OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

May 13, 2015

To:

Hon. David M. Reddy
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

Jacob J. Wittwer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Thomas R. Austin, #436981
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

You are hereby notified that the Court has entered the following opinion and order:

2014AP23-CR	State of Wisconsin v. Thomas R. Austin (L.C. #1996CT105)
2014AP24-CR	State of Wisconsin v. Thomas R. Austin (L.C. #2002CF326)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

In these consolidated cases, Thomas R. Austin appeals pro se from an order denying his motion to reconsider an order denying a motion to void judgments in his fifth- and sixth-offense operating-while-intoxicated (OWI) convictions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2013-14).[1] As Austin failed to file his notice of appeal within ninety days and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

his motion for reconsideration does not present any new issues, we dismiss for lack of jurisdiction.

Austin is a serial OWI offender. In 2002, he entered guilty pleas to fifth- and sixth-offense OWI ("2002 convictions"). In December 2007, he moved, unsuccessfully, to void the judgment on grounds that his second offense ("1992 conviction") was invalid, as it had been adjudicated in municipal court as a first offense, when, in fact, he had a prior Illinois OWI conviction.[2] *See* ***State v. Banks***, 105 Wis. 2d 32, 40-41, 313 N.W.2d 67 (1981) (court commissioner without jurisdiction to hear or enter judgment in criminal proceeding). This court affirmed because, pursuant to ***State v. Hahn***,[3] Austin was barred from collaterally challenging his municipal court conviction in the enhanced sentencing proceeding. ***State v. Austin***, Nos. 2008AP487-CR to 2008AP491-CR, unpublished slip op. at 3 (WI App Apr. 15, 2009) (***Austin I***).

In July 2013, the municipal court vacated the 1992 conviction. Austin filed a WIS. STAT. § 806.07(2) motion seeking to void the 2002 convictions. His motion cited the new municipal court order but otherwise mirrored his December 2007 motion and subsequent appeal. In September 2013, the circuit court denied the motion on grounds that this court already had decided the issue in its April 15, 2009 opinion and order and that a § 806.07(2) motion must be

[2] Austin's motion to the municipal court to vacate the conviction was denied September 7, 2007. ***State v. Austin***, Nos. 2008AP487-CR to 2008AP491-CR, unpublished slip op. at 4 (WI App Apr. 15, 2009). His November 17, 2007 appeal from that decision was dismissed as untimely. ***Id.***

[3] ***State v. Hahn***, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528, *modified on other grounds*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902

filed within a reasonable time. The court denied his motion for reconsideration on the same basis.

Austin filed a notice of appeal. As it was filed more than ninety days after entry of the September 2013 order denying his WIS. STAT. § 806.07 motion, this court ruled that, under WIS. STAT. §§ 808.03(1), 808.04(1) and WIS. STAT. RULE 809.10(1)(e), we lacked jurisdiction to review the order denying the motion to void the judgments. ***State v. Austin***, Nos. 2014AP23-CR and 2014AP24-CR, unpublished slip op. at 2 (WI App Feb. 6, 2014) (***Austin II***). We also ordered the parties to address whether this court has jurisdiction over the order denying the motion for reconsideration. That is the issue before us now.

A person may not obtain appellate review of a prior final order by appealing a latter order denying reconsideration. *See* ***Marsh v. City of Milwaukee***, 104 Wis. 2d 44, 46-48, 310 N.W.2d 615 (1981); ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25-26, 197 N.W.2d 752 (1972). The purpose of the rule is to prevent the use of motions for reconsideration to extend the time for appeal, thus "wholly nullif[ying]" the statute limiting the time to take an appeal. *See* ***Marsh***, 104 Wis. 2d at 47-48; ***Ver Hagen***, 55 Wis. 2d at 26.

Austin's August 2013 motion and September 2013 motion for reconsideration raise the same issues. He argued in both that, under ***Neyland v. Vorwald***, 124 Wis. 2d 85, 368 N.W.2d 648 (1985), the reasonable-time requirement of WIS. STAT. § 806.07 does not apply to void judgments. *See* ***Neyland***, 124 Wis. 2d at 100. His rebuke of the court in his motion for reconsideration for not following ***Neyland*** is simply a repackaged argument that ***Neyland*** applies. Even if ***Neyland*** does apply, it is not a new issue.

The motion for reconsideration also challenges the circuit court's September 2013 order stating that this court already had decided his issue in ***Austin I***. Austin contends that this court could not have done so because ***Austin I*** was decided in 2009—before the municipal court's 2013 decision and order vacating the 1992 conviction. The circuit court was aware of the municipal court's decision, however, because Austin had discussed it in his motion and provided the court with a copy. As with ***Neyland***, the issue is not the correctness of the circuit court's conclusion. Rather, the critical point is that Austin's challenge to the court's conclusion in his motion to reconsider did not raise a new issue.

We therefore measure the timeliness of the notice of appeal against the original order. As it was not filed within ninety days, we are without jurisdiction to address Austin's appeal.

Upon the foregoing reasons,

IT IS ORDERED that the appeal is summarily dismissed, pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals