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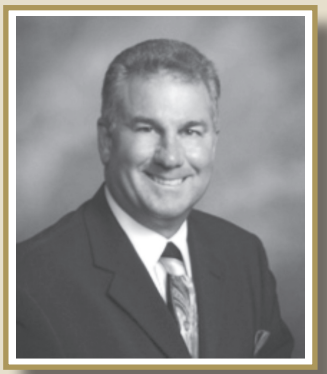

In Memoriam
Victor J. Pellegrino
1948 - 2009

Some fulfill a passion for living, while others live to fulfill a passion. It is the rare individual who can achieve each of these goals. Vic Pellegrino was one of those remarkable individuals who gloriously fulfilled both. The passion for living that Victor demonstrated throughout his life and during his final agonizing battle is unrivaled, and his passion for DUI defense will serve as a model for all.

Victor, who grew up in Tampa, graduated from Vermont Law School in 1977. Admitted to the Florida bar the same year, in 1983 he scored his first major DUI victory when he successfully disabled Florida's breath testing apparatus through a concentrated attack upon the effect that radio frequency interference was having upon tests across the state. In 1988, Vic would once again wreak havoc upon Florida's breath testing regimen. This time he adroitly demonstrated that the state had failed to add its current breath testing device to the list of approved machines.

Victor was successful because he was a detail person. Even before Vic uttered his first words in a trial, his presence was felt. Wearing one of his signature suits, a crisp white shirt and a handkerchief perfectly folded to reveal five points, he would position a cup on the defense table to hold his pens. Questioning prospective jurors on everything from reading habits to bumper stickers, he would warm the heart of the most skeptical juror and, on more than one occasion, cultivated a future client. Once the trial began, junior prosecutors would flock to the courtroom to witness Vic's near photographic memory engage in a kind of David and Goliath struggle, which struggle, more likely than not, ended in a victory for the defense.

Without question, through his careful preparation, education and skill, Victor Julius Pellegrino had reached, in Tom Wolfe's immortal words, "the top of the pyramid." "He was highly competent, very well-versed and I would have to say if you had to pull 10 lawyers from anywhere in the country in terms of DUI defense, he was definitely in the top 10," said Michael Cohen of Miami based Richard Essen's office. But more than merely acting as a practitioner of his craft, Victor unselfishly sought to bring others into the fold. One of the first attorneys to be Board Certified by the National College for DUI Defense, Victor was one of our most sought after lecturers. Moreover, he was a frequent speaker at such prestigious offerings as NACDL's "DWI Means Defending With Integrity," the New York State Bar Association's "Big Apple" series, "Mastering Scientific Evidence," and numerous other programs. Irrespective of his topic however, Victor's message would be the same, "Always Be Prepared."

Vic was, as Former Dean and popular NCDD speaker J. Gary Trichter noted, "...the consummate teacher. The great lessons he taught were about life and how to best live it." In the course of teaching us, Vic exhibited the type of compassion he repeatedly demonstrated for his clients. When asked, former Dean and popular NCDD speaker Barry T. Simons, related the following occurrence, "At one of our programs, a young lawyer who had not studied the case scenario tried to back away from the exercise on "How to Give an Effective Opening Statement." Vic calmed him down and suggested that he do a practice opening statement based on the facts from any case he had in his office. The young lawyer gave it his best and when done, asked us if we could show him how we would do it since we had 70 years combined experience. While I was trying my best to collect my thoughts, Victor launched into a skillfully orchestrated opening using the facts from the young lawyer's case as if he had studied the case for weeks. Victor knew how to listen! That skill made him a compassionate man and a great lawyer."

Former Dean and father of the NCDD's Board Certification program, James Farragher Campbell writes, "I was honored when our Dean, Victor Pellegrino, asked me to give the Keynote Address at this year's Summer Session. The Keynote speech is supposed to set the tone for the program but, in reality, the Keynote had already been set by Victor. His life and his dedication to this College is the Anatomy of a DUI Defense Lawyer. He lived it; and through his example, we see and understand the true DUI Defense Lawyer."

"Victor used his life force and his energy in his unique way. It was a power force for his clients. He was centered, clear on his role in life; and, we in the College, were better for knowing him. We became better lawyers and, most of all, better people."

"Vic has left us, far too soon," said Larry Taylor, "he was one of those special few who left this world a better place than he found it. He was a good and loving man, none of us who were fortunate enough to know him will ever be quite the same. Our profession has lost a gifted attorney, a man who represents the best in our profession. Our College has lost an inspirational teacher and a gentle leader and I have lost a friend."

Along with "Always Be Prepared", fair play was another of Victor's hallmarks. Veteran Tampa, Florida criminal defense attorney Denis Devlaming observed that "in discussing Victor with other lawyers who knew him, the comments were always the same, 'a gentleman lawyer who

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played fair and fought hard'. He never took the low road in defending and prosecutors would always find a hard but fair minded advocate when they had a case against him.

