Indiana Public Defender Council

OPERATING WHILE INTOXICATED

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Sufficiency of Evidence

Whether the Defendant was operating a motor vehicle

Courts often find that if a driver was discovered on or even near a roadway, the defendant was operating, as opposed to being parked in a lot or driveway.

In 2013, the legislature amended Ind. Code § 9-13-2-117.5 to define "operate" as "to navigate or otherwise be in actual physical control of a vehicle watercraft, off-road vehicle, or snowmobile." Prior to 2012, Ind. Code § 9-13-2-117.5 applied only to watercrafts. West v. State, 22 N.E.3d 872 (Ind. Ct. App. 2014).

Courts look at a few factors to determine whether the defendant was "operating" a vehicle under specific situations: (1) location of the vehicle when discovered; (2) whether the vehicle was in movement when discovered; (3) additional evidence that defendant was observed operating the vehicle before he was discovered; and (4) placement and type of transmission. Hampton v. State, 681 N.E.2d 250 (Ind. Ct. App. 1997) (vehicle was being operated where defendant's vehicle was in gear and was only stopped because of a rock in the yard). In addition to these factors, any evidence that leads to a reasonable inference should be included. West v. State, 22 N.E.3d 872 (Ind. Ct. App. 2014).

> Clark v. State, 611 N.E.2d 181 (Ind. Ct. App. 1993) (Where D was found asleep in driver's seat, in car with engine running, lights on, transmission in park; and car was in parking spot in apartment complex, but with front end partially in roadway; evidence was insufficient to show D operated vehicle while intoxicated); see also Corl v. State, 544 N.E.2d 211 (Ind. Ct. App. 1989) (evidence insufficient where D was found asleep behind steering wheel; lights on and engine running; D admitted drinking and falling asleep waiting for car to warm up) and Hiegel v. State, 538 N.E.2d 265 (Ind. Ct. App. 1989) (evidence insufficient where D was found asleep behind wheel of car in tavern parking lot).

Automatic vs manual transmission. Nichols v. State, 783 N.E.2d 1210 (Ind. Ct. App. 2003) (Evidence insufficient to show that D actually operated his vehicle, or intended to operate it, where he was asleep parked in parking lot when officer woke him, car rolled backwards and he applied the brake; vehicle was manual transmission and not in gear and vehicle was off). But see Parks v. State, 752 N.E.2d 63 (Ind. Ct. App. 2001) (fact that car was moving in reverse with engine running and D in driver's seat was sufficient to prove operating element; automatic transmission).

> Mordacq v. State, 585 N.E.2d 22 (Ind. Ct. App. 1992) (It is not sufficient to show D merely started engine in vehicle parked along city street).

Henderson v. State, 108 N.E.3d 407 (Ind. Ct. App. 2018) (evidence sufficient where defendant was found in his parked truck nearly passed out, but when police approached him, he revved the engine, shifted the transmission into drive, and lurched a few feet forward before striking another car).

Winters v. State, 132 N.E.3d 46 (Ind. Ct. App. 2019) (sleeping in driver's seat of a running car that was parked halfway in a residential driveway and halfway in the roadway is "operating" a motor vehicle).

Custer v. State, 637 N.E.2d 187 (Ind. Ct. App. 1994) (evidence was sufficient to support OWI conviction where D was found asleep in driver's seat, with engine running and car parked on side of highway; officer came upon D after getting radio report that car matching its description had been observed driving wrong way on highway). See also Toan v. State, 691 N.E.2d 477 (Ind. Ct. App. 1998) (vehicle found running on side of highway).

Note: Custer distinguished Mordacq by noting that, parking along the side of a city street, an area normally used for such a purpose, is distinguishable from stopping along the side of a highway, an area that is used only for emergencies. Custer, 637 N.E.2d at 189.

Crawley v. State, 920 N.E.2d 808 (Ind. Ct. App. 2010) (State presented sufficient circumstantial evidence to prove beyond reasonable doubt that D operated vehicle after driving privileges suspended for life, even though no one saw her operate vehicle found in back yard pool). But see Proof D operated while intoxicated, p. 4.

State v. Thomas, 20 P.3d 82 (Kan. App. 2001) (D drove when he pushed, coasted, steered, and parked car that did not run).

See also 93 A.L.R.3d 7 (What constitutes operating motor vehicle).

