DRIVING UNDER THE INFLUENCE (DUI) / DRIVING WHILE IMPAIRED (DWI)

South Carolina Code

Section 56-5-20. Applicability of chapter to vehicles operated upon highways; exceptions.

The provision of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways, except:

(1) When a different place is specifically referred to in a given section; and
(2) That the provisions of Articles 9 and 23 shall apply upon highways and elsewhere throughout the State.

Section 56-5-120. Vehicle.

Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks, is a "vehicle."

Section 56-5-2930. Operating motor vehicle while under influence of alcohol or drugs

(A) It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.

Section 56-5-2933. Driving with an unlawful blood alcohol concentration

(A) It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more

Florida Statutes

320.01 Definitions, general.—As used in the Florida Statutes, except as otherwise provided, the term:

(1) "Motor vehicle" means:
  (a) An automobile, motorcycle, truck, trailer, semitrailer, truck tractor and semitrailer combination, or any other vehicle operated on the roads of this state, used to transport persons or property, and propelled by power other than

muscular power, but the term does not include traction engines, road rollers, special mobile equipment as defined in s. 316.003(48), vehicles that run only upon a track, bicycles, swamp buggies, or mopeds.

316.193 Driving under the influence; penalties.—

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
   (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
   (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
   (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

Minnesota Statutes

169A.20 – Driving While Impaired

Subdivision 1. Crime; acts prohibited. It is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . within this state when:

(1) the person is under the influence of alcohol;
(2) the person is under the influence of a controlled substance;
(3) the person is knowingly under the influence of a hazardous substance that affects the nervous system, brain, or muscles of the person so as to substantially impair the person's ability to drive or operate the motor vehicle;
(4) the person is under the influence of a combination of any two or more of the elements named in clauses (1) to (3);
(5) the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more;
(6) . . . or
(7) the person's body contains any amount of a controlled substance listed in Schedule I or II, or its metabolite, other than marijuana or tetrahydrocannabinols.

Kentucky Revised Statutes

189.520 Operating vehicle not a motor vehicle while under influence of intoxicants or substance which may impair driving ability prohibited; presumptions concerning intoxication

(1) No person under the influence of intoxicating beverages or any substance which may impair one's driving ability shall operate a vehicle that is not a motor vehicle anywhere in this state.

Colorado Revised Statutes

42-4-1301. Driving under the influence - driving while impaired - driving with excessive alcoholic content - definitions - penalties

(1) (f) "Driving under the influence" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, that affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(g) "Driving while ability impaired" means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

Supreme Court of South Carolina.

The STATE, Appellant,
v.
Johnny GRAVES, Respondent.

269 S.C. 356 (1977)

Opinion

GREGORY, Justice.

This is an appeal by the State from an order of the circuit court reversing respondent's conviction and sentence in the magistrate's court for driving under the influence of intoxicants in violation of Section 56-5-2930 of the 1976 Code of Laws of South Carolina. We affirm.

*359 The respondent was arrested at approximately 5:00 A. M., November 1, 1975 by State Highway Patrolman J. I. Strickland for driving under the influence of intoxicants . . . .

At trial, Patrolman Strickland testified that at approximately 5:00 A. M., November 1, 1975, he was called to go to the Pink House on Highway 76 about one-half mile east of the City of Marion, South Carolina. There, across the highway from the Pink House, he saw a 1972 Pontiac, with the engine running and the transmission in gear, occupied by respondent who was leaning over the steering wheel asleep. Respondent was asked by Patrolman Strickland to get out of his car, at which time the car started moving and had to be stopped by Patrolman F. O. Buffkin who was also in attendance at the scene. Patrolman Strickland observed a strong odor of alcohol about the respondent as well as some physical impairment and placed him under arrest.

Patrolman Strickland testified on cross examination that Patrolman Buffkin assisted and that although he did not see respondent driving the car, he was of the opinion respondent was in control of the car.

