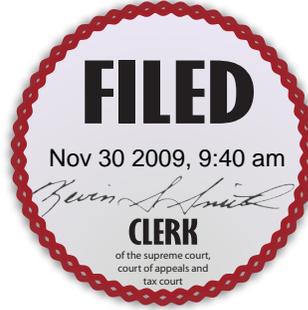


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CURTIS OUTLAW,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0904-CR-340
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0901-CM-4126

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

In this appeal, Curtis Outlaw asserts that the State failed to present sufficient evidence to support his conviction of operating a vehicle while intoxicated, as a Class A misdemeanor. We affirm.

FACTS AND PROCEDURAL HISTORY

On January 7, 2009, Indianapolis Metropolitan Police Department Officer Joel Anderson initiated a traffic stop of a vehicle that lacked a properly illuminated license plate. Outlaw was driving that vehicle, which had three other occupants. Upon approaching the driver's window, Officer Anderson noticed that both Outlaw's car and breath smelled of alcohol. Outlaw also had bloodshot eyes and slurred speech. Officer Anderson placed Outlaw in custody, Mirandized him, and asked him if he had had anything to drink that night. Outlaw responded that "he had had one or two beers." Transcript at 16. The officer then administered a portable breath test, which indicated the presence of alcohol on Outlaw's breath.

Officer Anderson escorted Outlaw to "roll call . . . to conduct field sobriety tests." Id. at 12. The officer administered three field sobriety tests, all of which Outlaw failed. Officer Anderson then gave Outlaw a copy of Indiana's Implied Consent Law for Outlaw to review and also read that law to him, and Outlaw agreed to take a certified breath test. However, Outlaw twice failed to produce a sufficient breath sample. Officer Anderson then arrested Outlaw.

On January 8, the State charged Outlaw with operating a vehicle while intoxicated, as a Class A misdemeanor, and public intoxication, a Class B misdemeanor. The court held a bench trial on March 25, after which it found Outlaw guilty as charged. The court merged the convictions and entered judgment for operating a vehicle while intoxicated and sentenced Outlaw accordingly. This appeal ensued.

DISCUSSION AND DECISION

Outlaw suggests that the State failed to present sufficient evidence to support his conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id. To convict Outlaw of operating a motor vehicle while intoxicated, as a Class A misdemeanor, the State had to prove beyond a reasonable doubt that Outlaw “operate[d] a vehicle while intoxicated . . . in a manner that endanger[d] a person.” Ind. Code § 9-30-5-2(b).

Outlaw first asserts that the State failed to prove that he was intoxicated. Indiana Code Section 9-13-2-86 defines intoxication in pertinent part as under the influence of alcohol “so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Impairment can be established by evidence of the

following: “(1) the consumption of a significant amount of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; and (6) slurred speech.” Fought v. State, 898 N.E.2d 447, 451 (Ind. Ct. App. 2008).

Here, the evidence submitted by the State demonstrated that, at the time of his arrest, Outlaw had bloodshot eyes, the odor of alcohol on his breath, and slurred speech. Further, Officer Anderson administered a portable breath test and three field sobriety tests, all of which Outlaw failed. Outlaw also twice failed to produce a sufficient breath sample to properly complete a certified breathalyzer test. And Outlaw admitted that he had had at least one or two beers before he operated his motor vehicle. Thus, the State presented sufficient evidence that Outlaw was intoxicated. See id. Outlaw’s assertions to the contrary on appeal are merely requests for this court to reweigh the evidence, which we will not do. See Jones, 783 N.E.2d at 1139.

Second, Outlaw contends that the State failed to present any evidence that he was operating his motor vehicle in a manner that would endanger another person. In Weaver v. State, 702 N.E.2d 750, 753 (Ind. Ct. App. 1998), this court stated:

The element of endangerment is proved by evidence that the defendant’s condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant. Blinn v. State, 677 N.E.2d 51, 54 (Ind. Ct. App. 1997). Thus, “proof that the defendant’s condition rendered operation of the vehicle unsafe is sufficient to establish endangerment.” Kremer v. State, 643 N.E.2d 357, 360 (Ind. Ct. App. 1994).

Outlaw's argument on this issue is that, because the traffic stop was based on a non-illuminated license plate rather than erratic or unlawful driving, he was not operating his motor vehicle in a manner that would endanger himself, his three passengers, or any other person. But Outlaw ignores the language in Weaver that "proof that the defendant's condition rendered operation of the vehicle unsafe is sufficient to establish endangerment." Id. (emphasis added). As discussed above, there is ample evidence of Outlaw's impaired condition, and Outlaw does not suggest that operating a vehicle while impaired would not "render[] operation of the vehicle unsafe." Id.; see also Dunkley v. State, 787 N.E.2d 962, 965 (Ind. Ct. App. 2003) ("The endangerment element was further established by [the defendant's impaired] condition."). Thus, the State presented sufficient evidence that Outlaw operated his vehicle while intoxicated in a manner that endangered others, and, accordingly, we affirm his conviction.

Affirmed.

KIRSCH, J., concurs.

BARNES, J., dissents with separate opinion.

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Appellee-Plaintiff.)	

BARNES, Judge, dissenting.

I respectfully dissent. Although there clearly is sufficient evidence that Outlaw was operating a vehicle while intoxicated, I cannot find any evidence that his driving endangered anyone. I cannot reconcile Outlaw’s conviction for Class A misdemeanor operating while intoxicated (“OWI”) with the statute’s requirement of proof that a defendant “operate[d] a vehicle in a manner that endanger[ed] a person.” Ind. Code § 9-30-5-2(b).

