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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  
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**DISTRICT II**

August 1, 2018

To:

Hon. Daniel J. Bissett  
Circuit Court Judge  
Winnebago County Courthouse  
P.O. Box 2808  
Oshkosh, WI 54903

Melissa M. Pingel  
Clerk of Circuit Court  
Winnebago County Courthouse  
P.O. Box 2808  
Oshkosh, WI 54903

Thomas J. Balistreri  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Christian A. Gossett  
District Attorney  
P.O. Box 2808  
Oshkosh, WI 54903-2808

Peter J. Long  
1135 Manor Dr. #22  
Neenah, WI 54956

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

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2017AP997

State of Wisconsin v. Peter J. Long (L.C. # 2008CF151)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Peter Long appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion after a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm the circuit court.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

One of Long's prior appeals, *State v. Long*, No. 2016AP1069, unpublished slip op. (WI App Feb. 22, 2017), informs our decision in this appeal. To date, Long has been convicted of at least eight offenses of operating a motor vehicle while intoxicated (OWI). In *Long*, Peter Long challenged his eighth offense conviction via a WIS. STAT. § 974.06 motion. Long made "a constitutional challenge to WIS. STAT. § 346.65(2) on the ground that it violates the ex post facto clauses of the [state and federal] Constitutions by enhancing his [eighth offense] conviction with offenses that could not have been counted when he committed them." *Long*, No. 2016AP1069, op. ¶17. We rejected Long's challenge, and we affirmed the circuit court's denial of his § 974.06 motion. *Id.*, ¶¶17-18.

With *Long* as background, we turn to the pending appeal. The pending appeal relates to Long's sixth conviction for OWI. In his WIS. STAT. § 974.06 postconviction motion,<sup>2</sup> Long raised a constitutional challenge and alleged an ex post facto violation relating to WIS. STAT. § 346.65(2). The circuit court addressed the issues on the merits and rejected them. The constitutional challenge and ex post facto challenges in this case are the same as that addressed in *Long*.

We need not reach the merits of this appeal because the issues Long raises were previously decided by this court in *Long*, as discussed above. Therefore, these issues cannot be relitigated. See *State v. Thames*, 2005 WI App 101, ¶11, 281 Wis. 2d 772, 700 N.W.2d 285 (issues that were previously adjudicated cannot be raised in a subsequent postconviction motion

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<sup>2</sup> Long's WIS. STAT. § 974.06 motion, which is the subject of this appeal, was filed on February 6, 2017 shortly before we decided *State v. Long*, No. 2016AP1069, unpublished slip op. (WI App Feb. 22, 2017).

under WIS. STAT. § 974.06); *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (same). It is the substance of the claim that matters. See *State v. Tillman*, 2005 WI App 71, ¶24, 281 Wis. 2d 157, 696 N.W.2d 574. In addition, a decision by this court on a legal issue ““establishes the law of the case and must be followed in all subsequent proceedings in the same case ... on a later appeal.”” *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986) (citation omitted). We reject all of Long’s attempts to circumvent the application of these rules in this appeal.

Even if Long were not barred from relitigating his challenges to WIS. STAT. § 346.65(2), we would hold that Long’s no contest plea waived his constitutional challenges to the statute. *State v. Bush*, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80 (an as-applied constitutional challenge may be waived); *Kenosha Cty. DHS v. Jodie W.*, 2006 WI 93, ¶24, 293 Wis. 2d 530, 716 N.W.2d 845 (a no contest plea waives the right to challenge the constitutionality of the statute as applied).

The record before this court indicates that during the proceedings leading up to the entry of the judgment of conviction for sixth offense OWI, Long was advised of the penalties he faced for the pending OWI charge. Long had an opportunity to challenge the application of the statute governing the effect of prior OWI convictions. The record reveals no substantive or procedural due process violations in relation to Long’s opportunity to raise this challenge. See *State v. Thompson*, 2012 WI 90, ¶46, 342 Wis. 2d 674, 818 N.W.2d 904 (citation omitted) (“The elements of procedural due process are *notice* and an opportunity to be heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules.”); see *Dane Cty. DHS v. P.P.*, 2005 WI 32, ¶19, 279 Wis. 2d 169, 694 N.W.2d 344 (“The

right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair.”).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*