

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2008

David R. Schanker
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. 2007AP2600

STATE OF WISCONSIN

Cir. Ct. Nos. 2006TR7529
2006TR7530

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF MARATHON,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. CARLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Daniel Carlson appeals a judgment of conviction for operating while intoxicated, first offense. He argues the evidence was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

insufficient to show that he was operating his vehicle on a highway. We disagree and affirm the judgment.

BACKGROUND

¶2 Shortly before 4 a.m. on November 11, 2006, Marathon County Sheriff's deputies Benjamin Shope and Ryan Berdal were dispatched to a car in the ditch adjoining United States Highway 51. After performing a battery of field sobriety tests, officers arrested the car's sole occupant, Carlson.

¶3 At the August 14, 2007 trial, Shope testified he observed skid marks on Highway 51, stating:

The skid marks ... came from the northbound lanes. I don't know if it was the right or the left lane. After the vehicle left the highway, it entered the shoulder, and then the ditch area where there was construction. There is gravel underneath with two to three inches of snow on top. I saw skid marks go from the pavement, slide into the shoulder, and then into the ditch.

Shope testified that Carlson's car was running and, as he approached it, he noticed all four windows were down. Shope made contact with Carlson, who stated he was coming from Illinois and he had consumed two beers before leaving Illinois.

¶4 At the conclusion of the County's case, Carlson moved to dismiss the case, arguing the County failed to meet its burden of showing that Carlson was operating on a public highway. The County argued Carlson was still technically on the highway even though the car was substantially off the road. Carlson argued the term "highway" encompasses a finite area and his vehicle was beyond the highway portion. The court concluded Carlson operated on a public highway, stating:

You don't drive all the way from Illinois in the ditch. He was on the highway. The skid marks show it. He told the officer he was driving up from Illinois, and Highway 51 is a common route to come up from Illinois.

The state's making an argument he was on the right-of-way.... I don't know if he falls within that right-of-way. So the question is, was he driving on the public road, and I find that he drove on Highway 51, I-39.

The question is, how long was he driving on the road before the police came. When did the driving occur? When did the police come? I can surmise from it there were no injuries in evidence to the driver that he complained of that he was not able to make an earlier phone call. There were skid marks on the highway that were not obliterated by the traffic.... There is no reason why he would sit there and wait and wait and wait. He had the ability to call. He did call in.

The court then found Carlson guilty of operating a motor vehicle while under the influence of an intoxicant.

DISCUSSION

¶5 Carlson argues the trial court lacked sufficient evidence to find that his vehicle operated on a highway while he was under the influence of an intoxicant. When we review a ruling for sufficiency of the evidence, we will uphold the trial court's verdict if there is any credible evidence to support it. *See Pieper v. Neuendorf Transp. Co.*, 87 Wis. 2d 284, 290, 274 N.W.2d 674 (1979). "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts." *State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶6 Carlson was convicted of operating while intoxicated as a first offense. In order to prove this, the County had to provide clear, satisfactory and

convincing evidence that Carlson operated a motor vehicle on a public highway and that he was under the influence of an intoxicant such that his ability to operate his vehicle was impaired. *See* WIS. STAT. §§ 346.63(1)(a), 345.45. Carlson only challenges the County's evidence that he was operating his vehicle on a public highway.

¶7 Here, a deputy testified that he saw skid marks across the highway, slide onto the shoulder and then go into the ditch where Carlson's vehicle was found. It was cold on the night of the accident and when the officers arrived at the scene, Carlson was sitting in the car with all of the windows down. Additionally, dispatch logs identified Carlson as the person who called to report the accident. Carlson told officers that he was driving up from Illinois. There was no evidence of drinking at the scene of the accident. Finally, Carlson failed the field sobriety tests. Based on these facts, it was reasonable for the trial court to infer that Carlson had been operating his vehicle on a public highway shortly before officers arrived at the accident scene. There was no reason for Carlson to wait in his vehicle on a cold evening, other than to wait for his blood alcohol content to diminish, when he had the ability to call in and report the accident. The skid marks show that he was on the highway. It is extremely unlikely that another vehicle skidded across the highway and into the ditch at the same location as Carlson and in a short enough time frame that the tracks were still visible. As the trial court noted, it is also unlikely and most likely impossible that Carlson drove the whole way from Illinois in the ditch. We therefore conclude that there was sufficient evidence for the court to conclude the County proved by clear, satisfactory, and convincing evidence that Carlson operated his vehicle on a public highway while intoxicated.

By the Court.—Judgment affirmed.

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

