"Driving" Under the Influence in California: Mercer v. Department of Motor Vehicles

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"DRIVING" UNDER THE INFLUENCE IN CALIFORNIA:
MERCER V. DEPARTMENT OF MOTOR VEHICLES

INTRODUCTION

California Vehicle Code section 23152(a) provides that "it is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle."1 The law seems simple enough. Until recently, however, a dispute existed among California appellate courts as to what constituted "driving" a motor vehicle for purposes of conviction under the recently amended driving under the influence (DUI)2 statutes.3 This has made it difficult to determine what, under California law, a prosecutor must prove to establish the element of "driving" for conviction of driving under the influence.

The interest in preventing motor vehicle accidents is the strongest policy underlying California drunk driving laws.4 It has been estimated that "the slaughter on our [national] highways exceeds the death toll of all our wars."5 In fact, California has not had a day without a drunk driving related fatality

1. CAL. VEH. CODE § 23152(a) (West Supp. 1989) (emphasis added). Unless otherwise indicated, all further statutory references are to the California Vehicle Code.

2. Developing case law has defined DUI as driving while under the influence of intoxicating alcohol or drugs to such an extent that it adversely and materially affects the ability to drive a motor vehicle safely or with due regard to the rights of others. Joyce, Recommendations for Safer Highways, 19 TRIAL 60 (1983). "To be under the influence . . . the intoxicating drug must so far affect the nervous system, the brain or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinary prudent and cautious person in full possession of his faculties, using care and under like conditions." Gilbert v. Municipal Court for North Orange County Judicial Dist., 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977). Driving while intoxicated (DWI) is the counterpart to DUI. The Drinking Driver, PREVENTION FILE, U. CAL. SAN DIEGO EXTENSION, Spring 1991, at 13 [hereinafter PREVENTION FILE].

3. In 1989, the California Legislature decreased the blood alcohol content (BAC) at which a person is presumed to be under the influence of intoxicating liquor from 0.10 percent to 0.08 percent. See supra note 1. Since the enactment of this amendment, alcohol-related accidents in California have decreased from 46,535 in 1986 to 41,921 in 1989, an annual difference of 4,614 accidents or nine percent. 1989 CAL. HIGHWAY PATROL ANN. REP. OF FATAL AND INJURY ACCIDENTS, Statewide Integrated Traffic Records Systems, table 5A, at 22 [hereinafter CAL. HIGHWAY PATROL]. Additionally, the combined number of fatalities and injuries have decreased proportionally. Id. table 5B, at 22.


since March 11, 1968.\(^6\) Government figures estimate that at least one in every 2,000 drivers is drunk each night but fewer than one percent are ever arrested.\(^7\) According to the National Highway Traffic Safety Administration, short term programs have been developed to deter the majority of drunk drivers who are never arrested; however, for any long term deterrence, society must harden its belief that drunk driving is unacceptable behavior.\(^8\)

There is evidence that this is beginning to occur. In the early 1980's, several citizens' organizations against drunk driving were formed, including Mothers Against Drunk Driving, Students Against Drunk Driving, and Remove Intoxicated Drivers.\(^9\) The television industry has begun to portray alcohol consumption and abuse in a more negative light.\(^10\) "Designated drivers," people who chauffeur their alcohol consuming friends to and from social gatherings but do not themselves drink, are becoming commonplace.\(^11\) In fact, as of July 1, 1988, Wyoming became the fiftieth state to raise its drinking age to twenty-one.\(^12\) And, because of federal legislation, consumers now see warnings on alcoholic beverage containers similar to those appearing on tobacco products.\(^13\)

Additionally, some judges have devised unusual and controversial sanctions in response to the drunk driving problem.\(^14\) These sanctions include community service,\(^15\) ordering convicted drunk drivers to place bumper stickers on their cars telling of their convictions,\(^16\) installation of breath analyzers and ignition locking devices in vehicles as a condition of probation,\(^17\) and the chance for chronic drunk drivers to opt out of jail with the

\(^{6}\) CAL. HIGHWAY PATROL, supra note 3.
\(^{7}\) Quade, War on Drunk Driving: 25,000 Lives at Stake, 68 A.B.A. J. 1551 (1982).
\(^{8}\) Id. In Scandinavian countries, where tough DUI laws have been implemented for decades, there is negative public sentiment toward drinking in excess and driving. Acker, A Report on America's War Against Drunk Driving, 25 CRIM. L. BULL. 376, 394 (1989).
\(^{9}\) Acker, supra note 8, at 391.
\(^{10}\) Id. at 392. It is estimated that the average child has seen at least 70,000 messages to drink beer by the age of 15. McAllister, The Drunk Driving Crackdown: Is It Working?, 74 A.B.A. J., Sept. 1, 1988, at 52, 56. Each year more people in America are arrested for drunk driving than for any other offense; beer is the beverage which a majority of convicted DUI offenders were drinking before their arrest. PREVENTION FILE, supra note 2, at 13-14.
\(^{11}\) Acker, supra note 8, at 392.
\(^{12}\) McAllister, supra note 10, at 54.
\(^{13}\) Acker, supra note 8, at 393. These warnings read: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcohol beverages impairs your ability to drive a car or operate machinery, and may cause health problems." Id.
\(^{14}\) Moss, New Attacks on Drunk Drivers, 73 A.B.A. J., Feb. 1, 1987, at 20. Critics contend that some judges refuse to implement tough sentences because they drink and drive themselves. Id.
\(^{15}\) Compton, Community Service as a Sanction for Driving While Intoxicated, 21 PROS., J. NAT'L DIST. ATT'YS A. 5-6 (1988).
\(^{16}\) Moss, supra note 14, at 20. These stickers read "Convicted Drunk Driver—Restricted License." Id.
use of a drug, known as Antabuse, that makes them seriously ill if they drink. 18 Recently, a Louisiana judge imposed a thirty year sentence in the state penitentiary for an individual who was convicted of his fourth DUI offense. 19 The trial judge told the defendant, "My goal is not to punish you, but to protect us." 20

There are over 40,000 alcohol-related accidents in California annually. 21 Consequently, determining what constitutes "driving" will have a direct impact on the rights of many California drivers, reaching beyond the narrow issue of the prosecution and defense of DUI cases. This Note begins with an overview of the recent California Supreme Court decision in Mercer v. Department of Motor Vehicles 22 which held that volitional vehicle movement is necessary to be convicted of DUI in California. This Note reviews the conflicting appellate court decisions of the First and Second Districts which reached opposite decisions on almost identical facts and discusses the rationale behind the requirement of movement. Next, it argues that although the California Supreme Court now requires movement as an essential element of a lawful DUI arrest, and holds that a situation which lacks evidence of observed movement of a vehicle should be classified as an attempted DUI, the California Legislature should amend section 23152(a). The amendment should forbid acts of operating or having actual physical control over a motor vehicle while intoxicated. This precludes the defense of voluntary intoxication, thus following the trend of the forty-three other states which have revised their DUI statutes. Finally, this Note concludes with a summary of pending relevant legislation.

