
Division of Motor Vehicles v. Gilbride
Cite as 5 *N.J.A.R.* 67

DIVISION OF MOTOR VEHICLES,
Petitioner,
v.
FRANCIS X. GILBRIDE, JR.,
Respondent.

Decided June 26, 1980

Initial Decision

SYNOPSIS

The Division of Motor Vehicles sought to suspend respondent's driver license for his failure to submit to a breath alcohol determination test, pursuant to *N.J.S.A. 39:4-50.2 et seq.*

The administrative law judge assigned to the case found that the questions of probable intoxication and arrest were undisputed. The judge determined, however, that the arresting officer did not have reasonable grounds to believe that respondent had been driving, operating, or had been in actual physical control of the motor vehicle since respondent had been arrested in a parked car before his key was put in the ignition.

Accordingly, the administrative law judge dismissed the charge against respondent.

MONYEK, ALJ:

This matter concerns the proposed suspension of the driving privileges of Francis X. Gilbride, Jr., for his alleged refusal to submit to a breath alcohol determination test as required by the "Implied Consent" Act (*N.J.S.A. 39:4-50.2 et seq.*).

The proposed suspension resulted from the Division of Motor Vehicles' having received a sworn report from Patrolman Vincent E. Metzler of the Somerville Police Department, indicating that on September 17, 1979, Francis X. Gilbride, Jr., was arrested for allegedly operating a motor vehicle while under the influence of intoxicating liquor, *N.J.S.A. 39:4-50*, and further, that he allegedly refused to submit to a breath alcohol determination test as required by *N.J.S.A. 39:4-50.2 et seq.* A Notice of Proposed Suspension, dated October 26, 1979, was sent to the licensee in accordance with *N.J.S.A. 39:4-50.4*.

The respondent/licensee requested a hearing and the matter was

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transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to *N.J.S.A.* 54:14F-1, *et seq.*

The issues to be determined herein are set forth in *N.J.S.A.* 39:4-50.4 as follows: (a) whether the arresting officer had reasonable grounds to believe that the respondent/licensee had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under influence of intoxicating liquor; (b) whether he was placed under arrest; and (c) whether he refused to submit to a breath alcohol determination test upon the request of the officer.

The sole witness to testify on behalf of the Division of Motor Vehicles was the arresting officer, Patrolman Vincent E. Metzler, of the Somerville Police Department. Officer Metzler alleged that his first contact with respondent/licensee on the date in question was when he observed him in the parking lot of the Somerville police station engaged in a verbal altercation with several other people, at which time petitioner/respondent claimed to be a Somerville policeman in plain clothes. This allegation immediately aroused the suspicion of Officer Metzler as he knew all of the members of the Somerville Police Department, and further knew that respondent/licensee was not one of them. Accordingly, he approached the participants of the colloquy and observed that respondent/licensee had a strong odor of alcohol emanating from his breath, that he swayed while standing and that his speech was slurred. He concluded that respondent/licensee was intoxicated and upon learning that respondent's vehicle was in the parking lot, advised him to walk, not drive to his home. In order to avoid further hostilities between the participants of the heated discussion and to avoid the possibility of the outburst of a fracas, he had the respondent/licensee accompany him inside police headquarters and suggested that he call someone to drive him home, or in the alternative to call a taxi to take him home. However, respondent/licensee assured the officer that he would walk home, and left police headquarters.

Shortly thereafter, Officer Metzler observed the respondent/licensee sneaking stealthily between automobiles in the parking lot of the bank immediately adjacent to the police station, which was used for public parking after banking hours. Respondent/licensee appeared to be bobbing between cars, keeping his body low in an apparent effort to avoid being observed by Patrolman Metzler. Accordingly, this surreptitious activity on behalf of respondent/licensee aroused Officer Metzler's suspicions and he continued to closely observe respon-

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dent/licensee. Thereafter, he left police headquarters and together with another officer went into the parking lot in an attempt to locate respondent/licensee. Upon arrival at the point where respondent/licensee's car was parked, the officer noted the respondent/licensee inside his vehicle, in the driver's seat, behind the wheel with his keyring in his hand. He observed the licensee futilely attempting to insert four different keys into the ignition switch, the last of which was a house key rather than a car key, and none of which properly could be inserted into the ignition. Without waiting any longer, as respondent/licensee might have eventually located the correct key and thereupon (Officer Metzler thought) successfully started the car, Officer Metzler opened the door and placed the respondent/licensee under arrest for allegedly "operating" while under the influence. Thereafter, respondent was read Motor Vehicle Form MF-12, requested to take the breath test and refused to do so.

