773 P.2d 1226

105 Nev. 230, 773 P.2d 1226

(Cite as: 105 Nev. 230, 773 P.2d 1226)

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Supreme Court of Nevada.
Nicky Dean ROGERS, Appellant,
v.
The STATE of Nevada, Respondent.
No. 17974.

May 18, 1989.

Defendant was convicted in the Third Judicial District Court, Lyon County, Mario G. Racanzone, J., of having .10 percent or more by weight of alcohol in his blood and being in **actual physical control** of vehicle on highway or on premises to which the public has access. Defendant appealed. The Supreme Court held that defendant was in " **actual physical control**" of car within meaning of statute.

Affirmed.

West Headnotes

[1] Automobiles 332
48Ak332 Most Cited Cases
A person is in "**actual physical control**" of vehicle, for purposes of statute making it unlawful for anyone who has .10 percent or more by weight of alcohol to be in **actual physical control** of vehicle on highway or on premises to which public has access, when person has existing or present bodily restraint, directing influence, domination, or regulation of a vehicle. N.R.S. 484.379, 484.379, subd. 1.

[2] Automobiles 332
48Ak332 Most Cited Cases
In deciding whether someone has existing or present bodily restraint, directing influence, domination, or regulation of a vehicle, and thus, has **actual physical control** of vehicle while intoxicated, trier of fact must weigh a number of considerations, including where, and in what position, person is found in vehicle; whether vehicle's engine is running; whether person is awake or asleep; whether, if person is apprehended at night, vehicle's lights are on; location of vehicle's keys; whether person was trying to move vehicle or moved vehicle; whether property on which vehicle is located is public or private; and whether person must, of necessity, have driven to location where apprehended. N.R.S. 484.379, 484.379, subd. 1.

[3] Automobiles 332
48Ak332 Most Cited Cases
If defendant was sleeping when apprehended, that may be a factor that suggests that defendant was not in **actual physical control** of vehicle, for purposes of statute making it unlawful for one who is under the influence to be in **actual physical control** of vehicle on highway or on premises to which public has access; however, that fact is not totally dispositive evidence that **actual physical control** did not exist. N.R.S. 484.379, 484.379, subd. 1.

[4] Automobiles 332
48Ak332 Most Cited Cases
Defendant was in "**actual physical control**" of vehicle for purposes of statute making it unlawful for any person who has .10 percent or more by weight of alcohol in his blood to be in **actual physical control** of vehicle on highway or on premises to which public has access; defendant was found parked on public highway, partially in a traffic lane, and not on private property, defendant apparently drove car to that location, vehicle's engine was running and its lights were on, and defendant, though asleep and slumped over, was seated in driver's position, directly behind steering wheel. N.R.S. 484.379, subd. 1.
****1226 *230** Terri Steik Roeser, State Public Defender, Robert Morris, Deputy Public Defender and Michael K. Powell, Chief Appellate Deputy State Public Defender, Carson City, for appellant.

Brian McKay, Atty. Gen., Carson City, William G.

Exh. #1
Exh. #2

Rogers, Dist. Atty., and James N. Varner, Deputy Dist. Atty., Yerington, for respondent.

*231 OPINION

PER CURIAM:

Just before 2:00 a.m., May 4, 1986, two Lyon County Sheriff's officers drove past a **1227 silver Camaro parked on the edge of Highway 50, in the west-bound lane. The Camaro was parked in the emergency lane, which was apparently about two feet wide, such that the car extended approximately one foot into the normal traffic lane.

The officers returned to examine the vehicle. The engine was running, the transmission apparently in neutral or park. Reserve Officer Kidd noticed that the headlights were on. The only occupant was sleeping, slumped over the steering wheel. Officer McKibben knocked on the window to get the driver's attention, but he did not respond. McKibben then opened the door and identified himself. Rogers awakened and asked "What?" Rogers told the officers he had stopped to sleep.