I. THE CURRENT INTERPRETATION OF DUI IN CALIFORNIA

A. Mercer v. Department of Motor Vehicles

On August 13, 1988, Barrie Mercer was arrested for driving while under the influence of alcohol, pursuant to section 23152(a). 23 The arresting officer had "responded to calls from neighbors." 24 When he arrived at the scene, the officer saw Mercer alone in the car with his seatbelt fastened, slumped behind the steering wheel. 25 The car was legally parked along the

19. McAllister, supra note 10, at 56.
20. Id.
21. It is estimated that 65 out of every 100 Americans will be involved in an alcohol-related accident in their lifetimes. NATIONAL HIGHWAY TRAFFIC AND SAFETY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, DRUNK DRIVING FACTS (1984).
22. 53 Cal.3d 753, 809 P.2d 404, 280 Cal. Rptr. 745 (1991) [hereinafter Mercer-Sup. Ct.], reversing 222 Cal. App. 3d 823, 271 Cal. Rptr. 885 (2d Dist. 1990) (222 Cal. App. 823-35 was deleted when the California Supreme Court granted review; all further Appellate Court references are to 271 Cal. Rptr. only) [hereinafter Mercer-App.].
23. Mercer-Sup. Ct., 53 Cal.3d at 756, 809 P.2d at 405, 280 Cal. Rptr. at 746.
24. Id.
25. Id. at 757, 809 P.2d at 405, 280 Cal. Rptr. at 746.
curb of a residential street, the engine was running and the headlights were on.26 The officer rocked the car and banged on it several times with his flashlight before Mercer woke.27 Once aroused by the officer, Mercer attempted to put the car in gear but was unsuccessful.28 Eventually, Mercer stopped trying to put his car in gear and rolled down his window.29 The officer smelled a heavy odor of alcohol on Mercer’s breath and asked him to step out of the car.30 While guiding Mercer to the sidewalk, the officer also observed Mercer’s slurred speech and red, watery eyes.31 Mercer was then arrested for driving while under the influence of alcohol.32 The officer advised him of the implied consent law on chemical testing,33 but Mercer refused to take the tests, stating “I wasn’t driving.”34 At trial, the officer testified that the car had never moved in his presence.35

That Mercer was intoxicated is undisputed.36 However, since Mercer’s car never moved in the officer’s presence, Mercer contended that his warrantless arrest was invalid under Penal Code section 836.37 Section 836 of the Penal Code permits an officer to make a warrantless misdemeanor38 arrest if he or she has “reasonable cause to believe that the person to be

26. Id.
27. Id. at 757, 809 P.2d at 406, 280 Cal. Rptr. at 747.
28. The car had a manual transmission. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. At the time of Mercer’s arrest, the pertinent part of California Vehicle Code section 23157(a)(1) provided:

Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her blood. . . . The testing shall be incidental to a lawful arrest. . . . [F]ailure to submit to . . . the required chemical testing will result in a fine and . . . the revocation of the person’s privilege to operate a motor vehicle for a period of three years if the refusal occurs within seven years of two or more separate violations of . . . section 23152 . . . which resulted in convictions.

34. Mercer-Sup. Ct., 53 Cal.3d at 757, 809 P.2d at 406, 280 Cal. Rptr. at 747.
35. Id. at 758, 809 P.2d at 406, 280 Cal. Rptr. at 747.
37. Mercer-Sup. Ct., 53 Cal.3d at 758, 809 P.2d at 406, 280 Cal. Rptr. at 747.
38. DUI is a felony if there is bodily injury (or fatality) to a person other than the driver. CAL. VEH. CODE § 23153 (West 1968).
arrested has committed a public offense in his presence. . . .”39

Pursuant to section 13353(a)(3) and in light of Mercer’s two previous DUI convictions, the Department of Motor Vehicles (DMV) revoked his driving privileges for three years.40 Mercer challenged his arrest and subsequent license revocation.41

The trial court concluded that the revocation of Mercer’s license was improper because section 23152(a) requires vehicular movement and the officer did not observe Mercer’s car move.42 Therefore the violation did not occur in the officer’s presence as required for a lawful DUI arrest pursuant to Penal Code section 836.43 The Second Appellate District reversed the trial court’s decision. It held that Mercer’s DUI arrest was justified because Mercer had “exercised such a degree of control over the vehicle that he was driving” within the meaning of section 23152(a) and that the offense was committed in the arresting officer’s presence.44 The court reasoned that the officer saw Mercer “assume active control over the vehicle and take every step necessary to resume travel along the public street,” and that the vehicle never moved in the officer’s presence did not invalidate the drunk driving arrest.45

The narrow issue before the California Supreme Court was whether an officer must witness movement of a lawfully parked vehicle in order to have reasonable cause to believe the vehicle has been driven in violation of section 23152(a), and that a public offense has been committed in his presence pursuant to Penal Code section 836. The court reversed the decision of the

40. Mercer-Sup. Ct., 53 Cal.3d at 758, 809 P.2d at 406, 280 Cal. Rptr. at 747. Former section 13353(a)(3) provided for a three-year revocation of driving privileges where the person who refused chemical testing made at or near an accident scene, or when a vehicle is found protruding into the street. Id. at 761, 809 P.2d at 408, 280 Cal. Rptr. at 749. Section 40300.5 provides: “Notwithstanding any other provision of law, a peace officer may, without a warrant, arrest a person who is (1) involved in a traffic accident or (2) observed by the peace officer in or about a vehicle which is obstructing a roadway, when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug.” CAL. VEH. CODE § 40300.5 (West 1984). However, neither exception applies when a vehicle is lawfully parked, as in Mercer. Mercer-Sup. Ct., 53 Cal.3d at 761, 809 P.2d at 408, 280 Cal. Rptr. at 749.
41. Id.
42. Id. The Legislature has enacted an exception to Penal Code section 836, subdivision 1, for “drunk driving” arrests made at or near an accident scene, or when a vehicle is found protruding into the street. Id. at 761, 809 P.2d at 408, 280 Cal. Rptr. at 749. Section 40300.5 provides: “Notwithstanding any other provision of law, a peace officer may, without a warrant, arrest a person who is (1) involved in a traffic accident or (2) observed by the peace officer in or about a vehicle which is obstructing a roadway, when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug.” CAL. VEH. CODE § 40300.5 (West 1984). However, neither exception applies when a vehicle is lawfully parked, as in Mercer. Mercer-Sup. Ct., 53 Cal.3d at 761, 809 P.2d at 408, 280 Cal. Rptr. at 749.
43. Id. at 758, 809 P.2d at 406, 280 Cal. Rptr. at 747.
44. Id. at 758, 809 P.2d at 406, 280 Cal. Rptr. at 747.
45. Mercer-App., 271 Cal. Rptr. at 888.
Second District and concluded that "[s]ection 23152 requires proof of volitional movement of a vehicle" to justify an arrest for misdemeanor DUI. The court based its decision on: (1) the "plain meaning" of the statutory term "drive," (2) the use of that and related terms by the California Legislature in related statutes, and (3) the interpretation of the word "drive" and related terms in numerous decisions by other states.

The court noted, however, that on facts of the case, Mercer could have been arrested for public intoxication or attempted DUI. Additionally, the court suggested that the state legislature should revise the relevant DUI statutes.

B. California Precedent Supporting DUI Without Movement

The Second Appellate District Court was not without precedent for its decision in Mercer. The Mercer appellate court relied on several earlier California cases to support its holding that vehicle movement is not required for an officer to make a lawful misdemeanor DUI arrest. The leading cases the court cited as authority were People v. Wilson and Henslee v. Department of Motor Vehicles.

