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WHEN IS AN ARIZONA DRUNK DRIVER NOT A DRIVER?: ZARAGOZA
AND ACTUAL PHYSICAL CONTROL

Alexander Y. Benikov*

I. INTRODUCTION	565
II. ARIZONA DUI LAW BEFORE ACTUAL PHYSICAL CONTROL	567
III. ARIZONA COURTS STRUGGLE TO DEFINE ACTUAL PHYSICAL CONTROL	568
A. State v. Webb	568
B. State v. Zavala	571
C. <i>Factors Determining Actual Physical Control</i>	572
1. State ex rel. McDougall v. Superior Court.....	572
2. State v. Vermuele	572
3. State v. Superior Court (Goseyun)	573
D. State v. Love.....	573
IV. ARIZONA ACTUAL PHYSICAL CONTROL POST <i>Love (Zaragoza)</i> .	574
V. CONCLUSION	577

I. INTRODUCTION

Arizona laws regarding driving under the influence of alcohol or drugs (“DUI”) can be unfair and lead to absurd results. Consider the following two scenarios about defendants who were charged with DUI.¹ The first defendant is a college student. After a long night of partying at a friend’s house, the college student knew he was too drunk to drive home; he also knew he was too far from his dorm to walk. He decided to go to his car and sleep. He got into the car, reclined the seat, and fell asleep. He had planned on sleeping off the

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¹ The following fact scenarios are based upon the author’s experiences practicing in criminal law. For clarification, this Article uses the following distinctions:

Key in: key is in the ignition, but the battery or engine has not been turned on.

Battery on: key turned in ignition at first point, but the engine is not running.

Engine on: key has been turned to the point that the engine is running.

alcohol and driving home in the morning. The next thing he remembered was a police officer knocking on the car window and accusing him of DUI. The student told the police officer that he was not driving, had no intention of driving, and had only slept in his car. Nevertheless, the police officer arrested the student for DUI. Under Arizona DUI law, was the student guilty of a DUI offense?

Next, consider the defendant who was charged with a DUI offense while sitting in his car outside his girlfriend's apartment. It was the middle of a hot day, and the man was parked in a covered parking spot outside the girlfriend's apartment. Although he did not start the engine, the man turned the car ignition "on" to activate use of the battery so he could roll down the electric windows and listen to the car's radio. While he was sitting inside the car, the man's car stereo drew the attention of police officers that were nearby investigating an unrelated matter. The police officers went over to the car, smelled alcohol on the man's breath, conducted a DUI investigation, and charged him with DUI. Under Arizona law, was the man guilty even though the engine was not running and he did not drive?

Both defendants faced consequences and punishment if convicted. Under Arizona DUI laws, the two defendants faced mandatory jail time ranging from one day to several weeks, thousands of dollars in fines, criminal records of conviction, mandatory alcohol education classes, and mandatory ignition interlock devices.² Besides the legal consequences of conviction, the defendants also faced other potential penalties such as possible job loss, embarrassment, and financial strain.³ Ultimately, a jury convicted one of the above defendants, but the other defendant was found not guilty. Were these results inconsistent or within the legislature's intent? Or, perhaps, were the results in fact consistent? Should Arizona consider changing its laws so that a person can only be charged with a DUI offense if he actually drives a vehicle while intoxicated?

Current Arizona misdemeanor law for DUI is well defined. In Arizona, "[i]t is unlawful for a person to drive or to be in actual physical control of a vehicle . . . [w]hile under the influence of intoxicating liquors, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substance if the person is impaired to the slightest."⁴ It is also unlawful for a person to have a blood alcohol concentration of .08 or more within two hours either of driving or of being in physical control of a vehicle, if the alcohol concentration results from alcohol consumption before or during the driving or physical control of the vehicle.⁵

² ARIZ. REV. STAT. ANN. § 28-1381 (2012).

³ *See id.*

⁴ *Id.* § 28-1381(A)(1).

⁵ *Id.* § 28-1381(A)(2).

