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**IN THE  
COURT OF APPEALS OF INDIANA**

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KIRK RESSEL, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 29A05-0702-CR-108

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable J. Richard Campbell, Judge  
Cause No. 29D04-0601-FD-514

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**September 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Kirk Ressel appeals his convictions for Operating a Vehicle with an alcohol content equivalent (ACE) of .15 or More,<sup>1</sup> a class D felony, and Operating a Vehicle While Intoxicated,<sup>2</sup> a class D felony. Specifically, Ressel argues that the State failed to present evidence of his guilt that was independent from his confession and, consequently, that the State failed to establish the corpus delicti. Thus, Ressel argues that the trial court should have suppressed his confession and that the State failed to establish the corpus delicti beyond a reasonable doubt as is required to sustain his convictions. We find that the State sufficiently established the corpus delicti to warrant the admission of Ressel's confession and to support his conviction for Operating a Vehicle While Intoxicated.

We also, however, find sua sponte that Ressel's dual convictions violate double jeopardy, inasmuch as operating a vehicle with an ACE of .15 or more is a lesser-included offense of operating a vehicle while intoxicated. Consequently, we affirm in part, reverse in part, and remand with instructions to vacate Ressel's conviction and sentence for operating a vehicle with an ACE of .15 or more.

### FACTS

On January 27, 2006, at 6:00 p.m., Ressel reported to the Hamilton County Community Corrections to serve a sentence. When Officer Steven Cash processed Ressel, he noted an odor of alcoholic beverage emanating from him. Ressel was then transported to the Hamilton County Jail, where Deputy Brian Niec noted that Ressel's eyes were bloodshot and his pupils were dilated and there was a strong odor of alcoholic beverage emanating from

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<sup>1</sup> Ind. Code §§ 9-30-5-1(b), -3(1).

him. Deputy Niec performed a certified breathalyzer test, which indicated that Ressel's ACE was .19. The deputy then read Ressel his rights, after which Ressel admitted that he had consumed one-third of a fifth of vodka earlier in the day and had then driven a model F-150 Ford truck to the Community Corrections parking lot. Ressel stated that the truck was registered to his business, Penn Automotive. The deputy administered a second certified breathalyzer test, which confirmed that Ressel's ACE was .19. After booking Ressel into the Hamilton County Jail, Deputy Niec drove to the Community Corrections parking lot, where he located a Ford F-150 truck bearing license plates registered to Penn Automotive.

On January 30, 2006, the State charged Ressel with class A misdemeanor and class D felony operating a vehicle with an ACE of .15 or more and with class A misdemeanor and class D felony operating a vehicle while intoxicated. On June 27, 2006, Ressel filed a motion to suppress his confession, arguing in relevant part that his confession was inadmissible because the State could not produce evidence independent of his admissions to establish the corpus delicti of the charged offenses. Following a hearing, the trial court denied the portion of Ressel's motion relating to corpus delicti on August 16, 2006.<sup>3</sup> Among other things, the trial court found as follows:

. . . In the case here, evidence of the Defendant's intoxication and evidence that his vehicle was located in the parking lot is sufficient independent evidence to prove the corpus delicti.

. . . The purpose of the [corpus delicti] rule is not to prevent the admission of evidence derived through a defendant's valid

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<sup>2</sup> I.C. §§ 9-30-5-2(a), -3(1).

<sup>3</sup> The trial court partially granted Ressel's motion on grounds that are irrelevant to this appeal.

confession. . . . [Here, t]he officer was able to locate the Defendant's vehicle in the parking lot based upon the Defendant's description of the vehicle. The location of the Defendant's vehicle is evidence, independent of the Defendant's admissions, which proves that a crime was committed.

The fact that the vehicle was discovered through the Defendant's admissions does not make the location of his vehicle inadmissible at trial under the corpus delicti doctrine. Under the Defendant's argument, a person could confess to a murder and the location of the victim's body, but when the police investigate and discover the body at that location, the court should exclude that evidence because it was solely derived from the person's confession.

Appellant's App. p. 7-8 (emphasis in original).

Following a bench trial, on January 4, 2007, the trial court found Ressel guilty as charged. On February 7, 2007, the trial court found that the misdemeanor convictions merged, respectively, into the felony convictions.<sup>4</sup> The trial court sentenced Ressel to three years for each felony conviction, with all suspended but 180 days of in-home detention, and to two years of probation, with the sentences to be served concurrently. Ressel now appeals.

### DISCUSSION AND DECISION

Ressel argues that the State has failed to establish the corpus delicti of the charged offenses. As explained more fully below, there are different burdens the State must carry with respect to the corpus delicti depending on whether the issue is the admission of the defendant's confession or the support of the defendant's convictions. Here, Ressel argues that the State has failed to meet both tests.

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<sup>4</sup> The trial court added the merger language to the sentencing order by a nunc pro tunc order entered on March 7, 2007.

