

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG ALAN SIDES,

Defendant-Appellant.

UNPUBLISHED

February 6, 1998

No. 200923

Otsego Circuit Court

LC No. 96-002088-FH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted of operating a vehicle while under the influence of liquor (OUIL), third offense, a felony, MCL 257.625(1); MSA 9.2325(1); operating in violation of license restrictions, MCL 257.312; MSA 9.2012; and having alcoholic liquor in an open container in a vehicle, MCL 257.624a; MSA 9.2324(1). He was sentenced to ninety days in jail for each conviction and fined \$500. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in failing to grant his motion for directed verdict where there was insufficient evidence that he was *operating* a motor vehicle while under the influence of intoxicating liquor. A trial court, when ruling on a motion for directed verdict, must consider the evidence presented by the prosecutor, up to the time of the motion, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). This Court applies the same standard when reviewing the trial court's ruling on a directed verdict motion. *Id.*

We hold that there was sufficient evidence that defendant was operating a motor vehicle within the meaning of the OUIL statute, MCL 257.625(1); MSA 9.2325(1)¹. The term "operate" was defined in *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995):

"[O]perating" should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle

has put the vehicle in motion, *or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.* [emphasis added.]²

In *Wood*, the defendant was found at a McDonald's drive-through window, unconscious in his van, with the engine running and the automatic transmission in drive. The defendant's foot was resting on the brake pedal, keeping the van from moving. The Court held that he was operating the motor vehicle within the meaning of the OUIL statute. *Wood, supra* at 401. The Court overruled two earlier cases, *People v Pomeroy (On Rehearing)* and *People v Fulcher (On Rehearing)*, 419 Mich 441; 355 NW2d 98 (1984), to the extent that they held that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." *Wood, supra* at 405.

In this case, unlike *Wood*, the defendant's transmission was in park and not in drive. The vehicle was neither in motion nor was there a risk of it being moved. However, there was evidence that the vehicle posed a risk of collision and had not been returned to a position of safety. One officer testified that it was as if defendant had intended to pull off to the side but had stopped partially on the roadway. Moreover, he testified that he called a wrecker to remove defendant's vehicle because, being on the roadway, it could cause problems with traffic or could cause a crash. Thus, the vehicle had not ceased to be in operation within the meaning of the term "operate" as defined by the Court in *Wood, supra*. Although there was conflicting testimony from another officer as to whether the vehicle was completely off the roadway, there was sufficient evidence from which the trier of fact could determine that defendant was "operating" the vehicle. The trial court did not err in denying defendant's motion for directed verdict.

Defendant also argues that there was insufficient evidence to prove that he was involved in an accident such that the police could justify their warrantless arrest of him for driving under the influence. MCL 764.15(1)(h); MSA 28.874(1)(h) provides:

(1) A peace officer may, without a warrant, arrest a person in the following situations:

(h) When the peace officer has reasonable cause to believe that the person was, at the time of an accident, the driver of a vehicle involved in the accident and was operating the vehicle upon a public highway or other place open to the general public . . . in the state while under the influence of intoxicating liquor . . .³

Because we hold that defendant was properly arrested for operating his vehicle while under the influence, the issue of whether he was properly arrested without a warrant under the accident provision is moot. However, if we were to address this issue, we would hold that, based on the record, there was sufficient cause for the police officers to believe that an accident had taken place. We also note that defendant incorrectly frames this issue as one of sufficient proofs. The issue, however, requires a determination as to whether the warrantless arrest was proper and whether the fruits of that arrest were admissible. The issues of whether there was probable cause and whether the evidence should be admitted are preliminary questions for the court to decide. MRE 104(a); *People v Taylor*, 454 Mich

580, 595; 564 NW2d 24 (1997). The trial court did not squarely reach this issue, but it did not need to reach the issue in light of our ruling with regard to defendant's first claim of error.

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White

¹ “A person, whether licensed or not, who is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, shall not operate a vehicle upon a highway or other place open to the general public, including an area designated for the parking of vehicles, within the state.” [MCL 257.625(1); MSA 9.2325(1).]

² Subsequent to the offense in this case, the Legislature amended MCL 764.15; MSA 28.874 , to add a provision allowing police officers to arrest, without warrant, any person "found in the driver's seat of a vehicle parked or stopped on a highway or street . . . if any part of the vehicle intrudes into the roadway and the peace officer has reasonable cause to believe the person was" violating the OUIL statute, MCL 257.625(1); MSA 9.2325(1). A similar provision was also added to the Michigan Vehicle Code, MCL 257.625a(1)(b); MSA 9.2325(1)(1)(b).

³ MCL 764.15; MSA 28.874 has subsequently been amended by 1996 PA 81, § 1.