In Wilson, the defendant was parked on the shoulder of a freeway, approximately one and a half miles from the nearest on ramp, with the left side of the vehicle partially in a traffic lane. The engine was running and the lights and the air conditioner were on. A California Highway Patrol officer noticed the vehicle and stopped to inspect it. Before waking the driver, the officer opened the door and turned off the engine. The driver exhibited signs of intoxication, performed poorly on the field sobriety tests, and was subsequently arrested for DUI. The driver challenged section 23152(a) as being unconstitutionally vague because it fails to give a person

46. Mercer-Sup. Ct., 53 Cal.3d at 768, 809 P.2d at 414, 280 Cal. Rptr. at 755.
47. Id.
48. Id. at 762, 809 P.2d at 409, 280 Cal. Rptr. at 750.
49. Id. at 769, 809 P.2d at 414, 280 Cal. Rptr. at 755.
50. 176 Cal. App. 3d Supp. 1, 222 Cal. Rptr. 540 (2d Dist. 1985) (holding that in the absence of evidence of observed movement of a vehicle, circumstantial evidence is sufficient to establish the element of "driving" for purposes of proving DUI). The California Supreme Court upheld the Wilson decision in its Mercer opinion and emphasized that "[w]e do not hold that observed movement of a vehicle is necessary to support a conviction for a 'drunk driving' under section 23152. The lower courts have routinely upheld such convictions in the absence of evidence of observed movement of a vehicle . . . . Nothing in this opinion calls in question the holding of these cases." Mercer-Sup. Ct., 53 Cal.3d at 756-57, 809 P.2d at 405, 280 Cal. Rptr. at 746.
52. Wilson, 176 Cal. App. 3d Supp. at 5, 222 Cal. Rptr. at 541.
53. Id.
54. Id.
55. Id. at 3-4, 222 Cal. Rptr. at 541.
adequate notice of what conduct is unlawful.\textsuperscript{56}

The \textit{Wilson} court concluded that the word "drive" is not vague and reasoned that a "reasonable person would construe the phrase 'to drive a vehicle' in subdivision (a) of Section 23152 of the Vehicle Code as encompassing any act or action which is necessary to operate the mechanisms and controls and direct the course of a motor vehicle."\textsuperscript{57}

The \textit{Mercer} court also relied on the Sixth District decision of \textit{Henslee}.\textsuperscript{58} In \textit{Henslee}, the arresting officer noticed a vehicle parked in a traffic lane and facing in the wrong direction.\textsuperscript{59} The engine was running, the lights were on, and the driver was asleep behind the wheel.\textsuperscript{60} The driver did not respond when the officer shook her, so the officer used a twist lock to wake her.\textsuperscript{61} The officer noticed an odor of alcohol and the driver's slurred speech.\textsuperscript{62} The driver put the transmission into "drive" and attempted to drive away.\textsuperscript{63} The car traveled several inches and the officer reached in and physically stopped her from proceeding.\textsuperscript{64} The driver "repeated this conduct two or three more times" but the officer was able to stop the vehicle on each occasion.\textsuperscript{65} The driver refused to take a field sobriety test. The officer then placed her under arrest.\textsuperscript{66} Subsequently, the DMV suspended her driving privileges for six months.\textsuperscript{67}

The Sixth District found a lawful warrantless arrest for driving under the influence and stated "'[i]n our opinion, the term 'drive' within the meaning of Vehicle Code section 23152(a) includes the situation where, as here, an intoxicated individual actively asserts control over a vehicle and takes every step necessary to resume travel along the public road.'"\textsuperscript{68}

The Second Appellate District Court agreed with the analysis of \textit{Wilson} and \textit{Henslee} and applied those rationales to the fact situation at issue in which no movement occurred while a police officer was present.

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\textsuperscript{56} \textit{Id}. at 5, 222 Cal. Rptr. at 542.
\textsuperscript{57} \textit{Id}. at 6, 222 Cal. Rptr. at 543.
\textsuperscript{58} \textit{Mercer/App.}, 271 Cal. Rptr. at 889.
\textsuperscript{59} \textit{Henslee}, 168 Cal. App. 3d at 448, 214 Cal. Rptr. at 250.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} \textit{Id}. Though generally a defensive move, a twist lock or twist hold, is also used to wake a sleeping intoxicated person. \textit{Id}. at 448, 214 Cal. Rptr. at 251.
\textsuperscript{62} \textit{Id}.
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} \textit{Id}. While the court found that "such a minimal movement . . . is not the type of driving which the vehicle code seeks to prohibit," the Sixth District refused to read section 23152 so narrowly. \textit{Id}. at 451, 214 Cal. Rptr. at 253. Although the appellate court held that the defendant drove her vehicle as a matter of law, it also noted that section 23152(a) includes active control over a vehicle. \textit{Id}. at 451-52, 214 Cal. Rptr. at 253. The California Supreme Court rejected such a broad interpretation of the word "drive." \textit{Mercer-Sup. Ct.}, 53 Cal.3d at 768, 809 P.2d at 413, 280 Cal. Rptr. at 754.
\textsuperscript{65} \textit{Henslee}, 168 Cal. App. 3d at 448, 214 Cal. Rptr. at 251.
\textsuperscript{66} \textit{Id} at 449, 214 Cal. Rptr. at 251.
\textsuperscript{67} \textit{Id} at 450, 214 Cal. Rptr. at 252.
\textsuperscript{68} \textit{Id}. at 451-52, 214 Cal. Rptr. at 253.
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C. California Precedent Requiring Movement for DUI.

The Second Appellate District decision in Mercer was in direct contradiction to the recent decision of the First District in Music v. Department of Motor Vehicles which involved an almost identical fact situation. The California Supreme Court relied on the rationale of Music when it reversed Mercer and held that volitional movement of the vehicle is required for a lawful DUI arrest.

In Music, the officer drove past a truck three times within the course of an hour. Each time, the truck and the driver were in the same condition: the truck was parked along the shoulder of a public street with its engine running and yellow parking lights on. The driver was slumped over the steering wheel. Eventually, the officer stopped to investigate and tried to wake the driver. The officer observed that the driver had a strong odor of alcohol on his breath, his speech was slurred, his eyes were red and glassy, and he seemed confused. When the officer instructed him to shut off the engine, the driver reached for the gear shift and the officer quickly reached in the window and turned off the engine. The driver claimed that he had decided to sleep in his truck “until he was okay to drive home,” and had turned on the engine so the heater would run because it was raining. Despite these claims, he was arrested for misdemeanor DUI in violation of section 23152(a) when he failed a number of field sobriety tests. The driver refused to submit to chemical testing. Because he had no previous DUI convictions, his license was suspended for six months pursuant to section 13353.

The driver in Music challenged the validity of the suspension of his driving privileges. The First Appellate District concluded that the suspension was not valid since the arrest had been illegal because the vehicle had never moved in the officer’s presence. The First Appellate District Court relied on the California cases of Padilla v. Meese and People v. Engleman.

69. 221 Cal. App. 3d 841, 270 Cal. Rptr. 692 (1st Dist. 1990), upon which the California Supreme Court relied when it ruled on Mercer.
70. 53 Cal.3d at 768, 809 P.2d at 413, 280 Cal. Rptr. at 755.
71. 221 Cal. App. 3d at 844, 270 Cal. Rptr. at 694.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id. at 846, 270 Cal. Rptr. at 695.
79. Id. at 851, 270 Cal. Rptr. at 698.
80. 3d 1022, 229 Cal. Rptr. 310 (3d Dist. 1986).
In Padilla, a highway patrol officer received a call from an inspector at an agricultural inspection station; the inspector had stopped a car whose driver was intoxicated. When he arrived at the inspection station, the officer found Padilla sitting in the driver's seat with the engine running. He placed Padilla under arrest for DUI and requested that the defendant submit to a chemical test. Padilla refused and consequently his driving privilege was suspended. On appeal, the Third District concluded that a vehicle must be moved in the presence of the arresting officer in order for the offense to occur in his presence so as to enable him to make a valid misdemeanor arrest.

The Music court also relied on the Second District decision in Engleman. In Engleman, two California Highway Patrol officers found the defendant asleep behind the wheel of his car on the shoulder of a road. The car was in park, but the engine was running. One of the officers rapped on the window for several minutes before the defendant woke up. The officers noticed an open can of beer on the dashboard and observed that the defendant “displayed symptoms of intoxication.” The defendant failed a field sobriety test and was then placed under arrest. Subsequently, at the station the defendant was given a breath test. The results of the test were admitted into evidence against him at trial.