Rogers then closed the door, revved the engine, and began turning the steering wheel. McKibben again opened the door and asked Rogers to step out and perform a field sobriety test, i.e., recite the alphabet, perform a finger count, and do a finger-to-nose test. Rogers successfully recited the alphabet. He had difficulty, *232 however, with the finger count. [FN1] On the finger-to-nose test, Rogers correctly touched the tip of his nose with his right hand, but touched the side of his nose with his left. McKibben testified that, although Rogers did not appear unkempt, his speech was slurred and his breath smelled of alcohol.

> FN1. Officer McKibben testified as to the finger count:
> Q. What is the finger count?
> A. Counting your fingers forwards and backwards, touching thumb to finger: one, two, three, four, five. Five, four, three, two, one.
> Q. And did you demonstrate it for him?
> A. Yes I did.
> Q. And did you explain for him how to do it?
> A. Yes.
> Q. Did he do it?
> A. Made two attempts. Q. And how did he perform on each one of those?
> A. The first time, he would touch his thumb and four fingers, but he would count them out of order, and the second time he would count out of order, not touching his thumb or his finger, just moving his fingers.
> Q. Did he appear to have some difficulty with that test?
> A. Yes.
> Q. Did--In your opinion, did he pass the test?
> A. No.

McKibben then arrested Rogers for driving under the influence and took him for a blood test. His blood, drawn about two hours after the arrest, reflected an alcohol level of 0.1014%.

A jury convicted Rogers of violating NRS 484.379, his third such conviction. He was sentenced to four years and fined $2,000. Rogers appeals.

DISCUSSION

This case presents one important issue for our consideration. NRS 484.379(1) provides:

> It is unlawful for any person who:
> (a) Is under the influence of intoxicating liquor; or
> (b) Has 0.10 percent or more by weight of alcohol in his blood, to drive or be in **actual physical control** of a vehicle on a highway or on premises to which the public has access.

As Rogers was not driving at the time he was apprehended, the issue that must be decided is whether he was in "**actual physical control**" of the Camaro.

NRS 484.379 proscribes both driving and being in **actual physical control** of a vehicle while under the influence. Accordingly, we must assume that

the statute does not contain a redundant phrase, but rather includes the term "**actual physical control**" to encompass activity broader than or different from driving a vehicle. Moreover, use of the disjunctive "or" between the term "drive" and the term "be in **actual physical control**" ***233** suggests that the two terms have different meanings. *See State v. Webb,* 78 Ariz. 8, 274 P.2d 338, 339 (1954); *People v. Pomeroy,* 419 Mich. 441, 355 N.W.2d 98, 102 (1984) (Levin J., dissenting); *Parker v. State,* 424 P.2d 997, 1000 (Okla.Crim.App.1967). Obviously, the objective in requiring the arrest of those who are not driving but who are in **actual physical control** of a ****1228** vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time apprehended.

Many courts have considered the issue of what constitutes **actual physical control** of a motor vehicle. *See generally,* 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 (1979). These courts have articulated several definitions of **actual physical control**; [FN2] and courts facing situations very similar to the instant case have decided differently. *Compare Kirby v. State, Dept. of Public Safety,* 262 N.W.2d 49 (S.D.1978) (motorist in **actual physical control** when sitting behind wheel of vehicle, asleep, with motor running, parking lights on, and vehicle positioned with its left wheels on edge of traffic lane of city street) *with People v. Pomeroy,* 419 Mich. 441, 355 N.W.2d 98 (1984) (motorist not in **actual physical control** when sitting behind wheel of vehicle, asleep, with motor running, headlights off, and vehicle legally parked in front of a bar on a street). Not surprisingly, defense counsel and the State have cited language and logic from those cases supporting their respective positions.

> FN2. For a summary of the definitions courts have developed, see *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance, supra,* at 18-19.

