COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2000

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

No. 99-2503-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THERESA M. SOBACKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANNE SUMI, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Theresa Sobacki was arrested in a parking lot of a four-unit apartment complex and charged with operating a motor vehicle while intoxicated (OWI) contrary to WIS. STAT. § 346.63(1)(a) (1997-98).[2] On a motion

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

[2] All references to the Wisconsin Statutes are to the 1997-98 version.

(continued)

to dismiss, Sobacki challenged the constitutionality of WIS. STAT. § 346.61, which states the types of parking lots where OWI statutes apply, claiming it violates the Equal Protection Cause. The trial court decided that § 346.61 does not violate the Equal Protection Clause and Sobacki appeals. We conclude the trial court was correct and we therefore affirm.

¶2 Since this appeal concerns a motion to dismiss, we assume the allegations in the complaint are true for the purpose of our review. *See* ***Ford v. Kenosha County***, 160 Wis. 2d 485, 490, 466 N.W.2d 646 (1991). The pertinent facts in the complaint are as follows. On January 28, 1999, at approximately 12:57 p.m. the City of Madison Police Department received a report that an intoxicated woman at 2217 Cypress Way was in a car and was possibly leaving the area. Officer Meredyth Thompson reported that when she arrived at the scene, Sobacki was inside her car and the car's engine was running. Officer Thompson also observed that Sobacki's gearshift was in drive and Sobacki's foot was on the break. When Officer Thompson made contact with Sobacki, she detected an extremely strong odor of intoxicants on Sobacki's breath and noticed that Sobacki's eyes were bloodshot red and glassy. Officer Thompson asked Sobacki if she had been drinking. Sobacki responded by saying, "Yeah way too much." Officer Thompson asked Sobacki to submit to field sobriety tests but Sobacki

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WISCONSIN STAT. § 346.63(1) provides in pertinent part:

> **Operating under influence of intoxicant or other drug.** (1) No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving….

refused. Sobacki was subsequently taken to Meriter Park Hospital in order to obtain a blood sample. The results of the test revealed that Sobacki's blood alcohol level was .203.

¶3 The sole issue on appeal is whether WIS. STAT. § 346.61 violates the Equal Protection Clause of the Wisconsin and the United States Constitutions. Section 346.61 provides:

> **Applicability of sections relating to reckless and drunken driving**. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employes for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

The constitutionality of a statute is a question of law that we review de novo. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989). Statutes are presumed constitutional and will be upheld unless the party challenging the statute shows that the statute is unconstitutional beyond a reasonable doubt. ***Id.***

¶4 The first task in determining whether WIS. STAT. § 346.61 violates the Equal Protection Clause is determining the level of scrutiny to apply.[3] If the classification in § 346.61 impedes a fundamental right or categorizes people based on a suspect class, we subject the statute to strict scrutiny. ***Szarzynski v. YMCA***,

[3] The equal protection clause in the Wisconsin Constitution and the Equal Protection Clause in the United States Constitution are interpreted in the same manner. *See* ***State v. Lindsey***, 203 Wis. 2d 423, 443, 554 N.W.2d 215 (Ct. App. 1996).

184 Wis. 2d 875, 886, 517 N.W.2d 135 (1994). If the classification does not involve a fundamental right or suspect class, it will be sustained if there is any rational basis to support it, that is, if the classification is rationally related to a legitimate government purpose. ***Id.*** at 886-87.

¶5 The Supreme Court described the rational basis test in ***McGowan v. Maryland***, 366 U.S. 420, 425-261 (1961), as follows:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rest on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

¶6 Sobacki argues that a fundamental right is implicated because the current WIS. STAT. § 346.61 removes a defense that was available before it was amended by 1995 Wis. Act. 127, § 1. Before that amendment, Sobacki contends, relying on ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 552, 419 N.W.2d 236 (1988), § 346.61 did not extend the application of WIS. STAT. §§ 346.62 to 346.64 to premises that were not held out to the public. Since the private nature of premises provided to tenants of rental housing in buildings of four or more units is no longer a defense under the current § 346.61, Sobacki argues that her due process right to present a defense is violated by the statute.

¶7 There is no merit to the argument. The due process right Sobacki refers to is the right to a fair opportunity to defend against the charges by offering testimony and argument in her defense. *See* ***State v. Maday***, 179 Wis. 2d 346,

354, 507 N.W.2d 365 (Ct. App. 1993). Sobacki has not been denied the opportunity to present argument or testimony. Rather her complaint is that the argument she wishes to present no longer has a basis in law because the legislature has amended the statute.

¶8 Since there is no fundamental interest or suspect class involved, we apply the rational basis test. Sobacki contends the statute prosecutes persons who operate motor vehicles while intoxicated on rental premises, but does not prosecute persons who operate motor vehicles while intoxicated on non-rental premises, and this distinction has no rational relation to the prevention or prosecution of drunk driving.

¶9 We disagree and conclude the statute meets the rational basis test. The statute treats persons differently only insofar as the persons are operating a motor vehicle while intoxicated on different types of premises. The legislature could reasonably conclude that operating a motor vehicle while intoxicated was more of a safety hazard on a parking lot of rental housing with four or more units than on the parking lot of rental housing with fewer units, or on the parking lot for a residence that was not rental housing. The legislature could reasonably assume that in the former situation, there are more people and more motor vehicles on the premises than in the latter two situations, and therefore a greater safety hazard when vehicles are operated by persons who are intoxicated. There is no question the State has a legitimate interest in protecting persons from injury by intoxicated drivers. Therefore, as did the trial court, we conclude that the distinction Sobacki challenges is reasonably related to a legitimate state interest.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. § Rule 809.23(1)(b)4.