

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 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. 98-2357-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIK W. PARLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

BROWN, J. Erik W. Parlow appeals from a judgment of conviction for operating a motor vehicle while intoxicated. Parlow contends that the State did not satisfy its burden of proof, and, as a matter of law, there is insufficient evidence to sustain the denial of his directed verdict motion. Alternatively, he argues that there was insufficient evidence to sustain the conviction. We cannot agree and affirm the trial court's judgment.

On August 15, 1997, at 3:00 a.m., a deputy sheriff found Parlow passed out in a vehicle in the eastbound travel lane of a highway. The vehicle was running, all lighting systems were on and the right turn signal was on. Parlow's head and torso were on the front driver's side portion of the seat, and his lower body was on the passenger side with his feet hanging out of the open passenger door. One sandal was on the driver's side floor and one was on the passenger side floor. The deputy woke Parlow, who stated that another man had been driving the car, but that that man had left to obtain help or gas. Parlow told the deputy that he was waiting for the man to return because they had run out of gas. Parlow was asked to exit the automobile to perform some tests. Subsequently, he was arrested.

Parlow was charged with violating § 346.63(1), STATS., operating under the influence of an intoxicant or other drug, and § 343.305(9), STATS., refusing a chemical test of his blood, breath or urine. The trial court concluded that there was not enough evidence to sustain a prima facie case that Parlow drove the vehicle, but that circumstantial evidence showed him to be the operator of the vehicle on the date in question and no credible evidence existed to the contrary. The trial court, therefore, denied Parlow's motion for a directed verdict.

The standard of review for a trial court's denial of a directed verdict motion at the close of the prosecution's case is whether all the evidence taken most favorably against the accused is sufficient to support a finding of guilt

beyond a reasonable doubt. *See State v. Kelley*, 107 Wis.2d 540, 544-45, 319 N.W.2d 869, 871 (1982).

Under § 346.63(1), STATS., “no person may drive or operate a motor vehicle” while under the influence of an intoxicant or other drug. Since the trial court concluded that Parlow did not drive the vehicle, the key issue facing the trial court was whether he operated the vehicle. Section 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.” It has further been found that “either when a defendant starts the motor and/or leaves it running” the defendant has operated a vehicle under the meaning of the statute. *County of Milwaukee v. Proegler*, 95 Wis.2d 614, 628-29, 291 N.W.2d 608, 614 (Ct. App. 1980). In *Proegler*, the defendant was found sleeping behind the steering wheel of a pickup truck parked on the side of I-43 with the keys in the ignition, the motor running, the lights and heater on, and the automatic transmission in park. *See id.* at 618, 291 N.W.2d at 610. The court found the circumstantial evidence “was sufficient to substantiate the fact” that Proegler operated his truck within the meaning of § 346.63. *See Proegler*, 95 Wis.2d at 628, 291 N.W.2d at 614.

In this case, the trial court found similar circumstantial evidence sufficient to conclude that Parlow operated the motor vehicle. Parlow was discovered passed out in a running vehicle parked in a lane of traffic with the lights on.

Parlow attempts to distance the facts in his case from the facts in *Proegler* on the grounds that Proegler admitted that he had parked the car. However, Parlow misunderstands the thrust of *Proegler*. If parking the car was the key to the result, then the court would have concentrated on the *driving* by Proegler and not whether the car was *operating* while at a standstill. The *Proegler* court focused on how it is that one can be found to be operating a vehicle while it is standing still. The court adopted the reasoning of *State v. Rouna*, 321 P.2d 615 (Mont. 1958), concluding that “[p]reventing a car from moving is as much control and dominion as actually putting the car in motion on the highway.” *Id.* at 618. The ability to control the vehicle is the crucial element of operating the vehicle. That is the rationale of *Proegler*, and it is determinative of the issue in this case.

Parlow alternatively contends that the evidence was insufficient to support the verdict. Primarily, he relies on James MacDonald’s testimony. MacDonald stated that he had been the driver of the vehicle and had left an unconscious Parlow in the car along the side of the road after the car began functioning poorly.

There are two flaws with this contention. First, the trial court was under no obligation to accept the testimony of Parlow or MacDonald. In fact, the trial court concluded that neither had any credibility and did not accept their testimony. Second, the court noted that the deputy discovered the vehicle in the middle of a lane of traffic. MacDonald testified that he left the car on the side of

the road. Thus, the trial court noted that even if it were to accept MacDonald's testimony, such testimony, along with the deputy's, leaves the inference that the automobile moved after MacDonald left the scene. Parlow then would be responsible for both driving and operating the vehicle. We uphold the trial court's reasoning.

We conclude that all the evidence, taken most favorably against the accused, was sufficient to support the trial court's denial of the directed verdict motion. Furthermore, the evidence was sufficient to support a finding of guilt beyond a reasonable doubt.

By the Court.—Judgment affirmed.

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