This Article focuses on how courts interpret “actual physical control” of a vehicle. Historically, the actual physical control language was not part of Arizona’s DUI law.⁶ Thus, this Article begins by tracing, through case law, the history of Arizona’s addition of actual physical control to its DUI statutes. Addition of the actual physical control language is significant because the addition made it possible for police to issue DUI charges, even when the subject was not actually driving. Next, this Article reviews some of the actual physical control cases leading to the seminal *State v. Zaragoza*⁷ decision. Finally, the author argues for changing Arizona’s DUI laws.

II. ARIZONA DUI LAW BEFORE ACTUAL PHYSICAL CONTROL

For many years, the legislature and courts limited Arizona DUI statutes to actual driving.⁸ If a person was not driving, he could not be charged with a DUI offense in Arizona.⁹ One of the last major Arizona cases that dealt with the definition of DUI, before the addition of actual physical control language, was *State v. Ponce*.¹⁰ In *Ponce*, the Arizona Supreme Court held that a person who operated a motor vehicle while impaired was guilty of a DUI crime.¹¹ Specifically, the *Ponce* court found that even though the defendant was intoxicated and collided with the deceased, he was not liable for driving while intoxicated unless he attempted to operate the vehicle. Thus, the court made a significant distinction between being in a vehicle while intoxicated, and operating a vehicle while intoxicated.¹² The *Ponce* court dealt with an accident, but an accident was not required for a defendant to be charged with DUI.¹³

In *Ponce*, the trial court defined the issue before it as:

Does proof that an accused, while operating a motor vehicle upon the public highway while under the influence of intoxicating liquor collides with a person thereon, causing injuries to said person from which he very shortly dies, ipso facto establish the commission of manslaughter, there being no further or additional proof of the manner of the operation of the motor vehicle, or the manner of the collision?¹⁴

⁶ See *State v. Ponce*, 124 P.2d 543, 543 (Ariz. 1942).

⁷ *State v. Zaragoza*, 202 P.3d 489 (Ariz. Ct. App. 2008).

⁸ See ARIZ CODE ANN. § 66-402 (1939).

⁹ See *id.*

¹⁰ See *Ponce*, 124 P.2d at 543.

¹¹ *Id.* at 544.

¹² *Id.*

¹³ See *id.*

¹⁴ *Id.* at 543.

The Arizona Supreme Court answered the question affirmatively.¹⁵ It relied on Arizona law, current at the time, that stated it is “a misdemeanor for any person to drive an automobile on the public highway while under the influence of intoxicating liquor.”¹⁶

The *Ponce* court made it clear that if a person operates a motor vehicle while under the influence of alcohol, he is not only responsible for the misdemeanor DUI charge, but also any criminal charge that stems from that driving.¹⁷ Thus, DUIs are not the only crimes in Arizona for which a defendant can be charged with a crime while operating a car under the influence of alcohol. Other crimes include vehicular manslaughter¹⁸ and felony driving under the influence.¹⁹

After the *Ponce* decision, the Arizona Legislature extended the DUI statute to prohibit actual physical control of a vehicle while under the influence of intoxicating liquor.²⁰ Although the impetus for the change is unclear, it is possible that the legislature was under pressure from citizens and groups like Mothers Against Drunk Driving.²¹ Nevertheless, the legislature may have intended that police have power to charge people with DUIs whether they were driving, just finished driving, or were about to drive. Although the legislature changed the DUI laws to include actual physical control of a vehicle, the legislature did not define actual physical control.²²

III. ARIZONA COURTS STRUGGLE TO DEFINE ACTUAL PHYSICAL CONTROL

A. *State v. Webb*

One of the first Arizona cases to address actual physical control was *State v. Webb*.²³ The facts in *Webb* were undisputed.²⁴ On November 17, 1953, at 2:00 a.m., a police officer, while responding to an unrelated call, saw the defendant’s truck stopped in a traffic lane.²⁵ The officer found the truck parked in

¹⁵ *Id.* at 544.

