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# Missouri Supreme Court Rules: Despite Change in Statute, Sleeping it off Behind the Wheel Is Still not an Option

*Cox v. Director of Revenue*<sup>1</sup>

## I. INTRODUCTION

In 2002, alcohol related highway accidents killed 17,419 people in the United States.<sup>2</sup> These amounted to 41 percent of all highway deaths in that year.<sup>3</sup> In addition to causing physical and property damage, driving while intoxicated can result in serious legal consequences for drunk drivers. Getting behind the wheel after having too much to drink can result in a criminal conviction punishable by fines, community service, probation, and incarceration.<sup>4</sup> A drunk driver may also have his driver's license suspended or revoked.<sup>5</sup>

When one thinks of drunk driving, one usually imagines a person careening down the road, putting the lives of other motorists in danger. However, an intoxicated person may be subject to the same drunk driving sanctions simply by sitting, sleeping, or passing out in the driver's seat after turning on the motor. In *Cox v. Director of Revenue*, the Missouri Supreme Court upheld a driver's license revocation on just those facts, holding that when a driver is in a vehicle and the motor is running, there is probable cause to believe that he is "operating" the vehicle even if he is asleep or unconscious.<sup>6</sup> However, the court further held that the act of turning *off* the motor is not "operating."<sup>7</sup>

## II. FACTS AND HOLDING

At about 10:20 p.m. on August 15, 1998, Eldon Missouri police officer James A. Upton responded to a report that a Cadillac was parked in a gas station parking lot at the intersection of Business 54 and Highway 87 with its

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1. 98 S.W.3d 548 (Mo. 2003) (en banc).

2. Press Release, National Highway Traffic Safety Administration, USDOT Releases 2002 Highway Fatality Statistics (July 17, 2003), available at <http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2003&file name=pr32-03.html>.

3. *Id.*

4. MO. REV. STAT. § 577.010 (2000).

5. MO. REV. STAT. § 302.505 (2000 & Supp. 2002).

6. *Cox*, 98 S.W.3d at 550.

7. *Id.* at 551.

engine running and its lights on.<sup>8</sup> Approaching the green Cadillac, Officer Upton saw Steven Cox asleep or unconscious in the driver's seat.<sup>9</sup> When the officer knocked on the window, Cox awoke, disoriented and confused.<sup>10</sup> When Cox rolled the window down, Officer Upton noticed that there was a glass containing a dark brown liquid tucked between Cox's legs, and Cox smelled strongly of alcohol.<sup>11</sup> When Officer Upton asked Cox if he was all right, Cox informed the officer that he was just sitting there.<sup>12</sup> The officer noticed that Cox's eyes were watery and bloodshot.<sup>13</sup>

Officer Upton asked Cox to shut off the motor and get out of the car, and Cox complied.<sup>14</sup> Cox was put through a series of field sobriety tests at Officer Upton's direction.<sup>15</sup> Cox was unable to perform the walk-and-turn test<sup>16</sup> or the one-leg stand,<sup>17</sup> and his performance on the horizontal gaze nystagmus test demonstrated that he was intoxicated.<sup>18</sup> Officer Upton arrested Cox for driving while intoxicated and for possession of an open container of alcohol.<sup>19</sup> In response to Officer Upton's inquiries, Cox indicated that he had, indeed, been operating the vehicle.<sup>20</sup> He also informed the officer that he had started drinking whiskey and iced tea in his vehicle on Lake Y10 at approximately 6:00 p.m.<sup>21</sup> Cox told the officer that, in the three hours prior to his arrest, he had been boat riding and sleeping, and that he had "pulled off the

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8. Cox v. Dir. of Revenue, No. WD 59189, 2002 WL 1070548, at \*1 (Mo. Ct. App. May 31, 2002), *transferred*, 98 S.W.3d 548 (Mo. 2003) (en banc).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. In the walk-and-turn test, a suspect is asked to walk a certain number of steps, heel-to-toe, then turn and walk back in the same manner. State v. Lawson, 84 S.W.3d 170, 172 (Mo. Ct. App. 2002).

17. In the one-leg stand test, a suspect is asked to stand on one foot and raise the other foot while the officer counts to thirty. A suspect will fail this test if he touches the raised foot to the ground three times or more. State v. Wheeler, 764 S.W.2d 523, 524 (Mo. Ct. App. 1989).

18. Cox, 2002 WL 1070548, at \*1. In the horizontal gaze nystagmus test, "an individual's eye movements are tested as a means of determining whether they are under the influence of alcohol." State v. Hill, 865 S.W.2d 702, 704 (Mo. Ct. App. 1993), *overruled by* State v. Carson, 941 S.W.2d 518 (Mo. 1997) (en banc). The suspect is instructed to follow the movements of an object with his eyes as the officer moves the object horizontally, back and forth. *Id.* Jerking of the eyes, especially at the periphery of vision or at certain angles, indicates to the testing officer that the suspect is intoxicated. *Id.*

19. Cox, 2002 WL 1070548, at \*1.

20. Cox v. Dir. of Revenue, 98 S.W.3d. 548, 549 (Mo. 2003) (en banc).

21. Cox, 2002 WL 1070548, at \*2.

road" to sleep at approximately 9:00 p.m.<sup>22</sup> A breath analysis test showed that Cox's blood alcohol content was .18 percent.<sup>23</sup>

Subsequently, Cox received notice that his driving privileges were suspended pursuant to Missouri Revised Statute Section 302.505.<sup>24</sup> He requested an administrative hearing with the Department of Revenue.<sup>25</sup> Cox's administrative hearing resulted in the Department of Revenue sustaining the suspension of his driving privileges.<sup>26</sup> Next, Cox petitioned for de novo review in the Circuit Court of Miller County.<sup>27</sup> The parties agreed to forgo the evidentiary hearing and submitted the case on the Department of Revenue's records, including Officer Upton's report.<sup>28</sup> The Circuit Court noted, however, that Cox disputed the admissibility of Officer Upton's report on the grounds that Officer Upton lacked probable cause to arrest him.<sup>29</sup> Cox argued that there was no probable cause because Upton did not observe Cox "driving" or "operating" the car.<sup>30</sup> Ultimately, the trial court found that the Director of Revenue did not meet the required burden of proof and ordered Cox's driver's license reinstated.<sup>31</sup>

The Director of Revenue appealed to the Missouri Court of Appeals for the Western District.<sup>32</sup> Reversing the trial court's decision, the Court of Appeals held that while the circumstantial evidence that Cox was driving his vehicle was insufficient, Officer Upton had probable cause to arrest Cox for operating his vehicle based on the fact that the car was running and Cox was behind the wheel.<sup>33</sup> The Supreme Court of Missouri affirmed, holding that (1) causing a vehicle's motor to run is "operating" the vehicle; and (2) the act of turning off the engine, by itself, is not "operating."<sup>34</sup>

### III. LEGAL BACKGROUND

Revised Missouri Statute Section 302.505 outlines administrative procedures for suspending or revoking a driver's license when a person is convicted of driving a motor vehicle with a prohibited blood alcohol content.<sup>35</sup>

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22. *Id.*

23. *Id.* at \*1. At that time, a blood alcohol concentration of .10 percent or more was punishable. MO. REV. STAT. § 302.520 (Supp. 1997) (amended 2001).

24. *Cox*, 2002 WL 1070548, at \*2.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 549 (Mo. 2003) (en banc).

31. *Cox*, 2002 WL 1070548, at \*2.

32. *Id.* at \*1.

33. *Id.* at \*11.

34. *Cox*, 98 S.W.3d at 551.

35. MO. REV. STAT. § 302.505 (2000).

However, that statute does not provide a definition of the word “driving,” so Missouri courts have applied the definition of “driving” set forth in Section 577.001,<sup>36</sup> which provides definitions for criminal public safety offenses, including driving while intoxicated.<sup>37</sup> Before 1996, Section 577.001 defined “driving” as “physically driving or operating or being in actual physical control of a motor vehicle.”<sup>38</sup> The current definition, adopted in 1996, omitted the language referring to “actual physical control.”<sup>39</sup> Determining the scope of this current definition and what behaviors fall within it has continually challenged Missouri courts.

Section 302.505 indicates that an individual’s driver’s license will be suspended or revoked by the Department of Revenue “upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle” while he or she had a prohibited alcohol concentration in his or her blood.<sup>40</sup> Probable cause exists when “an officer possesses facts which would justify a person of reasonable caution to believe that an offense has been or is being committed and that the individual to be arrested committed it.”<sup>41</sup> An officer makes this determination “in relation to the circumstances as they would have appeared to a prudent, cautious, and trained police officer.”<sup>42</sup> The police officer need not actually see a person driving drunk in order to find probable cause to arrest; rather, the officer may rely on circumstantial evidence.<sup>43</sup> If circumstantial evidence shows that a defendant actually drove his or her vehicle while intoxicated, it is unnecessary to demonstrate that he or she was “operating” the vehicle. However, proof that a defendant was “operating” a running vehicle by simply sitting behind the wheel becomes important when there is little or no evidence that the defendant actually drove.

36. MO. REV. STAT. § 577.001 (2000).

37. *Weiland v. Dir. of Revenue*, 32 S.W.3d 628, 630-31 (Mo. App. Ct. 2000), *overruled in part by Verdoorn v. Dir. of Revenue*, 119 S.W.3d 543 (Mo. 2003) (en banc).

38. MO. REV. STAT. § 577.001 (1994) (amended 1996).

39. Act of July 2, 1996, No. 722, § A, 1996 Mo. Laws 574, 593 (codified as amended at MO. REV. STAT. § 577.001 (2000)).

40. MO. REV. STAT. § 302.505.1.

41. *Schulte v. Dir. of Revenue*, 55 S.W.3d 876, 879 (Mo. Ct. App. 2001).

42. *Chinnery v. Dir. of Revenue*, 885 S.W.2d 50, 51 (Mo. Ct. App. 1994) (quoting *Stoltz v. Dir. of Revenue*, 816 S.W.2d 711, 714 (Mo. Ct. App. 1991), *abrogated by Cox v. Dir. of Revenue*, 98 S.W.3d 548 (Mo. 2003) (en banc)).

43. *Kramer v. Dir. of Revenue*, 924 S.W.2d 308, 310 (Mo. Ct. App. 1996); *see also Baptist v. Lohman*, 971 S.W.2d 366, 368 (Mo. Ct. App. 1998). For example, an officer had probable cause to arrest a suspect for driving while intoxicated when the suspect was found passed out in the driver’s seat with the keys in the ignition, and there was testimony that the car had only been in the parking lot for a few minutes. *Delzell v. Lohman*, 983 S.W.2d 633, 634-35 (Mo. Ct. App. 1999).

There is no shortage of Missouri cases involving an intoxicated person asleep or unconscious behind the wheel of a vehicle. Prior to the 1996 amendment to the drunk driving penal statute, most of these cases classified such individuals as having operated the vehicle based on the fact that their actions met the definition of "actual physical control."<sup>44</sup> "Actual physical control" is defined as "existing or present bodily restraint, directing influence, domination or regulation of a vehicle . . . even where the vehicle is motionless as long as the person is keeping the vehicle in restraint or is in a position to regulate its movements."<sup>45</sup> The fact that a driver is asleep or unconscious behind the steering wheel will not defeat a finding of actual physical control.<sup>46</sup> In *State v. O'Toole*,<sup>47</sup> an intoxicated driver was found behind the wheel of a car that was running, had its headlights on, and was partially blocking westbound U.S. Highway 40.<sup>48</sup> The Missouri Supreme Court reviewed the definition of "actual physical control" and held that because the defendant "was in a position to regulate [his] vehicle's movements," he was "operating" his vehicle.<sup>49</sup>

*Baptist v. Lohman*<sup>50</sup> was the first decision to interpret the driver's license revocation statute after the 1996 amendments. In that case, a convenience store employee noticed Billy Joe Baptist's pickup truck parked in the store's parking lot just before midnight on February 27, 1997.<sup>51</sup> Although the employee did not see the truck arrive, she did notice Baptist sitting behind the wheel with his eyes closed.<sup>52</sup> After thirty to forty-five minutes, the employee

44. See *State v. O'Toole*, 673 S.W.2d 25, 27 (Mo. 1984) (en banc), *superseded by statute as stated in Cox*, 98 S.W.3d 548; *Krienke v. Lohman*, 963 S.W.2d 11, 12 (Mo. Ct. App. 1998), *abrogated by Cox*, 98 S.W.3d 548; *State v. Nickerson*, 763 S.W.2d 716, 717 (Mo. Ct. App. 1989), *abrogated by Cox*, 98 S.W.3d 548; *State v. Hoeber*, 737 S.W.2d 484, 486 (Mo. Ct. App. 1987), *abrogated by Cox*, 98 S.W.3d 548; *Taylor v. McNeill*, 714 S.W.2d 947, 948 (Mo. Ct. App. 1986) (police found defendant passed out in the passenger seat; court held defendant had physical control), *abrogated by Cox*, 98 S.W.3d 548; *City of Kansas City v. Troutner*, 544 S.W.2d 295, 300 (Mo. Ct. App. 1976) (defendant was convicted under Kansas City Municipal Ordinance § 34.116, the functional equivalent of § 577.010, which uses the definitions in § 577.001).

45. *Taylor*, 714 S.W.2d at 948.

46. *Id.* In proving actual physical control, it is not necessary to show that the defendant intended to drive the vehicle. *State v. Dey*, 798 S.W.2d 210, 212 (Mo. Ct. App. 1990), *abrogated by Cox*, 98 S.W.3d 548.

47. 673 S.W.2d 25 (Mo. 1984) (en banc), *superseded by statute as stated in Cox*, 98 S.W.3d 548.

48. *Id.* at 26.

49. *Id.* at 27; see also *State v. Stimmel*, 800 S.W.2d 156, 158 (Mo. Ct. App. 1990); *Dey*, 798 S.W.2d at 212.

50. 971 S.W.2d 366 (Mo. Ct. App. 1998).

51. *Id.* at 367.

52. *Id.*

called the police.<sup>53</sup> An officer arrived at about 1:30 a.m. and observed Baptist slumped behind the wheel of the idling truck.<sup>54</sup> The officer had some difficulty waking Baptist.<sup>55</sup> Baptist failed subsequent field sobriety tests and, after being taken to the police station, refused to submit to a breath alcohol test.<sup>56</sup> The court held that, in spite of Baptist's claims, the circumstantial evidence forming the basis of his arrest was sufficient, and the revocation of his license was upheld despite the change in the statute.<sup>57</sup> The court did not specifically address how or whether the removal of "actual physical control" from the statute affected the definition of "operate."<sup>58</sup>

In contrast, *State v. Cross*<sup>59</sup> is a post-1996 amendment case that discusses the effect of the amendment in great detail. In *Cross*, police officers found a driver slumped across the seat of his car with the headlights on and the motor running.<sup>60</sup> When the police officer who discovered him asked the defendant how much alcohol he had consumed, the defendant replied, "Not enough."<sup>61</sup> After being arrested and taken to the police station, the defendant submitted to a breathalyzer test which showed his blood alcohol content to be .182 percent.<sup>62</sup> On appeal from his subsequent conviction, the defendant argued that the court lacked sufficient evidence to establish that he was operating a motor vehicle.<sup>63</sup> The appellate court acknowledged that previous cases with similar fact patterns have focused on the "actual physical control" portion of Section 577.001.<sup>64</sup> However, the court explained that it was not necessary to determine whether a defendant was operating or driving the vehicle if actual physical control was found because that term encompassed the other two acts.<sup>65</sup> The court held that sleeping behind the wheel of a running car falls within the definition of "operate," which had been construed broadly by the Missouri Supreme Court in the past.<sup>66</sup> The court declared that "Cross'

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 368. Baptist argued that the changes in the statute required that an intoxicated person actually be seen driving a vehicle. *Id.* He asserted that circumstantial evidence was no longer enough. *Id.*

58. *Id.*

59. 34 S.W.3d 175 (Mo. Ct. App. 2000), *overruled by Cox v. Dir. of Revenue*, 98 S.W.3d 548 (Mo. 2003) (en banc).

60. *Id.* at 177.

61. *Id.* at 178.

62. *Id.*

63. *Id.*

64. *Id.* at 181.

65. *Id.* at 182-83.

66. *Id.* at 178-81. The *Cross* court failed to define "operate," but determined that the defendant's behavior undoubtedly constituted operation. *Id.* at 180. In 1949, the Missouri Supreme Court, defining the term in Section 304.010, said

acts of being in a car with the engine running and then turning off the car's engine and headlights constituted operation of his car."<sup>67</sup> The defendant's conviction was upheld.<sup>68</sup>

The term "operate" in driving-while-intoxicated statutes has been challenged as unconstitutionally vague. The Missouri Supreme Court considered and rejected such a challenge in *State v. Johnson*.<sup>69</sup> That court held that the word "operate" had a commonly understood meaning that was readily understood by jurors, and declared that it was unnecessary for a statute to define such a common word.<sup>70</sup> A more recent case challenging the use of "operate" in the current version of Section 577.001, *State v. Wiles*,<sup>71</sup> came to the same conclusion. In that case, the court held that "operate" had "a plain and ordinary meaning cognizable by a person of ordinary intelligence."<sup>72</sup>

Other states in the Eighth Circuit seem to agree with Missouri that an intoxicated slumber behind the wheel of an idling car is sanctionable behavior. Minnesota case law states that "physical control is meant to cover situations where an inebriated person is found in a parked vehicle that, without too much difficulty, might again be started and become a source of danger."<sup>73</sup> In North Dakota, a sleeping driver can be found to be in "actual physical control" when the keys are in the car's ignition but the motor is not running,<sup>74</sup>

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"[A]ll acts . . . fairly incidental to the ordinary course of [an automobile's] operation, including not only the act of stopping en route for purposes reasonably associated with the transit but also all acts which, in point of time and circumstance, are reasonably connected with entering the vehicle at the point of departure and alighting therefrom at destination."

