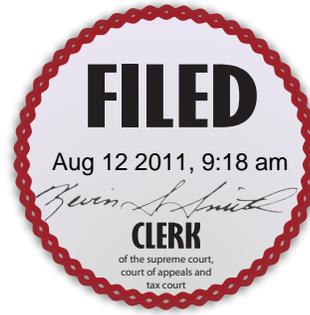


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN EVERETT,)
)
Appellant-Defendant,)
)
vs.) No. 29A02-1012-CR-1396
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Gail Z. Bardach, Judge
Cause No. 29D06-0906-FD-3649

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Steven Everett appeals his convictions for operating a motor vehicle while privileges are suspended, a Class D felony, and operating a motor vehicle with an alcohol concentration equivalent of at least .08, a Class C misdemeanor, following a jury trial. Everett presents a single issue for review, namely, whether the State presented sufficient evidence that he operated a motor vehicle. Specifically, Everett contends that his confessions to police are the only evidence that he operated a motor vehicle which, under the corpus delicti rule, is insufficient to sustain his convictions. We conclude that there is independent evidence the crimes were committed.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 22, 2008, Everett, who was an habitual traffic offender and who had forfeited his driving privileges until 2013, was intoxicated when he drove to a gas station in Hamilton County. A cashier at the gas station, Judy Allen, watched Everett exit the driver's side door of his vehicle and enter the gas station convenience store. After Allen observed Everett and suspected that he was intoxicated, she contacted police. Before police arrived, Allen watched Everett get back into his vehicle through the driver's side door and drive toward the exit of the parking lot, where he stopped the vehicle.

Noblesville Police Department Officers Bradley Kline and James Aloisio arrived at the scene and found Everett's vehicle stopped in a lane of travel near the exit of the parking lot. Everett was sitting in the driver's seat, and the engine was running. Officer Kline observed that Everett smelled of alcohol, and had red eyes and slurred speech.

When Officer Kline asked Everett to produce his driver's license, Everett could only produce an identification card. Officer Kline then learned that Everett was an habitual traffic offender and that his driving privileges were currently suspended. Everett then admitted to Officer Kline that he had been drinking and driving that day.

The State charged Everett with operating a vehicle as an habitual traffic violator, operating a vehicle while intoxicated, and operating a vehicle with an ACE of .08 or more.¹ A jury found Everett guilty as charged, and the trial court entered convictions on Count I, operating a vehicle as an habitual traffic violator, and Count III, operating a vehicle with an alcohol concentration equivalent to at least 0.08, with the sentences to be served concurrently. This appeal ensued.

DISCUSSION AND DECISION

When the sufficiency of the evidence to support a conviction is challenged, we neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 905-06 (Ind. 2005). It is the job of the fact-finder to determine whether the evidence in a particular case sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court's ruling. Id. at 906.

To prove operating a motor vehicle while privileges are suspended, a Class D felony, the State was required to show that Everett operated a motor vehicle while his

¹ The charging information lists a fourth charge, but neither party makes reference to it, so we assume it was dismissed.

driving privileges were validly suspended under Indiana Code Section 9-30-10 and that Everett knew that his driving privileges were suspended. And to prove operating a vehicle with an ACE of at least .08, a Class C misdemeanor, the State was required to show that Everett operated a vehicle with an alcohol concentration equivalent to at least .08 gram of alcohol but less than .15 gram of alcohol per 100 milliliters of his blood.

Everett's sole contention on appeal is that the State did not present sufficient evidence to prove that he operated a motor vehicle, which is an element of each of his convictions. As this court recently stated in Crawley v. State, 920 N.E.2d 808, 812 (Ind. Ct. App. 2010), trans. denied, according to Indiana Code Section 9-13-2-118(a)(1), the "operator" of a motor vehicle is "a person . . . who . . . drives or is in actual physical control of a motor vehicle upon a highway" Thus, to operate a vehicle is to drive it or be in actual physical control of it upon a highway. Id. A public highway is a "street, an alley, a road, a highway, or a thoroughfare . . . that is used . . . or open to use by the public." Ind. Code § 9-25-2-4.

Several factors may be examined to determine whether a defendant has "operated" a vehicle: (1) the location of the vehicle when it is discovered; (2) whether the car was moving when discovered; (3) any additional evidence indicating that the defendant was observed operating the vehicle before he or she was discovered; and (4) the position of the automatic transmission. Crawley, 920 N.E.2d at 812. In addition to these four factors, "[a]ny evidence that leads to a reasonable inference should be considered." Id.

Here, Everett admitted to police officers that he had been drinking and had driven to the gas station from a friend's house. On appeal, Everett contends that under the

corpus delicti rule, his confession to police, without more, is insufficient to support his conviction. See Malinski v. State, 794 N.E.2d 1071, 1086 (Ind. 2003) (stating corpus delicti rule holds that a crime may not be proven based solely on a confession). In Malinski, our supreme court reiterated the rule that “[a]dmission of a confession requires some independent evidence of the crime[.]” Id. But the independent evidence need not prove that a crime was committed beyond a reasonable doubt, but merely provide an inference that a crime was committed. Id.

Everett’s contention that the State did not present any independent evidence that he operated a motor vehicle is not well taken. At trial, Allen testified in relevant part as follows: “I was at the cash register [at] the time that he went back to his van, and then, as he got in the van and started driving, I watched him and he pulled towards me, and then over to the side of the store and stopped.” Transcript at 78. And the police officers found Everett awake and sitting in the driver’s seat of the vehicle, stopped, with the engine running, in a lane of travel. See, e.g., Traxler v. State, 538 N.E.2d 268, 270 (Ind. Ct. App. 1989) (holding evidence sufficient to support operating while intoxicated conviction where officer found defendant asleep in the driver’s seat of a vehicle with the engine running and stopped in a lane of travel on a county road). That evidence, along with Everett’s confession to police, is sufficient to prove that Everett operated a motor vehicle. Because Everett does not challenge the sufficiency of the evidence with regard to any other element of his convictions, we affirm his convictions.

Affirmed.

RILEY, J., and MAY, J., concur.