

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 1997

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. 97-1700-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEMITRUS L. MAYWEATHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Demitrus L. Mayweather appeals a judgment convicting him of first-degree reckless injury as party to the crime contrary to §§ 940.23(1) and 939.05, STATS. Mayweather received a ten-year sentence after he entered a no contest plea.

Mayweather's appellate counsel filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Mayweather received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report 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.

The no merit report addresses: (1) whether trial counsel's assistance was ineffective; (2) whether Mayweather's no contest plea was properly entered; (3) possible sentence modification; and (4) whether the trial court properly denied his motion to dismiss Count II of the Information. As discussed below, the no merit report contains a correct statement of the law governing these issues and properly applies the law to the facts. We agree with appellate counsel that these issues do not have arguable merit.

Our review of the record discloses that Mayweather's no contest plea was knowingly, voluntarily and intelligently entered. See *State v. Bangert*, 131 Wis.2d 246, 260, 389 N.W.2d 12, 20 (1986). The court confirmed the details of the plea agreement and that Mayweather desired to plead no contest to first-degree reckless injury as party to the crime. The court reviewed the elements of the crime, advised Mayweather of the maximum possible punishment for this crime and confirmed that Mayweather had signed a plea questionnaire and waiver of rights form. Additionally, the court reviewed the specific constitutional rights waived by the plea and noted Mayweather's age and the extent of his education. Finally, the court ascertained that Mayweather understood the proceedings, confirmed that Mayweather's counsel had a sufficient opportunity to discuss the plea decision with Mayweather and determined that Mayweather was satisfied with counsel's

representation. The court found an adequate factual basis for the plea based upon the criminal complaint. The court then accepted Mayweather's plea as having been knowingly, voluntarily and intelligently entered.

Based on the plea colloquy, we conclude that a challenge to Mayweather's no contest plea as unknowing or involuntary would lack arguable merit. Furthermore, Mayweather's plea waived any nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *County of Racine v. Smith*, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). This waiver would also encompass any challenge to the trial court's refusal to dismiss Count II of the Information, a battery charge, which Mayweather contended was a multiplicitous charge. See *State v. Dietzen*, 164 Wis.2d 205, 209-11, 474 N.W.2d 753, 755 (Ct. App. 1991).

We have also independently reviewed the sentence. 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 for protection of the public." *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984) (citations omitted). The weight to be given to these factors is within the trial court's discretion. *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 gravity of the offense, Mayweather's character (including his history of violence and criminal conduct) and the public's need to be protected from Mayweather. In imposing the ten-year sentence, the trial court followed the statutory

guidelines and properly exercised its sentencing discretion. Therefore, we see no basis for seeking sentence modification. Finally, there is no arguable merit to a challenge of the trial court's determination, after a *Machner*¹ hearing, that Mayweather's trial counsel was not ineffective. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Our independent review of the record confirms that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm the judgment of conviction and relieve Attorney Gregory N. Dutch of further representation of Demitrus L. Mayweather in this matter.

By the Court.—Judgment affirmed.

¹ A postconviction motion hearing on an allegation of ineffective assistance of counsel is authorized by *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

