

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2004

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 Nos. 03-1915-CR
03-1916-CR**

**Cir. Ct. Nos. 99CF004466
99CF006213**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TITUS GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: MARTIN J. DONALD and LAURENCE GRAM, Judges.
Affirmed in part; reversed in part and cause remanded with directions.

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Titus Graham appeals judgments convicting him of four counts of armed robbery with use of force, three as party to a crime. He also appeals an order denying his motion for postconviction relief.¹ The issue is whether the circuit court erroneously exercised its discretion in sentencing Graham. We affirm in part, reverse in part, and remand with directions.

¶2 Graham first argues that the circuit court erroneously exercised its discretion because it inaccurately characterized his criminal history. Although Graham had no prior criminal record, the court stated: “The defendant has been found guilty of four serious crimes and so when we talk about lack of a criminal record, that kind of applies as to one. [For] [t]he other three there is a criminal record.” We do not believe the circuit court’s comments indicate that it misunderstood the situation. The circuit court was simply noting, perhaps inartfully, that although Graham did not have a prior criminal record, he was convicted of multiple crimes that occurred over a period of time during which, presumably, Graham could have seen the error of his ways. The court was explaining that Graham’s convictions stem from several acts separate in time and, as such, are more serious.

¶3 Graham next argues that the sentence is based on inaccurate information because one of the judgments of conviction wrongly indicates that he was convicted of an enhancer for concealing identity. The State does not dispute that the judgment of conviction is incorrect. The plea hearing transcript clearly shows that the concealing identity enhancer was dismissed. Because the judgment

¹ Judge Martin J. Donald accepted Graham’s pleas and denied the motion for postconviction relief. Judge Laurence Gram sentenced Graham.

of conviction still contains the enhancer, we will remand to the circuit court to correct the judgment of conviction.

¶4 Graham argues that the circuit court sentenced him based on inaccurate information because it incorrectly believed he was subject to an additional five years of imprisonment based on the enhancer. We disagree. The incorrect judgment of conviction was not before the circuit court during sentencing. While it is true that when the circuit court clerk called the case at sentencing, she stated “[a]rmed robbery threat of force; concealing identity,” and “[a]rmed robbery threat of force, party to a crime, three counts,” there is no indication in the twenty-two-page transcript that the circuit court thought the enhancer applied. The prosecutor did not mention it. The defense did not mention it. And the presentence investigation report, which made the sentencing recommendation that the circuit court adopted, did not mention it. Because the circuit court did not rely on the erroneous information in imposing sentence, we reject this argument. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990) (“[A] defendant who requests resentencing based on inaccurate information must show both that the information was inaccurate, and that the court actually relied on the inaccurate information in the sentencing.”).

¶5 Finally, Graham argues that he is entitled to 169 days of sentence credit because credit was incorrectly applied only to one sentence when it should have been applied to a concurrent sentence as well. The State concedes that Graham is entitled to this sentence credit and we conclude that that concession is appropriate. Because Graham was sentenced concurrently, he is entitled to the credit on both sentences. *See State v. Ward*, 153 Wis. 2d 743, 744-45, 452 N.W.2d 158 (Ct. App. 1989). We remand to the circuit court to correct the judgment convicting Graham of three counts of armed robbery to indicate that he

is entitled to 170 days of credit, which is what the circuit court ordered.² In reviewing the record, we also note that the judgment convicting Graham of one count of armed robbery, which does contain the credit, is internally inconsistent. It reflects the credit in one section, but not in another. We remand for correction of that judgment of conviction to reflect the 170-day credit in both sections.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

² Both Graham and the State refer to 169 days of sentence credit. However, the circuit court awarded Graham 170 days of credit, not 169 days.

