A FEW MORE ABC'S ON DWI

Thomas P. Franczyk
Deputy for Legal Education
Assigned Counsel Program

In a recent article on DWI, (Finding the Line Between DWAI and DWI), counsel's attention was directed toward the legal distinction between Driving While Intoxicated (DWI) and Driving While Ability Impaired (DWAI) and the importance of discerning (preferably before the verdict), where judges in bench trials draw the line between them.

While equally applicable to non-jury trials, this article's principal focus is on jury trials of DWI cases and, in particular, the law that underlies the instructions that jurors are expected to follow in deciding whether the People have proven the defendant's guilt of DWI (or the lesser included offense of DWAI) beyond a reasonable doubt.

The instructions with respect to each offense are essentially the same with respect to operation of a motor vehicle on a public highway or other designated location [see VTL 134,1192(7)]). Where they diverge is with respect to the level of impairment from the voluntary consumption of alcohol that is required to establish each offense. As noted in People v Cruz 48 NY 2d 419 (1979), a motorist is impaired when his/her ability to employ the physical and mental skills needed to operate a motor vehicle as a reasonable and prudent driver is, by virtue of voluntary alcohol consumption, actually impaired (i.e. diminished) TO ANY DEGREE.

Intoxication, by contrast, requires proof that the defendant has voluntarily consumed alcohol to the extent that he/she is incapable of employing those physical and mental abilities that are expected of a reasonable and prudent driver. The difference between DWAI and DWI, then, is a matter of degree: i.e. from impairment (however slight), to substantial impairment. (See People v Ardila 85 NY2d 846 [1995]): there is no meaningful difference between "impaired to a substantial extent" and "incapable of employing the physical and mental abilities needed to operate as a reasonable and prudent driver."

Both instructions point out that the law does not require any particular chemical or physical test to prove intoxication/impairment, and they direct jurors to focus on "all the surrounding facts" including the defendant's manner of operation (unless the vehicle is stationary when first encountered), the defendant's physical condition, manner of speech, any odor of alcohol, balance, coordination, any opinion testimony and the circumstances of any accident. (See also People v Gallup 302 AD2d 681 [3d dep't 2003], People v Hasenflue 252 AD2d 829 [1998]).

Where there is chemical test evidence of the defendant's blood alcohol content (BAC), (which is relevant to but not singularly determinative of a common law DWI charge under VTL 1192-3),the instructions advise that if the device (e.g. breathalyzer) used was NYSDOH approved (10 NYCRR 59.4[b]), the People need not offer expert testimony to establish the validity of the underlying scientific principles (Frye v US 293 F. 1013 [D.C. Cir. 1923], People v Hampe 181 AD2d 238 [3d dep't 1992]), but the jury must assess the accuracy of the test results by considering: the qualifications/reliability of the test administrator, the lapse of time between operation of the motor vehicle and the test, whether the device was in good working order and the test was properly administered. (See People v Freeland 68 NY2d 699 [1986], People v Mertz 68 NY2d 136 [1986]).

If chemical test evidence reveals a BAC of less than .08 of one percentum of alcohol in the defendant's system, such evidence constitutes prima face evidence of non-intoxication, and in the absence of a chemical test, the jury may or may not find that the defendant was not intoxicated. Chemical test evidence of BAC .07% or more but less than BAC .08% (the statutory threshold for DWI perse under VTL 1992-2), is prima facile evidence of impairment.(VTL 1195[2][C]).

Pursuant to VTL 1195(2)(A), a BAC of .05% or less is prima facile evidence of non-intoxication and non-impairment and a BAC of over .05% but less than .07% is prima facie evidence of non-intoxication and relevant evidence of impairment (subd.2[B])

In the event of a REFUSAL ,without innocent explanation, to submit to a chemical test after a clear and unequivocal warning of the consequences thereof (suspension/revocation/ of license and introduction as evidence at trial) the jury may infer that the defendant did so out of fear that the test would disclose evidence of the presence of alcohol in violation of the law: i.e. consciousness of guilt. (People v Thomas 46 NY2d 100 [1978]).

