

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2232

Cir. Ct. No. 2003CV3590

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF CROSS PLAINS,

PLAINTIFF-APPELLANT,

V.

KRISTIN J. HAANSTAD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Reversed.*

¶1 HIGGINBOTHAM, J.¹ The Village of Cross Plains appeals a trial court order granting Kristin J. Haanstad's motion to dismiss two citations for Operating a Motor Vehicle While Under the Influence of an Intoxicant (in violation of Village Ordinance 26.01, adopting WIS. STAT. § 346.63(1)(a)) and Operating a Motor Vehicle With a Prohibiting Alcohol Content (in violation of Village Ordinance 26.01, adopting WIS. STAT. § 346.63(1)(b)). The Village argues the trial court erred in concluding Haanstad was not operating a motor vehicle pursuant to § 346.63 when Haanstad was found sitting behind the wheel of a running vehicle. We agree with the Village and reverse the trial court's order.

FACTS

¶2 On May 26, 2003, at approximately 12:30 a.m., Village of Cross Plains police officer Gregory R. Kosharek, while on duty, noticed both a car and a sport utility vehicle parked in the parking lot of Baer Park, a park located in the Village of Cross Plains. The car had its headlights on. Baer Park has a history of vandalism, including damage to park benches and theft involving soda machines. Kosharek could not remember vehicles ever parked at Baer Park at that time of night. Kosharek therefore parked his squad car in a nearby driveway and approached the vehicles on foot.

¶3 As he approached the two vehicles, Kosharek observed a running Chevy Cavalier with its headlights on and a non-running Chevy Blazer parked next to the Cavalier. Kosharek observed a female sitting in the driver seat and a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

male sitting in the passenger seat of the running Cavalier. Kosharek approached the driver side of the Cavalier.

¶4 The female in the driver seat rolled down the window and Kosharek identified himself. He informed both the female and the male that cars are not typically parked in the park at that time of night and he wanted to make sure everything was okay. Kosharek requested identification from both individuals. The female identified herself as Haanstad. The male, on his own accord, stepped out of the vehicle, met Kosharek at the rear of the Cavalier and identified himself as Timothy Satterthwaite. Kosharek asked Satterthwaite to remain at the rear of the vehicle while he talked with Haanstad.

¶5 As Kosharek was talking with Haanstad, he observed her bloodshot, watery eyes and her flushed face. Kosharek also noticed a strong, distinct odor of intoxicants emanating from Haanstad when she spoke. Haanstad stated she had been drinking at a bar but refused to reveal how much she had to drink. Haanstad indicated she had consumed her last drink about thirty minutes earlier.

¶6 Kosharek returned to speak with Satterthwaite, who informed Kosharek the couple had been discussing their relationship in the car. At that point, Satterthwaite told Kosharek that a male passenger was in the Blazer parked next to the Cavalier. Kosharek made contact with and identified the male passenger reclined in the passenger seat of the Blazer; this male, identified as Justin Cushman, told Kosharek that Satterthwaite was going to give him a ride home once Satterthwaite finished speaking with Haanstad.

¶7 Kosharek then returned to Haanstad and asked her to perform field sobriety tests. Kosharek eventually placed Haanstad under arrest for OWI. Kosharek issued Haanstad citations for OWI and PAC. The Village of Cross

Plains municipal court found Haanstad guilty of both charges. Haanstad appealed the municipal court's decision to the trial court on November 21, 2003.

¶8 Haanstad filed a motion to suppress, which was heard during trial. At the start of trial, the parties stipulated to the following: (1) Haanstad's blood alcohol concentration on the night in question was 0.225g/100mL; and (2) Kosharek had probable cause to arrest Haanstad. The only issues before the trial court, therefore, were whether Kosharek had reasonable suspicion to stop Haanstad and whether Haanstad was operating a motor vehicle under WIS. STAT. § 346.63.

¶9 At trial, Haanstad testified she had met Satterthwaite at a bar at approximately 7 p.m. Haanstad intended to spend the night with Satterthwaite and consumed alcoholic beverages. Sometime between 11:30 a.m. and 12:00 a.m., Haanstad, Satterthwaite and Cushman left the bar; Haanstad gave Satterthwaite her keys and Satterthwaite drove the three of them, in Haanstad's Cavalier, back to Baer Park where Satterthwaite had left his Blazer. Haanstad sat in the front passenger seat and Cushman sat in the back seat while Satterthwaite drove. Haanstad testified she had no intention of driving her car that evening because she was intoxicated.

¶10 When Satterthwaite arrived at Baer Park, he drove into the parking lot adjacent to the park shelter and parked Haanstad's Cavalier on the left side of Blazer facing the same direction as the Blazer. He placed the Cavalier in park and left the vehicle running with the headlights on. Both Satterthwaite and Cushman exited the vehicle on the driver's side and walked around the back of the car to the area between the two vehicles (i.e. the driver's side of the Blazer and the

passenger's side of the Cavalier). Satterthwaite apparently assisted Cushman into the Blazer.

¶11 While Satterthwaite was between the two vehicles helping Cushman, Haanstad slid over from the passenger's seat to the driver's seat. Both her body and her feet were still facing the passenger seat. Haanstad wanted to speak privately with Satterthwaite and thus allowed him to enter her car at the closest door, the front passenger door.