¹⁶ *Id.* at 543 (citing Section 1688, R.C. 1928, as amended by Laws 1935 c. 33 § 1).

¹⁷ *See id.* at 544.

¹⁸ *See* ARIZ. REV. STAT. ANN. § 28-675 (2012); *see also* *State v. Marty*, 801 P.2d 468 (Ariz. Ct. App. 1990).

¹⁹ *See* § 28-1382.

²⁰ ARIZ. CODE ANN. § 66-156(a) (Supp. 1951).

²¹ MADD, <http://www.madd.org/> (last visited May 8, 2013) (Mother’s Against Drunk Driving was founded in 1980 and did not influence the 1951 change to the Arizona code).

²² *See* ARIZ. REV. STAT. ANN. § 28-1301 (2012).

²³ *State v. Webb*, 274 P.2d 338, 338 (Ariz. 1954).

²⁴ *Id.*

²⁵ *Id.*

the westbound lane of Roosevelt Street next to some barricades.²⁶ The truck's headlights were on, but no one could be seen behind the wheel.²⁷ The officer noticed other cars passing the truck and thought the truck might be stalled.²⁸ When the officer passed the truck about twenty minutes later, the truck was in the same position.²⁹ The officer went to the truck to investigate.³⁰

The officer observed that the truck, along with the barricades, blocked the entire westbound lane of traffic.³¹ The vehicle had bright headlights on and the engine was running.³² The officer found the defendant in the truck, very intoxicated, and either "passed out" or asleep.³³ Eventually, after further investigation, the defendant's blood alcohol concentration was found to be .231.³⁴ The officer arrested the defendant and charged him with being in actual physical control of a motor vehicle while under the influence of intoxicating liquor.³⁵

At trial, the defendant conceded that he was impaired from alcohol, but he contended that the DUI statute's actual physical control of a vehicle language was not intended to include the conduct for which he was charged.³⁶ The defendant argued "that the statute in question is concerned with the driving of an automobile and other acts and conduct of a positive nature, and does not apply to the instant case where the vehicle was not moving and the defendant was asleep or unconscious."³⁷

The *Webb* court did not agree; the court found that the legislature sought to include more than just driving because "the word 'drive' was retained, and the words 'or be in actual physical control' were added in the *disjunctive*."³⁸ Specifically, the *Webb* court queried "whether under the facts, . . . the defendant was 'in actual physical control' of the motor vehicle in question in violation of Chapter 3, section 54, Laws 1950 . . ." ³⁹ The *Webb* court—citing the new law that retained the word "drive" but also added the phrase "in actual physical control"—concluded that "the legislature intended the [new] law should apply

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 339.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 338.

³⁶ *Id.* at 339.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 338.

to persons having control of a vehicle while not actually driving it or having it in motion.”⁴⁰

The *Webb* court further explained its reasoning as to why the legislature may have added the phrase “actual physical control.”⁴¹ The court stated:

An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist. While at the precise moment defendant was apprehended he may have been exercising no conscious volition with regard to his vehicle, still there is a legitimate inference to be drawn that defendant had of his own choice placed himself behind the wheel thereof, and had either started the motor or permitted it to run. He therefore had the “actual physical control” of that vehicle, even though the manner in which such control was exercised resulted in the vehicle remaining motionless at the time of the apprehension.⁴²

The *Webb* court relied on several cases from other states to reach its decision.⁴³ First, the *Webb* court looked at a similar case in Ohio.⁴⁴ In *Ohio v. Wilgus*, the facts were nearly identical to those in *Webb*;⁴⁵ and the Ohio statute included actual physical control.⁴⁶ In *Wilgus*, the defendant was apprehended while asleep in his car, intoxicated, and on the side of the highway; his vehicle’s engine was running.⁴⁷ The Ohio trial court found the defendant guilty of DUI because, although the defendant was not driving, the court found that he had actual physical control of the vehicle.⁴⁸

Second, the *Webb* court looked at a DUI case in Kentucky.⁴⁹ In *DeHart v. Gray*, the intoxicated defendant left his truck in the middle of the highway with the door open, headlights on, and motor running.⁵⁰ The defendant returned to the truck, stepped on the running board, and announced his intention to drive

⁴⁰ *Id.* at 339.