*Teters v. Kansas City Pub. Serv. Co.*, 300 S.W.2d 511, 516 (Mo. 1957) (quoting *Karnes v. Ace Cab Co.*, 287 S.W.2d 378, 379 (Mo. Ct. App. 1956)). The *Cross* court did not adopt this definition, but merely used it as an example of the court's broad treatment of "operate." *Cross*, 34 S.W.3d at 178-79.

67. *Cross*, 34 S.W.3d at 181; see also *Hoyt v. Dir. of Revenue*, 37 S.W.3d 356, 360 (Mo. Ct. App. 2000) (supports *Cross's* holding that turning off the engine constitutes operation), *overruled by Cox v. Dir. of Revenue*, 98 S.W.3d 548 (Mo. 2003) (en banc).

68. *Cross*, 34 S.W.3d at 185.

69. 55 S.W.2d 967 (Mo. 1932).

70. *Id.* at 968.

71. 26 S.W.3d 436 (Mo. Ct. App. 2000).

72. *Id.* at 443.

73. *Flamang v. Comm'r of Pub. Safety*, 516 N.W.2d 577, 581 (Minn. Ct. App. 1994) (citing *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992)). Based on that standard, intoxicated individuals have been convicted in Minnesota for sitting in the driver's seat with the car keys in a pants pocket, *Vivier v. Comm'r of Pub. Safety*, 406 N.W.2d 587, 590 (Minn. Ct. App. 1987), and for sleeping in the front seat while the keys are in the backseat, *Sens v. Comm'r of Pub. Safety*, 399 N.W.2d 602 (Minn. Ct. App. 1987).

74. *Buck v. N.D. State Highway Comm'r*, 425 N.W.2d 370, 372-73 (N.D. 1988).



and even when the keys are in a driver's coat pocket.<sup>75</sup> Iowa's case law interprets the term "operate," found in its operating-while-intoxicated statute,<sup>76</sup> as "the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running."<sup>77</sup> Iowa courts have specifically held that an intoxicated person asleep behind the wheel of car with the engine running is "operating" the car.<sup>78</sup> South Dakota and Arkansas courts have each upheld similar convictions, holding that such behavior constitutes "physical control" of the vehicle.<sup>79</sup>

In contrast, the New Hampshire Supreme Court sided with a sleeping drunk found behind the wheel of his car with the motor running, holding that

[w]hen the occupant is totally passive, has not in any way attempted to actively control the vehicle, and there is no reason to believe that the inebriated person is imminently going to control the vehicle in his or her condition, we do not believe that the legislature intended for criminal sanctions to apply.<sup>80</sup>

In another New Hampshire case that involved a drunk who was found sitting behind the wheel of his car with the motor and lights off, the opposite result was reached because the intoxicated driver admitted that he was waiting for a telephone call from his wife so that he could pick her up.<sup>81</sup>

Arizona has chosen to reject rigid definitions of "actual physical control," choosing instead to consider several factors in each case, including:

whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air

75. *City of Fargo v. Theusch*, 462 N.W.2d 162 (N.D. 1990).

76. IOWA CODE § 321J.2 (Supp. 2003).

77. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998) (quoting *State v. Boleyn*, 547 N.W.2d 202, 205 (Iowa 1996)).

78. *State v. Murray*, 539 N.W.2d 368 (Iowa 1995) (per curiam).

79. *Blakemore v. State*, 758 S.W.2d 425, 427 (Ark. Ct. App. 1988); *Kirby v. State Dept. of Pub. Safety*, 262 N.W.2d 49, 52 (S.D. 1978).

80. *State v. Willard*, 660 A.2d 1086, 1088 (N.H. 1995). This case is an interesting contrast to Missouri law because the New Hampshire legislature had changed the law to prohibit the "driving" of a motor vehicle while under the influence. Act of Jan. 1, 1982, No. 146, 1981 N.H. Laws 142, 268-69 (codified at N.H. REV. STAT. ANN. § 265.82 (1993)). The legislature's definition of "drive" includes "actual physical control." N.H. REV. STAT. ANN. § 259:24 (1993).

