

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2003

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. 03-0592
STATE OF WISCONSIN**

Cir. Ct. No. 90CF903854

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD GRAHAM,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Richard Graham, *pro se*, appeals from the circuit court order denying his motion to modify his sentence. He argues that his sentence was unlawful and subjected him to double jeopardy. We affirm.

¶2 On September 7, 1990, Graham shot and killed Darius Ferrance during an attempted armed robbery. On December 4, 1990, Graham pled guilty, and on February 8, 1991, the circuit court sentenced him to thirty years' imprisonment. The judgment of conviction, however, described the crime as felony murder with a penalty enhancer of attempted armed robbery. It also stated that, for the penalty enhancer, the sentence was "[t]en (10) years, consecutive to term on FELONY MURDER."

¶3 Graham did not file a direct appeal. In 2003, however, he filed a WIS. STAT. § 974.06 (2001-02) motion to modify his sentence contending that: (1) the sentence exceeded the twenty-year maximum for felony murder, and (2) his conviction for the attempted armed robbery violated his right against double jeopardy.¹ The postconviction court concluded that, consistent with the oral pronouncement of the sentence, Graham was convicted and sentenced for only one crime—felony murder.² Accordingly, the court concluded that Graham's double-jeopardy rights had not been implicated. The court did, however, order "the clerk's office [to] amend the judgment of conviction to reflect a conviction for felony murder (attempt armed robbery) and a sentence of thirty years consecutive."

¶4 Graham, citing WIS. STAT. § 973.13 contends that his sentence exceeded the statutory maximum.³ His contention is without merit.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The sentencing court's oral pronouncement trumps the inaccurate judgment of conviction. See *State v. Prihoda*, 2000 WI 123, ¶¶15, 17, 239 Wis. 2d 244, 618 N.W.2d 857.

³ WISCONSIN STAT. § 973.13, provides:

(continued)

¶5 Graham pled guilty to felony murder with the predicate offense of attempted armed robbery. WISCONSIN STAT. § 940.03 (1989-90), provided, in relevant part:

Felony murder. Whoever causes the death of another human being while committing or attempting to commit ... [an armed robbery, *see* WIS. STAT. § 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.) WISCONSIN STAT. § 943.32(2) (1989-90), stated:

Whoever violates sub. (1) [robbery] by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon is guilty of a Class B felony.

At the time of the Graham's crime, the penalty for a Class B felony was imprisonment not to exceed twenty years. *See* WIS. STAT. § 939.50(3)(b) (1989-90). And, pursuant to WIS. STAT. § 939.32 (1989-90), whoever *attempted to commit a felony* could be imprisoned for a period not to exceed one-half the maximum penalty for the completed crime. Hence, the maximum penalty for attempted armed robbery was ten years. The maximum penalty for felony murder was, therefore, twenty years plus ten. Because Graham was sentenced to thirty years' imprisonment for felony murder with attempted armed robbery as the predicate crime, and because thirty years was the maximum sentence for the

Excessive sentence, errors cured. 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.

crime, his sentence was not in excess of that allowed by law. Therefore, the postconviction court properly denied his motion for sentence modification.

¶6 Graham also contends that his double jeopardy rights were violated. He is incorrect. Graham was charged with only one crime, felony murder while attempting an armed robbery. The trial court sentenced him for that one crime. Although the clerk who prepared the original judgment of conviction divided the sentence into two consecutive sentences using a penalty enhancer, that error was corrected when the postconviction court ordered the judgment of conviction amended to reflect the sentencing court's oral pronouncement. No double jeopardy violation occurred.

¶7 Finally, Graham maintains that he was sentenced based on inaccurate information. In his argument, however, he merely restates his incorrect claim that his sentence exceeded the maximum penalty authorized by law. Because he has failed to establish that the information at his sentence was inaccurate or that the court relied on the inaccurate information, he has failed to meet his burden. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (defendant requesting resentencing based on inaccurate sentencing information must establish that the information was inaccurate and that the court actually relied on that information in sentencing).

By the Court.—Order affirmed.

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