DUI includes driving on private property

Manuwal v. State, 904 N.E.2d 657 (Ind. 2009) (Ind. Code § 9-30-5-1(b) and Ind. Code § 9-30-5-2 apply when a motorist is driving on public or private property, including property owned by the motorist. Neither statute expressly limits its application to public highways nor designates application to private property in any way. Moreover, Ind. Code § 9-30-5-9 provides that "it is not a defense in an action under [Chapter 5] that the accused person was operating a vehicle in a place other than on a highway; thus, prosecutor had discretion to charge D with OWI for operating his all-terrain vehicle on his private property).

Blood alcohol content over .08% (formerly .10%) – IC 9-30-5-1

Ind. Code § 9-30-5-1(a) creates strict liability for operating a vehicle with a blood alcohol concentration within the specified range, irrespective of whether the operator exhibits signs of intoxication.

Allman v. State, 728 N.E.2d 230 (Ind. Ct. App. 2000) (where breath test was not administered within three hours of driving, D's BAC was just over legal limit and State did not provide testimony relating BAC level at time of testing to BAC at time of accident, there was insufficient evidence to convict D of operating with .10% BAC; State must show BAC at time of alleged violation by means of extrapolation or chemical test administered at time of violation. Jury is permitted to find that D's BAC is at least .10% at time of alleged violation if test is administered within three hours of violation and results of test reveal BAC of .10%). See also State v. Stamm, 616 N.E.2d 377 (Ind. Ct. App. 1993) (only effect of failure to conduct test within three-hour period is loss of rebuttable presumption that if test shows BAC of at least .10%, D also had BAC of at least .10% at time he operated vehicle).

Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App. 2006) (presumption set forth in Ind. Code § 9-30-6-15(b) that a person has a BAC equivalent to at least .08 grams at time of driving if person tested at least .08 grams within three hours of driving applies to trials on Class A misdemeanor operating with .15 BAC).

Artigas v. State, 122 N.E.3d 1003 (Ind. Ct. App. 2019) (insufficient evidence to sustain conviction for class C misdemeanor operating with BAC of at least .08 but less than .15 g/100mL of blood where stipulated blood test presented only a range of from .07 to .084 g/100mL., and that his blood alcohol concentration was somewhere from.07 to.084 g/100mL; fact D displayed signs of intoxication irrelevant).

Johnson v. State, 879 N.E.2d 649 (Ind. Ct. App. 2008) (three-hour presumption applied to D, who tested .09 BAC about 40 minutes after operating her vehicle, was constitutional despite D's argument that the presumed fact lacked a strong logical nexus with the known fact. In motion in limine hearing, D submitted scientific article noting that a person's BAC can rise relatively significantly within 30 minutes of drinking alcohol, thus someone with D's relatively low BAC may not have been over .08 BAC at time of driving. D argued that the study's findings purported to invalidate the statutory presumption. The trial court admitted the journal article as reliable hearsay solely for the purposes of D's motion in limine hearing, but ultimately denied D's motion in limine as to the application of the presumption, thus the State was permitted to rely upon the presumption at trial).

Ramirez-Vera v. State, 144 N.E.3d 735 (Ind. Ct. App. 2020) (evidence was sufficient to support conviction even though evidence demonstrated that D may have parked her car three hours prior to her blood test and that car was in same location when officer responded to 9-1-1 call, where law enforcement officer testified that he found D asleep in her vehicle with its engine running, that D's vehicle was in the travel portion of the road at a stop sign facing a state highway, D's passenger testified that D drove the entire time, and blood test was timely conducted within three hours after officer had probable cause to believe that defendant had committed an offense).

Note: Because the three-hour presumption is rebuttable, scientific articles like the one D submitted in the motion in limine hearing in this case should be admissible and used at trial to rebut the presumption. See Indiana Rules of Evidence 803(18) and the U.S. Constitution, Sixth Amendment.

Black v. State, 621 N.E.2d 368 (Ind. Ct. App. 1993) (where Intoxilyzer 5000 gave reading of .10% BAC, and testimony was elicited that machine would round up to .10% from slightly lower actual reading, evidence was insufficient to support conviction for BAC > .10% under limited circumstances where no evidence was presented to refute this testimony).

