

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-197

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JANUARY TERM, 2009

JAN 14 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Caledonia Circuit
	}	
Ryan Dauphin	}	DOCKET NO. 6-1-08 Cacs

Trial Judge: Harold E. Eaton, Jr.

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the civil suspension of his driver's license. He argues that the State failed to prove that he was in actual physical control of his vehicle while intoxicated. We affirm.

The record indicates the following. At approximately 3:45 a.m. on January 27, 2008, police received a report that an unknown male was pounding on the door of a residence in Lyndonville, Vermont. The caller indicated that there was a black truck parked outside of his residence. When police arrived, they found a black truck parked on the road with its headlights turned on. Defendant was sitting in the driver's seat. When police asked defendant where his keys were, he stated that they were in his pocket. The officer did not find the keys in a pat down search, and defendant then indicated that the keys were near the truck. The officer did not search for the keys near the truck. Defendant told the officer that he had come from Danville and that he had not been at his present location very long. He stated that he was alone. The officer observed obvious signs that defendant was intoxicated. Based on the information provided by defendant, the officer estimated that defendant had operated the vehicle shortly before he started banging on the resident's door at approximately 3:15 a.m. Defendant failed field sobriety exercises and a preliminary breath test indicated that a blood alcohol level of .202%. Defendant was then processed for DUI.

At the civil suspension hearing, the State presented a copy of the officer's affidavit, including the breath alcohol analysis, the evidentiary ticket, and a sworn affidavit from the state chemist. The arresting officer also testified. Defendant testified in his own defense, arguing that because the ignition key was not found by police, he could not have been in actual physical control of the vehicle while intoxicated. The court rejected this argument, making findings on the record. The court framed the issue as whether the keys were necessary for defendant to have actual, physical control. It found that while the presence of keys in the ignition heightened the danger that might be presented, the absence of keys did not eliminate that danger and the lack of

keys was not dispositive. The court explained that defendant was seated behind the wheel and he was in a position to exercise the immediate potential to operate the vehicle, whether by pulling the car out of gear or by stepping on the clutch, or anything else that would constitute the opportunity to engage the vehicle in one way or another. The court thus found that the State had met its burden of proof and it entered judgment in its favor. This appeal followed.

On appeal, defendant reiterates his argument that, because the keys were not located, he could not have been in actual, physical control of the vehicle. We find this argument unavailing. Our case law supports the trial court's decision that defendant was in actual physical control of the vehicle here.

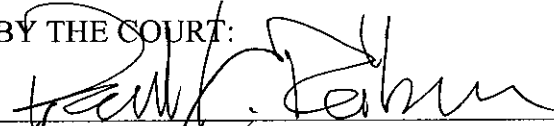
We held in State v. Godfrey that an individual who has the capacity to control a vehicle is in "actual physical control" of that vehicle, even if he lacks the ability to effectively exercise such control. 137 Vt. 159 (1979). In Godfrey, the defendant was found slumped behind the steering wheel, with the motor running and the taillights on, key in the ignition, and shift lever in "park." He argued that he was not in actual physical control of the vehicle because there was no evidence that he was touching any mechanism by which the vehicle could be controlled. We rejected this argument. We explained that "an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public," and while "the danger is less than where an intoxicated person is actually driving a vehicle," the danger does exist. Id. at 161 (citation omitted). Even where the defendant was passed out and exercising no conscious control over the vehicle, there remained 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." Id. (citation omitted). We thus concluded that the defendant had "actual physical control" of the vehicle within the meaning of the statute. See also State v. Blaine, 148 Vt. 272, 273-74 (1987) (fact that a vehicle's occupant may have been sleeping or otherwise unconscious does not prevent a finding of actual physical control). In a related vein, we have also held that a vehicle need not even be fully operable to establish that a defendant was in "actual physical control" of the vehicle. State v. Garber, 156 Vt. 637 (1991) (mem.) (evidence that defendant was behind wheel when car rolled backwards was sufficient to show defendant was in actual physical control of vehicle notwithstanding his testimony that he had pulled the coil wire before entering the vehicle so as to render it inoperable); see also State v. Griffin, 152 Vt. 41, 43 (1989) (evidence was sufficient to support finding that defendant was in actual physical control of vehicle where he was behind the wheel, he had removed key from ignition, and testified that he was coasting down the road because vehicle's radiator was damaged and without water).

In this case, defendant admitted that he had recently travelled from another town, alone, shortly before he was discovered by police. When police arrived, he was seated behind the steering wheel of the truck with the lights on. While the keys were not immediately located, it does not necessarily follow that they were irretrievable. As noted above, police testified that they undertook no search for the keys beyond the pat-down of defendant's pockets. Obviously the keys were somewhere nearby given defendant's admission that he had just arrived, alone and in his truck, from a neighboring town. Moreover, as the trial court found, defendant was in a position to operate the vehicle, and was thus in actual physical control of it, even without the keys. He had the capacity to engage the car in motion, and he posed a danger to other motorists. See Rist v. N. Dakota Dep't of Transp., 2003 ND 113, ¶ 14 (stating that primary factor in


determining whether defendant has “actual physical control” of vehicle is whether defendant has ability to manipulate controls of the vehicle, and holding that actual physical control does not solely depend on location of the ignition key). To conclude otherwise would allow drunk drivers to evade civil suspension proceedings simply by disposing of the car keys before police arrived. We cannot countenance such a result. See State v. Anderson, 2005 VT 80, ¶ 2 (civil suspension procedure serves remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads through purely administrative means). The State provided sufficient evidence to establish by a preponderance of the evidence that defendant was in “actual, physical control” of the vehicle while intoxicated, and the court did not err in granting judgment in its favor.

Affirmed.

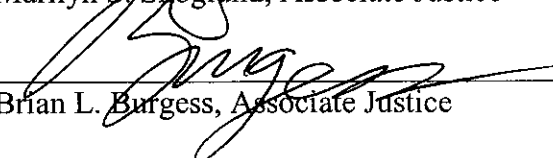
BY THE COURT:



Paul L. Reiber, Chief Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice