COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1160 **Cir. Ct. No. 2008CF32**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUTHEFER C. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Luthefer Davis, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Davis challenges the sufficiency of the criminal complaint to establish probable cause for his crimes. Because Davis's claim is both procedurally barred and waived, we affirm the order.

BACKGROUND

¶2 The State charged Davis with felony bail jumping; criminal damage to property; attempted robbery with threat of force; aggravated battery; and two counts of first-degree reckless endangerment, all but the bail jumping charge as party to a crime and the latter three charges with dangerous weapons enhancers. The criminal complaint alleged that in the early morning hours of October 13, 2007, two males approached a couple sitting in a parked vehicle and demanded the couple's property while attempting to enter the couple's vehicle. The couple drove out of the parking lot and the two males followed them. While attempting to evade their pursuers, the couple lost control of their vehicle and went into a steep ditch. The female victim called 911 and, while in the ditch, large rocks were propelled into the vehicle's windows resulting in injury to the couple.

¶3 When the police arrived, they observed Davis and another man step onto the road from the ditch. Police observed that the vehicle's windows had been smashed and six rocks, ranging in size from a softball to one foot in diameter, were found inside the vehicle. In response to questions, Davis denied approaching the couple in the parking lot or throwing rocks at the vehicle's windows. Rather, he claimed that he followed the couple's vehicle only after it suspiciously drove

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

by his residence. Davis further stated he walked into the ditch to check on the couple, picking up a rock that was in his way. Davis claimed that while holding the rock, he lost his balance, causing the rock to fall into the vehicle's window.

¶4 Davis's motion to suppress statements made at the scene was denied and he subsequently pleaded guilty to an amended count of substantial battery and one count of first-degree reckless endangerment, both as party to a crime and with the dangerous weapons enhancer. In exchange for his pleas, the remaining counts were dismissed and read in. The court imposed concurrent sentences resulting in a total of ten and one-half years' initial confinement followed by four years' extended supervision.

¶5 On direct appeal, Davis's appointed counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there was no arguable basis to challenge Davis's conviction. Davis was advised of his right to respond to the report, but did not respond. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we concluded there was no arguable basis for appeal and summarily affirmed the judgment. Davis's subsequent motion for postconviction relief was denied and this appeal follows.

DISCUSSION

¶6 We conclude Davis's challenge to the sufficiency of the complaint is barred by WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. ***Id.*** at 185. The bar to serial litigation may also apply when the direct appeal was conducted pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281

Wis. 2d 157, 696 N.W.2d 574; *see also* ***State v. Allen***, 2010 WI 89, ¶¶35-41, 328 Wis. 2d 1, 786 N.W.2d 124. Absent a sufficient reason for doing so, a defendant may not raise issues in later proceedings that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the no-merit proceeding to warrant application of the procedural bar. ***Allen***, 328 Wis. 2d 1, ¶62.

¶7 Davis has not demonstrated that his no-merit appeal was procedurally inadequate. Davis was afforded the opportunity to respond to his counsel's report. Although Davis did not respond, he was not required to do so. ***Id.***, ¶39. However, the fact that a defendant does not file a no-merit response is not, by itself, a sufficient reason to permit the defendant to raise new claims. ***Id.***, ¶55. Davis must nevertheless demonstrate a sufficient reason for failing to raise his present claim in the context of his no-merit appeal. ***Id.***, 56. Davis has not provided any reason, much less a sufficient reason, for not raising his claim in the earlier proceeding.

¶8 Ultimately, this court engaged in an independent review of the record and concluded there was no arguable basis for: (1) challenging the denial of Davis's suppression motions; (2) withdrawing Davis's guilty pleas; or (3) challenging the court's sentencing discretion. We also noted that all other nonjurisdictional defects and defenses had been waived by Davis's valid pleas. Our discussion reflects that the no-merit review conducted by this court represented a full and conscientious examination of the record. Accordingly, our resolution of the no-merit proceeding carries a sufficient degree of confidence warranting application of the procedural bar to Davis's claim.

¶9 In any event, Davis waived any objection to the sufficiency of the complaint by failing to raise an objection at his preliminary hearing.[2] "[O]bjections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived." WIS. STAT. § 971.31(5)(c) (2007-08); *see also* ***State v. Berg***, 116 Wis. 2d 360, 365, 342 N.W.2d 258 (Ct. App. 1983).

By the Court.—Order affirmed.

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

[2] To the extent Davis attempts to label his claim as a non-waivable challenge to the court's "subject matter jurisdiction," his claim does not implicate the circuit court's subject matter jurisdiction. The circuit court would lack subject matter jurisdiction only if the crime charged were unknown in law—in other words, if it were a "nonexistent crime." *See* ***State v. Briggs***, 218 Wis. 2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998). Here, Davis does not argue that the crimes charged were unknown in law.