



On appeal, the People raise two issues. First, the District Court erred by misapplying the case law pertaining to operating a motor vehicle under the influence and the admissibility of chemical evidence contrary to MCLA 257.625 and 257.625a; MSA 9.2325 and 9.2325a; and, second, the trial court erred in finding that the applicable law required mental intent or consciousness as a condition precedent to the admissibility of chemical evidence.

Like the trial court, this Court agrees that sufficient circumstantial or direct evidence was proffered by the prosecutor to establish that Defendant had operated the vehicle in an intoxicated state shortly before the officer arrived, and that a rational fact-finder could conclude, beyond a reasonable doubt, that the essential elements of the offense were proven. People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979). As noted above, the Defendant's vehicle was parked half on Highway 137 and half on the shoulder. The engine was running and the vehicle was creating a traffic hazard by obstructing a portion of the highway. Thus, the physical placement of Defendant's vehicle in relation to the highway provides strong indication that Defendant had previously operated the vehicle in an impaired state or under the influence.

In People v Pomeroy (Rehearing), 419 Mich 441; 355 NW2d 98 (1984), a similar factual scenario existed. Defendant Pomeroy was found by police legally parked outside of a bar, asleep and slumped over the steering wheel of his car. The car was in neutral with the motor and heater running. While the conviction was reversed, the Michigan Supreme Court noted that, "At Pomeroy's trial, no evidence was offered that he had earlier driven while visibly impaired." Id. at p 447. By implication, chemical test results would be admissible even though Defendant was asleep when arrested. The probative value of said evidence would be to establish the level of intoxication when Defendant had earlier operated the vehicle.

"The holding of People v Pomeroy, supra, is narrow: where there is no evidence of prior impaired driving, a defendant arrested while asleep at the wheel of a stationary car cannot be found guilty of driving while

impaired (or by extension, OUIL) because he is not presently "operating" the vehicle at the time of his arrest. See 419 Mich 447. Stated otherwise, to sustain an OUIL conviction, there must be direct or circumstantial evidence that a person arrested while asleep at the wheel was operating a vehicle while under the influence of intoxicants at some time prior to his arrest.

In the instant case, as the circuit court found, defendant clearly was not "operating" his vehicle at the time of his arrest. Thus, the question to be decided is whether there was sufficient direct or circumstantial evidence that defendant had operated his vehicle while under the influence at some point before he was arrested." People v Schinella, 160 Mich App 213, 216; 407 NW2d 621 (1987).

In Schinella, supra, the arresting officer found Defendant's vehicle off the roadway straddling a ditch. Evidence at the scene indicated Defendant had attempted to free the stuck vehicle by placing tree branches under the rear wheels. The vehicle's hood and rear tires were still warm. The engine was not running. The Schinella Court held, "[a] reasonable jury could infer beyond a reasonable doubt that defendant was at least as intoxicated while he was driving as he was when the officers discovered him. Nothing in Pomeroy bars a conviction on this quantum of evidence." Schinella, supra, at p 217. Again, by implication, the Court of Appeals suggested that chemical evidence or field sobriety tests are admissible to demonstrate intoxication at the time Defendant was operating the vehicle even though the Defendant was not actually operating the vehicle when discovered by the officers. The Defendant in Schinella was behind the wheel and "awake but glassy-eyed. . .either sleepy or intoxicated." Id. at p 214.

Upon finding the Defendant Welch's vehicle half on the roadway and half on the shoulder, the officer woke him and asked that he step out of the vehicle. The officer noted a strong odor of alcohol on the Defendant's person. Defendant was unable to maintain his balance, his eyes were glazed and speech slurred. After failing field sobriety tests, Defendant was administered a preliminary breathalyzer test resulting in a blood alcohol content

of .17%. Defendant made a statement that he had consumed the last of five beers at a residence in Interlochen about 10:30 or 11:00 p.m. Defendant was on his way home when he stopped the vehicle on Highway 137. He was arrested and a breathalyzer test was administered. The result was .16%.

The trial court quashed the breathalyzer results because there was no showing that the Defendant was conscious when he was arrested. The implication of this decision is that absent a showing that the Defendant was alert and observed to be operating the vehicle when arrested, the test results are not admissible. This cannot be so. If there is probable cause to believe the Defendant was operating the motor vehicle shortly before his arrest, then the fact that he passed out or fell asleep at the wheel cannot be used to preclude the admission of breathalyzer evidence. Such evidence is relevant material and highly probative of the level of intoxication--if the jury concludes that the Defendant was driving.

In People v Smith, 164 Mich App 767, 770; 417 NW2d 261 (1987), Smith was discovered by State Police parked on the shoulder of I-75, unconscious, slumped over the wheel with the engine running. There was a strong odor of alcohol when the officer opened the door. The officer had to shake the suspect before he awoke. Smith's eyes were bloodshot, his speech slurred and unable to walk on his own, recite the alphabet or count backwards. A breathalyzer indicated a blood alcohol content of .25%. The Smith Court affirmed the conviction based upon the sufficiency of circumstantial evidence that Defendant had operated the vehicle while under the influence. As in Smith, supra, there is sufficient evidence from which a rational trier of fact could find Defendant Welch had operated the vehicle while under the influence of intoxicating liquor just prior to his arrest. Id. at p 770.

The cases previously cited as controlling do not require mental intent or consciousness at the time of arrest to sustain a conviction or to admit breathalyzer results. In, Pomeroy, supra, Schinella, supra, and Smith, supra, all Defendants were found

asleep or glassy-eyed behind the wheel of their parked vehicles. The sufficiency of the evidence of operation while intoxicated just prior to their arrest, whether direct or circumstantial, was the issue which the appellate courts addressed in deciding the appeals.

The admissability of chemical test results does not turn on the Defendant's "consciousness" at the time of his arrest, but on whether there is sufficient direct or circumstantial evidence that Defendant had operated his vehicle while under the influence at some point before he was arrested. Schinella, supra, 216. The record supports a finding that such evidence exists. Once this threshold has been crossed, the breathalyzer results are admissible because they are probative of the degree of intoxication at that earlier time when the Defendant was operating the vehicle. This case will be remanded to the District Court for further proceedings consistent with this decision and order.

IT IS SO ORDERED.



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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 8/26/92