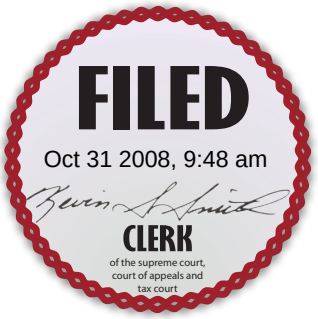

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IN THE COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 66A04-0804-CR-237
	)	
HONEY LOEHMER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE PULASKI SUPERIOR COURT
The Honorable Patrick Blankenship, Judge
Cause No. 66D01-0707-CM-154

October 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The State appeals the trial court's involuntary dismissal of the State's case for operating a vehicle while intoxicated, endangering others against Honey Loehmer. Loehmer cross-appeals her conviction of Driving With a .08 Breath-Alcohol Content of At Least .08,[1] a class C misdemeanor. Together, the parties present the following consolidated, restated issues for review:

1. Did the trial court err in dismissing the charge of operating while intoxicated, endangering others?

2. Did the trial court err in admitting the results of a breath test administered to Loehmer?

We affirm.

On June 9, 2007, Sergeant Robert Zimmerman of the Pulaski County Sheriff's Office was traveling behind a vehicle being driven by Loehmer when she turned left at an intersection. According to Sergeant Zimmerman, Loehmer did so in such a manner that her wheels left the traveled portion of the roadway and rolled onto an agricultural access lane used by farmers when they enter the adjacent field. Sergeant Zimmerman watched as Loehmer continued to drive erratically. Sergeant Zimmerman turned around and followed Loehmer until he could initiate a traffic stop. Sergeant Zimmerman approached Loehmer's stopped vehicle and explained the reason for the stop and asked for her license and registration. Sergeant Zimmerman noted that Loehmer's eyes were glassy, her speech was slurred, and an odor of alcohol emanated from her vehicle. He asked her to step out of the vehicle. Loehmer complied, whereupon Sergeant Zimmerman observed that Loehmer stumbled and was unsteady on her feet. As Sergeant Zimmerman spoke with Loehmer when

[1] Ind. Code Ann. § 9-30-5-1(a) (West, PREMISE through 2007 1st Regular Sess.).

she was outside the vehicle, he determined that the odor of alcohol emanated from her person and breath. He asked Loehmer to submit to several field sobriety tests. She complied and failed. He then administered a preliminary breath test that provides an approximate estimate of blood-alcohol content. The test indicated a blood-alcohol content (BAC) of .09.

At this point, Sergeant Zimmerman read Loehmer a standard implied consent advisement and then asked, "Will you now take a chemical test?" *Transcript* at 75. She did not respond. He asked, "Do you understand what I read to you?" *Id*. She responded, "Yes." *Id*. Loehmer informed the officer that she had a six-month-old child and then stated that she did not remember the last time she had gone out. After briefly ascertaining that Loehmer understood what was happening and why she was stopped, he said,

> Now listen, you're not under arrest, okay? I just developed enough probable cause to offer you a certified breath test, which is what my intention is. Okay? I'm going to transport you to … to do a certified chemical test, if you will do that. If you don't then you will be arrested for refusal. Okay. So will you take a certified chemical test?

Id. at 76. She responded, "I don't want to. I mean … I'm such a fucking idiot." *Id*. The exchange between the two continued as follows:

> LOEHMER I have four kids. I have too much to worry about to even deal with (inaudible).
>
> OFFICER And it may be the case that your breath alcohol comes back under the legal limit okay but I have enough reason to believe that you've operated while intoxicated to offer you a certified test.
>
> LOEHMER Can you just take me home?
>
> OFFICER I can't just take you home.
>
> LOEHMER Please?

OFFICER I can not.

LOEHMER (INAUDIBLE) I don't know what I'll do if I don't.

OFFICER I understand what you're telling me.

LOEHMER I know.

OFFICER I need you to answer my question though.

LOEHMER I know. Okay.

OFFICER It's a yes or no answer okay. We can't stand out here all night.

LOEHMER Okay, can I call my husband and what do we do with my truck?

OFFICER We're going to pull it off the road for now.

LOEHMER Can I get my purse?

OFFICER Yes I'll get your purse out of there and I'll get your keys and I'll lock your truck up. Okay.

LOEHMER Okay. I guess I don't have much of a choice do I.

OFFICER I need you to turn around and put your hands behind your back and I'll put you in a set of handcuffs because that's policy.

