*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2015-335

FEBRUARY TERM, 2016

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| State of Vermont | } | APPEALED FROM: |
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| | } | Superior Court, Chittenden Unit, |
| v. | } | Criminal Division |
| | } | |
| | } | |
| Dorothy M. Fuller | } | DOCKET NO. 369-2-15 Cncr |
| | | Trial Judge: Michael S. Kupersmith |

In the above-entitled cause, the Clerk will enter:

Defendant appeals her conviction for driving while under the influence (DUI). On appeal, defendant argues that she was convicted on different grounds than noticed in the charging documents and that there was insufficient evidence to demonstrate that any operation was on a public highway. We affirm.

Defendant was charged with DUI, and the court held a bench trial at which the following facts were presented. A witness testified that she was traveling northbound on Shelburne Road when she observed a vehicle crashed into a tree on the green belt. She approached the vehicle to check on the occupant, and observed that the car brake lights were being engaged. She found defendant in the driver's seat and saw defendant attempting to move the gearshifter. The vehicle's lights and the windshield wipers were on. When she was talking to defendant, she observed that defendant had slurred speech and glazed eyes. The witness reported the accident to the police. The officer who responded to the call testified that he found defendant in her vehicle, which was facing southbound about eight inches parallel to the northbound lanes of Shelburne Road. It was a cold evening, and there was blowing snow. The officer observed tire tracks from a parking lot leading directly to defendant's vehicle. The vehicle's lights and wipers were on, and he observed defendant attempting to put the car into gear. When he approached defendant and spoke with her, he smelled an odor of intoxicants and observed that defendant had slurred speech. Defendant admitted to drinking alcohol and stated she was on her way from her boyfriend's house to her home. The officer arrested defendant for suspicion of DUI, and the result of the evidentiary breath test was .199%. After processing defendant, the officer returned to the scene and followed the tracks. He stated that the tracks came from an apartment building parking lot, into the grassy area, across Shelburne Road, into a hotel parking lot, then southbound on the northbound lane of the green to the scene of the accident.

The court credited this testimony and found that defendant had been in the operator's seat, the headlights were on, the windshield wipers were operating, and defendant was attempting to place the car in reverse while stepping on the brake. The vehicle was facing south, about six inches from the curb of Shelburne Road. Defendant had slurred speech and glazed eyes. Based on these facts, the court concluded that defendant had operated a motor vehicle by attempting to put the car in motion on Shelburne Road. The court further found that Shelburne

Road was a public highway and that defendant was under the influence of intoxicating liquor at the time. Accordingly, the court entered a judgment of guilty.

Defendant filed a post-judgment motion for acquittal. The court denied the motion and entered judgment.

On appeal, defendant renews arguments made in her post-judgment motion. Defendant first argues that the court erred in finding her guilty because the judgment was founded on a basis not noticed in the information. Specifically, defendant claims that the court found her guilty of being in actual physical control of a vehicle, but she was charged with operating a vehicle. The DUI statute states that a person "shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway" when under the influence of alcohol. 23 V.S.A. § 1201(a). The information charged defendant with committing DUI by operating a motor vehicle on a public highway. According to defendant, she prepared her defense based on a charge of "operation." Defendant claims, however, that the court found her guilty of being in actual physical control of the vehicle—a charge that was not noticed.

There was no error because the judgment was based on an offense charged. The court found in both its oral and written findings that defendant committed DUI by operating a motor vehicle while impaired—exactly what was charged. In its oral findings, the court explained that operation includes attempting to operate, and the facts—including that defendant was adjacent to the public road, the lights and windshield wipers were on, and defendant was attempting to put the car in reverse and employ the brakes—were sufficient to show that defendant was attempting to operate a vehicle. The court's written findings are similar. The court noted that operation includes "an attempt to operate," 23 V.S.A. § 4(24), and concluded that defendant had attempted to operate her vehicle when impaired. Therefore, the court did not impermissibly convict defendant of a charge not properly noticed.

Defendant also asserts that the court erred in finding that any operation was on a public highway. Defendant claims that there was no evidence that she was on a public highway because the vehicle was just adjacent to the roadway and therefore she contends not in an area open to general circulation of traffic. She argues that the court simply speculated that she tried to drive on Shelburne Road. The trial court considered, and rejected, this argument. The court explained that it made a reasonable inference that defendant was attempting to operate the vehicle on a public highway based on the facts that Shelburne Road is a road of general circulation, defendant was in a vehicle eight inches from the traveled portion of the road, and defendant was attempting to engage the engine and move the vehicle.

We agree with the trial court that there was sufficient evidence for the court to find that the public highway element was satisfied in this case. The statute defines public highway to "include all parts of any bridge, culvert, roadway, street, square, fairground, or other place open temporarily or permanently to public or general circulation of vehicles, and shall include a way laid out under authority of law." Id. § 4(13) (emphasis added). We have concluded that this definition subsumes more than just the main portion of a roadway. See State v. Bailey, 149 Vt. 528, 528 (1988) (holding that defendant's vehicle was on public highway where two tires were on surface of breakdown lane and two tires were in snowbank); State v. Trucott, 145 Vt. 274, 283 (1984) (concluding that gravel pull-off area next to highway was public roadway).

Defendant appears to concede that the paved portion of Shelburne Road is a public road, but contends that the greenspace where her vehicle was found is not a public highway, and therefore the element was not satisfied. We need not reach the question of whether the

greenspace was a part of the roadway sufficient to satisfy the statute because we conclude that there were sufficient facts for the court to find that defendant was attempting to operate on the traveled portion of the road. Defendant's vehicle was just inches from the traveled part of the roadway, the car's lights and wipers were operating, and defendant was engaging the brakes and attempting to put the car into gear. Under these circumstances, there was sufficient evidence to support the court's determination that defendant was attempting to operate on a public highway.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice