COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2914-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRUCE NUTTLEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

DYKMAN, P.J.[1] Bruce Nuttleman appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), second offense, contrary to § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), second offense, contrary to

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

§ 346.63(1)(b), STATS. He argues that: (1) the evidence was insufficient to prove that the parking lot in which he was arrested was held out to the public for use of their motor vehicles, as required by § 346.61, STATS.; and (2) the trial judge improperly testified at the suppression hearing. We reject Nuttleman's arguments and affirm.

BACKGROUND

Nuttleman was arrested for OMVWI and BAC on October 20, 1996. He filed a motion to suppress evidence, arguing that the alleged offense occurred when he was operating a motor vehicle in a parking lot, not upon a highway.[2]

At the motion hearing, Deputy William Ottoway of the Iowa County Sheriff's Department testified that on October 20, 1996, at 12:30 a.m., he was providing security for a wedding dance at the Don Q Inn in the Town of Dodgeville. A person came into the bar and stated that someone had run into his car out in the parking lot. Ottoway went out to the parking lot. A white Honda was pushed up against a guard rail, and an Oldsmobile was in contact with the rear of the Honda. Ottoway observed Nuttleman, who was sitting in the passenger side of the Oldsmobile, reach over and shut the car off. Nuttleman got out of the car, and Ottoway detected a strong odor of intoxicants and observed that Nuttleman was swaying. At 12:34 or 12:35 a.m., Deputies Jon Pepper and Dan Carey arrived on the scene.

Deputy Pepper made contact with Nuttleman. Pepper detected an odor of intoxicants and observed that Nuttleman's speech was slurred, his eyes

[2] Nuttleman also raised other arguments that are not relevant to this appeal.

were red and watery and that he had a hard time maintaining his balance. Nuttleman admitted that he had been drinking at a friend's wedding reception. Nuttleman at first denied ever being in the vehicle, but then stated that he decided to sleep in his car because there were no rooms available at the motel. After Nuttleman performed field sobriety tests, Pepper formed the opinion that he was under the influence of alcohol and placed him under arrest.

Both Pepper and Ottoway testified that the accident occurred in the customer parking lot. Ottoway testified that he did not see an "Employee Only" sign in the lot and that he had previously parked in the lot while a customer of the Don Q Inn. Ottoway never spoke to the owner of the Don Q Inn.

The trial court denied Nuttleman's motion. The court stated:

> The Court will make a finding that that is a parking lot held open to the public. It would be frankly ludicrous for this Court with the knowledge that this Court does have of the public use of the Don Q Inn, its national reputation, its national advertising, and the fact that not only do people go there for purposes of motel accommodations, they also go there regularly for restaurant and bar accommodations, and it is something certainly of a parking lot that serves the tourist attraction qualities of the Don Q Inn. In addition to that, it's quite often that marriage ceremonies are performed in one of the chapels at the Don Q Inn. So to find that that parking lot is anything other than held out for public use would be, as I indicated earlier, begging one to find something that would be in the area of ludicrous.

Nuttleman subsequently pleaded no contest to OMVWI and BAC. He now appeals.

DISCUSSION

In addition to being applicable on the highways, the drunk driving laws apply "upon all premises held out to the public for use of their motor

vehicles." Section 346.61, STATS. Nuttleman argues that the testimony of the sheriff's deputies was insufficient to prove that the parking lot was held out to the public for the use of their motor vehicles.

We first note the procedural posture of this case. Nuttleman argues that the State needed to prove beyond a reasonable doubt that he was operating a motor vehicle on premises held out for public use. But Nuttleman pleaded no contest to OMVWI and BAC. We are reviewing the trial court's decision on Nuttleman's motion to suppress, not the sufficiency of the evidence for Nuttleman's conviction.

The legal basis for Nuttleman's motion to suppress is unclear. In Nuttleman's written motion, he argued:

> [T]he officer contacted the defendant regarding an accident that had occurred in a parking lot. However, to have violated, and be arrested for a violation of Wis. Stat. § 346.63(1), a person must be operating a motor vehicle upon a highway. The defendant in this case allegedly operated his vehicle in a parking lot. Since the defendant did not operate his vehicle upon a highway, his arrest for operating while intoxicated is unlawful.

During the motion hearing, Nuttleman's argument centered on whether the parking lot was held out to the public for use of their motor vehicles. We assume that Nuttleman was arguing that the officers did not have probable cause to believe that the parking lot was held out for public use at the time of the arrest.

Probable cause exists when the facts known to the officer at the time of the arrest would lead a reasonable officer to believe that the defendant probably violated the statute. *See* ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Probable cause does not require proof beyond a reasonable doubt or even that guilt is more likely than not. ***Id.*** at 357, 525 N.W.2d at 104.