Victor Carmody took note of those who sought to pay tribute to Victor after his passing: "The line to his wake stretched outside for hours. Family, friends, colleagues, prosecutors, judges and even cops showed their respect and admiration for our Dean. Those who knew him well spoke of his dedication and love of the law and how great a lawyer he was. Those who knew him well spoke of his love for NCDD and his many friends in our organization, his kindness, his integrity, his compassion and his sense of humor."

Given the state of our profession, too many of us view our fellow attorneys not as colleagues but as competitors. Not Victor. Again, Devlaming noted that "we were in a group that the *Saint Petersburg Times* dubbed 'Club DUI.' We would regularly meet for dinner and talk about the most recent case law involving DUI defense."

Victor was not only compassionate to his colleagues and clientele, but was a model family man as well. New York attorney Peter Gerstenzang described Victor as "a man who cared deeply for his friends and family. The warmth of his caring will be missed by all of us who were privileged to have his friendship. The keen objectivity of his intellect was always tempered by his concern for the feelings of others. His last few precious years have taught us all a great deal about what really matters in life. While we will all make our own passage, we can only hope that our lives will be as filled with the love and respect that Victor enjoyed; and that our passing bears the same honor and dignity of that of our friend and colleague."

Above all, and in all he did, Victor was a fighter and a leader. As Gary Trichter notes, "like the great generals of the Civil War, Victor led from the front and was a model for all to follow." And Vic led not just in the courtroom, but in life as well. Trichter emphasized that, "he was a model for all of us to follow in life and in death. As for the latter, Vic showed great courage in fighting his demon. He showed even greater compassion to those close friends and family that he realized were in pain because of his illness and made great efforts to let them know he'd be alright as he was only going home to be with our Father."

No article about Vic would be complete without commenting on his love of cigars. In this regard, I can recall sharing cigars on a warm spring evening several years ago in New York's Little Italy. Vic was carrying a large box of cannolis he purchased to bring home for family and friends. So touched was I by this gesture of kindness that I engaged him in a conversation about family. It was then that I realized that Vic's concept of family was not what we think of in the traditional sense, but included all those that he knew and all those whose lives he touched. Perhaps another Vic, Vic Carmody said it best: "It came to me that Victor was and is the miracle to all who knew him. I am truly blessed to have enjoyed his company, to have been a part of his professional achievements, and lastly to have been able to carry out his last wish for me. As Vic passed, I hugged my sons and I passed Victor's miracle on to them." As I envision this scene, I am profoundly affected. I think about my beloved three year old son. I call for him so that I too can give him a hug, a kiss and pass Victor's miracle on to him as well.

– Ed Fiandach

A PERSONAL TRIBUTE TO DEAN VICTOR PELLEGRINO

James Farragher Campbell, ESQ.

I was honored when our dean, Victor Pellegrino, asked me to give the Keynote Address at this year's Summer Session. The Keynote speech is supposed to set the tone for the program but, in reality, the Keynote had already been set by Victor. His life and his dedication to this College is the Anatomy of a DUI Defense Lawyer. He lived it; and through his example, we see and understand the true DUI Defense Lawyer.

How can we ever thank Victor Pellegrino? What token can be bestowed upon his memory to remind us of what he gave so many of us? I submit one thing and one thing only would be treasured by him – and that is for you to become the very best DUI defense lawyer that you can! For, truth be told, the truest gift is a portion of yourself.

Choreographer Martha Graham famously told her students something that Victor lived: "There is a vitality, a life-force, an energy, a quickening that is translated through you into action and because there is only one of you in all of time, this expression is unique. And if you block it, it will never exist through any other medium and be lost."

Victor used his life force and his energy in his unique way. It was a power force for his clients. He was centered, clear on his role in life; and, we in the College, were better for knowing him. We became better lawyers and, most of all, better people.

When you attend the College you mingle with the legends of the DUI defense bar. You also see others not yet fully recognized, but who will clearly join these legends in the years to come. That invitation was extended directly to you by Dean Victor Pellegrino. Many have come before us and many will come after us. By attending the College you have already made your commitment to excellence. So, we turn to you now, our next best hopes; we need you to carry the torch, to carry us forward and to light the way for us in the future as our great Dean Victor Pellegrino did.

The impact we have as DUI defense lawyers upon our society is intimately personal for our clients, yet relentlessly expansive in terms of our impact on our society. We have the privilege to work in the greatest arena for correcting injustice - the trial courts.

I have always believed that the greatest power given to the individual lawyer is the ability to combat injustice in the everyday case involving everyday people. And nowhere is that more evident than in the defense of a DUI case. And no one did that on a day in and day out basis better than Victor Pellegrino.

As you now come together in College, Victor's passing reminds us that this time together is fleeting; but, at the same time it is charged with extraordinary meaning and pregnant with possibility for all of us. We have stopped for a moment to

encounter each other, to meet and to share. This is a precious moment, but it is transient. If we share with caring and love, then we will create abundance for each other. And then this moment, this time together, will have been worthwhile. That certainly is what Victor wanted for all of us.

Now is your time to absorb great information and learn great trial skills. Now is your time to come away with a renewed dedication to excellence. Now is the time and opportunity to emulate the life of a great DUI defense lawyer, Victor Pellegrino.