[1][2][3] After consideration of the many cases discussing the concept of **actual physical control**, the parties' briefs, and oral argument, we conclude that a person is in **actual physical control** when the person has existing or present bodily restraint, directing influence, domination, or regulation of the vehicle. [FN3] In deciding whether someone has existing or present bodily restraint, directing influence, domination, or regulation of a vehicle, the trier of fact must weigh a number of considerations, including where, and in what position, the person is found in the vehicle; whether the vehicle's engine is running or not; whether the occupant is ***234** awake or asleep; [FN4] whether, if the person is apprehended at night, the vehicle's lights are on; the location of the vehicle's keys; whether the person was trying to move the vehicle or moved the vehicle; whether the property on which the vehicle is located is public or private; and whether the person must, of necessity, have driven to the location where apprehended. [FN5]

> FN3. *State v. Ruona,* 133 Mont. 243, 321 P.2d 615,618 (1958); *City of Kansas City v. Troutner,* 544 S.W.2d 295, 300 (Mo.Ct.App.1976); *Hughes v. State,* 535 P.2d 1023, 1024 (Okla.Crim.App.1975); *Commonwealth v. Klock,* 230 Pa.Super. 563, 327 A.2d 375, 383 (1974); *State v. Bugger,* 25 Utah 2d 404, 483 P.2d 442, 443 (1971).

> FN4. Rogers argues that a person who is asleep cannot be in **actual physical control** of anything, and that the use of the modifier "actual" prohibits judicial interpretation of NRS 484.379 to include constructive control. He also argues that a sleeping person cannot form the requisite criminal intent necessary for a conviction. However, as noted in *Webb:*
> While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to the vehicle, still there is a

> legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the "**actual physical control**" of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of his apprehension.
> 274 P.2d at 340. Accordingly, if a defendant was sleeping when apprehended, this may be one factor that suggests that he or she was not in **actual physical control** of a vehicle; however, it is not, as Rogers argues, totally dispositive evidence that **actual physical control** did not exist.
>
> FN5. For example, if, after leaving a bar, a person under the influence flopped into the back seat of his vehicle, while the vehicle was yet in the bar's parking lot, and fell asleep without starting or driving the vehicle, the person would not, under NRS 484.379, be in **actual physical control** of the vehicle. On the other hand, if an intoxicated person started the car, drove onto a public highway, and pulled onto an emergency lane to change a flat tire, that person would clearly be in **actual physical control**, notwithstanding the fact that he or she had stopped the vehicle before the police arrived. Between the two ends of such a hypothetical spectrum lie a multitude of factual possibilities, each of which must be determined according to its specific facts and the considerations we have mentioned.

[4] Applying these considerations to the case at hand, we conclude that the jury ****1229** correctly found, under NRS 484.379, that Rogers was regulating, dominating, directing and influencing the car he was in. Rogers was found parked on a public highway, partially in a traffic lane, and not on private property. He apparently drove the car to that location. When apprehended, the car's engine was running and its lights were on. Rogers, though asleep and slumped over, was seated in the driver's position, directly behind the steering wheel. In this situation, Rogers could have easily resumed driving; indeed, he took measures apparently designed for doing so. Accordingly, we conclude that Rogers was, under NRS 484.379(1), in **actual physical control** of the car.

We have fully examined the remaining issues raised by appellant and conclude that they are without merit. Accordingly, we affirm the Rogers' judgment of conviction.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE CITY OF HENDERSON, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE SALLY L. LOEHRER, DISTRICT JUDGE, Respondents, and LAURIE ANN RHYMER, Real Party in Interest.	)	No. 30730 FILED JUN 23 1999 CLERK OF SUPREME COURT BY CHIEF DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of certiorari challenging an order of the district court declaring NRS 484.379 unconstitutional as applied in this case. Real party in interest Laurie Ann Rhymer was arrested in the City of Henderson, Nevada ("the City"), and ultimately charged with a misdemeanor violation of NRS 484.379(1). NRS 484.379(1) provides:

> 1. It is unlawful for any person who:
> (a) Is under the influence of intoxicating liquor;
> (b) Has 0.10 percent or more by weight of alcohol in his blood; or
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood,
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