Respondent was found guilty by the jury and sentenced to pay a fine of $100.00 or serve thirty days.

Notice of intention to appeal was duly filed, and the matter came before the circuit court on February 6, 1976. In an order dated February 9, 1976, the circuit court set **586 aside the respondent's conviction and sentence after finding that it was error for the magistrate to have refused to grant respondent's motion for a directed verdict at the close of the State's case. The basis for the circuit court's ruling was that “the arresting officer did not see appellant (now respondent) *360 commit the offense for which he was charge,” that of driving under the influence of intoxicants.

The essential question presented by this appeal is whether or not the respondent's actions on November 1, 1975, as testified to by Patrolman Strickland, constitute driving under the influence

of intoxicants within the meaning of Section 56-5-2930, 1976 Code of Laws. The statute in pertinent part provides: "It is unlawful for any person * * * who is under the influence of intoxicating liquors, narcotic drugs, barbiturates, paraldehydes or drugs, herbs or any other substance of like character, whether synthetic or natural, to drive any vehicle within this State" (emphasis added).

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Because Section 56-5-2930 is penal in nature, we must approach its interpretation by invoking the rule of strict statutory construction and resolve any uncertainty or ambiguity against the State and in favor of the respondent. State v. McCord, 258 S.C. 163, 187 S.E.2d 654 (1972).

Sections 56-5-400 and 56-1-10(1) of the 1976 Code of Laws define driver as: "Every person who drives or is in actual physical control of a vehicle"; and Section 56-1-10(2) defines operator as: "Every person who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle." Section 56-9-20(10) also defines operator as: "Every person who is in actual physical control of a motor vehicle, whether or not licensed as an operator or chauffeur under the laws of this State." Section 56-5-2930 makes it a penal offense for any person to "drive any vehicle within this State" while in an intoxicated condition.

Section 56-5-2930 is a portion of the Uniform Act Regulating Traffic on Highways which is a substantial adoption of the uniform act by the same name that was approved by the National Conference of Commissioners of Uniform *361 State Laws, 1926, as revised in 1930 (withdrawn as obsolete in 1943). This uniform act has served as the basis for the motor vehicle codes of numerous states, most of which have adopted a provision that is similar to Section 56-5-2930.

Section 56-5-2930 is modeled after Article V Section 18 of the approved Uniform Act as revised in 1930, which reads as follows:

> It shall be unlawful and punishable as provided in subdivision (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon any highway within this state.

Although South Carolina adopted the phrase "drive any vehicle within this state" from the approved Uniform Act as revised in 1930, several states adopted this provision with amendments that also prohibit the "operation" of an automobile while in an intoxicated condition. While choosing to define both "driver" and "operator", the 1949 General Assembly by Act 281 of 1949, 1949(46) 466, proscribed only driving a motor vehicle while intoxicated, and did not proscribe operating.

The distinction between these terms is material, for it is generally held that the word "drive", as used in statutes of this kind, usually denotes movement of the vehicle in some direction, whereas the word "operate" has a broader meaning so as to include not only the motion of the vehicle, but also acts which engage the machinery of the vehicle that, alone or in sequence, will set in motion the motive power of the vehicle. Flournoy v. State, 106 Ga.App. 756, 128 S.E.2d 528 (1962), Gallagher v. Commonwealth, 205 Va. 666, 139 S.E.2d 37 (1964).

This distinction is well noted in an extensive annotation at 47 A.L.R.2d 570, 571:

> **587 Although statutes prohibiting "driving" a motor vehicle while under the influence of intoxicating liquor and those *362 prohibiting "operating" a motor vehicle while in a similar condition exist for the same general purpose of protecting the users of the highways from the hazard of vehicles controlled by persons under the influence of alcohol, a certain distinction between the two terms is nevertheless recognized. Of the two terms, "driving" is given the stricter construction, and in numerous cases it has been held that to be guilty of driving a vehicle while intoxicated, the defendant must have had the vehicle in motion at the time in question. While in a few cases the term "operating" has been given a similar limited construction, "operating" has been more liberally construed in other cases to include starting the engine or manipulating the mechanical or electrical agencies of a vehicle (footnotes omitted).