The Second Appellate District held that it was error to admit the breath test results because they were the product of an illegal warrantless arrest. It reasoned that the defendant did “not drive his car in the presence of the officers and therefore could not be validly arrested” for driving while under the influence of intoxicating liquor.

The Music court agreed with the rationale of Padilla which distinguished

82. Padilla, 184 Cal. App. 3d at 1025, 229 Cal. Rptr. at 311.
83. Id.
84. Id.
85. Id.
86. Id. at 1029, 229 Cal. Rptr. at 314. The Mercer court distinguished Padilla by noting that at issue in Padilla was not the validity of the DUI arrest, but rather the validity of a citizen’s arrest. Mercer-App., 271 Cal. Rptr. at 891.
88. Id.
89. Id.
90. See generally supra note 10.
92. Id.
93. Id.
94. Id. at 20, 172 Cal. Rptr. at 476.
95. Id. at 19, 172 Cal. Rptr. at 476.
Henslee from Engleman. The Padilla court reasoned that the driver in Henslee actually moved the car in the officer's presence, whereas in Engleman, no movement had occurred in the presence of the officer. The Padilla court had also noted that the driver in Henslee only moved the car slightly. "But the movement need not be extensive; even a matter of a few inches will suffice to constitute driving. In our view, if the driver does not move the vehicle in the officer's presence, the offense has not been committed in his presence." The Music court concluded that according to California precedent, "if the driver does not move the vehicle in the officer's presence at least a few inches, the offense of driving under the influence has not occurred in the officer's presence. Any ensuing warrantless arrest is invalid." Thus, by adopting Music, the California Supreme Court made movement a necessary requirement for a lawful arrest under section 23152(a).

II. SECTION 23152(A): A MOVEMENT REQUIREMENT IS JUSTIFIED BY STATUTORY INTERPRETATION

In justifying a volitional movement requirement for a lawful DUI arrest under section 23152(a), the California Supreme Court based its decision on: (1) the plain and ordinary meaning of the statutory term "drive," (2) the use of the term "drive" and related terms by the California Legislature in related statutes, and (3) numerous decisions of other states which interpret the word drive and related terms.

96. Music, 221 Cal. App. 3d at 849-50, 270 Cal. Rptr. at 697. With respect to Henslee, the Music court did not agree with the definition given to the term "drive" but did agree with the DUI conviction because the driver actually moved the vehicle in the officer's presence. Id. The California Supreme Court upheld the Music court's interpretation of Henslee. Mercer-Sup. Ct., 53 Cal.3d at 769, 809 P.2d at 414, 280 Cal. Rptr. at 755.


98. Id. at 1029, 229 Cal. Rptr. at 314.

99. Id. The Henslee court, upon which the Mercer appellate court relied, distinguished Engleman from Henslee by noting that the driver in Henslee had parked "the wrong way in a traffic lane and, unlike the defendant in Engleman, she actively placed the car in 'drive' and would have continued but for the officer's quick reactions." Henslee, 168 Cal. App. 3d at 453, 214 Cal. Rptr. at 254.

100. Music, 221 Cal. App. 3d at 850, 270 Cal. Rptr. at 698. The Music court also successfully distinguished Wilson. The Music court noted that the Wilson court stated: "With respect to the element of 'driving,' a 'slight movement' of the vehicle constitutes direct evidence that the vehicle was being driven." Music, 221 Cal. App. 3d at 850, 270 Cal. Rptr. at 698. In Music, the First District expressed the opinion that "at issue in Wilson was not the validity of a warrantless arrest but rather the sufficiency of the evidence to support a conviction of driving under the influence." Id.

101. Mercer-Sup. Ct., 53 Cal.3d at 768, 809 P.2d at 414, 280 Cal. Rptr. at 755.
A. The Plain and Ordinary Meaning of The Term
"Drive" Necessarily Includes Movement.

California case law rejects the contention that like terms must be defined similarly. When determining the meaning of a statutory provision, one must first look to the language of the statute itself.\(^{102}\) If a statute's language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.\(^{103}\) Section 23152(a) makes it unlawful for a person to drive a vehicle while under the influence of intoxicating liquor or drugs or any combination thereof.\(^{104}\) Similarly, section 23157(a)(1) provides that a person who drives while under the influence impliedly gives consent to chemical testing.\(^{105}\) Nevertheless, the California Vehicle Code gives no definition of the terms "drive" or "driving." "Driver," however, is defined in the Code as "a person who drives or is in actual physical control of a vehicle."\(^{106}\)

Elementary principles of statutory interpretation state that "where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed."\(^{107}\) Therefore, the definition of "driver," which includes physical control of a vehicle, cannot be used to distort the term "drive" within sections 23152 and 23157. Rather, California law dictates that the plain and ordinary meaning of the term "drive" be used.

Webster's Third New International Dictionary supports a definition of "drive" that includes movement.\(^{108}\) Similarly, Black's Law Dictionary defines the term "drive" as "[t]o urge forward under guidance, to compel to go in a particular direction, urge onward and direct the course of."\(^{109}\)

\(^{102}\) People v. Craft, 41 Cal. 3d 554, 715 P.2d 585, 224 Cal. Rptr. 626 (1986).


\(^{104}\) See supra note 1.

\(^{105}\) See supra note 33.

\(^{106}\) CAL. VEH. CODE § 305 (West 1971) (emphasis added).

\(^{107}\) People v. Drake, 19 Cal. 3d 749, 566 P.2d 622, 139 Cal. Rptr. 720 (1977); People v. Valentine, 28 Cal. 2d 121, 169 P.2d 1 (1946); See also People v. Woodhead, 43 Cal. 3d 1002, 741 P.2d 154, 239 Cal. Rptr. 656 (1987). (When the Legislature has "employed a term in one place and omitted it in another, the term should not be inferred where it has been excluded.")

\(^{108}\) Mercer-Sup. Ct., 53 Cal.3d at 763, 809 P.2d at 410, 280 Cal. Rptr. at 751. (quoting WEBSTER'S THIRD NEW INT. DICTIONARY 692 (16th ed. 1971)). ("Drive" is defined as "1: to set and keep in motion or in action through application of some amount of force: a: to impart an onward or forward motion to by expenditure of physical force . . . . b: to impart violent motion or great impetus to . . . .")

\(^{109}\) BLACK'S LAW DICTIONARY 495 (6th ed. 1990). Note that each phrase within the definition is separated from the next by a comma and that semi-colons are not utilized. Nor is the disjunctive "or" found anywhere in the definition. Therefore, the definition must be taken as a whole.
Consequently, the plain and ordinary meaning of “drive” requires movement. It is incorrect to construe the language of sections 23152 and 23157 to include instances where no movement has occurred.

In Mercer, the California Supreme Court noted that in “everyday usage, the phrase, ‘to drive a vehicle,’ is understood as requiring evidence of volitional movement of a vehicle.”110 In addition to referring to section 305 of the Vehicle Code, which defines the term “driver,” the Court also considered section 13353.2 and section 12501 to interpret the phrase “to drive.”

Section 13353.2 states that the DMV “shall immediately suspend the privilege of any person to operate a motor vehicle if the person was driving or was in actual physical control of a motor vehicle.”111 Similarly, section 12501 exempts certain persons “driving or operating” vehicles from the general rule of requiring a “driver’s license.”112

The court concluded that the use of the disjunctive “or” in these three related statutes suggests an important distinction: the Legislature differentiates between one who “drives” a vehicle and one who “operates” or “is in actual physical control of” a vehicle.113 The court concluded its analysis of related statutes by noting that “the Legislature knows how to broaden the scope of coverage when it wants to.”114 Clearly, the phrase “to drive a vehicle” in section 23152 requires proof of volitional movement based on the ordinary use of the term “drive” and the use of related terms in related statutes.

