

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3364**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DONALD A. LeSAVAGE,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Donald A. LeSavage appeals from an order in which the trial court found that he unlawfully refused to submit to a chemical test in violation of § 343.305(9), STATS., after a police officer arrested him for operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1), STATS. LeSavage argues that the trial court erroneously received evidence that his vehicle was in a parking lot "held open to the public" as required by § 346.61, STATS.<sup>1</sup> We conclude that the trial court properly found

---

<sup>1</sup> Section 346.61, STATS., provides: "In addition to being applicable upon highways,

the lot was "held open to the public" and that there was probable cause to arrest LeSavage for OMVWI.

## BACKGROUND

On August 3, 1995, Fitchburg Police Officer Denise Fisher was dispatched to Quivey's Grove, a restaurant and bar, in regard to a traffic accident involving Donald A. LeSavage's car. When Officer Fisher arrived, she saw LeSavage leaning up against his car weaving back and forth. Officer Fisher also noticed that LeSavage's eyes were red and bloodshot and he noticed a strong odor of intoxicants. Officer Fisher requested that LeSavage take a field sobriety test. LeSavage agreed. Based on the officer's observations both before and during the field tests, LeSavage's bloodshot eyes and the odor of intoxicants on his breath, the officer concluded that LeSavage had been driving while under the influence of an intoxicant and arrested him.

At the Madison Police Department, Officer Fisher read LeSavage the Informing the Accused form and asked him to submit to a chemical test of his breath. LeSavage refused.

At the refusal hearing, Officer Fisher testified that in her opinion, the parking lot where LeSavage was arrested was open to the public. LeSavage objected and the trial court found that there was sufficient foundation for Officer's Fisher's opinion testimony. Officer Fisher stated that there was a party sponsored by the Isthmus Paper at the bar that evening. Officer Fisher also testified that there were other vehicles in the parking lot besides LeSavage's. LeSavage presented no evidence.

Based on this testimony, the court concluded that the parking lot at Quivey's Grove was "held open to the public" and the requirements of § 343.305(9)(a)5, STATS., had been met. The court revoked LeSavage's operating privilege. LeSavage appeals.

(..continued)

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."

## DISCUSSION

A person can be convicted of OMVWI only if the person operated a motor vehicle on premises that are "held out to the public for use of their motor vehicles." Section 346.61, STATS. A parking lot is "held out to the public" when the owner of the premises intends to "permit the public as a whole to use the premises for parking purposes." *City of Kenosha v. Phillips*, 142 Wis.2d 549, 558, 419 N.W.2d 236, 239 (1988).

In *City of LaCrosse v. Richling*, 178 Wis.2d 856, 859-60, 505 N.W.2d 448, 449 (Ct. App. 1993), 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, 505 N.W.2d at 449. 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.*

By the parking lot's very nature as a lot for Quivey's Grove customers, it appears to be open to the public. There was no indication that use of this lot, or the restaurant and bar for that matter, was limited to only a specified group of individuals.<sup>2</sup> Instead, it appears that potentially any resident of the community with a car and a license could have used this lot in an authorized manner on August 3, 1995, as a customer of Quivey's Grove.

Further, the State's burden of showing that the owners intend to hold out their premises for public use may be satisfied "by direct, demonstrative, testimonial, or circumstantial proof, and even upon the basis of judicial notice, if properly taken." *Phillips*, 142 Wis.2d at 558, 419 N.W.2d at

---

<sup>2</sup> Although there was testimony that Quivey's Grove was having a party sponsored by the Isthmus Paper, the officer was entitled to infer that persons attending this party were not the only occupants of Quivey's Grove, and that the restaurant had not limited the use of its parking lot to only participants in the Isthmus party.

239. Opinion testimony is admissible if it is "rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Section 907.01, STATS.

Here, the fact in issue was whether the parking lot was held out to the public for use of their motor vehicles. The officer's opinion establishes that fact. Thus, the trial court properly admitted opinion testimony on the issue. Absent evidence to the contrary, the court properly concluded that the premises were held open to the public. Accordingly, we affirm.

*By the Court.* – Order affirmed.

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