COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3336-FT

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

CITY OF MONDOVI,

PLAINTIFF-RESPONDENT,

V.

GREGORY A. LAEHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Gregory Laehn appeals from a judgment convicting him of operating a motor vehicle while intoxicated, first offense, contrary to the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

City of Mondovi's ordinance adopting WIS. STAT. § 346.63(1)(a). The sole issue on appeal is whether the trial court erred by directing the jury to find that the County had satisfied one of two necessary elements of the offense. Specifically, the trial court directed the jury to find that Laehn operated a motor vehicle on a parking lot "held out to the public for use of their motor vehicles," as defined in WIS. STAT. § 346.61. Because the evidence of this required element was so clear and convincing as to permit unbiased and impartial minds to come to but one conclusion, the trial court did not erroneously direct the jury. Accordingly, the judgment is affirmed.

¶2 To convict Laehn, the County was required to prove (1) that Laehn operated a motor vehicle on "premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned," see WIS. STAT. § 346.61[2]; and (2) that Laehn was under the influence of an intoxicant at the time he operated the vehicle. *See* WIS. STAT. § 346.63(1)(a). Laehn argues the evidence was insufficiently clear and convincing to allow the trial court to direct the jury's finding on the first element. This court disagrees.

¶3 Generally, whether a premise is held out for public use is a question of fact to be determined by the trier of fact. ***State v. Carter***, 229 Wis. 2d 200, 208, 598 N.W.2d 619 (Ct. App. 1999). However, both sides agree that because this is a civil case, the trial court had authority to direct the jury to find that Laehn was

[2] WISCONSIN STAT. § 346.61 provides in pertinent part:

> **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, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof.

operating his vehicle on a premises held out to the public if the evidence presented gives rise to no dispute or is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion. *See* ***Zillmer v. Miglautsch***, 35 Wis. 2d 691, 707, 151 N.W.2d 741 (1967); ***Jacobson v. Greyhound Corp.***, 29 Wis. 2d 55, 64, 138 N.W.2d 133 (1965).

¶4 Therefore, the issue on appeal is whether the evidence presented was sufficiently clear and convincing to permit the trial court to conclude as a matter of law, and direct the jury to find, that Laehn was operating his vehicle on a premises held out to the public. The standard of review for this court in passing on the correctness of the trial court's decision to direct the verdict, or in this case, to direct the jury to find one element of the offense had been satisfied, "is whether the trial court was clearly wrong." *See* ***State v. Leach***, 124 Wis. 2d 648, 665, 370 N.W.2d 240 (1985).

¶5 Prior to the jury trial, the trial court held an evidentiary hearing on Laehn's motion to dismiss the case on grounds that, as a matter of law, he was not operating a motor vehicle on premises held out to the public for use of their motor vehicles. Mondovi City police officer Kerry Bauer testified that he was dispatched to the Mondovi Truck Repair building at about 2:47 a.m. after the police received an emergency call indicating there was a van parked behind the building with its engine running loudly and a person slumped in the driver's seat. Bauer stated that he located the van, opened the van's door and shut the engine off. He identified Laehn as the person in the driver's seat.

¶6 The court received evidence showing the layout of the business's exterior, the location of Laehn's van, the location of various signs and the distances in the lot. The trial court, however, did not permit Laehn to call a

witness, Verl Metcalf, who operates the truck repair business. Metcalf would have testified regarding the location of the business, the layout of the parking lot in relation to the van and whether the van was found in an area open to the public. The trial court concluded as a matter of law that the van was in an area open to the public and, therefore, denied Laehn's motion.

¶7 At the jury trial, Laehn admitted that at the time of his arrest he was intoxicated, but denied his van was being operated in a place open to the public for use of motor vehicles. The evidence from the motion hearing was essentially repeated, but this time with an additional offer of proof from Metcalf who testified that he permitted Laehn to park his van on the parking lot behind the building. Metcalf described the location of the business and the lot, including the paved portion where customers parked. He testified that the photographs accurately showed the business location and that Laehn's van was on the same gravel area in the photograph as the day of the arrest. He stated that the gravel area was used to park equipment waiting to be serviced.

¶8 The trial court ruled that as a matter of law, Laehn had operated his van on a premises held out to the public as defined by WIS. STAT. § 346.61. The court directed the jurors to find that the County had satisfied that element of the offense. The jury found Laehn guilty and this appeal followed.