A MOTOR VEHICLE is defined as every "motor vehicle operated or driven upon public highway which is PROPELLED BY ANY POWER OTHER THAN MUSCULAR POWER. (VTL 125). Motorcycles also qualify (VTL 123) but bicycles or pedi-cabs (Rickshaws) which are powered by human muscles, do not qualify.

VTL 134 defines a PUBLIC HIGHWAY as any highway, road, street, avenue, alley, public place, public driveway or any other public way. It also encompasses areas of private road open to motor vehicle traffic including a driveway that provides access to or from a public highway and a parking lot having the capacity for parking four or more vehicles. (See People v Williams 66 NY2d 657v[1987], People v Murphy 169 Misc 2d 357 [Village of Fishkill Justice Ct. 1996]): VTL 1192[7] provides that VTL 1992 charges apply to parking lots).

See also People v Beyer 21 AD3d 592 (3d dept 2005): A ditch adjacent to the road qualifies as part of the public highway as do " sluices (artificial water passage with a valve that regulates flow), drains ...and similar accouterments"(citing People v Haszinger 149 Misc2d 856 [Nassau County Dist.Ct.1991]]): car six feet into grassy lawn off parkway exit ramp deemed to be on public highway for DWI purposes).

In People v Whipple 97 NY2d 1 (2001), the People's proof at trial established that that defendant crashed his vehicle into a bar located in a strip mall but failed to establish how many parking spaces were in the parking lot. After the defendant moved for a trial order of dismissal, the Court granted the People's request to re-open their case for the limited purpose of establishing the number of spaces in the lot. The Court of Appeals upheld the trial court's determination to grant the People's motion per CPL 260.30(7), because the issue was not seriously contested (other than during the motion to dismiss) and the element was easy to prove. (This case seems unfair to the defense if for no other reason than there was no good excuse for the People's failure to establish a basic fact of their case (i.e. operation of a motor vehicle at a proscribed location). Nevertheless, under limited circumstances, Whipple grants the People new life after they've rested their case without covering all of their bases).

One of most important and oft-challenged elements of DWI trials is that of OPERATION. The law's definition and cases interpreting it going back to the early days of automobile traffic is sufficiently expansive to include not just driving a motor vehicle, but engaging in preparatory conduct that manifests an intent to put the vehicle in motion. It can be established by direct evidence (e.g. witness observes the defendant driving all over the road and then stumbling out of his car in a drunken stupor), or circumstantial evidence of recent operation (e.g. car jammed headlong into a telephone pole with steam coming through the hood, and defendant slumped behind the wheel), or something less dramatic (and more bucolic), like counting sheep while dozing behind the wheel of a stationary vehicle on some lonesome roadway in the middle of nowhere with the keys in the ignition and the engine running.

According to the Criminal Jury Instruction (CJI), a person operates a motor vehicle when he/she drives it or when he/she is seated behind the wheel of a motor vehicle "for the purpose of placing it in motion, and when it is moving, or even if it is not moving, the engine is running."

Frequently cited cases on operation include: People v Alamo 34 NY2d 453 (1974), People v Prescott 95 NY2d 655 (2001), People v Marriott 37 AD2d 868 (3d dep't 1971) and Matter of Prudhomme v Hults 27 AD2d 234 (3d dep't 1967), but most, if not all of them, reach back to People v Domagala 123 Misc 757 (Erie County County Court 1924, Noonan, J.), where the court held that operation occurs the instant that one BEGINS TO MANIPULATE THE MACHINERY of the motor FOR THE PURPOSE of putting the motor vehicle in motion even though the driver does not succeed in moving it.

In Domagala, police officers observed the defendant, who turned out to be intoxicated, sitting in his vehicle, the front two wheels of which were up against the curb. He tried to start the engine a half dozen times only to have it stall out every time he put it into gear. The court flatly rejected the defendant's argument that operation means actual movement of the vehicle on the street. Determining that operating a motor vehicle is akin to operating a machine (i.e. "to put in action and supervise the working of: as to operate a machine"), the court deemed it sufficient that the defendant made every effort to put the vehicle in motion, albeit with no luck.

