STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Case No. 01-3485-AR
HON. PHILIP E. RODGERS, JR.

GREGORY FRANCIS HUGHES,

Defendant-Appellant.

Charles H. Koop (P27290)
Attorney for Plaintiff-Appellee

Daniel J. Hartman (P52632)
Attorney for Defendant-Appellant

DECISION AND ORDER VACATING
DEFENDANT-APPELLANT'S CONVICTION

Following a trial by jury on April 30, 2001, the Defendant-Appellant ("Appellant") was convicted of operating a motor vehicle while visibly impaired. MCL 257.253-A. A judgment of conviction and sentence was entered on June 26, 2001. This appeal was filed on July 9, 2001. It is timely. MCR 7.101(B)(1). The transcript was also ordered in a timely fashion and filed with this Court on August 6, 2001. The Appellant, however, was unconscionably dilatory in filing his brief. When no brief was timely filed, the Court scheduled an oral argument to move the case forward. The oral argument was adjourned and ultimately heard December 10, 2001. Despite the adjournment, Appellant's brief was not filed until December 6, 2001 and, not surprisingly, the Prosecutor-Appellee ("Appellee") could not respond until the morning of the day set for oral argument.

At the oral argument, the Appellant wisely abandoned his arguments regarding inappropriate hearsay evidence and the failure to produce a res gestae witness. The Appellant focused on the

instructions the trial court provided to the jury and the trial court's questioning of the jury following its return of its verdict. The sole issue for consideration by this Court, then, is whether an individual can be convicted of operating a motor vehicle while visibly impaired where the motor vehicle is incapable of being driven.

To place this legal issue in an appropriate context, the following facts are important. The Appellant acknowledges playing a round of golf and consuming alcohol. He did not admit to being intoxicated or impaired when he completed his round of golf and returned to his cottage. On the way, he acknowledges stopping and purchasing a six pack of beer. He resumed driving, struck a deer in the roadway and remained with his disabled vehicle. The investigating officer, Deputy Pamela Woodhouse, testified that she observed the vehicle on the west side of the road, off the road facing south. A tow truck had arrived before her and was positioned in front of the vehicle. According to the officer, the Appellant initially denied he had been drinking but then admitted he had consumed some alcohol but not enough to affect his driving ability. There was no evidence that the vehicle presented a risk of collision to other vehicles and counsel for both parties agreed that the vehicle was inoperable. Although this portion of the record was not provided to the Court, the parties agreed that the Appellant testified that he drank the six pack of beer after the accident while waiting for the wrecker as he knew he would not be driving again.

Obviously, given that the six pack was consumed and that there had been an accident with a deer and that the Appellant denied drinking initially to the officer, a jury might very well have disbelieved him and found that he had consumed alcohol and was impaired at the time he hit the deer. However, a spontaneous colloquy occurred between the Court and the jury. It is as follows:

> THE COURT: While we're here, I will ask you, you folks, all of you arrived at this verdict pretty quickly. It was within 15 or 20 minutes. Did you have some doubt about when the alcohol was consumed or would you like to talk about this at all? You don't have to talk about this. Mr. Rowl - - Rowley?
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> JUROR ROWLEY: No, I don't think so, Your Honor. You mean how we arrived at the - - well, we arrived at the situation that the vehicle was fired after the consumption.
>
> THE COURT: Pardon?

JUROR ROWLEY: That he fired the vehicle after the consumption. That he drank in the vehicle and he was still in an operatable (sic) position and that the tow truck driver was not hooked to the vehicle to prevent - -

THE COURT: I see.

JUROR ROWLEY: That's how we reached the verdict.

THE COURT: Okay. So as far as operating at the - - you determined then that the defendant was operating the vehicle because he had the engine running at the time the tow truck guy showed up, or at least at some point on the side of the road. Is that accurate?

(No verbal response)

THE COURT: Yes? And that you did find that he was consuming the alcohol on the side of the road? Is that right?

(No verbal response)

THE COURT: Okay. All right. Well, that's interesting. Thanks for your time. You're excused with our thanks and just pick up your vouchers from the district court window there and you can take them to the treasurer and get paid. All right? Thanks again.

Trial transcript, pp 70-71.

Generally, when a jury verdict is challenged, it is the obligation of the Court to review the evidence and the logical inferences therefrom most favorably from the prevailing party's point of view. With reference to that general standard, the evidence and the inferences therefrom would support a conviction. However, considering the conversation between the trial judge and an impaneled jury, the record indicates that the jury found that the consumption of alcohol occurred in the vehicle after the collision with the deer and that the Appellant operated while impaired when he started the engine while waiting for the tow truck driver. The jury did not find that the Appellant was impaired while operating the motor vehicle prior to the car-deer accident.

Given the stipulation that the vehicle was inoperable and had to be removed by a tow truck, the question presented by the Appellant is whether he can legally be convicted of operating a motor vehicle while impaired when the motor vehicle itself was incapable of operation.

I.