Rather, the officer must be reasonably convinced that guilt is more than a possibility. *See* ***County of Dane v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

In support of his argument that the evidence was insufficient to establish that the parking lot was held out for the use of the public, Nuttleman relies primarily on ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 419 N.W.2d 236 (1988). In ***Phillips***, the supreme court considered whether a parking lot was "held out to the public" for purposes of § 346.61, STATS. The court held that "there must be proof that it was the intent of the owner to allow the premises to be used by the public." ***Phillips***, 142 Wis.2d at 554, 419 N.W.2d at 238. The court also concluded that the premises must be held out to the population or community as a whole, not a defined, limited portion of the citizenry. ***Id.*** at 557, 419 N.W.2d at 239.

Nuttleman argues that the officers' testimony cannot establish the owner's intent because the officers did not know the owner of the Don Q Inn. In addition, Nuttleman argues that the parking lot was not held out for public use at the time he was arrested because the motel was hosting a wedding reception and did not have any rooms available.

In ***Phillips***, the court noted that the State has the burden of proving that the premises were held out to the public for use of their motor vehicles. ***Id.*** at 558, 419 N.W.2d at 239. The court went on to hold:

> This burden can be satisfied in the same way that any burden of proof can be—by direct, demonstrative, testimonial, or circumstantial proof, and even upon the basis of judicial notice, if properly taken. Holding out can be by action or inaction that would make the intent explicit or

> implicit. Either action or inaction might, in appropriate circumstances, constitute a holding out to the public ….

Id.

We again note that Nuttleman pleaded no contest to the charges. In contrast, the case in ***Phillips*** went to trial. In ***Phillips***, the issue was whether the State proved to the court's satisfaction that the premises were in fact held out for public use. Here, the question is whether the facts known to the officer at the time of the arrest would lead a reasonable officer to believe that Nuttleman was driving while intoxicated on premises held out to the public for use of their motor vehicles. *See* ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104.

Deputy Pepper was the officer who arrested Nuttleman. Pepper testified that he was called to the Don Q Inn, where a dance was taking place, to investigate an accident in the parking lot. He testified that the accident took place in a customer parking lot, near the reception hall. Pepper also testified that Nuttleman advised him that a wedding reception was occurring at the motel and that there were no rooms available.

The facts known to Deputy Pepper are undisputed. Whether undisputed facts show probable cause to arrest is a question of law that we review *de novo*. ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104. Pepper knew that the accident took place in the customer parking lot of a motel. This information would lead a reasonable police officer to believe that the owner of the motel probably held out the parking lot to the public for use of their motor vehicles.

Our conclusion is not affected by the fact that the motel was hosting a wedding reception and had no room vacancies. First, the appropriate test for determining whether a parking lot is held out for public use is "whether, on any

given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." ***City of La Crosse v. Richling***, 178 Wis.2d 856, 860, 505 N.W.2d 448, 449 (Ct. App. 1993). The officers observed that the accident occurred in a customer parking lot, and the evidence does not show that lot access was restricted to those who had room reservations or were attending a wedding reception. A reasonable police officer in Pepper's position would have believed that potentially any resident of the community could have used the parking lot in an authorized manner.

Second, a parking lot reserved exclusively for a business establishment's customers is still considered to be held out for public use. In ***Richling***, 178 Wis.2d at 861, 505 N.W.2d at 450, we observed:

> [I]f we were to hold that a business establishment's customers do not constitute the public as that term is used in sec. 346.61, Stats., we would essentially render the "owner's intent" test in ***Phillips*** meaningless. If customers do not qualify as the public, it would be difficult to conceive of any parking lot in this state as being held out to the public under the statute.

Our conclusion is consistent with ***Richling***.

Nuttleman also argues that the trial judge improperly testified by injecting his own personal knowledge into his conclusion that the parking lot was held out for public use. *See* § 906.05, STATS.[3] The State argues that the judge was not testifying, but taking judicial notice of generally known facts. *See* §

[3] Section 906.05, STATS., states: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

902.01(2), STATS.[4] Whether the trial court was testifying or taking judicial notice is irrelevant, however, because a probable cause hearing focuses on the facts within the officer's knowledge, not the facts within the trial court's knowledge. We have already concluded that the facts known to Deputy Pepper would lead a reasonable police officer to conclude that the parking lot probably was held out to the public for use of their motor vehicles. Accordingly, the trial court properly denied Nuttleman's motion to suppress.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

[4] Section 902.01(2), STATS., states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."