

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - May 17, 2007

A. GAIL PRUDENTI, P.J.
FRED T. SANTUCCI
JOSEPH COVELLO
EDWARD D. CARNI, JJ.

2003-01558

DECISION & ORDER

The People, etc., respondent,
v Kenneth Poole, a/k/a Ken Poole, appellant.

(Ind. No. 43/02)

Virginia Boccio, Farmingdale, N.Y., for appellant.

Kathleen M. Rice, District Attorney, Mineola, N.Y. (Margaret A. Mainusch and
Cristin N. Connell of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Nassau County
(Berkowitz, J.), rendered January 17, 2003, convicting him of driving while intoxicated per se, upon
a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was convicted of driving while intoxicated per se under former Vehicle
& Traffic Law § 1192.2. That law provided that “[n]o person shall operate a motor vehicle while
such person has .10 of one per centum or more by weight of alcohol in the person’s blood as shown
by chemical analysis of such person’s blood, breath, urine or saliva” (former Vehicle & Traffic Law
§ 1192.2). The defendant argues that the jury should have been charged with driving while ability
impaired as a lesser-included offense.

When it is impossible to commit a particular crime without concomitantly committing,
by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the
former, a “lesser included offense” (CPL 1.20). Driving while intoxicated per se “pertains only to
blood alcohol level without regard to the effect which that alcohol may have on the driver” (*People*

June 26, 2007

Page 1.

PEOPLE v POOLE, KENNETH, a/k/a POOLE, KEN

v Brown, 53 NY2d 979, 981). Since a driver need not be impaired to be convicted under subdivision 2 of section 1192, driving while impaired is not a lesser-included offense of that crime (*id.*). Accordingly, the Supreme Court properly refused to charge driving while ability impaired as a lesser included offense of driving while intoxicated per se (*see People v Gemboys*, 270 AD2d 847, 848; *People v Sawinski*, 148 AD2d 888, 889-890).

PRUDENTI, P.J., SANTUCCI, COVELLO and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court