COURT OF APPEALS DECISION DATED AND FILED

October 15, 2003

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. 03-1113-CR

Cir. Ct. No. 02CT000440

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. GRAEF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, P.J.[1] While WIS. STAT. § 346.61 makes Wisconsin's drunk driving laws apply to "all premises held out to the public for use of their motor vehicles," the breadth of coverage does not include every premises upon

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

which a car or truck can be driven. Because we conclude that the construction site of a funeral home is not open to the public for the use of their vehicles, we reverse Christopher L. Graef's conviction for second offense operating a motor vehicle while intoxicated (OWI) in violation of WIS. STAT. § 346.63(1)(a).

Background

¶2 Just after midnight on March 7, 2002, a police officer responded to a report of a suspicious vehicle parked at a building construction site. The officer found Graef sleeping inside of a red pickup truck with the engine running. When the officer confronted Graef, he said that he had a fight with his girlfriend and because he was the contractor for the building that was under construction, he decided to spend the night on the building site. The officer administered several field sobriety tests and arrested Graef for OWI, second offense, and a chemical test revealed a blood alcohol level of 0.196%.

¶3 Graef moved either to dismiss the complaint or to suppress the evidence obtained at the construction site and subsequently obtained blood alcohol evidence because he "was arrested for sleeping in his car on a construction site. No reasonable person could conclude that the premises are held out to the public for use of their motor vehicles pursuant to [WIS. STAT. §] 346.61."

¶4 The circuit court denied both motions. Following a jury trial during which the circuit court denied Graef's motion for a directed verdict, the jury returned a verdict of guilty of OWI, second offense, and the circuit court entered a judgment of conviction.

Discussion

¶5 On appeal, Graef contends that the circuit court erred in denying his motion to suppress. For reasons not apparent to this court, Graef intermixes the legal concepts of "probable cause" and "reasonable suspicion." However, we find no indication that the initial detention in this case (encompassing the field sobriety tests and the preliminary breath test) needed to be supported by more than reasonable suspicion. Accordingly, if we are to overturn the trial judge with respect to the evidence obtained at the accident scene before Graef's arrest, we must conclude the officer lacked reasonable suspicion, not that he lacked probable cause. Of course, the chemical test after Graef's arrest needed to be supported by probable cause, but Graef sought and continues to seek suppression of all evidence obtained after the initial detention.

¶6 Graef's decision to intermix two legal concepts in his argument on appeal does not cause any practical problem for our analysis. All of his arguments are easily translated into a reasonable suspicion framework. Further, for reasons that will be apparent, our conclusion that the officer lacked reasonable suspicion for the initial detention equally supports the conclusion that the officer lacked probable cause supporting the subsequent arrest and chemical test. Accordingly, we will limit our discussion to whether the officer possessed reasonable suspicion.

¶7 The disputes on appeal do not involve whether the officer possessed reasonable suspicion to believe Graef was intoxicated or that he was operating a vehicle. Rather, our attention is directed solely to whether the officer had reasonable suspicion to believe Graef was operating on a "highway" or road held

out to the public when the officer found him in the driver's seat of the red pickup truck parked at the construction site.[2]

¶8 Drunk driving laws apply to "highways" and to "all premises held out to the public for use of their motor vehicles." WIS. STAT. § 346.61.[3] The prosecutor has the burden of proving that a suspected drunk driver was driving on a "highway" or on premises held out to the public. ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 558, 419 N.W.2d 236 (1988). "When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision." ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted). A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "that criminal activity may be afoot." ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106, *cert. denied*, ***Williams v. Wisconsin***, 534

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[2] A person is "operating" a motor vehicle if he or she starts the ignition for the sole purpose of running the heater. *See* ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980).

[3] WISCONSIN STAT. § 346.61 provides:

> **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 use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the 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. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

U.S. 949 (U.S. Wis. Oct. 9, 2001) (No. 00-10530) (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996).

¶9 This appeal raises a single question: Did the police officer possess reasonable suspicion to believe that the construction site where the officer first made contact with Graef was "held out to the public"? With respect to this question, the facts are undisputed and, thus, whether the construction site involved here was "held out to the public" is a question of law. ***Phillips***, 142 Wis. 2d at 559 n.2. We note that when reviewing a suppression ruling, we are not limited to the record before the circuit court at the time of the suppression ruling. Other information produced before or after the suppression hearing may be used to support the circuit court's decision. ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995). In this case, we have the benefit of the complete transcript of the jury trial and we develop the relevant facts from both the motion hearing and the trial.

¶10 Two police officers were dispatched to the site of a funeral home under construction upon an anonymous report, believed to be from an employee or patron of an adjacent twenty-four hour emergency veterinarian clinic, of a suspicious truck parked behind the building. The arresting officer entered the area using a driveway shared by the construction site and the veterinarian clinic, which was open for business. The officer did not drive into the construction site, choosing to remain on the paved parking lot adjacent to the veterinarian clinic. From this vantage point, the officer could see a pickup truck parked at the rear of the building under construction on an unpaved area consisting of dirt and stone.

The officer testified that the truck was surrounded by typical construction equipment.

