RECEIVED
06-22-2016
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2015 AP 2184
Trial Court Case No. 14 TR 9971

COUNTY OF KENOSHA,

Plaintiff-Respondent,

-vs-

ROBERT PAUL ADAMS,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appealed from a Judgment of Conviction Entered
In the Circuit Court for Kenosha County
The Honorable Chad G. Kerkman Presiding

Respectfully Submitted:

Lubar & Lanning, LLC
2100 Gateway Court, Suite 200
West Bend, WI 53095
Telephone: (262) 334-9900

By: **Chad A. Lanning**
State Bar No. 1027573
Attorney for Defendant-Appellant

ARGUMENT

I. ADAMS WAS NOT OPERATING HIS VEHICLE ON A PREMISES HELD OUT TO THE PUBLIC FOR USE OF THEIR MOTOR VEHICLES.

The drunk driving laws were not intended to apply to any premises upon which a motor vehicle can be driven. *City of Kenosha v. Phillips*, 142 Wis. 2d 549, 556, 419 N.W.2d 236 (1988); *see also State v. Tecza*, 208 WI App 79, ¶15, 312 Wis. 2d 395, 751 N.W.2d 896 (rejecting any test that focuses on physical accessibility of motor vehicles).

Rather, the legislature has limited the applicability of Wisconsin's drunk driving laws to being applicable upon highways,[1] and all premises held out to the public for use of their motor vehicles. *See* Wisconsin Statute § 346.61.

1 Again, there has been no argument or allegation that Mr. Adams drove on a "highway" in the Boy Scout camp.

The County bears the burden of proving that the roads in the Boy Scout campground are "premises held out to the public for use of their motor vehicles." *Phillips*, 142 Wis. 2d at 558.

The *Philips* court held that the primary test of whether a premises is "held out to the public"[2] focuses on the intent of the owner. *Id*. at 557-58. Specifically the *Philips* court stated:

> Is it the intent of the person or corporation in control of the premises that they be available to the public [as a whole] for the use of their motor vehicles?

Id. at 557-58.

Later, the Court of Appeals in *Richling* redefined "held out to the public" as:

> 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.

Richling, 178 Wis. 2d at 860.

---

2 The *Philips* court defined "public" to mean "the public as a whole." *See Philips*, 142 Wis. 2d at 557-58.

Importantly, appellate courts agree that an owner's intent can be proven by demonstrative or circumstantial proof, by action or inaction of the owner that would make the intent explicit or implicit. *Phillips*, 142 Wis. 2d at 558.

In this case, the private roads in the Boy Scout camp were not "held out to the public" under either the *Philips* test or *Richling* test. (Adams' br. at 20-23.) Importantly, Adams was not driving in a parking lot, but rather on internal camp roads.[3] In fact, when arrested, Adams was driving on a "narrow track" consisting of "two ruts" the width of car tires. (R37 at 25.)

A. The Intent of the Owner.

First, Hale testified that the intent of the owner was to limit the use of the private roads in the camp to Boy Scout use only. (R37 at 10.) Hale clarified that the only people that are lawfully entitled to be at the camp are employees, invited guests

3 Mr. Hale testified that the internal roads of the camp are gravel or dirt, and the only paving would be the caretaker's driveway and maybe at the entrance of the

and the parents of invited Boy Scout guests. *See* (R37 at 16, 17.)

Admittedly, Hale appeared to agree to the County's use the term "public" – albeit, incorrectly during cross-examination:

> Q: During weekends and times when Boy Scouts use the facility, the facility is open to vehicular traffic that comes in and out with parents and scout leaders and things like that; is that correct?
>
> A: Correct.
>
> Q: So on a weekend when there is normal traffic in the facility, the facility is open to public use by automobiles?
>
> A. Yes.

(R37 at 12.)

When viewed in context with his other answers, Hale was not testifying that the public as a whole, or that people unaffiliated and uninvited to Camp Sol R. Crown are free to come to the camp on weekends when the camp is full of Boy Scouts camping. *See* (R37 at 10, 16, 17.) Rather, Hale's initial

---

camp. (R37 at 15.)

statement is correct, the camp's roads were for Boy Scout use only. (R37 at 10.)

B. The Big Signs.

The intent of the owner to limit the use of the Boy Scout camp's roads was made implicitly, if not explicitly, by the "big signs" posted at the entrance which stated, "Camp Sol R. Crown, Boy Scouts of America."[4] *See* (R37 at 14, 37.) Anyone reading the "big signs" would know that the camp was privately owned by a membership only organization.