"EZ Street" is a dead-end for a true trial lawyer. You must fight the comfort zone; if you are relaxed, something's wrong. If you are not living on the edge, you are taking up too much room. Your client is hoping for your best. We, as your colleagues and members of this College, are hoping for your best. That is what Victor always promised; and, that is all you can promise. And that is what you must always deliver.

In the film *Don Juan De Marco* , Don Juan (played by Johnny Depp), tells Don Octavio (played by Marlin Brando):

> "There are only 4 questions of value in life, Don Octavio: What is sacred? Of what is the spirit made? What is worth living for? And, what is worth dying for? The answer to each is the same: only love!"

We have witnessed that love up close and personal this year as exhibited by our great friend and Dean, Victor Pellegrino. Despite his health he continued on with us and for us. Why? His love of this College. His fellowship with us. For him, it was sacred; it constitutes our spirit; it is what is worth living for and what is worth dying for.

This is the bond of our College, our members, our love for each other and what we do as lawyers.

I saw a small frail man on the side of the street, cold, nervous and shivering being belittled and badgered by the police. I saw that same man in court before a judge being punished because a competent lawyer did not come to his defense. I became angry and asked God, "Why do you permit this? Why don't you do something about this?"

God said nothing. That night, God's reply came in the silence: "I certainly did do something about it – I made Victor Pellegrino."

Flem's Case Law Update

by Flem K. Whited III, Fellow

Minnesota Supreme Court finds Defendant made proper showing of need for I-5000EN Source Code & the Source Code was in the possession or control of the State based upon the request for proposal made to the State by CMI.

State v. Underdahl,
2009 WL 1150093 (Minn.)

Dale Lee Underdahl and Timothy Arlen Brunner (appellants) each sought discovery of the complete computer source code for the Minnesota model of the Intoxilyzer 5000EN in their separate driving while intoxicated (DWI) criminal prosecutions. The district courts in both cases ordered the State to produce the computer source code within 30 days, or the courts would dismiss certain charges and find that the breath test results were not admissible. The State appealed the discovery orders, and the court of appeals consolidated the actions and reversed both orders for production. *State v. Underdahl,* 749 N.W.2d 117, 121 (Minn.App.2008). Both defendants appealed to the Minnesota Supreme Court.

Both defendants were arrested and prosecuted for DWI. Both made requests for the source code for the I-5000EN. Underdahl brought a motion for discovery, seeking State production of complete copy of the computer source and object codes for the Minnesota model of the Intoxilyzer 5000EN that was used to test the Defendant. The State opposed the motion, arguing that the source code was not relevant and not in the State's possession because the Intoxilyzer 5000EN's manufacturer, CMI, Inc., owned the source code. Underdahl's motion contained no other information or supporting exhibits related to the source code.

Appellant Brunner submitted a memorandum and nine exhibits to support his request for the source code. The memorandum gave various definitions of source code. The first exhibit was the written testimony of David Wagner, a computer science professor at the University of California in Berkeley, which explained the source code in voting machines, the source code's importance in finding defects and problems in those machines, and the issues surrounding the source code's disclosure. The next exhibits detailed Brunner's attempts to obtain the source code, both from the State and CMI. The last exhibit was a copy of a report prepared on behalf of the defendants in New Jersey litigation about the reliability of New Jersey's breath-test machine. *See State v. Chun,* 943 A.2d 114 (N.J.2008). The report analyzed the New Jersey machine's computer source code and uncovered a variety of defects that could impact the test result. Based on Brunner's evidence, the district court found that the integrity of the source code is essential to the scientific reliability of the Intoxilyzer 5000EN test result. Further, the jury instructions asked the jurors to assess the reliability of the testing method, which could not be done without Brunner having access to the software controlling that testing process.

The District Court granted both motions. The State appealed the discovery orders, and the court of appeals consolidated the actions and reversed both orders for production. *State v. Underdahl*, 749 N.W.2d 117, 121 (Minn.App.2008).

The Supreme Court initially found their critical impact rule dealing with State appeals of pre trial orders applied to discovery orders. The State was able to show the discovery orders had a critical impact on the prosecutions of the DWI cases.

The Court next turned to whether the district courts abused their discretion in concluding that the computer source code was relevant and otherwise discoverable under Minn. R.Crim. P. 9.01, subd. 2. Rule 9 of the Minnesota Rules of Criminal Procedure governs discovery in criminal cases.

Rule 9.01, subd. 1, describes what must be disclosed by the prosecution without a court order. Rule 9.01, subd. 2, details the circumstances under which the court may use its discretion in ordering additional discovery. In relevant part, Rule 9.01, subd. 2(3), states:

> Upon motion of the defendant, the trial court at any time before trial may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any *relevant* material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a *showing is made that the information may relate to the guilt or innocence of the defendant* or negate guilt or reduce the culpability of the defendant as to the offense charged.
> Minn. R.Crim. P. 9.01, subd. 2(3) (emphasis added).

