Appellate Division Holds That "Sleeping It Off" In A Car Is Operation Under The Driving While Intoxicated Statute

February 21, 2020 | by Brian Kenney

On February 10, 2020, the Appellate Division released an opinion approved for publication in the case State v. Thompson, Docket Number A-2011-18T4. The defendant in Thompson appealed from his convictions for driving while intoxicated and refusing to submit to a breath test. The issue involved was that of "operation." The Defendant argued that the State did not prove the conscious intent to operate his motor vehicle when police found him sleeping in his vehicle with the engine running in the parking lot of a 7-Eleven. The police woke him, noticed a strong smell of alcohol on his breath, and he admitted that he had "a couple of drinks." He failed field sobriety tests and was arrested. At the police station, he admitted to having two drinks and to being on prescribed medications. (He also refused to submit samples of his breath). He was convicted at the municipal court level and his conviction was affirmed in Superior Court.

The Appellate Division affirmed the lower courts' decisions. Their focus was whether an intoxicated individual, seated behind the wheel of a vehicle with its engine running, is in violation of N.J.S.A. 39:4-50(A). The court went through what "operation" was, and how it applied to the Thompson case.

In essence, the Court ruled that defendant was "operating" his vehicle since operation of a motor vehicle could include sitting or sleeping behind the wheel of a vehicle with the engine running, even if the vehicle is not observed in motion. The court cited the New Jersey Supreme Court's decisions in State v. Tischio, 107 N.J. 504, 513-514 (1987); State v. Mulcahy, 107 N.J. 467, 478 (1987); State v. Wright, 107 N.J. 488, 494-503 (1987); and State v. Sweeney, 40 N.J. 359, 360-361 (1963), while reaching their decision.

In reviewing the New Jersey Supreme Court's cases, the Appellate Division held that an intoxicated person could be found guilty of driving while intoxicated when the engine was running but the vehicle was not moving, or if the intoxicated person moved or attempted to move the vehicle but the engine

was not running. The Thompson Court held that operation could be proven by "observation of the defendant in or out of the vehicle under circumstances indicating that the defendant had been driving while intoxicated," citing State v. Ebert, 377 N.J. Super 1, 11 (App. Div. 2005). In Ebert, the Appellate Division found operation when an intoxicated individual was looking for her vehicle in the parking lot. Id. at 9-11. The Thompson Court indicated that in light of the Ebert and Stein cases, there is "no doubt" that an "intoxicated and sleeping defendant behind the wheel of a motor vehicle with the engine running is operating the vehicle" even if the vehicle was not observed in motion because it is the "possibility of motion" that is relevant, citing State v. Stein, 203 N.J. 275, 279 (App. Div. 1985).

The Thompson Court then discussed how courts are to construe the driving while intoxicated statute purposefully to "effectuate the legislative goals of the drunk driving laws, … which, of course, are to rid our roadways of the scourge of drunk drivers." The court then went on to state that although the opinion expressed "nothing new", they were "driven to publish because of the extraordinary number of the times the court has recently faced this precise issue."

This particular case is problematic for several reasons. First, while the Appellate Division cited the New Jersey Supreme Court cases in Tischio, Mulcahy, Wright and Sweeney, it seemed to bypass the main point of those decisions, that a defendant's "intent to operate a motor vehicle can constitute 'operation' within the meaning of the statute." See State v. Sweeney, supra, 40 N.J. at 360-361; State v. Stein, supra, 203 N.J. Super at 279; State v. Tischio, supra, 107 N.J. at 513; State v. Mulcahy, 107 N.J. at 478. Moreover, in State v. Daly, 64 N.J. 122 (1973), the New Jersey Supreme Court ruled that a defendant, who was found intoxicated in the driver's seat of his car in the parking lot of a tavern with the engine running one hour and twenty minutes after it closed, who asserted that he had started the engine to turn on the heat in the vehicle while he slept, was not operating his car. The Daly Court cited Sweeney and held that the purpose of the statute was not to make proof of "an unexecuted intent" to drive sufficient to convict of the offense of driving while intoxicated. Id. at 127 citing Sweeney, supra, 40 N.J. at 367. Finally, in Mulcahy, the Court held, "Following *Sweeney* and *Daly* we determined that we must focus upon defendant's intent" when operation is an issue. Mulcahy, supra, 107 N.J. at 477.

Thus, pursuant to the Daly, Mulcahy and Sweeney New Jersey Supreme Court rulings, the State must prove beyond a reasonable doubt that the defendant had the intent to drive or intent to move the

vehicle to establish the element of operation, in addition to just starting the motor vehicle. That is still the standard in New Jersey, and the Thompson opinion cannot supplant the New Jersey Supreme Court decisions cited above.

That being said, because of the Thompson decision, municipal courts across the State can now cite it when faced with an intoxicated person trying to "sleep it off" in their car with the heat on and engine running. While the Defendant in the Thompson plans on petitioning for certification before the New Jersey Supreme Court, there is no guarantee that certification will be granted, or worse, that the Thompson decision will be overturned, despite the fact it seems contrary to their rulings in Daly, Sweeney, Mulcahy, Tischio and Wright.