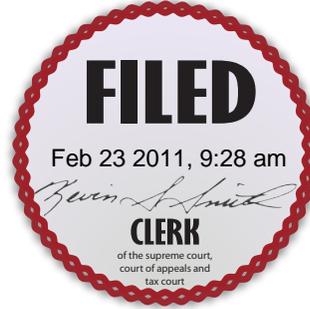


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL S. POLITES,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 68A01-1004-CR-150

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APPEAL FROM RANDOLPH SUPERIOR COURT  
The Honorable Pete D. Haviza, Judge  
Cause No. 68D01-0809-CM-00539

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**February 23, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issue

Michael S. Polites brings this interlocutory appeal from the trial court's partial denial of his motion to suppress. He raises a single issue which we restate as whether officers needed a warrant to arrest him for the misdemeanor of operating a vehicle with a blood alcohol content of 0.15 or more, a Class A misdemeanor, given that the offense allegedly occurred outside the officers' presence. Concluding a warrant was not required, we affirm.

## Facts and Procedural History

On August 17, 2008, Kyle Abernathy and his family were walking on a sidewalk when he was taken aback by a speeding car that nearly hit them. As the car slowed at a stop sign, Abernathy called out to admonish the driver and after a brief response the driver took off again. Abernathy called the Winchester Police Department and reported that a white male with a dark complexion in a red shirt was driving a white 2008 Dodge Avenger, dealer license plate of 866M6,<sup>1</sup> at sixty-five to seventy miles per hour in a twenty miles per hour zone. Abernathy also reported the driver appeared intoxicated because he was bobbing his head and briefly closed his eyes.

In response to Abernathy's report, Officer Bradley Cottrell was dispatched and within minutes met Abernathy near where Abernathy first encountered the driver. Abernathy briefly reiterated what happened, and Officer Cottrell and Officer Brandon Barndollar began canvassing the neighborhood in search of the vehicle. Within five minutes they located the vehicle in the backyard of a nearby home.

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<sup>1</sup> At the suppression hearing, witnesses' testimony differed slightly as to the exact license plate, but the record does not indicate a dispute as to the proper identity of the car and there is no such dispute on appeal.

Polites answered Officer Cottrell's knock on his door and Officer Cottrell explained Abernathy's report regarding the vehicle in Polites's backyard. Polites and Officer Cottrell went to the backyard and Officer Cottrell felt with his hand the car's hood, which was hot to the touch. Polites volunteered that the car belonged to his employer, a local car dealer, and pulled a key out of his pocket that Officer Cottrell recognized as a Dodge or Chrysler key. At some point the two entered Polites's home to continue their conversation. Officer Cottrell observed Polites had a strong odor of alcohol on his breath, his eyes were bloodshot and glassy, his speech was "thick tongued [and] slurred, [and he] mumbled at times." Transcript at 22. Polites stated he had been drinking earlier in the day and just arrived home. Officer Cottrell administered the horizontal gaze nystagmus field sobriety test, which Polites failed. Officer Cottrell told Polites he failed and Polites refused additional field sobriety tests.

Officer Cottrell advised Polites of his Miranda rights and Polites acknowledged that he understood his rights. Officer Cottrell testified he then requested Polites to accompany him to the police station to further discuss the criminal complaint and Polites agreed. Polites asked if he could call his wife because if he left home then his teenage child restricted to a wheelchair would be home alone. Officer Cottrell refused "[b]ecause his wife had no bearing on the situation," also reasoning that since the child was home alone while Polites was previously out of the house, he was capable of being alone while Polites was taken to the police station. Id. at 30, 34. Polites testified he also asked to call his attorney, Linda Stemmer, but Officer Cottrell refused and told Polites that Stemmer was not a criminal attorney. Officer Cottrell testified he does not recall Polites requesting an attorney while at his home.

During transport Polites was handcuffed pursuant to department policy, and upon arriving at the station and Polites's written acknowledgment of another advisement of his Miranda rights, officers conducted a videotaped interview of Polites. Officer Cottrell then requested and Polites agreed to take a breathalyzer test. The breathalyzer indicated an alcohol concentration of 0.20. Polites was charged with operating a vehicle with an alcohol concentration equivalent to at least 0.15 grams of alcohol, a Class A misdemeanor.

