COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-1011 and 97-1012

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

JOHN M. VIRNIG,

DEFENDANT-APPELLANT.

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

VERGERONT, J.[1] John M. Virnig was adjudged guilty of operating a motor vehicle while under the influence of an intoxicant (OWI) and of operating a motor vehicle with a prohibited alcohol concentration (PAC) in

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

violation of a City of Madison municipal ordinance adopted in conformity with § 346.63(1), STATS. A judgment of conviction was entered on the OWI charge and a sentence was imposed on that charge. On appeal, Virnig contends that there was insufficient evidence to establish by clear, satisfactory and convincing evidence that he was guilty of either charge. We conclude that the record supports the trial court's decision affirming the determination of the municipal court that Virnig was operating a motor vehicle while under the influence of an intoxicant. We therefore affirm the conviction and sentence and do not address the challenge to the adjustment or guilt on the PAC charge.

Officer Jeffrey Fryer testified as follows. While on duty at 2:00 a.m., June 20, 1995, he saw a pickup truck parked partially in the driveway of 1830 Elka Lane in the City of Madison and partially on the front lawn of 1902 Elka Lane. The truck was at an angle, with the back end in the driveway and the front end on the lawn. The engine was running, the lights were on, and the radio or the stereo in the car was on. Virnig was alone in the truck, sitting in the driver's seat slumped against the driver's door. Officer Fryer tapped on the window, waking Virnig up. Virnig rolled down the window and Officer Fryer asked for his driver's license, which he provided. Officer Fryer immediately noticed a very strong odor of intoxicants coming from inside the truck.

Officer Fryer asked Virnig where he was going, and he said he was going home. Officer Fryer asked where he was and Virnig said he was at home. Because Officer Fryer noticed that Virnig's address on his driver's license was on Londonderry Drive, he asked Virnig if he knew what street he was on and Virnig said he did not. Officer Fryer asked where Virnig was coming from, and Virnig answered that he was coming from the Villa Tap, which was several blocks away. Officer Fryer observed that Virnig's speech was very slurred.

Virnig got out of the truck at Officer Fryer's request, stumbling and falling as he did so. Officer Fryer then asked Virnig if he would submit to field sobriety tests, and Virnig said he would. In his testimony, Officer Fryer described each test, how he explained and demonstrated it to Virnig, and what Virnig did in response. In Officer Fryer's opinion, Virnig did not successfully perform the finger-to-nose, one-legged stand, and heel-to-toe tests, but did correctly recite the alphabet. While attempting to perform the heel-to-toe test, Virnig stumbled, then looked at the officer, held up his hands and said "I'm high."

Officer Fryer placed Virnig under arrest for operating a motor vehicle while intoxicated and took him to the City-County Building, where another officer performed an intoxilyzer test. The intoxilyzer reported a .24 value for the tested breath sample.

Virnig testified that he went to the Villa Tap in the early evening and played pool. He had some drinks and the last thing he remembered was playing pool with a female. He does not recall what he had to drink, when he left the Villa Tap, or if he left alone; he remembers nothing else until the officer tapped his truck window.

The municipal court concluded that there was clear, satisfactory and convincing evidence on both the OWI and the PAC charges. On the OWI charge, the court pointed to this evidence: "The position and condition of his truck, the odor of intoxicants, slurred speech, disorientation as to location, admission of being 'high,' amnesia about the events of the evening, and performance of the field tests." With respect to how Virnig got to the location where Officer Fryer found him, the court stated:

> [T]here is uncontradicted testimony that defendant was first at the Villa Tap and then on Elka Lane. He lives on

> Londonderry and was, presumably, on his way home. He cannot explain how he got to Elka Lane. He was found partially in the driveway and partially on the lawn of a private residential building. The engine, lights and radio were all on. The driver's side window was closed and defendant was in the driver's seat, but slumped against the door…. It is highly speculative, let alone unlikely, that anyone else drove defendant. Defendant is well over six feet tall and well over 200 pounds in weight…. It is simply too difficult to believe, without some further evidence, that another person placed a person who was unconscious (and thus even more difficult to move) into the driver's side seat of a truck and left the motor, lights and radio on….[2]

The circuit court affirmed the municipal court's decision on both charges.[3]

Virnig's challenge to the OWI conviction is directed to the requirement that the operation of the motor vehicle be on highways or "premises held out to the public for use of their motors vehicles." Section 346.61, STATS. A private lot or driveway is not included in this definition, Virnig contends, and there is no evidence that he operated the vehicle while intoxicated on a highway or premise for public use. There is no merit to this contention.

It is undisputed that Virnig was at the Villa Tap where he consumed alcohol, and was later found a few blocks away from the tavern, alone in his truck in the driver's seat with the engine running, passed out or asleep. There is no evidence from which one could infer that someone other than Virnig drove him to

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[2] The court made these findings with reference to the time of operation of the vehicle, a fact relevant to the PAC charge. However, the portion of these findings relating to operation of the vehicle are relevant to the OWI charge as well. The deletions from the quote relate to the time of operation.

[3] Pursuant to § 800.14(5), STATS., since neither party requested a new trial, the appeal to the circuit court was based on a review of the transcript. We have held that this procedure complies with due process, ***City of Middleton v, Hennen***, 557 Wis.2d 818, 557 N.W.2d 818 (Ct. App. 1996). We therefore reject Virnig's challenge to this procedure, which he raises, he states, to preserve the issue for appeal.

the location where he was found. Virnig's argument that it is possible that someone else drove him and left him there—such as the female he remembered playing pool with—is not a reasonable inference from the evidence but is, as the municipal court correctly stated, simply speculation. There is ample evidence—and Virnig does not dispute—that when Officer Fryer came upon Virnig, he was then under the influence of intoxicants. We do not hesitate to conclude that the municipal court and the trial court correctly decided that the City established by clear, convincing and satisfactory evidence that Virnig was operating on a highway while under the influence of an intoxicant.

Because we affirm the conviction on the OWI charge, it is unnecessary to address Virnig's challenge to the PAC adjudgment of guilt. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (an appellate court need only address dispositive issues). Section 346.63(1)(c), STATS., provides that when a person is found guilty of both OWI and PAC, there will be only a single conviction for the purpose of counting convictions and sentencing. The effect of this section is that Virnig would have received the same number of convictions and the same sentence, regardless of whether he was convicted of OWI, PAC or both. The question of whether the PAC adjudgment of guilt was proper is, therefore, irrelevant since he was properly convicted of OWI.

By the Court.—Order affirmed.

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