Id. at 76-77. Sergeant Zimmerman transported Loehmer to the Pulaski County Justice Center and administered a breath test, which Loehmer failed with a reading of .11.

Loehmer was placed under arrest and charged with operating while intoxicated (OWI), endangering others, as a class A misdemeanor, and operating with an alcohol concentration equivalent (ACE) of at least .08, a class C misdemeanor, and unsafe lane movement while turning, a traffic infraction. Following a bench trial, the trial court granted

Loehmer's motion for directed verdict with respect to the OWI endangering charge, but found her guilty of operating with an ACE of at least .08. The State appeals the directed verdict in Loehmer's favor with respect to the OWI charge, while Loehmer cross-appeals her conviction of operating with an ACE of at least .08.

1.

The State contends the trial court erred in granting a directed verdict on the charge of operating while intoxicated, endangering others.

Before we begin our analysis, we review the motion and ruling in question. At the conclusion of the State's case-in-chief, Loehmer asked for a directed verdict on both criminal charges. She did this based upon the claim that the State's primary witness, Sergeant Zimmerman, was not credible, i.e., "[a]nd his words make it so hard to believe that anything that he says in not just for convenience of getting a conviction which is the purpose that he is here." *Id*. at 132. The court embarked upon a lengthy discussion of its reservations about various aspects of law enforcement practices in processing drunk-driving suspects and administering sobriety tests. Ultimately, the court granted Loehmer's motion for directed verdict, stating,

> I will GRANT the Motion on [sic] Directed verdict as to Count 1. I didn't hear any evidence that the vehicle was operated in such a manner that a person was endangered. There wasn't any testimony as to that. The little bit of testimony as to how it was operated that the passenger side wheels left the roadway and drove onto a field access, um, um, I'm sorry, the Court sees that every single day when the Court's driving up and down the road. People make a wide turn and their wheels, you know, cross the white line or go onto the berm. And uh, I think the operating while endangering a person, operating while intoxicated endangering a person, I think involves a little bit more than the wheels running off the roadway. The testimony was that there was no other observed driving irregularities going up to that turn. Speed or anything else. I just didn't get the

> sense that anybody was endangered at that scene. I will take the Motion for Directed Verdict on Count 2 under advisement along with your renewed Motion to Suppress, is that right?

Id. at 146-47. The foregoing clearly reflects that the trial court granted a directed verdict on the basis that there was not sufficient evidence to prove that Loehmer operated her vehicle in a manner that endangered others. This ruling was both procedurally and substantively erroneous.

Both Loehmer and the State agree upon appeal that when a case is tried to the bench, the proper mechanism to test the State's case after the State has rested its case is via a motion for involuntary dismissal under Trial Rule 41(B), which states:

> (B) Involuntary dismissal: Effect thereof. After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

T.R. 41(B) is made applicable to criminal trials by way of Criminal Rule 21.[2] *See State v. Holmes*, 181 Ind. App. 634, 393 N.E.2d 242 (1979). Of course, a trial court may elect to disregard any part of the evidence set forth in the State's case-in-chief in making its final

[2] Crim. R. 21 states, "The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

determination on the merits. When considering a motion for involuntary termination under T.R. 41(B), however, it is required to accept as true all the evidence and reasonable inferences therefrom that favor the State's allegations. *State v. Seymour*, 177 Ind. App. 341, 379 N.E.2d 535 (1978). Therefore, in considering Loehmer's motion, the trial court was bound to accept as true all the evidence and reasonable inferences supporting the State's allegation that Loehmer committed the offense of operating a vehicle while intoxicated endangering others. Finally, in reviewing a ruling on a T.R. 41(B) motion, we consider whether, considering as true all of the State's evidence along with the reasonable inferences drawn therefrom, there was sufficient evidence of probative value to support a finding of guilt with respect to each element of the offenses with which defendant was charged. *State v. Holmes*, 181 Ind. App. 634, 393 N.E.2d 242.

The offense of operating a vehicle while intoxicated endangering others is set out in I.C. § 9-30-5-2 (West, PREMISE through 2007 1st Regular Sess.), which provides, "(a) Except as provided in subsection (b), a person who operates a vehicle while intoxicated commits a Class C misdemeanor. (b) *An offense described in subsection (a) is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person*." (Emphasis supplied.)

