

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2013AP2406-CR

Cir. Ct. No. 2003CF423

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK J. GRANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Patrick J. Grant, *pro se*, appeals an order of the circuit court, denying his motion to correct “clerical errors” in his judgment of conviction. We affirm the order.

¶2 In 2003, Grant pled guilty to one count of felony murder with armed robbery as the predicate offense. The circuit court sentenced Grant to twenty-two years' initial confinement and sixteen years' extended supervision. It also required him to submit a sample of his DNA and pay the \$250 DNA surcharge if he had not already done so. Grant appealed, but his conviction was summarily affirmed. *See State v. Grant*, No. 2007AP2136-CRNM, unpublished slip op. (WI App Dec. 22, 2005). In 2009, Grant sought to vacate the DNA surcharge, based on this court's decision in *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, but the motion and a subsequent reconsideration motion were denied. Grant did not appeal.

¶3 On September 23, 2013, Grant filed the motion underlying this appeal, a motion "to cure and correct a clerical error of the sentence and judgment of conviction pursuant to Wis. Stats. s. 973.13." Grant argued "that he was convicted and sentenced for both felony-murder and armed robbery," violating double jeopardy protections. He further contended that felony murder "carries only 15 years of incarceration and with the underlying charge of armed robbery it can only be increased by five (5) years [for] a total of 20 years." Thus, his thirty-eight-year sentence was excessive and should be commuted to twenty years.¹ Grant also claimed that he should be reimbursed for the \$250 DNA surcharge that he has since paid because the circuit court, when imposing the surcharge, did not exercise its discretion as required by *Cherry*.

¹ *See* WIS. STAT. § 973.13 (2011-12) ("In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.").

¶4 The circuit court denied the motion, explaining that *Cherry* was not retroactive and, in any event, Grant's challenge was time-barred. The circuit court also noted that Grant had not even been charged with armed robbery, just the felony murder, the crime for which he was ultimately convicted.² The circuit court further noted that, at the time of Grant's offense, armed robbery was punishable by up to sixty years' imprisonment, so the maximum penalty Grant faced was eighty years' imprisonment, not twenty. Grant appeals.

¶5 It is true that a defendant cannot be convicted of both felony murder and the predicate offense; the predicate is necessarily a lesser-included offense of felony murder. *See State v. Krawczyk*, 2003 WI App 6, ¶26, 259 Wis. 2d 843, 657 N.W.2d 77. It is not wholly clear why Grant believes he was convicted of both felony murder and armed robbery, but we suspect Grant's confusion stems from the judgment's description of his offense as "Felony Murder-Armed Robbery."

¶6 This charge description is not inaccurate: it lists both the offense of conviction and the predicate offense. Describing the predicate offense is important because felony murder can occur during the commission of at least five different types of felonies: first-degree sexual assault, violent second-degree sexual assault, arson of buildings, certain burglaries, and armed robbery. *See WIS.*

² In fact, while the State originally charged only felony murder, it issued an amended information in September 2003 that charged Grant with first-degree intentional homicide as party to a crime, armed robbery with the use of force as party to a crime, and possession of a firearm by a felon. Grant then agreed to enter a plea to felony murder, and the State amended the charges back to a single count of felony murder.

STAT. § 940.03 (2001-02).³ Felony murder itself is an unclassified felony, so its penalty is determined by reference to the penalty for the predicate offense. However, not all of the predicates are in the same class.⁴ Thus, reference to the predicate offense on the judgment of conviction for felony murder is necessary, at a minimum, for determining the maximum possible sentence in a given case.

¶7 In short, Grant identifies no clerical error on the judgment of conviction that convicts him of two offenses contrary to double jeopardy protections. The judgment notes only and properly that he was convicted of felony murder with armed robbery as the predicate offense.

¶8 It is also not clear why Grant believes that his maximum possible penalty exposure was twenty years' imprisonment. Under WIS. STAT. § 940.03, “[w]hoever causes the death of another human being while committing or attempting to commit ... [armed robbery contrary to §] 943.32(2) may be imprisoned for not more than 20 years *in excess of the maximum period of imprisonment provided by law for that crime or attempt.*” (Emphasis added.)

¶9 In other words, we look to the “maximum period of imprisonment” for the predicate offense and add twenty years. Armed robbery is a Class B

³ Although Grant's offense date is January 4, 2003, this and all subsequent references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. This is because 2001 Wis. Act 109, which was published on July 29, 2002, implemented major changes to the criminal code. The changes took effect on February 1, 2003. *See* 2001 Wis. Act 109, § 9459(1) (changes first effective in the seventh month beginning after publication). As a result, the official 2003-04 statutes as published reflect substantive changes in the law that were not in effect at the time of Grant's crime.

⁴ In 2001-02, the second-degree sexual assault offenses were Class BC felonies, while the other offenses were Class B felonies. *See, e.g.*, WIS. STAT. §§ 940.225(2)(a) & 943.32(2). In 2003-04, the predicate felonies were in Classes B, C, and E. *See, e.g.*, WIS. STAT. §§ 940.225(1) (2003-04), 943.10(2) (2003-04); & 943.32(2) (2003-04).

felony, punishable at the time by up to sixty years' imprisonment. *See* WIS. STAT. §§ 943.32(2) & 939.50(3)(b). Consequently, when the circuit court denied Grant's motion, it properly noted the possible maximum of eighty years' imprisonment.⁵ The imposed thirty-eight year sentence does not exceed that maximum, so there is no basis for commuting or otherwise "correcting" the sentence.

¶10 With respect to Grant's attempt to vacate the DNA surcharge, we conclude that the circuit court properly denied that request as well. For one thing, *Cherry* is not retroactive. *See State v. Nickel*, 2010 WI App 161, ¶8, 330 Wis. 2d 750, 794 N.W.2d 765. In addition, Grant's request to vacate the surcharge is untimely as a sentence modification motion, regardless of any "sufficient reason" he might plead. *See id.*, ¶5. Finally, Grant previously litigated a request to vacate the surcharge with his motions in 2009. He cannot continue to litigate the issue, no matter how he might attempt to reframe it. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

⁵ The State, in its brief at footnote 1, asserts that the circuit court erred, albeit harmlessly, because WIS. STAT. § 940.03, as amended by 2001 Wis. Act 109, § 585, only adds fifteen years for felony murder. As explained above in our footnote 1, that amendment did not take effect until February 1, 2003, after Grant's offense.

