COURT OF APPEALS
DECISION
DATED AND RELEASED

January 29, 1997

No. 96-2078-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRYAN K. HECKMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

SNYDER, P.J. Bryan K. Heckman appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI) contrary to § 346.63(1)(a), STATS., and of operating a motor vehicle while having a prohibited blood alcohol concentration contrary to § 346.63(1)(b). He contends that the trial court erred in convicting him of OWI absent any evidence that would prove beyond a reasonable doubt that he was operating on a public highway, as required by

§ 346.61, STATS. In addition, he argues that the trial court erred in convicting him of operating with a prohibited blood alcohol concentration absent any evidence that the Intoxilyzer test was performed within the mandatory three-hour period of the above offense, as required by § 885.235, STATS.[1]

We conclude that the evidence was sufficient to show that Heckman operated a motor vehicle on a state highway while under the influence of an intoxicant and that the Intoxilyzer test was performed within the mandatory three-hour period. Consequently, we affirm.

This case arose out of the peculiar path that Heckman chose to drive on July 8, 1995. The parties stipulated to the following facts from the report of the arresting officer. At approximately 9:20 a.m., Carol Brott heard a noise and looked outside her residence. She observed a man, later identified as Heckman, driving a vehicle through a ditch running along her property. Brott observed the vehicle continue around her mound septic system before turning and continuing across her yard. The vehicle traveled a short distance further before parking in a field just north of the Brott property line. Brott immediately contacted the sheriff's department because she was unfamiliar with the driver and concerned with what she had observed and the manner in which he parked. According to Brott, the driver was alone.

[1] Initially, Heckman challenged his conviction on double jeopardy grounds, but he has withdrawn that issue due to the dispositive decision in ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *aff'd*, No. 95-1159-CR, slip op. (Wis. Dec. 13, 1996).

Deputy Daniel Knitt was dispatched to the scene and upon arrival observed Heckman, who appeared to be sleeping, seated in the driver's seat of the running vehicle with his foot sticking out of the driver's side window. As Knitt reached into the vehicle to turn it off, he noticed a half full bottle of Zima propped between Heckman's legs in his lap. After several unsuccessful attempts, Knitt finally awakened Heckman, who appeared very confused and unsure of what was happening. In response to Knitt's questions, Heckman did not know where he was, where he came from, where he was going and could not say whether it was Saturday or Sunday.

Knitt placed Heckman under arrest for OWI based upon the circumstances of the incident: Heckman's confusion, the strong odor of intoxicants on his breath, his glassy eyes, his poor performance on field sobriety tests, and Knitt's conclusion that Heckman's vehicle could not have arrived at its present location without having traveled on the nearby county highway. Knitt found four empty bottles of Zima, six empty beer cans, and a full can of beer in Heckman's car.

Heckman consented to a breath test and was found to have a blood alcohol concentration of 0.16%. Knitt then issued Heckman a citation for OWI and for the companion charge of operating with a prohibited blood alcohol concentration.

Heckman argues that the trial court erred in finding that he operated his vehicle on a highway prior to Brott observing him drive his car alongside a county highway in the ditch. He contends that the State failed to

prove that he was driving on a public highway, as required by § 346.61, STATS., because there was no direct evidence showing that he drove on a public highway and the circumstantial evidence offered by the State was too weak to meet the beyond a reasonable doubt standard. He then reasons that the State lacked evidence that the Intoxilyzer test was performed within the mandatory three-hour period from operating on a public highway as required by § 885.235, STATS., because operation was not established.

Both issues require an examination of the evidence supporting Heckman's conviction. An appellate court may not overturn a judgment of conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). This standard for reviewing the sufficiency of the evidence to support a conviction applies equally to direct and circumstantial evidence. ***Id.*** Furthermore, if more than one reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. ***State v. Hamilton,*** 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

The pivotal contested issue is whether Heckman drove his motor vehicle on a public highway while intoxicated. We conclude that the record evidence supports a logical inference that Heckman drove his motor vehicle on a public highway just prior to Brott observing him drive in the ditch alongside

the county highway. Brott observed Heckman driving through the north ditch of the adjacent county highway, and both Knitt and the trial court could reasonably infer from that evidence that Heckman had left the county highway just prior to Brott's observations.

Heckman argues that because the stipulated facts do not contain direct evidence that he had driven on a public highway, the court could logically infer that Heckman had been in the ditch for quite some time and had then started up his vehicle and driven it across Brott's property. However, no evidence supports this defense hypothesis, and a trier of fact is free to "choose among conflicting inferences of the evidence and may ... reject that inference which is consistent with the innocence of the accused." *See* ***Poellinger***, 153 Wis.2d at 506, 451 N.W.2d at 757.

The weight to be given the evidence is a determination for the trial court. ***Id.*** at 504, 451 N.W.2d at 756. We review the evidence in the light most favorable to the trial court's findings. ***Id.*** We are satisfied that there was sufficient evidence to support the reasonable inference that Heckman drove his vehicle on a public highway just prior to Brott's observation of him.

Because the evidence supports the finding that Heckman was driving on a public highway, the record also supports Heckman's conviction for operating a motor vehicle with a prohibited blood alcohol concentration. Heckman stipulated to the fact that the Intoxilyzer test was conducted with breath samples obtained at 11:01 a.m. and 11:02 a.m. Because he was observed

operating the vehicle at 9:20 a.m., the test was performed well within the three-hour period mandated by § 885.235, STATS.

By the Court.—Judgment affirmed.

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