Essentially, the trial court's comments reflect that it determined the State's evidence was insufficient to prove OWI endangering others because it did not establish that Loehmer drove her vehicle in an unsafe manner and that no one was endangered thereby. We note, however, that the State was not required to prove that a person other than Loehmer was

actually in the same area as her vehicle in order to support a conviction for OWI endangering others; rather, such can be established by showing either that the defendant's condition or the manner in which he or she was driving could have endangered any person, including the public, police, or another driver. *Shaw v. State*, 595 N.E.2d 743 (Ind. Ct. App. 1992). More to the point, it is well established that proof that the defendant's condition rendered driving unsafe is sufficient to establish the "endangerment" required for conviction of OWI endangering others *See id.*; *see also Slate v. State,* 798 N.E.2d 510, 516 (Ind. Ct. App. 2003) ("pursuant to Indiana Code Section 9-30-5-2(b), … proof that the defendant's condition rendered operation of the vehicle unsafe is sufficient to establish the endangerment element of operating a vehicle while intoxicated as a Class A misdemeanor").

The trial court erred in focusing only on the evidence relative to the manner in which Loehmer drove the vehicle and neglecting to consider the alternate means by which the State could establish that Loehmer had committed the offense of OWI endangering others, i.e., by establishing that Loehmer's condition rendered operation of the vehicle unsafe. The evidence pertinent to that determination was easily sufficient to withstand Loehmer's motion for involuntary dismissal under T.R. 41(B).

Despite the fact that the dismissal of Count 1 was erroneous on independent procedural and substantive grounds, it does operate as a judgment of acquittal on the merits. *See* T.R. 41(B). Therefore, Loehmer cannot be retried because an erroneous entry of acquittal by the trial court acts as an acquittal for double jeopardy purposes. *State v. Taylor,* 863 N.E.2d 917 (Ind. Ct. App. 2007). *See also Williams v. State*, 634 N.E.2d 849, 852 (Ind. Ct. App. 1994) ("[e]ven where an acquittal is 'based upon an egregiously erroneous

foundation,' a defendant may not be retried for the same offense") (quoting *Sanabria v. United States*, 437 U.S. 54 (1978)).

2.

Upon cross-appeal, Loehmer contends the trial court erred in admitting the results of her breath test. This contention is based upon (1) the claim that Sergeant Zimmerman failed to comply with the requirement in Ind. Code Ann. § 9-30-6-7(a) (West, PREMISE through 2007 1st Regular Sess.) that he inform Loehmer that refusal would result in the suspension of her license, and (2) the claim that Loehmer was affirmatively misadvised that she would be arrested for refusing to submit to a breath test. Thus, Loehmer explains, "when the Defendant involuntarily surrendered her right to deny the State of Indiana a sample of her breath for testing, it was because she succumbed to the coercive force of the arresting officer improperly advising her she would be arrested if she did not do so." *Appellee's Brief* at 11-12.

The admission or exclusion of evidence lies within the discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id*. "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*. at 1025.

Indiana's Implied Consent Law provides, "If a person refuses to submit to a chemical test, the arresting officer shall inform the person that refusal will result in the suspension of the person's driving privileges." I.C. § 9-30-6-7 (West, PREMISE through 2007 1st Regular Sess.). It is undisputed that Sergeant Zimmerman read a legally sound version of the implied

consent law to Loehmer and she acknowledged that she understood it. The issue in this case arises from a comment made by Sergeant Zimmerman in the ensuing discussion during which he sought to obtain an answer from Loehmer with respect to whether she would consent to a chemical test. In the course of that discussion, he made a statement that could reasonably have been interpreted to mean that Loehmer would be arrested if she refused to consent, *because* she refused. Sergeant Zimmerman explained at trial that this was not what he meant to convey by that statement. He claimed he meant to communicate to Loehmer that she would be arrested because he had probable cause to believe she had been driving while intoxicated, and that the refusal to submit to a chemical test would be noted. Regardless of his subjective intent, however, we agree that Loehmer reasonably could have understood his statement to mean that she would be arrested if she refused to submit to the test. We therefore proceed upon the assumption that such was the case. The question is, does this render the test results inadmissible?