⁴¹ *Id.* at 340.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (reviewing *Ohio v. Wilgus*, 17 Ohio Supp. 34 (1945)).

⁴⁵ *Wilgus*, 17 Ohio Supp. at 35.

⁴⁶ OHIO GEN. CODE ANN. § 6307-19(a) (1945).

⁴⁷ *Wilgus*, 17 Ohio Supp. at 35.

⁴⁸ *Id.* at 38-39.

⁴⁹ *State v. Webb*, 274 P.2d 338, 338 (Ariz. 1954) (reviewing *DeHart v. Gray*, 245 S.W.2d 434 (Ky. Ct. App. 1952)).

⁵⁰ *DeHart*, 245 S.W.2d at 434.

away.⁵¹ The Kentucky court held that the defendant had physical control of the truck within the meaning of Kentucky's DUI statutes, and that the responding police officer saw the crime occur in his presence.⁵²

Although the *Webb* court did not establish a bright-line rule defining actual physical control of a vehicle under Arizona's DUI statutes, the *Webb* court did find that sitting in a vehicle with the engine running constitutes actual physical control.⁵³

B. State v. Zavala

The next Arizona case that attempted to define actual physical control was *State v. Zavala*.⁵⁴ In *Zavala*, police officers found the defendant partially hanging out of the driver's side window of his vehicle.⁵⁵ The defendant was parked in the emergency lane of the freeway, with his vehicle's key in the "off" position, and thus, without the motor running.⁵⁶ The officers found the defendant to be extremely intoxicated and unconscious.⁵⁷ The *Zavala* court ultimately found the defendant was not in actual physical control of the vehicle within the meaning of the DUI statute and distinguished the case from *Webb* for two reasons.⁵⁸

First, unlike *Webb*, the engine in *Zavala*'s case had been turned off.⁵⁹ The *Zavala* court noted the obvious: a vehicle cannot be driven if the engine is turned off.⁶⁰ Second, the *Zavala* court reasoned that unlike *Webb*, the truck was not in a traffic lane.⁶¹ The *Zavala* court held that given the circumstances of the case, the "defendant voluntarily ceased to exercise control over the vehicle prior to losing consciousness."⁶²

The *Zavala* court explained that because the defendant had voluntarily ceased control over the vehicle, he was not in actual physical control.⁶³ The court felt compelled to reach this decision because "it is reasonable to allow a driver, when he believes his driving is impaired, to pull completely off the

⁵¹ *Id.*

⁵² *Id.* at 435.

⁵³ *Webb*, 274 P.2d at 340.

⁵⁴ *State v. Zavala*, 666 P.2d 456 (Ariz. 1983).

⁵⁵ *Id.* at 457.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 458-59.

⁵⁹ *Id.* at 458.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.* at 459.

⁶³ *Id.*

highway, turn the key off and sleep until he is sober”⁶⁴ Perhaps if the vehicle had been more on the roadway, the *Zavala* court would have reached a different decision because, at the time of the court’s decision, how far off the road a vehicle was located played a crucial role in whether the defendant could be charged with DUI.

C. *Factors Determining Actual Physical Control*

Next came three Arizona cases, all of which held that parking a vehicle and turning the engine off are controlling factors as to whether a person is in actual physical control of the vehicle.

