

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 17, 2007

Cornelia G. Clark
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. 2006AP1860-FT

Cir. Ct. No. 2005TR5937

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY B. OLSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 ANDERSON, J.¹ Jeremy B. Olsen appeals from a judgment for operating a motor vehicle while under the influence of an intoxicant contrary to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

WIS. STAT. § 346.63(1)(a). Olsen claims that § 346.63(1)(a) does not apply because he operated his vehicle on the New Berlin Trail, a recreational trail not open to motor vehicles. We hold that the New Berlin Trail is a “highway” subject to § 346.63. We affirm.

Facts

¶2 The parties stipulated to the following facts. On February 20, 2005, at 12:09 a.m., several New Berlin police officers were dispatched to a motor vehicle accident. One of the officers observed a red Toyota SUV approximately 200 feet up the right-of-way on the west side of South 124th Street. The officer further saw Olsen sitting in the driver’s seat “attempting to get the truck unstuck.” The officers noticed nearly forty-five feet of damaged fence line near the accident. Two of the officers approached the vehicle and had Olsen exit the vehicle to perform field sobriety tests.

¶3 After exiting the vehicle, the officers observed that Olsen had a difficult time maintaining his balance. The officers conducted the horizontal gaze nystagmus test, which revealed three clues in each eye, and a preliminary breath test. Olsen performed the alphabet test, but spoke with slurred speech and incorrectly recited the end of the alphabet as “w, x, y, z, s, t, u, v, w, x, t, u.” During the tests, Olsen swayed in all directions and displayed poor balance. The officers smelled a strong odor of intoxicants on Olsen’s breath and Olsen admitted consuming three drinks. Due to the snowy conditions, the officers did not conduct the other standardized field tests.

¶4 Olsen’s vehicle was located on the New Berlin Trail, a six-mile recreation trail that is a part of the Waukesha County Park System. Bicycles, but not motor vehicles, are allowed on the New Berlin Trail. One of the officers asked

Olsen how the vehicle came to be on the recreation trail, since the officer did not observe any tire tracks in the snow leading to 124th street. Olsen informed the officer that he had driven the vehicle there. One of the officers followed the vehicle's tire tracks in the snow. The tire tracks led across a bridge located at 1900 South 124th Street, but the bridge was a walking bridge not meant for motor vehicle traffic. The tire tracks did not lead to 124th Street or any other street.

¶5 Ultimately, Olsen was cited and arrested for operating a motor vehicle while under the influence of intoxicants contrary to WIS. STAT. § 346.63(1)(a). Based upon the above facts, the trial court determined that Olsen violated the statute. Olsen appeals.

Standard of Review

¶6 Whether Olsen was operating a motor vehicle while under the influence of intoxicants on a “highway” involves the construction of statutory provisions and their application to undisputed facts. This issue, therefore, presents a question of law we review de novo. *See State v. Carlson*, 2002 WI App 44, ¶6, 250 Wis. 2d 562, 641 N.W.2d 451.

Discussion

¶7 Olsen argues that he did not violate WIS. STAT. § 346.63(1)(a) when he operated his motor vehicle on the New Berlin Trail. WISCONSIN STAT. § 346.61(1) states that § 346.63 applies to “all premises held out to the public for the use of their motor vehicles.” According to Olsen, because the use of motorized vehicles was prohibited on the New Berlin Trail, § 346.63 does not apply.

¶8 Olsen ignores the first phrase of WIS. STAT. § 346.61 which makes WIS. STAT. § 346.63 applicable to “highways.” Section 346.61 states:

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 the use of their motor vehicles (Emphasis added.)*

¶9 The broadly drawn statutory definition of “highway” embraces the New Berlin Trail. WISCONSIN STAT. § 340.01(22) defines “highway” for purposes of the drunk driving laws and states:

“Highway” means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel....

The New Berlin Trail is a public way or thoroughfare open to the use of the public for the purposes of vehicular travel. It is a part of the Waukesha County Parks linear trail system and is made available to the public. Travel by bicycle is permitted on the New Berlin Trail. The applicable statutory definition of “vehicle” includes bicycles. Section 340.01(74) defines “vehicle” quite broadly as, “every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains.” Further, by its very definition, a bicycle is a vehicle. *See* § 340.01(5) (“‘Bicycle’ means every vehicle”). Reading these definitions together, we conclude that the New Berlin Trail is a “highway” subject to the drunk driving laws. Therefore, when Olsen operated his motor vehicle on the New Berlin Trail while under the influence of an intoxicant, he violated WIS. STAT. § 346.63(1)(a).

¶10 Olsen directs our attention to *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 419 N.W.2d 236 (1988), and *City of La Crosse v. Richling*, 178

Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993). These two cases do not control. They were concerned with the construction of the second clause of WIS. STAT. § 346.61, which makes the drunk driving laws “applicable upon all premises held out to the public for use of their motor vehicles,” and its application to parking lots. *See Phillips*, 142 Wis. 2d at 552; *Richling*, 178 Wis. 2d at 858. This case, on the other hand, deals with the construction of the first clause of § 346.61, which subjects highways to the drunk driving laws, and its application to a public recreation trail permitting the operation of bicycles. As we have already demonstrated, the New Berlin Trail fits squarely within the definition of “highway.”

¶11 Olsen also complains that the officers did not possess probable cause to arrest him for operating a motor vehicle while intoxicated. However, his entire argument assumes that the New Berlin Trail is not subject to WIS. STAT. § 346.63(1)(a) because it is not held out to the public for the use of their motor vehicles. We have already determined that the New Berlin Trail is subject to the drunk driving laws. Olsen’s probable cause argument fails.

By the Court.—Judgment affirmed.

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

