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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHAWN BREEDEN, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 49A02-0702-CR-187  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Barbara Collins, Judge  
Cause No. 49F08-0508-CM-147179

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**July 23, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Shawn Breeden appeals his conviction and part of his sentence for operating a vehicle while intoxicated (“OWI”). We affirm.

## **Issues**

The issues before us are:

- I. whether the evidence provided at trial is sufficient to sustain Breeden’s conviction; and
- II. whether the trial court properly sentenced Breeden.

## **Facts**

The evidence most favorable to the conviction reveals that on August 27, 2005, Breeden was employed as a manager and bartender at an establishment called Rookies Sports Bar. He worked that evening from 6:00 p.m. until 3:30 a.m. the next morning. After the last patrons left, Breeden cleaned the bar, restocked beer, and played a bowling game to wind down. At trial, Breeden testified that he consumed two beers and one shot of liquor between the hours of 3:30 a.m. and 5:30 a.m. Breeden drove away from the bar at 5:30 a.m.

That same morning, Indiana State Trooper John Pang was running stationary radar on I-65 at the 108-mile marker in Marion County. The posted speed limit along this stretch of highway is fifty-five miles per hour. Trooper Pang observed Breeden approaching in a Ford pick-up truck at a high rate of speed. Breeden’s cruise control was set to seventy miles per hour, and Trooper Pang measured his speed at seventy-one miles per hour on his radar gun.

Trooper Pang testified that upon approaching other vehicles, Breeden “hit his brakes rapidly and in a real jerky fashion.” Tr. pp. 6-7. Trooper Pang initiated a traffic stop and Breeden pulled over. Trooper Pang approached Breeden’s vehicle on the front-passenger side and observed both a strong odor of alcohol about his person and an open beer bottle sitting in the console. At trial, Trooper Pang testified that Breeden demonstrated additional signs of intoxication including bloodshot and watery eyes, mumbled speech, and slow manual dexterity. Trooper Pang further noted that Breeden’s balance was unsteady. In contrast, Trooper Pang also testified on cross examination that Breeden did not have any balance problems, trouble pulling the vehicle over, or impairment of thought processes. Moreover, Breeden passed the one-leg field sobriety test. Relying on his training, experience, and observations of the facts and circumstances surrounding Breeden’s behavior, Trooper Pang determined that Breeden was driving under the influence of alcohol and placed him under arrest.

On August 28, 2005, the State charged Breeden with Count I, Class A misdemeanor OWI, and Count II, operating a vehicle with a blood alcohol concentration (“BAC”) equivalent to at least eight-hundredths grams of alcohol. At trial, Breeden successfully moved to suppress the breathalyzer test result based on a failure to follow statutory BAC testing procedures and Count II was dismissed. With regard to Count I, the trial court found Breeden guilty as charged. As part of Breeden’s sentence, the trial court ordered Breeden to serve “365 days jail, two days credit, 363 suspended” and “363 days probation.” Tr. pp. 92-93. Breeden now appeals.

## Analysis

### *I. Sufficiency of Evidence*

Breeden contends the State presented insufficient evidence to support his conviction. We neither reweigh the evidence nor judge the credibility of witnesses. Trimble v. State, 848 N.E.2d 278, 279 (Ind. 2006). If there is sufficient evidence of probative value to support the conclusion of the trier of fact then the conviction will not be disturbed. Id.

To convict Breeden, the State was required to prove that he was intoxicated while operating a vehicle. Under Indiana Code Section 9-13-2-86, “intoxicated” means under the “influence of (1) alcohol; . . . so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” Evidence of the following may establish intoxication: (1) consumption of significant amounts of alcohol; (2) odor of alcohol; (3) impaired attention and reflexes; (4) bloodshot or watery eyes; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. Pickens v. State, 751 N.E.2d 331, 335 (Ind. Ct. App. 2001). Finally, proof of intoxication does not require a showing of a specific blood alcohol content. Hurt v. State, 553 N.E.2d 1243, 1248 (Ind. Ct. App. 1990).

Breeden relies on Warner v. State, 497 N.E.2d 259, 262 (Ind. Ct. App. 1986), to challenge the trial court’s conclusion that Breeden was intoxicated. In Warner, the arresting officer followed Warner for roughly seventeen blocks but observed nothing that would indicate that he was impaired. Warner, 497 N.E.2d at 262. Warner passed a field

sobriety test and there was no evidence that his speech was slurred or that his thought process was impaired. Id.

Here, the State presented sufficient evidence to establish Breeden's impairment. With respect to the sufficiency of the evidence upon the element of intoxication, it is established that a non-expert witness may offer an opinion upon intoxication, and a conviction may be sustained upon the sole testimony of the arresting officer. Wright v. State, 772 N.E.2d 449, 460 (Ind. Ct. App. 2002). Unlike in Warner, Trooper Pang identified several signs of intoxication and stated his opinion that Breeden appeared intoxicated. Additionally, Breeden smelled of alcohol, had an open container of alcohol in his vehicle, and consumed two bottles of beer and a shot of liquor between 3:30 a.m. and 5:30 a.m. before driving. Trooper Pang testified that Breeden was speeding in moderately foggy conditions and "hit his brakes rapidly and in a real jerky fashion." Tr. p. 6-7. Testimony from Trooper Pang also revealed that Breeden had bloodshot and watery eyes, mumbled speech, and made a "slow lethargic movement" to obtain his driver's license. Tr. p. 35. This testimony is sufficient to support the trial court's conclusion that Breeden was intoxicated.

Breeden contends that his successful completion of the one-leg stand field sobriety test together with contradictory statements made by Trooper Pang form an insufficient basis to uphold his conviction. Breeden's challenges ask us to go beyond our standard of review and reweigh the evidence. The trial court was in the best position to judge the credibility of Trooper Pang's testimony and to accept or reject that testimony as it saw fit. We cannot reweigh the evidence or judge the credibility of witnesses. Drawing

reasonable inferences from the evidence most favorable to the State, we find that the trier of fact had substantial evidence of probative value to find Breeden guilty as charged.

## *II. Sentence*

Breeden also contends that his sentence exceeded the maximum limit for a misdemeanor conviction. Indiana Code Section 35-50-3-2 provides, in part, that “[a] person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one [1] year. . . .” Moreover, Indiana Code Section 35-50-3-1(b) provides that a court may suspend any part of a sentence for a misdemeanor, although “whenever the court suspends a sentence for a misdemeanor, it may place the person on probation under IC 35-38-2 for a fixed period of not more than one (1) year.” Smith v. State, 621 N.E.2d 325, 326 (Ind. 1993). Breeden correctly acknowledges that the trial court may suspend a Class A misdemeanor’s sentence in whole or in part and may place the defendant on probation provided that the “combination of the executed sentence and the probationary period do not exceed the maximum statutory sentence for that offense.” Id. Accordingly, the sentence and assessment of probation for a misdemeanor conviction may not exceed one year. Id.

The sentence imposed by the trial court was proper. The trial court ordered, “365 days jail . . . , two days credit, 363 suspended” and “363 days on probation.” Tr. pp. 92-93. It is reasonable to infer that Breeden’s sentence included 365 days jail time, with two days executed, and 363 days suspended to probation. In other words, the probationary term is concurrent with the suspended sentence. Here, the combined term of imprisonment and probation equals 365 days, the maximum period for which a

misdemeanant may be sentenced. Breeden's sentence, therefore, is consistent with the statutory requirements for a misdemeanor offense.

### **Conclusion**

The evidence presented at trial is sufficient to support Breeden's conviction and his sentence is proper. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.