81. *State v. Holloran*, 669 A.2d 800, 801-02 (N.H. 1995) (per curiam).

conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense.<sup>82</sup>

#### IV. INSTANT DECISION

##### A. Majority Opinion

In *Cox v. Director of Revenue*,<sup>83</sup> the Missouri Supreme Court held that a driver who is asleep or unconscious behind the wheel of a running vehicle is "operating" that vehicle within the meaning of Section 302.505 of the Missouri Revised Statutes.<sup>84</sup> The court also held that the act of turning off a vehicle is not, by itself, "operating" a vehicle within the meaning of the statute.<sup>85</sup> The court began by examining the terms in Section 302.505,<sup>86</sup> as they are defined in Section 577.001.<sup>87</sup> Pre-1996, the term "driving" was defined as "'physically driving or operating or being in actual physical control of a motor vehicle.'"<sup>88</sup> In 1996, the Missouri General Assembly removed the "actual physical control" language from the statute.<sup>89</sup> The court noted that when the legislature changes the language of a statute, that change is presumed to effect a change in the existing law, and that this particular change was intended to narrow the scope of behaviors that fall under the definition of "driving."<sup>90</sup> The intent of the legislature, the court observed, was to undermine its previous holding that "actual physical control" meant that "even though the machine merely stands motionless, . . . a person keeps the vehicle in restraint or [is] in a position to regulate its movements."<sup>91</sup> In addition, the fact that the legislature again used the terms "driving" and "operating" indicated that it intended both words have separate meanings, although neither word is defined in Section 577.001.<sup>92</sup> Therefore, the intent of the legislature must be discerned by examining the plain and ordinary meaning of the words.<sup>93</sup> The court examined the dictionary definition of each word and found that, according to Webster's Third New International Dictionary,

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82. *State v. Love*, 897 P.2d 626, 628 (Ariz. 1995). Arizona is a Ninth Circuit state.

83. 98 S.W.3d 548 (Mo. 2003) (en banc).

84. *Id.* at 550.

85. *Id.* at 551.

86. *Id.* at 550.

87. MO. REV. STAT. § 577.001 (2000).

88. *Cox*, 98 S.W.3d at 550 (quoting MO. REV. STAT. § 577.001.1 (1994)).

89. *Id.*

90. *Id.*

91. *Id.* (alteration in original) (quoting *State v. O'Toole*, 673 S.W.2d 25, 27 (Mo. 1984) (en banc) *superseded by statute as stated in Cox*, 98 S.W.3d 548).

92. *Id.*

93. *Id.*

“drive” means “to guide a vehicle along or through,” and “operate” means “to cause to function usually by direct personal effort.”<sup>94</sup>

The court held that because Mr. Cox was not guiding his vehicle along or through anything, he was not driving the car.<sup>95</sup> However, the court did find that Mr. Cox was operating his vehicle because he had caused its engine to function, and also found that the officer had probable cause to believe that a person behind the wheel of an idling vehicle was operating that vehicle even if that person was not awake or conscious at the time.<sup>96</sup> Because lack of probable cause was the only issue Mr. Cox raised in his appeal, the court held that the suspension of Mr. Cox’s license was appropriate.<sup>97</sup>

Finally, the court overruled previous cases that held that the act of turning off the engine was “operating” the vehicle.<sup>98</sup> Because turning off the vehicle’s engine causes the vehicle *not* to function, the court held that this act does not fall under the “operating” definition.<sup>99</sup> In addition, the court explained that cases decided before the 1996 amendment could not be relied on to properly define “operating,” because “driving” and “operating” were not defined separately before 1996.<sup>100</sup>

### B. Dissenting Opinions

Justice White dissented from the majority decision.<sup>101</sup> He agreed with the majority’s finding that the Missouri General Assembly intended to narrow the scope of the statute when they deleted the phrase “actual physical control” from the definition of “driving.”<sup>102</sup> However, he argued that the majority “appears to ignore its own observation.”<sup>103</sup> In Justice White’s view, Mr. Cox’s behavior fit exactly the court’s definition of “actual physical control”: keeping in restraint a motionless vehicle, while being “in a position to regulate its movements.”<sup>104</sup> Justice White observed that the definition of “actual physical control” comes from a case with facts that are very similar to those in the instant case.<sup>105</sup> In that case, *Kansas City v. Troutner*,<sup>106</sup> a man was

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94. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 692, 1581 (1993)).

95. *Id.*

96. *Id.* at 550-51.

97. *Id.* at 551.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (White, J., dissenting).

102. *Id.* (White, J., dissenting).

103. *Id.* (White, J., dissenting).

104. *Id.* at 551-52 (White, J., dissenting). See *supra* note 45 and accompanying text.

105. *Cox*, 98 S.W.3d at 552 (White, J., dissenting).

106. 544 S.W.2d 295 (Mo. Ct. App. 1976).

found asleep behind the wheel of a camper in a parking lot with the camper's engine running.<sup>107</sup> Justice White argued that the legislature had changed the statutory language with the intent of allowing intoxicated persons to sit or sleep behind the wheel of a motionless vehicle without criminal or administrative punishment.<sup>108</sup> He criticized the majority's definition of the word "operate" as frustrating the intent of the legislature.<sup>109</sup> Justice White reiterated that a legislative change to a statute is presumed to have some effect, but that the majority's definition of "operate," which includes the same situations that "actual physical control" used to include, prevents the legislature's statutory amendment from having any effect.<sup>110</sup>

Justice Wolff, in a separate dissent, agreed with Justice White.<sup>111</sup> He added that, in order to avoid the hazards of drunk driving, it should be legal for that person to sleep behind the wheel of a motionless car, where the risks are to the drunk only, and not to innocent parties.<sup>112</sup>

## V. COMMENT

When a statute is amended by the legislature, that amendment is intended to make some change in the existing law.<sup>113</sup> Judge Ellis, dissenting in *State v. Cross*,<sup>114</sup> pointed out that "[t]o amend a statute and accomplish nothing from the amendment would be a meaningless act."<sup>115</sup> He contends that the way Missouri courts have chosen to interpret the amendment to Section 577.001 has stripped the amendment of any meaning.<sup>116</sup>

The vast majority of "actual physical control" cases occur when an intoxicated person is sleeping behind the wheel of a running car.<sup>117</sup> Judge Ellis argued that "Missouri courts have *consistently* upheld driving while intoxicated . . . convictions and license revocations and suspensions where the defendant or licensee is sitting in a motionless vehicle with the engine running *solely* under the theory that the person was in 'actual physical control' of the vehicle."<sup>118</sup> Courts have repeatedly used the same theory to uphold convictions of drivers found asleep or unconscious behind the wheel while the motor is running.<sup>119</sup> It now appears that, after the 1996 amendment, the courts

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107. *Cox*, 98 S.W.3d at 552 (White, J., dissenting).

108. *Id.* (White, J., dissenting).

109. *Id.* (White, J., dissenting).

110. *Id.* (White, J., dissenting).

111. *Id.* (Wolff, J., dissenting).

112. *Id.* (Wolff, J., dissenting).

113. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. 1992) (en banc).

114. 34 S.W.3d 175 (Mo. Ct. App. 2000), *overruled by Cox*, 98 S.W.3d 548.

115. *Id.* at 185 (Ellis, J., dissenting).

116. *Id.* at 186 (Ellis, J., dissenting).

117. *See supra* note 44.

118. *Cross*, 34 S.W.3d at 186 (emphasis added) (Ellis, J., dissenting).

119. *Id.* (Ellis, J., dissenting).

intend the term “operate” to encompass almost all situations that previously fell solely under the term “actual physical control.”

Dissenting again in *Cox* at the appellate level, Judge Ellis pointed out that “[t]he function of the judiciary is to interpret statutory language to give effect to the intent of the Legislature and not to write or re-write statutes.”<sup>120</sup> The legislature likely looked toward the kinds of cases they wished to decriminalize and then eliminated that portion of the statute under which most of those cases fell. The majority in *Cross* claimed that it was giving effect to the intent of the legislature, but at the same time admits that “actual physical control” traditionally and most frequently involves this particular situation.<sup>121</sup> The legislature most likely intended to allow intoxicated persons to sleep in a warm, heated car rather than attempt to drive home. As Justice White exclaimed in his *Cox* dissent, the majority ignored its own research.<sup>122</sup> It would certainly seem that the judiciary and the legislature are at odds with one another: the legislature undoubtedly attempted to narrow the definition of “driving” and therefore the range of activities that can be sanctioned, while the judiciary is fighting to keep that definition as encompassing as possible. This ideological conflict was illustrated in *State v. Cross*. The majority in that case asserted, “[a] drunken individual in the driver’s seat of a motor vehicle with the engine running poses a danger to the driving public.”<sup>123</sup> The dissent, speaking on behalf of the legislature, retorted, “[t]he revision serves the legitimate purpose of encouraging individuals who are concerned that they might be impaired to get off the roadway and stop, thereby enhancing the safety of the driving public.”<sup>124</sup>

