

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

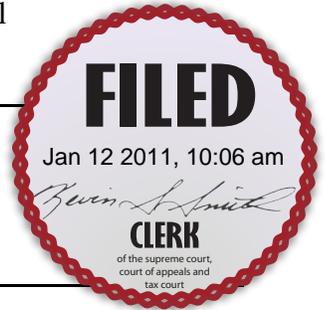
KATHARINE C. LIELL
Liell & McNeil Attorneys
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



LUCAS T. SCHOLL,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 07A01-1004-CR-166

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0810-CM-452

January 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Lucan T. Scholl appeals his conviction for Operating a Vehicle While Intoxicated, Endangering a Person,¹ a class A misdemeanor. He presents the following restated issue for review: Did the State present sufficient evidence to support his conviction?

We affirm.

The facts favorable to the judgment are that at approximately 7:20 a.m. on October 9, 2008, Brenda Fowler, a Brown County school bus driver, picked up two school children in the parking lot of the Parkview Nazarene Church. The parking lot was approximately four feet lower than State Road 46, which ran in front of it. The side of the parking lot abutting State Road 46 was landscaped with a four-foot retaining wall made of landscaping stones. When Fowler entered the parking lot, she noticed part of the retaining wall was knocked down and a vehicle was stuck on it. The back of the car was stuck on the rocks from the collapsed wall, while the front of the car was over the wall. While Fowler watched, she saw landscaping stones moving around the car and the rocks under the car were shaking. She also saw a rock fall from the wall. Fowler saw a man sitting in the driver's seat. Fowler radioed another bus driver who was associated with the church to tell him what had happened. The dispatcher overheard Fowler's radio transmission with the other bus driver and called local law enforcement.

At 7:57 a.m., Brown County Sheriff's Deputy Rick Followell arrived in the parking lot. He saw a white Datsun in the parking lot with the back end suspended off the ground three to four feet in the air. Followell found Scholl under the driver's side of the vehicle, preparing to use a car jack. The deputy asked Scholl what happened and Scholl responded

¹ Ind. Code Ann. § 9-30-5-2(b) (West, Westlaw through 2010 2nd Regular Sess.).

that he missed the turn in the fog the night before and landed in the parking lot. Scholl was unable to relate which direction he was driving when his car left the road. Deputy Followell determined that the car could not be driven from its location and a tow truck was summoned.

Meanwhile, as Deputy Followell spoke with Scholl, he smelled an odor of alcohol. The deputy questioned Scholl, who claimed he had consumed alcohol the night before but had not consumed any alcohol since. The deputy asked Scholl to perform three standardized field sobriety tests. Scholl subsequently failed all three tests. Deputy Followell concluded that Scholl was intoxicated and transported him for a breathalyzer test, to which Scholl consented and which registered an ACE of .14. The test was administered at 8:36 a.m. An inventory search of Scholl's car was conducted and no alcohol containers were recovered.

Scholl was charged with operating a motor vehicle while intoxicated, endangering a person as a class A misdemeanor and operating a vehicle with an ACE greater than .08 as a class B misdemeanor. A jury trial was conducted on February 17, 2010, after which the jury found Scholl guilty as charged. The trial court merged the greater offense with the lesser one and entered judgment of conviction for operating while intoxicated as a class A misdemeanor. The trial court sentenced Scholl to one year in jail and suspended all but forty-five days.

Scholl contends the evidence is not sufficient to sustain his conviction. Specifically, he contends there was no evidence to prove that he operated the vehicle while he was intoxicated. Our standard of review when considering a challenge to the sufficiency of the evidence is well settled.

When reviewing the sufficiency of the evidence needed to support a criminal

conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). “We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence.” *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

Bailey v. State, 907 N.E.2d 1003, 1005 (Ind. 2009).

Scholl contends the State presented no evidence that he was intoxicated when he operated the vehicle in question. He points out that Fowler was unable to identify the man she saw sitting in the car when she arrived on the scene at approximately 7:20 a.m. Moreover, he notes, by the time she arrived the car was already sitting atop the wall and she never saw it move, i.e., she never saw him or anyone operate the vehicle. Further, he notes that Deputy Followell testified that the vehicle was inoperable when he arrived at the scene shortly before 8 a.m. Thus, the deputy did not see Scholl operate the vehicle either. For his part, Scholl admitted that he had driven the vehicle to the position it was in when Fowler and later Deputy Followell observed it. But, he claimed that the accident occurred at approximately 3:00 that morning when he missed a turn in the fog and ran off State Road 46 and over the retaining wall. He also claimed that he hit his head in the incident, and that after calling several friends for help, he drank vodka because of the pain in his head.

The State’s theory during trial was that Fowler saw a man sitting behind the wheel of the car with his hands on the wheel. At that time, rocks from the retention wall were not only strewn around and under the car, but they also were moving around the car, shaking under it, and one fell beside the car - all while Fowler watched. The State contended below and reiterates upon appeal that this evidence permits a reasonable inference that Scholl, while

Fowler watched, attempted to move his vehicle off of the retention wall and thus operated it, notwithstanding that the vehicle was stuck and his attempt was ultimately unsuccessful. Scholl responds that his vehicle was inoperable by the time Deputy Followell saw it and that a mere application of common sense is all that is required to conclude that “[a] person simply cannot operate an inoperable car.” *Appellant’s Reply Brief* at 3.