¶11 The officer stated that the building was not open for business and that he saw a sign in front of the site that stated it was the future home of *Church and Chapel* funeral home. He did not see if the sign listed who the general contractor was. He testified that there was no fence around the construction site, no gates blocking entry into the site, no signs limiting parking and no signs prohibiting the public from entering the construction site. The officer also testified that he was never informed at his roll call that the owner of the funeral home under construction intended to limit vehicle access to the construction site. The officer's purpose in investigating the truck was to determine if the driver had a legitimate reason for being on the construction site.

¶12 Several witnesses testified on Graef's behalf. First, the carpenter on the job testified Graef was the general contractor and that he and Graef worked together on two job sites the day of Graef's arrest. The carpenter told the jury that he was driving his truck, that after work he and Graef went to a tavern, and that later that evening he dropped Graef off at the construction site. The carpenter stated that laborers were not permitted to park on the construction site but had to use a frontage road or a driveway shared with the veterinarian clinic. The only exceptions, according to the carpenter, were for delivery vehicles and when laborers needed to drop off their tools and supplies. The second witness was the electrical contractor on the job and he confirmed that his employees could not park on the job site with the exception that they could to unload their tools. Finally, a representative of the owner of the funeral home testified that during construction, Graef, as the general contractor, had the authority to regulate access to the construction site.

¶13 Graef testified on his own behalf. He stated that at the time of his arrest, the construction site was roughly graded; it was all dirt except for a small portion that had gravel to serve as a "mud spot" to collect the dirt from vehicles leaving the construction site. He testified that personal vehicles were not permitted on the construction site for safety reasons, that only construction equipment and vendor vehicles were permitted near the building.

¶14 In ***Phillips***, the supreme court rejected a contention that under WIS. STAT. § 346.61, "all premises held out to the public for use of their motor vehicles" included any area except "cornfields, gardens and backyards." ***Phillips***, 142 Wis. 2d at 556. "It does not appear reasonable … to conclude that 'hold out' was intended to apply to any premises upon which a motor vehicle can be driven." ***Id.*** The ***Phillips*** court also concluded that permitting a limited portion of the public to operate their vehicles on a premises does not bring the premises within the definition of § 346.61, "a holding out to a defined, limited portion of the citizenry is not a holding out to the public. 'Public' is defined as 'of, pertaining to, or affecting a population or a community as a whole.'" ***Phillips***, 142 Wis. 2d at 557.

¶15 Applying the limited definitions of "hold out" and "public" from ***Phillips***, along with its test that it is the intent of the owner that is important, ***id.***, we can determine that the construction site is not within the applicability of Wisconsin's drunk driving laws. This is a construction site that was roughly graded, there was no paving or finished grading around the building; the laborers' personal vehicles were permitted on the site for the limited purpose of loading and unloading tools; vendors' vehicles were permitted only for unloading construction supplies, and the building was not open to the public for business because it was under construction.

¶16 The burden was upon the State to establish that the construction site was a "premises held out to the public for the use of their motor vehicles." ***Id.*** at 558-59; WIS. STAT. § 346.61. The State failed to meet that burden because the uncontradicted evidence was that the "public"—"a population or a community as a whole"—was not allowed to drive or operate their motor vehicles on the construction site—the site was limited to the loading and unloading of vendors' and laborers' vehicles.

¶17 The State argues that it met its burden because there were no signs posted prohibiting the public from using the construction site or no fencing around the site to keep the public out. In making this argument, the State relies upon ***City of LaCrosse v. Richling***, 178 Wis. 2d 856, 505 N.W.2d 448 (Ct. App. 1993), where we held, "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.*** at 860 (emphasis added). The State ignores the qualifying phrase *authorized manner*—the funeral home was under construction, it was not open for business; the public would not have a legitimate reason for using the roughly graded construction site.[4]

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[4] It is not necessary for the owner or general contractor to post warning signs or fence off the construction site to evidence intent that the public is not permitted on the premises. As the supreme court observed in ***Phillips***, "[h]olding out can be by action or inaction that would make the intent explicit or implicit. Either action or inaction might, in appropriate circumstances, constitute a holding out to the public." ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 558, 419 N.W.2d 236 (1988). In this case, not opening the building to the public, parking construction equipment around the building, and not providing a graded and paved construction site explicitly inform the public that they cannot use their motor vehicles on the construction site.

Conclusion

¶18 We reverse the circuit court's order denying Graef's motion to suppress, for the reason that the building construction site was not a premises open for the motoring public to drive their vehicles on; therefore, under WIS. STAT. § 346.61 the drunken driving laws are not applicable.[5] This case is remanded to the circuit court for proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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

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[5] We recognize that there are several policy arguments that might compel a different result. However, as the ***Phillips*** court noted, it was a deliberate legislative decision to adopt WIS. STAT. § 346.61 with a more limited geographical sweep than several other proposals which were before the legislature. ***Phillips***, 142 Wis. 2d at 560. We join in the supreme court's closing comments in ***Phillips***, 142 Wis. 2d at 560-61 (citation omitted):

> Even were we to find the statute may in some instances lead to results that, in view of the general policies of the state on drunken driving, are unjust or contrary to those policies, that does not give this court the leeway to rectify what may be a legislative oversight. These arguably untoward results do not "justify a court in amending the statute or giving it a meaning to which its language is not susceptible merely to avoid what the court believes are inequitable or unwise results."