In *Schmerber v. California*, 384 U.S. 757 (1966), the United States Supreme Court considered the question whether administering a test to determine blood-alcohol content in a drunk driving case where the defendant did not voluntarily consent violated the Fourth and Fourteenth Amendments. The Court noted that it is often true in the case of charges alleging driving under the influence that the case involves an officer without a warrant. Ultimately, the Court concluded that consent is not required and the evidence thus obtained is admissible where: (1) there is probable cause to believe the person has operated a vehicle while intoxicated; (2) the dissipation of alcohol in the blood creates exigent circumstances under which there is no time to secure a search warrant; (3) the test chosen to measure the person's

blood alcohol concentration is a reasonable one; and (4) the test is performed in a reasonable manner. This court has previously cited this analysis from *Schmerber* in affirming the admissibility of blood-alcohol tests where consent for the test was refused.

For instance, in *Duncan v. State,* 799 N.E.2d 538 (Ind. Ct. App. 2003), we held that it is acceptable for police to draw blood without a person's consent so long as the foregoing conditions are satisfied. In that case, the defendant inadvertently drove his truck over his infant son, killing the child. The incident occurred on the lawn of a friend's house. When police contacted the defendant at the hospital shortly after the incident and following his son's death, he was read Indiana's implied consent warning and Mirandized. Law enforcement personnel present at the time did not administer any field sobriety tests and later were not able to elaborate on their observation that "due to [the defendant's] speech and mannerisms that he was intoxicated." *Id*. at 541. The defendant was informed that, pursuant to local law enforcement policy in all accidents involving a fatality, his blood would be drawn for analysis. The test revealed a BAC of .106. He was charged with operating a vehicle with a BAC of .08 or more involving death.

The defendant moved to suppress the results of the blood test on grounds that the blood was drawn without a warrant or probable cause, in violation of the Fourth Amendment and article 1, section 11 of the Indiana Constitution. Citing *Schmerber,* the court stated that police may draw blood from the defendant without his or her consent so long as the four conditions set out in *Schmerber* are met. The court went on to note that the involuntary test for intoxication (i.e., the blood draw) was deemed acceptable by the *Schmerber* Court because the police had probable cause to believe that the defendant in that case had operated

a vehicle while intoxicated. The *Duncan* court concluded, however, that the same was not true in Duncan's case. Specifically, the court observed, "the record does not contain 'a clear indication' that Duncan was intoxicated at the time of the incident, thereby supplying the police with the probable cause necessary to compel Duncan to submit to the drawing of his blood." *Duncan v. State*, 799 N.E.2d at 543 (quoting *Schmerber v. California*, 384 U.S. at 768). Ultimately, the court held in *Duncan* that the exception to the warrant requirement carved out in *Schmerber* authorized administering involuntary testing to determine intoxication only where probable cause is "*clearly*" indicated. *Id*. at 544 (emphasis in original).

In all three cases, i.e., *Schmerber*, *Duncan*, and here, the gravamen of the alleged offense in question was the operation of a vehicle while intoxicated. In all three cases, the test was the sole means of establishing that element of the alcohol-related offense. In *Duncan*, as here, the specific OWI-related charge involved proof of a certain BAC level, proof which only a chemical test can provide. We are aware, of course, that the test for determining intoxication in *Schmerber* and *Duncan* was a blood draw and that the instant case involves the administration of a breathalyzer test. We perceive no meaningful distinction between the two, however, for purposes of assessing the admissibility of the result where the subject did not consent to the test and it was administered without the benefit of a warrant. Indeed, in light of the fact that a blood draw is a more invasive procedure than a breath test, we presume the Supreme Court would establish stricter requirements to justify use of the more invasive procedure. In other words, if the foregoing rationale is deemed acceptable to justify a blood draw, then it certainly justifies a chemical breath test.

We proceed now to an analysis of the *Schmerber* factors. Sergeant Zimmerman's testimony clearly established probable cause to believe that Loehmer was intoxicated at the time of arrest. She flunked each of the field sobriety tests that he administered, and she tested in excess of the legal limit in the preliminary breath test administered at the scene. With respect to the second factor, Sergeant Zimmerman might reasonably have believed the delay necessary to obtain a warrant would have threatened the destruction of evidence, i.e., a measurement of Loehmer's BAC, which the preliminary test indicated was at or near the legal limit. We note in this regard the *Schmerber* Court's observation that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber v. California*, 384 U.S. at 770. Clearly, the test chosen to measure Loehmer's BAC was a reasonable one. Finally, the record reflects that the test was administered in a reasonable manner.

Therefore, we conclude that the results of the test were admissible. Based upon this conclusion, we summarily reject Loehmer's contention that the trial court erred in entering judgment of conviction on Count II.

The final issue raised by the State concerning the lesser included offense of Count II is rendered moot by our resolution of Issue 2 above.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur