

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:

**COREY L. SCOTT**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

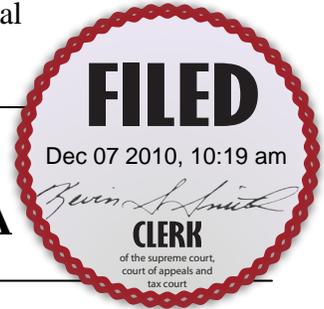
**GREGORY F. ZOELLER**  
Attorney General of Indiana

**WADE JAMES HORNBACHER**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---



ELBERT WRIGHT, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-1004-CR-440

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Reuben B. Hill, Judge  
Cause No. 49F18-0902-FD-28503

---

**December 7, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Elbert Wright appeals his conviction for operating a vehicle while intoxicated as a class D felony.<sup>1</sup> Wright raises two issues, which we revise and restate as whether the evidence is sufficient to support his conviction for operating a vehicle while intoxicated as a class D felony. We affirm.

The facts most favorable to the conviction follow. At approximately 4:00 a.m. on February 27, 2010, Beech Grove Police Department Officer Michael Treat and another officer were radio dispatched to the area of North 8<sup>th</sup> Avenue in Marion County where a black Camaro had driven off the road and was stuck on some railroad ties in a yard in a residential neighborhood. The officers arrived on the scene and observed that that the Camaro was still running and the door to the driver's seat was open, that Wright was standing within ten feet of the Camaro, and that Wright's clothing was muddy from his knees down to his shoes. The officers did not observe any other person in the vicinity of the vehicle. As Officer Treat walked toward the accident scene, Wright stated to Officer Treat that he had "just wrecked into a yard as he was attempting to turn around . . . ." Transcript at 15. Police arrested Wright for operating a vehicle while intoxicated and later discovered marijuana in his pocket.

On February 27, 2010, the State charged Wright with Count I, operating a vehicle while intoxicated as a class A misdemeanor; Count II, possession of marijuana as a class A misdemeanor; Count III, driving while suspended as a class A misdemeanor; and Count IV, operating a vehicle while intoxicated with a prior conviction as a class D

---

<sup>1</sup> Ind. Code §§ 9-30-5-2 (2004); 9-30-5-3 (Supp. 2008).

felony. A bench trial was conducted on March 29, 2010, at which Wright stipulated that he had a prior offense in April 2005 for operating a vehicle while intoxicated, that he was intoxicated at the time he came into contact with Officer Treat on February 27, 2009, and that marijuana was found in his pocket at the time Officer Treat arrested him. In its case-in-chief, the State presented the testimony of Officer Treat. After the State presented its case-in-chief, Wright moved for involuntary dismissal under Ind. Trial Rule 41(B), and the court denied the motion. The court found Wright guilty on Counts I, II, and IV and not guilty on Count III. The court merged Count I into Count IV and entered judgment on Counts II and IV. Wright was sentenced to 365 days with 325 days suspended to probation for his conviction under Count II for possession of marijuana as a class A misdemeanor and to 545 days with 485 days suspended to probation for his conviction under Count IV for operating a vehicle while intoxicated as a class D felony, and the sentences were ordered to be served concurrent with each other.

The issue is whether the evidence is sufficient to sustain Wright's conviction for operating a vehicle while intoxicated as a class D felony.<sup>2</sup> When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the

---

<sup>2</sup> Wright does not challenge his conviction for possession of marijuana as a class A misdemeanor on appeal.

crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id. A conviction may be based upon circumstantial evidence alone. Fought v. State, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. Id.

The offense of operating a vehicle while intoxicated is governed by Ind. Code § 9-30-5-2, which provides that “a person who operates a vehicle while intoxicated commits a Class C misdemeanor,” but “[a]n offense . . . is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.” Ind. Code § 9-30-5-3 provides that “a person who violates section 1 or 2 of this chapter commits a Class D felony if . . . the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter . . . .”

Wright argues only that the State failed to prove that he operated a vehicle.<sup>3</sup> Specifically, Wright argues that “the State presented no evidence that Wright was ever in actual physical control of the Camaro.” Appellant’s Brief at 6. Wright argues that “there was no evidence that Wright was ever physically present inside of the car period, let

---

<sup>3</sup> As previously mentioned, Wright stipulated that he had a prior offense in April 2005 for operating a vehicle while intoxicated and that he was intoxicated at the time he came into contact with Officer Treat on February 27, 2009.

alone that he drove the car,” that “[a]t best, the State pointed to the facts that Wright was the only person near the vehicle and the door was open,” and that “[t]his conclusion is consistent with the court’s acquittal of Wright on the driving while suspended charge.” Id. at 6-7.