B. Penal Statutes Require Fair Warning

A basic premise of the criminal law is that “conduit is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.”115 This premise is known as the “principle of legality.”116 The principle of legality is reflected in the rule of strict construction of criminal statutes and the void-for-vagueness doctrine.117

The rule that criminal statutes must be strictly construed in favor of the defendant is elementary in statutory interpretation.118 There are two reasons for this rule of strict construction: (1) criminals should be given fair warning as to what conduct is punishable before they engage in conduct, and (2) the power to define crimes lies not with the courts but rather with the
If the term "drive" in section 23152(a) had been interpreted in accordance with the appellate court's decision in Mercer, making movement unnecessary for a violation of the statute, it would not be clear to a reasonable person what conduct this statute forbids. For example, must an intoxicated person necessarily be in control of a running vehicle to violate section 23152(a) according to the Second District? Or is it enough that the driver have possession of the car keys while simply sitting in the dormant vehicle? Under the Mercer appellate court's interpretation of the word "drive," these acts could be potentially criminal. The result, however, is unclear to a reasonable person. If a statute is unclear, then is it unlikely to give fair warning.120

If a statute is found to be void-for-vagueness, then it is held to be unconstitutional.121 A statute is deemed to be vague when "men of common intelligence must differ as to its application."122 As discussed previously, section 23152(a) was challenged as being unconstitutionally vague in Wilson where the defendant claimed that section 23152(a) failed to give a person adequate notice of what conduct is unlawful.123 The Second Appellate District held that the term "drive" in section 23152(a) is not vague and consequently the statute was not invalidated.124

However, a statute which is not so vague as to be unconstitutional may still be ambiguous. "Ambiguity exists if reasonable persons can find different meanings in a statute, document, etc."125 When a criminal statute is ambiguous, it must be narrowly construed to be upheld by the courts.126

It is obvious that the term "drive" in section 23152(a) is ambiguous because the First and Second Appellate Districts had defined the term differently. Thus, it must be narrowly construed to be upheld. Narrow construction of section 23152(a) demands that the term "drive" necessarily include movement. A broader interpretation would not provide the requisite consistency with the rule of statutory construction. The California Supreme Court interpreted the term "drive" in accordance with Music to require movement.127 The court noted that "we are guided by the rule that because section 23152 is a penal statute, it should be strictly rather than broadly

119. Id. at 78.
120. Id. § 2.2(d), at 96.
121. Id. § 2.2(d), at 80.
123. Wilson, 176 Cal. App. 3d Supp. at 9, 222 Cal. Rptr. at 542.
124. Id.
126. W. LAFAVE & A. SCOTT, JR., supra note 115, § 2.2(d), at 80. This statutory interpretation principle is used with regard to criminal as well as civil statutes. Id.
127. Mercer-Sup. Ct., 53 Cal.3d at 768, 809 P.2d at 414, 280 Cal. Rptr. at 755.
construed."128 A bright line has been created and the forbidden conduct is clear: volitional movement is a prerequisite for conviction under section 23152. This clarity gives fair warning that such conduct is criminal, satisfying the rule of strict construction of criminal statutes.

C. "Actual Physical Control" And "Operating" Are Broader Terms Than "Driving."

DUI statutes vary from state to state by prohibiting different activities.129 Not all of them specifically require that a person "drive" a motor vehicle while intoxicated, as the California statute does.130 Instead, some state statutes merely prohibit the driver from "operating" a motor vehicle while under the influence.131 Other states prohibit the driver from being in "actual physical control" of a vehicle.132 In addition, many statutes combine these activities and so prohibit not only driving a motor vehicle while intoxicated, but also operating or being in actual physical control. These distinctions are discussed below.

1. "Driving" Defined. Ordinarily, courts which have defined "driving" have held that the term requires movement.133 Many courts require that for a defendant to be convicted of drunk driving, his or her vehicle must have been in motion.134 Other courts, including the Second Appellate District of California in the case of People v. Jordan,135 have held that driving means steering and controlling a vehicle while in motion.136 In Jordan, the court held that the defendant, who was pedaling a moped without the motor turned on, "drove" within the meaning of the California drunk driving laws.137 The court concluded that the term "drive" means to steer or

128. Id. at 763, 809 P.2d at 410, 280 Cal. Rptr. at 751.
129. Annotation, What Constitutes Driving, Operating, or Being in Actual Physical Control of Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance, 93 A.L.R.3d 7, 10 (1979).
130. See supra note 1. Since 1923, section 23152 has retained the language "drive a vehicle" as opposed to "operating" or "actual physical control" of a vehicle. 1923 CAL. STAT. 266, § 112. In contrast, California's first DUI statute forbade an intoxicated person to "operate or drive" a vehicle.
131. Annotation, supra note 129, at 11.
132. Id.
133. Id. at 15.
control a vehicle in motion.\textsuperscript{138}

2. \textit{\textquoteleft\textquoteleft Operating\textquote right\textquotequote right\textquoteleft\textquotequote} Defined. In contrast, it is clearly established that \textquoteleft\textquoteleft operating\textquote right\textquotequote right\textquotequote a vehicle is a broader term than the term \textquoteleft\textquoteleft driving\textquote right\textquotequote right\textquotequote since operating does not require that the vehicle be in motion.\textsuperscript{139} Courts have held that a person may operate a vehicle without driving it.\textsuperscript{140} Though there are several variations, a typical definition of \textquoteleft\textquoteleft operating\textquote right\textquotequote right\textquotequote is the \textquoteleft\textquoteleft doing of any act that makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.\textquotequote right\textquotequote right\textquotequote.\textsuperscript{141}

For example, the former DUI statute in Georgia prohibited \textquoteleft\textquoteleft driving and operating\textquote right\textquotequote right\textquotequote a motor vehicle while intoxicated.\textsuperscript{142} The Georgia case of \textit{Flournoy v. State},\textsuperscript{143} held that a motorist who was sitting in the driver’s seat of a car located on a public highway with the motor running and who turned on the lights as the arresting officers approached, was \textquoteleft\textquoteleft operating\textquote right\textquotequote right\textquotequote the vehicle within the meaning of a statute.\textsuperscript{144} Noting that the motorist was charged with driving and operating a motor vehicle while under the influence, the Georgia appellate court pointed out that \textquoteleft\textquoteleft although the evidence might be insufficient to establish that the motorist had driven the automobile to the place where it was found by the arresting officers, the evidence was sufficient to show that he had operated the automobile.\textquotequote right\textquotequote right\textquotequote.\textsuperscript{145} Further, the court observed that the word \textquoteleft\textquoteleft operate\textquote right\textquotequote right\textquotequote has a broader meaning than \textquoteleft\textquoteleft drive\textquote right\textquotequote right\textquotequote so as to include not only motion of the vehicle but also \textquoteleft\textquoteleft acts which engage the machinery of the vehicle that, alone or in sequence, will set in motion the motive power of the vehicle.\textquotequote right\textquotequote right\textquotequote.\textsuperscript{146}

