

1 **14-4512. Actual physical control; defined.**

2 In determining whether the state has proved beyond a reasonable doubt that the defendant
3 was in actual physical control of the vehicle and that the defendant intended to drive the vehicle,
4 thereby posing a real danger to [~~himself~~ ~~herself~~] themselves or the public, you should consider
5 the totality of the circumstances shown by the evidence. You may consider the following factors
6 and any other relevant factors supported by the evidence:

- 7 1. whether the vehicle was running;
- 8 2. whether the ignition was in the ["_on["_ position;
- 9 3. where the ignition key was located;
- 10 4. where and in what position the driver was found in the vehicle;
- 11 5. whether the person was awake or asleep;
- 12 6. whether the vehicle's headlights were on;
- 13 7. where the vehicle was stopped;
- 14 8. whether the driver had voluntarily pulled off the road;
- 15 9. the time of day;
- 16 10. the weather conditions;
- 17 11. whether the heater or air conditioner was on;
- 18 12. whether the windows were up or down;
- 19 13. whether the vehicle was operable;
- 20 14. any explanation of the circumstances shown by the evidence.

21 It is up to you to examine all the available evidence in its totality and weigh its credibility
22 in determining whether the defendant was simply using the vehicle as stationary shelter or actually
23 posed a threat to the public by the exercise of actual control over it while impaired.

1 [Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011; as amended by
2 Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending or filed on or after
3 December 31, 2025.]

4 **Committee commentary.** — *See State v. Sims*, 2010-NMSC-027, ¶ 26, 148 N.M. 330, 236 P.3d
5 642 (holding that when a DWI charge is based on the allegation that the defendant was in actual
6 physical control of the vehicle, the state must prove that the defendant had an intent to drive and
7 limiting the holdings of *Boone v. State*, 105 N.M. 223, 731 P.2d 366 (1986); *State v. Johnson*,
8 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233). *See also State v. Mailman*, 2010-NMSC-036 , ¶ 20,
9 148 N.M. 702, 242 P.3d 269 (holding that the operability of a vehicle is an additional factor for
10 the jury to consider in determining whether a defendant has the general intent to drive).

11 [Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]