COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1065-FT

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

BROWN COUNTY,

PLAINTIFF-RESPONDENT,

V.

ROBERT W. BURCH, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

CANE, C.J. Robert W. Burch, Jr., appeals[1] from a judgment finding him guilty of operating while intoxicated, first offense, and operating with a prohibited alcohol concentration, contrary to § 346.63(1)(a) and (b), STATS. Burch argues that the trial court erred by finding that Burch, when encountered by

[1] This is an expedited appeal under RULE 809.17, STATS.

the police, was operating his vehicle on property subject to enforcement under § 346.63(1). Specifically, Burch contends that the property was not "held out to the public for use of their motor vehicles," as defined under § 346.61, STATS. Because the property at issue was held out to the public as contemplated under § 346.61, the judgment is affirmed.

The following facts are undisputed. On April 4, 1998, at about 6:30 p.m., Burch was found intoxicated in his vehicle, on a "lane" connecting Highway 57 and Deuster Road near Wrightstown in Brown County. A police officer, responding to the report of a vehicle at that location, encountered Burch "hunched over" the steering wheel of his truck with the engine still running. Following the administration of field sobriety tests, Burch was arrested for operating while intoxicated.

Burch filed a motion to dismiss, asserting in part that because he was found on private property, not held out to the public, the prohibitions of § 346.63(1), STATS., were inapplicable. The trial court, finding that the property at issue, although private, was nevertheless held out to the public, as contemplated under the statute, refused to grant Burch's motion to dismiss. Subsequently, Burch filed a motion to suppress which, in essence, urged the trial court to reconsider its decision regarding the property. Reiterating its analysis from the first motion hearing, the trial court refused to depart from its earlier conclusion and denied Burch's motion to suppress. After a trial to the court, Burch was found guilty of operating while intoxicated.[2] This appeal followed.

[2] Although Burch was found guilty of both operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, the judgment of conviction was entered only on the conviction for operating a motor vehicle while under the influence of an intoxicant. *See* § 346.63(1)(c), STATS.

Section 346.63(1), STATS., provides, in pertinent part, that "[n]o person may drive or operate a motor vehicle while … [u]nder the influence of an intoxicant." This prohibition applies not only to highways, but also to "all premises held out to the public for 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." Section 346.61, STATS. Burch, in his brief to this court, concedes that he "was operating his motor vehicle at the time of the police intervention." Therefore, the disputed question is whether Burch was operating the vehicle on premises covered by the drunk-driving law.

The issue here presents a mixed question of law and fact. This court must separate the factual determinations from the conclusions of law and apply the appropriate standard of review to each part. *See* ***DOR v. Exxon Corp.***, 90 Wis.2d 700, 712-13, 281 N.W.2d 94, 101 (1979), *aff'd*, 447 U.S. 207 (1980). Findings of fact will not be set aside unless clearly erroneous. *See* § 805.17(2), STATS. Accordingly, this court will apply the clearly erroneous standard to the facts and then review the application of statute to those facts, a question of law that is reviewed de novo. *See* ***City of La Crosse v. Richling***, 178 Wis.2d 856, 858, 505 N.W.2d 448, 449 (Ct. App. 1993).

Burch, relying on ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 419 N.W.2d 236 (1988), asserts that for premises to be held out to the public for use of motor vehicles, there must be "some overt display of permission or, at the least, a course of conduct or custom amounting to a public invitation." In ***Phillips***, the defendant was found intoxicated in his car, parked with the motor running in the American Motors Corporation parking lot. *See* ***id***. at 552, 419 N.W.2d at 237. The parking lot had been posted with a sign that read, "AMC parking only. Violators will be towed at own expense." ***Id***. at 553, 419 N.W.2d at 237. Our

supreme court, in interpreting what constituted "held out" under § 346.61, decided that "there must be proof that it was the intent of the owner to allow the premises to be used by the public. In the absence of any proof to show that intent, the charge [is] properly dismissed." ***Id***. at 554, 419 N.W.2d at 238. The ***Phillips*** court further noted, however, that "[h]olding 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, but the burden of proof is on the proponent of the applicability of the statute." ***Id***. at 558-59, 419 N.W.2d at 239-40 (emphasis added).

