude he was ineffective.

[9] As we have explained, ***State v. Peebles***, 2010 WI App 156, 330 Wis. 2d 243, 792 N.W.2d 212, was solely concerned with whether incriminating statements regarding other crimes compelled during sex offender treatment may be considered by a court in a subsequent criminal proceeding.

[10] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

By the Court.—Orders affirmed.

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