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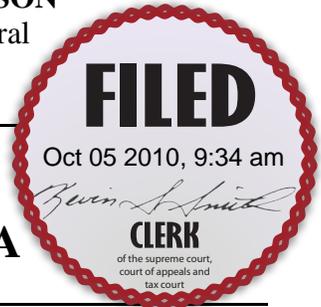
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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS L. WHITE,)
)
Appellant-Defendant,)

vs.)

No. 20A05-1001-CR-38)

STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Charles C. Wicks, Judge
Cause No. 20D05-0801-FD-20

October 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Thomas White appeals his conviction for operating a vehicle while intoxicated (“OWI”) as a Class D felony. White contends that the trial court abused its discretion in admitting the results of his chemical breath test because the officer lacked probable cause to administer the test and that the remaining evidence is insufficient to sustain his conviction. We conclude that there was sufficient probable cause to administer the chemical breath test and that the evidence is sufficient to support White’s OWI conviction. But because the trial court improperly entered judgment of conviction on a second OWI conviction, we remand for issuance of a new sentencing order and abstract of judgment. We therefore affirm and remand.

Facts and Procedural History

On January 23, 2008, Indiana State Police Officer Dan Ringer was observing traffic from a bridge above the US 20 bypass in Elkhart County. At approximately 1:52 p.m., Officer Ringer observed a maroon Buick with a luggage rack on the trunk traveling in excess of the posted speed limit of sixty-five miles per hour. Officer Ringer clocked the vehicle and received three separate readings of seventy-nine miles per hour. Officer Ringer then radioed the description of the vehicle to Officer James Strong who was positioned in the roadway below. Officer Strong directed the driver of the vehicle, White, to pull over.

During his initial contact with White, Officer Strong noted the odor of alcohol. Tr. p. 118-19. Officer Strong also noticed that White was slow to speak and that his speech was slurred. *Id.* at 119. When Officer Strong asked White to accompany him to

his patrol car, he observed that White needed help pulling himself from his vehicle. *Id.* at 120. Inside the patrol car, a strong odor of alcohol was coming from White. *Id.* at 120-21. Officer Strong asked White if he had consumed any alcohol, and White admitted that he had drank a beer. *Id.* at 122.

Inside the patrol car, Officer Strong conducted three field sobriety tests—a backwards count test, a recitation of the alphabet, and a finger count test. In the first test, Officer Strong asked White to start at 100 and count backwards to 88 without stopping; White was advised that if he stopped, it would be considered a failure. *Id.* at 125. White counted backwards to 90 and paused for four seconds before continuing on to 89. *Id.* at 126. In the second test, Officer Strong asked White to start at A and recite the alphabet without stopping. *Id.* White properly recited A-S; he then recited “T, U, X, H, I,” at which point Officer Strong stopped the test. *Id.* at 127. For the final test, Officer Strong asked White to conduct a finger count test. *Id.* at 127-28. For this test, Officer Strong asked White to touch his thumb to each of his fingers, starting with his index finger, and count 1, 2, 3, 4, and then count back 4, 3, 2, 1. *Id.* at 127. White counted his middle finger twice and missed his ring finger. *Id.* at 128.

After White failed all three sobriety tests, Officer Strong read him the Indiana Law Enforcement Academy Implied Consent Warning, and White consented to a certified chemical breath test. The chemical breath test was conducted by Officer Strong at the Elkhart County Sheriff’s Department using a certified Datamaster instrument. White tested at 0.08 grams of alcohol per 210 liters of breath. *Id.* at 151; State’s Ex. 5.

Initially, the State charged White with two counts: OWI and OWI with an alcohol concentration equivalent to at least 0.08 grams of alcohol per 210 liters of a person's breath, both as Class C misdemeanors. Ind. Code §§ 9-30-5-2(a), -1(a)(2); Appellant's App. p. 10. These counts were elevated to Class D felonies based on White's prior OWI conviction. Ind. Code § 9-30-5-3(a)(1); Appellant's App. p. 12. The State also alleged that White was a habitual substance offender. Ind. Code § 35-50-2-10; Appellant's App. p. 15. A jury found White guilty of both OWI counts. Tr. p. 233-34. White then stipulated to the Class D felony enhancements. *Id.* at 236-37. White also stipulated to being a habitual substance offender. *Id.* at 238-43.

