

IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON  
April 8, 2003 Session

**STATE OF TENNESSEE v. RODNEY M. BUTLER**  
**Appeal by Permission from the Court of Criminal Appeals,**  
**Criminal Court for Madison County**  
**No. 00-543 Donald H. Allen, Judge**

---

**No. W2001-01084-SC- R11-CD - Filed June 24, 2003**

---

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

Although I agree with the law applicable to this case, I cannot agree with the majority's application of that law to the facts here presented. The majority holds that the evidence is sufficient to convict the defendant of the offense of Driving Under the Influence based on either (or both) of two theories:

1. That the defendant drove the motorcycle while under the influence of an intoxicant; or
2. That the defendant was in physical control of the motorcycle while intoxicated.

As to the first theory, I certainly acknowledge the jury's right to reject the defendant's testimony that he began drinking after having driven to Wal-Mart. Accordingly, the evidence is sufficient in this regard.

As to the physical control issue, however, I do not believe that the evidence was sufficient to show that the defendant had "actual physical control" over his motorcycle at the time of his arrest. I agree with the majority's statement that when determining whether a person is in physical control of a motor vehicle, we look to the totality of the circumstances including:

The location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, [and] the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise.

State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993).

Considered in light of the foregoing factors, I find the evidence insufficient to show that the defendant was in actual physical control of his motorcycle at the time of arrest. First, the defendant was approximately one hundred yards away from his motorcycle at the time of arrest. The majority states that the defendant “was in reasonably close proximity to his motorcycle.” I do not agree. I think we begin a downhill slide when we convict a defendant of Driving Under the Influence when that defendant was approximately a football field away from the vehicle at the time of arrest. It is simply counter-intuitive to arrest for *driving* a vehicle when the arrestee is publicly drunk a great distance from the vehicle. The implications of this application of the law for public events is great and extends far beyond the legislature’s intent in creating the Driving Under the Influence statute.

Additionally, the motorcycle was inoperable at the time of the defendant’s arrest. The mechanic testified that the spark plug in the defendant’s motorcycle had to be replaced and the cylinder drained prior to the vehicle becoming operational. It is true that the defendant could have obtained another spark plug at Wal-Mart. He could not (or at least could not without difficulty), however, drain the cylinder in the Wal-Mart parking lot. Therefore, at the time of arrest, the motorcycle was not operational. The majority states that “the fact the defendant had the present ability to remove the spark plug while in an intoxicated state demonstrates that he could direct the motorcycle’s operation and movement.” This could demonstrate, also, that the defendant was not intoxicated at the time he removed the spark plug, which is what the defendant contends. The instant case is analogous to Carter, which held that the evidence was insufficient to convict for Driving Under the Influence where the car battery was dead. Here, the defendant could not himself drain the cylinder and make the motorcycle operational.

Therefore, in consideration of the foregoing, I concur with the majority that the evidence is sufficient to prove that the defendant drove while under the influence of an intoxicant. I, however, dissent in the holding of the majority that the evidence is sufficient to prove that the defendant was in actual physical control of his motorcycle at the time of his arrest.

---

ADOLPHO A. BIRCH, JR., JUSTICE