1. *State ex rel. McDougall v. Superior Court*⁶⁵

McDougall dealt with a defendant who was sleeping inside his car located in a parking lot, with the engine running.⁶⁶ Police officers approached the vehicle, determined the defendant was intoxicated, and cited the defendant for DUI.⁶⁷ The court held that in this case, the defendant was in actual physical control—although he was not in a roadway’s driving lane—because the engine was running.⁶⁸

2. *State v. Vermuele*⁶⁹

In *Vermuele*, the court found that whether a car was parked, and whether the engine was on, were determining factors for actual physical control of the vehicle.⁷⁰ In *Vermuele*, an intoxicated driver was illegally parked, had the key in the ignition of his vehicle, and had the key turned to the “on” position.⁷¹ Unlike the driver in *McDougall*, the driver in *Vermuele* had the key turned on to the point that the engine’s battery was on, but the engine was not running.⁷²

The trial court dismissed the case; the appellate court reversed, finding that the defendant was in actual physical control.⁷³ The appellate court explained that the intoxicated defendant was in actual physical control of the vehicle

⁶⁴ *Id.*

⁶⁵ *State ex rel. McDougall v. Superior Court*, 845 P.2d 508 (Ariz. Ct. App. 1992).

⁶⁶ *Id.* at 509.

⁶⁷ *Id.*

⁶⁸ *Id.* at 512-13.

⁶⁹ *State v. Vermuele*, 772 P.2d 1148 (Ariz. Ct. App. 1989).

⁷⁰ *Id.* at 1150.

⁷¹ *Id.* at 1149.

⁷² *Id.*

⁷³ *Id.* at 1150.

because he was behind the wheel of the car, was illegally parked, had the key in the ignition, and had the battery turned on.⁷⁴

The *Vermuele* case is similar to *Zavala* because in each of the two cases, the vehicle's engine was not running. However, the *Zavala* court found that the defendant was not in actual physical control of the vehicle because, among other things, the engine was turned off—indicating that the driver voluntarily ceased control of the vehicle. Whereas in *Vermuele*, the court reached a different decision because the battery was on.

3. State v. Superior Court (Goseyun)⁷⁵

The third case, *Goseyun*, focused on where the suspect parked his vehicle, and on whether the engine was turned off.⁷⁶ In *Goseyun*, the court determined that there was actual physical control—although the defendant was parked ten to twenty feet from the edge of the road—because the car's engine was running.⁷⁷

The *Goseyun* court did not establish a distance in feet that the vehicle must be off the road for actual physical control to cease. It is not clear whether the suspect would have been in actual physical control if the vehicle had been parked farther away from the road—for example, fifty or sixty feet. The *Goseyun* court seemed concerned for two reasons—for purposes of actual physical control—with how far off the road a defendant driver is located.⁷⁸ First, the farther off the main road, the less likely it is that an individual can cause an accident or be hit by another driver.⁷⁹ Second, the farther someone is off the main road, the less likely he is to drive.⁸⁰

D. State v. Love⁸¹

The next Arizona case, *Love*, also took up the issue of actual physical control.⁸² The *Love* court adopted a “totality approach,” which was a move away from the bright-line approach of focusing on where the vehicle was located, and on whether or not the engine was off.⁸³ In *Love*, the defendant was asleep in his car, “lying with his head near the passenger door and his legs underneath

⁷⁴ *Id.* (defendant “was readily capable of placing his vehicle into the stream of traffic.”).

⁷⁵ State v. Superior Court (*Goseyun*), 735 P.2d 149 (Ariz. Ct. App. 1987).

⁷⁶ *Id.* at 152.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ State v. Love, 897 P.2d 626 (Ariz. 1995).

⁸² *Id.*

⁸³ *Id.* at 628.

the steering wheel.”⁸⁴ The car was parked in an emergency lane located off the road with the engine still running.⁸⁵ A police officer approached the vehicle and woke up the defendant.⁸⁶ When awakened, the defendant immediately reached for the gearshift as if to drive, but the officer convinced him to move over and allow the officer to turn off the car.⁸⁷ A DUI investigation ensued, and tests confirmed that the defendant was intoxicated.⁸⁸ The trial court found Love guilty of DUI.⁸⁹

The *Love* court concluded it was preferable “to allow the trier of fact to consider the totality of the circumstances in determining whether defendant was in actual physical control of the vehicle.”⁹⁰ The court listed a number of factors to be considered in determining whether a defendant had actual physical control, including:

