

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 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. 2008AP930-CR

Cir. Ct. No. 2005CF192

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRAD L. POOLO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Brad Poolo appeals *pro se* from a circuit court order denying his WIS. STAT. § 974.06 (2007-08) motion without a hearing. We agree with the circuit court that Poolo was not entitled to relief from his 2006 convictions for operating a motor vehicle with a detectable amount of a restricted

controlled substance (5th offense) contrary to WIS. STAT. § 346.63(1)(am) (2005-06)¹ and felony bail jumping contrary to WIS. STAT. § 946.49(1)(b). We affirm.

¶2 We review the circuit court’s decision to deny Poolo’s WIS. STAT. § 974.06 motion without a hearing for an erroneous exercise of discretion. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citations omitted). The circuit court properly exercises its discretion if it denies a § 974.06 motion without a hearing when “the record conclusively demonstrates that the defendant is not entitled to relief....” *Id.* at 309-10. The court’s order denying the motion only addressed Poolo’s challenge to his bail jumping conviction.

¶3 On appeal, Poolo argues that a prior revocation for refusal does not count toward an enhanced penalty for a subsequent operating while intoxicated conviction. Poolo is wrong.

¶4 A prior revocation arising from a refusal to take a chemical test enhances a subsequent penalty for operating while intoxicated or under the influence of another drug. WISCONSIN STAT. § 343.307(1)(f) states that revocations under WIS. STAT. § 343.305(10) for refusing to take a chemical test count to determine the penalty under WIS. STAT. § 346.65 (which sets forth the penalties for violation of § 346.63(1)). Therefore, Poolo’s 1991 revocation for refusal counts toward the penalty for his 2006 operating with a detectable amount of a restricted controlled substance, and makes the 2006 offense a fifth offense.

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

¶5 Poolo also attacks the 1991 revocation for refusal on the grounds that he was not told that if he refused the officer's request to take a test to determine his blood alcohol level, such refusal would count toward subsequent operating while intoxicated convictions under WIS. STAT. § 346.63(1). This is an impermissible basis for collaterally attacking the 1991 revocation for refusal. The only permitted basis for a collateral attack is a denial of the constitutional right to counsel in the prior case. *State v. Hahn*, 2000 WI 118, ¶4, 238 Wis. 2d 889, 618 N.W.2d 528. The circuit court correctly concluded that Poolo was not entitled to relief on this claim.

¶6 Poolo's appellant's brief lists two other issues for appeal: whether the bail jumping charge should have been dismissed and whether the implied consent law is unconstitutional. Neither of these issues is briefed. We do not consider inadequately briefed issues. *Vesely v. Security First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985). In addition, the argument regarding the constitutionality of the implied consent law is raised for the first time in Poolo's reply brief, and for that reason, we do not consider it. *State v. Grade*, 165 Wis. 2d 143, 151 n.2, 477 N.W.2d 315 (Ct. App. 1991).

¶7 The circuit court properly exercised its discretion in denying Poolo's WIS. STAT. § 974.06 (2007-08) motion without a hearing because the record demonstrates that Poolo was not entitled to relief.

By the Court.—Order affirmed.

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

