



POLICE / PROSECUTOR UPDATE

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It has been three years since we have looked at the case law addressing the "operating" element of OWI. It would be helpful to the newer officers to review that law, and it won't hurt the more experienced officers to have a short refresher course. The OWI statute does not define "operate," but courts have defined it as "to drive or be in actual physical control of a vehicle." This is not a very helpful definition so we will look at some fact situations which were sufficient to establish operation of the vehicle and then some that were not.

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Evidence Sufficient

The officers encountered the defendant at 12:55 a.m. passed out in his car, partially on the roadway, with the motor running, the transmission in reverse, and the defendant's foot on the brake.

The defendant, the sole occupant of the car, was found asleep in the driver's seat. The car was stopped partially on the roadway, the engine was running, and the transmission was in gear. The car was not moving because it had come to rest against a large rock in an adjacent yard. The car was not "parked" but was simply stopped with its transmission in gear.

The defendant was found asleep in a motionless vehicle, with engine running, along the side of a highway. Also, a radio report to which the arresting officer responded, that a vehicle matching the description had been seen traveling southbound in the northbound lane of the highway, was additional evidence that the defendant had recently operated the vehicle.

The fact that the defendant was discovered passed out behind the wheel of a vehicle which had rear ended a parked vehicle supported the inference that he had recently operated the vehicle, even though the vehicle's lights were off and the engine was not running when officers arrived. Likewise, a defendant had "operated" a vehicle where he was found pinned behind the wheel of a crashed vehicle.

A driver who was behind the steering wheel of a car stuck in a snowbank with the headlights on and motor running was "operating" the vehicle even though it could not move at all.

Finally, where an officer found the defendant behind the steering wheel of a car stopped in the lane of traffic on a county road with engine running and lights off, the defendant was operating the vehicle.

Evidence Insufficient

A police officer on rounds in the early morning hours observed a vehicle parked, apparently properly, along the street with the engine running. About an hour later, the officer returned and observed the same vehicle, engine running, apparently unmoved. The defendant was asleep in the driver's seat. The court said that while it is not necessary to prove movement of the vehicle, "operate" requires effort, the doing of something, by the operator. The court seemed to place emphasis on the fact the vehicle was not in the roadway but was properly parked.

The defendant was found in the driver's seat of a car with the engine running, the lights on, and the transmission in park. The car was sitting in a parking spot, even though the front end of the car protruded into the roadway going through the apartment complex where he was found.

The defendant's vehicle was parked in a tavern parking lot. The lights were on and the engine and heater were running. The vehicle's transmission was in park, and the defendant was asleep in the driver's seat. The court stated there must be some evidence, other than simply starting the engine, to show the defendant operated the vehicle. Likewise, the evidence was insufficient where the defendant was found in a vehicle asleep in a reclining position on the front seat, and the vehicle was parked in a city parking lot adjacent to a tavern with its lights on and engine running.

Summary

Where the vehicle is observed motionless (and not having been in a collision) two factors seem to be of importance to the courts: the location where the vehicle is observed and whether or not the transmission is in gear.

Smith v. State, 681 N.E.2d 687 (Ind. 1997).
Hampton v. State, 681 N.E.2d 250 (Ind. Ct. App. 1997).
Custer v. State, 637 N.E.2d 187 (Ind. Ct. App. 1994).
Taylor v. State, 560 N.E.2d 100 (Ind. Ct. App. 1990).
Geyer v. State, 531 N.E.2d 235 (Ind. Ct. App. 1988).
Garland v. State, 452 N.E.2d 1021 (Ind. Ct. App. 1983).
Traxler v. State, 538 N.E.2d 268 (Ind. Ct. App. 1989).
Mordacq v. State, 585 N.E.2d 22 (Ind. Ct. App. 1992).
Clark v. State, 611 N.E.2d 181 (Ind. Ct. App. 1993).
Hiegel v. State, 538 N.E.2d 265 (Ind. Ct. App. 1989).
Corl v. State, 544 N.E.2d 211 (Ind. Ct. App. 1989).

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