

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2004

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. 03-2793
STATE OF WISCONSIN**

Cir. Ct. No. 03TR004958

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF ADAM D.
STEINKE:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM D. STEINKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. Affirmed.

¶1 HIGGINBOTHAM, J.¹ Adam D. Steinke appeals from an order of the circuit court finding that he unlawfully refused to submit to a chemical test as

¹ This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

required by WIS. STAT. § 343.305(9). Steinke argues that the law enforcement officer did not have sufficient facts to support a belief that he was operating a motor vehicle on premises held out to the public for public use. We disagree and affirm the order of the circuit court.

FACTS

¶2 On July 14, 2003, at approximately 1:30 a.m., City of Fort Atkinson police officer Jeff Hottman was patrolling Main Street when he heard a crash. Hottman backed up his squad car, peered between two buildings and observed a red Ford truck against a sign in a parking lot behind one of the buildings. Hottman continued backing up until he reached the driveway for Steinke Realty, turned into the driveway and drove to the back of the building.

¶3 As Hottman was pulling into the driveway and making his way to the back of the building, he heard a second crash; he continued toward the back of the building, activating the lights on the squad car. Both Hottman's car and the red Ford truck came to a stop in the parking lot behind Steinke Realty. Hottman looked at the driver, later identified as Steinke, through the windshield, after which Steinke exited from the driver's door and fled west between Steinke Realty and 218 North Main Street. Steinke was ultimately arrested and refused to submit to a chemical test.

¶4 Steinke and his truck were found in a parking lot behind a building; this building is a real estate brokerage business owned by his mother, Linda Steinke. There are two driveways to the Steinke Realty parking lot: the driveway Hottman used, which is the actual driveway to Steinke Realty, and another driveway from a private lot. On the driveway between the private parking lot and

the Steinke Realty parking lot is a sign that reads, on both sides, “Private Drive, No Trespassing.” There are no signs posted on the driveway Hottman used.

¶5 There are no signs in the Steinke Realty parking lot indicating that it is a private lot. Linda Steinke testified that this lot was intended for her customers. Linda Steinke testified that the “Private Drive, No Trespassing” sign was intended to stop the flow of traffic between the Steinke Realty parking lot and the private parking lot.

¶6 A refusal hearing was held on October 3, 2003. The sole issue was whether or not Hoffman possessed sufficient facts to support a belief that Steinke was operating on a highway or premises held out to the public for use of their motor vehicles. The trial court found there were sufficient facts. Steinke appeals.

DISCUSSION

¶7 Steinke was charged with operating a motor vehicle while intoxicated, in violation of WIS. STAT. § 343.63(1)(a). That section applies not only to highways but

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.

WIS. STAT. § 346.61. WISCONSIN STAT. § 346.305(2) states

Any person who ... drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent

to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer

If a person refuses to take such a test, the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke the person's operating privileges. The driver can also be charged with this refusal, as Steinke was here.

¶8 Steinke argues that in the instant case the officer did not have sufficient facts to support a belief that he was operating a motor vehicle on "premises held out to the public for use of their motor vehicles" as required by WIS. STAT. § 346.61. This issue requires the application of a statute to a set of undisputed facts, a question of law we review de novo. *City of La Crosse v. Richling*, 178 Wis. 2d 856, 857, 505 N.W.2d 448 (Ct. App. 1993). We disagree with Steinke's contentions.

¶9 In determining whether the parking lot where Steinke was found are "premises held out to the public for use of their motor vehicles," the test is whether the person in control of the lot intended it to be available to the public for use of their motor vehicles. *Richling*, 178 Wis. 2d at 859. More specifically, 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. In *Richling* we determined 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 the "public" within sec. 346.61, Stats. Nor is it necessary that some minimum percentage of the city's population patronize the business.

....

... [I]f we were to hold that a business establishment's customers do not constitute the public as that term is used in sec. 346.61, Stats., we would essentially render the "owner's intent" test in [*City of Kenosha v. Phillips*, 142 Wis. 2d 549, 419 N.W.2d 236 (1988)] meaningless. If customers do not qualify as the public, it would be difficult to conceive of any parking lot in this state as being held out to the public under the statute.

Richling, 178 Wis. 2d at 860-61.

¶10 Here, Steinke was found in the parking lot for Steinke Realty. There are no signs in the Steinke Realty parking lot indicating that it is a private lot. Linda Steinke testified that this lot was intended for her customers. Linda Steinke testified that the "Private Drive, No Trespassing" sign was intended to stop the flow of traffic between the Steinke Realty parking lot and the private parking lot.

¶11 In the case before us, virtually any motorist in Fort Atkinson could be a customer and park in Steinke Realty's parking lot on any day Steinke Realty is open. *See Richling*, 178 Wis. 2d at 860. Applying the reasoning of *Richling*, we conclude that the lot where Steinke was arrested falls under the category of "premises held out to the public." *See id.*

¶12 Hottman had sufficient facts to support a belief that Steinke was operating a motor vehicle on premises held out to the public for public use. We affirm the order of the circuit court.

By the Court.—Order affirmed.

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

