



POLICE / PROSECUTOR UPDATE

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The Vienna Convention on Consular Relations provides that when police arrest a **foreign national**, they shall inform the foreign national "without delay" of his right to communicate with his nation's consular officers. The United States Supreme Court has determined the effect on a confession obtained from a foreign national during detention without having been informed of his right to contact national consular officials. The Court held that a violation of such right does not require suppression of statements made by the detainee during the detention.

Earlier, the Indiana Court of Appeals held that nothing in the Vienna Convention on Consular Relations requires law enforcement officials to cease all interrogation until foreign nationals speak to their consular officials. The court also held that violation of the right to consular assistance following arrest does not require suppression of evidence or dismissal of charges.

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On occasion in **OWI** cases, the issue arises as to whether the defendant had in fact "**operated**" the vehicle.

There are four factors that can be used to determine whether a person operated or was in actual physical control of a vehicle: (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the engine was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel.

Evidence insufficient: A police officer on rounds in the early morning hours observed a vehicle properly parked along the street with the engine running. The officer continued on his rounds and about one hour later returned to the same place and observed the same vehicle, engine running, apparently unmoved. The Court of Appeals held there was not sufficient evidence that the defendant had operated the vehicle. The court stated that while it is not necessary to prove movement of the

vehicle, the word "operate" requires effort, the doing of something, by the operator. The court seemed to place emphasis on the fact the vehicle was not stopped in the roadway. The only evidence here was that the vehicle parked in the same spot for one hour.

A vehicle was parked in a tavern parking lot with its lights on and engine and heater running. The transmission was in park and the defendant was asleep on the driver's side of the vehicle. This evidence was not sufficient. The court stated that showing that the defendant merely started the engine is not sufficient to prove "operating" the vehicle. There must be some direct or circumstantial evidence, other than simply starting the engine, to show that the defendant operated the vehicle.

Evidence sufficient: The fact that a vehicle is "in gear" when discovered is a factor to be considered. Evidence that the defendant, the sole occupant of a vehicle, was found asleep in the driver's seat, the vehicle was stopped partially on the roadway, the engine was running, and the transmission was in gear was sufficient to show that the defendant "operated" the vehicle. The vehicle was not moving because it had come to rest against a rock, and was not "parked" but was simply stopped with its transmission in gear.

Evidence that the defendant was found intoxicated and asleep behind the steering wheel of a van parked with its engine running in the drive-thru lane at a Burger King supported the inference that the defendant had recently "operated" the vehicle.

A driver who was behind the steering wheel of a car stuck in a snowbank with the engine running and headlights on was "operating" the car even though it could not move at all.

There was sufficient evidence where an officer found the defendant asleep behind the steering wheel of a car stopped in a lane of traffic on a county road with the engine running and lights off.

Prosecuting Attorneys Handbook, pp. 3-7 and 1-40.