

### **Can a person DWI in a parking lot?**

Colleagues,

In the old days, a DWI wasn't an appropriate charge in a parking lot; PI, especially with a child in the car, maybe.

Has the law changed?

David Suhler

### **RE: Can a person DWI in a parking lot?**

If the parking lot is a public place, i.e. accessible to all, it is DWI. There are private parking lots (ex. College dorm where only residents can park). There is quite a bit of law on the subject.

Chuck Lanehart

### **3. RE: Can a person DWI in a parking lot?**

That is correct. The "public place" element of 49.04 is defined by 1.07(a)(40), and it includes the common areas of apartment buildings where the public has some access to. It would not apply in a truly private driveway that is access-restricted, such as a gated driveway of a large home. The old version of 49.04, Tex. Rev. Civ. Stat. Art. 6701I-1, limited DWIs to "public roads" or "highways." See, e.g., *Nelson v. State*, 628 S.W.2d 451 (Tex. Crim. App. 1982).

Michael Mowla

### **RE: Can a person DWI in a parking lot?**

DWI charging instruments today usually allege "a public street or place". They used to only allege "street". I remember using that once when the police caught my backing away from a pump at a gas station.

Michael Ray Harris

### **RE: Can a person DWI in a parking lot?**

Look at the following cases:

**Fowler v. State, 65 S.W.3d 116 (Tex. App.--Amarillo 2001)**

DWI. Reversed and an acquittal ordered.

**1. DWI -- Public Place**

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. Tex. Pen. Code Ann. § 49.04(a) (Vernon Supp. 2001). "Public place" is any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. Tex. Pen. Code Ann. § 1.07(40) (Vernon 1994).

A private residence is not a public place, nor has a driveway of a private residence ever been construed as such. *Commander v. State*, 748 S.W.2d 270, 271 (Tex. App.--Houston [14th Dist.] 1988, no pet.).

The Court of Appeals held an unpaved driveway of a rural residence approximately 1/4 mile from a county road in an isolated and secluded area was not a public place and held the evidence legally insufficient to convict.

**Shaub v. State, 99 S.W.3d 253 (Tex. App.--Fort Worth 2003)**

DWI. Affirmed.

**1. DWI -- Public Place - Marina**

Appellant was arrested for DWI at a boat marina on Lake Grapevine. He argued the evidence was insufficient to prove that the marina was a public place.

The definition of a public place is cast in broad language. *Perry v. State*, 991 S.W.2d 50, 51 (Tex. App.--Fort Worth 1998, pet. ref'd). The Tex. Penal Code § 1.07(a)(40) defines "public place" as the following:

any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

The penal code's list of specific areas that are public places is nonexclusive. In determining whether an area is a public place, the relevant inquiry is whether the public has access to it. *Loera v. State*, 14 S.W.3d 464, 467 (Tex. App.--Dallas 2000, no pet.); see also *Perry*, 991 S.W.2d at 52. Although the penal code does not define "access," the term is commonly defined as "'freedom of approach or communication; or the means, power, or opportunity of approaching, communicating, or passing to and from.'" *Loera*, 14 S.W.3d at 467 (citing BLACK'S LAW DICTIONARY 13 (6th ed. 1990)).

The Fort Worth Court of Appeals held: the evidence indicated the public had access to the marina, that it was part of a public park. A rational jury could have found from the facts and the reasonable inferences from those facts that the marina was a public place within the meaning of the statute. See *McDuff*, 939 S.W.2d at 614; *Johnson*, 23 S.W.3d at 9, 12.

Greg S. Velasquez

**RE: Can a person DWI in a parking lot?**

The Fifth Court of Appeals issued an opinion today that you might find relevant. It concerned a DWI in an apartment parking lot. That wasn't the main issue--it is a case about whether the police had a reasonable suspicion to stop a guy in a parking lot--but you might want to look at it.

[http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=97e4df34-09cc-4879-927b-ba9aad3d8447&MediaID=6e634bd9-cc71-43e7-82f1-fbdeb1876c7f&coa="+this.CurrentWebState.CurrentCourt+"&DT=Opinion](http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=97e4df34-09cc-4879-927b-ba9aad3d8447&MediaID=6e634bd9-cc71-43e7-82f1-fbdeb1876c7f&coa=)

Niles Illich

**RE: Can a person DWI in a parking lot?**

For a parking lot being held a "public place" for purposes of a DWI, see *State v. Nalior*, 949 S.W. 2d 357, San Antonio, and *Kelly v. State*, 2013 Tex. App. LEXIS 404, 3013 WL 173306.

For a gated community being held a public place for purposes of a DWI, see *State v. Gerstenkorn*, 239 S.W.3d 357 San Antonio.

For an air force base - fenced, 24 hour guards, etc. - being held a public place for purposes of a DWI, see *Woodriff v. State*, 899 S.W.2d 443 Austin

David B. Black

**RE: Can a person DWI in a parking lot?**

So much for particularized suspicion.

Kristin Brown