In support of his contentions, Scholl cites *Johnson v. State*, 518 N.E.2d 1127 (Ind. Ct. App. 1988), and *Floyd v. State*, 399 N.E.2d 449 (Ind. Ct. App. 1980). In *Johnson*, the defendant was found sitting in his vehicle on the side of the road. The defendant explained to the officer who arrived at the scene that his car was disabled and would not start. Johnson was determined to be intoxicated and later convicted of OWI. This court reversed the conviction upon concluding that there was an absence of evidence supporting a conclusion that he was “in sole control of a vehicle “in operation.”” *Johnson v. State*, 518 N.E.2d at 1129.

In *Floyd*, a Rambler struck a parked vehicle. When police arrived at the scene a few moments later, injured passengers in the Rambler informed the officer of the driver’s name and that he had left the scene. The officer headed in the direction that the passengers informed him the defendant had gone. He came upon a man matching the passengers’ description. The man was intoxicated. The driver was charged and convicted of OWI. This court reversed upon the following rationale

There was no testimony as to the length of time between when the accident happened and when the defendant was spotted by [the police officer]. Furthermore, identification of the vehicle causing the collision was vague in that it was never identified by model, type, year or color. Similarly, identification of the defendant as the driver or operator of the vehicle at issue

is totally lacking. None of the State's witnesses placed the defendant at the scene of the accident. No witness identified him as the driver or operator of the car or established that he had ever driven it. On the contrary, [the police officer's] testimony revealed that the defendant denied driving the automobile.

Floyd v. State, 399 N.E.2d at 450-51.

One fact common to both *Johnson* and *Floyd* is that there was no evidence placing the defendant at the scene and at the wheel of the vehicle at the time the alleged operating while intoxicated occurred. In the instant case, on the other hand, Fowler saw a person matching Scholl's general description sitting in the driver's seat of the vehicle stuck on the retention wall between the parking lot and State Road 46. When Deputy Followell arrived on the scene approximately thirty-five minutes later, he found Scholl attempting to use a jack to extricate his car from its predicament. Taken together, this evidence gives rise to a reasonable inference that Scholl was the person Fowler saw in the car. Fowler testified that while she watched and while Scholl was sitting in the driver's seat with his hands on the steering wheel, some of the landscaping stones that had been knocked from the wall and were under and around Scholl's car were "moving" and "kind of shook", and one stone fell from the wall near one of the rear corners of Scholl's car. *Transcript* at 95 and 96, respectively. This evidence permits a reasonable inference that Scholl was attempting to drive the car out of its predicament.

Scholl contends that the evidence showed that his vehicle was "inoperable" by the time first Fowler and later Deputy Followell saw it and that as a matter of simple logic, Scholl cannot be said to have operated an inoperable vehicle. *Id.* at 156. Although we can envision a scenario in which a truly "inoperable" car might render this argument persuasive,

this is not such a situation. In the case of a mechanical device such as a motor vehicle, “inoperable” is best understood to refer to mechanical functionality. Thus, a car that is inoperable is one whose engine will not start or run. There is no indication that Scholl’s car’s engine was malfunctioning such that it would not start. Rather, it is clear by context that the term “inoperable” attributed to Deputy Followell did not refer to the functionality of the mechanical components of the car. Rather, as reflected in the following excerpt from Deputy Followell’s cross-examination, it referred to the prospects of Scholl, while seated in the driver’s seat and using only the accelerator, brakes, and steering wheel, being able to move the car from its perch straddling the retention wall.

Q ...and you thought that was an indicator. The car...would it be safe for me to say that based on what you saw that car was inoperable at that location. It had to be towed off that wall, didn't it?

A [Deputy Followell] Yes.

Id. In point of fact, Scholl was not immobilized because of a mechanical failure of his vehicle; instead, he was a victim of the laws of physics. Like Rosco P. Coltrane’s police cruiser after yet another unsuccessful run-in with the Duke boys, Scholl’s car was stuck. This is no different than a situation in which a driver is stuck in snow (*see, e.g., Garland v. State*, 452 N.E.2d 1021 (Ind. Ct. App. 1983), straddling a median, or for some other more conventional reason is unable to extricate his or her vehicle from its predicament and drive away. In such cases, assuming all of the other elements are met, if an intoxicated person gets behind the wheel of the mechanically functioning vehicle and attempts, even unsuccessfully, to drive out of the predicament, that person is “operating a vehicle” within the meaning of I.C. § 9-30-5-2. *See Johnson v. State*, 518 N.E.2d at 1128 (this court agreed that “the State

does not have to prove movement of the car” in order to gain a conviction under this provision). As indicated earlier, Fowler’s testimony was sufficient to create a reasonable inference that Scholl attempted to drive his vehicle from its location at approximately 7:20 a.m. This satisfies the “operating” element of I.C. § 9-30-5-2.

Scholl also contends there was insufficient proof that he was intoxicated contemporaneous with his operation of the vehicle. We observe that much of his argument in this regard is premised upon the view that the “operation” of the vehicle in question occurred when he drove off of the State Road 46 and onto the retention wall. By his own testimony, this occurred sometime shortly after 3 a.m., approximately five hours before Deputy Followell arrived on the scene. We have determined, however, that there was sufficient evidence to support the State’s theory of prosecution, i.e., that the operation of the vehicle upon which the conviction is based occurred at approximately 7:20 a.m., a mere forty minutes before Deputy Followell arrived on the scene and began his investigation. He promptly administered three field sobriety tests, which Scholl flunked. Shortly after this, a breathalyzer test was administered and the results indicated that Scholl was at a .14 level, well above the .08 threshold for intoxication. Considered in conjunction with the failed sobriety tests, there was sufficient evidence to prove that Scholl was intoxicated when he attempted to drive out of his predicament at approximately 7:20 a.m. Scholl’s claim that he consumed alcohol only *after* he was stuck was considered and rejected by the jury and it was well within their discretion to do so. We will not revisit that determination.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.