The Supreme Court affirmed the appellate court in Underdahl case:

> Although broad discretion is given to district courts in discovery matters, the district court in appellant Underdahl's case abused its discretion in finding the source code relevant and related to his guilt or innocence. Underdahl made no threshold evidentiary showing whatsoever; while he argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code would help him do so.

The Supreme Court reversed the appellate court in Brunner case:

> Brunner submitted source code definitions, written testimony of a computer science professor that explained issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects. Brunner's submissions show that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to Brunner's guilt or innocence. Therefore, we hold that the district court in Brunner's case did not abuse its discretion in concluding that the source code may relate to his guilt or innocence.

The Court then had to determine whether the district courts' findings that the State had possession or control of the source code were clearly erroneous. They found that it was not.

The court of appeals did not reach this issue because it reversed both district courts' discovery orders based on the grounds of relevance. Minnesota Rule of Criminal Procedure 9.01, subd. 2(1), requires prosecuting attorneys to assist the defendant in seeking access to matters that are within the possession or control of the State. Both district courts found that the State is the owner of the source code for the Minnesota model of the Intoxilyzer 5000EN, relying on the request for proposal (RFP) issued by the State when replacing the previous version of its breath-test instrument. The State argues that the district courts erred; it asserts that our holding in *Underdahl I* is distinguishable because the *Underdahl I* court was reviewing this question under the higher threshold of a writ of prohibition, and further contends that the RFP actually gives appellants, not the State, the right to access the source code.

In *Underdahl I,* the State had been ordered to produce the source code in appellant Underdahl's implied consent hearing. 735 N .W.2d at 709. The Commissioner of Public Safety petitioned the court of appeals for a writ of prohibition to prevent the district court from enforcing the order, a writ that can be issued if the mandated discovery is clearly not discoverable and for which there is no adequate remedy at law. *Id.* at 711. We concluded that the Commissioner had failed to meet his burden of demonstrating that the source code was clearly not discoverable because the source code was in possession, custody or control of the State; the Commissioner had conceded that the State owned some of the source code, a concession supported by the express copyright language in the RFP. *Id.* at 712.

We therefore hold that it was not an abuse of discretion for the district courts to find that the source code was in the possession or control of the State.

We similarly conclude that the district courts did not abuse their discretion in finding the State had possession or control of the source code under Minn. R.Crim. P. 9.01, subd. 2(1). The RFP language cited by the district courts supports their conclusions that the State had possession of the source code. The State's arguments that appellants have access to the source code are also unpersuasive, because Rule 9.01, subd. 2(1), only speaks to the State's obligation to assist a defendant in seeking access to material the State possesses, aside from the defendant's possible access. We therefore hold that it was not an abuse of discretion for the district courts to find that the source code was in the possession or control of the State.

Starting a car with a remote starter, then sitting behind the wheel of that car with the motor running without inserting ignition key constituted operation of a motor vehicle pursuant to statute defining offense of operating a motor vehicle while under the influence of intoxicating liquor or drugs.

State v. Cyr,
967 A.2d 32 (Conn.)

The charge arose from an incident that occurred in the early morning hours of February 28, in which the defendant and a friend were sitting in the defendant's car with the engine running, in a parking lot near the bar where the defendant worked. The record at the administrative review hearing reflected the sworn testimony of the defendant, two police officers who were present for the defendant's arrest and an expert witness who explained that a car that has been started with a remote starter cannot be driven until its ignition key is inserted and turned.

The defendant filed motions to dismiss that were denied. He entered a conditional plea and appealed the denial

of his motions to dismiss. The appellate court reversed, citing two decisions of this court establishing a definition of operation. The Appellate Court concluded that the stipulated facts did not meet that definition, in particular because the defendant, having used a remote starter, was outside the vehicle when he started its engine. Appellate Court further reasoned that the state had not alleged, or produced any evidence to indicate, that the defendant had the ignition key in his possession or that the vehicle was capable of motion without the key. Consequently, the Appellate Court determined that the state had not shown that the defendant had undertaken an act that alone or in sequence [with other acts would] set in motion the motive power of the vehicle.

The parties argued the following in the Supreme Court:

> The state argues that the Appellate Court improperly concluded that the allegations and evidence were insufficient to show that the defendant was operating a motor vehicle. The state claims that the definition of operation established by this court's precedent is broad enough to encompass the acts undertaken by the defendant, and further, that the Appellate Court failed to consider the entire record considered by the trial court when it denied the second motion to dismiss. According to the state, Connecticut's broad definition of operation and strong public policy aimed at minimizing the hazards associated with operating under the influence compel a conclusion that the defendant, by sitting in his vehicle after he started the engine with a remote starter, was operating that vehicle within the meaning of 14-227a(a). The defendant argues in response that he was not operating his motor vehicle as contemplated by the statute because he had started its engine while he was outside of the vehicle and because his key was not in the ignition, a necessary precursor to setting in motion a vehicle that has been started with a remote starter. According to the defendant, the fact that the engine is running does not also mean that the vehicle is capable of motive power. Where more steps are necessary to engage the motive power of a vehicle that has been started through remote control than to engage the motive power of a vehicle not remotely started, remote starting of a vehicle does not mean that one is operating the vehicle [for purposes of 14-227a].