[W]hether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle’s headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense.⁹¹

The *Love* court concluded that under a “totality of the circumstances” test, the defendant could have been acquitted or convicted, and the court reversed the conviction.⁹² The court went on to state that, “if it can be shown that such a person drove while intoxicated to reach a place where he or she was found, the evidence will support a judgment of guilt.”⁹³

IV. ARIZONA ACTUAL PHYSICAL CONTROL POST *Love* (*Zaragoza*)

In *State v. Zaragoza*, the Arizona Supreme Court relied on *Love*’s “totality of the circumstances” test to develop model jury instructions that define actual

⁸⁴ *Id.* at 627.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 628.

⁹¹ *Id.* (citing *Atkinson v. State*, 627 A.2d 1019, 1027 (Md. 1993)).

⁹² *Id.* at 629.

⁹³ *Id.* at 629-30.

physical control of a vehicle.⁹⁴ However, the *Zaragoza* court held that a “defendant’s purpose in exercising control of a vehicle” should not be considered when determining whether a defendant was in actual physical control of a vehicle.⁹⁵

In *Zaragoza*, a police officer observed the defendant holding on to cars while staggering through a parking lot toward his car.⁹⁶ After the defendant entered his car, the officer pulled up behind him.⁹⁷ The officer shined his flashlight inside the car and saw the defendant “in the driver’s seat with one hand on the steering wheel as he inserted the key into the ignition with the other hand.”⁹⁸ Before the defendant started the car, the officer instructed him to exit the car.⁹⁹ The defendant complied; it was later determined that he was extremely intoxicated with a blood alcohol content of .357.¹⁰⁰

At the trial the defendant testified that he “intended to sleep in the car after having an argument with a woman inside the apartment complex and that he only planned to start the ignition to roll down the window and to turn on the radio.”¹⁰¹ The only issue was “whether [the defendant] had exercised ‘actual physical control’ over his vehicle.”¹⁰² The trial court instructed the jury on actual physical control, as follows: “The defendant is in actual physical control of the vehicle if, based on the totality of the circumstances shown by the evidence, his *potential use* of the vehicle presented a real danger to himself or others at the time alleged.”¹⁰³ The jury found the defendant guilty of DUI.¹⁰⁴ The defendant appealed his conviction.¹⁰⁵

The appellate court reversed the conviction and concluded that the trial court’s jury instructions misled the jury because the instructions defined actual physical control to include the phrase “potential use.”¹⁰⁶ The court explained, “[b]ecause the instruction could have been interpreted by the jurors as requiring them to find [the defendant] guilty based on control of his vehicle he *might* have hypothetically exercised but never *did*, that instruction was erroneous.”¹⁰⁷

⁹⁴ State v. Zaragoza, 209 P.3d 629 (Ariz. 2009) (en banc).

⁹⁵ *Id.* at 634.

⁹⁶ *Id.* at 630.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 631.

¹⁰⁷ *Id.* Observing “many impaired adults have ready access to a vehicle, and therefore the potential use of one, but retain the sound judgment not to drive,” the court of appeals concluded

The Arizona Supreme Court granted the State of Arizona's petition for review because the court believed this was a recurring issue of statewide importance.¹⁰⁸

When the case came to the Arizona Supreme Court, both the defendant and the State of Arizona asked the court to recommend an instruction that would avoid confusion about the meaning of "actual physical control."¹⁰⁹ The Arizona Supreme Court vacated the court of appeals decision and stated, "[t]he court of appeals here also attempted to give guidance to trial courts on an appropriate instruction"¹¹⁰ but found the suggested language could create unnecessary ambiguity:

[a]t least under the facts presented here, any instruction defining the scope of the crime must focus on the totality of the circumstances and what they demonstrate about the *defendant's purpose* in exercising control of the vehicle. More specifically, we believe the legislature intended to criminalize an impaired person's control of a vehicle when the circumstances of such control—as actually physically exercised—demonstrate an *ultimate purpose* of placing the vehicle in motion or directing an influence over a vehicle in motion.¹¹¹