At the sentencing hearing, the trial court entered judgment of conviction on both OWI counts. Sent. Tr. p. 19-20; Appellant's App. p. 18 ("The court now enters judgment on the jury's verdict pursuant to count one Count two, court enters judgment pursuant to the jury's verdict"). For the OWI conviction ("count one"), the trial court sentenced White to one and a half years, plus three years for the habitual substance offender enhancement, with three years suspended to probation. Sent. Tr. p. 19; Appellant's App. p. 18. For the conviction of OWI with an alcohol concentration equivalent to 0.08 grams of alcohol per 210 liters of a person's breath ("count two"), the trial court sentenced White to six months, plus three years for the habitual substance offender enhancement, with three years suspended to probation, to be imposed "concurrent with sentence imposed in count one." Sent. Tr. p. 20. The trial court's order states, "Sentences merge for sentencing purposes resulting in no additional time for any sentence imposed in count two." Appellant's App. p. 18. White now appeals.

Discussion and Decision

As an initial matter, we note that the trial court erred by entering judgments of conviction and sentences on both counts. Instead, the trial court should have merged the convictions and entered a judgment only as to count one, OWI as a Class D felony. *See Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006) (stating a defendant's constitutional rights are not violated when a defendant is "simply found guilty of a particular count. . . . [A] merged offense for which the defendant is found guilty, but on which there is neither a judgment nor a sentence is 'unproblematic' as far as double jeopardy is concerned."); accord *Laux v. State*, 821 N.E.2d 816, 819 (Ind. 2005); *Carter v. State*, 750 N.E.2d 778, 781 (Ind. 2001). Because of this error, we remand to the trial court for issuance of a new sentencing order and abstract of judgment which reflects judgment of conviction and sentence for only OWI as a Class D felony. Nonetheless, we now proceed to address White's arguments.

White raises two issues on appeal: (1) whether the trial court abused its discretion in admitting the results of his chemical breath test because the officer lacked probable cause to administer the test and (2) whether the evidence presented at trial is sufficient to sustain both OWI convictions. Because we have already determined that judgment of conviction should have been entered only on the first OWI conviction, we address the sufficiency of the evidence only as to this count.

I. Admissibility of Chemical Breath Test

White first contends that the trial court erred by admitting the results of his chemical breath test because Officer Strong lacked probable cause to administer the test.

Specifically, White argues that Officer Strong lacked probable cause because White was only speeding and not driving erratically.

In Indiana, a law enforcement officer has probable cause to offer a chemical test where the officer “has knowledge of facts and circumstances that would lead a reasonably prudent person to believe that the crime of operating a vehicle while intoxicated has been committed.” *Dalton v. State*, 773 N.E.2d 332, 334 (Ind. Ct. App. 2002). “Intoxicated” is defined as

under the influence of:

- (1) alcohol;
- (2) a controlled substance (as defined in IC 35-48-1);
- (3) a drug other than alcohol or a controlled substance;
- (4) a substance described in IC 35-46-6-2 or IC 35-46-6-3; or
- (5) a combination of substances described in subsection (1) through (4);

so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.

Ind. Code § 9-13-2-86.