The Court agreed with the State.

Pursuant to 14-227a(a), a] person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person *operates a motor vehicle*... (1) while under the influence of intoxicating liquor or any drug or both.... (Emphasis added.) Because the statute and its predecessors did not define the term operate, and the legislative history of the statute is unilluminating, that task was left to the courts. See *State v. Haight,* supra, 279 Conn. at 551, 903 A.2d 217. The resulting definition that long has been in use has its origins in *State v. Swift,* 125 Conn. 399, 403, 6 A.2d 359 (1939), an appeal in which this court approved the following jury instruction explaining what it meant to operate a vehicle: person operates a motor vehicle within the meaning of [the] statute, when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle. (Internal quotation marks omitted.)

Adoption of that definition established, and subsequent cases confirmed, that the term operating encompasses a broader range of conduct than does [the term] driving. *State v. Haight,* supra, 279 Conn. at 551, 903 A.2d 217. After a number of decisions made clear that sitting at the wheel of a nonmoving vehicle with the engine running constituted operation; see, e.g., *State v. Wiggs,* 60 Conn.App. 551, 554-55, 760 A.2d 148 (2000); *State v. Marquis,* 24 Conn.App. 467, 468-69, 589 A.2d 376 (1991); *State v. Ducatt,* 22 Conn.App. 88, 93, 575 A.2d 708,cert. denied, 217 Conn. 804, 584 A.2d 472 (1990); the question arose whether the definition could be satisfied when a defendant had been seated in a vehicle that neither was in motion nor had its motor running. See *State v. Haight,* supra, at 552, 903 A.2d 217. In *Haight,* this court concluded that it could. Id. Specifically, we held that the evidence was sufficient to sustain a prosecution under 14-227a(a) when the defendant was found sleeping in the driver's seat of his legally parked vehicle, with the key in the ignition and the headlights illuminated, but without the motor running. Id., at 547, 903 A.2d 217. We explained: the act of inserting the key into the ignition and the act of turning the key within the ignition are preliminary to starting the vehicle's motor. *Each act, in sequence with other steps, will set in motion the motive power of the vehicle.... Each act therefore constitutes operation of the vehicle* under the definition set forth in *Swift.* (Citation omitted; emphasis added; internal quotation marks omitted.) Id., at 553, 903 A.2d 217.

We conclude that the facts of this case warrant a similar conclusion. In starting the engine of his vehicle remotely then getting behind the steering wheel, the defendant clearly undertook the first act in a sequence of steps necessary to set in motion the motive power of a vehicle that has been equipped with a remote starter. The fact that the defendant next needed to insert his key to continue the process of setting in motion that motive power is of no greater import in determining whether there has been operation than the fact that a person without a remote starter, after inserting the ignition key, will need to turn that key to start the motor. See footnote 9 of this opinion. In either circumstance, the defendant has taken the first step toward engaging the motive power of the vehicle but, due to the different technologies employed, the order of the steps varies. We see no logical or policy reason why reversing the sequence of the steps involved in starting a motor vehicle should defeat a finding of operation, as long as the defendant has taken the first step in whichever sequence applies.

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We find additional support for our conclusion in cases that have distinguished between situations in which a defendant is attempting to control a vehicle that is permanently disabled and, therefore, incapable of operation, and situations in which a temporary obstacle or impediment to movement exists that the defendant, having an otherwise functional vehicle, readily may overcome. In regard to the former category, this court has observed: person could not be said to be operating a car with no engine in it if he entered it and manipulated the controls.... A car which is totally disabled cannot be said to have been operated. *State v. Swift,* supra, 125 Conn. at 404, 6 A.2d 359. Stated otherwise, manipulating the controls of an inoperable vehicle contributes nothing toward setting in motion its motive power, because such a vehicle is wholly incapable of movement. Because movement of a permanently disabled

vehicle is impossible, an intoxicated person at its controls poses no danger to himself or to others and, therefore, falls outside the proscriptions of 14-227a(a).

When an obstacle or impediment is temporary, however, it remains possible that it can be surmounted, and that movement of the vehicle will ensue. Thus, the threat targeted by statutes disallowing not just driving, but also operating a motor vehicle while intoxicated-that is, the danger that a parked vehicle will be put in motion by an intoxicated occupant and thereby pose a risk to the safety of the occupant and others remains present when the condition rendering the vehicle inoperable is a temporary one that quickly can be remedied. *State v. Adams,* 142 Idaho 305, 308, 127 P.3d 208 (Ct.App.2005), review denied, 2005 Idaho Lexis 206 (June 8, 2005). Consequently, the existence of a temporary obstacle or impediment will not preclude a finding of operation. Id. (w]hen there is evidence from which a fact-finder could sensibly conclude that the vehicle was reasonably capable of being rendered operable, the issue [of operation] is [one] for the jury .

