the Jasuta / Schulman report

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TIBA's Case of the Week

Houston - 14th - Court of Appeals

Case Name: ***The State of Texas v. Jennifer Aileene Espinosa***

- **OFFENSE**: Driving While Intoxicated / State's Appeal
- **COUNTY**: Harris
- **C/A CASE No**. 14-20-00751-CR
- **DATE OF OPINION**: May 10, 2022 **OPINION**: Justice Meg Poissant
- **DISPOSITION**: Trial Court Affirmed
- **TRIAL COURT**: CCrCL 4; Hon. Shannon Baldwin
- **LAWYERS**: Carmen Roe (Defense); Bridget Holloway (State)

(**Background Facts**): At around 3:15 p.m. in August of 2019, Ashley Fajkus and her cousin drove past a stopped line of cars waiting in the far-right lane of a public roadway for after school pick-up at an elementary school. All the cars were at a standstill. Fajkus saw Appellee sitting in the driver's seat of her car in the waiting line but noticed Appellee's neck appeared to be at an odd angle. Concerned that Appellee might be experiencing a medical emergency, Fajkus asked her cousin to stop. The two approached Appellee's vehicle. Appellee was alone in the car, which was in park with the engine running. Appellee appeared to be sleeping. Fajkus tried to open the door, but it was locked and the windows were up. Fajkus began pounding on the car's door and window. At this point, another driver waiting in the pick-up line called 911. Appellee awoke and opened her door. Fajkus could smell alcohol, and noticed Appellee's car was in park. Though Appellee was initially unresponsive, she spoke after a minute or two but was very difficult to understand. Appellee got out of the car and asked Fajkus to drive her home. An elementary school teacher, Tasha Luce, approached and told Appellee that 911 had been called and the police were on the way. According to Fajkus, when Appellee learned that the police had been

called, she went from "lethargic" to "kind of panicky a little bit" and started walking toward her car. Fajkus removed the keys from the vehicle. At that point, the vehicles in the pick-up line had begun moving and were driving around Appellee's car to make the turn to proceed into the line. When Luce approached Appellee, Appellee was already outside her vehicle, and Luce could not say how long she had been in the pick-up line. With Appellee's permission, Luce drove the vehicle to a nearby parking lot while Appellee rode in the passenger seat.

[§§ 31.024 Search & Seizure / Warrantless Searches / Probable Cause][534 Sufficiency of the Evidence / Driving While Intoxicated]: After Luce moved Appellee's car, she kept the car keys. Luce confirmed that she did not see Appellee inside her vehicle. Luce testified, however, that the pick-up line generally starts accumulating around 3:00 p.m. and that Appellee's car was about the fifth car in line. A fire truck arrived about thirty minutes after Fajkus first saw Appellee. Fire department personnel checked Appellee for medical issues and then waited for the police. Ten minutes later, Houston Police Department ("HPD") Officer Richard Brasuell arrived. Officer Brasuell is certified in standardized field sobriety testing and has some training and experience with evaluating intoxicated drivers. Officer Brasuell spoke to Fajkus, her cousin, Luce, a firefighter, and Appellee. Fajkus told Officer Brasuell that she saw Appellee behind the wheel of her parked vehicle stopped in the non-moving school pick-up line of traffic, with keys in the ignition and the engine running. Fajkus also told the officer that Appellee "smelled like a bar" and "couldn't walk a straight line." One of the firefighters also told the officer that Appellee smelled of alcohol. Four empty wine bottles were removed from Appellee's car. Luce told Officer Brasuell that Appellee said she was going to a nearby middle school, possibly to pick up her son. However, Luce also acknowledged that she did not see Appellee actually drive her car or know when Appellee parked at that location. Officer Brasuell approached Appellee. He observed that she had slurred speech, was disoriented, was confused about where she lived, was unsteady on her feet, had "glossy" red eyes, and had a strong odor of alcohol emanating from her person. The officer acknowledged that no one had seen Appellee driving her vehicle but explained that Appellee told him that she was coming from her house and was on her way to pick up her son. Appellee refused standardized field sobriety testing, and Officer Brasuell arrested her for suspicion of DWI. It is undisputed that Officer Brasuell arrested Appellee without a warrant. After hearing the evidence, the trial court granted Appellee's motion to suppress all evidence, concluding that Appellee was arrested without probable cause because the State failed to establish that Appellee operated a motor vehicle while intoxicated as required for the offense. The State asserts that the officer had probable cause because Appellee was seen in the driver's seat of a car on a public roadway, in a moving lane of traffic, with the engine on, yet asleep at the wheel, and because she stated she was driving somewhere, either to work or to get her son.