In Matter of Prudhomme v Hults 27 AD2d 234 (3d dep't 1967) supra, the petitioner brought an Article 78 proceeding challenging the revocation of his license for his alleged refusal to submit to a chemical test on the grounds that the police lacked probable cause to arrest him for DWI in the first place for lack of evidence of operation. (VTL 1194[1]). There, a state trooper found the defendant slumped over behind the wheel of a car that was situated on the center mall of a highway with the motor running but not in gear. The headlights and interior dome light were on. The trooper called out to the defendant who promptly woke up and sat up straight. He revealed signs of intoxication. A review of thruway ticket information revealed that the car entered the highway seven miles back and about an hour earlier.

The hearing court rejected the petitioner's argument finding, as per Domagala supra, that "operation" is a much broader concept than "driving" and begins when the motorist manipulates the machinery of the motor in order to put the vehicle in motion whether or not it actually moves. Moreover, it was reasonable to infer that the vehicle didn't just appear in the center mall without someone driving it there.

It should be noted that in order to arrest someone for DWI, the police must have reasonable grounds (i.e. probable cause) to believe that he/she has violated VTL 1192 (i.e. operation on a public highway while in an intoxicated condition [or impaired by alcohol or drugs]). (See People v Fenger 68 AD3d 1441 [3d dep't 1991]), People v Kowalski 291 AD2d 669 [3d dep't 2002], People v Mojica 62 AD3d 100 [2d dep't 2009]): assessment of DWI is based on the totality of the circumstances.

In Fenger supra, there was sufficient evidence to support a finding of probable cause with respect to operation (despite the defendant's denial that he was driving), when an officer responded to a "check the welfare "call and encountered the defendant behind the wheel of a vehicle on the side of the road. Firemen already on the scene advised that the engine was running when they arrived, and the vehicle moved forward when they tried to wake the defendant who exhibited glassy eyes and slurred speech. He also stumbled when he got out of the vehicle.

Although People v Alamo 34 NY2d 453 (1974) supra, was an auto theft case (with an issue as to asportation), the Court of Appeals analyzed the issue in terms of operation finding sufficient evidence thereof based on the defendant being observed at the side of the road, sitting behind the wheel of a vehicle with the engine running, and the front wheels turned toward the roadway. Citing People v Marriott supra, the Court said that "a person operates a motor vehicle when he intentionally does an act or makes use of any mechanical agency which alone, OR IN SEQUENCE, will set in motion the motive* power of the vehicle." (* "motive," in this context, refers to the thermodynamic force or energy used to propel a mechanical device forward).

In People Marriott 37 AD2d 868 (3d dep't 1971), the defendant's own witness may have unwittingly helped the People's case with respect to operation (and intoxication). She testified that she drove the defendant in his vehicle because he was in no condition to do so. However, he upset her, and she pulled over on the shoulder of a remote country road. She left the defendant in the vehicle and said, "good luck getting home." As she walked away, she observed the defendant slide over to the driver's seat and fall asleep with the engine off. The police testified that when they arrived, they observed the defendant asleep at the wheel with the engine running.

The Court held that the defendant's presence alone behind the wheel of an automobile in an intoxicated state with the motor running in a remote area where the vehicle had been parked allowed the jury to draw the inference that the defendant had started the engine with the intent to drive home.(See also People v Rockwell 2007 NY Slip Op. 505724 (Rochester City Court): Reasonable to infer intent to drive where D was slumped over wheel with key in the ignition. In contrast, see People v Khan 168 Misc 2d 192 (Kings County Crim Ct. 1995): court finds insufficient proof of operation where D was legally parked with the engine running).

See also People v Key 45 NY2d 111(1978) where the officer's observation of the defendant lying unconscious across the driver's seat with no mention of the state of the engine was not enough to establish either recent operation or any intent to put the vehicle in motion.

Occasionally, defendants may argue that they were "sleeping one off" with the engine running in order to keep warm (rather than to put the vehicle in motion). In People v Balcolm 22 Misc 3d 1137(A) (City Court of Lockport 2004), the court took an unfavorable view, finding sufficient evidence of operation even though the defendant dropped his car off in a Stop-N-Go parking lot (with capacity for more than four vehicles despite the lack of painted lines), got a ride to a bar, was returned later where police found him (drunk) in the wee morning hours behind the wheel with the engine on (while he allegedly was waiting for his brother to come pick him up).

