

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2008

David R. Schanker
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. 2007AP1041-CR

Cir. Ct. No. 2002CF6126

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Orders affirmed and cause remanded with
directions.*

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

¶1 PER CURIAM. James A. Graham, *pro se*, appeals from an order denying his WIS. STAT. § 973.13 (2005-06) motion to cure excessive sentences and from an order denying his motion for reconsideration. Graham moved for

sentence commutation on the ground that his sentences exceed the maximum penalties for the crimes that are reflected on his original judgment of conviction, namely, robbery and attempted robbery. The court determined that the judgment of conviction misstated the verdict and that Graham's sentences are within the lawful maximum for his actual convictions of armed robbery by threat of force and attempted armed robbery by threat of force. The court denied Graham's motions and ordered the clerk of courts to correct the judgment of conviction. We affirm the circuit court's orders. Additionally, because the clerk of courts has twice tried and twice failed to correct the judgment of conviction, we direct the circuit court to supervise the clerk of court's preparation and entry of an amended judgment. Last, we deny as procedurally barred Graham's claim that the evidence at trial was insufficient to support his convictions.

Background

¶2 A jury found Graham guilty of armed robbery by threat of force, in violation of WIS. STAT. §§ 943.32(1)(b) and 943.32(2) (2001-02),¹ and of attempted armed robbery by threat of force, in violation of WIS. STAT. §§ 943.32(1)(b), 943.32(2), and 939.32. Upon those verdicts, the court adjudged Graham convicted of armed robbery by threat of force and of attempted armed robbery by threat of force. Because both crimes were committed in October 2002, each was a Class B felony. *See* § 943.32(2).² Graham faced potential maximum

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

² Amendments to the penalty provisions of the applicable statutes effected by 2001 Wis. Act 109 first applied to offenses committed on February 1, 2003. *See id.*, §§ 9359(3), 9459(1). *See also State v. Thums*, 2006 WI App 173, ¶¶6 & n.1, 11, 295 Wis. 2d 664, 721 N.W.2d 729.

determinate sentences of sixty years for the armed robbery conviction and thirty years for the attempted armed robbery conviction. *See* WIS. STAT. §§ 939.50(3)(b), 939.32(1). On July 23, 2003, the circuit court imposed consecutive determinate sentences of twenty-six years and three months for the armed robbery conviction and twenty-five years for the attempted armed robbery conviction.

¶3 Graham pursued postconviction relief from his conviction for armed robbery pursuant to WIS. STAT. RULE 809.30. He alleged a miscarriage of justice based on the vagaries of eyewitness identifications. His appeal was not successful. *See State v. Graham*, No. 2005AP1437, unpublished slip op. (WI App June 14, 2006).

¶4 In March 2007, Graham filed a motion for sentence commutation. In support, he pointed to the judgment of conviction entered in July 2003. Apparently unnoticed for four years, the judgment wrongly stated that Graham was convicted of two Class C felonies: (1) robbery with threat of force and by use of a dangerous weapon; and (2) attempted robbery with threat of force and by use of a dangerous weapon. Graham argued that his sentences must be commuted because they exceed the statutory maximums for these offenses.

¶5 The circuit court denied the motion.³ It found that Graham had been convicted of two Class B felonies but that the judgment of conviction inaccurately reflected the verdicts. The court ordered the clerk of courts to enter an amended

³ The Honorable Jean W. DiMotto presided over Graham's trial and sentencing. The Honorable Dennis P. Moroney presided over Graham's postconviction motion.

judgment of conviction correctly reflecting Graham's convictions for armed robbery by threat of force and attempted armed robbery by threat of force.

¶6 On March 21, 2007, a court clerk signed an amended judgment of conviction. That judgment, like the original judgment, erroneously stated that Graham had been convicted of robbery and attempted robbery instead of armed robbery and attempted armed robbery. Graham moved for reconsideration, again asserting that his sentences are illegal. On April 17, 2007, the court denied the motion and ordered the clerk of courts to enter a second amended judgment of conviction. The court's order stated with specificity Graham's crimes and the statutes he violated. On April 25, 2007, a court clerk signed a third erroneous judgment of conviction. This appeal followed.

Discussion

¶7 The original judgment of conviction erroneously showed that Graham was convicted of two Class C felonies. These errors are clerical. A clerical error is "a mere omission to preserve of record, correctly in all respects, the actual decision of the court" *Bostwick v. Van Vleck*, 106 Wis. 387, 390, 82 N.W. 302 (1900). The clerical errors in the judgment do not provide Graham a basis for sentence commutation. "When there is a conflict between the judgment of conviction and an unambiguous record of the trial court's pronouncement, the record is controlling." *State v. Schordie*, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997).

¶8 The circuit court twice ordered the clerk of courts to correct the judgment. See *State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (court can correct a clerical error at any time). Despite those orders, the amended judgments of conviction are wrong. Upon remittitur, the circuit court

shall direct the clerk of courts to enter an amended judgment of conviction that conforms to the circuit court's order of April 17, 2007. The amended judgment shall provide that, as to count one, Graham was convicted of armed robbery with threat of force, a Class B felony, in violation of WIS. STAT. §§ 943.32(1)(b) and 943.32(2). The amended judgment shall further provide that, as to count two, Graham was convicted of attempted armed robbery with threat of force, a Class B felony, in violation of WIS. STAT. §§ 943.32(1)(b), 943.32(2), and 939.32. The clerk of courts shall, within twenty-one days of the release of this opinion, certify to this court that an amended judgment of conviction approved by the circuit court has been entered in this case.

¶9 Graham raises a second issue, contending that the State presented insufficient evidence to convict him of possessing a dangerous weapon. Graham failed to raise this issue in his direct appeal. Any postconviction claim that could have been raised in a prior proceeding is barred in a subsequent proceeding, absent the defendant demonstrating a sufficient reason for the failure to raise the issue in the first appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). In his postconviction motion, Graham offered no reason, much less a sufficient reason, for his failure to raise his current claim in the earlier proceeding. Accordingly, the claim is barred and we will not address it.

By the Court.—Orders affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