This court has stated that “[s]howing that the defendant merely started the engine of the vehicle is not sufficient evidence to sustain a conviction for operating a vehicle while intoxicated.” See Hiegel v. State, 538 N.E.2d 265, 268 (Ind. Ct. App. 1989), trans. denied. Rather, the State must show that the defendant drove, or was in actual physical control of, a motor vehicle. See Crawley v. State, 920 N.E.2d 808, 112 (Ind. Ct. App. 2010), trans. denied; Hampton v. State, 681 N.E.2d 250, 251 (Ind. Ct. App. 2007)). 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 112 (citing Hampton, 681 N.E.2d at 251). In addition to these four factors, “[a]ny evidence that leads to a reasonable inference should be considered.” Id.

In the present case, although nobody observed Wright operate the Camaro, the State presented sufficient circumstantial evidence from which the trier of fact could conclude that Wright operated the vehicle. The record reveals that Officer Michael Treat testified that he was dispatched to the area of North 8<sup>th</sup> Avenue at approximately 4:00

a.m. and, arriving at the scene “[w]ithin minutes,” observed a black Camaro in a residential yard and stuck on some railroad ties. Transcript at 20. The vehicle was still running and the driver’s door was open. Officer Treat approached Wright, who was within ten feet of the vehicle and the only person in the vicinity, and Wright stated that he had “just wrecked into a yard as he was attempting to turn around” Id. at 15. Wright’s clothing was muddy from his knees down.

Based upon the record, we cannot say, when taken as a whole, that the inferences made by the court as the trier of fact based upon the circumstantial evidence were unreasonable. We conclude that evidence of probative value exists from which the court could have found Wright guilty beyond a reasonable doubt of operating a vehicle while intoxicated as a class D felony. See Crawley, 920 N.E.2d at 811-814 (holding that taken as a whole the substantial circumstantial evidence supported the trial court’s inference that the defendant operated the car and observing that it was of no moment that no one observed the defendant operate the vehicle because the State presented sufficient circumstantial evidence from which the trier of fact could conclude beyond a reasonable doubt that the defendant did so); see also Hampton, 681 N.E.2d at 252 (holding that direct and circumstantial evidence including the physical location of the vehicle being partially in a roadway showed that the defendant had operated the vehicle).

Wright also argues that the court erred in denying his Trial Rule 41(B) motion for involuntary dismissal of the State’s charges of operating a vehicle while intoxicated. The grant or denial of a motion to dismiss made under Trial Rule 41(B) is reviewed under the

clearly erroneous standard. Todd v. State, 900 N.E.2d 776, 778 (Ind. Ct. App. 2009) (citation omitted). In a criminal action, the defendant's Rule 41(B) motion is essentially a test of the sufficiency of the State's evidence, and our review of the denial of the motion for involuntary dismissal is limited to the State's evidence presented during its case-in-chief. Id. As previously mentioned, the State presented evidence during its case-in-chief that when Officer Treat discovered Wright, Wright was within ten feet of the Camaro and exhibited signs of intoxication, the vehicle was still running, the door to the driver's seat was open, and Wright's clothing was muddy from the knees down. Our review of the evidence presented by the State during its case-in-chief as set forth in the record does not point unerringly to a conclusion different from the one reached by the trial court on the motion to dismiss. Accordingly, we must affirm the court's ruling to deny Wright's Rule 41(B) motion to dismiss. See Todd, 900 N.E.2d at 779 (noting that the State's evidence from its case-in-chief did not "point[ ] unerringly to a conclusion different from the one reached" by the trial court on the defendant's Trial Rule 41(B) motion to dismiss and holding that it "must affirm the court's ruling to deny that motion") (citation omitted).

In addition, to the extent that Wright argues that the State failed to present evidence of his guilt that was independent from his alleged confession and, consequently, that the State failed to establish the *corpus delicti* as is required to sustain his conviction, we cannot agree. The *corpus delicti* rule provides that a crime may not be proved based solely on a confession. Malinski v. State, 794 N.E.2d 1071, 1086 (Ind. 2003). To

warrant the admission of a confession, the State must provide an inference that a crime was committed, which may be established by circumstantial evidence. Workman v. State, 716 N.E.2d 445, 447 (Ind. 1999). Based upon our review of the record and the circumstantial evidence presented by the State and discussed above, we conclude that the State presented sufficient evidence to provide an inference that a crime was committed, so as to establish the *corpus delicti*. See Fowler v. State, 900 N.E.2d 770, 775-776 (Ind. Ct. App. 2009) (holding that the State presented sufficient evidence to provide an inference that a crime was committed, so as to establish the *corpus delicti*).

For the foregoing reasons, we affirm Wright's conviction for operating a vehicle while intoxicated as a class D felony.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.