The court rejected the defendant's claim (which relied inter alia, on People v O'Connor 159 Misc 2d 1072 [Crim Ct. Nassau County 1994]: D attempted to help his friend/vehicle owner start his car by pressing on the gas pedal while the friend jimmied the carburetor with a screw driver; and People v DeSantis [NYLJ, 5/21/90 at 32, col. 4 [App. Term 9th/10th Jud. Dists: D fell asleep behind wheel while keeping warm with the engine on at train station lot where he left his car); opting to rely instead on People v Alamo supra.

The O'Connor case supra, nevertheless is helpful insofar as it distinguishes other cases which "compel an inference that the defendant EITHER DROVE his vehicle to the place where it was found or was attempting to drive from such place." (159 misc 2d at 1075): (see, for example, People v Domagala supra, People Foster 133 Misc 2d 427 [Nassau County Dist Ct 1986] (D drives a half block after police found him sleeping behind the wheel); People v Marriott supra; Matter of Prudhomme v Holts supra; People v Collins 70 AD2d 986 [3d dep't 1979]: circumstantial evidence of operation on public highway sufficiently established where witnesses observed D'S car pulling into driveway where D slumped over behind the wheel; People v Blake 5 NY2d 118 [1958]: D found drunk and alone in car up against guard rail).

The O'Connor court reasoned that the definition of operation cannot so alter its ordinary meaning as to create a new crime not intended by the Legislature. In that court's view, the proof established only that the defendant was seated behind the

wheel of his friend/the intended driver's car for the purpose of helping him start it BUT NOT with any intention of driving it himself.

In contrast, sufficient evidence of operation was found in People v Totman 208 AD2d 970 (3d dep't 1994) where a passing motorist twice observed the defendant slumped over behind the wheel of a stopped car with its engine on in the middle of the street. The defendant who exhibited slurred speech and glassy/blood shot eyes admitted that he was drunk and had driven to that location. Similarly, in People v Saplin 122 AD2d 498 (3d dep't 1986), the court found sufficient evidence of operation where the defendant was found asleep at the wheel of a vehicle that was stopped in the middle of the wrong lane of a roadway in a remote area.

See also People v Biondo 2015 NY Slip Op. 50819(U) (App. Term 2d dep't 9th/10th Jud. Dists): Officer sees D standing next to vehicle which had hit a light pole. D told officer her was driving 40 mph and that car was his.

And see People v Booden 69 NY2d 185 (1987): Police find D and two others standing by disabled car on wrong side of road facing the wrong direction. D admits driving. The court found that while there may be an innocent explanation for the accident, the facts supported the inference that a crime had been committed because of intoxicated driving.

In People v Black 58 Misc 3d 221 (Crim. Ct. Queens County 2017), the court went through a detailed review of pertinent cases (including those mentioned above and People v Cunningham 274 AD2d 484 [2d dep't 2002] and People v David W. 83 AD2d 690 [3d dep't 1981] and determined that the misdemeanor information was legally sufficient to support the DWI charge where it alleged that the defendant was observed sitting behind the wheel of Hyundai vehicle, in front of a fire hydrant, with the KEYS IN THE IGNITION even though there was no mention whether or not the engine was running. In the court's view, these allegations fit within the broad definition of operation.

In People v Lekram 2017 NY Slip Op. 57562(U) (Mt. Vernon City Court) by contrast, the court found the information LEGALLY INSUFFICIENT because the allegations with respect to operation were CONCLUSORY and did not permit an inference of recent operation or an intent to put the vehicle in motion. (CPL 100.15, 100.40, People v Concepcion 36 Misc3d 551 (Crim Ct. City of N.Y. 2012). In this case, the information alleged that the officer observed the defendant in an intoxicated state behind the wheel of a Hyundai with a KEY FOB in his pocket. When asked if he'd been drinking, the defendant said, "a couple drinks." No mention was made of any admission to driving, nor was it alleged that the engine was running.

Citing People v Alamo, supra, the court held that absent some non-hearsay allegation of fact to support the inference that the defendant performed some physical act such as activating the engine (in this case, presumably, by stepping on the brake pedal and hitting the start button), the element of operation was lacking.

