

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1809-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT L. WEDIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County:
JAMES R. BEER, Judge. *Reversed.*

¶1 EICH, J.¹ Robert L. Wedig appeals from a judgment convicting him of operating a motor vehicle while intoxicated.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

¶2 Wedig was arrested after police found him in a parked automobile, with the engine not running; and he argues that, on these facts, he could not be found to have been “operating” the vehicle in violation of the statute because, under the law, for one to “operate” a vehicle requires not only that he or she “start[] the motor and/or leave[] it running,” but also that “the defendant physically manipulate or activate ... the controls necessary to put the ... vehicle in motion.” *State v. Modory*, 204 Wis. 2d 538, 543, 555 N.W.2d 399 (Ct. App. 1996), citing *Milwaukee County v. Proegler*, 95 Wis. 2d 614, 628-29, 291 N.W.2d 608 (Ct. App. 1980) (citations and internal quotations omitted).

¶3 The State, for reasons unknown to us, has elected not to file a brief in opposition. We have often said that because a respondent’s failure to file a brief is a tacit concession that the trial court erred and the appeal has merit, we usually will reverse the judgment in such circumstances. *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993). And there is nothing here to suggest that this is one of those rare cases where the issue is of such great public concern that we would elect, in the exercise of our discretion, to consider it despite the lack of briefing. *See Vogt v. Nelson*, 69 Wis. 2d 125, 127, 230 N.W.2d 123 (1975).

¶4 We therefore reverse the judgment based on the State’s failure to file a brief countering Wedig’s arguments.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4 (1997-98).

