

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 14, 1997

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(1), 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. 96-1415-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY J. OLSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

CANE, P.J. Jeffrey Olson appeals his conviction for operating a motor vehicle while intoxicated and makes two contentions on appeal. He contends that the court erred by inadequately instructing the jury on the issue of whether the tavern parking lot was open to the public for use at the time of his arrest, and the evidence was insufficient to show that he operated his vehicle upon a public highway or in an area open to the public. This court rejects his contentions and affirms the judgment.

At approximately 2:45 a.m., officer John Modl of the Altoona Police Department found Olson passed out in his truck which was parked in the Happy Hollow Tavern parking lot and approximately forty feet from the garage

of his residence. Olson is the owner of the tavern. Legal closing time of the tavern is 2 a.m. Olson's truck had its engine running and headlights on. It was the only vehicle in the parking lot. Modl found Olson asleep behind the steering wheel and obviously intoxicated. A later blood test revealed Olson's blood alcohol content at .27%.

In order to be convicted for OWI, §§ 346.63(1)(a) and (b), STATS., require that the accused person operate a motor vehicle upon a public highway or on a premise held out to the public. Olson reasons that the tavern parking lot is an area covered by a Class B liquor license and because § 125.68(4)(c), STATS., requires these premises to be closed after 2 a.m., the area was not held out to the public for its use at the time of his arrest. In addition, he argues that even if this court rejects his reasoning, the truck was parked in his private driveway and therefore not upon a public highway or in an area held out to the public. Finally, he argues the trial court erred by not instructing the jury on the owner's intent to close the tavern parking lot after closing hours thereby showing that the parking lot was not held open to the public's use at the time of his arrest.

The operation of a motor vehicle while under the influence of an intoxicant is illegal if it takes place upon a public highway or "upon ... premises held out to the public for use of their motor vehicles ... whether such premises are publicly or privately owned." Section 346.61, STATS. 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 § 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. *Id.* at 554, 419 N.W.2d at 238. The burden to present this proof is on the prosecution. *Id.* at 558, 419 N.W.2d at 239. 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.*

There is no question that the tavern parking lot was open to the public during the tavern's operating hours. It is also undisputed that there were no signs posted in the parking lot which restricted or prohibited parking when the premises were closed. The undisputed use and absence of such signs or posting satisfied the burden of proof assigned to the State under *Phillips*. This court rejects Olson's argument that the tavern's parking lot was closed to the public as a matter of law because it was after closing hours for the tavern.

Absent information or observations to the contrary, a reasonable person could fairly infer that the tavern's parking lot is not off limits to vehicles even though the business is closed. The fact that Olson had posted a "private-no parking" sign on the front of his garage is insufficient to indicate that the tavern's parking lot is closed to the public's use after the tavern's closing hours.

Whether Olson's truck was parked in the tavern's parking lot or the driveway to Olson's residence was a factual matter resolved by the jury. After reviewing the record, this court is satisfied the jury could reasonably find that Olson's truck, parked approximately forty feet from his garage and facing sideways to the garage, was still in the tavern's parking lot and not in the driveway of his residence. Officer Modl testified that an individual driving into the tavern's parking lot at the time he found Olson passed out in his truck would have driven right into Olson's truck or right by it. Additionally, Modl testified that on many occasions he observed the parking lot full of vehicles with some of them parked in the same area Olson's truck was parked on the morning of the arrest. Similarly, officer Charles Wysocky of the Altoona Police Department testified that he had on numerous occasions observed vehicles in the tavern's parking lot within thirty to forty feet of Olson's garage.

The trial court instructed the jury that premises are held out to the public for use of their motor vehicles if it is the intent of the person or corporation in control of the premises that the premises be available to the public for the use of their motor vehicles. Olson requested the trial court to also instruct the jury that the intent of a person or a corporation in control of a premises can be interpreted by how they have labeled or signed their property. Olson's request was based on the fact that he had posted a sign on his garage indicating "private-no parking." The trial court rejected his request and observed that the general instruction adequately stated the law. This court agrees. The trial court's jury instruction correctly stated the law. *See Phillips.*

Therefore, this court affirms the judgment convicting Olson of operating a motor vehicle while intoxicated.

By the Court. – Judgment affirmed.

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