COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1879

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

CITY OF APPLETON,

PLAINTIFF-APPELLANT,

V.

PAUL D. WINK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded.*

¶1 HOOVER, P.J.[1] The single issue raised on appeal is whether sitting behind the wheel of a vehicle with the engine running and the heater and headlights on constitutes operation of that vehicle. The City of Appleton appeals the circuit court's order dismissing an operating while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98).

intoxicant and a related status offense after a trial to the court. The issue at trial was whether Paul Wink was operating his motor vehicle.[2] The circuit court concluded, in substance, that it would not find operation on the basis of a running engine. This court holds that the undisputed evidence that Wink was seated behind the steering wheel of a vehicle with the engine running and headlights illuminated requires a finding that he operated the vehicle. Therefore, we reverse the judgment and remand for further proceedings.

FACTS

¶2 The circuit court heard the following evidence.[3] Wink operated a vehicle that became stuck in a snowbank. Wink testified that he had not consumed alcohol before driving his vehicle. After Wink and an alleged passenger unsuccessfully tried to extricate the vehicle, they walked to Wink's parents' residence to retrieve the passenger's four-wheel drive truck. They intended to use the truck to remove Wink's vehicle from the snow. Once at the residence, Wink decided that due to the pain from a previous injury, he would simply call a tow truck.[4] Wink testified that the pain became intense and when he could not find his pain medication, he substituted alcohol. He drank "at least four inches off [a two liter] bottle." About forty-five minutes later, Wink returned to his vehicle.

[2] It is undisputed that Wink was under the influence of an intoxicant when the investigating officer encountered him. The trial court accepted the parties' stipulation that Wink's blood alcohol content was 0.275 g/100 ml. Indeed, during closing argument Wink's attorney referred to his client's "high degree of intoxication."

[3] Only those facts necessary to resolve the issue before this court are recounted.

[4] Wink did not call a tow truck.

¶3 Upon arriving at his vehicle, two cars came upon the scene in brief succession. The second car appeared to be a squad car driven by someone out of uniform. When Wink asked the driver to call a tow truck, the driver told Wink to wait in his car. Wink entered his vehicle and started the engine. Shortly thereafter, the second car left and sergeant Donald Kramer responded to the scene. When he arrived, he observed a vehicle stuck in a furrow of snow made by a snowplow. The back tires were in the roadway. The vehicle's engine was running, its lights were on and Wink was seated behind the steering wheel.

¶4 After a brief encounter, Kramer determined that "maybe [Wink] had too much to drink to be driving his vehicle." Wink told Kramer that a friend had been driving when the vehicle became stuck in the snow.[5] Kramer testified to his observations that suggested Wink was the sole occupant of the vehicle and, implicitly, that Wink had not left it.[6] Another officer testified that he searched Wink's vehicle and discovered a large bottle of brown-colored-liquor. "A good portion of [the contents] was gone."

¶5 The City began its closing argument by stating:

> Your Honor, given the stipulated facts that, that the primary issue here as the City sees it, is operation. And as there is a body of law, it's pretty well founded that operation is something as simple--

¶6 At which point the circuit court interjected:

[5] The alleged passenger testified that in fact Wink had been driving, and Wink agreed that the passenger's testimony was correct.

[6] For example, Kramer testified that Wink's vehicle's headlights were on. He also testified as to footprints he found at the scene.

> Let's not talk about the technical turning on the car engine argument, if that is going to be the conviction, because it's not going to be. That is not going to be the basis of any conviction that I find today.

The court, after marshaling the evidence, concluded that the parties had tried the case to "a draw" and that therefore the City had failed to prove its case by clear, satisfactory and convincing evidence.[7]

STANDARD OF REVIEW

¶7 It is undisputed that Wink started his vehicle's engine shortly before Kramer arrived at the scene and at a time when he was under the influence of an intoxicant. Whether undisputed facts meet a legal standard is a question of law that this court reviews de novo. *See* ***Bahr v. State Inv. Bd.***, 186 Wis. 2d 379, 386, 521 N.W.2d 152 (Ct. App. 1994).

ANALYSIS

¶8 WISCONSIN STAT. § 346.63(1)(a) (1997-98)[8] prohibits driving or operating a motor vehicle while under the influence of an intoxicant. "Driving" and "operating" are defined 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.

[7] The circuit court did not articulate specifically what the City failed to sufficiently prove.

[8] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

The legislature thus intended that § 346.63(3)(a) applies when a vehicle is in motion and (3)(b) controls when a vehicle is not in motion.

¶9 ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980), held that the definition of operate in WIS. STAT. § 346.63(3)(a) is clear and unambiguous. Proegler was found asleep in his car. ***Id***. at 618. As in this case, the engine was running and the headlights and heater were on. 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***. at 626. The only material differences between ***Proegler*** and the present case are that Wink admittedly started the engine and was not asleep when Kramer encountered him.[9]

[9] Wink, recognizing ***Proegler***'s applicability, attempts to distinguish that case by noting that here an officer told Wink to wait in his car and was present when Wink started his vehicle's engine. *See* ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980). He does not explicate, and this court fails to appreciate why, these distinctions are material. Would either of these circumstances present a defense to *driving* while under the influence? In this instance, to pose the question is to answer it.

Wink does develop arguments that this court should carve either a "fairness" or an "emergency" exception to the ***Proegler*** holding. He contends that it is "unfair to hold Mr. Wink in violation of the law for following orders …." Wink further claims that the only reason he started the engine was for medical reasons and that this court should "recognize this medical emergency as an exception to operation of a vehicle."

(continued)

¶10 The circuit court was undoubtedly concerned that it not base a conviction upon a hypertechnical application of the law. Kramer testified that Wink's vehicle's front tires were over the top of the snow furrow and that its undercarriage was on the snowbank. The circuit court could thus have inferred that the vehicle was effectively immobilized. In ***Proegler***, however, we observed that "[t]he severity of Wisconsin's drunk driving law is intended to discourage individuals from initially getting behind the wheel of a motor vehicle while under

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As to Wink's fairness argument, the individual he believed to be an officer told Wink to wait in the vehicle, not to start its engine. Wink is therefore not being prosecuted for following orders. Concerning the contention that this court should recognize a medical emergency exception to the definition of "operating," even if such an exception might be appropriate under certain circumstances, they are not present here. The medical emergency Wink points to was the alleged need to keep his pain medication warm. An emergency is defined as a state calling for immediate action or a pressing need. Drawing upon Wink's analogy to the medical emergency exception to the Fourth Amendment's warrant requirement, a warrantless search is valid under that exception if the searching officer is actually motivated by a perceived need to render aid or assistance and a reasonable person under the circumstances would have thought an emergency existed. *See* ***State v. Prober***, 98 Wis. 2d 345, 365, 297 N.W.2d 1 (1980), *overruled on other grounds by* ***State v. Weide***, 155 Wis. 2d 537, 455 N.W.2d 899 (1990).. Wink's argument fails to meet the second requirement. Wink had other alternatives available to him to keep his vial of medicine warm besides violating the law. For example, if he truly believed that the person who directed him to wait in his car was a law enforcement officer, he could have explained the situation to him and asked for assistance.

the influence of alcohol." ***Id***. at 626. It is thus apparent from ***Proegler*** that the legislature intended that the term "operate" be given a broad definition and application. Consistent with this legislative intent and the precedent established in ***Proegler***, this court applies the statute's plain meaning to conclude that Wink was operating. 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. *See* WIS. STAT. RULE 809.23(1)(b)4.