Consistent with the foregoing distinction, intoxicated defendants attempting to extricate vehicles that are stuck in ditches, snow or loose dirt, or hung up on some physical object, regularly are found to have been operating those vehicles, even though they temporarily were incapable of movement. See, e.g., *State v. Boynton,* 556 So.2d 428, 429-30 (Fla.App.1989); *State v. Saul,* 434 N.W.2d 572, 577 (N.D.1989); *Jenkins v. State,* 501 P.2d 905, 906 (Okla.Crim.App.1972); *Commonwealth v. Kallus,* 212 Pa.Super. 504, 506-508, 243 A.2d 483 (1968); *Gallagher v. Commonwealth,* 205 Va. 666, 670, 139 S.E.2d 37 (1964); see also *Waite v. State,* 169 Neb. 113, 117-18, 98 N.W.2d 688 (1959). We believe the present matter is analogous. Like a slippery surface or trapped wheels, the lack of an inserted ignition key is but a temporary impediment to the movement of a remotely started vehicle. Because such an impediment easily is overcome by insertion of the key, it will not preclude a finding of operation.

Our decision today finds support in the policy reasons underlying broad statutory prohibitions like the bar against operating a motor vehicle while intoxicated created by 14-227a(a). Such provisions are *preventive measure[s]...* which deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers ... and which enable the drunken driver to be apprehended *before he strikes....* (Citations omitted; emphasis added; internal quotation marks omitted.) *State v. Smelter,* 36 Wash.App. 439, 444, 674 P.2d 690 (1984); see also *State v. Love,* 182 Ariz. 324, 327, 897 P.2d 626 (1995) (recognizing obvious statutory aim of enabling the drunken driver to be apprehended *before* he maims or kills himself or someone else [emphasis added; internal quotation marks omitted]); *State v. Adams,* supra, 142 Idaho at 307-308, 127 P.3d 208 (statute is a *prophylactic measure that is intended to discourage* intoxicated persons from entering motor vehicles except as passengers [emphasis added]). By deterring intoxicated individuals from taking even the most preliminary steps toward driving their vehicles, our holding today furthers Connecticut's unambiguous policy ... [of] ensuring that our highways are safe from the carnage associated with drunken drivers. (Internal quotation marks omitted.) *State v. Haight,* supra, 279 Conn. at 555, 903 A.2d 217.

Suspicion based on a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because the legal justification for a traffic stop must be objectively grounded.

State v. McDade,
2009 WL 804636 (N.J.Super.A.D.)

The sole issue in this case is the validity of defendant's motor vehicle stop. The facts showed that on September 10, 2006, at 12:17 a.m., East Windsor Police Officer Frank Maisano stopped the 2001 Volkswagen Jetta being operated by defendant because passenger side rear tail light [was] out. Undeniably, the Motor Vehicle Code requires two functioning tail lights, one on each side. *N.J.S.A.* 39:3-61 states in pertinent part:

> (a) Every motor vehicle other than a motor cycle and other than a motor-drawn vehicle shall be equipped on the front with at least 2 headlamps, an equal number at each side, and with 2 turn signals, one on each side; *and on the rear with 2 tail lamps,* 2 stop lamps, 2 turn signals and 2 reflectors, *one of each at each side;* except that a passenger vehicle manufactured before July 2, 1954, and registered in this State may be equipped with one stop lamp, one reflector and one tail lamp and is not required to be equipped with turn signals. In addition, every such vehicle shall be equipped with adequate license plate illumination, and with one or more lamps capable of providing parking light as required in section 39:3-62. [(emphasis added).]

The sole issue in this case is the validity of defendant's motor vehicle stop.

Although Maisano testified at least three times on direct that he stopped defendant's vehicle because the passenger rear tail light was out, on cross-examination, the officer acknowledged that it was possible that the vehicle has two red tail lights on each side and that only one of the four was out, but that he simply did not recall . In fact, during argument following the close of testimony, defense counsel produced a Kelly Blue Book printout displaying a 2001 Volkswagen Jetta presumably showing multiple lights on each side of the vehicle's rear. Although the municipal court judge did not admit the photograph into evidence because the State objected, he nevertheless viewed it to help identify the look of the Jetta .

The defendant filed a motion to suppress which was denied. He pled and appealed the denial of his motions. The appellate court agreed with the defendant.

Consequently, the instant suppression motion must turn on whether the officer had reasonable suspicion to stop defendant's car. On this score, a valid motor vehicle stop requires that an officer have reasonable and articulable suspicion that a motor vehicle violation has been committed by the driver. *State v. Puzio,* 379 *N.J.Super.* 378, 381-82 (App.Div.2005); *State ex rel. D.K.,* 360 *N.J.Super.* 49, 54 (App.Div.2003); *State v. Murphy,* 238 *N.J.Super.* 546, 553-54 (App.Div.1990). The

officer's belief that a traffic violation has occurred, however, must be objectively reasonable. *Puzio, supra,* 379 *N.J.Super.* at 383; *D.K., supra,* 360 *N.J.Super.* at 54.