At Rhymer's municipal court trial, the City apparently did not offer any blood alcohol or other physical evidence but proceeded solely on the "under the influence of intoxicating liquor" paragraph, NRS 484.379(1)(a). The defense theory was that under NRS 484.379(1)(a) the City had to plead and prove that Rhymer was under the influence "to a degree which render[ed] her

Exh. #2

incapable of safely driving or exercising actual physical control of a vehicle." Henderson Municipal Court Judge Ken Proctor rejected the defense theory, specifically declining to make a finding that Rhymer was incapable of safely driving or exercising actual physical control of a vehicle. The municipal court found Rhymer guilty of violating NRS 484.379(1)(a) and ordered her to pay a fine of $500.00, pay an administrative court fee of $100.00, attend DUI school and Victim Impact Panel, and perform forty-eight hours of community service.

Rhymer appealed her conviction to the district court. By stipulation, the sole issue on appeal to the district court was whether the City had to allege and prove that Rhymer was under the influence of an intoxicating liquor to a degree which rendered her incapable of safely driving or exercising actual physical control of a vehicle and whether the municipal court's failure to require such allegation and proof harmed Rhymer. A hearing was held before Eighth Judicial District Court Judge Sally Loehrer. On May 14, 1997, the district court reversed, declaring NRS 484.379(1)(a) "impermissi[bly] vague, and consequently, unenforceable against Ms. Rhymer."

The City then filed the present petition, pursuant to NRS 34.020(3),[1] for issuance of a writ of certiorari, or review, seeking reversal of the order of the district court.

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[1]NRS 34.020(3) provides:

> In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a justice's court or from a municipal court, and wherein the district court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the supreme court upon application of the state or municipality or defendant, for the purpose of reviewing the constitutionality or validity of such statute or ordinance, but in no case shall the defendant be tried again for the same offense.

As a preliminary matter, we must determine whether the district court declared NRS 484.379(1)(a) unconstitutional on its face or merely as applied to Rhymer. The district court's order is not clear as to basis of the constitutional challenge; we note, however, that this court has recognized previously that statutes challenged for vagueness are evaluated on an "as-applied" basis where, as here, first amendment interests are not implicated. See Lyons v. State, 105 Nev. 371, 320, 775 P.2d 219, 221 (1989). We further note that "trial judges are presumed to know the law and to apply it in making their decisions." Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991). Accordingly, we interpret the district court's order as declaring NRS 484.379(1)(a) unconstitutional only as applied in this case.

We now address the question of whether the district court erred in declaring NRS 484.379(1)(a) void for vagueness as applied to Rhymer. The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975). "The test of granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinary meanings for the words employed when viewed in the context of the entire statutory provision." Id.

The City argues that the term "under the influence" is in no sense vague and, in fact, "has been in common usage for generations and its meaning in the context of DUI law is well understood"; the City does not, however, indicate anywhere in its brief the well established meaning it attributes to the phrase "under the influence." Rhymer agrees that the phrase "under the influence" has a well established meaning, at least in Nevada, to wit: that a person is under the influence (i.e., effects of a controlled substance or alcohol) to a degree which

renders him incapable of safely driving or exercising actual physical control of a vehicle.

We agree that the phrase "under the influence," as used in the statute at issue here, is not vague, as it implicitly and ordinarily refers only to those individuals who ingest intoxicating liquor to a degree that renders them incapable of safely driving or exercising physical control of a vehicle. We conclude that this construction is consistent with the purpose of the DUI statute, which, presumably, is to protect the public against unsafe drivers. Because the phrase "under the influence," has a well-settled and ordinary meaning, we conclude that NRS 484.379(1)(a) meets the constitutional requirement of definiteness, at least when this well-settled and ordinary meaning is recognized in applying the statute. Unfortunately, the municipal court, at the insistence of the City, refused to recognize the well-established and ordinary meaning of the phrase "under the influence."