The Missouri Supreme Court in *Cox* explained that it “ascertains the legislature’s intent by considering the plain and ordinary meaning of the words in the statute;” because the definition of “operate” cannot be found within the statute, it is found in the dictionary.<sup>125</sup> That court found that to run a vehicle’s motor is “to cause to function,” and it is difficult to disagree with that finding.<sup>126</sup> Because the court had to use this dictionary definition of “operate,” it had to concede that turning off the motor is not “operating.” This concession does little to further the intent of the legislature, for it is difficult to imagine a situation in which the only behavior on the part of the driver is turning off the car. Turning off the motor has been used in the past

120. *Cox v. Dir. of Revenue*, No. WD 59189, 2002 WL 1070548, at \*15 (Mo. Ct. App. May 31, 2002) (Ellis, J., dissenting), *transferred*, 98 S.W.3d 548 (Mo. 2003) (en banc).

121. *Cross*, 34 S.W.3d at 181.

122. *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 552 (Mo. 2003) (en banc) (White, J., dissenting).

123. *Cross*, 34 S.W.3d at 182.

124. *Id.* at 187 (Ellis, J., dissenting).

125. *Cox*, 98 S.W.3d at 550.

126. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1993)); see *supra* text accompanying note 94.

as direct evidence of operation of the vehicle,<sup>127</sup> but such evidence is now largely unnecessary if a driver can be convicted for simply sitting or sleeping behind the wheel when the car is running.

*Cox v. Director of Revenue* upheld lower court authority that the removal of "actual physical control" from Section 302.505 had no effect on this common situation. If the goal of the legislature was to encourage an intoxicated driver to sleep behind the wheel rather than drive, a test similar to the one New Hampshire uses might fit this goal. Such a test allows intoxicated persons to use their vehicle as a shelter for safety and warmth while they sleep, while it punishes those who intend to move the vehicle and endanger themselves and others.<sup>128</sup> Of course, police officers and courts may understandably have trouble determining which drivers fall into which categories. A flexible, factors-based test like the one used in Arizona could also be helpful because courts would be allowed to take each individual driver's unique situation into account when deciding whether he had "actual physical control" of the vehicle.<sup>129</sup> However, this test could leave many Missouri drivers wondering where the boundaries of legally acceptable behavior lie. Perhaps, if it is still the intent of the Missouri General Assembly to allow intoxicated drivers to sit or sleep behind the wheel of an idling car, Section 302.505 should be amended again to include a definition of the term "operate" that specifically excludes such behavior.

## VI. CONCLUSION

In *Cox v. Director of Revenue*, the court defined the term "operate" as it applies to Section 302.505.<sup>130</sup> It reaffirmed that sleeping behind the wheel of a car while the engine is running falls under that definition, and it overruled cases that held that the act of turning off the car's motor is "operating."<sup>131</sup> Historically, Missouri courts have described sleeping while intoxicated in a car with the motor running as having "actual physical control" of that car. When the General Assembly removed that portion of its definition of "driving," courts began to classify that behavior as "operating" the vehicle, a term that was still included in the definition. In doing so, the court may have ignored the intent of the legislature, who, by removing "actual physical control" from the definition, intended to decriminalize and de-sanction that behavior. However, by not defining the term "operate," the legislature has allowed the judiciary to define the term using the dictionary definition. The legislature and the judiciary clearly have differing views on the dangerousness of allow-

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127. Hoyt v. Dir. of Revenue, 37 S.W.3d 356 (Mo. Ct. App. 2000).

128. See *supra* note 80 and accompanying text.

129. See *supra* note 82 and accompanying text.

130. *Cox*, 98 S.W.3d. at 550-51.

131. *Id.*

ing an intoxicated driver to turn on his motor and sleep behind the wheel. Because the Missouri Supreme Court in *Cox* upheld lower court decisions to punish drivers for such behavior, it seems the legislature will have to again amend the statute in order to obtain the effect that it seeks—allowing drunk drivers to sleep it off behind the wheel.

AMANDA ALLEN MILLER