Melton v. State, 597 N.E.2d 359 (Ind. Ct. App. 1992) (when alcohol testing of D's blood plasma revealed .167% milligrams of alcohol per deciliter, but no evidence to translate this finding into percentage of alcohol by weight in whole blood, evidence was insufficient to support conviction for Operating while BAC > .10%; while BAC may be established by testing breath, blood, urine or other bodily substances, standard set for intoxication by legislature is based on weight of alcohol in whole blood, and any results from other testing must be converted into this measure).

Newcomb v. State, 758 N.E.2d 69 (Ind. Ct. App. 2001) (because State presented no expert testimony converting blood serum figures to whole BAC and failed to establish medical technologist as expert qualified to testify regarding D's BAC based on results of serum blood test, evidence was insufficient to sustain D's conviction).

Baran v. State, 639 N.E.2d 642 (Ind. 1994) (Printout of Intoxilyzer 5000 showing reading of .11% was sufficient to support conviction for Operating with BAC > .10%. Court rejected argument that because Ind. Code § 9-11-2-1(a) requires evidence of BAC, additional evidence of breath alcohol to blood alcohol conversion process of Intoxilyzer was required; on the contrary, conversion not necessary because Intoxilyzer expressed results by required BAC, and machines are tested for accuracy and trial court was entitled to take judicial notice of fact printout expressed result as percentage by weight in blood).

Proof of intoxication – impairment – Class C misdemeanor OWI conviction under IC 9-30-5-2(a)

"Intoxication" means under the influence of: (1) alcohol; (2) a controlled substance; (3) a drug other than alcohol or a controlled substance; (4) toxic vapors or nitrous oxide; (5) a combination of alcohol, controlled substances, drugs, or toxic vapors; or (6) any other substance not including food and food ingredients (as defined in IC 6-2.5-1-20), tobacco (as defined in IC 6-2.5-1-28), or a dietary supplement (as defined in IC 6-2.5-1-16); 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.

Prima facie evidence of intoxication includes evidence that at the time of an alleged violation the person 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 two hundred ten (210) liters of the person's breath. Ind. Code § 9-13-2-131.

Although proof of .08% BAC is prima facie evidence of intoxication, a conviction for operating while intoxicated cannot be won simply by demonstrating that the defendant was driving with a BAC of .08 or more. The State must also show impairment of thought and action. Smith v. State, 502 N.E.2d 122 (Ind. Ct. App. 1986).

Awbrey v. State, 191 N.E.3d 925 (Ind. Ct. App. 2022) (pursuant to the plain language of Ind. Code § 9-30-5-2, the level of an intoxicant in the defendant's blood, standing alone, is insufficient to establish impairment; here, police officer testified he did not see any impairment and D passed the HGN field sobriety test. The assistant director of the State toxicology lab testified she would "expect" impairment based upon the level of methamphetamine in D's blood and testified in general terms about how methamphetamines can impair operation of a vehicle; this was insufficient to support conviction for operating while intoxicated).

Proof of intoxication does not require proof of blood alcohol content; it is sufficient to show that the defendant was impaired. Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999); Pickens v. State, 751 N.E.2d 331, 335 (Ind. Ct. App. 2001). Evidence of impairment may include: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of an alcoholic beverage on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. Id.

Minix v. State, 726 N.E.2d 848 (Ind. Ct. App. 2000) (sufficient evidence of intoxication where D took curve at high speed, paramedics smelled alcohol, and BAC taken one and a half hours after accident was .128%; Sullivan, J., dissented on basis that D's BAC and wreck were insufficient to prove impaired thought and action).

Smith v. State, 502 N.E.2d 122 (Ind. Ct. App. 1986) (although proof of 10% BAC is prima facie evidence of intoxication, conviction for OWI cannot be won simply by demonstrating that D was driving with BAC of .10%; State must also show impairment of thought and action. Here, there was sufficient evidence of impairment due to results of field sobriety test and officer observations).

Warner v. State, 497 N.E.2d 259 (Ind. Ct. App. 1986) (insufficient evidence of OWI where officer followed D for 17 blocks but observed no evidence of driving impairment; D performed finger-to-nose field sobriety test with good results and there was no evidence that his speech was slurred, or his thought processes were impaired in any way, notwithstanding proof that his BAC was more than .10%).

