



## **LGIT'S ROLL CALL REPORTER FEBRUARY 2008**

**The Validity of an Arrest for Driving While Impaired Arising From the Operator's "Actual Physical Control" of the Vehicle Depends on the Facts and Circumstances of Each Case and Whether Those Facts Establish that the Defendant's Actions Posed an Imminent Threat to the Public**

**QUESTION:** Is one in "actual physical control of a vehicle" where he is found asleep in the driver's seat, with the vehicle stopped in a turn lane, with its headlights on but dim, and with its ignition key on the floorboard?

**ANSWER:** Yes. The fact that the operator was in the driver's seat, combined with the facts that the vehicle's headlights were on and it was located in the travel portion of the roadway, were sufficient to establish that the operator was "in actual physical control" of the vehicle at the time of his arrest.

**CASE:** *Dukes v. State*, Court of Special Appeals of Maryland  
Decided January 31, 2008

In *Dukes v. State*, the Court of Special Appeals interpreted the phrase "in actual physical control of a vehicle" in relation to an arrest for driving while impaired. The facts established that on October 3, 2006, at 4:47 a.m., an Anne Arundel County Police Officer observed a 1986 Cadillac on Baydale Drive, near its intersection with College Parkway. The vehicle was stopped in a right turn lane with its headlights on, but the lights were dim. The officer had passed the vehicle approximately thirty minutes earlier, and, when he saw it the second time, it had not moved from its original position. The officer pulled over, exited his cruiser, and approached. He observed that the operator was asleep in the driver's seat. The vehicle's keys were on the floor mat below the steering wheel. The officer woke the operator, and detected a strong odor of an alcoholic beverage emanating from his breath. The operator's speech was slurred. The operator, identified as Dwight Dukes, had trouble locating his identification, handing the officer only his driver's license. He could not find the vehicle's registration card. While Dukes looked for it, the officer noticed that his movements were slow and disjointed. The officer then asked Dukes to exit the car and to perform several field sobriety tests. When Dukes failed the tests, he was arrested. Dukes refused the chemical test.

Dukes was charged with driving or attempting to drive while impaired by alcohol, in violation of Md. Code § 21-902(b) of the Transportation Article. Dukes was also charged with driving on a revoked license. He was convicted and sentenced to a one-year term of

imprisonment for driving while impaired and to a consecutive, suspended term of two years for driving while revoked. Duke appealed his convictions.

On appeal, Dukes challenged only the trial court's finding that he was "driving" a vehicle at the time of his arrest. Specifically, he contended that he was not in "actual physical control" of an operable vehicle. The Court of Special Appeals rejected Dukes' contention, focusing first on the definition of "drive" in the Transportation Article. In § 11-114, "drive" is defined as "to drive, operate, move, or be in *actual physical control of a vehicle* . . ." The court concluded that the words "drive", "operate", and "move" imply either some motion of the vehicle or some physical movement or manipulation of the vehicle's controls. To "move" a vehicle plainly requires that the vehicle be placed in motion. To "drive" a vehicle means to steer and control the vehicle while in motion. To "operate" a vehicle is given a broader meaning, and includes starting the engine or manipulating the mechanical or electrical devices of a standing vehicle. Since Dukes was doing none of these things, the issue became whether he was in "actual physical control" of the vehicle when he was arrested.

The court identified six non-exhaustive factors to be used in determining whether an individual in a vehicle has "actual physical control" over the vehicle, or is merely using it as a shelter to, for example, "sleep it off": (1) whether or not the vehicle's engine is running, or the ignition is on; (2) where and in what position the person is found in the vehicle; (3) whether the person is asleep or awake; (4) where the vehicle's ignition key is located; (5) whether the vehicle's headlights are on; and (6) whether the vehicle is located in the roadway or is legally parked. A reviewing court must examine the evidence before it to determine what the defendant was doing or had done, and whether these actions posed an imminent threat to the public.

Dukes contended that the factors were in his favor because he was asleep in the car; the key was not in the ignition; and the headlights were dim, indicating that the battery was low. The State contended that Dukes was in the driver's seat; the headlights were on; and the vehicle was located in the travel portion of the roadway. The Court of Special Appeals agreed with the State and the trial court and affirmed the convictions. It found that there was enough charge in the battery to light the car's headlights and that the car obviously had been driven to its location and stopped in the turn lane. These factors established that Dukes was in "actual physical control" of the vehicle at the time of his arrest.

**NOTE:** In drawing the inference of "actual physical control", courts cannot speculate, but must apply the six critical factors discussed above and any others that are pertinent to the case. The strongest factor will be whether there is evidence that the defendant started or attempted to start the vehicle's engine. The location of the vehicle is also a determinative factor, as it was in the *Dukes* case, because a person whose vehicle is parked illegally or stopped in the roadway is obligated by law to move it. Also, even if a defendant is not in "actual physical control" of a vehicle at the time of his arrest, he can still be convicted of driving while intoxicated if circumstantial evidence proves beyond a reasonable doubt that he had driven the vehicle at an earlier time.

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