Importantly, the big signs worked. As the citizen witness testified, he had never "seen vehicles driving into this camp that may not be associated with the Boy Scouts." (R37 at 29.) Likewise, the arresting deputy testified that the only drivers he saw during "exit patrols" at the camp who were unaffiliated with

4 Hale further testified that the camp had other signage stating that the camp is owned and operated by the Northern Illinois Council and signs directing people to different facilities inside the camp, as well as some speed limit signs and one-way signs. (R37 at 11, 13.)

the Boy Scouts were "lost."[5] *See* (R37 at 45.) Specifically, the deputy stated he found "people that had no reason to be there and that were lost, stopping asking for directions." *Id*.

Importantly, the deputy did not testify that he had seen drivers in the Boy Scout camp, using the campground that had nothing to do with the Boy Scouts, but mistakenly thought they could lawfully use the campground. For example, the deputy was never told by drivers that, "We thought the camp was open to the public. We did not see a gate, or any signs saying private property or keep out – so we thought the public was welcome here."

Such additional signage was not necessary, however, as the "big signs" at the entrance of the Boy Scout camp communicated to uninvited, unauthorized drivers that the camp

5 The County and the deputy are attempting to argue that Camp Sol R. Crown was "open to the public" because lost drivers were able to drive into the camp. (County's br. at 12, 15.); (R37 at 44-45.) As previously argued, physical accessibility to vehicular traffic is not part of the test. *See Philips*, 142 Wis. 2d at 556.

was not "held out to them for the use of their motor vehicles." *See generally* Wis. Stat. § 346.61.

Critically, the deputy's own statement that he found "people that had no reason to be there" indicated that the campground is not "open to the public." In other words, if the campground was open to the public – they would not need "a reason" to be there.

C. The Caretaker.

A caretaker lived near the front of the Boy Scout camp. (R37 at 12.) The caretaker's duties include security. (R37 at 7, 12, 17.) Accordingly, the caretaker would talk to people who they suspected did not belong on the campgrounds. (R37 at 12, 17.)

Thus, the caretaker worked to keep uninvited, unauthorized drivers from using the camp's roads and facilities. In fact, the mere site of the caretaker's residence at the front of

the camp may have turned unwelcome, unauthorized visitors away without the caretaker needing to intervene.

Inexplicably, the County asserted in its brief that Adams' incorrectly stated that "the caretaker stopped cars they suspected did not belong. However, there was no such testimony provided during the trial." (County's br. at 15.)

To the contrary, the complete quote from Adams' brief was:

> Admittedly, while every vehicle was not stopped and checked every day – there was a caretaker that would stop cars they suspected did not belong, i.e., were not associated with the Boy Scouts.

(Adams' br. at 21.)

The County asked Hale whether people can "on a normal basis" drive into the camp "liberally" and the response was "if they [the caretaker] see somebody driving back and they don't recognize them, they'll check." *See* (R37 at 11-12.) Further, the County asked whether people are allowed to drive in the camp

on a "regular basis" and the response was "if they [the caretaker] happen to see somebody… they're definitely known to say something if they don't feel like they belong there." (R37 at 16-17.)

Ironically, the County admits that "if the caretaker sees somebody driving back that he does not recognize, this caregiver [sic] will 'check.'" (County's br. at 14.) Likewise the County asserted "vehicles could still use the premises and only on occasion would the campground's caretaker question the driver." (County's br. at 13.)

Moreover, the County stated "if the caretaker happens to see someone the caretaker will say something if the person does not belong." [6] (County's br. at 15.) In this context, the word

6 Troublingly, the County's argument section of its brief contains only two citations to the record and the facts section was difficult to navigate as it consisted almost entirely of block quotes, without written explanation. Lastly, it appears the County's appendix was assembled out of order as the pinpoint citations do not appear to match the page numbers. *See* (County's br. at p. 14, 15.) These problem will be more fully addressed below.

"someone" used by the County can be replaced with the word "drivers."

Thus, the County's assertion that Adams made an argument unsupported by "testimony" is mistaken. Again, the testimony established, as the County admitted, that "there was a caretaker that would stop cars they suspected did not belong." (Adams' br. at 21.)

Lastly, unlike the gated community in *Tecza*, where the "security station's" purpose was to "facilitate entry into the community" – one of the caretaker's purposes was to make sure people in the camp were authorized to be there. (R37 at 16-17.)

D. The Boy Scout Camp's Roads were Not "Held Out to the Public for Use of Their Motor Vehicles."

The owner testified that it intended to limit access to the camp's roads, and effectively demonstrated its intent by the use of signage and a caretaker which kept unauthorized users out of the camp. *See Philips*, 142 Wis. 2d at 558.