The amount of evidence needed to supply probable cause of operating a vehicle while intoxicated is minimal. *Hannoy v. State*, 789 N.E.2d 977, 989 (Ind. Ct. App. 2003), *aff’d on reh’g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003), *trans. denied*. In some cases, the odor of alcohol on the driver’s breath may be sufficient. *Id.* *But see Frensemeier v. State*, 849 N.E.2d 157, 162 (Ind. Ct. App. 2006) (cautioning that the occurrence of a traffic accident “coupled *only* with an odor of alcohol” may not rise to the level of probable cause in all cases), *trans. denied*. Nonetheless, the odor of alcohol on a person’s breath, dilated pupils, and bloodshot or glassy eyes have been recognized as “objectively observed clear indications of intoxication.” *Id.*

In this case, Officer Strong testified to his training and experience in identifying intoxicated individuals. Tr. p. 111-12, 123, 129. He also testified to his own observations of White, including the odor of alcohol, White's slow and slurred speech, White's need for assistance in exiting the vehicle, and White's own admission that he had consumed alcohol before operating his vehicle. *Id.* at 119-22. Finally, Officer Strong testified as to his observations during White's performance of three field sobriety tests, including White's difficulty counting backwards, White's inability to recite the alphabet, and White's inability to touch all four fingers to his thumb, in order. *Id.* at 125-28.

Nonetheless, White says that these field sobriety tests were "not the standardized field sobriety tests." Appellant's Br. p. 4, 7. However, he provides no cogent argument as to why these tests cannot be used to establish probable cause. Moreover, these same "non-standardized" field sobriety tests have been admitted as evidence in other OWI cases. *See Hinds v. State*, 906 N.E.2d 877, 880-81 (Ind. Ct. App. 2009) (Hinds' failure to pass the backwards count test is admissible evidence of impairment); *Beasey v. State*, 823 N.E.2d 759, 760 (Ind. Ct. App. 2005) (failure of field sobriety tests, including the finger count test and backwards count test, considered along with other evidence of intoxication); *see also Smith v. State*, 751 N.E.2d 280, 282 (Ind. Ct. App. 2001) (evidence of the officer's training and experience is the only evidentiary foundation required to admit the results of field sobriety tests).

Collectively, this evidence provides a sufficient basis for a reasonable person to believe that White was under the influence of alcohol and that the alcohol had impaired White's ability to control his thoughts and actions. Thus, the trial court did not err in

concluding that Officer Strong had sufficient probable cause to conduct a chemical breath test and in admitting the results of the test.

II. Sufficiency of the Evidence

White also contends that the State presented insufficient evidence to support his conviction. We note that he predicates this argument on the exclusion of his breath test results, which we have already determined to be admissible.

When reviewing the sufficiency of the evidence to support a conviction, we 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.* Any conflicting evidence is considered in the light most favorable to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* at 146-47. 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.*

In order to convict White of count one, OWI as a Class D felony, the State had to prove that White operated a vehicle while intoxicated and that he had a prior conviction of OWI within the previous five years. The only element in dispute is whether White was "intoxicated." Pursuant to Indiana Code section 9-13-2-131, an alcohol concentration equivalent to at least 0.08 grams of alcohol per 210 liters of a person's breath is "prima facie evidence of intoxication." To establish the necessary impairment, other relevant evidence includes consumption of significant amounts of alcohol, impaired

attention and reflexes, watery or bloodshot eyes, the odor of alcohol on the breath, unsteady balance, failure of field sobriety tests, and slurred speech. *Monjar v. State*, 876 N.E.2d 792, 798 (Ind. Ct. App. 2007) (citing *Pickens v. State*, 751 N.E.2d 331, 335 (Ind. Ct. App. 2001)), *trans. denied*.

Here, the State presented the Datamaster results showing that White had an alcohol concentration equivalent of 0.08 grams of alcohol per 210 liters of his breath. Tr. p. 147-51; State's Ex. 5. The State presented additional evidence of impairment, including: the odor of alcohol on his breath, White's slow and slurred speech, White's need for assistance in exiting the vehicle, White's difficulty in counting backwards, his inability to recite the alphabet, and his inability to touch all four fingers to his thumb in order. The totality of this evidence is sufficient to affirm White's conviction for OWI.

As to White's second conviction for OWI with an alcohol concentration equivalent to at least 0.08 grams of alcohol, but less than 0.15 grams of alcohol per 210 liters of breath, we remand to the trial court for issuance of a new sentencing order and abstract of judgment reflecting that this conviction is merged with count one.

Affirmed and remanded.

MAY, J., and ROBB, J., concur.