

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2011

A. John Voelker
Acting 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. 2011AP661
STATE OF WISCONSIN**

Cir. Ct. No. 2010TR9492

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF MATTHEW J. MILLER:

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Matthew J. Miller appeals from a judgment convicting him of refusing to take a test for intoxication. Miller's refusal occurred

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

after he was arrested for OWI on the Experimental Aircraft Association (EAA) Air Venture grounds. He argues that the police lacked probable cause because the intoxicated operation of the motor vehicle occurred on private property and therefore not in a place “held out to the public” according to WIS. STAT. § 346.61. We hold that the area was sufficiently held out to the public because the EAA opened the complex to members of the public who purchased passes and therefore the public had substantial access. Accordingly, we affirm.

¶2 On August 1, 2010, at approximately 3:30 a.m., a deputy working security on the EAA property was dispatched to the Warbirds area. When he arrived, two firefighters told him that a driver, later identified as Miller, drove to the Warbirds area from the EAA campground at a high speed. The deputy spoke with Miller, who admitted driving from the campgrounds. Ultimately, Miller refused a chemical test and was charged accordingly. At his refusal hearing, Miller alleged that the officer lacked probable cause because he was driving on private property and not in a place that was “held out to the public” according to WIS. STAT. § 346.61. *See* WIS. STAT. § 343.305(9)(a)5.

¶3 At the hearing, the arresting deputy and the executive director for EAA Warbirds of America testified about the composition of the EAA compound. Both testified that the area in which Miller was seen and arrested had limited access that was controlled by a series of gates. The executive director testified that access to this area is limited to people who are camping or have purchased parking passes on the EAA complex. Additionally, vendors, security, and thousands of people constituting a small city have driving access to the complex. Potential patrons may purchase passes during set business hours, and there are no restrictions on who may purchase passes. Passes are not sold outside of business

hours, and were not being sold at the time of Miller's arrest. However, anyone who holds a pass may freely enter or exit the grounds at any time.

¶4 After hearing testimony, the trial court found that limiting access to those with passes was insufficient to find that the EAA roads were not held out to the public. In its reasoning, the court cited the EAA's indiscriminate admissions policy and high level of patronage. Miller now appeals.

¶5 The sole issue in this case is whether the police had probable cause to believe Miller was driving while intoxicated in a place "held out to the public" according to WIS. STAT. § 346.61. This is a question of statutory interpretation which we review de novo. *City of La Crosse v. Richling*, 178 Wis. 2d 856, 858, 505 N.W.2d 448 (Ct. App. 1993). Statutory interpretation starts with the language of the statute. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Both context and prior case law interpreting the statute are relevant to a statute's plain meaning. *Berkos v. Shipwreck Bay Condominium Ass'n*, 2008 WI App 122, ¶8, 313 Wis. 2d 609, 758 N.W.2d 215. If the meaning of the statute is plain, we ordinarily stop the inquiry and apply that meaning. *Kalal*, 271 Wis. 2d 633, ¶45.

¶6 Ample Wisconsin case law has addressed the meaning of "held out to the public" in WIS. STAT. § 346.61. An area is held out to the public if there is proof that it was the intent of the owner to allow the premises to be used by the public. *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 554, 419 N.W.2d 236 (1988). Establishing intent entails determining whether the premises were made available for use to the public or only to a limited portion of the public. *Richling*, 178 Wis. 2d at 859-60. Physical accessibility is not determinative in deciding

whether an area is available to the public. *State v. Tecza*, 2008 WI App 79, ¶15, 312 Wis. 2d 395, 751 N.W.2d 896.

¶7 The analysis in *Tecza* is most analogous to this case. In *Tecza*, we held that roads in a private gated community were within the jurisdiction of OWI laws. *Id.*, ¶22. We found that while the roads were restricted by security stations, all that was necessary for entrance was to stop at the security station and obtain a pass. *Id.*, ¶¶20-22. Thus, the roads were held open to the public because nonresidents were freely and regularly admitted. *Id.*, ¶¶19-20. We also noted that permitting police presence in an area indicates an explicit intent to hold the roadways out to the public. *Id.*, ¶21.

¶8 Miller argues that since passes to the EAA could not be purchased at the time of his arrest, the grounds were not held out to the public. However, the evidence shows that the EAA explicitly intends the complex be held open to the public and contemplates the public driving there. While the campground and Warbirds area are restricted by a controlled gate, anyone who is camping or purchases parking permission is allowed to drive on the EAA complex at any time, including the time of Miller's arrest. Additionally, vendors, security and thousands of people constituting "a mini city" have driving access at the complex. Also, like *Tecza*, the EAA uses police presence, presumably for security and safety purposes. When all is said and done, Miller's argument boils down to the claim that, because passes must be purchased, access is therefore limited and the greater public is not allowed to drive on the premises, therefore making it a private way. But the mere fact that passes must be purchased does not differentiate the EAA's roads from the gated community in *Tecza*. The fact that anyone can purchase a pass—not just employees, not just owners of airplanes, not just

members of the EAA—is an important indicator that the public at large may have access. There is no exclusivity present here.

By the Court.—Judgment affirmed.

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