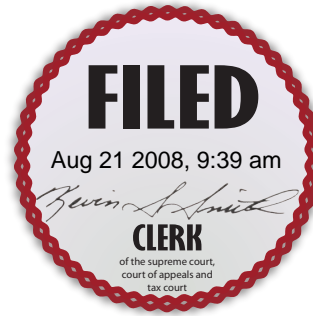


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL HAMILTON, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. )  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

No. 49A02-0802-CR-129

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Rebekah Pierson-Treacy, Judge  
The Honorable Shatrese M. Flowers, Master Commissioner  
Cause No. 49F19-0703-CM-55117

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August 21, 2008

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Michael Hamilton appeals his conviction for Class A misdemeanor operating while intoxicated (“OWI”). We affirm in part, vacate in part, and remand.

### **Issues**

Hamilton raises one issue, which we restate as whether sufficient evidence exists to sustain his Class A misdemeanor OWI conviction. We raise the issue, sua sponte, whether Hamilton’s simultaneous convictions for Class A misdemeanor OWI and Class B misdemeanor public intoxication violate double jeopardy protections.

### **Facts**

The facts most favorable to the conviction indicate that on March 31, 2007, at 4:30 a.m., Officer Jamin Davis observed Hamilton’s car make a wide left hand turn, striking the curb of the White River Parkway in Indianapolis. Hamilton’s car began to weave, crossing the centerline twice and straddling the line for half of a block. Officer Davis pulled Hamilton over and observed that he had red, glassy eyes, slurred speech, and the odor of alcohol on his breath.

Officer Charles Lewis arrived on the scene to assist and noticed Hamilton had poor balance and was stumbling. Hamilton told Officer Lewis he believed he was driving in downtown Indianapolis near Illinois and Ohio streets, when he was actually a few miles north. Officers offered Hamilton a portable breath test, but he refused and became increasingly argumentative. Officer Lewis read the implied consent law and offered field sobriety tests, which Hamilton also refused. Officers also offered a certified breath test and explained to Hamilton that if he did not take it they would attempt to

obtain a warrant for a blood draw. Hamilton refused and stated that he would not be “stuck by any needles.” Tr. p. 34.

Officers repeatedly told Hamilton that if he refused all tests his license would be suspended for one year. He continued to refuse, and officers placed him under arrest. The State charged Hamilton with Class A misdemeanor OWI and Class B misdemeanor public intoxication. Officers Lewis and Davis testified at the bench trial. Hamilton was convicted on both counts. The trial court sentenced him to 365 days, with 363 suspended to probation, for the OWI conviction and 180 days, with 178 suspended to probation, for the public intoxication conviction, to run concurrently. Hamilton was granted permission to file a belated appeal and this appeal followed.

## **Analysis**

### ***I. Sufficiency of the Evidence***

Hamilton argues the State presented insufficient evidence to support his conviction for operating a vehicle while intoxicated in a way that endangered another person. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the trier of fact’s exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction. Id.

To convict Hamilton, the State was required to prove that he was intoxicated while operating a vehicle. See Ind. Code § 9-30-5-2. 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).

Proof of intoxication can be established by impairment, independent of tests for blood alcohol level. Stevens v. State, 701 N.E.2d 277, 280 (Ind. Ct. App. 1998). Officers did not administer independent tests for blood alcohol levels. Instead, they testified to their observations of Hamilton’s bloodshot and watery eyes, unsteady balance, slurred speech, and an odor of alcohol on his breath. The trial court found this testimony credible and disregarded Hamilton’s testimony that he visited several downtown bars, but only drank water. We will not reweigh witnesses’ credibility on appeal.

Furthermore, Hamilton was properly convicted of Class A misdemeanor OWI because he endangered others. See I.C. § 9-30-5-2(b). Hamilton argues that there was not proof he endangered anyone. We disagree. Officer Davis testified that Hamilton’s vehicle struck a curb, weaved, crossed the centerline twice, and drove for half of a block straddling the centerline. Hamilton was obviously disoriented as to his location as well, believing he was still navigating downtown Indianapolis when he had actually traveled quite a few miles north. Clearly, such erratic and unsafe driving endangers the motoring

public. See Blinn v. State, 677 N.E.2d 51, 54 (Ind. Ct. App. 1997) (reasoning that the element of endangerment is proved by evidence showing the operation of the vehicle “could have endangered any person, including the public, the police, or the operator”) (internal quotations omitted)). We conclude that sufficient evidence existed to convict Hamilton of Class A misdemeanor OWI.

## *II. Double Jeopardy*

We next address, sua sponte, whether Hamilton’s simultaneous convictions for Class A misdemeanor OWI and Class B misdemeanor public intoxication subjected him to double jeopardy. We raise this issue sua sponte because a double jeopardy violation, if shown, implicates fundamental rights. Scott v. State, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006). The Indiana Constitution’s Double Jeopardy Clause, found in Article 1, Section 14 of the Indiana Constitution, “was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression.” Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the “same offense” in violation of the Indiana Double Jeopardy Clause, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Id. Under the “actual evidence” test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. at 53.

The same facts—that Hamilton had glassy eyes, slurred speech, unsteady movement, and the smell of alcohol on his breath—were used to establish both

convictions. The same action—Hamilton driving on the White River Parkway while intoxicated—formed the basis of both convictions. We find that the convictions for OWI and public intoxication violate the double jeopardy clause of the Indiana Constitution. See also Smith v. State, 725 N.E.2d 160 (Ind. Ct. App. 2000) (vacating public intoxication conviction after finding that the trial court used the same evidence to establish convictions for OWI and public intoxication). We vacate the public intoxication conviction and remand for the trial court to enter an order accordingly.

### **Conclusion**

Sufficient evidence existed to support Hamilton’s conviction for Class A misdemeanor OWI. We vacate the public intoxication conviction and remand to the trial court for disposition consistent with this opinion. We affirm in part, vacate in part, and remand.

Affirmed in part, vacated in part, and remanded.

FRIEDLANDER, J., and DARDEN, J., concur.