COURT OF APPEALS
DECISION
DATED AND RELEASED

October 3, 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, 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. 96-1510-FT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KRISTI M. HOGAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

DYKMAN, P.J.[1] Kristi M. Hogan appeals from an order revoking her operating privileges for one year pursuant to § 343.305(10)(b)4, STATS., for refusing to submit to a blood test and a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI) in violation of § 346.63(1)(a), STATS. Hogan argues that she was not operating a vehicle upon premises held out to the public for the use of their motor vehicles when

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. This appeal has been expedited. RULE 809.17, STATS.

she was arrested, and therefore § 346.63(1)(a) does not apply. We reject her argument and therefore affirm.

BACKGROUND

On July 23, 1995, a University of Wisconsin police officer observed Hogan's vehicle bumping against the parking stops in the service drive of a university parking area. Access to the service drive is restricted to service vehicles, emergency vehicles and motorcycles.

The officer approached Hogan and noticed a strong odor of intoxicants coming from the vehicle. Hogan admitted she had been drinking alcoholic beverages, and the officer asked her to perform field sobriety tests. Hogan exhibited signs of being intoxicated, and the officer administered a preliminary breath test, which gave results of .25 and .24 percent. Hogan was arrested for operating a motor vehicle while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS.

Hogan refused to submit to a chemical test. The State issued a notice of intent to revoke her operating privilege, and Hogan requested a refusal hearing. At the December 20, 1995 refusal hearing, the court found that the officer had probable cause to believe that Hogan was under the influence of an intoxicant while operating a motor vehicle upon premises held out to the public for use of their motor vehicles and revoked her operating privileges for one year. At a March 18, 1996 bench trial, the court found Hogan guilty of OMVWI. Hogan appeals.

STANDARD OF REVIEW

To determine whether the service drive was held out to the public for use of their motor vehicles, we must apply a statute to a set of undisputed facts. This is a question of law, which we review *de novo*. ***State ex rel. Stedman v. Rohner***, 149 Wis.2d 146, 150, 438 N.W.2d 585, 587 (1989).

DISCUSSION

Hogan argues that the service drive was not held out to the public for use of their motor vehicles because access was restricted to service vehicles, emergency vehicles and motorcycles. We disagree.

Section 346.61, STATS., provides that in addition to being applicable on highways, the drunk driving laws are "applicable upon all premises held out to the public for use of their motor vehicles." In ***City of LaCrosse v. Richling***, 178 Wis.2d 856, 860, 505 N.W.2d 448, 449 (Ct. App. 1993), we concluded that the appropriate test for determining whether an area is held out to the public for use of their motor vehicles "is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the [premises] in an authorized manner." Because the service drive was designated for motorcycle parking, potentially any resident with a driver's license and access to a motorcycle could use the premises in an authorized manner. A motorcycle is a motor vehicle. Section 340.01(32), STATS. Therefore, the ***Richling*** test is satisfied.

In addition, "there must be proof that it was the intent of the owner [of the premises] to allow the premises to be used by the public." ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 554, 419 N.W.2d 236, 238 (1988). The fact motorcycles could park in the service drive proves that the owner intended it to be used by the public. Therefore, the service drive satisfies the requirements of § 346.61, STATS.

Hogan argues she was not using the service drive in an authorized manner because she was not driving a motorcycle, and therefore the ***Richling*** test is not satisfied. Hogan misconstrues ***Richling***, however. ***Richling*** does not direct us to inquire whether the accused was using the premises in an authorized manner; rather, we must determine whether *potentially* any resident with a driver's license and access to a motor vehicle *could* use the premises in an authorized manner. Although Hogan was not using the service drive in an authorized manner, she could have done so if she had access to a motorcycle and a license to drive one.

Hogan also argues that the service drive must be held out to the public for the use of all motor vehicles, not just motorcycles, for the ***Richling*** test to be satisfied. We disagree. Section 340.01(35), STATS., defines "motor vehicle" as "a vehicle ... which is self-propelled." In ***Lemon v. Federal Ins. Co.***, 111 Wis.2d 563, 565-67, 331 N.W.2d 379, 380-81 (1983), the court concluded that a tractor with a backhoe on one end and a loader on the other end is a motor vehicle within the definition of § 340.01(35). We doubt that the legislature intended to allow people to drive drunk in all parking lots and other areas not held out to the public for the use of backhoes and loaders. Likewise, we doubt that the legislature intended to allow Hogan to drive drunk in an area held open to the public, but restricted to motorcycle access.

By the Court.—Judgment and order affirmed.

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