The County stresses the ***Phillips*** court's recognition that "action or inaction" could constitute a holding out to the public. The County additionally relies on ***Richling*** which, like ***Phillips***, involved the discovery of an intoxicated individual in his vehicle, located in a parking lot. In ***Richling***, the parking lot belonged to a business and was *intended* for use by the business's patrons; however, unlike the parking lot in ***Phillips***, the ***Richling*** lot posted no signs restricting its use to customers only. *See* ***Richling***, 178 Wis.2d at 857, 505 N.W.2d at 448. Recognizing that the test was "whether the person in control of the lot intended it to be available to the public for use of their motor vehicles," ***id***. at 859, 505 N.W.2d at 449, the ***Richling*** court addressed what constituted "the public." ***Id***. The court held that the appropriate test in determining what constitutes "the public" 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." ***Id***. at 860, 505 N.W.2d at 449.

Here, the trial court, in denying Burch's motion to dismiss, found that there were no gates, nor signs posted on the premises and that the "lane" provided "a means of ingress and egress between two other roadways." The court

further found that there was "nothing to indicate that … there [was] a prohibition of any licensed driver from using [the lane] in an appropriate matter, i.e., pulling in on this roadway and driving from one point to another." In denying Burch's subsequent motion to suppress, the trial court reiterated its original findings and emphasized:

> This [was] a circumstance where you had that type of entryway off of the highway; some sort of access and you had what appeared to be an area available for the travel of a motor vehicle and nothing to indicate that it was not public or that the owner of the property intended that it not be held out to the public as a means of ingress and egress between the two highways.

This court will not reverse a factual determination made by a trial court without a jury unless the finding is clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983) (citing § 805.17, STATS.). Although this court applies the "clearly erroneous" test as the standard of review, the "great weight and clear preponderance test" may also be used to review a factual determination made by a trial court without a jury, as the two tests are essentially the same. *See* ***id***. This court has recognized that:

> The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Id. at 643-44, 340 N.W.2d at 577.

Upon review of the record, this court concludes that the trial court's findings are not clearly erroneous. Burch introduced an affidavit by the Wrightstown town clerk, wherein the town clerk stated that the "lane" was private property and that the landowner did not consider it open to the public for any reason. The landowner submitted no affidavit and did not otherwise testify at either of the hearings or the trial as to her intent regarding use of the lane. The landowner's tenant, however, when asked about the "lane" testified: "People do cut through it. It is a private road but there's no signs posted saying it's [a] private drive or no trespassing or anything." The arresting officer further confirmed the absence of signs, gates or any other deterrents to access of the lane. Accordingly, this court affirms the trial court's findings and applies the statute to those findings.

The absence of signs, gates or other deterrents evidences inaction on the part of the landowner that, under these circumstances, constitutes an implicit "holding out to the public." *See* ***Phillips***, 142 Wis.2d at 559, 419 N.W.2d at 240. This inaction effectively constitutes intent on the part of the landowner to hold out this "lane" to the public for use of their motor vehicles, as contemplated under § 346.61, STATS. Once such intent is established, either explicitly or, as here, implicitly, the question remains 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 [premises] in an authorized manner." ***Richling***, 178 Wis.2d at 860, 505 N.W.2d at 449.

Testimony established that people did use the "lane" as a "cut through" between Highway 57 and Deuster Road. Further, Burch's decision to pull onto the "lane" serves to underscore the fact that anyone with a driver's license and a motor vehicle could use the "lane" in an authorized manner. As such, this court holds that the "lane," although private property, was held out to

the public for use of their motor vehicles, as provided under § 346.61, STATS, thereby subjecting it to the prohibitions of the drunk-driving law, § 346.63(1), STATS.

In any event, even if the lane on which Burch was stopped was not held out to the public, it is obvious from these facts that an intoxicated Burch had been operating his motor vehicle on Highway 57. Burch testified that he had been drinking alcohol during the early afternoon hours of April 4, 1998, and that he had been driving north on Highway 57 when he decided to pull onto the "lane." Burch further testified that he had not consumed any intoxicants while driving in his vehicle, nor after stopping on the "lane." Additionally, Burch concedes that at 7:40 p.m., his blood alcohol concentration level was 0.194 grams per one hundred milliliters. The inference drawn from these facts is that Burch was operating his motor vehicle on Highway 57 while under the influence of an intoxicant, in violation of § 346.63(1), STATS. As the trial court noted, "[Burch] had to have gotten there from somewhere. He didn't drop out of the sky with a pick-up truck." Accordingly, the trial court's judgment is affirmed.

By the Court.—Judgment affirmed.

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