

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 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. 98-3035-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MARCO A. DELATORRE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Marco A. Delatorre appeals from a judgment convicting him of one count of false imprisonment, contrary to § 940.30, STATS., and two counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS. Delatorre received an aggregate prison term of fifty-five years after he entered no contest pleas.

Delatorre's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Delatorre received a copy of the report and has responded to it. Upon consideration of the report, Delatorre's response and an independent review of the record as mandated by *Anders*, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment of conviction.

Appellate counsel has concluded and our review of the record confirms that Delatorre's no contest pleas were knowingly, voluntarily and intelligently entered. See *State v. Bangert*, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). During the hearing at which Delatorre entered his pleas and for which an interpreter was provided, the court confirmed that Delatorre understood: (1) the proceedings; (2) the constitutional rights he was waiving by entering no contest pleas; (3) the fact that he could be deported as a result of the convictions; and (4) the elements of and maximum penalties for the charges against him. The court confirmed his prior convictions, and that he had adequate time to consult with counsel. It also found an adequate factual basis for the pleas based upon the criminal complaint and the evidence adduced at the preliminary hearing. The court then accepted Delatorre's pleas as having been knowingly, voluntarily and intelligently entered.

Based on the plea colloquy, we conclude that a challenge to Delatorre's no contest pleas as unknowing or involuntary would lack arguable merit. Furthermore, Delatorre's pleas waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. See *Racine County v. Smith*, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

We also agree with appellate counsel that the sentence is not infirm. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. See *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender and the need to protect the public. See *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given to these factors is within the trial court's discretion. See *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Our review of the sentencing transcript reveals that the court considered the appropriate factors. The court considered the gravity of the offense, Delatorre's history of similar criminal conduct, Delatorre's character, and the need to protect the public. We therefore conclude that the trial court properly exercised its sentencing discretion in imposing an aggregate fifty-five year term.

In his response, Delatorre claims (without elaboration) that his trial counsel was ineffective because he did not: (1) contact witnesses; (2) investigate Delatorre's alcohol abuse; (3) inform Delatorre of his rights as a non-citizen relating to the "Vienna Treaty" or seek help from the Mexican government; (4) provide Delatorre with an opportunity to review a psychologist's report, photographs or a plastic surgeon's report after a consultation with the victim regarding her injuries; or (5) provide psychological counseling.¹ Delatorre also

¹ Delatorre also claims appellate counsel was ineffective because he would not give the case to a Spanish-speaker, never met with Delatorre and did not explain postconviction relief or sentence modification to him. Claims challenging representation by appellate counsel may not be raised in a response to a no merit report. Such claims must be raised by petition for writ of habeas corpus in the court of appeals or by motion filed pursuant to § 974.06, STATS., or petition for writ of habeas corpus in the circuit court depending on the nature of the actions complained of. See *State ex rel. Smalley v. Morgan*, 211 Wis.2d 795, 797-99, 565 N.W.2d 805, 807 (Ct. App. 1997).

poses the following questions in his response: shouldn't he have been prosecuted under federal law, isn't it illegal to charge multiple counts, and didn't the trial court misuse its sentencing discretion?

We conclude that Delatorre's response is not sufficient to raise an issue of arguable merit. All of Delatorre's allegations are merely one-sentence assertions, unsupported by any facts or explanation as to their importance in this case of trial counsel's alleged omissions. For example, under *State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994), *cert. denied*, 514 U.S. 1030 (1995), a defendant must state with specificity what trial counsel's investigation would have revealed (had counsel investigated) and how it would have altered the outcome of the case. Delatorre's allegations are insufficient to raise an issue of arguable merit. *See State v. Saunders*, 196 Wis.2d 45, 51-52, 538 N.W.2d 546, 549 (Ct. App. 1995) (defendant must offer facts in support of allegations relating to claims for postconviction relief).

We affirm the judgment of conviction and relieve Attorney Steven D. Phillips of further representation of Marco C. Delatorre in this matter.

By the Court.—Judgment affirmed.