The Arizona Supreme Court reasoned that the model instruction from the appellate court was flawed because *facts* determine whether a defendant exercised physical control of his vehicle, and *facts* determine a defendant's purpose for exercising control of his vehicle.¹¹² To make jury instructions clearer and simpler, the supreme court held that the following jury instruction should be given to juries when deciding if a defendant had actual physical control of a vehicle:

In determining whether the defendant was in actual physical control of a vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. Whether the vehicle was running;

that the "potential use" language in the instruction rendered it erroneous because it would "broadly reach those impaired persons merely at risk to control a vehicle." *Id.* at 633.

¹⁰⁸ *Id.* at 631.

¹⁰⁹ *Id.* at 630.

¹¹⁰ *Id.* at 634.

¹¹¹ *Id.*

¹¹² *Id.*

2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle's headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioning was on;
12. Whether the windows were up or down;
13. Any explanation of the circumstances shown by the evidence.

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.¹¹³

After providing the model jury instruction, the Arizona Supreme Court went on to explain that “[t]his instruction captures *Love*’s holding that ‘actual physical control is a question for the fact finder and should be based upon consideration of all the circumstances.’”¹¹⁴ The court found that this model jury instruction was appropriate not only because it requires a fact finder to look at all the circumstances, but also because it helps the fact finder to decide if the defendant “actually posed a threat to the public by the exercise of present or imminent control over [the vehicle] while impaired.”¹¹⁵

Through this holding, the Arizona Supreme Court made a public policy argument that drivers, pedestrians, and defendants are safer when this model jury instruction is given—as more people can be convicted of drunk driving. Perhaps, the court finds that the more people that can be charged with drunk driving, the less people will drive drunk due to fear of the consequences.

V. CONCLUSION

Arizona DUI law and the definition of actual physical control have come a long way from the early cases that were determined on a case-by-case basis and that revealed little consistency. The *Love* decision helped fact finders decide if a suspect was in actual physical control. *Zaragoza* went beyond *Love* by telling

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *State v. Love*, 897 P.2d 626, 630 (Ariz. 1995)).

¹¹⁵ *Id.* at 635 (citing *Love*, 897 P.2d at 628-29).

the fact finder not only to look at certain factors, but also to look at all the available evidence, including whether the defendant posed a threat to himself and to the public.

The two defendants charged with DUI, who were discussed in the beginning of this Article, ended up with very different results. The college student was found not guilty after a jury trial. The man who was sitting in his car outside his girlfriend's apartment was found guilty after a jury trial. The juries did not explain the reasoning behind the verdicts. To the person that was convicted, it would seem that the system is not very fair because he was not driving and had no intention of driving, but was still charged with and convicted of DUI. The question becomes what can be changed to make Arizona's DUI law more equitable when it comes to the issue of actual physical control.

The best way for Arizona to provide a more equitable approach to its DUI laws is to only charge a person with DUI if he is actually observed driving. The goal of DUI laws in every state is not only to keep the public safe, but also to keep the impaired driver safe by keeping him off the road. If a drunken person is simply sitting in a car and not driving, he poses no risk to himself or anyone around him. If an officer or a civilian sees a drunk or impaired person actually driving, then the driver should be charged with DUI.

This change would ensure that a person sitting in a car and having no intent of driving is not charged with a DUI offense. Of course, a counter argument exists that a person who might be impaired and about to drive, or who has just driven, will get away with DUI—whereas, under current Arizona law, this person would not escape charges. The major problem with this counter argument is that cases exist in which people who were not driving, and had not driven, were convicted of DUI. The Arizona Legislature might be reluctant to make this change because it does not want to appear that it is being “soft on crime.” Thus, the change would not be easy, but it would ensure that only someone who is actually driving under the influence is charged with and convicted of driving under the influence.