3. \textit{\textquoteleft\textquoteleft Actual Physical Control\textquote right\textquotequote right\textquotequote} Defined. Similarly, the term \textquoteleft\textquoteleft actual physical control\textquote right\textquotequote right\textquotequote also does not require movement.\textsuperscript{147} The most commonly used definition of actual physical control has been \textquoteleft\textquoteleft existing or present bodily restraint, directing influence, domination or regulation of any vehicle.\textquotequote right\textquotequote right\textquotequote.\textsuperscript{148} Several courts applying this definition have specifically held that movement

\begin{thebibliography}{148}
\bibitem{138} \textit{Id.} at Supp. 7, 142 Cal. Rptr. at 405.
\bibitem{139} Annotation, \textit{supra} note 129, at 16.
\bibitem{140} \textit{Id.}
\bibitem{141} \textit{Id.} at 11.
\bibitem{142} 1953 Ga. Laws 575, art. V, \textsection 47. The Georgia DUI statute has been amended to state: \textquoteleft\textquoteleft[A] person shall not drive or be in actual physical contact of a moving vehicle.'\textquotequote right\textquotequote right\textquotequote. \textsc{Ga. Code Ann.} 40-6-391 (1991).
\bibitem{143} 106 Ga. App. 756, 128 S.E.2d 528 (1962).
\bibitem{144} \textit{Id.} at 758, 128 S.E.2d at 530.
\bibitem{145} \textit{Id.}
\bibitem{146} \textit{Id.}
\bibitem{147} Annotation, \textit{supra} note 129, at 18.
\bibitem{148} \textit{Id.} Under a statute which forbids being in actual physical control of a motor vehicle while under the influence of alcohol, physical control means that the defendant is in the position to physically regulate and determine movement or lack or movement of the vehicle. \textit{Beck}, 42 Wash. App. at 14, 707 P.2d at 1383.
\end{thebibliography}
is not included in the definition.\textsuperscript{149}

South Carolina, one of the seven states which forbids solely the act of "driving" while under the influence,\textsuperscript{150} provides a good illustration of the distinction. In \textit{State v. Graves},\textsuperscript{151} a motorist was found leaning over the steering wheel asleep with the engine running and the transmission in gear.\textsuperscript{152} As the motorist was getting out of the car, his vehicle moved slightly and had to be stopped by the arresting officer.\textsuperscript{153} The Supreme Court of South Carolina held that the motorist was not "driving" the vehicle within the meaning of a statute making it an offense for any person to drive under the influence of intoxicating liquors.\textsuperscript{154} However, the court noted that the motorist's actions constituted being in "actual physical control" of the vehicle.\textsuperscript{155}

In conclusion, the large majority of states which have judicially defined "driving," in statutes which prohibit driving while intoxicated, require a finding of movement. Those state statutes which forbid the operation of a motor vehicle while intoxicated or being in actual physical control of a vehicle while intoxicated typically do not require movement. Because the misdemeanor DUI statute of California includes only the term "to drive" and does not mention operation or actual physical control, movement of a vehicle in the officer's presence is justified for conviction under section 23152(a).

III. TREATING MERCER CONDUCT AS ATTEMPTED DUI

\textbf{A. The Nature of Attempted DUI}

In its \textit{Mercer} decision, the Second Appellate District suggested that the driver in a \textit{Mercer} situation could drive away upon being woken by a police officer, and become a dangerous public menace.\textsuperscript{156} The California Supreme Court rejected the possibility that "absurd results would occur if police officers were made to wait for an intoxicated person to 'lurch...forward' before making an arrest for drunk driving."\textsuperscript{157} Instead, the court offered a method to punish "\textit{Mercer}" behavior and prevent DUI accidents while requiring movement for conviction under section 23152(a): classify

\begin{itemize}
\item \textsuperscript{149} State v. Ghylin, 250 N.W.2d 252 (N.D. 1977); Kansas City v. Troutner, 544 S.W.2d 295 (Mo. App. 1976).
\item \textsuperscript{151} Graves, 269 S.C. 356, 237 S.E.2d 584.
\item \textsuperscript{152} Id. at 357, 237 S.E.2d at 585.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. at 360, 237 S.E.2d at 588.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Mercer-App., 271 Cal. Rptr. at 889.
\item \textsuperscript{157} Mercer-Sup. Ct., 53 Cal.3d at 762, 809 P.2d at 409, 280 Cal. Rptr. at 750.
\end{itemize}
Mercer conduct as an attempted DUI. This way, no movement, accident, or injury need occur before a crime can be recognized. Prosecution for attempted DUI will deter Mercer conduct yet will not be as drastic as if the person had actually driven under the influence.

1. Attempt Defined. Generally, an attempt consists of an act that falls short of completion of a specific criminal offense, the actus reus, committed with the intent to complete the offense, the mens rea. California defines attempt to commit a crime as “a specific intent to commit the crime and a direct but ineffectual act done toward its commission.” Once the mens rea and the actus reus have occurred, the crime of attempt is complete.

a. Mens Rea. Generally, mens rea is the mental attitude required for a crime. There are three mens rea categories into which crimes fall: specific intent crimes, general intent crimes, and strict liability crimes. Although the offense of driving under the influence in violation of section 23152(a) is a general intent crime, all attempts are specific intent crimes and require that the defendant act with a particular goal or objective to commit the object offense. Specific intent crimes focus on what the defendant was actually thinking or planning at the time of the offense and require that the defendant accomplish certain results or intend to engage in certain additional conduct beyond what has already been done to be guilty of an attempt. Exactly what the defendant must intend to do will be determined by the definition of the offense. The specific intent required for attempt need not include the knowledge that completion of the conduct would constitute a crime. Therefore, in order to be convicted of an attempted DUI, one must have the specific intent to commit the object offense of driving while under the influence.

158. Id. at 769, 809 P.2d at 414, 280 Cal. Rptr. at 755.
159. An attempt in California is generally given one-half the maximum sentence of the completed offense. CAL. PENAL CODE § 664 (West 1986).
161. CAL. PENAL CODE § 21(a) (West 1982).
162. W. LAFAVE & A. SCOTT, JR., supra note 115, § 6.2(d), at 503-04. Mens rea and actus reus must occur concurrently. Id. § 3.11(a), at 268. The basic premise that for criminal liability some mens rea is required is expressed by the Latin maxim “actus non facit reum nisi mens sit rea,” which means, an act does not make one guilty unless his mind is guilty. Id. § 3.4(a), at 212.
163. Id. § 6.2(c), at 500.
164. Id. § 3.4, at 213.
165. Id. § 3.5, at 224.
166. Id. Designation of attempt as a specific intent crime means that one cannot commit an attempt recklessly or negligently. Id. § 6.2, at 276.
167. Id. § 3.5, at 224.
168. Id.
169. Id. § 6.2, at 500.
Normally, the fact-finder will be asked to infer specific intent based on the circumstances under which the defendant’s conduct was performed. 170 Section 21 of the California Penal Code states that “intent or intention is manifested by the circumstances connected with the offense.” 171 In other words, the fact-finder is permitted to consider the surrounding circumstances when determining whether a defendant had the requisite specific intent for attempt. The facts of Mercer and the surrounding circumstances support an inference of the necessary specific intent to drive while under the influence. The arrest took place during the month of August, 172 so it is unlikely that the engine of the car was turned on to run the heat for warmth nor do the facts specify that the air conditioner was running. In addition, the car’s headlights were on. 173 The arresting officer even testified at trial that when Mercer was pulling on the gears, it was as if “in his mind he was already driving or about ready to drive.” 174 In considering the surrounding circumstances, a fact-finder could determine that Mercer had intended to drive while intoxicated when he reached for the gears. These circumstances would satisfy the requisite intent for a charge of attempted DUI. 175

b. Actus Reus. Actus reus refers to the conduct prohibited in the definition of any given crime. 176 The conduct can be an omission but will usually be an affirmative act described in the definition of the offense. 177 The actus reus of section 23152(a) is the affirmative act of driving while under the influence.