In People v Beyer 21 AD3d 592 (3d dep't 2005), the defendant was observed by a passerby seated in a truck that was on it's passenger side in a four-foot ditch. The defendant was on the passenger side reaching over and gunning the engine with his left foot on the gas pedal (and left hand on the wheel) in a futile attempt to extricate the vehicle. When asked if he needed help, the defendant, who was slurring his words, said no. He also told a nearby homeowner that his dog (who was in the vehicle) had somehow caused him to drive off the road. When police came, the defendant had to be forcibly removed for refusing to comply with orders to get out of the vehicle. Once out, he was unsteady on his feet and admitted that he was "drunk." He refused to take a chemical test.

The court, as noted at the outset, found that the ditch qualified as part of the roadway and that there was ample evidence of operation. (citing People v Prescott 95 NY2d 655 [2001]).

In Prescott supra, the defendant was charged with Attempted DWI after he was observed (while in an intoxicated condition) getting into the complainant's vehicle which had keys in the ignition. When confronted by the owner, the defendant said that he needed the vehicle to drive to his vehicle which was stuck in a ditch. The trial court dismissed the charge (not possible to attempt to commit DWI), but the Appellate Division reversed, reasoning that one can intend to operate a motor vehicle (while he/she is intoxicated), and engage in conduct that tends to effect the commission of such crime. (PL110.00).

The Court of Appeals reversed, holding that while there is a difference between crimes that have an unintended result (no attempt possible), and statutes that simply proscribe conduct, the Legislature's detailed and specific statutory scheme for proscribing and penalizing DWI offenses (criminally and administratively) did not contemplate an attempt to commit DWI. (For example, there is no penalty that would address Attempted DWI).

The Court also noted that “operation” is defined so broadly as to encompass conduct that does not reach the point of actually putting a vehicle in motion. (i.e. intentionally doing any act or making use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle. (Citing People v Alamo supra).

When a defendant is charged with FELONY DWI (based on a prior conviction for misdemeanor DWI (VTL 1192-2,2a,3,4,4a and Vehicular Assault within the last ten years), or is charged with MISDEMEANOR DWAI (based on two prior convictions of any subdivision of VTL1192 within the last ten years), the fact of the prior conviction (which is a necessary element to the elevated charge), can (and probably should) be stipulated to after commencement of the trial after the defendant has been arraigned on the Special Information charging that/those prior(s). (CPL 200.60), People v Cooper 78 NY2d 476 [1991]).

In such case, there can be no mention of the prior conviction in the court’s definition of the charge or its listing of the elements for the jury’s consideration. Nor should any witness testify to any prior convictions or counsel imply their existence to the jury. The purpose is to avoid the undo prejudice inherent in the risk that the jury will convict the defendant based on propensity rather than proof of conduct alleged in the indictment.

Some defense attorneys, for reasons not entirely clear, stipulate to the prior conviction in bench trials where the judge is already aware of the defendant’s criminal history and, presumably, will not be unduly swayed by the defendant’s sodden past. By stipulating to the prior, counsel is in effect, giving the prosecution a free pass on the very element that can, in the event of a felony conviction, increase the defendant’s exposure from local jail time to a lengthy stretch in a state penitentiary.

Also, if the defense stipulates to the prior, the court’s only verdict options are (assuming an acquittal is unlikely on the facts of the case), either: guilty of a felony or guilty of a non-criminal violation (DWAI) as a lesser-included offense. In view of the stipulation, the court would probably be hard-pressed to justify a misdemeanor conviction when the defendant has admitted the very fact that makes it a felony. In the absence of a stipulation, however, the court might be able to find reasonable doubt if the proof of the prior leaves room for doubt, for example, on the issue of the defendant’s identity as the person previously convicted. In such circumstances, a misdemeanor DWI conviction would be a much more desirable outcome (and possibly more palatable for the fact finder in light of the defendant’s history).

Counsel, therefore, should seriously consider NOT STIPULATING to the prior conviction UNLESS he/she has good reason to expect a non-felony conviction (based on pre-trial conferences or the judge’s predilections in similar cases), or the proof is objectively weak on intoxication or operation. Otherwise, the People should be put to their proof on every element of the crime(s) charged.