by James B. Seplowitz

"Driving" While Intoxicated When Sleeping in a Parked Car?

There is a widespread misconception among both motorists and the legal community that the police must observe the defendant driving the motor vehicle in order to sustain a conviction for drunk driving. However, in New Jersey, motorists do not have to be "driving" to be convicted of Driving While Intoxicated (DWI).

Although the State must prove both operation and intoxication to sustain a conviction for DWI under *N.J.S.A.* 39:4-50, our courts have defined operation in a very broad manner. The New Jersey Supreme Court has addressed five cases in which the defendant was convicted of Driving While Intoxicated where no driving was actually observed[1]. In only one of those five cases did the Supreme Court find that operation was not proven beyond a reasonable doubt. According to the standard set forth by the New Jersey Supreme Court, the State need only prove that the defendant either operated a motor vehicle at some prior time while in a state of intoxication or that the defendant intended to drive the vehicle while in a state of intoxication. Evidence that the motor vehicle was actually set in motion is not required for a conviction.

Even an individual sound asleep in a parked car can be found guilty of DWI.[2] The earliest reported decision involving a sleeping DWI defendant was *State v. Baumgartner*, 21 *N.J. Super.* 348 (App. Div. 1952). In that case, the defendant was found slumped over the wheel of his truck, with his right arm hanging through the spokes and his left arm hanging to the side. The truck was standing in the street, approximately six feet from the curb, near an intersection without a traffic light. The headlights and ignition were on, but the motor was not running. The defendant later admitted to being in a tavern and driving his truck. The Appellate Division held that the inference of operation was inescapable from the undisputed facts in the case. It was clear that the individual had driven to that location while in a state of intoxication.

In *State v. Damoorgian*, 53 *N.J. Super.* 108 (Law Div. 1958), a state trooper found the defendant's car parked on the shoulder of the New Jersey Turnpike in Secaucus at 11:05 p.m. The defendant was fast asleep in the driver's seat with the parking lights on, the engine running and the radio playing. Upon inspection of the vehicle, the trooper found a toll receipt from the Secaucus toll stamped at 10:04 p.m. (E-Z Pass was not an option then). The Law Division found that the defendant had been operating the motor vehicle because he had to have passed through the toll to gain access to the location where he was found and the defendant was the sole occupant of the vehicle.

Sixteen years later, the Appellate Division heard a similar case in *State v. Dickens*, 130 N.J. Super. 73 (App. Div. 1974). The arresting officer found the defendant asleep in his car parked on the shoulder of I-287 in Piscataway with the headlights on and the engine running. When awakened by the officer, the defendant asked "what did I hit?" He then admitted to drinking at a bar in Rahway and pulling over on the highway because he did not feel well. The Appellate Division held that the evidence compelled the conclusion that the defendant in fact operated the motor vehicle to get to the place where he was found, which was not a normal place for parking.

Meanwhile, in *State v. Daly*, 64 N.J. 122 (1973), the arresting officer observed the defendant at 3:20 a.m. reclining in the driver's seat of his car in the parking lot of a tavern that had closed at 2:00 a.m. The motor was running but the lights were off. According to the officer's testimony, the defendant was not asleep and had stated the he was sitting in his car to keep warm (it was February) and intended to drive home in a little while. However, the defendant testified that he was sleeping off the intoxication and had the engine running to keep warm. The Supreme Court held that operation was not proved because their was no evidence of intent to move the vehicle. The Court noted the fact that the tavern had been closed for over an hour and that the defendant stated he did not intend to drive until he sobered up. The Supreme Court held that more than a running engine is necessary to prove "operation." "[E]vidence of intent to drive or move the vehicle at the time must appear." 64 N.J. at 125.

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In *State v. Grant*, 196 N.J. Super. 470 (App. Div. 1984), officers responded to a report of a possibly intoxicated driver. Upon arrival, they observed a vehicle solely occupied by the defendant, parked along the shoulder of the road. The defendant was in the driver's seat sound asleep. The engine was not running, the headlights were off and the hood of the car did not appear to be warm. The officers needed an ammonia inhalant to awaken the defendant. At trial, the defendant was acquitted of DWI because the state failed to prove beyond a reasonable doubt that he had operated the vehicle, but was convicted of the subsequent Refusal to Submit to a Breathalyzer. On appeal, the Appellate Division upheld the Refusal conviction, finding that although operation was not proved beyond a reasonable doubt, there was still probable cause to believe operation had occurred to justify the arrest of the defendant and require that he submit to a breath test.

