

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID E. ROUWHORST,

Defendant-Appellant.

UNPUBLISHED

March 6, 1998

No. 198557

Ottawa Circuit Court

LC No. 95-018826 AR

Before: Griffin, P.J., and Holbrook and Neff, JJ.

PER CURIAM.

Defendant appeals by leave granted an order of the circuit court affirming a district court order denying defendant's motion to dismiss a charge of OUIL/UBAL second, MCL 257.625(1), (7)(b); MSA 9.2325(1), (7)(b). We affirm.

For purposes of defendant's pretrial motion to dismiss, the parties have stipulated to some facts. However, the preliminary facts agreed to by the parties do not impact on the dispositive issue whether defendant was "operating" the disabled vehicle. On this factual question, defendant claims at page ten of his appellate brief that although he had his hands on the steering wheel of the disabled vehicle, he was merely attempting to "steady the wheel" and "did not have actual physical control of the wrecked vehicle." On the other hand, the people rely on the testimony of Deputy Steve Austin, who testified in connection with the district court motion that he observed defendant "in the driver's seat with the hands on the steering wheel *steering the vehicle*." (Emphasis added.) Further, in response to questions by the court, Deputy Austin stated, "when I turned around my headlights were right on both of them and I could see [defendant] steering the steering wheel."

Defendant is charged with operating a vehicle on a highway while intoxicated. The statutory scheme at issue defines "operator" as every person "who is in actual physical control of a motor vehicle upon a highway." MCL 257.36; MSA 9.1836. Here, the accident exception is not applicable because the parties have stipulated that defendant was not the operator of the vehicle at the time of the collision. See, generally, *People v Lyon*, ___ Mich App ___, ___ NW2d ___ (Docket No. 202442, issued 2/3/98). Rather, at the time of his arrest, defendant was behind the steering wheel of a disabled vehicle

while the vehicle was being towed with a forty to fifty-foot tow strap. The disputed factual issue which arises is whether defendant was in “actual physical control of the motor vehicle.” See *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995). Although the parties have stipulated to some facts, there is no stipulation as to the extent, if any, of defendant’s operation of the vehicle. Specifically, the parties dispute whether defendant controlled, in part, the direction of travel of the disabled vehicle while it was being pulled with the tow strap. Although we recognize that more than one person can be the operator of a single vehicle, *Flager v Associated Truck Lines, Inc*, 52 Mich App 280; 216 NW2d 922 (1974), the extent, if any, of defendant’s “actual physical control” of the vehicle is in dispute. Accordingly, at this pretrial juncture, we hold that a genuine issue of material fact exists as to defendant’s operation, if any, of the disabled vehicle, thereby making defendant’s motion to dismiss premature. For this reason, we agree with the result of the rulings of the lower courts.

Affirmed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff