

ALBUQUERQUE CRIMINAL LAWYER BLOG

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Control of Vehicle and Intent to Drive Must be Proven in New Mexico DWI: Competing Theories Must Both be Sound

The New Mexico Supreme Court expanded on its ruling in *State v. Sims* in the case of *State v. Mailman*. *Sims* addressed the problematic situation that had arisen by overly aggressive DWI/DUI enforcement in the arrest and prosecution of drivers found sleeping in their cars after drinking.

Sims stated that for a DWI arrest in such situations, the driver must have been in actual physical control of the vehicle as evidenced by both control and intent to drive. *Sims* set forth several factors to be considered in the issues of control and intent which have since been formalized in proposed jury instructions to address sleeping while intoxicated. These factors include:

1) whether the vehicle was running, 2) whether the ignition was in the "on" position, 3) where the key was located, 4) where the driver was located, 5) whether the person was asleep, 6) whether the headlights were on, 7) where the vehicle was stopped, 8) whether the driver had voluntarily pulled off the road, 9) the time of day, 10) the weather conditions, 11) whether the heater or A/C was on, 12) whether the windows were up or down, 13) whether the vehicle was operable, and 14) any reasonable explanations justified by the circumstances.

The Court in *Mailman* reiterated the finding in *Sims* stating that intent may not be inferred by control of the vehicle. The court stated that actual physical control requires not only control but intent, suggesting that each be proven independently. The court explicitly overruled *State v. Tafoya* which involved a conviction of a driver found in an inoperable vehicle that had stalled in the middle of a major street because the court had failed to consider control and intent as set forth in *Sims*.

In *Mailman*, the driver was found highly intoxicated in his broken down vehicle in the parking lot of a convenience store. The driver admitted to being intoxicated and admitted to having driven to the store. The State presented two different theories to the jury, 1) he was actually driving while intoxicated, and 2) he was in control of the vehicle while impaired to the slightest degree. The jury found the defendant guilty but it was not clear on which theory the verdict was rendered.

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The Supreme Court in *Mailman* found that though defendant might have legitimately been convicted for actual driving while intoxicated which was basically admitted by defendant, there was insufficient evidence presented by the State for conviction based upon actual physical control under *Sims*. Because it was not clear on which grounds the conviction rested, the legitimate or illegitimate grounds, the verdict was reversed.

The Court expanded on *Sims* in holding that actual physical control, control plus intent to drive, may be established by eyewitness testimony of defendant's driving. However, in the absence of eyewitnesses, the State must prove actual physical control as set forth in *Sims* adding that defendant's own admissions may/should be taken into consideration. In other words, Mr. Mailman dodged a bullet as a result of the prosecutor's failure to settle on one theory or another.

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