A. Evidence that Laehn was operating a motor vehicle

¶9 The evidence is undisputed that the officer found Laehn sleeping and seated behind the steering wheel of his van with its engine running. It is well established that the operation of a motor vehicle occurs either when a defendant starts the motor or leaves it running. ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985). Consequently, the trial

court correctly instructed the jury to find that Laehn was "operating" a motor vehicle.

B. Evidence that Laehn was on premises open to the public

¶10 There is no dispute as to the van's location when the officer found Laehn. The evidence, including the offer of proof, shows that the van was found in a parking lot behind the Mondovi Truck Repair's building. The parking lot is partly blacktop and partly gravel. The building has a sign on the side entrance shop door prohibiting unauthorized parking and notice that unauthorized vehicles would be towed away. There is an additional sign in the parking lot allowing truck and trailer parking and noticing that, "if you are unauthorized, you are trespassing." The signs do not distinguish between parking on the blacktop or gravel area. In the offer of proof, the owner testified that customers were not allowed to park in the gravel area of the parking lot unless it was for equipment waiting to be worked on. However, it is undisputed that there are no signs indicating that it is a private parking lot or that the parking lot is divided into two different areas for permitted parking.

¶11 Laehn, an over-the-road-truck driver, had parked his van on the gravel section of the parking lot next to his semi-truck parked behind the truck repair building. It is undisputed that this is an area where semi-trucks and trailers are permitted to park when not in use or in need of repair. On several occasions, the owner permitted Laehn to park his van in the gravel section of the business's parking lot. On this particular evening, Laehn had been drinking with a friend and

returned to his parked van in order to sleep. He had started the engine in order to keep warm.[3]

¶12 In ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 419 N.W.2d 236 (1988), the supreme court considered whether a parking lot was "held out to the public" for the purposes of WIS. STAT. § 346.61. 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. The burden to present this proof is on the prosecution. ***Id***. at 558. However, this burden can be satisfied by any of the conventional forms of proof—direct, demonstrative, testimonial, circumstantial or judicial notice. ***Id.*** The proof can consist of action or inaction. ***Id.***

¶13 In ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993), we developed a common-sense test for the application of WIS. STAT. § 346.61. The appropriate test 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 premises in an authorized manner. *See* ***id.*** In other words, the owner of the premises must have intended the area to be open to the public. ***Phillips***, 142 Wis. 2d at 554.

¶14 In ***Phillips***, the defendant was arrested for OWI in a parking lot owned by the American Motors Corporation (AMC) and designated for use by its employees. In determining whether the lot was "held out to the public," the Supreme Court stated that the test was whether the person in control of the lot

[3] The officer found Laehn asleep in the smoke-filled van with its engine running at an extremely high rate of revolutions. A reading of the transcript suggests to this court that but for the citizen's call and the police officer's quick response, Laehn may not have been alive for a trial.

intended it to be available to the public for use of their motor vehicles. ***Id.*** at 557. The court then resorted to RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1562 (2d ed. unabr. 1987), to define "public" as "of, pertaining to, or affecting a population or a community as a whole." ***Id.*** at 557. Finally, the court concluded that because AMC's employees constituted a "defined, limited portion of the citizenry," rather than the population or community as a whole, the lot was not held out to the public. ***Id.***

¶15 Relying on ***Phillips***, Laehn contends that the jury could conclude that parking lot was not held out to the public for use because only customers were authorized to park there. We recently rejected this argument in ***Richling***, where we held that a parking lot is held out to the public even when its use is restricted to its customers. We reasoned that "it is not necessary that a business establishment's customers form a representative cross section of a city or town's population for them to be considered 'public' within § 346.61, Stats." ***Id.*** at 860. Nor did we find it necessary that some minimum percentage of the city's population patronize the business. ***Id.*** Instead, we held that the appropriate test 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.***

¶16 In ***Richling***, we observed that if we were to hold that a business establishment's customers do not constitute the public as that term is used in WIS. STAT. § 346.61, 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.

¶17 Like the parking lot in ***Richling***, here the parking lot for the truck repair business was held out to the public for use because, on any given day, potentially any resident of the community could use the parking lot in an authorized manner. Therefore, because the undisputed evidence shows that Laehn was operating his vehicle on a premises held out for public use as required by WIS. STAT. § 346.61, the trial court did not err when it instructed the jury to find that the County had established that element of the offense.

By the Court.—Judgment affirmed.

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