

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 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. 2008AP629

STATE OF WISCONSIN

Cir. Ct. No. 1996CF960856

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TINGIA WHEELER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
PAUL VAN GRUNSVEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tingia Wheeler appeals *pro se* from an order denying his motion for postconviction relief. The circuit court concluded that Wheeler's claims are procedurally barred, and we affirm.

BACKGROUND

¶2 In 1996, a jury found Wheeler guilty of first-degree reckless homicide while armed. The circuit court denied Wheeler's postconviction motion for relief. Wheeler appealed his conviction and the denial of his postconviction motion. His appellate counsel filed a no-merit report, and Wheeler filed a response. This court accepted the no-merit report and summarily affirmed the judgment of conviction and postconviction order. See *State v. Wheeler*, No. 1998AP1577-CRNM, unpublished slip op. (Wis. Ct. App. Mar. 3, 1999) (*Wheeler I*).

¶3 In 2005, Wheeler filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04). Wheeler claimed that: (1) he received ineffective assistance of trial and postconviction counsel; (2) his arrest lacked probable cause; (3) the magistrate's probable cause determination was invalid; and (4) the circuit court admitted his inculpatory statements in error. The circuit court denied the motion, and then denied Wheeler's request for reconsideration. In 2006, this court affirmed the circuit court's orders. See *State v. Wheeler*, No. 2005AP3059, unpublished slip op. (WI App Oct. 17, 2006) (*Wheeler II*). We concluded that Wheeler could have raised his claims in *Wheeler I* and, therefore, Wheeler was procedurally barred from raising those claims in a subsequent postconviction motion. See *Wheeler II*, No. 2005AP3059, ¶10.

¶4 On January 31, 2008, Wheeler filed a postconviction motion pressing the identical claims that he raised in *Wheeler II*. The circuit court concluded that the motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Wheeler moved for reconsideration, and the circuit court denied relief. This appeal followed.

DISCUSSION

¶5 Wheeler brought the postconviction motion underlying this appeal citing the authority of WIS. STAT. § 805.15 (2005-06).¹ That statute permits a party to move for a new trial, but any such motion must be filed no later than twenty days after the verdict unless the court sets a longer time by an order specifying a different deadline. *See* WIS. STAT. § 805.16(1). The verdict in this case was rendered in 1996, and the record contains no circuit court order extending the deadline for motions after verdict through January 31, 2008. Therefore, Wheeler may not proceed under § 805.15. *See Fakler v. Nathan*, 214 Wis. 2d 458, 464, 571 N.W.2d 465 (Ct. App. 1997) (time limit contained in § 805.16 is strictly construed). We are obliged, however, to consider a prisoner's pleadings without regard to the procedural label that the prisoner selected. *See bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Wheeler raises constitutional claims that may be brought after the time for an appeal has passed pursuant to WIS. STAT. § 974.06. Accordingly, we will treat his motion as brought under the authority of that statute. *See bin-Rilla*, 113 Wis. 2d at 521 (if necessary court should relabel prisoner's pleadings and proceed from there).

¶6 We must next consider whether Wheeler's claims are barred by the rule prohibiting criminal defendants from bringing successive postconviction motions under WIS. STAT. § 974.06. *See Escalona-Naranjo*, 185 Wis. 2d at 185. Whether litigation is procedurally barred presents a question of law that we review

¹ All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

de novo. See *State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

¶7 Pursuant to *Escalona-Naranjo*, Wheeler must demonstrate a sufficient reason for bringing a second or subsequent postconviction motion in order to be heard.

[I]f the defendant’s grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion. The language of [the statute] does not exempt a constitutional issue from this limitation, *unless* the court ascertains that a “sufficient reason” exists for either the failure to allege or to adequately raise the issue in the original, supplemental or amended motion.

Escalon-Naranjo, 185 Wis. 2d at 181-82 (emphasis in original). The rule is equally applicable where the defendant conducted his or her first appeal pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. See *Tillman*, 281 Wis. 2d 157, ¶¶19-20.

¶8 Wheeler asserts that his conviction constitutes a fundamental miscarriage of justice, and this is a sufficient reason for an additional postconviction motion. In *Wheeler II*, however, we determined that the claims Wheeler raises now are barred, stating: “the no-merit process procedures were followed [during Wheeler’s direct appeal] and the record further demonstrates a sufficient degree of confidence in the result.” See *id.*, No. 2005AP3059, ¶10. Our decision barring Wheeler’s claims established the law of the case. “A decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit and appellate courts.” *State v. Casteel*, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d

338. Accordingly, we follow *Wheeler II* here. Wheeler's instant claims are barred.

By the Court.—Order affirmed.

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

