

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 7, 1995

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, STATS.

NOTICE

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

Nos. 95-0991-CR, 95-1323-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 orders of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *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 orders denying his motions for postconviction relief. Guibord contends the trial court abused its discretion when it denied his motions for postconviction relief without stating its reasons. Guibord further contends that this court should exercise its power of discretionary reversal because the trial court did not allow him to explain probable cause to the jury and to argue that the officer was acting without probable cause. Because this court concludes that the trial court did not erroneously exercise its discretion and that the interests of justice do not warrant a new trial, the judgment and orders are affirmed.

At approximately 1:55 a.m., officer Alec Christianson was in the McDonald's parking lot across the street from a group of bars when he noticed Guibord driving without his lights on. After following him for several blocks, Christianson stopped Guibord and noticed an odor of intoxicants on Guibord's breath and that Guibord's eyes were glassy. Guibord admitted to having three beers. Christianson conducted several field sobriety tests and concluded that Guibord failed to perform them properly. Christianson then arrested Guibord for operating a motor vehicle while under the influence of an intoxicant. Guibord was later transported to the hospital where a blood sample was taken that showed a .181% blood alcohol content.

At trial, Guibord, acting as his own counsel, indicated to the trial judge at a side-bar conference that he wanted to question Christianson about what he was doing in the parking lot the night he arrested Guibord. Guibord's purpose was to show that Christianson was acting without probable cause. The court allowed Guibord to ask the questions but told Guibord that he could not use the words "probable cause" in front of the jury and could not explain those words to the jury. While Guibord asked questions using the words "probable cause," he did not explain those words to the jury. At the close of the evidentiary portion of trial, Guibord again requested to explain the words "probable cause" to the jury during closing arguments. The trial court denied his request.

The jury convicted Guibord of operating a motor vehicle while intoxicated and with a prohibited alcohol content. The trial court subsequently denied Guibord's post-trial motions.¹ Guibord then filed amended post-trial motions to set aside the jury's verdict, for a new trial pursuant to § 805.15(1), STATS., and to stay enforcement of the judgment of conviction. In the amended motions, Guibord claimed that he was denied his due process rights because the trial court did not allow him to explain probable cause to the jury and to argue that the officer acted without probable cause. The trial court denied the motions without comment.

¹ Guibord did not argue the denial of these motions in his brief. Claims not briefed are deemed waived and will not be addressed. *State v. S.H.*, 159 Wis.2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990).

The denial of Guibord's amended post-trial motions is addressed to the trial court's discretion. See *State v. Harp*, 161 Wis.2d 773, 779, 469 N.W.2d 210, 212 (Ct. App. 1991); *State v. Hancock*, 48 Wis.2d 687, 694-95, 180 N.W.2d 517, 520 (1970). The decision whether to admit evidence is also addressed to the trial court's discretion. *State v. Jenkins*, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). When the trial court fails to set forth its reasoning in exercising its discretion, this court independently reviews the record to determine whether it provides a basis for the trial court's exercise of discretion. *Camelot Enters., Inc. v. Mitropoulos*, 151 Wis.2d 277, 284, 444 N.W.2d 401, 404 (Ct. App. 1989); *State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

An independent review of the record conclusively demonstrates that Guibord is not entitled to relief. In Guibord's motion, he argued that Christianson was sitting in the McDonald's parking lot for the sole reason of observing people leaving the bars located across the street. He argues that as a result Christianson was conducting a "search" without probable cause of all bar patrons as they left. Guibord further argues that he should have been allowed to explain the importance of probable cause to the jury in showing the illegality of the officer's "search" on the night of his arrest.

This court concludes that the trial court properly denied Guibord's motions without an evidentiary hearing because his claim has no merit. Guibord is proposing that the officer must have probable cause to park his car in the parking lot and observe people driving their cars. However, parking in a parking lot and observing people and cars does not amount to a "search" which requires probable cause under the Fourth Amendment. If Guibord's reasoning were followed, police officers would never be allowed to observe any people who were on public streets. Guibord could properly ask questions regarding the reasons that the officer was in the parking lot, but the officer is not required to have probable cause to park in a parking lot and observe people. Because the evidence elicited by Guibord did not involve probable cause, the trial court reasonably exercised its discretion when it denied the motions and when it denied Guibord's request to explain the words to the jury.

This court further concludes that the interests of justice do not require a new trial. This is a discretionary decision with this court. *State v. Penigar*, 139 Wis.2d 569, 577-78, 408 N.W.2d 28, 32 (1987). Because Guibord's claim regarding probable cause has no merit, this court finds no basis to

conclude that justice has miscarried or that a new trial would lead to a different result. Accordingly, the judgment of conviction and the orders denying postconviction relief are affirmed.

By the Court. – Judgment and orders affirmed.

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