

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

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. 2007AP2959

Cir. Ct. No. 1997CF971568

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ONTARIO ANTWAN DAVIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. This appeal arises from the latest in a series of motions filed by Ontario Antwan Davis following his 1997 criminal convictions. By decision and order dated December 10, 2007, the circuit court denied both

Davis's motion for relief from an allegedly void sentence and his motion for relief from postconviction orders entered in 2006. We affirm.

BACKGROUND

¶2 According to the criminal complaint, Davis and a co-actor shot and killed Kevin Gibson during an apparent drug transaction or robbery. Pursuant to a plea agreement, Davis entered guilty pleas to two offenses: (1) second-degree reckless homicide while armed as party to a crime, which carried a maximum prison sentence of fifteen years;¹ and (2) first-degree reckless endangerment while armed, which carried a maximum prison sentence of nine years.² At the plea hearing, the State explained that the reckless endangerment charge was based on Davis having fired his gun in the direction of a second victim who was never identified. The circuit court accepted Davis's guilty pleas and imposed consecutive maximum sentences.

¶3 Davis appealed his convictions pursuant to the no-merit procedure of WIS. STAT. RULE 809.32 (1997-98). His appointed counsel filed a no-merit report, and Davis filed a response. This court summarily affirmed. *See State v. Davis*, No. 1998AP1623-CRNM, unpublished slip op. (Wis. Ct. App. Jan. 11, 1999) (*Davis I*).

¶4 In August 2001, Davis filed a postconviction motion pursuant to WIS. STAT. § 974.06 (1999-2000). All four of his claims related to his contention that the charge of reckless endangerment lacked a factual basis. The circuit court

¹ See WIS. STAT. §§ 940.06, 939.05, 939.63, 939.50(3)(c) (1997-98).

² See WIS. STAT. §§ 941.30(1), 939.63, 939.50(3)(d) (1997-98).

denied the motion, and this court affirmed. We held that the claims Davis presented in his motion were raised and rejected in the no-merit proceeding. *See State v. Davis*, No. 2001AP2235, unpublished slip op. (WI App Oct. 18, 2002) (*Davis II*).

¶5 In 2006, Davis filed a postconviction motion seeking modification of his sentence for reckless endangerment based on an alleged new factor and a claimed abuse of sentencing discretion. By order dated May 26, 2006, the circuit court denied the motion and, by order dated June 9, 2006, the circuit court denied Davis's motion for reconsideration. Davis appealed, and this court affirmed. *See State v. Davis*, No. 2006AP1534-CR, unpublished slip op. (WI App Mar. 13, 2007) (*Davis III*). We agreed with the circuit court's conclusion that Davis's sentence modification claims were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *Davis III*, No 2006AP1534-CR, ¶¶8-11. We further determined that the claims were substantively meritless. *Id.*, ¶¶12-19.

¶6 On November 27, 2007, Davis filed the postconviction motions underlying this appeal. Pursuant to WIS. STAT. § 806.07 (2005-06),³ Davis moved the circuit court for relief from the orders entered on May 26, 2006, and June 9, 2006. In a separate motion, Davis claimed that his sentence for second-degree reckless homicide exceeds the statutory maximum and should be modified pursuant to WIS. STAT. § 973.13. The circuit court denied both motions, and this appeal followed.

³ All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶7 We first consider Davis’s efforts to secure relief from his sentence for first-degree reckless endangerment by filing a motion pursuant to WIS. STAT. § 806.07. Application of a statute to a set of facts presents a question of law that we review *de novo*. See *State v. Bodoh*, 226 Wis. 2d 718, 724, 595 N.W.2d 330 (1999).

