

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2016

Diane M. Fremgen
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. 2015AP2423

Cir. Ct. No. 2003TR860

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. HESS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Reversed and cause remanded with directions.*

¶1 GUNDRUM, J.¹ Michael Hess appeals pro se from a circuit court order denying his amended motion to vacate a revocation order related to an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

alleged refusal under WIS. STAT. § 343.305. He asserts the revocation order is void because he was never served with the notice of intent to revoke as required by § 343.305 and, therefore, the circuit court never had jurisdiction to enter the order. For the following reasons, we reverse the court's order and remand for further proceedings consistent with this opinion.

¶2 More than a decade after the circuit court entered a default judgment and issued an order revoking Hess's driver's license in relation to a January 1, 2003 alleged drunk driving event, Hess filed a motion pursuant to WIS. STAT. §§ 806.07(1)(h) and 974.06 to vacate that 2003 revocation order. He subsequently filed an "amended motion," asking the court to vacate the default judgment and revocation order on the basis that they are void under § 806.07(1)(d) because he was never served with the notice of intent to revoke as required under WIS. STAT. § 343.305 and he was denied due process.

¶3 The circuit court addressed Hess's amended motion by stating: "The Motion you filed is *denied*, not timely, and no basis to grant." Hess appeals the denial of his amended motion.²

¶4 The decision to reopen a default judgment under WIS. STAT. § 806.07 is within the circuit court's discretion and we will not reverse unless the court has erroneously exercised that discretion. *Dustardy H. v. Bethany H.*, 2011 WI App 2, ¶14, 331 Wis. 2d 158, 794 N.W.2d 230 (2010). Under § 806.07(1)(d), a court may relieve a party from a judgment if the judgment is void. Although

² Both parties make factual assertions in their brief without citation to the record. We encourage the parties to show greater care in the future regarding adhering to WIS. STAT. RULE 809.19(1)(d).

§ 806.07(2) states that “[t]he motion shall be made within a reasonable time,” the Wisconsin Supreme Court has held that this “reasonable time” requirement does not apply to void judgments because “[i]t is the duty of the court to annul an invalid judgment.” *Neylan v. Vorwald*, 124 Wis. 2d 85, 97, 100, 368 N.W.2d 648 (1985) (citation omitted). In so holding, the *Neylan* court stated that a motion seeking relief from a void judgment may be brought at any time without regard to whether the moving party has been “dilatatory or lackadaisical in his [or her] efforts to overturn the judgment.” *Id.* (citation omitted).

¶5 In his amended motion, Hess moved the circuit court to vacate the January 2003 default judgment and related revocation order as void under WIS. STAT. § 806.07(1)(d), and the circuit court denied it, stating “not timely, and no basis to grant.” In light of *Neylan* and because we are unable to determine what the circuit court was relying upon in its determination that Hess’s motion was “not timely,” and that it had “no basis to grant,” we are reversing the court’s order denying Hess’s amended motion and remanding to the circuit court for further proceedings.

¶6 For due process, WIS. STAT. § 343.305, and the demands of personal jurisdiction to be satisfied, it was necessary that Hess receive notice of the notice of intent to revoke his operating privileges and a chance to be heard. *See* § 343.305(9)(a); *State v. Moline*, 170 Wis. 2d 531, 536-542, 489 N.W.2d 667 (Ct. App. 1992). Hess claims he was never served with the notice of intent to revoke his operating privileges, and a material factual question appears to exist on this issue. If he is correct, the circuit court may have lacked personal jurisdiction, the 2003 judgment and related revocation order may be void, and he may be entitled to relief. *See Moline*, 170 Wis. 2d at 536-42. While Hess ultimately may or may not be able upon remand to meet his burden of proof for reopening this matter and

vacating the default judgment and revocation order, *see Richards v. First Union Sec., Inc.*, 2006 WI 55, ¶27, 290 Wis. 2d 620, 714 N.W.2d 913 (holding that “the burden of proof is on the person seeking to reopen and set aside or vacate the default judgment”), we conclude the court erred in determining without a hearing that his amended motion was “not timely, and no basis to grant.”

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

