

Michigan OWI: "Operating" a Motor Vehicle Defined

One of the elements of an OWI or drunk driving offense, is that the person had to be "operating" a motor vehicle. Sounds simple enough, but the case law trail on what constitutes "operating" says otherwise. Usually the operating part is not in dispute. The issue of operating most commonly arises in situations where someone is found sleeping in a car or passed out in a car along the roadside or in a parking lot. The question now becomes can the prosecutor prove the person was "operating" the vehicle and were they "operating" the vehicle while intoxicated? These unique circumstances can lay the groundwork for a good argument on a motion to dismiss or to raise reasonable doubt at trial. The suspect must be in "actual physical control" of the vehicle. Let's take a closer look at how the courts have defined "operating."

The Michigan Supreme Court gave the following definition: "'[O]perating' should be defined in terms of the danger the OUIL [operating under the influence of liquor] statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such a risk."¹ This standard has been upheld and recently the Court of Appeals rejected replacing it with a "to cause to function" standard.² In other words, "actual physical control" includes scenarios where a suspect has put a vehicle in motion or in a position posing a significant risk of collision. The suspect is in "actual physical control" until that risk of collision no longer exists.

A person can be convicted of a DUI or OWI based on circumstantial evidence. The evidence would have to show that a reasonable conclusion could be reached that the suspect had been operating the motor vehicle sometime before the arrest, even if there was no testimony or video or photographic evidence that shows the suspect operating the vehicle. This can prove to be quite difficult for the prosecution as they have to prove beyond a reasonable doubt that 1) the suspect was operating the vehicle, 2) someone else was not operating the vehicle, and 3) the suspect's blood alcohol content or BAC was above the legal limit at the time he was operating the vehicle. The last one can prove to be especially difficult if there is no way to pinpoint when the suspect was operating the car, if at all. The defendant could always claim or raise the question that he started drinking after the car was parked. These problems often come up in cases where the suspect is found sleeping in the car.

A case-by-case basis of the facts will determine how strong or how weak the prosecution's case is. For example, was the car running or off? Was the car in drive, neutral, or park? Were the keys in the ignition? Did the suspect even have

¹ *Peo v Wood*, 450 Mich 399, 404-05 (1995)

² *Peo v Lechleitner*, 291 Mich App 56 (2010)

any keys? Was the car operable? In one particular case, a sleeping motorist in a parked car along the roadside with no keys in hand who was arguing with another motorist when police arrived was found to not be in "actual physical control" of the vehicle.³ In another case, the suspect was using a car as a shelter and was found to not be in "actual physical control" because he had no intentions of putting the vehicle in motion.⁴

How about placing a car in gear but never moving it? Yes, that counts for "actual physical control." In that case, there was no dispute that the suspect placed a parked car in reverse, but ultimately the car never moved. The police officer saw the brake light come on. When a conscious driver places a car in gear, even if the car never is placed in motion, has placed the vehicle "in a position posing a significant risk of causing a collision."⁵

Does "operating" mean "driving?" In 2010 we found out the answer to that was no! In that particular case the defendant was driving on a slippery highway with his BAC above the statutory limit when he lost control and struck a guardrail. After the collision his car was in the middle of the freeway blocking traffic in both lanes. One car came upon the incident and swerved onto the shoulder and came to a stop to avoid colliding with the defendant's car. The defendant, with his hazard lights on, was attempting to push his car off to the side with his arms and legs. That is when another car came upon the scene and while swerving to avoid the defendant's car, slammed into the other car on the side and killed the motorist. Defendant was charged with OWI Causing Death with the prosecutor alleging that Defendant, by pushing his car was "operating" it and that operation while intoxicated caused an accident that resulted in death. Defendant urged the court to adopt the "to cause to function" standard for "operating" but the Court of Appeals rejected the argument and concluded that the car does not necessarily have to be in motion at the time of the accident.⁶

This is a very complex area of the law which is why you need an experienced Michigan OWI attorney representing you, especially if your case hinges upon whether the prosecution can prove you were "operating" or were in "actual physical control" of a motor vehicle. The stakes are too high and the process too complex to do it alone. If you have been charged with OWI while in a parked car, contact a Michigan DUI lawyer today.

3 *Peo v Lyon*, 227 Mich App 599 (1998)

4 *Peo v Burton*, 252 Mich app 130 (2002)

5 *City v Longeway*, 296 Mich App 1 (2012)

6 *Peo v Lechleitner*, 291 Mich App 56 (2010)