COURT OF APPEALS DECISION DATED AND FILED

May 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP634-CR

Cir. Ct. No. 1996CF966120B

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael A. Henderson, *pro se*, appeals from an order denying a motion for sentence modification. In his motion, Henderson argued that the sentencing court imposed a sentence in excess of the maximum allowable sentence and that his trial and appellate counsel were ineffective for not

challenging the sentence on that basis. Because the record conclusively shows that Henderson was properly sentenced, we affirm.

¶2 A criminal complaint, filed on December 10, 1996, charged Henderson with two counts of armed robbery, threat of force, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) and (2), and 939.05 (1995-96).[1] The complaint also charged several other defendants with additional counts of armed robbery, threat of force, party to a crime. The complaint stated that the "maximum possible penalty" for the charge of armed robbery, threat of force, party to a crime was "imprisonment for not more than 40 years" and that the charge was "a Class B felony."

¶3 On March 11, 1997, Henderson pled guilty to one of the two counts charged in the criminal complaint. The other count was dismissed and read-in at sentencing. No other charging concessions were made. During the colloquy, the court explained the elements of armed robbery, threat of force, and Henderson told the court that he understood the charge. The court also explained the concept of party to a crime, and Henderson told the court that he understood. The court informed Henderson that if he pled guilty, he "could be sentenced to up to forty years in prison and there is no fine on this particular charge. The maximum penalty is up to forty years." Henderson told the court that he understood.

¶4 Henderson was sentenced on February 12, 1998, together with several of his co-defendants. The transcript of the sentencing shows that all of the defendants were charged with "Armed Robbery, PTAC." While discussing the

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

contents of the presentence investigation report with the court, Henderson's counsel acknowledged that Henderson had pled guilty to armed robbery. Throughout the sentencing proceeding, the attorneys and the court repeatedly referred to the underlying crimes as armed robberies. When addressing Henderson specifically, the court stated that "[h]e was involved in two armed robberies and convicted only of one." The court then sentenced Henderson to "an indeterminate period not to exceed fourteen years."

¶5 The written judgment of conviction that was prepared by the clerk of the circuit court incorrectly reflects that Henderson pled guilty to "Robbery with Threat of Force [939.05 Party to a Crime]," a Class C felony. The judgment correctly states that Henderson was sentenced to fourteen years.

¶6 Henderson appealed and appointed counsel filed a no-merit report under WIS. STAT. RULE 809.32 (1999-2000). This court summarily affirmed the judgment of conviction. We did not mention the discrepancy between the written judgment and the crime for which Henderson was sentenced. ***State v. Michael L. Henderson,*** No. 1999AP1584-CRNM, unpublished slip op. (WI App March 16, 2000).

¶7 In his *pro se* motion for sentence modification, Henderson focuses on the statement in the written judgment of conviction that he was convicted of a Class C felony – robbery, threat of force, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) and 939.05. Henderson notes that the maximum penalty for a Class C felony at the time was a fine not to exceed $10,000 or imprisonment not to exceed ten years or both. *See* WIS. STAT. § 939.50(3)(c). Henderson contends that the fourteen-year sentence imposed by the court exceeded the maximum

allowable sentence. Henderson also contends that his trial and appellate attorneys were ineffective for not challenging the sentence on that ground.

¶8 The circuit court rejected Henderson's arguments. The court, however, did recognize the error in the written judgment of conviction and directed the clerk to enter a corrected judgment of conviction to reflect that Henderson "was convicted of armed robbery with threat of force as a party to a crime – a Class B felony."

¶9 A circuit court's oral pronouncement of sentence "trumps the written judgment of conviction." ***State v. Prihoda***, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857. When a written judgment of conviction differs from the court's oral pronouncement of sentence, a clerical error exists that may be corrected at any time. ***Id.***, ¶¶15-17. When a clerical error is discovered, the circuit court may direct the clerk to make the necessary correction. ***Id.***, ¶17. By definition, a clerical error is "minor and mechanical," and the court is not required to conduct a hearing prior to ordering that the error be corrected. ***Id.***, ¶31.

¶10 The record unambiguously shows that Henderson pled guilty to armed robbery, threat of force, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(b) and (2) and 939.05, a Class B felony. The record also unambiguously shows that Henderson was sentenced for that crime. The court's

correction of the erroneous description of the crime on the written judgment of conviction is authorized by ***Prihoda***.[2]

¶11 The fourteen-year sentence is well within the maximum sentence of forty years. Therefore, the court did not impose an illegal sentence. Henderson's trial and appellate counsel were not ineffective. The circuit court correctly denied Henderson's motion to modify sentence.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

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[2] In ***State v. Prihoda***, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857, a clerical error was corrected twenty years after entry of the incorrect written judgment of conviction. The court held that neither laches nor the statute of limitation found in WIS. STAT. § 893.40 (1997-98) precluded correction of the clerical error. In this case, only six years elapsed between clerical error and the court's order directing the clerk to correct the error. Henderson cannot make a viable laches argument.