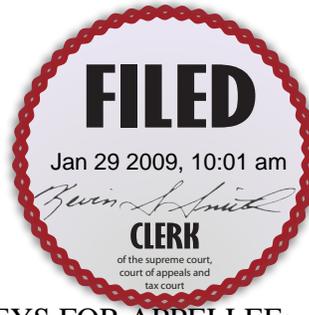


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**TIMOTHY J. BURNS**  
South Bend, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**KARL M. SCHARNBERG**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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NGUN THANG, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A05-0807-CR-398  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jeffrey Marchal, Judge Pro Tempore  
Cause No. 49F08-0804-CM-87373

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**January 29, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

Ngun Thang appeals his conviction for class A misdemeanor operating a vehicle while intoxicated (“OWI”). We affirm.

In the early morning hours of April 19, 2008, Indianapolis Metropolitan Police Department Officer Richard Kivett was summoned to a south side parking lot to investigate an incident involving an impaired driver. When he arrived, he found Thang’s vehicle in a ditch adjacent to the parking lot. He saw Thang and asked if he had been the driver of the vehicle, and Thang responded affirmatively. Officer Kivett observed the following indicia of Thang’s intoxication: alcohol on his breath, repetitious speech, unsteady gait, vomiting, and falling asleep. Thang failed three field sobriety tests, and Officer Kivett placed him under arrest.

On April 20, 2008, the State charged Thang with class A misdemeanor OWI and class B misdemeanor public intoxication. On June 9, 2008, following a bench trial, the trial court found Thang guilty as charged, and merged the public intoxication conviction with the OWI conviction.

On appeal, Thang contends that the trial court erred in admitting his statement to Officer Kivett that he was the driver of the vehicle. The trial court has broad discretion in deciding to admit or exclude evidence. *Sublett v. State*, 815 N.E.2d 1031, 1034 (Ind. Ct. App. 2004). We will not reverse the trial court absent an abuse of discretion. *Myers v. State*, 887 N.E.2d 170, 188 (Ind. Ct. App. 2008), *trans. denied*. “A trial court abuses its discretion when its evidentiary ruling is clearly against the logic, facts, and circumstances presented.” *Id.*

Specifically, Thang argues that he made the statement while he was in custody and, as such, it was inadmissible because he had not received *Miranda* warnings.

In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the U.S. Supreme Court held that when law enforcement officers question a person who has been “taken into custody or otherwise deprived of his freedom of action in any significant way,” the person must first “be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”

*Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003). Statements taken in violation of *Miranda* are generally inadmissible in a criminal trial. *State v. Hicks*, 882 N.E.2d 238, 241 (Ind. Ct. App. 2008). However, *Miranda* warnings need not be given when the person has not been placed in custody. *Id.* The key in determining whether a person has been placed in custody or deprived of freedom is whether he has been formally arrested or has been subject to restraints on his freedom of movement to the degree associated with a formal arrest. *Id.* To make this determination, we examine “whether a reasonable person in similar circumstances would believe he is not free to leave.” *Id.* (citation omitted). In doing so, we examine the objective circumstances, rather than basing our conclusion on “the subjective views of the interrogating officers or the subject being questioned.” *Id.* (citation omitted).

Thang relies on Officer Kivett’s testimony to bolster his claim that he had been placed in custody at the time he made the statement. As a preliminary matter, defense counsel questioned Officer Kivett as follows:

Q Okay, you asked my client if he was driving correct?

A I asked him if he had been driving yes.

Q And he was not free to leave at this point correct?

A I was doing an investigation yes.

Q So he was in custody for the purposes of an investigation correct?

A Yes.

Tr. at 8. Thereafter, defense counsel objected to the admission of Thang's response to the officer's question and filed a motion to suppress. The trial court denied the motion to suppress, and the State elicited the following from Officer Kivett:

Q Officer the initial question was how did you know that you were speaking to the driver of the vehicle?

A I spoke to the driver on the scene and asked him if he had driven the vehicle that was in the ditch and he stated yes.

Q And the individual who stated that he had driven the vehicle did he identify himself to you that night?

A Through identification yes.

Q Okay, what type of identification?

A I think he had an Indiana driver's license if I remember correctly.

Q Is the person who identified himself to you as Ngun Thang by a driver's license on April 19, 2008, in court today?

A Yes.

*Id.* at 10. Officer Kivett testified that, after noticing numerous signs of intoxication, he took the "next step" of administering the field sobriety tests, which Thang failed. *Id.* at 11-12.

We conclude that Thang was not in custody at the time Officer Kivett questioned him about being the driver. First, we note that the question preceded the officer's observations

regarding Thang's intoxication and subsequent administration of the field sobriety tests. We also note that driving one's car into a ditch is not, of itself, a criminal offense. To the extent Thang argues that Kivett's assignment to the drunk driving task force and his presence at the scene indicated an intent to arrest him upon arrival, the record provides no indication that Officer Kivett conveyed, either through words or actions, any intent to place Thang in custody at the time he asked the question to which Thang objects. *See Morris v. State*, 871 N.E.2d 1011, 1016 (Ind. Ct. App. 2007) (holding officer's knowledge and beliefs relevant to custody question only if conveyed, through words or actions, to defendant), *trans. denied*; *see also United States v. Kelly*, 991 F.2d 1308, 1313 (7th Cir. 1993) (holding defendant not in custody where officer who had previously decided to arrest him had not informed him of that decision). Therefore, the trial court acted within its discretion in admitting the evidence that Thang was the driver of the vehicle.<sup>1</sup> Accordingly, we affirm.

Affirmed.

ROBB, J., concurs.

BROWN, J., concurs with separate opinion

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<sup>1</sup> Thang further contends that the evidence is insufficient to sustain his conviction. Because this contention is premised solely on his argument that his statement was inadmissible, his sufficiency argument fails.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**BROWN, J. concurring**

I concur with the majority but write separately to state that our Supreme Court has stated that *Miranda* warnings are not required prior to general on-the-scene questioning related to obtaining the facts of the incident. *Johnson v. State*, 269 Ind. 370, 377, 380 N.E.2d 1236, 1240 (1978). An officer may ask routine questions for the purpose of obtaining basic identifying information without giving *Miranda* warnings. *Hatcher v. State*, 274 Ind. 230, 232-3, 410 N.E.2d 1187, 1189 (1980). Here, in order for the officer to take anyone into custody, he was required to first ascertain who was driving the car and was engaged in general investigatory questioning.

As to Thang's argument as to sufficiency of the evidence made almost in passing at the close of his brief, it essentially questions the reasonable inferences to be drawn from the evidence and is an invitation to reweigh the evidence which we cannot do.