When determining whether the actus reus of an attempt has occurred, one must distinguish between acts which are mere preparation and those which constitute the beginning of an attempt. 178 Mere preparation is not sufficient

170. Id. at § 3.12(k), at 301. It is often said that a person is presumed to intend the natural and probable consequences of his acts. Id. § 3.5(f), at 225.

171. See supra note 164.


173. Id.

174. Id.

175. The common law and older codes often define an offense as requiring only a single mental state. In contrast, the Model Penal Code dictates that a single offense may require a different culpable state of mind for each element of the offense. Under the Model Penal Code analysis for the necessary mens rea for an attempted DUI, one must purposely do those physical acts necessary to put the car in motion, must be aware of the risk of being under the influence of alcohol or drugs and yet disregard that risk, and must have the purpose to drive, that is, to move the vehicle. Robinson, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 683 (1983). The early conceptions of mens rea were simply “a general notion of moral blameworthiness,” an “evil-meaning mind,” and a “vicious will.” Id. at 685. A majority of American jurisdictions have adopted criminal codes that incorporate the Model Penal Code approach. Id. at 683. In fact, only sixteen American jurisdictions, including California, have not adopted penal codes which reflect the Model Penal Code approach to culpability requirements. Id. at 692.


177. Id. § 6.2, at 504.

178. Id. § 3.2, at 196.
to constitute an attempt.\textsuperscript{179} Acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime.\textsuperscript{180} Such acts must be an immediate step toward the commission of a crime which would be completed unless interrupted by some circumstance not intended in the original design.\textsuperscript{181} As movement is now required to constitute driving under section 23152(a), reaching for the gears while the car's engine is not running and the car is parked in the garage would probably not constitute an attempt. In contrast, shifting gears when the car is already running, with the headlights on, and the seatbelt fastened, would surely constitute an act in furtherance of driving and would not be considered mere preparation. In \textit{Mercer}, the driver did not stop trying to put the car into gear until he was persuaded to stop by the officer.\textsuperscript{182} This interruption precluded the driver from completing the act of driving under the influence.

2. \textit{Attempted DUI: California Precedent}. In 1989, the Second Appellate District determined, in \textit{People v. Garcia},\textsuperscript{183} that the offense of attempted DUI existed in California.\textsuperscript{184} The California Supreme court implicitly upheld the \textit{Garcia} decision in \textit{Mercer}.\textsuperscript{185} The \textit{Garcia} court noted that the purpose of the general attempt statute is "both to penalize conduct which would have been harmful if not fortuitously prevented, and to permit intervention by law enforcement personnel before the harm has occurred."\textsuperscript{186}

In \textit{Garcia}, an officer saw a vehicle stopped in a traffic lane with its flashers on.\textsuperscript{187} When he asked Garcia, the driver, what was wrong she did not

\begin{footnotesize}
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\item\textsuperscript{179} \textit{Id.}
\item\textsuperscript{180} \textit{Id.}
\item\textsuperscript{181} \textit{Id.} at 506; \textit{People v. Buffum}, 40 Cal. 2d 709, 256 P.2d 317 (1953).
\item\textsuperscript{182} \textit{Mercer-App.}, 271 Cal. Rptr. at 887.
\item\textsuperscript{183} 214 Cal. App. 3d Supp. 1, 1262 Cal. Rptr. 915 (2d Dist. 1989).
\item\textsuperscript{184} \textit{Garcia}, 214 Cal. App. 3d Supp. at 5, 262 Cal. Rptr. at 918. A charge of attempt is contained within the charge of an object offense. W. \textsc{LaFave} \& A. \textsc{Scott}, \textit{Jr.}, \textit{supra} note 115, \S\ 6.3, at 523. However, one cannot be convicted of both the object offense and the attempt. \textit{Id.} Other states have held that attempting to operate a vehicle while intoxicated is a valid charge. Where the defendant accelerated the engine while seated in the driver's seat, such conduct constituted a substantial step toward the operation of the vehicle and the jury could infer from other evidence the necessary intent to operate a motor vehicle while under the influence of intoxicating liquor. \textit{State v. Henderson}, 416 A.2d 1261 (Me. 1980). Where a motorist was asleep in the driver's seat of a vehicle which was parked on the side of a public highway with the motor running and lights out, the court held that the motorist was engaged in conduct "constituting a substantial step toward the commission of a continuing crime" and that the driver's intent to operate the vehicle was inferable from the circumstantial evidence. \textit{State v. Martin}, 116 N.H. 47, 351 A.2d 52 (1976).
\item\textsuperscript{185} \textit{Mercer-Sup. Ct.}, 53 Cal.3d at 762, 809 P.2d at 409, 280 Cal. Rptr. at 750.
\item\textsuperscript{186}\textit{Garcia}, 214 Cal. App. 3d Supp. at 3, 262 Cal. Rptr. at 916. (quoting \textit{People v. Meaders}, 148 Cal. App. 3d 1155, 1159, 197 Cal. Rptr. 1, 3 (1983)). \textit{See also} W. \textsc{LaFave} \& A. \textsc{Scott}, \textit{Jr.}, \textit{supra} note 115, \S\ 6.2(b), at 498-99.
\item\textsuperscript{187} \textit{Garcia}, 214 Cal. App. 3d Supp. at 4, 262 Cal. Rptr. at 917.
\end{itemize}
\end{footnotesize}
respond. Because her car was rolling backward, the officer told Garcia to put the brake on, but she just stared out the window. The car was in neutral and continued to roll as Garcia tried to start it. The second time the officer told Garcia to put on the brake, she put the gear shift into the park position and the car stopped. At the scene, she failed the field sobriety tests. Two breath tests each registered a blood alcohol content of 0.13 percent. At trial, Garcia testified that she would have driven home had she started the car. The two arresting officers each testified that Garcia's vehicle rolled fifteen to twenty feet in their presence.

The Second District found that this evidence was sufficient to establish that Garcia "drove" her vehicle, and was sufficient for the jury to have inferred that Garcia drove the vehicle to the location at which she was found. The court affirmed Garcia's conviction of attempted DUI, noting that this was a lenient result.

Similarly, in *Mercer*, the driver was found in the driver's seat of his vehicle which was parked on a public street. In the officer's presence, Mercer attempted to put the car into gear and stopped when the officer yelled at him. It is undisputed that Mercer was intoxicated. Although Garcia's vehicle was not running, it did move while the officers were present. The Second District acknowledged that Garcia could have been convicted of DUI but instead, affirmed her attempted DUI conviction. Garcia's conduct, however, went further than that of Mercer because Garcia's vehicle actually moved while the officers were present and Garcia admitted that she would have driven the vehicle had she gotten it started. Mercer, therefore, could have been charged with attempted DUI, but not with DUI. The California Supreme Court agreed.

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 5, 262 Cal. Rptr. at 918.
196. *Id.*
198. *Id.* at 887.
199. *Id.*
201. *Id.* at 5, 262 Cal. Rptr. at 918. A defendant may be convicted on a charge of attempt even if it is shown that the crime was complete. W. LAFAVE & A. SCOTT, JR., *supra* note 115, § 6.3, at 510.
203. *Mercer-Sup. Ct.*, 53 Cal.3d at 762, 809 P.2d at 409, 280 Cal. Rptr. at 750.
B. The Flaw in Attempted DUI: The Defense of Voluntary Intoxication

"Voluntary" intoxication is the voluntary introduction of substances into the body, which the defendant knows or should know are likely to have intoxicating effects, resulting in disturbance of mental or physical capacities.204 Every American jurisdiction agrees that evidence of voluntary intoxication is inadmissible to negate general intent.205 Hence, a person charged with DUI under section 23152(a) is unable to claim the defense of intoxication because DUI is a general intent crime.