Moreover, "potentially any resident of the community with a driver's license and access to a motor vehicle" could not use the Boy Scout camp's roads in an authorized manner. *See Richling*, 178 Wis. 2d 860.

Importantly, the big signs posted at the entrance of the camp was not an invitation to the public to enter and use the campgrounds – unlike a commercial business which is looking to invite potential customers.

To the contrary, the sign communicated that the Boy Scout camp was privately owned, by a membership only organization. Thus, there is not a parent or guardian that would think that they could just randomly drop their child off at Camp Sol R. Crown, or even simply use it, without prior permission.

E. The County's arguments.

The County's argument is that "it is clear that the intent of the campground was to allow the public to use its facility." (County's br. at 15.) The County's argument is based on 11

overlapping "factors." The County, however, fails to cite the record for any of these "factors" in violation of Rule 809.19.

Rule 809.19(3) states, in part:

> (a)2 The [Response] brief must conform with sub. (1) except that….

Rule 809.19(1), as referred to in Rule 809.19(3)(a)2 states, in part:

> (1) ….The brief must contain:
> ….
> (e) …. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, **the reasons therefore, with citations to the authorities, statutes and parts of the record relied on**….

The County has ignored this rule, and obfuscated the lack of support for many of its assertions regarding whether the Boy Scout camp's roads were held out to the public for use of their motor vehicles. Furthermore, the County fails to explain how these "factors" make the Boy Scout camp open to the public. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts not address insufficiently

developed arguments). Accordingly, this Court should reject the "factors" listed by the County.

The County's "factors" also fail on their own merit:[7]

1. The campground did not have private property signs posted.

This is true, but the "big signs" at the entrance which stated, "Camp Sol R. Crown, Boy Scouts of America" communicated that the camp was privately owned, by a membership only organization. *See* (R37 at 14, 37.)

2. The campground did not have signs alerting the public of the intended use of the property.

To the contrary, the "big signs" at the entrance informed the public that the property beyond the signs was a campground, used by the Boy Scouts for camping. *See* (R37 at 14, 37.)

3. The campground did not have signs that stated parking was private.

7 All of the County's "factors" are located on page 12 of its brief. *See* (County's br. at 12.)

4. The campground did not have signs that stated employee or Boy Scout parking only.

Adams had not driven in a parking lot. Accordingly, this line of argument is a red herring. Moreover, the big signs at the entrance keep unauthorized users out of the camp entirely. *See* Section B.

5. The campground did not have any gates….

Again, physical accessibility to vehicular traffic is not part of the test. *See Philips*, 142 Wis. 2d at 556.

6. On the weekend the camp ground was open to public use by automobiles.

7. Parents of Boy Scouts were allowed to use the camp ground by driving in and out through the areas where there are paths and roadways.

8. When the Boy Scouts were having a function, as they were in this case on October 11, 2014, parents, leaders and individuals can drive into the camp ground without being stopped.

The County's failure to properly provide citations to the record is troubling here, especially when Hale testified that the

intent of the owner was to limit the use of the private roads in the camp to Boy Scout use only. (R37 at 10.) Any allegation that the owner intended to have the camp open to uninvited members of the public is therefore taken out of context. *See* Section A.

Lastly, the fact that the owner of a property invites and authorizes some people to use their land, does open the land to the public for use of their motor vehicles, as the County suggests with this line of argument.[8] The County further fails to cite any legal authority to support such an argument contrary to Rule 809.19(1)(e) and thus, this argument should be rejected.

> 9. [The arresting deputy] testified that he has been at the camp ground and that vehicles are allowed to ingress

8 Likewise, the County argues the campground was "public" because "even when the campground was closed, vehicles could still use the premises and only on occasion would the campground's caretaker question the driver." (County's br. at 13.) *But see Tecza*, 2008 WI App at ¶15 (rejecting any test that focuses on physical accessibility of motor vehicles.) Further, any unauthorized use, should not be considered when determining whether an owner intended to make their property available to the public. *See Richling*, 178 Wis. 2d at 860(the court only considered the use of the parking lot when the business was open).

> and egress as they please. He testified that it is open to the public and anybody could drive there…. [H]e did not know the people in the vehicles.

Again, it is the owner's intent, not the conclusory statement of a deputy that determines whether a premises is "held out to the public." *Philips*, 142 Wis. 2d at 557-58; *see generally Richling*, 178 Wis. 2d at 860 (the owner determines who can use the premises in an authorized manner).