¶8 WISCONSIN STAT. § 806.07 permits a court to relieve a party from a judgment, order, or stipulation if the movant makes a proper showing. The statute applies in civil actions. See *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 172, 346 N.W.2d 457 (1984). Davis does not cite any authority to support a contention that § 806.07 applies to sentence modification proceedings. Rather, Davis acknowledges that “cases suggest[] that § 806.07 does not apply to criminal appeals.” Nonetheless, Davis contends that the statute should apply here because he is otherwise without a remedy.⁴ Davis’s argument is little more than an emotional appeal, and we reject it. See *State v. Armstead*, 220 Wis. 2d 626, 641-42, 583 N.W.2d 444 (Ct. App. 1998).

¶9 Moreover, Davis’s claim for relief from the circuit court’s orders could not succeed even if WIS. STAT. § 806.07 were applicable. Davis asserts that the original no-merit proceeding was procedurally defective because this court did

⁴ We note that Davis has adequate remedies for pursuing appellate relief. Should a new factor arise, for example, he may move the court to exercise its inherent power to modify his sentence. See *State v. Trujillo*, 2005 WI 45, ¶10, 279 Wis. 2d 712, 694 N.W.2d 933. Under appropriate circumstances, he may also move for postconviction relief pursuant to WIS. STAT. § 974.06. Davis is merely barred from bringing an unending series of postconviction motions without showing a sufficient reason for doing so. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

not discuss his sentences in *Davis I*. He concludes that the circuit court therefore erred in applying a procedural bar to his subsequent postconviction motion for sentence modification. See *State v. Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574 (in considering whether to apply procedural bar following a no-merit appeal, court should consider whether no-merit procedures were followed).

¶10 We expressly considered and rejected Davis’s argument in *Davis III*. There, we barred Davis from bringing his sentence modification motions subsequent to his no-merit appeal because “the no-merit procedures were followed [in *Davis I*] and the record demonstrates a sufficient degree of confidence in the result.” *Davis III*, No. 2006AP1534-CR, ¶10. Our decision governs this litigation. “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, the circuit court properly refused to consider Davis’s claim that there were inadequacies in the no-merit proceeding warranting further litigation of the sentence modification motions.

¶11 We turn to Davis’s claim that his sentence for second-degree reckless homicide while armed exceeds the statutory maximum and must be modified pursuant to WIS. STAT. § 973.13. Davis contends that the sentence for this offense was “based exclusively on the victim described in [the homicide charge].” In his view, the reckless endangerment count “had no factual basis whatsoever ... and was simply used as a tool to enhance the sentence imposed [for reckless homicide].” He concludes that he is serving a twenty-four-year sentence

for reckless homicide while armed, and that the sentence is void to the extent that it exceeds fifteen years.

¶12 Although couched as a challenge to the validity of his sentence for reckless homicide, Davis’s claim is that the evidence was insufficient to support the reckless endangerment charge and, therefore, insufficient to support a sentence for that offense. As we held in three prior appeals, Davis’s guilty plea waived any claim that the reckless endangerment count lacks a factual basis. *Davis I*, No. 1998AP1623-CRNM at 2-3; *Davis II*, No. 2001AP2235 at 2; *Davis III*, No. 2006AP1534-CR, ¶16. Our determinations resolved a question of law. *See State v. Kelty*, 2006 WI 101, ¶13, 294 Wis. 2d 62, 716 N.W.2d 886 (determination of whether guilty plea waived right to appeal an issue is a question of law). Accordingly, our prior holdings that Davis waived his challenge to the sufficiency of the evidence are binding on the circuit court and on this court as the law of the case. *See Casteel*, 247 Wis. 2d 451, ¶15.

¶13 In his reply brief, Davis asserts that his challenge “was also premised on the fact that in pronouncing sentence, the [circuit] court did not even mention count two – first-degree reckless [sic] endangering safety – and for [the court of appeals] to discern or conclude that the charge was actually considered is unfair.” This argument renews Davis’s claim that the circuit court erroneously exercised its sentencing discretion. We considered and rejected that contention in *Davis III*. We will not revisit it here. “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

By the Court.—Order affirmed.

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