American jurisdictions differ regarding the use of voluntary intoxication as a defense to specific intent crimes.206 California allows the jury to consider admissible evidence which may show the defendant was intoxicated at the time of the alleged crime when determining whether the defendant had the requisite specific intent.207 If the jury has reasonable doubt as to whether the defendant formed such specific intent, they are instructed to find that the defendant did not have such specific intent.208 The California Penal Code permits evidence of voluntary intoxication "solely on the issue of whether or not the defendant actually formed the required specific intent . . . when a specific intent crime is charged."209

However, the Garcia court considered this situation when it held that attempted DUI exists in California. The Second District stated "[w]e can envision a situation in which a person who is mildly under the influence would be capable of forming the requisite specific intent to commit attempted driving under the influence, but a person who is severely intoxicated would be incapable of forming such an intent."210 The court concluded that the resolution of this discrepancy must await appropriate cases or possible legislative clarification.211

204. W. LAFAVE & A. SCOTT, JR., supra note 115, § 4.10(f), at 388. In California, a person is presumed to be under the influence of intoxicating liquor when his or her BAC is 0.08 percent. See supra note 3. Intoxication may actually occur at a lower BAC. The American Medical Association suggests that the required BAC should be at 0.05 percent. NATIONAL COUNSEL ON ALCOHOLISM, POLICY RECOMMENDATIONS ON DRINKING AND DRIVING (1986). Even at BACs as low as 0.02 percent, alcohol affects driving. Mothers Against Drunk Driving, A Summary of Statistics Related to the National Drunk Driving Problem 5 (Sept. 1989). The probability of an accident begins to increase significantly at 0.05 percent and climbs rapidly after about 0.08 percent BAC. Id.

205. W. LAFAVE & A. SCOTT, JR., supra note 115, § 4.10(a), at 390.

206. Id. at 389.

207. CALJIC 4.21 (rev. 5th ed. 1989).


209. CAL. PENAL CODE § 22(b) (West 1982).


211. Id. at 6, 262 Cal. Rptr. at 918.
IV. PROPOSED SOLUTIONS

As discussed previously, section 23152(a) forbids the act of driving while under the influence. In its Mercer decision, the California Supreme Court noted that “California is one of only seven states that confines the substantive offense of ‘drunk’ driving to the act of ‘driving’ a vehicle.”212 The court emphasized that “the Legislature is free to revise the relevant statutes” to prohibit driving and operating or having actual physical control over a motor vehicle while under the influence of drugs or alcohol.213 With this amendment, movement will not be necessary to find a violation of section 23152(a) because “operating” and “actual physical control” are broader terms than “drive” and do not require movement. As a result, the conduct in Mercer and Music will not need to be classified as an attempted DUI because it will violate the amended DUI statute, a general intent crime. Because the defense of voluntary intoxication is not available for general intent crimes, such an amendment by the California Legislature would preclude the use of the defense against attempted DUI, a specific intent crime, because those acts encompassed in an attempted DUI charge would now fall under the amended DUI statute.

However, the California Supreme Court also noted that “there are legitimate policy reasons supporting a decision to retain the current narrow statutory scheme, including the policy of encouraging intoxicated drivers to stop driving and safely park their cars until they become sober.”214 One way to continue to encourage such a policy and still insulate the charge of attempted DUI against the defense of severe voluntary intoxication is to diminish the availability of the defense itself. The Legislature need not eliminate the defense for all crimes,215 but public policy216 strongly supports its elimination at least with respect to attempted DUI.

Under existing law, evidence of voluntary intoxication is admissible on the issue of whether the defendant actually formed the required specific intent when a specific intent crime is charged.217 Assembly Bill 1867, now pending with the California Legislature, would amend Section 22 of the Penal Code. This bill would make “[e]vidence of voluntary intoxication not admissible on the issue of whether or not the defendant actually formed the

212. Mercer-Sup. Ct., 53 Cal.3d at 761, 809 P.2d at 408-09, 280 Cal. Rptr. at 749-50.
213. Id. at 769, 809 P.2d at 414, 280 Cal. Rptr. at 755. The court also noted that the legislature could exempt “drunk driving” arrests from the “presence” requirement of Penal Code § 836 or it could amend sections 23157 and 13353 so they apply to attempted drunk driving arrests. Id.
214. Id.
215. Currently, the defense of voluntary intoxication is not available for the following specific intent crimes: assault with a deadly weapon on a peace officer, assault with a deadly weapon, and simple assault. People v. Hood, 1 Cal. 3d 444, 82 Cal. Rptr. 618, 462 P.2d 370 (1969).
216. See supra note 3-21 and accompanying text.
217. See supra note 207.
required specific intent . . . when a specific intent crime is charged." 218
Additionally, this bill would dictate that "[n]o jury instruction shall be given
which instructs the jury that the voluntary use of alcohol, drugs, or any other
substance which results in voluntary intoxication may be used as a defense
to any crime requiring specific intent." 219

Should this bill receive the required vote under the state constitution, 220
the elimination of the defense of voluntary intoxication would assure that
those defendants convicted of attempted DUI, a specific intent crime, would
receive the proper punishment. 221 In turn, this should deter others who
drive drunk or who have control of a vehicle when drunk.

CONCLUSION

Under the current statutory scheme, the California Supreme Court correctly
held that a person cannot be convicted of DUI without volitional movement
of the vehicle witnessed by the police officer. Requiring vehicle movement
as a necessary element for conviction of driving under the influence in
violation of section 23152(a) of the California Vehicle Code is justified. All
crimes require sufficiently unambiguous conduct to avoid unwarranted
interference with innocent behavior and provide a clear indication of what
conduct is punishable. 222 When movement is an essential requirement of
the offense of driving under the influence, the prohibited conduct is
unambiguous and easily applied to all defendants in a uniform manner.

Additionally, the term "drive" itself is not vague and should be given its
plain and ordinary meaning by courts applying section 23152(a). A
movement requirement creates a bright line which makes it easy for police
officers and juries to determine if all the elements of the crime of driving
under the influence of alcohol or drugs are present.

However, there are important policy reasons for punishing those who, with
the intent to drive while intoxicated, have taken a step toward the completion
of that goal. Therefore, the California Supreme Court has classified such
conduct as attempted DUI. Yet, the very nature of the offense of attempted
DUI tends to provide drunk drivers with a legal excuse since voluntary
intoxication may preclude the formation of specific intent.

The California Supreme Court noted that the Legislature could amend the
relevant Vehicle Code provisions to prohibit not only driving, but also

219. Id.
220. The California Constitution provides that relevant evidence may not be excluded in any
criminal proceeding except by statute enacted by a two-thirds vote of the membership in each
house of the Legislature. CAL. CONST. art. 1, § 28(d). As Assembly Bill 1867 provides for
the exclusion of relevant evidence in a criminal proceeding, it requires a two-thirds vote from
each house to be enacted. See supra note 220, at 1.
221. See supra note 162.
222. W. LAFAVE & A. SCOTT, JR., supra note 115, § 2.2, at 78.
operating or having actual physical control over a motor vehicle while under the influence of alcohol or drugs. Such an amendment would update California DUI law and avoid the defense of voluntary intoxication to the charge of attempted DUI.

Another possible solution to avoid the defense of voluntary intoxication is to eliminate the defense as applied to attempted DUI. Assembly Bill 1867 pending with the California Legislature would have this effect. However, as section 23152(a) currently reads, and pursuant to Penal Code section 836, an officer must witness movement of a vehicle to make a lawful warrantless misdemeanor arrest of driving under the influence of alcohol or drugs.

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