IN THE COURT OF APPEALS OF IOWA

No. 0-896 / 10-1029
Filed February 23, 2011

DARREN LEE EHRP,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
MOTOR VEHICLE DEPARTMENT,
Respondent-Appellee.

No. 1-035 / 10-1152

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARREN LEE EHRP,
Defendant-Appellant.

Appeals from the Iowa District Court for Sac County, Gary L. McMinimee, Judge.

Darren Ehrp appeals from the judicial review ruling upholding the revocation of his driver's license and from his conviction following a trial to the court on the charge of operating while intoxicated, third offense. **AFFIRMED ON BOTH APPEALS.**

David P. Jennett, Storm Lake, for appellant.

Thomas J. Miller, Attorney General, Michelle R. Linkvis and Darrel Mullins, Assistant Attorneys General, and Earl Hardisty, County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

The Iowa Department of Transportation (DOT) revoked the driver's license of Darren Lee Ehrp after he failed to pass a chemical test under Iowa's implied consent statute. In a separate action based on the same facts, Ehrp was convicted of operating while intoxicated (OWI) as a third offender, in violation of Iowa Code section 321J.2 (2009). Ehrp now appeals both judgments. His appeals present the following issue: Was Ehrp "operating" his pickup truck when he was behind the wheel while the truck was being pulled backwards out of a ditch by a tractor? Because we conclude Ehrp was operating the vehicle within the meaning of Iowa law, we affirm the judgments below.

I. Facts and Procedural Background.

Sac County Deputy Sheriff Bruscher was dispatched on a 911 call to a dirt road in a rural location at about 1 a.m. on October 19, 2009. He described the scene upon arrival, which was recorded on DVD, as follows:

> I had my red lights and camera on at the time moment I arrived. At the time I arrived, the tractor pulled the pickup out of the ditch back up onto the road, and then the male subject I recognized as Darren Ehrp exited the driver's seat of the vehicle, went around, unhooked the vehicle.
>
> At this time I went up, asked him what was going on, and in talking to him, I could tell that he had had a considerable amount to drink.
>
> At that time Mr. Ehrp tried to walk away from me and jumped in the front seat of the pickup. He was going to pull it up to the road, stating he was going to take it up to his house.

Deputy Bruscher stopped Ehrp from getting back into the truck, administered field sobriety tests that Ehrp did not pass, and placed Ehrp under arrest. Later, implied consent was invoked under Iowa Code section 321J.6, and

Ehrp was found to have a blood alcohol level of .178, more than twice the legal limit.

Deputy Bruscher noted that the driver's front tire was off the rim of the pickup. The keys were in the ignition of the pickup, but Deputy Bruscher could not recall whether the pickup's engine was running when it was being pulled out of the ditch by the tractor. A neighbor was operating the tractor.

Ehrp's sister Holly was also on the scene. Although the pickup was registered to her brother, she claimed to have been operating the pickup when it went in the ditch. According to her testimony, she had borrowed Ehrp's truck to get some lumber and had decided to return it around 1:00 a.m. after watching Sunday Night Football, only to end up in the ditch when a tire blew out. Holly also testified the pickup's engine was not running when it was being pulled out of the ditch by the neighbor's tractor. On the DVD, Holly can be seen driving the pickup a very short distance up the road while Deputy Bruscher was performing the field sobriety tests on her brother.

The DOT sought revocation of Ehrp's driver's license. Citing *Munson v. Iowa Department of Transportation*, 513 N.W.2d 722 (Iowa 1994), the administrative law judge (ALJ) determined that because Ehrp was in the driver's position of a motor vehicle that was in motion, the deputy who invoked implied consent had reasonable grounds to believe Ehrp was operating the vehicle.

Ehrp sought judicial review of the ruling, and the district court affirmed the revocation, finding Ehrp

> was exercising a degree of control over the truck, albeit minimal control, as it was being pulled by the tractor; although it is doubtful the truck, even without steering, would have strayed far from a

> direct path, [Ehrp] did guide the movement of the truck in a straight line as it was in motion. That constituted the operation of a motor vehicle.