Holding: The term "operate" is not defined in the penal code; however, case law provides that, under a sufficiency review, a person operates a vehicle if the totality of the circumstances indicates that the person took action to affect the functioning of a vehicle in a manner that would enable the vehicle's use or exerted personal effort to cause the vehicle to function. ***Maciel v.***

State, 631 S.W.3d 720 (Tex.Cr.App. 2021)(see ☙, Vol. 29, No. 39; 10/11/2021); ***Denton v. State***, 911 S.W.2d 388 (Tex.Cr.App. 1995)(see ☙, Vol. 3, No. 36; 12/11/1995). *** For the evidence to be sufficient to support a conviction for DWI, a "temporal link" must exist between the defendant's intoxication and his driving. This temporal link may be established by circumstantial evidence ***Kuciemba v. State***, 310 S.W.3d 460 (Tex.Cr.App. 2010)(see ☙, Vol. 18, No. 20; 05/31/2010). *** The State argues that Officer Brasuell had probable cause to believe that Appellee had operated her vehicle while intoxicated. We disagree. The circumstantial evidence was insufficient to establish a temporal link between Appellee's intoxication and her driving. *** No one saw Appellee drive her car, and there was no evidence of Appellee's intoxication at the time she allegedly "operated" the car -- as logically there could not be given that no witness could state when Appellee drove the car. *** There was no testimony adduced as to when Appellee arrived at the location where she was spotted by Fajkus. Further, there was no evidence that Appellee intended to drive her car; to the contrary, Fajkus, the woman who testified she initially made contact with Appellee, testified that Appellee asked Fajkus to drive her home. Luce then drove the car to a parking lot after obtaining Appellees' permission to do so, indicating an intention of Appellee not to operate her vehicle. *** In summary, unlike the authority relied upon by [the State], there was insufficient evidence to establish a temporal link between [Appellee]'s alleged intoxication and her operation of her vehicle. *** Appellee did not admit to drinking, there were no positive breathalyzer results or failed field sobriety tests to suggest if, when, and how much, if any, alcohol was consumed, none of the witnesses knew how long Appellee's vehicle was in the location where she was observed, no one saw Appellee drive or operate her vehicle, and the testimony indicates Appellee did not express an intent to drive or operate her vehicle. *** Considering the totality of the circumstances, we conclude that the facts presented are insufficient for a prudent person to believe that Appellee had been driving while intoxicated, and thus the officer did not have probable cause to arrest her. Accordingly, the trial court did not err in granting Appellee's motion to suppress.

> **Concurring / Dissenting Opinions**: Justice Kevin Jewell dissented. He argued that the majority opinion and the trial court were wrong in determining that probable cause did not exist because nobody saw Appellee operating the car, given the "undisputed evidence from witnesses the trial court found to be credible" and that a "concerned citizen" discovered the defendant was "asleep in her vehicle with the keys in the ignition and the engine running on a public roadway, caught in the standstill traffic associated with a school pick-up line."

(**David A. Schulman**) An integral part of the State's argument was that "Appellee was seen in the driver's seat of a car on a public roadway, in a moving lane of traffic, with the engine on . . .." The problem with that theory is that the testimony was clearly to the effect that the line was not moving and did not begin moving until after 911 had been called and Fajkus had removed the keys from Appellee's vehicle. The bottom line is that Appellee was not "operating" when the car was first noticed, there was no evidence which would have

allowed anyone (certainly not the trial judge) to say Appellee probably operated the vehicle while intoxicated, and more than ample evidence for the trial court to have found that, although it was possible that Appellee operated the vehicle while intoxicated, the evidence presented in the suppression hearing showed nothing more than that she had "possibly" operated the vehicle while intoxicated. Both the trial judge and the Court of Appeals reached the proper conclusion.

(**John G. Jasuta**) I think this will not last. The evidence showed she was alone in a car, empty bottles were there, she couldn't walk well and the car was running. While I think the majority got it right, I doubt that the Court of Criminal Appeals will agree.