Ressel first contends that the trial court erroneously admitted his confession into evidence. The admissibility of evidence is within the trial court's sound discretion, and we afford the trial court's decision great deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). We will reverse a trial court's decision regarding the admissibility of evidence only when the trial court abuses its discretion, which occurs when the decision is against the logic and effect of the facts and circumstances before the court. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

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). “[A]dmission of a confession requires some independent evidence of the crime including evidence of the specific kind of injury and evidence that the injury was caused by criminal conduct.” Workman v. State, 716 N.E.2d 445, 447 (Ind. 1999). To warrant the admission of the defendant's confession, the State need not prove that a crime was committed beyond a reasonable doubt. Id. Instead, the State must provide an inference that a crime was committed, which may be established by circumstantial evidence. Id. at 447-48.

Here, Ressel admits that he was intoxicated on the night in question. He argues, however, that the State has failed to present evidence independent of his confession that he operated a vehicle while he was intoxicated.

The only evidence, apart from Ressel's admissions, that Ressel drove to Community Corrections is the location of his truck in the parking lot. Ressel acknowledges that he is not attempting to suppress the location of the vehicle; instead, he “seeks to suppress only his

admissions . . . as they relate to the ownership of the Ford.” Appellant’s Br. p. 6 n.6. He emphasizes that Deputy Niec “was able to confirm that the Ford belonged to Ressel based solely on Ressel’s statements that the vehicle he had driven to the corrections facility was registered to his business, Penn Automotive.” Id. at 7.

It is true, of course, that Deputy Niec found the Ford truck based on Ressel’s admissions. It does not necessarily follow, however, that the police could not have discovered the vehicle without Ressel’s assistance. Had he not informed them of its location, they would have run a license plate check and discovered that the Ford was registered to Penn Automotive. Inasmuch as Ressel was in the system, the police would have easily determined that Penn Automotive is his employer. Consequently, we find that the truck’s location and connection to Ressel are sufficiently independent of his confession to form the corpus delicti.

As aptly noted by the trial court, “[t]he purpose of the [corpus delicti] rule is not to prevent the admission of evidence derived through a defendant’s valid confession.” Appellant’s App. p. 8 (emphasis in original). Here, Ressel’s confession was concededly valid. His undisputed intoxication and the fact that his vehicle was parked in the Community Corrections lot give rise to an inference that he operated that vehicle while intoxicated. Thus, the State sufficiently established the corpus delicti to warrant the admission of Ressel’s confession.

To support Ressel’s convictions, the State is required to establish the corpus delicti beyond a reasonable doubt. Harkrader v. State, 553 N.E.2d 1231, 1233 (Ind. Ct. App. 1990).

An attack on the corpus delicti underlying a defendant's convictions is essentially an attack on the sufficiency of the evidence supporting those convictions. And in determining the sufficiency of the evidence, the confession may be considered along with the independent evidence of the defendant's guilt. Id.

Here, to convict Ressel of class D felony operating a vehicle while intoxicated, the State was required to prove beyond a reasonable doubt that he operated a vehicle while intoxicated and that he has a previous conviction of operating while intoxicated within the five years immediately preceding the occurrence of this violation. I.C. §§ 9-30-5-2(b), -3(1). Ressel concedes that he was intoxicated. He also concedes that he has a prior conviction falling within the previous five years such that an enhancement to a class D felony is warranted. And the State offered evidence that, on the night Ressel arrived at Community Corrections in a state of intoxication, the Ford truck that is registered to Ressel's employer was parked in the Community Corrections parking lot. Moreover, Ressel confessed. Under these circumstances, it is apparent that the State proved the corpus delicti and Ressel's guilt beyond a reasonable doubt.

The trial court convicted Ressel of class D felony operating a vehicle with an ACE of .15 or more and class D felony operating a vehicle while intoxicated and sentenced Ressel on both convictions. It is well established that operating a vehicle with an ACE of .15 or more is a lesser-included offense of operating a vehicle while intoxicated. See Hornback v. State, 693 N.E.2d 81, 85 (Ind. Ct. App. 1998) (applying former version of Indiana Code section 9-30-5-1 that set a bar of blood alcohol content over .10 but was otherwise the same as the

current version). As the Hornback court observed, “[t]he State can charge a defendant with both the greater and the lesser included offense, but convictions for both offenses cannot stand. When a defendant is found guilty of both the greater and lesser included offenses, the convictions merge, and sentences cannot be imposed on both counts.” Id. Consequently, we reverse the trial court’s judgment to the extent that it convicted and sentenced Ressel under Indiana Code section 9-30-5-1 and remand with instructions to vacate that conviction and sentence.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate Ressel’s conviction and sentence for operating a vehicle with an ACE of .15 or more.

BAILEY, J., and VAIDIK, J., concur.