Ehrp was also charged with OWI third offense. The case was submitted to the district court for a bench trial based on the record from the administrative hearing. The district court found Ehrp guilty of OWI, using the same language quoted above from the administrative ruling.

Ehrp appeals the district court's administrative review ruling, *see* Iowa Code § 17A.20, as well as the criminal conviction.

II. Standard of Review.

Our review of driver's license revocations under Iowa Code chapter 321J is governed by the Administrative Procedure Act as set forth in chapter 17A. Iowa Code § 321J.14; *Ludtke v. Iowa Dep't of Transp.*, 646 N.W.2d 62, 64 (Iowa 2002). We review for correction of errors of law. *Munson*, 513 N.W.2d at 723.

For purposes of the criminal appeal, we must determine whether a rational trier of fact could have found Ehrp guilty of "operating" while intoxicated. *State v. Murray*, 539 N.W.2d 368, 369 (Iowa 1995).

III. Was Ehrp Operating the Pickup Truck?

Although no reported Iowa decision is directly on point with our present facts, Iowa courts have held that a person in the driver's seat of a disabled vehicle that has its engine running is "operating" that vehicle. *Murray*, 539 N.W.2d at 369; *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987); *State v. Hines*, 478 N.W.2d 888, 889 (Iowa Ct. App. 1991). As the court said in *Murray*:

> We do not find capability of vehicle movement to be an essential element of 'operating.' Thus the disablement of Murray's vehicle does not place his conduct beyond the scope of the statute. OWI

> statutes attempt to deter intoxicated individuals from getting into their vehicles except as passengers.

The supreme court has stated numerous times, "This protects against any 'possible results from a drunken condition of a driver.'" *Murray*, 539 N.W.2d at 369; *Weaver*, 405 N.W.2d at 854; *State v. Webb*, 202 Iowa 633, 637, 210 N.W. 751, 752 (1926).

By contrast, in *Munson*, the supreme court found that an individual who was asleep behind the wheel of a pickup with the engine off, although the keys were in the ignition, was *not* operating the vehicle. 513 N.W.2d at 724. The *Munson* court reasoned as follows:

> The current uniform instruction provides "the term 'operate' means the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running." 2 Iowa Criminal Jury Instructions 2500.6 (1988). We approve this definition requiring that either the vehicle be in motion or its engine be running.

See also State v. Boleyn, 547 N.W.2d 202, 205 (Iowa 1996) (reversing OWI conviction concluding a person who was sleeping in a motionless vehicle with the engine not running was not operating the vehicle).

Here, the engine was apparently not running, but the vehicle was in motion. Ehrp was behind the wheel. We believe therefore that he was "operating" that vehicle.

Ehrp argues that he was not in "actual physical control" of the pickup. According to Ehrp, the neighbor driving the tractor was in control, and Ehrp was merely steering while his vehicle was being pulled out of the ditch. But the problem with this argument is that Iowa case law does not equate "control" with "having the predominant ability to affect the movement of the vehicle." In *Murray*,

for example, the driver had *no* ability to affect the movement of the vehicle, since it was disabled due to a malfunctioning clutch. 539 N.W.2d at 369. Nonetheless, the supreme court found he was operating it. *Id.* at 369-70. That is because the "OWI statutes attempt to deter intoxicated individuals from getting into their vehicles except as passengers"—exactly what Ehrp did here. *Id.* at 369. Notably, if not stopped by Deputy Bruscher, Ehrp would have driven the pickup at least to his nearby home. If a person sitting in a disabled vehicle with the engine running is in control, as the supreme court has said, it is difficult to see why a person steering a towed but moving vehicle would not be. In Ehrp's case, he had some ability to affect the movement of the vehicle and, thus, his intoxicated condition posed at least some potential threat to the safety of himself or others.

Ehrp argues that "control" means "[t]o exercise authoritative or dominating influence over." American Heritage College Dictionary, at 311 (4th ed. 2004). But we find no reason to import another definition when the supreme court has made clear in *Murray* that "control" in the OWI context essentially turns on (1) whether the vehicle was in motion or had its engine running and, if so, (2) whether the purported operator was in the driver's seat. 539 N.W.2d at 369. This bright-line definition of "operating" also has the advantage of providing clear guidance for citizens and law enforcement personnel alike.

Additionally, cases from other jurisdictions have repeatedly decided that a person who is behind the wheel of a vehicle that is being towed or pushed by another vehicle is "in control" of his or her vehicle for purposes of the OWI laws. *See generally* James O. Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While*

Intoxicated Statute or Ordinance, 93 A.L.R.3d 7, 25-26 (1979) ("§ 6[c] Vehicle in motion – By being towed or pushed by another vehicle"); *see also Williams v. State*, 884 P.2d 167, 168-69 (Alaska Ct. App. 1994) (intoxicated person steering a car being towed by another car was "in physical control" of the vehicle), *abrogated on other grounds by State v. Coon*, 974 P.2d 386, 391 (Alaska 1999); *Bridgers v. State*, 444 S.E.2d 330, 330 (Ga. Ct. App. 1994) (intoxicated person steering a vehicle as it as being towed was "in control" of the vehicle); *State v. Larson*, 479 N.W.2d 472, 474 (N.D. 1992) (intoxicated individual steering a bus as it was being pushed by another vehicle was "driving" the bus); *State v. Keeton*, 600 N.E.2d 752, 755-56 (Ohio Ct. App. 1991) (intoxicated person steering a pickup as it was being towed out of a ditch and down the road was "operating" that vehicle); *State v. Dean*, 733 P.2d 105, 105–06 (Or. Ct. App. 1987) (intoxicated person steering and braking a towed vehicle was "in actual physical control" of that vehicle); *Hester v. State*, 270 S.W.2d 321, 321 (Tenn. 1954) (intoxicated person steering his vehicle that was being pushed by another car was "in physical control" of his vehicle); *Chamberlain v. State*, 294 S.W.2d 719, 720 (Tex. Crim. App. 1956) (intoxicated person steering a car that was being pushed by another car was "operating" the vehicle). *But see State v. Derby*, 607 A.2d 1068, 1071-72 (N.J. Super. Ct. Law Div. 1992) (intoxicated person who was behind the steering wheel of a vehicle under tow that had no engine was "clearly in physical control" but was not "operating" the engineless vehicle so as to sustain an OWI conviction).

Our dissenting colleague maintains that the facts of these cases are distinguishable because in each instance the vehicle was being towed down the

highway rather than being pulled out of a ditch. We see this is as a distinction without a difference, however. For one thing, in *Keeton*, the vehicle was steered by the defendant as it was pulled out of a ditch and then down the road; there is no indication in the opinion that *both* activities were necessary to sustain the conviction. 600 N.E.2d at 753. Additionally, in this case, the pickup was towed up and directly onto the road with Ehrp steering it. The vehicle was in the road, and Ehrp was in the process of unhitching the chain and getting ready to drive the pickup forward, when Deputy Bruscher arrived. Most importantly, Iowa's OWI laws are not limited in their scope to public highways. They apply anywhere "in this state." Iowa Code §§ 321J.2(1), 321J.6(1).

The OWI statutes are "remedial in nature and should be liberally interpreted in favor of the public interest and against the private interests of the drivers involved." *Murray*, 539 N.W.2d at 369-70. In short, we believe both precedent and logic support the rulings below.

For the foregoing reasons, we affirm Ehrp's license revocation and his criminal conviction.

AFFIRMED ON BOTH APPEALS.

Sackett, C.J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I dissent. The majority's well-written opinion correctly describes the pattern of the application of the term "operate" to factual situations involving intoxicated persons in the driver's seat of a vehicle with its engine running. *Murray*, 539 N.W.2d at 369; *Weaver*, 405 N.W.2d at 855; *Hines*, 478 N.W.2d at 889. In my view, however, this case is more like *Munson*, 513 N.W.2d at 724, which involved neither motion nor a running engine.

In *Munson*, a police officer came upon a pick-up parked in a private parking lot. 513 N.W.2d at 723. Munson was asleep behind the wheel of the pick-up and the engine was off, although the radio was playing and the keys were in the ignition. *Id.* at 724. The officer woke Munson by knocking on the window of the vehicle, and requested Munson's driver's license. *Id.* at 723. When Munson produced his license the officer smelled alcohol and asked Munson to perform sobriety tests. *Id.* at 724. Munson's driver's license was revoked.

The *Munson* court adopted the definition of the term "operates" found in Iowa Criminal Jury Instructions 2500.6. *Id.* at 724. Under that definition, a person "operates" a motor vehicle when that person has "immediate, actual physical control over the operating mechanisms of a motor vehicle that is in motion or has its engine running." *Id*. at 724–25. The *Munson* court noted there was no evidence the motor vehicle was in motion or its engine running at the time the officer observed Munson in the parking lot and thus the police officer did not possess reasonable grounds to believe Munson was "operating a vehicle while intoxicated." *Id.* at 725. The *Munson* court rejected the concept that to operate a

motor vehicle includes having "the present or potential capability to activate or direct the movement of a vehicle," a concept that had been included in the instruction submitted to the jury and approved by the supreme court in *Weaver*, but which was no longer contained in the uniform instruction. *Id.* at 724.

The court has stated numerous times, "This protects against any 'possible results from a drunken condition of a driver.'" *See*, *e.g.*, *Murray*, 539 N.W.2d at 369. I note again this is not a case like *Murray*, *Hines*, or *Weaver*, where the person in the driver's seat "was 'operating' his vehicle when he started the car's engine, thereby exerting control over the vehicle." *Hines*, 478 N.W.2d at 889. This situation is one in which the engine was not running, a front tire was off the rim, the tractor had raised the back wheels off of the truck off the ground, and the only motion of the vehicle was the result of the tractor pulling the truck up and out of the ditch. There were no "possible results from [his] drunken condition." *Murray*, 539 N.W.2d at 369.

The issue is whether Ehrp was "operating" under the alternative found in Iowa Criminal Jury Instruction 2500.6—did he have "immediate, actual physical control over the operating mechanisms of a motor vehicle that is in motion"? The motor vehicle was concededly in motion, but Ehrp was not in "immediate, actual physical control" of a motor vehicle. "Control" means "[t]o exercise authoritative or dominating influence over." American Heritage College Dictionary, at 311 (4th ed. 2004); *cf. State v. Anspach*, 627 N.W.2d 227, 234 (Iowa 2001) (noting dictionary definition of "control"). Ehrp was not exercising authoritative influence over the pick-up being hauled backwards out of a ditch.

The majority contends that the expansive policy language in *Murray*, requires an affirmance in these cases, since Ehrp was intoxicated and was in the driver's seat of the truck. Yet, as they discuss a bright line rule, the majority sidesteps the relevant facts and instead points to what might have happened next if the deputy had not arrived on the scene.

I am also not convinced that this falls within the range of cases noted by the majority from other jurisdictions involving an intoxicated individual behind the steering wheel of a vehicle being towed or pushed on a public highway. In each of those cases, the person behind the steering wheel had some control over whether the vehicle, which was traveling down a road, remained in its lane of traffic, or endangered others on the highway. The majority's citation to *Keeton* ignores the language of the Ohio Court of Appeals in determining that the Ohio statute defining "operate" "imposes strict criminal liability". 600 N.E.2d at 755 (stating "[i]n light of the legislative purpose" "we must hold that this conduct by appellant constituted the operation of a vehicle").

Although the state has "broad discretion," to pass criminal laws, *Murray*, 539 N.W.2d at 369, some common sense surely tempers the scope of the interpretation of those laws absent a legislative purpose of strict criminal liability. The term "operate" in sections 321J.2 and 321J.6 must have some connection to the goal of protecting the public. I see the limits of the meaning "to operate" in the situation here.

Under these facts, there is no evidence to support a finding that the deputy had reasonable grounds to believe Ehrp was or had been "operating" a motor vehicle at the time the deputy invoked implied consent. I would reverse

the judgment of the district court and remand for entry of judgment reversing the license revocation.