In conclusion, we hold that it was not necessary for the City to have explicitly alleged that Rhymer was under the influence to a degree that rendered her incapable of safely driving or exercising physical control of a vehicle because this well-settled and ordinary meaning is implicit in the phrase "under the influence." The City was, however, required to prove that Rhymer was "under the influence" to a degree that rendered her incapable of safely driving or exercising physical control of a vehicle.[2] Because the municipal court apparently rejected the well established and ordinary meaning of the phrase "under the influence," it is unclear whether the municipal court required the requisite degree of proof in convicting Rhymer. Therefore, the district court did not err in concluding that NRS

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[2]"Incapable of safely driving" does not, of course, mean that one is incapable of reaching her destination in safety, but that her mental or physiological functions are diminished so that the risk of an accident is unreasonably increased.

484.379(1)(a) is impermissibly vague as applied by the municipal court in this case and, as Rhymer was clearly prejudiced by this unconstitutional application of the law, properly reversed her judgment of conviction.

Because we find no abuse of the district court's authority, the petition for a writ of certiorari is denied.

It is so ORDERED.

_____, C.J.
Springer

_____, J.
Shearing

_____, J.
Rose

_____, J.
Young

_____, J.
Maupin

cc: Sally L. Loehrer, District Judge
Shauna Hughes, Henderson City Attorney
David Mincavage, Deputy City Attorney
John H. Howard, Jr.
Keith Puckett-Hart
Loretta Bowman, Clerk

disseminated to all subscribers of the advance sheets of the Nevada Reports and to all persons and agencies listed in NRS 2.345.

5. **Publication of public reprimand issued by state bar.** A public reprimand issued by the state bar under Rule 113 shall be published in the state bar publication.

[Added; effective October 5, 2003.]

Rule 122. Effective date. These rules are effective on February 15, 1979; any disciplinary proceeding pending on that date in which a written complaint has been filed with a local administrative committee shall be concluded pursuant to Rules 99 et seq. of the Supreme Court Rules in effect prior to these rules. All other disciplinary matters shall be transferred to the appropriate disciplinary board.

[Added; effective February 15, 1979.]

Rule 123. Citation to unpublished opinions and orders. An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; or (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding.

[Added; effective August 23, 1983.]

G. RULES OF PROFESSIONAL CONDUCT

NEVADA CASES.

Mandamus is appropriate remedy in matters involving disqualification of lawyers. Mandamus (see NRS 34.160) is used properly to challenge order disqualifying attorney from representing party in action pending in district court. (See, generally, Nevada Rules of Professional Conduct, S.C.R. 150 et seq.) Cronin v. Eighth Judicial Dist. Court, 105 Nev. 635, 781 P.2d 1150 (1989), cited, Ciaffone v. Eighth Judicial Dist. Court, 113 Nev. 1165, at 1167, 945 P.2d 950 (1997), Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, at 1206, 14 P.3d 1266 (2000), Leibowitz v. Eighth Judicial Dist. Court, 119 Nev. 523, at 529, 78 P.3d 515 (2003)

Rule 150. Adoption of rules of professional conduct.

1. The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, with certain amendments approved by this Court, are hereby adopted as the rules of professional conduct for lawyers who practice in Nevada. The rules may be referred to as the Nevada Rules of Professional Conduct and are comprised of the rules set out in this section of Nevada Supreme Court Rules entitled "Rules of Professional Conduct."

2. The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments.

3. All other rules of this Court stating or adopting by reference rules of professional conduct for lawyers who practice in Nevada in effect as of the date of the adoption of this Rule 150 are hereby repealed.

[Added; effective March 28, 1986.]

WEST PUBLISHING CO.

Attorney and Client ⇐ 32(2).
WESTLAW Topic No. 45.
C.J.S. Attorney and Client § 44.

NEVADA CASES.

Agreement guaranteeing fixed sum if more not recovered from other defendant prohibited. In a malpractice action against three doctors, an agreement between the plaintiff and insurance carriers for two defendants which, in effect, guar-

Exh. #3