In determining what is objectively reasonable, there is a clear distinction between those cases where a defendant's car is stopped based on an entirely erroneous reading of the statute and those where the officer correctly understands the statute, but arguably misinterprets the facts concerning whether a vehicle or operator has violated the statute. *Puzio, supra,* 379 *N.J.Super.* at 382. In the latter, courts have approved the motor vehicle stop because it is only necessary that the officer have a reasonable and articulable suspicion of a violation. In such circumstances, it is not necessary or relevant that the facts testified to by the officer actually support a finding of guilt beyond a reasonable doubt of the statutory violation. *See, e.g., D.K., supra,* 360 *N.J.Super.* at 52-55 (obscured license plate); *Cohen, supra,* 347 *N.J.Super.* at 380-81 (tinted windows significantly obstructing vision); *Murphy, supra,* 238 *N.J.Super.* at 554 (failure of license plate to be conspicuously displayed). In each of these cases, the officer entertained a reasonable belief that a traffic law had been violated. In each, the only dispute was whether the officer's factual observations established guilt beyond a reasonable doubt of the traffic offense, not whether the officer correctly interpreted the statute.

As to the former category of cases, however, we held in *Puzio:*

> Although our courts have never addressed this precise issue, other jurisdictions have concluded that where an officer mistakenly believes that driving conduct constitutes a violation of the law, but in actuality it does not, no objectively reasonable basis exists upon which to justify a vehicle stop. [T]he legal justification [for the vehicle stop] must be objectively grounded. Even under the good faith exception rejected in *Novembrino* [,] objective reasonableness is judged through the eyes of a reasonable officer acting in accordance with governing law. To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey. If officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive. We cannot countenance an officer's interference with personal liberty based upon an entirely erroneous understanding of the law. [379 *N.J.Super.* at 383-84 (internal citations omitted).]

Thus, in *Puzio,* we held the automobile stop was not justified by the officer's belief that the defendant was operating his vehicle in violation of a statute requiring display of business and address on a commercial vehicle when in fact the statute, by its plain and unambiguous terms, did not apply to passenger vehicles, which was the type of vehicle defendant was driving. 379 *N.J.Super.* at 382-83.

Even federal courts, which honor the good faith exception, have declined to extend it to motor vehicle stops involving a mistake of law. *See, e.g., United States v. Twilley,* 222 *F.3d* 1092, 1096 (9th Cir.2000); *United States v. Lopez-Valdez,* 178 *F.3d* 282, 289 (5th Cir.1999). In *Lopez-Valdez,* a state trooper stopped the defendant's car near the U.S.-Mexican border believing that a broken tail light, emitting both white and red light, constituted a traffic infraction. 178 *F.3d* at 284-85. The statute at issue required that every motor vehicle be equipped with at least two tail lamps mounted on the rear, which when lighted must emit a red light plainly visible from a distance of one thousand feet to the rear. *Id.* at 288 n. 5. However, a case that had been decided and published ten years earlier made clear that in Texas, state police officers do not have authority to stop vehicles with cracked tail light lenses that permit some white light to be emitted with red light. *Id.* at 288.Finding the trooper's interpretation of the law erroneous, albeit in good faith, the court granted the suppression motion, reasoning that officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive. *Id.* at 289.

Thus, suspicion based on a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because the legal justification for a traffic stop must be objectively grounded. Here, we are satisfied that the law requires only a total of two functioning rear tail lamps, one on each side. Thus, if as defendant maintains, only one of four tail lights was extinguished, leaving the minimum number of working rear tail lights, then no violation of the law occurred here and Officer Maisano's honest but mistaken view of the law cannot justify the vehicular stop in issue. However, neither the municipal court judge nor the Law Division judge made any factfinding as to the exact number of rear tail lights on defendant's 2001 Volkswagen Jetta, nor for that matter did either of them resolve whether the officer's interpretation of the statute was correct. Instead, both judges referred generally to the officer's good faith belief and, in addition, the Law Division judge cited the community caretaking doctrine, both of which, for reasons already stated, do not justify the automobile stop in this instance.

Rather, the legality of the stop here depends exclusively on whether there were a total of two functioning rear tail lights, one on each side, a fact we are unable to ascertain from the state of the present record. Under the circumstances, then, we are constrained to remand to the Law Division for further factfinding.

No substantial evidence at trial that a driver's inability to drive was affected by recent methamphetamine ingestion.

People v. Torres
93 Cal.Rptr.3d 303

Defendant was convicted for DUI-Methamphetamines. He challenged the sufficiency of the evidence.

San Diego Police Narcotics Detective Ray Morales was conducting surveillance on a house when he observed Mr. Torres show up. When Mr. Torres departed, Det. Morales followed him. Det. Morales stopped Mr. Torres when Mr. Torres failed to stop prior to the line marking the intersection. Evidence at trial was that the vehicle did not follow through the intersection, he did not lock up the truck's brakes and come to a screeching halt, and he was not involved in any near-miss accidents with other vehicles. He simply did not bring the truck to a complete stop until after

half the truck had passed the limit line.