Respondent/licensee testified on his own behalf. It was his testimony that he arrived in Somerville on the evening in question at approximately 7 p.m., parked his automobile in the bank parking lot, and thereafter went to a bar across the street. He remained therein for approximately 45 minutes, during which time he consumed two drinks consisting of Canadian whiskey and Seven-Up. Thereafter, he walked down Main Street and consumed four more like alcoholic beverages. Upon completion of his imbibery he wandered onto the outside premises of the Somerville Police Station immediately adjacent to the parking lot. Thereat, he became embroiled in a verbal fracas with several bystanders.

Respondent/licensee thereupon corroborated Officer Metzler's testimony with regard to the officer settling the controversy by accompanying respondent/licensee into police headquarters. Thereat respondent/licensee was advised by the police not to drive his vehicle to his home but rather to make other arrangements for transportation. Respondent/licensee testified that he asked for a ride home but was refused said accommodation. He further acknowledged that he returned to his car in the peculiarly evasive manner described by the officer. He claimed, however, that it was not his intention to operate his vehicle or to drive home, but rather his unsuccessful attempts to insert a variety of keys into the ignition were directed toward turning the ignition to the accessory position in order to listen to the radio, rather than to turn the ignition the opposite way to ignite the engine. He claimed that he wanted to rest in his car, doze a little and thereafter, upon adequately regaining sobriety, to drive to his second job,

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which consisted of performing janitorial services in a municipal building in the vicinity of his home. He further claimed that he was in his car for some 6 to 7 minutes in his effort to turn the accessory switch on prior to being arrested by Officer Metzler.

Respondent/licensee admitted that he exhibited the indicia of drunkenness, that he staggered and swayed, that he was advised by the police not to drive his vehicle because he appeared to be too drunk to do so, that he was arrested, requested to take the breath test, and that he did, in fact, refuse. He nevertheless claimed that it was his intention not to drive his vehicle at the time of and immediately before his arrest, and therefore had no obligation to take the test.

Since neither the arrest, nor the refusal of the respondent/licensee to take the breath test are contested, the sole issue to be determined is whether the officer had reasonable grounds to believe that the respondent/licensee "had been driving or was *in actual physical control*" of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of liquor. This issue may further be sub-divided, in this case, into three separate sub-issues as follows:

1. Did the officer have reasonable grounds to believe that respondent/licensee was under the influence?
2. Did the officer have reasonable grounds to believe that the vehicle was on the public highways or quasi-public areas of this State?
3. Did the officer have reasonable grounds to believe that the respondent/licensee was driving or in actual physical control of his vehicle?

There is neither doubt, nor dispute that the officer had reasonable grounds to believe that respondent/licensee was intoxicated. Respondent/licensee admitted his patent drunkenness. It is well settled in New Jersey that a parking area used by the public falls within the definition of a "quasi-public area," and operation therein is subject to prosecution. *State v. McKelvey*, 142 N.J. Super. 259 (App. Div. 1976) (Airport restricted service road); *State v. Gillespie*, 100 N.J. 71 (App. Div. 1968) (Apartment house parking lot); *State v. Sisti*, 62 N.J. Super. 84 (App. Div. 1960) (Shopping center parking lot). Although not pertinent herein, by virtue of the express language of the statute, N.J.S.A. 39:4-50.4, "public highways or quasi-public areas," it has been held that operation in a totally private location constitutes a violation of N.J.S.A. 39:4-50. See, *State v. Manger*, 151 N.J. Super. 451 (App. Div. 1977) (Private beach club parking lot from which the public was excluded).

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Accordingly, I **FIND** that the bank parking lot, which, the testimony adduced, was used for public parking after banking hours and for the parking of bank patrons during business hours, and further, which parking area provided the only means of vehicle ingress and egress to the Somerville Police Headquarters was a quasi-public area, and therefore, included within the proscription expressly set forth in *N.J.S.A.* 39:4-50.4.

The third sub-issue herein presents a further dichotomy; the officer must have reasonable grounds to believe that the respondent/licensee was either: (a) driving or (b) in actual physical control of a motor vehicle. Unquestionably, in the case herein the respondent/licensee was not "driving." Therefore, a determination must be made as to whether he was "in actual physical control" of his vehicle. Unfortunately, this phrase, to date, has not been judicially construed by any New Jersey decisional authority. However, the word "operate" in the context of automobile locomotion has received judicial treatment. In the case of *State v. Sweeney*, 40 *N.J.* 359 (1963), the Supreme Court stated:

We read the opinion of the Appellate Division, 77 *N.J. Super.* 512 (1962), to hold that a person 'operates'—or for that matter, 'drives'—a motor vehicle under the influence of intoxicating liquor, within the meaning of *N.J.S.A.* 39:4-50 and 39:4-50.1, when, in that condition, he enters a stationary vehicle, on a public highway or in the place devoted to public use, *turns on the ignition, starts and maintains the motor in operation* and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle, and that in this case the trial court could clearly infer such intent from the endeavor. We thoroughly agree and therefore affirm the judgment of conviction (emphasis supplied).

State v. Daly, 64 *N.J.* 122 (1973), reiterated the concept hereinabove set forth in the following language, "We conclude, as we did in *Sweeney*, that *in addition to starting the engine* (emphasis supplied), evidence of intent to drive or move the vehicle at the time must appear" (emphasis supplied). Accordingly, to have "operated" a motor vehicle requires a finding, at the very least, that: (1) the ignition was at some point turned on, (2) the engine was started and maintained in order that the motor was at some point running and (3) the driver must be in the driver's seat behind the steering wheel with an intent to drive.

Historically, it is interesting to note that the statute here in question, *N.J.S.A.* 39:4-50.4, was enacted by the Laws of 1966, three years after

the Supreme Court decision in *State v. Sweeney, supra*. The Legislature used the alternative “had been driving” or “was in actual physical control” of a motor vehicle. A logical conclusion might be drawn that, the Legislature, being aware of the rationale set forth in *Sweeney* three years earlier, declared that if a person was either driving or “operating,” as defined by *Sweeney*, he would be required to submit to an alcohol breath determination test. In other words “in actual physical control” was interchangeable with, akin and tantamount to “operating.” In short, one must be “operating” to be “in actual physical control.” This premise would appear to be buttressed by the very language contained in the Division of Motor Vehicle Form MF-12, which specifically and expressly states, “I have reason to believe you *operated* a motor vehicle in violation of the New Jersey Drinking Driving Law.” Nowhere within the text of said form is a respondent/licensee advised that there is reason to believe that he “had been driving” or “was in actual physical control of a motor vehicle.” It is, therefore, deducible that the specific language of the statute was reduced to the single concept of “operation,” which included both “driving” and/or “being in actual physical control” pursuant to the definition of “operation,” as set forth in *State v. Sweeney, supra*, which was something less than actual driving.

In assessing Officer Metzler’s testimony, I found him to be an extremely candid, forthright, credible and convincing witness. Much of what he said was acknowledged and corroborated by the respondent/licensee. Similarly, I found the testimony of the respondent/licensee to have been plausible on all points, save one. His testimony regarding his absence of intention to turn on the ignition and start his motor vehicle was extremely suspect, and belied his actions in traversing the parking lot from the police station to his car, weaving in and out of parking spaces occupied by other parked vehicles, bobbing up and down to avoid being observed, and in general, putting on a “gumshoe” performance to gain access to his vehicle. I found that portion of his tale to have been merely a corroborative contrivance, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative. Accordingly, I **FIND** that it was, in fact, respondent/licensee’s intent, albeit frustrated by ineptitude, to turn on the ignition, start the car and drive, but due to his state of inebriation and concomitant absence of control of his faculties, to have been unable to effectuate said intention. It is, therefore, concluded, that respondent/licensee was neither driving, operating, nor in actual physical control of his motor vehicle prior to and at

