

A newsletter by **Taheri & Todoro, P.C.**, devoted to Driving While Intoxicated law in New York State

Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, Telephone: (716) 633-0374

Definition of “Operating” a Motor Vehicle in a DWI Case

What is the definition of “operation”?

The term “operate” is not defined by the Vehicle and Traffic Law . Instead, it has been left for the courts to define the precise meaning and intent of this word, and the courts have given the term “operate” a broader meaning than the ordinary definition of “driving.” For example, in *Prudhomme v. Hulst*, 27 A.D.2d 234 (3d Dept. 1967), the court affirmed the determination of the Commissioner of the Department of Motor Vehicles that the defendant operated a motor vehicle based on the defendant having been found alone, slumped over the steering wheel of his car in the center mall of the Thruway. The car was not in gear, but the headlights were on.

What factors have the courts used to evaluate the element of “operation”?

Courts have consistently examined certain factors in deciding whether a person was “operating” a motor vehicle in violation of VTL § 1192. In *People v. Zervakos*, N.Y.L.J., Feb. 27, 1998 at 33, col.6. (Nassau Co.), the court set forth several factors that are typically considered when the element of “operation” is challenged. These factors are:

1. Whether or not the person in the motor vehicle was asleep or awake;
2. Whether or not the motor was running;
3. Whether or not the keys were in the

ignition;

4. The location of the vehicle and all the circumstances bearing on how the vehicle arrived at a given location;

5. The intent of the person behind the vehicle.

In *Zervakos, supra*, the court went through this five factor analysis and concluded that the defendant won “... on factors 1, 2, 3 and 5, but not factor 4, the crucial factor of the van’s location and how it got there.” As a result, the court found that the accusatory instrument adequately alleged the element of operation.

What is the mens rea requirement in DWI cases?

Both the pattern jury instruction and the case law provide that there must be evidence that the defendant *intended* to move the motor vehicle for “operation” to be established In a DWI case. Judicial analysis has concluded that proof of operation requires more than merely placing the defendant behind the wheel of a running vehicle. In *Prudhomme v. Hulst*, 27 A.D.2d 234 (3d Dept. 1967), the court held that the driver must *intend* to put the vehicle in motion. In quoting from a decision of the Supreme Court of Massachusetts (*Commonwealth v. Uski*, 263 Mass. 22, 24 (1928)), the court observed:

A person operates a motor vehicle within the meaning of [the statute] when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle. *Prudhomme*, 27 A.D.2d at 237.

In *People v Khan*, 168 Misc.2d 192 (Kings Cty. 1995), the court concluded the defendant did *not* operate a car as a matter of law even though the police found the defendant legally parked on a public highway while asleep or unconscious behind the wheel of a car with the engine running . The defendant stated to law enforcement that he was waiting for a friend who was going to drive the car. In granting the defendant’s motion to suppress, the court wrote, “...when a driver of a legally parked car starts the engine of his car, without an intention to set the car in motion, operation of a motor vehicle has not occurred.” *Khan*, 168 Misc.2d at 201. In applying the “intent” requirement to the facts of the case, the court concluded its analysis by observing:

Since none of the facts or circumstances in this case raises the inference that the defendant, who appeared to be in a stupor when observed by the officer, recently moved the car or intended to do so, it cannot be said that he operated his car, as a matter of law.

Khan, 168 Misc.2d at 201.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

Edited by James F. Orr

Newsletter available by e-mail if you contact us with your address.