

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 2009

David R. Schanker
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. 2009AP1173-CR

Cir. Ct. No. 2007CT906

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. MILLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Christopher J. Mills appeals from a judgment of conviction for operating a motor vehicle while intoxicated, second offense. He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

contends that his arrest was not supported by probable cause and therefore the circuit court erred when it did not grant his motion to suppress the evidence derived from his arrest. Specifically, he argues that the arresting officer did not have probable cause to believe that Mills had operated a motor vehicle. We disagree and affirm the judgment of conviction.

¶2 The relevant facts are brief and undisputed. On June 24, 2007, Winnebago county deputy sheriff David Roth was working at the Country USA music festival. Roth received a report of a black truck “spinning donuts” on festival grounds. Roth and another deputy set off to investigate. On the way, Roth received a dispatch that campground security personnel needed assistance. They responded and came upon a security supervisor detaining a black truck. Roth saw Mills alone in the driver’s seat and observed that the truck engine was running. The security supervisor told Roth that the truck had been speeding and had nearly hit one of the security staff.

¶3 Roth then approached Mills, who was seated in the truck. Roth noted that Mills smelled of intoxicants and had something spilled on the front of his pants. He asked Mills to perform field sobriety tests. Based upon the results of the tests, including a preliminary breath test, Roth arrested Mills for operating a motor vehicle while intoxicated, a violation of WIS. STAT. § 346.63(1)(a).

¶4 Mills moved to suppress all evidence obtained from the arrest.² The circuit court held a hearing on December 12, 2007 and denied the motion. The

² The motion challenged the lawfulness of the arrest on grounds that Roth had no probable cause to believe that Mills was impaired and specifically addresses the reliability of field sobriety tests. The issue on appeal, whether Mills had operated the vehicle, was raised orally at the motion hearing.

case went to trial before a jury and Mills was convicted of his second offense of OWI. He now appeals.

¶5 Mills makes one argument on appeal. He asserts that, at the moment of arrest, Roth did not have probable cause to believe that Mills had operated the pick up truck. He points to testimony provided at the suppression hearing to show that another person, Samuel Zold, had been driving the pick up truck until it was stopped by Country USA security personnel. He emphasizes that by the time Roth arrived at the scene to assist, Zold had been told to leave. Also, the security officer who made the initial stop had been told to leave and the security supervisor, who arrived after Zold and Mills had exited the truck, was on the scene. Mills suggests that the investigation focused on him because he acknowledged that he was the owner of the truck.

¶6 At the moment of arrest, probable cause requires that the officer knew of facts and circumstances which were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985). A reasonable officer need only believe that guilt is more than a possibility. *Id.* Mills contends that there was insufficient evidence to indicate that he was operating the pickup truck. To operate a motor vehicle is to physically manipulate or activate any of the controls of a motor vehicle which are necessary to put it in motion. WIS. STAT. § 346.63(3)(b). Operation of a motor vehicle occurs either when a defendant starts the motor or leaves it running. *Borzyskowski*, 123 Wis. 2d at 189. The question presented, therefore, is whether Roth knew of facts and circumstances which were sufficient to warrant a prudent person to believe that Mills had operated the pickup truck.

¶7 “In reviewing a motion to suppress, we accept the circuit court’s findings of fact unless they are clearly erroneous; the correct application of constitutional principles to those facts presents a question of law, which we review de novo.” *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. At the motion hearing, the circuit court made the following findings: Roth saw Mills in the truck, the truck was running, and witnesses indicated to Roth that Mills had been the driver.³ Each finding is supported in the record.

¶8 Under *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 628-29, 291 N.W.2d 608 (Ct. App. 1980), “[o]peration’ of a vehicle occurs either when a defendant starts the motor and/or leaves it running.” Proegler was found sleeping behind the steering wheel of a vehicle parked on the side of a road. *Id.* at 618. The keys were in the ignition, and the motor was running. *Id.* Proegler submitted to a breathalyzer test, which revealed a prohibited blood alcohol content. *Id.* He was convicted of operating a motor vehicle while under the influence of an intoxicant. *Id.* at 619. On appeal, Proegler alleged that the trial court erred in finding that he had “operated” his vehicle while under the influence. *Id.* at 624. He argued that sleeping in a car with the motor running on the side of a highway did not fall within the statutory definition of “operating.” *Id.* We upheld the conviction because “activation of any of the controls of a motor vehicle necessary to put it in motion” applies either to turning on the ignition or leaving the motor running while the vehicle is in “park.” *Id.* at 626.

³ The circuit court also stated that “there were admissions by Mr. Mills that he was driving.” However, Mills’ admission occurred after the OWI arrest and was not a factor supporting probable cause.

¶9 Mills nonetheless asserts that, under the facts of his case, sitting at the wheel of a running vehicle does not meet the definition of “operate” in WIS. STAT. § 346.63(3)(b). He relies largely on *Village of Cross Plains v. Haanstad*, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447, to distinguish his case from *Proegler*. Haanstad had been in the passenger seat of a vehicle until the vehicle had been parked, but left running, and the driver exited to help a friend. *Haanstad*, 288 Wis. 2d 573, ¶¶3-4. At that point, Haanstad slid over to the driver’s seat, with her body and feet facing the passenger seat, allowing her friend to enter the car at the front passenger door so they could engage in a discussion about their relationship. *Id.*, ¶4. The supreme court observed that “the evidence [there was] undisputed that Haanstad did not drive the car to the point where the officer found her behind the wheel.” *Id.*, ¶21. The court held, “[B]ecause there exists no evidence, direct or circumstantial, that Haanstad touched any controls of the vehicle necessary to put it in motion while she was intoxicated,” Haanstad was not operating the motor vehicle. *Id.*, ¶24. Mills argues that, like Haanstad, he did nothing more than sit in the driver’s seat, never touching or manipulating the gas pedal, steering wheel, or the keys in the ignition. *See id.*, ¶10.

¶10 Mills’ assertions stretch the issue beyond the scope of probable cause. Whether Mills operated the pickup truck was ultimately a question for the jury, but Mills has not challenged the sufficiency of the evidence for the jury’s finding. Rather, he limits his appeal to the question of probable cause. For that reason, we focus only on those facts and reasonable inferences available to Roth at the time of the arrest. *See State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551 (probable cause to arrest refers to the information known to the officer at the time of the arrest). Here, Roth was investigating reports of reckless driving on Country USA grounds when he responded to a call for assistance from

security staff. When he arrived at the scene, he saw Mills alone in the truck and noted that the truck's engine was still running. Leaving a vehicle's motor running constitutes operation within the meaning of WIS. STAT. § 346.63(3)(b). *See Proegler*, 95 Wis. 2d at 626. The security supervisor on the scene indicated that Mills had been driving the truck and Mills never told Roth that someone else had been the driver. Roth's determination, based on the facts available and reasonable inferences from those facts, was that Mills had been the driver of the truck.

¶11 Because the totality of the circumstances known to Roth at the moment of arrest would lead an officer to reasonably conclude that Mills had operated the pick up truck while intoxicated, the arrest was supported by probable cause. The circuit court properly denied Mills' motion to suppress the evidence arising from the arrest. We therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