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the time of his arrest. Regrettably, Officer Metzler, in exercising his assiduity in apprehending respondent/licensee before he could start the engine of his car and perhaps, inflict damage to person and property because of his inebriated condition, did not afford respondent/licensee the opportunity to drive, operate or be in actual physical control of his motor vehicle. The pivotal ingredients of operation and thus, physical control, as defined by *Sweeney, supra*, and reaffirmed by *Daly, supra*, are absent. At best, we have herein, an unrealized intent to operate, personified by, at most, an unfulfilled attempt to turn on the ignition, which falls somewhat short of the statutory prerequisites.

Counsel for respondent argues, and persuasively so, that by virtue of the requirement of a reading of the questions and statements contained in Motor Vehicle Form MF-12, "A person is not given notice that he must take a breath test if he was 'in actual physical control' of a motor vehicle at the time of his arrest, if actual physical control of a motor vehicle is defined as something other than the term 'operating' as defined in the cases, the person would have to be so notified in order that he could make a logical decision as to the consequences of his refusal to submit to the test. The exercise of a constitutional right not to subject oneself to search based on an unlawful arrest must not be allowed to result in the revocation of a license." Therefore, if it be argued that being "in actual physical control" is different from "operating," respondent/licensee was not properly advised of his options when the Motor Vehicle Form MF-12 was read to him, and therefore, he was denied procedural due process. *See, Sidler v. Strelecki*, 98 *N.J. Super.* 530 (App. Div. 1968); *State v. McCarthy*, 123 *N.J. Super.* 513 (Law Div. 1973); *State v. Hudes*, 128 *N.J. Super.* 589 (Cty Ct. 1974).

Based upon the testimony heard and proofs adduced, I make the following:

FINDINGS OF FACT

1. The arresting officer had reasonable grounds to believe that respondent/licensee was under the influence of intoxicating liquor at the time of the arrest.
2. Respondent/licensee's vehicle was located in a quasi-public area immediately prior to the arrest.
3. The arresting officer did not have reasonable grounds to believe that respondent/licensee had been driving a motor vehicle on

- the public highways of the State of New Jersey or in a quasi-public area while under the influence of in toxicating liquor.
4. The arresting officer did not have reasonable grounds to believe that the respondent/licensee had been operating a motor vehicle on the public highways of the State of New Jersey or in a quasi-public area while under the influence of intoxicating liquor.
 5. The arresting officer did not have reasonable grounds to believe that the respondent/licensee was in actual physical control of a motor vehicle on the public highways of the State of New Jersey or in a quasi-public area while under the influence of intoxicating liquor.
 6. The respondent/licensee was placed under arrest.
 7. The respondent/licensee was requested to and refused to submit to an alcohol determination breath test.

CONCLUSIONS OF LAW

Respondent/licensee did not violate the provision of *N.J.S.A.* 39:4-50.4, by virtue of his refusal to perform an alcohol determination breath test, because the arresting officer did not have reasonable grounds to believe that respondent/licensee had been driving or was in actual physical control of a motor vehicle on the public highways or in a quasi-public area of this State, or in the alternative, if he was in such actual physical control, he was not properly advised of the consequences of a refusal to take the breath test because the arresting officer indicated that prejudice to the respondent/licensee would result only if he were "operating" a motor vehicle, and not merely in "actual physical control" thereof.

It is, therefore, **ADJUDGED** that the State has failed to meet its burden of proof by a preponderance of the credible evidence and the notice of proposed suspension of the respondent/licensee's driving privileges is hereby **DISMISSED**.

**ADOPTED BY SILENCE PURSUANT TO *N.J.S.A.* 52:14B-10(c)
BY THE DIVISION OF MOTOR VEHICLES.**