At the outset, I believe it is necessary to review the legislative history behind the OWI statutes. Until 2001, the OWI statute simply stated, “A person who operates a vehicle while intoxicated commits a Class A misdemeanor.” I.C. § 9-30-5-2 (2000). The statutory definition of “intoxicated” at the time was being “under the influence of . . . alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties to an extent that endangers a person.” I.C. § 9-13-2-86 (2000) (emphasis added). Thus, in every OWI case in the years preceding 2001, the State had to prove that the defendant was so impaired that he or she endangered a person.

In 2001, the Legislature substantially altered the OWI statutes. Subsection (a) was added to Section 9-30-5-2, which now states, “Except as provided in subsection (b), a person who operates a vehicle while intoxicated commits a Class C misdemeanor.” P.L. 175-2001 § 6 (eff. July 1, 2001). Subsection (b) of the statute reads in full, “An offense described in subsection (a) is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.” *Id.* Simultaneously, the Legislature altered the definition of “intoxication” so that it now reads, “‘Intoxicated’ means under the influence of . . . alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” I.C. § 9-13-2-86; P.L. 175-2001 § 1 (eff. July 1, 2001).

Thus, the Legislature deleted the “endangerment” requirement from the general definition of intoxication, created the new offense of Class C misdemeanor OWI that requires no proof of endangerment, just impairment/intoxication, but retained the offense

of Class A misdemeanor OWI that requires a showing of endangerment. Unlike the previous statutory scheme, however, proof of “endangerment” now is explicitly tied to proof that the defendant “operate[d] a vehicle in a manner that endanger[ed] a person.” I.C. § 9-30-5-2(b). This is much different, I believe, than proof that the defendant was impaired, and requires some objective evidence of erratic or dangerous driving. Without more detailed explanation from the legislature, I presume that one of the reasons for this change may have been to permit OWI convictions, albeit at a lesser level, where there is no proof that a person’s intoxication led to any observed erratic driving. This may have been in recognition of the fact that an intoxicated driver is always dangerous, even if a police officer or others do not happen to view the effects of that intoxication.

It appears to me that an analysis of the OWI statutes in light of the 2001 amendments is necessary and warranted in the context of a sufficiency of the evidence challenge. We have previously noted the changes in addressing a claim that the new Class C misdemeanor offense was unconstitutionally vague. See Wells v. State, 848 N.E.2d 1133, 1146-47 (Ind. Ct. App. 2006), trans. denied, cert. denied. We stated,

The creation of the new Class C misdemeanor OWI offense does not require definitive proof of endangerment, but it still requires of proof of impairment. The argument could be made that driving a vehicle while intoxicated always endangers someone. However, it might not always be possible to prove such endangerment beyond a reasonable doubt to a fact-finder’s satisfaction

Id. at 1147.

My belief is that the proof necessary for the endangerment prong of Class A misdemeanor OWI should not, and given the current statutory scheme, cannot be equivalent to proof of impairment. I realize and acknowledge that the majority here believes that the precedent of Weaver et al. should be followed and dictates that there is sufficient proof of endangerment here. I respectfully, but firmly, disagree. In Weaver and numerous other cases, there was evidence of erratic and potentially dangerous operation of a vehicle that independently supported a finding of endangerment, apart from the driver's intoxication. See, e.g., Staley v. State, 895 N.E.2d 1245, 1251 (Ind. Ct. App. 2008) (defendant drove at night without lights on and traveled ten miles per hour over speed limit), trans. denied; Dunkley, 787 N.E.2d at 965 (defendant drove left of center); Smith v. State, 725 N.E.2d 160, 161-62 (Ind. Ct. App. 2000) (defendant drove twenty-seven miles per hour over speed limit, failed to stop at red light, and crossed center line); Weaver, 702 N.E.2d at 753 (defendant drove at night without headlights, crossed center line, and drove twenty-one miles per hour over speed limit); Blinn v. State, 677 N.E.2d 51, 55 (Ind. Ct. App. 1997) (defendant rear-ended another vehicle that was stopped at a red light); Kremer v. State, 643 N.E.2d 357, 360-61 (Ind. Ct. App. 1994) (defendant operated helicopter in manner that violated minimum flight restrictions and was involved in crash not caused by mechanical failure; opinion also cites five other cases where there was some independent evidence of dangerous vehicle operation, including speeding). I have no quarrel with the results in these cases.

Here, however, there is a complete lack of evidence of any similar driving conduct by Outlaw, not even that he was traveling one mile per hour over the posted speed limit. I cannot equate a failure to have an illuminated license plate, or even Outlaw's alleged failure to immediately pull over after Officer Anderson activated his lights,¹ with "dangerous" driving. The State, indeed, concedes that "there is no evidence that Defendant operated his vehicle in an unsafe manner" Appellee's Br. p. 8. I submit that this set of factual circumstances is the very reason the Class C misdemeanor OWI offense exists. I am confident this view reflects the will of the legislature as evidenced by its 2001 "fix" of the OWI statutes, and affirming Outlaw's Class A misdemeanor conviction renders that "fix" meaningless. I vote to reverse Outlaw's conviction for Class A misdemeanor OWI and believe that a conviction for Class C misdemeanor OWI is appropriate here.

¹ Officer Anderson asserted that Outlaw did not pull over for one or two blocks after he activated his lights.