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IN THE
COURT OF APPEALS OF INDIANA

DEAN JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0706-CR-344
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Nelson, Judge
Cause No. 49F07-0612-CM-235497

DECEMBER 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant/Appellant Dean Jones appeals his conviction of operating a vehicle while intoxicated, a Class A misdemeanor. Ind. Code § 9-30-5-2.

We affirm.

ISSUE

Jones presents one issue for our review which we restate as: whether there was sufficient evidence to support his conviction.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the trial court's judgment follow. On December 8, 2006, a police officer observed Jones in the driver seat of a vehicle slumped over the steering wheel while the vehicle was running. The vehicle's lights were off. The officer tapped on the glass of the driver window and motioned for Jones to open the door. Due to Jones' unresponsiveness, the officer opened the door. The officer noticed the strong odor of an alcoholic beverage, as well as Jones' red, bloodshot eyes, immediately upon opening the car door. The officer also noted that the vehicle was not in park but was in drive. The officer ordered Jones to place the vehicle into park approximately three times. After fumbling with the gearshift, Jones finally placed the vehicle into park. Upon receiving no response to his request for Jones to exit the vehicle, the officer helped Jones from the vehicle. Unable to stand, Jones fell to the ground, at which time the officer noticed that Jones' pants were stained with what appeared to be urine. Jones stated to the officer that he had come from his cousin's house and was going home. The officer arrested Jones and a certified breath test revealed that Jones had a BAC of .29%.

Following a bench trial, Jones was convicted of operating a vehicle while intoxicated as a Class A misdemeanor. It is from this conviction that he now appeals.

DISCUSSION AND DECISION

Jones contends that the State failed to present evidence sufficient to sustain his conviction of operating a vehicle while intoxicated. Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. We are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

In order to obtain a conviction for operating a vehicle while intoxicated in this case, the State must prove beyond a reasonable doubt that Jones (1) operated a vehicle (2) while he was intoxicated (3) in a manner that endangered a person. *See* Ind. Code § 9-30-5-2. Jones challenges only the sufficiency of the State's evidence on the first of these three factors.

To operate a vehicle is to drive it or be in actual physical control of it upon a highway. *Custer v. State*, 637 N.E.2d 187, 188 (Ind. Ct. App. 1994) (*citing Mordacq v. State*, 585 N.E.2d 22, 23 (Ind. Ct. App. 1992)). Whether a defendant has operated a

vehicle is a question of fact to be determined by examining the surrounding circumstances. *Id*.

Here, the evidence before the trier of fact discloses that Jones was asleep in the driver's seat with the vehicle's engine running and the lights off. The vehicle was situated in an alley and was in drive. Jones' BAC was .29%. Based upon these facts, Jones claims that the location of his vehicle in the alley shows he did not operate his vehicle. Further, he asserts that although the police officer testified that his vehicle was not in park but rather was in drive, it was actually in park.

We agree with Jones that the location of the vehicle at the time it is discovered is of substantial import. *See Toan v. State*, 691 N.E.2d 477, 480 (Ind. Ct. App. 1998); *see also Custer*, 637 N.E.2d at 188. However, he seems to be arguing that the mere fact that his vehicle was in an alley negates the trial court's finding that he operated his vehicle. We disagree. As we stated above, to operate a vehicle is to drive it or be in actual physical control of it upon a highway. *Custer*, 637 N.E.2d at 188. The term "public highway" is defined as, "a street, **an alley**, a road, a highway, or a thoroughfare in Indiana, including a privately owned business parking lot and drive, that is used by the public or open to use by the public." Ind. Code § 9-25-2-4 (emphasis supplied). Thus, an alley constitutes a highway. Therefore, Jones' argument that he could not have operated

the vehicle because he was in an allegedly seldom-used alley when the police officer found him, holds no water.[1]

Furthermore, in support of his argument that his car was actually in park, Jones points to his own self-serving testimony. Jones testified at his trial that when his vehicle is shifted out of park, the doors lock automatically. When the vehicle is shifted into park, the doors unlock. The intended inference then is that if Jones' vehicle had been in drive, as the police officer testified, the doors would have been locked, and the officer would not have been able to open the door. It is the function of the trier of fact to resolve conflicts in testimony and to determine the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). Essentially, Jones is inviting us to reweigh the evidence and judge the credibility of the witnesses. If we were to accept Jones' invitation, it would be an invasion of the province of the trier of fact. This we will not do. The State sufficiently proved that Jones operated a vehicle.

This Court has listed several factors to consider when determining whether the accused has "operated" a vehicle: (1) location of the vehicle when discovered; (2) whether the vehicle was in movement when discovered; (3) additional evidence that the accused was observed operating the vehicle before he or she was discovered; and (4) the position of the automatic transmission of the vehicle. *Hampton v. State*, 681 N.E.2d 250, 251-52 (Ind. Ct. App. 1997). In addition, any evidence that leads to a reasonable inference should be considered. *Id*. The analysis of the facts of the present case with

[1]We note that it is not a defense in an action under Chapter 5 of Title 9 that the accused person was operating a vehicle in a place other than on a highway. *See* Ind. Code 9-30-5-9.

regard to these factors supports the inference that Jones had operated the vehicle and that was how he and the vehicle came to where they were found. *See Traxler v. State*, 538 N.E.2d 268 (Ind. Ct. App. 1989) (defendant held to be operating the vehicle when found at wheel with engine running and vehicle positioned in lane of traffic); *Garland v. State*, 452 N.E.2d 1021 (Ind. Ct. App. 1983) (evidence found sufficient to show defendant operated vehicle when found at wheel with engine running and vehicle positioned in snow bank on median of interstate highway); and *Bowlin v. State*, 164 Ind. App. 693, 330 N.E.2d 353 (1975) (defendant found to have operated vehicle when found at wheel with engine running and vehicle positioned on median strip of four lane highway). Thus, the evidence was sufficient to support Jones' conviction.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude there was sufficient evidence to sustain Jones' conviction of operating a vehicle while intoxicated.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.