



Issue Brief: What Constitutes Driving?

Issue Brief 5: What Constitutes Driving? (May 2014)

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Depending on which state you are in, different standards apply to what constitutes “driving” in the event you are questioned pursuant to a possible DWI/DUI. For the purposes of this brief, we are ignoring cases where the driver is in a moving vehicle on a roadway and pulled over based upon some reasonable grounds. The vast majority of those DWI/DUI cases show the similarities of laws from state to state. However, case law surrounding one factual difference is still being tossed about, that being when the driver is in the driver’s seat and the motor vehicle is stationary. A typical case is where the accused is found by police in a parked car, inebriated, with or without the keys in the ignition. Some state courts have attempted to simplify the analysis of “stationary vehicle” DWI/DUI cases by outlining the most common factors at play, and then examining them based on the totality of the circumstances. Most important to courts in such decisions are undoubtedly the traditional policy considerations: that being the balance of fairness to the defendant in light of protection of the public from impaired drivers. An example of the factors being considered are outlined in *State v. Zaragoza*¹:

1. Was the driver awake?
2. Was the engine running or the ignition on?
3. Where were the keys?
4. Where was the driver located?
5. Were the headlights on?
6. What time of day or night was it?
7. Was the vehicle legally parked or was it on a road?
8. Was the heater or air conditioner on?
9. Were the windows up or down?
10. What was the defendant’s version of events?

¹ See *State v. Zaragoza*, 221 Ariz. 49, 209 P.3d 629; 2009 Ariz. Lexis 107



The following are typical situations which courts deliberate the nature of “Driving”:

Defendant Found Asleep/Unconscious Behind the Wheel with Engine Off

Generally courts tend to view an unconscious driver behind the wheel with the engine off as insufficient proof of “driving”.² However, as stated, courts will look at the totality of the evidence at issue and make a judgment based upon the state’s DUI statute and relevant case law. For example, most recently the Montana Supreme Court confirmed in *State v. Rand*³, that a person who is sleeping behind the wheel of a running vehicle has “physical control of the vehicle”. In *State v. Lawrence*⁴, the Tennessee Supreme Court held that a defendant who was asleep on the driver’s side of the vehicle parked on a public roadway with the keys to the vehicle in his pants pocket had “physical control” of the vehicle for the purposes of the state statute. Similarly, the New Mexico Court of Appeals in *State v. Yellowman*⁵ held that the defendant was in “physical control” of the vehicle when he was found in the driver’s seat of the vehicle with keys in his pants pocket.

Defendant Found Asleep/Unconscious Behind the Wheel with Engine On

When the defendant is unconscious behind the wheel and the engine is running, counsel may have a more difficult time attacking the sufficiency of the evidence. One court may find this to be sufficient circumstantial evidence of driving, while another may decide that driving requires the driver to be conscious and/or the vehicle in motion.⁶ An example of the differing views is seen in the New Jersey Appeals Court (2013) case of *State v. Bennett*⁷, where the court reversed a conviction where the defendant was found slumped over the wheel of a car idling in a Wawa parking lot. There, the court held that the officer had made a constitutionally impermissible search that led to the exclusion of evidence that had formed the basis for a conviction at trial. Similarly, the Indiana Appeals Court in *Hiegel v. State*⁸, consulted the dictionary definition to determine that a defendant asleep in his vehicle with the engine running and the lights on was not “operating” it. The court there reasoned that the defendant had “become a passive occupant” who did not attempt to “operate” the vehicle.

² See *People v. Nelson*, 2011, 200 California Appeal 4th 1083.

³ See *State v. Rand*, 2014 MT 19N, 2014 Mont. Lexis 21

⁴ See *State v. Lawrence* 849 S.W. 2d 761 (Tenn. 1993); see also *State v. Zaragoza*, 221 Ariz. 49, 209 P.3d 629; 2009 Ariz. Lexis 107

⁵ See *State v. Yellowman*, 148 N.M. 611, 241 P.3d 612, 2010 N.M. LEXIS 468 (N.M. 2010)

⁶ Taylor, Lawrence. *Drunk Driving Defense*. New York, 7th edition. Pg. 18

⁷ See *State v. Bennett*, 2013 N.J. Super. Unpublished. Lexis 2972 (App. Division. Dec. 18, 2013)

⁸ See *Hiegel v. State*, 538 N.E.2d 265(1989); followed in *Nichols v. State*, (2013) 783 N.E.2d 1210

Conscious (Engine on), Stationary Vehicle

Further to the above discussion, some state courts have held that there must be some actual movement of the vehicle for the facts to constitute driving or operating. Defendants have a much more difficult burden of proof in situations where they are behind the wheel of a running vehicle and they are only a gear shift away from being behind the wheel of a moving vehicle. That said, in *Mercer v. Department of Motor Vehicles*⁹, the California Supreme Court was confronted with a case where the defendant was unsuccessfully attempting to put his running vehicle in gear. The court held that there must be some actual volitional movement of the vehicle by the defendant to amount to “driving”.

Other instances often seen in states with cold winter climates are when the vehicle is claimed to being used as a temporary shelter from the elements. In *State v. Willard*¹⁰ the New Hampshire Supreme Court held that a defendant found asleep in a vehicle with the engine running was not in actual physical control because the court reasoned that the main focus should be on whether the vehicle was being used as a temporary shelter against the weather or whether it was reasonable to assume that there was an imminent danger he was about to drive.

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⁹ See *Mercer v. Department of Motor Vehicles*, 53 Cal 3d. 753 (1991); see also *People v. Nelson*, 200 Cal. App. 4th 1083 (Cal. App. 1st Dist. 2011)

¹⁰ See *State v. Willard* 660 A.2d 1086 (N.H. 1995); see also *State v. Natoli*, 2007 N.H. Lexis 262 (N.H. Dec. 7 2007)