It is also stated at 60 C.J.S. Motor Vehicles s 6(2) that:

> As used in connection with motor vehicles, the word "drive" usually denotes movement of the vehicle in some direction, and the word "operate" may also import motion of the automobile; but the word "operate" may have a somewhat broader meaning, and may not necessarily be limited in meaning to the movement of the vehicle itself, that is, it may not be limited to a state of motion produced by the mechanism of the car. It may include not only the motion of the vehicle, but also acts which engage the machinery of the vehicle which, alone or in sequence, will set in motion the motive power of the vehicle. Thus, a person is considered to operate a vehicle 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 (footnotes omitted).

See also: 7 Am.Jur.2d Automobiles and Highway Traffic s 256; 42 A.L.R. 1498; 49 A.L.R. 1389; 68 A.L.R. 1356; 13A Words and Phrases "Drive" pp. 37-39; 13A Words and Phrases "Driving" pp. 44-46; 29A Words and Phrases "Operate" pp. 396-400; and Nicolls v. Commonwealth, 212 Va. 257, 184 S.E.2d 9 (1971) (defendant *363 found asleep at the steering wheel of a parked car with the motor running and the transmission in gear may be convicted of operating a motor vehicle while intoxicated).

In the case of State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966) this Court stated that the conduct proscribed by Section 56-5-2930 is "the operation of a motor vehicle by one who is under the influence of intoxicating liquor or drugs," and that "(t)he act of operating a motor vehicle with impaired faculties is the gravamen of the offense." 248 S.C. at 466, 150 S.E.2d at 917. In Sheppard we used the terms "driving" and "operating" synonymously, but the issue before the Court in that case clearly involved driving, not operating, and we employed the two terms interchangeably in only their common and informal sense.

In Truesdale v. South Carolina Highway Dept., 264 S.C. 221, 213 S.E.2d 740 (1975) we were presented with the question of whether or not the phrase "while being operated" as used in Section 15-77-230 limited the effect of that statute to only those cases where the motor vehicle was in motion. In holding that motion was not an essential element of operating an automobile, we recognized the distinction intended by the General Assembly in its choice of the word "operate" instead of "drive."

Section 56-5-400 defines "driver" as "Every person who drives or is in actual physical control of a vehicle . . . ." It would seem clear that the statute provides two distinct definitions of "driver," for "driving" and "being in actual physical control" can describe the same activity only if we treat the phrase "or is in actual physical control" as useless baggage. Such a construction would run counter to the principle that "a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." 82 C.J.S. Statutes s 346. Savannah Bank & Trust Co. of Savannah v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1967).

**588 *364 In its present form Section 56-5-2930 proscribes only the conduct of "driving any vehicle within the State" while under the influence of intoxicants. It does not prohibit being a "driver" of a motor vehicle while in a similar condition and thus it does not proscribe both driving and being in actual physical control of an automobile while intoxicated. The statute prohibits "operating" a motor vehicle while intoxicated only to the extent that driving of necessity includes operating.

We now hold that within the meaning of Section 56-5-2930, the word "drive" requires the vehicle to be in motion to constitute the offense. This requirement may be met by either direct or circumstantial evidence.

The record indicates that respondent's vehicle began to move after respondent was asked by the arresting officer to get out of his car, but this movement was incidental to the officer's instructions and is not the type of movement proscribed by the statute:

> A mere movement of the vehicle might occur without any affirmative act by a driver, or, in fact by any person. If a vehicle is moved by some power beyond control of the driver, or by accident, it is not such an affirmative or positive action on the part of the driver as will constitute a driving of a vehicle within the meaning of the statute. State v. Taft, 143 W.Va. 365, 367, 102 S.E.2d 152, 154 (1958).

