

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1093-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAVIER BELMONTES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Javier Belmontes appeals from two judgments convicting him of one count of first-degree sexual assault of a child, one count of attempted first-degree sexual assault of a child and two counts of fourth-degree sexual assault. He also appeals from a postconviction order denying him relief from the maximum sentences he received on each count, totaling sixty years in

prison. He claims that counsel performed ineffectively by failing to request a continuance before sentencing and that the trial court's refusal to modify his sentences was an erroneous exercise of discretion. For the reasons discussed below, we reject his contentions and affirm.

BACKGROUND

¶2 Belmontes was originally charged with four counts of first-degree sexual assault of a child. Two of the charges related to sexual conduct with his younger half-sisters over a period of years and the other two charges related to sexual overtures he made to two other girls on a single occasion. The charges were eventually amended to one count of first-degree sexual assault of a child, one count of attempted first-degree sexual assault of a child, and two counts of fourth-degree sexual assault. Belmontes pled guilty to the first-degree count and no contest to the attempted first-degree count and he entered *Alford* pleas on the fourth-degree counts.¹ Two other offenses involving different victims were read in.

¶3 At the sentencing hearing, the district attorney disclosed that Belmontes' stepfather would also be charged with sexually assaulting Belmontes' half-sisters. The trial court proceeded to sentence Belmontes to consecutive terms of forty and twenty years on the first-degree counts and concurrent nine-month terms on the fourth-degree counts. Belmontes subsequently cooperated with authorities in the prosecution of his stepfather. The stepfather pled guilty to one

¹ We note that the judgment inaccurately indicates that Belmontes pled no contest, rather than *Alford*, on Count 3. However, we do not address this technical defect because the parties do not.

count of first-degree sexual assault and two counts of second-degree sexual assault and was sentenced to a total of forty years in prison.

¶4 Belmontes filed a postconviction motion for sentence modification based on counsel's failure to request a continuance after learning the stepfather would be charged, Belmontes' cooperation with authorities, and the disparity between Belmontes' and the stepfather's sentences. The trial court denied the motion and Belmontes appeals.

STANDARDS OF REVIEW

¶5 Claims of ineffective assistance of counsel present mixed questions of law and fact. See *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings regarding counsel's actions and the reasons for them unless they are clearly erroneous. See WIS. STAT. § 805.17(2) (1997-98);² *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. See *id.* at 634.

¶6 We review sentencing determinations under the erroneous exercise of discretion standard. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. See *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). Because the trial court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

with its sentencing discretion and will presume that it acted reasonably. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

ANALYSIS

Failure to Request a Continuance

¶7 Belmontes claims he was entitled to a hearing on whether counsel's failure to request a continuance constituted ineffective assistance of counsel. No hearing is required, though, when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. *See Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We see no possibility that Belmontes' allegations here would entitle him to relief.

¶8 First, Belmontes has not alleged that he was unaware until the date of sentencing that his stepfather was abusing his stepsisters. Even if he thought that his stepfather's conduct in some way mitigated his own—a proposition of which we are skeptical—he gives no reason for not disclosing that information when he was given the opportunity to address the court prior to sentencing. Furthermore, at the time of sentencing, counsel could not know whether his client would or would not be cooperating with the prosecution of his stepfather. Counsel's performance must be assessed from the facts known at the time assistance was rendered. *See Pitsch*, 124 Wis. 2d at 636-37. Finally, because the trial court has indicated it would not have granted a continuance to await the completion of collateral proceedings which were just beginning, there would not have been a different outcome at sentencing even if trial counsel had asked for a continuance. Because Belmontes' allegations do not satisfy either the deficient performance or prejudice prong of the test for ineffective assistance of counsel,

see *Strickland*, 466 U.S. at 687, the trial court properly denied the motion without a hearing.

Refusal to Modify Sentences

¶9 Belmontes claims he was entitled to sentence modification because the sentences imposed on him were unduly harsh and disproportionate to those later received by his stepfather for similar crimes. In order to warrant modification, however, Belmontes must show not only that his sentences differed from those given to another offender, but that the differences were arbitrary or based on improper considerations. See *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). He has failed to do so.

¶10 Proper considerations for the exercise of sentencing discretion include the gravity of the offense, the character of the offender and the need to protect the public. See *Harris*, 119 Wis. 2d at 623. Here, the trial court properly considered Belmontes' offenses to be "extremely serious" and "heinous" due to the young age of the victims, and the court properly considered the number of offenses against multiple victims as showing an "absolute need" to protect the community from further such acts. In addition, the trial court properly considered that the defendant's minimization of his acts indicated a lack of remorse, notwithstanding the defendant's assertion of remorse and the entry of pleas. The trial court was in the best position to judge the defendant's sincerity.

¶11 Furthermore, the trial court pointed out that, although both Belmontes and his stepfather had assaulted the same two girls, the charges against the stepfather focused on the older sister while the primary charge against Belmontes dealt with the younger sister. In addition, Belmontes had assaulted four other girls who were not relatives. Finally, the trial court was not required to

take into consideration any potentially mitigating behavior which occurred *after* the date of sentencing, such as Belmontes' cooperation with the prosecution of his stepfather. *See State v. Johnson*, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997) (discussing what constitutes a new sentencing factor). We see no misuse of discretion.

By the Court.—Judgments and order affirmed.

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

