

Wilfred V. Rhea, III was convicted after a bench trial of operating a vehicle with a blood alcohol content (“BAC”) of at least .08 but less than .15¹ as a Class C misdemeanor. He appeals, raising several issues, which we consolidate and restate as: whether the trial court erred by applying the presumption under Indiana Code section 9-30-6-15 as a mandatory presumption.

We vacate the trial court’s finding of guilt and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of March 3, 2009, Rhea was operating a vehicle in Evansville, Indiana. After observing Rhea disregard a traffic signal and turn left at a red light, Officer Douglas Bueltel of the Evansville Police Department initiated a traffic stop of Rhea’s vehicle. When Officer Bueltel approached Rhea’s vehicle, he smelled the odor of alcohol from inside. He called for back-up to assist with his investigation, and Trooper James Boling of the Indiana State Police responded. Trooper Boling also smelled the odor of alcohol coming from inside Rhea’s vehicle and noticed that Rhea’s eyes were “very bloodshot” and his speech was slurred. *Tr.* at 16. Rhea told Trooper Boling that he had “drank about twelve beers earlier” and that it had been a couple of hours since his last drink. *Id.* Rhea was arrested and was given a certified breath test by Trooper Boling, which showed that he had a BAC of .09.

Rhea was charged with operating a vehicle with a BAC of at least .08 but less than .15 as a Class C misdemeanor, of which he was convicted after a bench trial. He was

¹ See Ind. Code § 9-30-5-1(a).

also charged with disregarding a traffic control device as a Class C infraction, which was dismissed by the trial court. Rhea now appeals.

DISCUSSION AND DECISION

Rhea argues that the trial court erred because it based his conviction on the incorrect belief that the breath test presumption under Indiana Code section 9-30-6-15(b) is a mandatory presumption when it is actually only a rebuttable presumption. He contends that the language used by the trial court demonstrated that it believed that the presumption was mandatory. Because this court has held that it is error to apply the presumption under section 9-30-6-15 as a mandatory presumption, Rhea asserts that his conviction should be reversed.

Indiana Code section 9-30-6-15 states:

If, in a prosecution for an offense under IC 9-30-5, evidence establishes that:

- (1) a chemical test was performed on a test sample taken from the person charged with the offense within a period of time allowed for testing under section 2 of this chapter; and
- (2) the person charged with the offense had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per:
 - (A) one hundred (100) milliliters of the person's blood at the time the test sample was taken; or
 - (B) two hundred ten (210) liters of the person's breath;

the trier of fact shall presume that the person charged with the offense had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per one hundred (100) milliliters of the person's blood or per two hundred ten (210) liters of the person's breath at the time the person operated the vehicle. However, this presumption is rebuttable.

Here, the trial court made the following statements regarding the statute and the court's findings:

. . . [T]he mandatory presumption is there for the alcohol order for probable cause to take a test. Based upon the statute I will enter a finding of guilty as a class C misdemeanor. . . . I am finding that the uh . . . what I am finding as findings of fact are that he uh . . . smelled of alcoholic beverage, that he took a field test or took the uh . . . Breathalyzer test within three hours and that he admitted to the officers that he had been drinking but that his last drink had been several hours before the stop and that the statute is mandatory uh . . . that if he . . . if the test is greater than .08 I believe however it reads that I then at that finding as long as it is within three hours I find that . . . that I think the statute . . . I don't have the exact words in front of me would find uh . . . compel me to say that . . . that was sufficient for the time of the stop as well alright.

Tr. at 25-26.

An examination of the foregoing comments discloses a significant degree of confusion on the part of the trial court regarding the proper treatment of the statutory presumption. The trial court was not alone in such confusion.

In his closing argument, counsel for the defendant stated:

It is illegal to have a BAC of .08 to .15 uh at the time you operate a vehicle. Now this is either is a mandatory presumption in this case and that is that if the test is given within three hours of the time of the driving the Court shall presume that uh . . . the results are . . . that this is a trier of fact shall presume that the person charged with the offense had an alcohol concentration equal to at least eight hundredths uh . . . at the time of driving. *Your Honor this is a mandatory presumption.*

Tr. at 23-24 (emphasis added).

Similarly, the State in its appellate brief, citing to *Hall v. State*, 560 N.E.2d 561 (Ind. Ct. App. 1990), states that “Defendant is correct that *the statute creates a rebuttable, not a mandatory, presumption.*” *Appellee's Br.* at 4 (emphasis added).

The source of all of this confusion is the statute itself. The plain language of the statute sets out a mandatory rebuttable presumption when it states that “the trier of fact shall presume However, the presumption is *rebuttable*.” Ind. Code § 9-30-6-15(b) (emphasis added).

As we stated in *Hall*,

The statute and instruction do not create and implement a conclusive presumption. They do however appear to contemplate a mandatory presumption. . . . The statute appears to create a mandatory presumption and states that the jury "shall presume" unless the presumption has been rebutted.

560 N.E.2d at 563.

The Hall court then noted that *Chilcutt v. State*, 544 N.E.2d 856 (Ind. Ct. App. 1989) held that because the statute does not excuse the State from proving each and every element of the offense beyond a reasonable doubt, that it does not shift the burden of proof as to any such element to the defendant and passes constitutional muster. In light of this holding, *Hall* held that notwithstanding the phrase “shall presume,” the statute does not create a mandatory presumption, and even in a case in which the defendant does not rebut or attempt to rebut the presumption, the trier of fact is not compelled to find the presumed fact of blood alcohol content at the time of vehicle operation from the proved fact of blood alcohol content at the time of later testing, but is free to accept the presumption or not, just as it is free to do with other evidence. *Hall*, 560 N.E.2d at 563.

In *Hall*, this court held that the statutory presumption here at issue was neither mandatory, nor rebuttable, but merely permissive. *Id.* at 564. Under a permissive presumption, the trier of fact may accept or reject it and is not compelled to find the

presumed fact even if the defendant does not come forward with evidence to rebut the presumption.

The trial court erred in treating the statutory presumption as mandatory. For this reason, we vacate the trial court's finding of guilt and sentencing, and we remand with instructions to treat the statutory presumption as permissive, to enter a new finding based upon the evidence presented, and to conduct further proceedings consistent with this opinion.

Vacated and remanded with instructions.

FRIEDLANDER, J., and ROBB, J., concur.