Polites moved to suppress all evidence, including his statements, and the trial court held a hearing on the motion. The trial court granted Polites's motion as to all of his statements at his home after requesting an attorney and during the custodial interrogation at the police department, but denied the motion as it related to the breathalyzer test and result. Polites now appeals.

## Discussion and Decision

### I. Standard of Review

We generally review the denial of a motion to suppress as a matter of sufficiency, for an abuse of discretion. Griffith v. State, 788 N.E.2d 835, 839 (Ind. 2003). In determining whether sufficient evidence supports a trial court's ruling on the validity of a warrantless arrest, we consider the evidence favorable to the trial court's ruling and any uncontradicted substantial evidence to the contrary. Id. To the extent our review involves a question of law, we review the trial court's ruling de novo. Sapen v. State, 869 N.E.2d 1273, 1276 (Ind. Ct. App. 2007), trans. denied.

### II. Misdemeanor Arrest

Polites argues the result of his breathalyzer test should be suppressed because it was obtained as a result of his unlawful arrest. In particular, he argues the officers had no authority to arrest him because the alleged misdemeanor was alleged to have been committed outside their presence, and the officers did not have an arrest warrant.

The State concedes officers generally do not have authority to make a warrantless arrest of a suspect for a misdemeanor not committed in their presence. See McConnell v. State, 540 N.E.2d 100, 102 (Ind. Ct. App. 1989); Brown v. State, 229 Ind. 470, 474, 99 N.E.2d 103, 105 (1951). But the State also directs us to Indiana Code section 35-33-1-1(a)(3), which codifies an exception to the general rule. This section authorizes a warrantless arrest when the officer has probable cause to believe the person has committed the misdemeanor offense of operating a vehicle while intoxicated. See Ind. Code §§ 35-33-1-1(a)(3) & 9-30-5-1(b)(2).

Section 35-33-1-1(a)(3) directly contradicts Polites's argument that Officer Cottrell lacked authority to arrest him. In addition, the trial court quoted this section in its order as authorizing his arrest. Yet, Polites does not address or attempt to argue why this statute would not apply. Upon our review of section 35-33-1-1(a)(3), we conclude that if the officers had probable cause, their warrantless arrest of Polites for the offense of operating a vehicle while intoxicated was not improper.

Polites next discusses what constitutes an arrest or seizure under Indiana common law and the constitutions of the United States and Indiana, and applies these rules to the facts of his case to explain when he was arrested. Admittedly, determining the precise moment of his arrest might be important when considering whether evidence obtained prior to his arrest is admissible.

However, aside from challenging the officers' authority to arrest for a misdemeanor they did not observe, Polites does not challenge the trial court's finding that probable cause supported his warrantless arrest. In his discussion about the timing of his arrest he does not argue that the officers lacked probable cause to arrest him. He restates his own contention that the officers arrested him without having seen him commit the misdemeanor and before administering the breathalyzer. He also takes issue with his arrest while in his home, but only to argue that the questioning in his home constituted an arrest.<sup>2</sup> See Appellant's Brief at 7.

Because Polites does not challenge the trial court's finding of probable cause, we will not sua sponte review whether probable cause existed. His sole challenge on appeal is to the officers' arrest power for a misdemeanor allegedly committed outside their presence. We conclude Officer Cottrell had both legal authority and probable cause to arrest Polites for operating a vehicle while intoxicated with a blood alcohol content of 0.15 or more, a Class A misdemeanor.

### Conclusion

The trial court did not err in finding that Polites's arrest for operating a vehicle with a blood alcohol content of 0.15 or more, a Class A misdemeanor, was lawful despite the lack of the officers' presence during the alleged offense. The trial court's denial of Polites's motion to suppress is therefore affirmed.

Affirmed.

RILEY, J., and BROWN, J., concur.

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<sup>2</sup> In his reply brief, Polites argues his arrest was unreasonable because a warrantless arrest from one's home requires probable cause and exigent circumstances. This argument raises for the first time a new issue not discussed in his Appellant's Brief, and as a result we decline to consider it. See Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); Flick v. Simpson, 145 Ind. App. 698, 710, 255 N.E.2d 118, 119 (1970).