Whether the Appellant can be convicted of OUIL when he is found under the influence in an inoperable motor vehicle

MCL § 257.625; MSA § 9.2325 provides, in pertinent part, as follows:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:
>
> > (a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.
> >
> > (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Section 36 of the Michigan Vehicle Code, MCL § 257.36; MSA § 9.1836, defines an "operator" as anyone "in actual physical control of a motor vehicle upon a highway."

People v Pomeroy, 419 Mich 441; 355 NW2d 98 (1984), was the consolidated appeal of the convictions of two defendants, Pomeroy and Fulcher, on charges of operating a motor vehicle while ability to do so was impaired due to consumption of intoxicating liquor and operating a motor vehicle while ability to do so was visibly impaired, respectively. The Court of Appeals affirmed. The Supreme Court, in an equally divided opinion, affirmed. 415 Mich 328; 329 NW2d 697. On rehearing, the Supreme Court held that: (1) under any reasonable interpretation of the phrase "operate a vehicle," a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping, and (2) thus, evidence on element of operating a vehicle was insufficient to sustain a conviction in each case, since both defendants were arrested while asleep at the wheel of a stationary car.

In *People v Schinella*, 160 Mich App 213; 407 NW2d 621 (1987), the Court of Appeals confronted a similar factual situation. In *Schinella* the defendant's vehicle was found off the road, straddling a ditch. Appellant was behind the wheel, awake but glassy-eyed. While the engine was not running, there were indications at the scene that defendant had attempted to dislodge his vehicle just moments before. There was a strong smell of alcohol on defendant's breath. While defendant was able to recite the alphabet and count backwards, he failed two physical dexterity tests.

With respect to the application of *Pomeroy*, the Court stated:

> "The holding of *People v Pomeroy, supra*, is narrow: where there is no evidence of prior impaired driving, a defendant arrested while asleep at the wheel of a stationary car cannot be found guilty of driving while impaired (or by extension, OUIL) because he is not presently 'operating' the vehicle at the time of his arrest. See, 419 Mich 447; 355 NW2d 98]. Stated otherwise, to sustain an OUIL conviction, there must be direct or circumstantial evidence that a person arrested while asleep at the wheel was operating a vehicle while under the influence of intoxicants at some time prior to his arrest.

The Court concluded that there was sufficient circumstantial evidence that the defendant had operated his vehicle while under the influence. While the engine was not running when the officers arrived, there were indications that the defendant had attempted to dislodge his vehicle from the ditch. Freshly broken tree branches were stuck under the wheels in an apparent attempt to provide traction. Although it was cool, the hood of the vehicle was still warm. The front tires were cold but the back tires were warm, suggesting that they had been spun in an effort to extricate the vehicle. The defendant admitted consuming five beers before he began his trip home. He further claimed that he had nothing to drink while in the vehicle.

The Court of Appeals also distinguished *Pomeroy* in *People v Smith*, 164 Mich App 767; 417 NW2d 261 (1988). In *Smith*, the defendant was parked on the shoulder of I-75. There was a 45-degree embankment next to the shoulder of the road. The nearest exit was 1/4 mile away. Defendant was alone and seated on the driver's side of the car. Unlike the facts involving defendant Fulcher in *Pomeroy*, there were no bottles or cans found in the car that would support the theory that defendant became drunk while parked. Unlike Fulcher, where the defendant was parked in front of a bar, it was unlikely in the instant case that defendant could have gotten to the shoulder of I-75

unless he had driven while intoxicated. Hence the Court concluded that there was sufficient circumstantial evidence to sustain defendant's conviction.

In *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995), the police officers found Wood unconscious in his van at a McDonald's drive-through window. Wood was slumped forward, with his head resting on the steering wheel. The vehicle's engine was running, and the automatic transmission was in drive. Wood's foot, which rested on the brake pedal, kept the vehicle from moving. Wood had a twenty-dollar bill in his hand, and a Budweiser beer between his legs. He smelled of alcohol and, when the police awakened him, appeared confused. Wood was arrested, and the police searched the front seat of the vehicle. They found a cooler containing baggies of marijuana, money, a list of names, and a calculator. Wood was charged with possession of marijuana, operation of a motor vehicle while under the influence of liquor (OUIL), and operation of a motor vehicle in violation of terms of a restricted license. Relying on *Pomeroy*, the Circuit Court granted the defendant's motion to suppress and dismissed the charges. The Court of Appeals affirmed. The Supreme Court reversed and remanded for trial.