¶12 Satterthwaite then got back into Haanstad's vehicle through the front passenger door and sat in the passenger seat. Haanstad and Satterthwaite then had a conversation about their relationship; Haanstad estimates they were talking for, at most, ten minutes before contacted by Kosharek. Haanstad testified that while sitting in the driver's seat of the Cavalier, she never touched or manipulated the gas pedal, steering wheel or the ignition of the car. Haanstad testified she did nothing more than sit in the driver's seat with her feet and body facing the passenger seat.

¶13 The trial court issued a written decision holding Kosharek had reasonable suspicion to stop Haanstad. However, the trial court held Haanstad was not operating a motor vehicle under WIS. STAT. § 346.63 because no evidence was presented that she actively manipulated the controls of the car. The trial court concluded that sitting in the driver's seat of a running, parked motor vehicle, without more evidence, was not operating a motor vehicle under §346.63. The trial court dismissed the case.

¶14 The Village moved for reconsideration, which the trial court denied. The Village appeals.

DISCUSSION

¶15 The Village argues the trial court erred in concluding Haanstad, who admitted being impaired and sitting behind the wheel of a running motor vehicle for ten minutes, was not operating the motor vehicle within the meaning of WIS. STAT. § 346.63. We conclude that under the factual circumstances presented in this case, Haanstad was operating a motor vehicle within the meaning of § 346.63.

¶16 Whether Haanstad was operating a motor vehicle under WIS. STAT. § 346.63 involves the application of that statute to undisputed facts. Thus, this issue presents a question of law we review de novo. *State v. Carlson*, 2002 WI App 44, ¶6, 250 Wis. 2d 562, 641 N.W.2d 451. WISCONSIN STAT. § 346.63 proscribes a person from either driving or operating a motor vehicle while under the influence of an intoxicant or with a prohibited blood alcohol concentration. WIS. STAT. § 346.63(1)(a) and (b). 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.”

¶17 Haanstad testified Satterthwaite drove the car to the parking lot and placed the vehicle in park. While Satterthwaite was between the two vehicles, Haanstad slid over from the passenger’s seat to the driver’s seat with both her body and her feet still facing the passenger seat. Haanstad testified that while sitting in the driver’s seat of the Cavalier, she never touched or manipulated the gas pedal, steering wheel or the ignition or any of the controls of the car. Haanstad testified she did nothing more than sit in the driver’s seat with her feet and body facing the passenger seat. The Village presented no testimony to the contrary.

¶18 The Village asserts Haanstad's mere presence behind the wheel of a running motor vehicle is sufficient to constitute operation of a motor vehicle within the meaning of WIS. STAT. § 346.63 as interpreted in *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980). We agree.

¶19 In *Proegler*, the defendant was found alone sleeping in his automobile while it was parked on the side of a freeway emergency ramp at approximately 4:00 a.m. with the keys in the ignition, the motor running and the lights on. *Id.* at 618. In addition, the defendant testified he had driven to the spot where the officers found his truck, stopped there without completely pulling off the highway, left the car running with the lights on and then fell asleep. *Id.* We concluded this evidence was sufficient to show the defendant had operated his truck for the purposes of the statute prohibiting operation of a vehicle while under the influence of intoxicants. *Id.* at 625. We stated

The prohibition against the 'activation of any of the controls of the motor vehicle necessary to put it in motion' applies either to turning on the ignition or leaving the motor running while the vehicle is in 'park.' One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself [or herself] and the public as one who actually drives while intoxicated. The hazard always exists that the car may be caused to move accidentally, or that the one who starts the car may decide to drive it. This interpretation . . . is consistent with the legislative action in amending the statutes to distinguish between the terms "operate" and "drive." This interpretation is also in conformity with the stricter laws adopted by the legislature with respect to intoxicated drivers in Wisconsin. 1977 Wis. Laws, ch. 193. 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. at 626. We concluded in *Proegler* that it is not necessary to find intent to drive or move the vehicle before finding the defendant guilty of operating a motor

vehicle while under the influence of an intoxicant. *Id.* at 628. An individual “operates” a motor vehicle when he or she “starts the motor and/or leaves it running.” *Id.* at 628-29. In either situation, the possibility of danger exists. *Id.* at 629.

¶20 Here, it is undisputed Haanstad did not activate any of the controls of the car. She did not physically manipulate or activate any of the controls necessary to put the vehicle in motion. She did not physically manipulate or activate any of the controls of the motor vehicle necessary to put it in park. She did nothing more than sit in the driver’s seat of her car with the motor running while under the influence of an intoxicant and talk to Satterthwaite. Under *Proegler*, Haanstad was operating her motor vehicle within the meaning of WIS. STAT. § 346.63(1)(b). *Proegler* clearly stands for the proposition that actual physical manipulation of the motor vehicle is not necessary for a person under the influence of an intoxicant to be guilty of § 346.63(1)(b). As we said in *Proegler*, “The prohibition against the ‘activation of any of the controls of the motor vehicle necessary to put it in motion’ applies either to turning on the ignition or *leaving the motor running while the vehicle is in ‘park.’*” *Proegler*, 95 Wis. 2d at 626 (emphasis added). There is no dispute Haanstad was sitting behind the wheel of a motor vehicle with the motor running while it was in park. Haanstad was operating the motor vehicle.

By the Court.—Order reversed.

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