The following year, the Appellate Division heard a case with a novel and unique set of facts in *State v. Gately*, 204 N.J. Super. 332 (App. Div. 1985). In Gately, the arresting officer observed a vehicle stopped at an intersection for some time at 2:40 a.m. He approached the vehicle and found the defendant sprawled across the front seat, with his head on the passenger side and his feet under the steering wheel. The car was in drive with the motor running. The defendant, however, denied being the driver. The defendant and the two females who were with him that night testified at trial. The first woman testified that she took the defendant's car keys, maneuvered him into the passenger side, and drove off from the other woman's house. She left the car in a rage after traveling only a few hundred feet because the defendant was slobbering all over her and grabbing her in an inappropriate fashion. The other woman corroborated the fact that the defendant got in the passenger side and that her friend drove off. Unlucky in love, the defendant at least got lucky on appeal, where the Appellate Division found, on credibility grounds, reasonable doubt as to operation.

In *State v. DiFransisco*, 232 N.J. Super. 317 (Law Div. 1988), the arresting officer found the defendant passed out in the driver's seat of a pickup truck that had its front end partially in a driveway and the bed of the truck in a ditch. The defendant's foot was on the brake, the keys were in the ignition and the engine was warm but not running. The officer testified that the truck was not capable of being operated as it was wedged in the ditch and had to be towed out. The Law Division found that there was no operation because there has to be at least the possibility or capability of operation. [3]

[3] For unknown reasons, the Court did not address the issue of prior operation and how the vehicle had gotten into that position with the defendant behind the wheel. Based on the logic of this Law Division case, DWI defendants involved in single-car accidents might actually be better situated if they total their vehicles and render them incapable of being operated.

The lesson to be learned from DWI cases in general is "don't drink and drive." The moral of the above cases is "don't drink and get into your car." However, should a client irresponsibly drink and drive but then decide to responsibly pull over and sleep it off in the car or if one really was not driving, the following suggestions could prevent that individual from being convicted of driving while intoxicated:

- Park in a spot that is designated as such, i.e. in a parking lot or on a road where parking is permitted. Avoid parking on the shoulder of a major highway if possible.
- Turn off the car and take the keys out of the ignition. Do not turn the engine back on unless you start to develop frostbite (at which point you must decide whether your license or your toes are more important).
- Get out of the driver's seat. Sleep it off in either the front passenger seat or in the rear of the car (fogging up the windows is optional).
- When approached and questioned by the police, do not make any admissions or statements of intent to drive in the near future.
- Keep some empty beer cans in the trunk. The "glove box defense" allows attorneys to argue that there is doubt as to whether the driver became intoxicated before or after the vehicle was placed in park. It is always better to get convicted of Consumption of Alcohol in a Motor Vehicle, in violation of N.J.S.A. 39:4-51a, rather than Driving While Intoxicated. The former does not carry a suspension of driving privileges.
- If you have a designated driver, do not slobber all over him or her, causing that individual to leave you alone stranded in the vehicle. Either way, make sure he or she is willing to testify on your behalf at your DWI trial. See *State v. Gately*, *supra*.

If all of the above suggestions are followed, your client will probably still be arrested for DWI if an officer stumbles upon him or her, but you stand a much better chance of winning at trial. More importantly, everyone should be sure to drink responsibly and drive responsibly at all times.

[1] *See State v. Sweeney*, 40 *N.J.* 359 (1963); *State v. Chapman*, 43 *N.J.* 300 (1964); *State v. Macuk*, 57 *N.J.* 1 (1970); *State v. Daly*, 64 *N.J.* 122 (1973); *State v. Mulcahy*, 107 *N.J.* 467 (1987).

[2] New Jersey does not have a "safe harbor" provision in its laws to allow an intoxicated driver to make the responsible decision to pull over and sleep off the intoxication. ◆

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