

Case Law Chronology: The Elements of DWI
Case List

I. Operation

Chamberlain v. State, 294 S.W.2d 719 (Tex. Crim. App. 1956)

Barton v. State, 882 S.W.2d 456 (Tex. App.—Dallas 1994, no pet.)

Texas Department of Public Safety v. Allocca, 301 S.W.3d 364 (Tex. App.—Austin 2009, no pet.)

Dansby v. State, No. 12-15-00269-CR, 2017 Tex. App. LEXIS 3897, 2017 WL 1534051 (Tex. App.—Tyler 2017)

II. Motor Vehicle

Flores-Garnica v. State, 625 S.W.3d 651 (Tex. App.—Fort Worth 2021)

III. Intoxication

Massie v. State, 744 S.W.2d 314 (Tex. App.—Dallas 1988, pet. ref'd)

Reagan v. State, 968 S.W.2d 571 (Tex. App.—Texarkana 1998, pet. ref'd)

Atkins v. State, 990 S.W.2d 763 (Tex. App.—Austin 1999, pet. ref'd)

IV. Public Place

Tracey v. State, 350 S.W.2d 563 (Tex. Crim. App. 1961)

Kapuscinski v. State, 878 S.W.2d 248 (Tex. App.—San Antonio 1994, pet ref'd)

Fowler v. State, 65 S.W.3d 116 (Tex. App.—Amarillo 2001, no pet.)

State v. Gerstenkorn, 239 S.W.3d 357 (Tex. App.—San Antonio 2007, no pet.)

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By the end of this session, participants will be able to:

- (1) List the elements of DWI in Section 49.04 of the Penal Code; and
- (2) Explain how Texas appellate courts have interpreted four critical elements: operation, motor vehicle, intoxication, and public place.

2

Section 49.04(a), Penal Code “Driving While Intoxicated”

A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.



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I. Operation

§ 159.3(14), Administrative Code

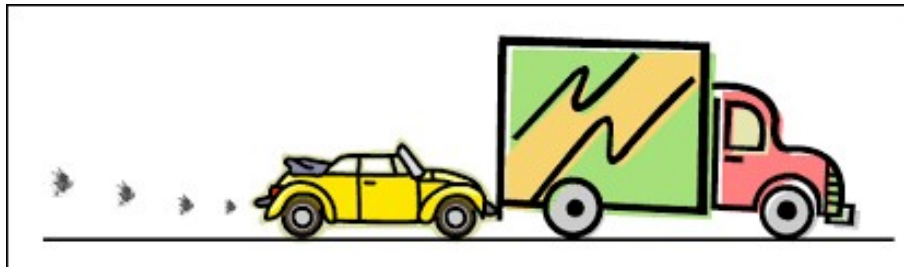
“Operate” means:

To drive or be in actual physical control of a motor vehicle.

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Chamberlain v. State (CCA 1956)

Steering a car that is being pushed down a highway was operation even though the engine was turned off.



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Barton v. State (Dallas 1994)

There can still be operation even if the driver's personal effort fails to make the automobile move.



6

Texas DPS v. Allocca (Austin 2009)

Defendant was not operating his vehicle when he was sleeping in it on a reclined seat, in park, lights off, with the engine running.



7

Dansby v. State (Tyler 2017)

Operation existed when a man was found inside a Whataburger while his car was unoccupied at a store next to the Whataburger.



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II. Motor Vehicle

Section 32.34(a)(2), Penal Code

“Motor Vehicle” means:

a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

Section 541.201(11), Transportation Code

“Motor Vehicle” means:

A self-propelled vehicle or vehicle that is propelled by electric power from overhead trolley wires. The term does not include an electric bicycle or an electric personal assistive mobility device.

DO NOT USE TRANSPORTATION CODE DEFINITION FOR DWI!

9

Flores-Garnica v. State (Fort Worth 2021)

Even though an All-Terrain Vehicle was not allowed on a road, it was still considered a motor vehicle for the purposes of DWI.



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III. Intoxication

Section 49.01, Penal Code

“Intoxicated” means:

- (A) not having the **normal use of mental or physical faculties** by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
- (B) having an alcohol concentration of 0.08 or more.

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Massie v. State (Dallas 1988)

Statute is not unconstitutionally vague where it does not specify whether the “mental or physical faculties” are those of the defendant or those of a “common man.” However, the faculties tested must belong to the defendant.



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Reagan v. State (Texarkana 1998)

State need not prove what “normal” use of faculties is. Slurred speech, red eyes, odor or alcohol, balance difficulties, and inability to complete Horizontal Gaze Nystagmus test all supported conviction.



13

Atkins v. State (Austin 1999)

Defendant's behavior must be gauged subjectively. Aberrant behavior may be due to factors other than the introduction of a substance into the body.



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IV. Public Place

Section 1.07(a)(40), Penal Code

“Public Place” means:

Any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

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Tracey v. State (CCA 1961)

Military bases can be public places.



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Kapuscinski v. State (San Antonio 1994)

Parking lots can be public places.



17

Fowler v. State (Amarillo 2001)

Rural unpaved driveway located $\frac{1}{4}$ mile from country road was not a public place.



18

State v. Gerstenkorn (San Antonio 2007)

Roads inside a limited-access gated community were a public place.



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THANK YOU!

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