

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0934-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERTO B. FLORES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Alberto B. Flores appeals from a judgment convicting him of four counts of second-degree sexual assault of a child, § 948.02(2), STATS., and from an order denying his sentence modification motion. We affirm.

After the trial court declined to grant Flores a continuance of the scheduled jury trial to permit him to locate trial witnesses, Flores entered no contest pleas to four of the six sexual assault counts against him. During the plea colloquy, Flores, through an interpreter, acknowledged that he was giving up the opportunity to have counsel locate additional witnesses before his defense began.

On appeal, Flores argues that the trial court erroneously exercised its discretion when it denied him an adjournment. We do not address this argument on the merits because it was waived by Flores' no contest pleas. *See State v. Skamfer*, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993) (no contest plea waives defects and nonjurisdictional defenses).

Flores next argues that the trial judge, the Honorable Mary Kay Wagner-Malloy, should have disqualified herself due to a prior contact with Flores. The presentence investigation report (PSI) states that in July 1994, Judge Wagner-Malloy conducted a marriage ceremony for Flores and one of his victims, Sheila M. At sentencing, the prosecutor remarked that Flores, who at the time he married Sheila M. was also married to Sheila M.'s mother, had "fooled this court ... when you married him ... to the minor Sheila [M.] and he was a bigamist at that point." The prosecutor also stated that Flores had "lied to this court in the past." The court noted that although Flores applied for a marriage license under false circumstances, he presented the court with what appeared to be a legitimate license at the time of the marriage ceremony. At no time did Flores suggest that Judge Wagner-Malloy should disqualify herself.

A party must raise and argue an issue with some prominence in order to allow the trial court to address the issue and make a ruling. *See State v. Ledger*, 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993). Here, Flores did not do

so, and the issue is deemed abandoned in the trial court. *See id.*; *see also State v. Marhal*, 172 Wis.2d 491, 505, 493 N.W.2d 758, 765 (Ct. App. 1992) (a defendant must allege a basis for disqualification as soon as possible and not wait until after the judge rules to raise the issue). Even if the issue had not been abandoned, we note that Judge Wagner-Malloy never suggested that she was personally offended by Flores' conduct in relation to the marriage. Rather, she noted that Flores had applied under false circumstances for a marriage license from the county clerk and presented what appeared to be a valid license to her. The court did not refer to the July 1994 marriage in its sentencing remarks. The record does not reveal a basis for Judge Wagner-Malloy to have disqualified herself due to a subjective belief that she could not preside impartially. *See* § 757.19(2)(g), STATS.

At sentencing, Flores objected to statements in the PSI that while imprisoned on another sexual assault conviction, Flores was found in possession of a razor and that he sold marijuana prior to his incarceration. Flores complains that the court was required to make a finding as to the truth or falsity of these contested allegations. Under the facts of this case, we disagree. At sentencing, the court acknowledged Flores' objections but did not rely upon this information in sentencing him. A defendant must show that specific information in the PSI was inaccurate and that the court actually relied on the inaccurate information at sentencing. *See State v. Johnson*, 158 Wis.2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990). Flores has not met this burden.

Finally, Flores argues that the court erroneously exercised its discretion in sentencing him. Again, we disagree. The court considered the appropriate factors in sentencing Flores: the gravity of the offense, the defendant's character and the need to protect the public. *See State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). Flores argues that the court should

have considered that he entered pleas which relieved the victim and her family of the trauma of a trial and that his rehabilitation needs could be met in less time than the sentence imposed. These arguments are unavailing on appeal. The weight to be given these and other sentencing considerations was within the trial court's discretion. *See State v. Spears*, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988).

By the Court.—Judgment and order affirmed.

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