Although respondent's actions on November 1, 1975 constituted both being "in actual physical control", People v. Chamberlain, 5 Ill.App.3d 235, 282 N.E.2d 784 (1972), and "operating", Nicolls v. Commonwealth, *supra*, a motor vehicle while intoxicated, his actions did not constitute "driving" within the meaning of Section 56-5-2930, since there was no showing by direct or circumstantial evidence that respondent had placed his vehicle in motion while under the influence of intoxicants.

*365 The General Assembly may bring conduct such as respondent's within the prohibition of Section 56-5-2930 by simply adding the phrase "or operate" to the statute so as to make it unlawful for any person "to drive or operate any vehicle within this State" while under the influence of intoxicants.

AFFIRMED.

LEWIS, C. J., and RHODES, J., concur.

LITTLEJOHN and NESS, JJ., dissent.

NESS, Justice (dissenting):

Not subscribing to the narrow technical definition of "driving" adopted by the majority, I dissent.

While it is true that some courts in other jurisdictions have distinguished the terms "operating" and "driving" a motor vehicle, according a narrower definition to the latter, other courts have construed the terms as being synonymous. See State v. Michael, 141 W.Va. 1, 87 S.E.2d 595 (1955); State v. Sullivan, 146 Me. 381, 82 A.2d 629. As stated in 60 C.J.S. Motor Vehicles s 6(2):

> "The words 'operate' and 'drive,' as applied to motor vehicles, may be synonymous, since, according to popular acceptance, to operate a motor vehicle is the same as to drive it . . . "

This Court, in considering an indictment brought under the present statute's predecessor, Section 46-343, Code of 1962, used the terms "operating" and "driving" interchangeably. State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966). Although the exact language of the statute made it unlawful "to drive any vehicle within this State" while in an intoxicated condition, this Court stated: "The act of operating a motor vehicle with impaired faculties is the gravamen of the offense . . . " State v. Sheppard, 248 S.C. at 466, 150 S.E.2d at 917. (Emphasis added).

*366 I perceive no compelling reason why this Court should now abandon the common sense interpretation of the two terms in favor of a narrow, technical construction.

Moreover, even if a distinction is to be drawn between "operating" and "driving" a motor vehicle, the conduct of respondent **589 arguably falls within the definition of "driving." The term "driver" is defined in Sections 56-5-400 and 56-1-10(1) of the 1976 Code of Laws as: "Every person who drives or is in actual physical control of a vehicle." (Emphasis added). The arresting officer in this case testified that in his opinion, respondent was in control of the car. Furthermore, when respondent was asked to get out of the car, the vehicle began to move forward and had to be stopped by another patrolman on the scene.

The majority's strained construction of the statute cuts against the social purpose behind the provision, i. e., the apprehension of persons whose intoxication renders them unfit to operate a motor vehicle. Respondent here started his automobile and put the car in gear. The fact that his level of intoxication caused him to pass out before he accelerated the vehicle to actual motion should not remove his conduct from that intended to be proscribed by the statute.

I would reverse, on the basis that "operating" and "driving" are synonymous, or in the alternative, even if a distinction is recognized, respondent was in physical control of his vehicle and was therefore a "driver" under the Code definition of the term.

District Court of Appeal of Florida, Third District.

Daniel FIESELMAN, Petitioner,
v.
The STATE of Florida, Respondent.

537 So.2d 603 (Fl. App. Ct. 1988)

Opinion

*604 DANIEL S. PEARSON, Judge.

Daniel Fieselman was charged in the county court with being in actual physical control of a vehicle while under the influence of alcoholic beverages, in violation of Section 316.193(1)(a), Florida Statutes (1985). Fieselman moved to dismiss the charge on the ground that the undisputed facts established that, although he was indisputably under the influence, he was not in actual physical control of the vehicle. The county court dismissed the charge, and the State appealed to the circuit court, which, sitting in its appellate capacity, reversed the county court's order and remanded the cause for further proceedings. The defendant has petitioned this court to issue a writ of certiorari to review the circuit court's order. We deny the defendant's petition.