Ultimately, the County acknowledged that the deputy had no knowledge of whether the vehicles he had seen were authorized users, as he did not know who the drivers were. (County's br. at 12.); (R37 at 45.) Thus, the act of seeing vehicles coming and going from a property, without knowing if they were authorized users, cannot enter the analysis on whether the owner intended to make the property open to the public. *Phillips*, 142 Wis. 2d at 55-58.

> 10. [The deputy] also testified that he has been on the camp ground and that they do various **exit [it is**

believed that this term should be extra] patrols through the camp ground during daylight hours; and

11. [The deputy] testified that the camp ground is open to the public because during the various exit patrols, he met people who were lost on the camp ground and asked him for directions how to get out of the campground.

As indicated above, the County suggested a change to the transcript – again, without citation to the record – and thus is arguing facts not in the record. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600, 603 (1981). (appellate courts will not consider assertions of fact outside the record).

Specifically, the County argues that the deputy "testified . . . that they do various **exit [it is believed that this term should be extra] patrols** through the camp ground during daylight hours." (County's br. at 12.)(emphasis added.); *but see* (R37 at 44.)

Importantly, if the deputy misspoke, the County should have corrected him at the time. Importantly, the County does

not suggest a correction the second time the deputy says "exit patrol." *See* (County's br. at 12.)(the deputy "testified . . . that during the various **exit patrols**, he met people who were lost."); *see also* (R37 at 45.)(emphasis added).

An "exit patrol" is not defined by the deputy, however, it descriptively describes patrolling the exit of the campground. Yet, the County continues with its changed term "extra" without explanation. This line of argument ends with the County stating that the Boy Scout camp "enjoys the county resources of having sheriff's deputies patrol the grounds in the daylight hours [and] clearly demonstrates an intent to allow the public to use the camp ground premises." (County's br. at 15.)

Again, this argument is made without citation to legal authority. The law does not support the principal that because private property is protected by law enforcement, the land is "open to the public." Rather, it appears the County, without

citation, has attempted to say this case should be treated like *Tecza*.

In *Tecza*, the police patrolled the roadways of a gated community and enforced the traffic code. *Tecza*, 2008 WI App at ¶21. Conversely, it appears that the "exit patrol" in this case was to help the Boy Scouts by keeping unwelcome, unauthorized users with "no reason to be there" out of the camp. *See* (R37 at 45.) Critically, there is no evidence that deputies patrolled the campground to enforce traffic codes.

Thus, the County has failed to prove that the campground was open to the public for use of their motor vehicles.

II. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT ADAMS WAS INTOXICATED OUTSIDE THE CAMP.

During the court trial, the County acknowledged that one could not know if Adams was intoxicated at the time he was driving outside the camp, because that time is unknown. *See* (R37 at 47.) In fact, the County did not present evidence or

argue that Adams was intoxicated prior to arriving inside the camp.

The County's brief again fails to cite the record or legal authorities in its new argument that Adams "was intoxicated . . . while getting to the campground."[9] (County's br. at 16.) The County's argument is if Adams was intoxicated in the camp, he was intoxicated earlier. *Id*. However, as stated in Adams' brief, that argument involves assumptions unsupported by the record.[10] (Adams' br. at 23-28.); *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979) ("respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute").

9 Thus, the County's argument should be rejected as it again violates Rule 809.19(1)(e).

10 "Verdicts cannot be permitted to rest upon speculation or conjecture." *Schulz v. St. Mary's Hospital*, 81 Wis. 2d 638, 658, 260 N.W.2d 783 (1978).

Accordingly, the County's argument that Adams was intoxicated outside the camp should be rejected.

CONCLUSION

WHEREFOR, Adams respectfully requests this Court to reverse his conviction based on the circuit court's failure to suppress evidence because the Boy Scout camps roads were not held out to the public for use of their motor vehicles and because verdicts cannot be based on speculation.

Dated this ____ day of June, 2016.

Respectfully submitted,
LUBAR & LANNING, LLC

By: _____
Chad A. Lanning
State Bar No. 1027573
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.64(4) in that it is proportional serif font. The text is 13 point type and the length of the brief is 2,967 words.

I hereby certify that filed with this brief, either as a separate document, is an appendix that complies with s. 809.62(2)(f) & 809.19(2) and that contains:

(1) a table of contents;
(2) the findings or opinion of the trial court; and
(3) the portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the electronically filed brief is identical in both content and format as the paper copy.

Dated this 22nd day of June, 2016.

Respectfully submitted:
By:_____
Chad A. Lanning
State Bar No. 1027573
Attorney for Defendant-Appellant