The Supreme Court said:

> A statute provides that an "operator" is anyone "in actual physical control of a motor vehicle upon a highway." MCL § 257.36; MSA § 9.1836. This Court addressed the definition of "operate" in *Pomeroy* and the companion case, *Fulcher*. We there said that a conscious person in a stationary vehicle might have "actual physical control," and thus operate it. We suggested that no particular state of mind is required to operate a motor vehicle. We also said that a person who is sleeping in a moving vehicle might be found to "operate" it. But the combination of a stationary vehicle and an unconscious driver in *Pomeroy/Fulcher* persuaded the Court that the defendants there were not operating their vehicles when found by the police.
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> In *Pomeroy*, the defendant was found asleep in a parked vehicle outside a bar. The engine was running, but the manual transmission was in neutral. Pomeroy testified that he had only entered the vehicle to sleep, and had turned on the engine and heater because he was cold. No other evidence was offered that Pomeroy had driven while intoxicated.
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> In *Fulcher*, police found Fulcher's automobile with its rear end in a ditch and the front end in the roadway. Fulcher was asleep in the driver's seat with the engine idling. Fulcher's foot was off the accelerator, but the automatic transmission was in drive. The vehicle was motionless. It had furrowed tire tracks into the ground. In

both *Pomeroy* and *Fulcher*, this Court found that the driver was not operating a motor vehicle at the time of arrest.

> We conclude that "operating" 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 as 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.
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> The *Pomeroy/Fulcher* Court stated that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." We read that statement as reflecting an assumption that there was no danger of collision in such a case. The facts of this case show that this assumption was an overgeneralization. *Pomeroy/Fulcher* is overruled to the extent it holds, for purposes of construing what conduct is within the meaning of "operate a vehicle," that "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping."
>
> Wood had put the vehicle in motion and in a position posing a significant risk of collision. The vehicle had not been returned to a position of safety. Only Wood's foot resting on the brake pedal kept the vehicle from moving forward. Were Wood, who had then become unconscious, to have slipped to the side, his foot might have moved off the brake, putting the vehicle in motion. Wood had not returned the vehicle to a position posing no risk of collision with other persons or property. We conclude that he continued to operate the vehicle when he was observed by the officers.

Id at 404-405.

In the case now before the Court, the question that must be answered then is whether the Appellant Hughes had "put his vehicle in motion" or "in a position posing a significant risk of collision." Given the uncontested facts that the vehicle was inoperable and off the traveled surface of the roadway and the absence of any opinion evidence that it was in a position posing a significant risk of collision, this Court must conclude that the evidence fails to support a conviction on a legally cognizable theory.

Unfortunately, there was no discussion with counsel regarding the amended jury instructions provided by the trial court. The amendment included the following language:

> And I will instruct you that operating includes driving the vehicle. It also includes having the engine running and being behind the wheel on the shoulder of a highway. So operating includes both of these instances and both of those aspects of driving.

A review of the preceding case law clearly indicates that the Court's instructions accurately reflect Michigan law, with one exception. The exception is that a person who is impaired and sitting behind the wheel of idling motor vehicle parked on the shoulder of a roadway and not exposing other drivers to the danger of collision cannot be guilty of driving while impaired unless the vehicle is capable of movement. The Appellant's vehicle had a broken wheel and could not be driven. The nuance with respect to this uncontested fact was not discussed or argued on the record and, in fairness to the trial court, no motion regarding the issue of operability was brought to the trial court's attention prior to or subsequent to the entry of judgment.

The jury found that the Appellant consumed alcohol while parked along the roadside and then committed the offense of operating while impaired when he turned on the car's ignition and let the engine idle, even though the parties agreed the car was inoperable. On these facts, a conviction of operating while impaired may not stand.

II.

Whether the Appellant waived the sufficiency of the evidence issue by not raising it before the trial court

An objection going to the weight of the evidence can be raised by a motion for a new trial. However, a defendant's failure to file a motion for new trial does not preclude appellate review of the sufficiency of the evidence supporting a jury verdict. *People v Walker*, 142 Mich App 523, 525; 370 NW2d 394 (1985).

A challenge to the sufficiency of the evidence does not involve judicial discretion, need not be preserved by motion for a new trial, and may be raised for the first time on appeal. *People v Wright*, 44 Mich App 111; 205 NW2d 62 (1973), citing *People v Ragland*, 34 Mich App 673; 192 NW2d 73 (1971). The evidence is insufficient if it could not support a finding of guilt beyond a reasonable doubt. *People v Williams*, 368 Mich 494; 118 NW2d 391 (1962). See also, *People v Kremko*, 52 Mich App 565, 573; 218 NW2d 112 (1974), which was most recently cited in *People v McGee*, Mich App, 2001WL 1002704.

CONCLUSION

Despite the Appellant's failure to timely file the trial brief or to present these issues for proper resolution by the trial court either prior to or subsequent to the entry of judgment, this Court must vacate the Appellant's conviction of operating while impaired. The admissions of counsel and the record provided to this Court for review do not contain evidence that supports a conviction of operating while impaired. While a jury certainly could have found the Appellant was impaired prior to his collision with the deer, it did not do so. Rather, the jury found that the Appellant became impaired at the roadside and "operated" the vehicle when he turned it on to warm himself. Yet, the vehicle was not capable of being driven, and there is no evidence that it posed a risk of collision to other drivers. Accordingly, the Appellant's conviction is hereby vacated.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/05/02