. . .

II.

We turn now to the merits of the controversy. The facts are undisputed. At about 3:10 a.m., the defendant was found lying down, asleep in the front seat of his automobile. His car was in a parking lot, the car's automatic gear shift was in the park position, its key was in the ignition in *605 the off position, its “lights” were on, and its engine, not running, was cold.

With considerable difficulty—presumably because the defendant was intoxicated—a police officer woke the defendant. Observing the defendant's condition and taking into account the above-described circumstances (but discounting the lack of any direct evidence that the defendant had driven the car in his intoxicated state), the officer placed the defendant under arrest for violating Section 316.193(1), Florida Statutes (1985), which provides that a person who is under the influence of, inter alia, alcoholic beverages is guilty of driving under the influence “if such person is ... in actual physical control of a vehicle within this state....”

The issue before us, as the reader by now surely knows, is whether, as the county court believed, Fieselman was as a matter of law not in actual physical control of the vehicle in which he was found under the influence of alcoholic beverages, or whether, as the circuit court later ruled, the question of Fieselman's actual physical control vel non was one for the jury to decide.3

III.

A.

The State suggests that our task is a simple one. It contends that the present case is controlled by Griffin v. State, 457 So.2d 1070 (Fla. 2d DCA 1984), in which the court, concluding that the circumstantial evidence sufficiently established that the defendant was exercising control over the vehicle while under the influence, rejected the defendant's claim that he was entitled to a judgment of acquittal.

The evidence in Griffin was that

> at approximately 2:30 a.m., a police officer found [defendant] in the driver's seat of a car which was stationary in a traffic lane facing in a direction opposite to that in which traffic was to flow. The engine was stopped, the key was in the ignition, the lights were on, and the footbrake apparently was depressed by petitioner's foot, as indicated by the illumination of the rear brake light on the car. [Defendant] was, or appeared to be, asleep. The brake light went off when the petitioner got out of the car after the arresting officer shook him to awaken him.

Griffin v. State, 457 So.2d at 1071.

According to the court, the particular evidence which showed that the defendant was exercising control over the vehicle at the time he was found under the influence was that the "brake light, ... illuminated when the officer approached the car, went off when [the defendant] got out of the car." Id. Perhaps, as the State argues, a person like Fieselman, who is lying down asleep in the front seat of a stationary motor vehicle, the key to which is in the ignition, but the engine of which is not running, exercises as much control over a vehicle as a person who, sitting asleep in a similarly immobilized but not similarly situated automobile, happens to have his foot depressing the brake pedal. Nonetheless, it is clear from Griffin that the court attached great significance to the fact that Griffin was seated behind the wheel in a car that was found in the middle of the road. Thus, in adopting the views expressed by an Oklahoma court in Hughes v. State, 535 P.2d 1023 (Okla.Crim.App.1975), the Griffin court stressed "that an intoxicated person seated behind the steering wheel " is in actual physical control of the vehicle because "there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away." *606 Griffin v. State, 457 So.2d at 1072 (quoting from Hughes v. State, 535 P.2d at 1024) (our emphasis).

Griffin does not stand alone in emphasizing that evidence that the defendant was found sitting behind the wheel of the vehicle is a circumstance heavily supporting a finding that the defendant was exercising control over the vehicle. Other courts reaching the same result as Griffin have

similarly pointed to the defendant's upright position behind the wheel as an important part of the calculus in determining the question of the defendant's actual physical control over the vehicle. See, e.g., State v. Conley, 754 P.2d 232 (Alaska 1988) (defendant seated behind steering wheel with hands on steering wheel and keys in hand; ignition off); State v. Ruona, 133 Mont. 243, 321 P.2d 615 (1958) (defendant asleep in driver's seat, motor running, car parked in traffic lane of public street); City of Cincinnati v. Kelley, 47 Ohio St.2d 94, 351 N.E.2d85 (1976) (defendant seated behind steering wheel in possession of ignition key); State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954).4 Since this crucial factor is missing in the present case, cases such as Griffin lend little support to the State's position.