Mr. Torres was cooperative. According to Det. Morales, he was jittery, his facial muscles twitched, and he shuddered. He was also nervous and agitated. His demeanor went from remorse to paranoia. He was sweating profusely, had rigid muscles, and could not stand still. He appeared sleepy despite his eyes being open and watery. He had bad breath with a chemical odor and was unkempt. Mr. Torres admitted to using 2 days prior.

Det. Morales testified that he examined Mr. Torres about 1 hour and 40 minutes after the stop. He found Mr. Torres' pulse to be elevated, his pupils to be more dilated than normal with signs of slow contraction and rebound dilation.

Det. Morales is not a DRE, nor did he seek to have a DRE administer the protocol to Mr. Torres. However, Det. Morales was found by the trial court to be qualified to testify as an expert on the recognition of a person under the influence of methamphetamine, but did limit his testimony to impairment, not allowing him to testify on how a person's use of methamphetamine affects a person's ability to drive. Morales concluded that Mr. Torres was under the influence of methamphetamine and was in the euphoria stage when he was arrested.

Det. Morales further testified about the various and sundry ways that methamphetamine intoxication can affect a person's abilities judgment, focusing, muscle rigidity. Det. Morales did not conduct other field tests or otherwise test his balance capability. Det. Morales testified that he has conducted those tests on others he believed to be under the influence of alcohol, he has never done so with persons he believed to be under the influence of methamphetamines. Additionally, he has never observed how methamphetamine use affects a person's ability to multitask or engage in divided attention tasks.

Ola Bawardi testified as the state expert on toxicology. She tested Mr. Torres' urine and found 50,000 nanograms per ml of methamphetamines and 60,000 ng/ml of amphetamines. She described that it was a high level, but that she was unable to determine if Mr. Torres was under the influence of meth because urine testing does not show how much meth is circulating through the person's body and brain. She explained that meth ingestion is exhibited by fidgetiness, sweating, muscle rigidity, dilated pupils, wide-open appearance of the eyes, and elevated pulse. She testified that these symptoms would be noticeable within the first 12 hours after ingestion.

Bawardi has never observed people under the influence of meth, but has seen videos of such. She has never done research on the issue, and is unaware of any research having been done on how meth use at abuse levels affects the body. She knows of only therapeutic studies having been done. She has studied literature on drugs and alcohol, including one study done by Dr. Barry Logan on meth use and driving impairment that concluded that use at any level is likely to produce systems inconsistent with safe driving. She was also aware of the NHTSA fact sheet on meth that asserts that amphetamines may affect some psychomotor tasks and increase risk-taking at higher doses and that drug withdrawal may impair psychomotor skills required for safe driving. She agreed with these statements.

She believed that a person examined 1 hour, 40 minutes after the stop who exhibited the above mentioned symptoms which were observed in Mr. Torres would be exhibiting several symptoms consistent with stimulant use. She could not determine whether or not someone with the symptoms observed in Mr. Torres would be an unsafe driver, but opined that she would expect this to be true. She opined that dilated pupils from meth use might cause momentary blindness while driving, but acknowledged that sweating, fidgetiness, and a high pulse rate would not make a driver unsafe. She also stated that failing to stop at the intersection line by itself does not indicate an unsafe driver, nor was she aware of any study concluding that someone with 50,000 ng/ml in a person's urine would make that person unsafe.

Mr. Torres testified that he had ingested meth at 8:00 that morning, but was not feeling the effects of the meth when he was stopped. He admitted to being untruthful with Det. Morales.

In assessing the **sufficiency of the evidence**, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]. [Citations.] (People v. Bolin (1998) 18 Cal.4th 297, 331, 75 Cal.Rptr.2d 412, 956 P.2d 374; accord, People v. Steele (2002) 27 Cal.4th 1230, 1249, 120 Cal.Rptr.2d 432, 47 P.3d 225.)

[T]o be guilty of driving while under the influence of drugs in violation of Vehicle Code section 23152, subdivision (a), the ... drug(s) must have so far affected the nervous system, the brain, or muscles [of the individual] as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.] [Citations.] (People v. Canty (2004) 32 Cal.4th 1266, 1278, 14 Cal.Rptr.3d 1, 90 P.3d 1168.) It is not enough that the drug could impair an individual's driving ability or that the person is under the influence to some detectible degree. Rather, the drug must actually impair the individual's driving ability. (People v. Enriquez (1996) 42 Cal. App.4th 661, 665-666, 49 Cal.Rptr.2d 710.)

The California Court of Appeals found that there was ample evidence demonstrating Mr. Torres' ingestion of methamphetamine, even that he was under the influence of that drug. However, there was no evidence that the drug was adversely affecting his ability to drive on the night of his arrest. The Court pointed out that Bawardi acknowledged that pupil dilation might lead to temporary blindness while driving, but that there was no evidence that Mr. Torres exhibited such. Furthermore, fidgetiness, high pulse rate, sweatiness and rigid muscles was not correlated to impaired driving, and that there was no expert evidence to so link the two. At best the jury could infer that there was a potential for such linkage, but they could not conclude that there was such a situation on that night with Mr. Torres. Mr. Torres was not driving erratically, he had committed a common traffic infraction which, alone, does not demonstrate impairment.