COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 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. 2009AP1294 **Cir. Ct. No. 2008TR4063**

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

IN THE MATTER OF THE REFUSAL OF ALLEN S. BINGHAM:

CITY OF TWO RIVERS,

PLAINTIFF-RESPONDENT,

V.

ALLEN S. BINGHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Allen S. Bingham appeals the revocation of his operating privileges for operating while intoxicated on grounds that the arresting officer lacked probable cause to believe that he was "operating" the vehicle. He asserts that he did not drive the vehicle to where it was found and presents plausible, innocent scenarios that *could* have been the case. But the facts are that the officer found Bingham slouched down alone in the driver's seat of a running vehicle on the side of the road with no room for anyone to sit in the passenger seat and no one around that could have driven the vehicle to where it was stopped. These are more than sufficient facts from which the officer could infer that Bingham "operated" the vehicle. The law does not require the officer to rule out all innocent explanations before establishing probable cause. We therefore affirm.

¶2 While on patrol a little after midnight, an officer drove past a vehicle parked in a lane of traffic with its engine running and its headlights on. He did not see anybody in it. He found this suspicious and thought someone might be in the nearby marina looking at the boats or perhaps trying to steal something. So he took a few seconds to drive through the marina parking lot. When he did not see anybody there, he pulled behind the vehicle again and approached it from the passenger side. He still did not see anybody. But as he looked in further, he saw a man in the driver's seat. That man was Bingham. He was slid down so low with his chin down on his chest that the officer could not see him from behind the truck. The officer also noticed the passenger side was filled with two laptop computers and other items suggesting that there had not been anyone else in the vehicle that could have driven it to where it was now parked.

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

¶3 The officer then made contact with Bingham. Bingham turned the vehicle off, pulled the keys out, and said that he was not driving. Bingham stated that he drove to Two Rivers from Minnesota that morning, had been out with friends, and was looking for a hotel or motel. Bingham kept repeating that he was not driving. Then the officer performed a series of field sobriety tests, and based on the performance of those, the officer arrested Bingham for operating while intoxicated. When Bingham refused to take an evidentiary blood test, his operating privileges were revoked.

¶4 Bingham appeals on the narrow issue of whether there was sufficient evidence that he was "operating" the vehicle. When reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We must adopt the inference that supports the verdict when more than one reasonable inference can be drawn from the evidence. ***Id.*** at 506-07.

¶5 WISCONSIN STAT. § 346.63(3)(b) defines "operate" as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Under ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980), the definition of operate includes either turning on the ignition or leaving the motor running while the vehicle is in "park."

¶6 In ***Proegler***, the defendant argued that sleeping behind the steering wheel in a car, with the keys in the ignition and the motor running, on the side of a

highway did not fall within the statutory definition of "operate." ***Id.*** But we concluded that those facts were sufficient because

> [a]n intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that defendant had of his choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the "actual physical control" of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.

Id. at 627 (citation omitted).

¶7 Like the defendant in ***Proegler***, Bingham may not have been exercising conscious volition with regard to the vehicle at the moment he was found behind the steering wheel of a running vehicle. However, one "could reasonably infer that the car was where it was and was performing as it was because of [Bingham's] choice, from which it followed that [Bingham] was in 'actual physical control' of and so was 'operating' the car while he slept." *See* ***id.*** at 628 (citation omitted). As the ***Proegler*** court concluded, "[i]t is in the best interests of the public and consistent with legislative policy to prohibit one who is intoxicated from attempting to get behind the wheel rather than to make a fine distinction once such a person is in the position to cause considerable harm." ***Id.*** at 629.

¶8 Bingham repeatedly claimed that someone else drove the vehicle to that location and makes that same argument to the trial court and to this court on appeal. He cites to ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶¶17-21,

288 Wis. 2d 573, 709 N.W.2d 447. In ***Haanstad***, the defendant, who was found both under the influence and behind the steering wheel of a running vehicle, was not found to have "operated" the vehicle under WIS. STAT. § 346.63(3)(b). The court reasoned that ***Proegler*** did not apply to the defendant's situation because

> the evidence here is undisputed that Haanstad did not drive the car to the point where the officer found her behind the wheel.... The Village offered no circumstantial evidence to prove that Haanstad had operated the vehicle. The Village does not contest that [Haanstad's friend] was the individual who "operated" the vehicle by driving it, placing it in park, and leaving the motor running.

Haanstad, 288 Wis. 2d 573, ¶21. In ***Haanstad***, it was undisputed that Haanstad had been in the passenger seat until the vehicle had been parked, and the driver exited to help a friend. ***Id.***, ¶¶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 her car at the front passenger door so they could engage in a discussion about their relationship. ***Id.***, ¶4.

¶9 But recently, we noted that ***Haanstad***'s applicability is limited to instances where there is undisputed evidence that a person other than the defendant had driven the vehicle. ***State v. Mertes***, 2008 WI App 179, ¶13 n.5, 315 Wis. 2d 756, 762 N.W.2d 813. Here, there is no undisputed evidence that someone else drove the vehicle to the spot where the officer found it. Instead a reasonable police officer could determine that the evidence shows, unlike in ***Haanstad***, that Bingham was *alone* in the vehicle, with no one else found in the area, and no room for anybody to sit in the passenger seat. So Bingham's reliance on ***Haanstad*** is misplaced.

¶10 Though Bingham claims he did not drive the vehicle, his only evidence in support is that he was in a company vehicle, the ownership of the

items in the passenger seat was unknown to the officer, and some time passed between when the officer first saw the vehicle and when the officer approached the vehicle and found Bingham behind the wheel. Bingham appears to argue that the officer had to rule out every reasonable theory of innocence which might stem from these facts before probable cause can be established. But probable cause may exist notwithstanding a possible innocent explanation for the defendant's conduct. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991). The fact that Bingham *possibly* might not have operated the vehicle, or that his conduct *possibly* might have an innocent explanation, does not require the officer to ignore all of the facts and reasonable inferences pointing to his having operated the vehicle while intoxicated. Someone had to get the vehicle to where it was, and the reasonable inference that supports the verdict is that Bingham drove it there.

¶11 Repeating what we detailed at the top, the facts here are that the officer found Bingham slouched behind the wheel of a vehicle with its engine running and its lights on. No one else was found in the vehicle or in the area. There also would not have been any room for anyone to have been in the passenger seat. And Bingham indicated that he was searching for a hotel or motel, suggesting that he had been driving on his way and had pulled over, parking the vehicle where the officer found it. His stance and odor provided reasonable grounds for believing that he was intoxicated. These facts provided sufficient evidence from which the officer could infer that Bingham had "operated" the vehicle while under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1). We affirm.

By the Court.—Judgment affirmed.

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