Moreover, and even more significantly, Fieselman's vehicle was discovered in a parking lot, not, as Griffin's, in the traveled portion of a public roadway. Thus, unlike State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954), in which the defendant, who was found passed out or asleep with both hands and head resting on steering wheel of truck with lights on and engine running stopped in lane of traffic, was deemed to be in actual physical control of the vehicle, in the present case there is not "a legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel [of the vehicle], and had either started the motor or permitted it to run." Id. at 10, 274 P.2d at 340. See State v. Zavala, 136 Ariz. 356, 357, 666 P.2d 456, 457 (1983) (unconscious defendant, although discovered "hanging partially from the window on the driver's side of the truck," could not be convicted of being in actual physical control of the vehicle where the truck was in the parking lane off the traveled portion of the road, the engine was not running, and the ignition was in the off position).

Therefore, rejecting the State's argument that Griffin is indistinguishable, and being persuaded that sleeping in a prone position in the front seat of a vehicle parked in a parking lot, the engine of which is not running, is not itself sufficient to establish actual physical control of the vehicle, we must now decide whether the presence of the car key in the ignition is a fact from which the factfinder could infer that the defendant was-within a reasonable time before being found and while intoxicated-in actual physical control of the vehicle.

B.

Although we recognize, as did the court in Griffin, 457 So.2d at 1072, that a compelling argument can be made that inebriated drivers should be encouraged to pull off the road and "sleep it off," we believe that this argument is more properly directed to the Legislature. See State v. Martin, 5 Ohio Misc.2d 22, 23, 450 N.E.2d 306, 308 (Mun.Ct.1982) (Legislature's deletion of words "or be in physical control of" vehicle is eminently sensible recognition of the proposition that "[p]ersons who realize that they have consumed too much alcohol should be encouraged to pull off the road and not operate a vehicle on the highways."). Our task—far more limited—is to determine whether, from the evidence that the keys were in the ignition of the vehicle in which Fieselman was found intoxicated and asleep, lying down on the front seat, a reasonable inference can be drawn that *607 Fieselman, while intoxicated, placed the keys in the

ignition and thus was at least at that moment in actual physical control of the vehicle while intoxicated.

We believe that such an inference can be drawn since a person who has placed keys in the ignition of a vehicle may be as much in actual physical control of the vehicle as a person seated behind the wheel of the vehicle. As the court recognized in Griffin, a legitimate inference to be drawn from the defendant's sitting position behind the wheel is that the defendant "could have at any time started the automobile and driven away"; this inference is no less legitimate when it is drawn from the presence of the keys in the ignition. As has been observed:

> It does not matter whether the motor is running or is idle nor whether the drunk is in the front seat or in the back seat. His potentiality for harm is lessened but not obviated by a silent motor or a backseat position-provided, of course, that he is the one in control of the car. It only takes a flick of the wrist to start the motor or to engage the gears, and it requires only a moment of time to get under the wheel from the back seat.

State v. Bugger, 483 P.2d at 443 (Ellett, J., dissenting).

Lastly, we point out that evidence that the key was in the ignition does not inexorably lead to the conclusion that the defendant was in actual physical control of the vehicle. It is merely a fact-along with the defendant's presence asleep and intoxicated in the vehicle—which, being capable of establishing the defendant's actual physical control of the vehicle, precludes the conclusion that as a matter of law the defendant was not in actual physical control of the vehicle and thus precludes the entry of a dismissal of the charges.

CERTIORARI DENIED.