

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 1999

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 § 808.10 and RULE 809.62, STATS.

No. 99-0740-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROBERT J.D. WOLFORD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
RICHARD J. DIETZ, Judge. *Reversed and cause remanded.*

PETERSON, J. The State appeals the trial court's order dismissing the charge against Robert Wolford for operating while under the influence, fourth offense. The State contends the circuit court erred by ruling that Wolford was not operating a motor vehicle when he was found sleeping in the driver's seat of a vehicle with the key in the ignition, turned on but without the motor running. This court agrees and reverses the dismissal.

FACTS

The facts are not in dispute. Patrick Buckley of the Green Bay Police Department was dispatched to check on the welfare of a person in a pickup truck. Officer Buckley observed Wolford in the driver's seat slumped over the steering wheel. The key was in the ignition in the "on" position. The dashboard lights and instrument panel were lit. The motor was not running.

The State filed a motion in limine asking the circuit court to rule that these facts constitute operating a motor vehicle. The circuit court concluded that Wolford was not operating, as that term is defined in § 346.63(b), STATS., stating that "until the starter kicks in I do not think you are manipulating or activating the controls necessary to put the motor vehicle in motion." Wolford then moved to dismiss and the court granted the motion.¹

STANDARD OF REVIEW

The interpretation of a statute is a question that we review without deference to the trial court. *See State v. Sostre*, 198 Wis.2d 409, 414, 542 N.W.2d 774, 776 (1996).

ANALYSIS

When interpreting a statute, this court first determines whether the meaning is clear and unambiguous. The primary source is the language of the statute itself. *Wisconsin's Environmental Decade, Inc. v. PSC*, 81 Wis.2d 344,

¹ The trial judge was presented with the motion in limine on the morning of the jury trial. He was understandably frustrated with the timing of the motion, the fact that no authority was cited and that he had to rule with little time to consider the issue.

350, 260 N.W.2d 712, 715 (1978). In determining the meaning of a word in a statute, the word should be examined in light of the entire statute. *State ex rel. Tilkens v. Board of Trustees*, 253 Wis. 371, 373, 34 N.W.2d 248, 249 (1948).

Section 346.63(1)(a), STATS., prohibits driving or operating a motor vehicle while under the influence of an intoxicant. The legislature has defined driving and operating in § 346.63(3):

(a) “Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

(b) “Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

Thus, looking at the entire statute, driving applies when a vehicle is in motion. Operating applies when a vehicle is not in motion. Nothing in the definition of operate explicitly requires that the motor be running when it is not in motion.

In *Milwaukee County v. Proegler*, 95 Wis.2d 614, 626, 291 N.W.2d 608, 613 (Ct. App. 1980), we concluded that the statutory definition of operate is clear and unambiguous. Proegler was found asleep in his car. The keys were in the ignition. The lights and heater were on. The motor was running. We held that the definition of operate “applies either to turning on the ignition or leaving the motor running while the vehicle is in ‘park.’” *Id.*

The only difference here is that Wolford’s motor was not running. However, *Proegler* is not limited to a running vehicle. If it were, the definition of operate would be restricted to a very narrow fact scenario. And as we pointed out in *Proegler*: “The severity of Wisconsin’s drunk driving law is intended to discourage individuals from initially getting behind the wheel of a motor vehicle while under the influence of alcohol.” *Id.*

Consistent with this legislative intent, this court gives the statute its plain meaning. First, the ignition is a control necessary to put a motor vehicle in motion. Second, placing the key in the ignition and turning it on constitutes manipulation or activation of a control. This conduct, therefore, falls within the clear and unambiguous meaning of the statute, and consistent with the legislative intent. Accordingly, this court reverses the circuit court order and remands for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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

