

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0389-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. GUIBORD,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Judgment modified and, as modified, affirmed; order affirmed.*

MYSE, J. Kevin L. Guibord, pro se, appeals a judgment of conviction for operating a motor vehicle while intoxicated and with .10% or more alcohol by weight in blood contrary to §§ 346.63(1)(a) and (b), STATS., second offense, and an order denying his motion for postconviction relief. Guibord contends that the convictions under both §§ 346.63(1)(a) and (b) violated his constitutional protection against double jeopardy under the Fifth Amendment to the United States Constitution. Because the trial court was required to dismiss one of the charges under § 346.63(1)(c),¹ this court modifies

¹ Section 346.63(1)(c), STATS., provides:

the judgment by dismissing the BAC count and, as modified, affirms the judgment.

On March 13, 1995, Guibord was convicted of operating a motor vehicle while intoxicated contrary to § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited alcohol concentration contrary to § 346.63(1)(b). The trial court, however, sentenced Guibord on only one of the convictions. Guibord subsequently filed several postconviction motions, none of which raised the double jeopardy issue, and the trial court denied the motions. Guibord appealed the judgment of conviction and the trial court's orders denying his postconviction motions. This court affirmed the judgment and orders in a November 7, 1995, decision. *See State v. Guibord*, Nos. 95-0991-CR, 95-1323-CR, unpublished slip op. (Wis. Ct. App. Nov. 7, 1995). On December 19, 1995, Guibord filed a "Motion to Set-Aside Judgment of Conviction in the Interest of Justice" claiming that his constitutional protection against double jeopardy was violated. The trial court first denied the motion, then rescinded the denial, ruling that it lacked jurisdiction to hear the motion.

The trial court correctly concluded that it lacked jurisdiction to hear Guibord's motion to set aside his judgment of conviction. Guibord brought his motion pursuant to §§ 805.15(1), 805.18 and 753.03, STATS. Such a motion must be filed within twenty days after the verdict is rendered unless the court sets a longer time by order. Section 805.16, STATS. Because the judgment of conviction was dated March 13, 1995, and Guibord did not bring the motion until December 19, 1995, he failed to comply with § 805.16. Therefore, the trial court properly ruled that it lost competency to exercise jurisdiction. *See*

(..continued)

A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

Brookhouse v. State Farm Mut. Auto Ins. Co., 130 Wis.2d 166, 167-71, 387 N.W.2d 82, 83-84 (Ct. App. 1986).²

Guibord argues, however, that even though his motion was untimely, this court should exercise its discretionary power of reversal under § 752.35, STATS. The State does not address the jurisdictional issue directly but asserts that *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), precludes relief.

This court will address Guibord's argument under its discretionary powers to consider claims in the interest of justice. This court may reverse a judgment in the interest of justice if the real controversy has not been fully tried or justice has miscarried. Section 752.35, STATS. Whether Guibord's double jeopardy rights were violated presents a question of law this court reviews de novo. See *State v. Kanarowski*, 170 Wis.2d 504, 509, 489 N.W.2d 660, 663 (Ct. App. 1992). Guibord argues that the prosecution of both charges violates double jeopardy because OWI under § 346.63(1)(a), STATS., is a lesser included offense of BAC under § 346.63(1)(b).

This court rejects Guibord's argument. Section 346.63(1)(c), STATS., provides that each offense "require[s] proof of a fact for conviction which the other does not require." Under 346.63(1)(a), the State must prove that a defendant was operating while under the influence of an intoxicant. A driver is "under the influence" if the driver's ability to operate a motor vehicle is materially impaired or the driver is incapable of safely driving. *State v. Waalen*, 130 Wis.2d 18, 28, 386 N.W.2d 47, 50-51 (1986). Under § 346.63(1)(b), the State must prove that a defendant was operating a motor vehicle with a BAC of .10% or more. Thus, a driver may be under the influence but not have a BAC of .10% or more, or may have a BAC of .10% or more and not be under the

² Further, if Guibord's motion could be construed as a § 974.06, STATS., motion for postconviction relief, Guibord is barred from raising the issue. See *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Under *Escalona-Naranjo*, an issue that could have been raised in a postconviction motion under § 974.02, STATS., and on direct appeal may not be raised in a motion under § 974.06 absent a sufficient reason for the failure to allege or adequately raise the issues in his or her original motion or appeal. *Id.* at 185-86, 517 N.W.2d at 163-64. Because Guibord did not raise the double jeopardy issue in either his previous motions or his previous appeal and he did not allege a sufficient reason, he may not raise the issue in a § 974.06 motion.

influence. Because each offense requires proof of a fact that the other does not as stated in § 346.63(1)(c), Guibord's double jeopardy argument fails. See *Kanarowski*, 170 Wis.2d at 509-10, 489 N.W.2d at 662-63.

However, § 346.63(1)(c), STATS., provides that if a person is found guilty of both OWI and BAC "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions" "In other words, the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed." *Menasha v. Bastian*, 178 Wis.2d 191, 195, 503 N.W.2d 382, 383 (Ct. App. 1993). While the trial court only sentenced Guibord on the OWI charge, it did not dismiss the BAC charge. Because the trial court was required to dismiss one of the charges, this court modifies the judgment by dismissing the BAC count.³

By the Court.—Judgment modified and, as modified, affirmed; order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

³ Although the trial court erred by not dismissing one of the charges, the error is harmless. Guibord does not contend that he was prejudiced by the failure to dismiss one of the charges as long as they were treated as one for purposes of sentencing and counting convictions. This court is authorized to reverse a judgment only when the error prejudiced the complaining party's case. Section 805.18, STATS.