Geyer v. State, 531 N.E.2d 235 (Ind. Ct. App. 1988) (sufficient evidence of OWI where D struck light pole and there was no evidence of other vehicle involvement, officer detected strong odor of alcohol in vehicle and that D's eyes were bloodshot, and two hours after accident, D's BAC was .158%; operation of vehicle at high rate of speed permitted inference that accident was result of D's impaired state).

Boyd v. State, 519 N.E.2d 182 (Ind. Ct. App. 1988) (sufficient evidence where D was stopped at a light, then took off at high speed when light changed, attaining 54 m.p.h. in 30 m.p.h. zone, D smelled strongly of alcohol, had bloodshot eyes, was talkative, and forty minutes after accident, BAC was .14%; adequate evidence that high speed driving at night demonstrated impaired judgment and ability, despite no field tests being given).

Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App. 2005) (objectively observed clear indications of intoxication include dilated pupils, bloodshot eyes, glassy eyes, and the odor of alcohol on the person's breath).

Curtis v. State, 937 N.E.2d 868 (Ind. Ct. App. 2010) (even though Ind. Code § 9-13-2-86 requires an evidentiary showing of impaired conditions of a person's thought *and* action *and* loss of normal control of a person's faculties, the State is not required to prove all three were impaired in order to obtain an OWI conviction. Impairment of *any* of the three abilities necessary for the safe operation of a vehicle renders the operation of a vehicle dangerous).

Mannix v. State, 54 N.E.3d 1002 (Ind. Ct. App. 2016) (fact that a blood draw was administered more than three hours after an accident does not render it inadmissible; rather, it deprives the State of the rebuttable presumption in Ind. Code § 9-30-6-15(b) that the driver's blood-alcohol concentration (BAC) at the time of the test was the same at the time of the accident).

Proof Defendant operated "while" intoxicated

In addition to proof of intoxication, the State must show that the defendant was intoxicated contemporaneously while operating the vehicle.

Gatewood v. State, 921 N.E.2d 45 (Ind. Ct. App. 2010) (court reversed conviction for operating while intoxicated where State did not prove D was impaired at time he drove his moped one hour earlier. Even though State produced evidence D was heavily intoxicated (.286 BAC) when he was found at 9:00 p.m. sleeping by his moped in hospital parking lot, State presented no evidence D was impaired when he drove his moped to the hospital one hour earlier at 8:00 p.m. Jury could not reasonably infer D was intoxicated while driving from officer's testimony suggesting a 150-pound man would need to drink twenty beers in one hour to reach .286 BAC. D drank a pint of vodka, not beer, and officer was unable to extrapolate from his testimony the volume of vodka D needed to consume in one hour to reach .286 BAC. Inference of intoxication while driving was also inappropriate because D was unobserved between 8:00 p.m. and 9:00, as he had entered hospital to visit his mother).

Flanagan v. State, 832 N.E.2d 1139 (Ind. Ct. App. 2005) (court reversed conviction for operating a vehicle while intoxicated, where State did not prove when D consumed alcoholic beverages and thus failed to prove he drove "while" intoxicated). See also Robinson v. State, 835 N.E.2d 518 (Ind. Ct. App. 2005).

McCray v. State, 850 N.E.2d 998 (Ind. Ct. App. 2006) (distinguishing Flanagan, Court held that State presented sufficient evidence to convict D of operating while intoxicated, where there was a reasonably defined time period in which the drinking, intoxication, and driving occurred).

Clark v. State, 512 N.E.2d 223 (Ind. Ct. App. 1987) (State established that the corpus delicti of OWI had been established independently of D's verbal admissions. Sufficient corroborating evidence included the facts that D was found near a struck vehicle of which he was the owner, in an intoxicated state, close to the time of the accident).

Proof of endangerment necessary for Class A misdemeanor OWI conviction – IC 9-30-5-2(b)

To obtain a conviction for Class A misdemeanor OWI, Ind. Code § 9-30-5-2(b) requires the State to prove beyond a reasonable doubt that the defendant operate[d] a vehicle while intoxicated..."in a manner that endangere[d] a person."

Outlaw v. State, 929 N.E.2d 196 (Ind. 2010) (evidence of intoxication, standing alone, is not sufficient to prove endangerment; State is required to submit proof that D operated his vehicle in a dangerous manner; defendant was pulled over for a license plate light).

Staten v. State, 946 N.E.2d 80 (Ind. Ct. App. 2011) (conviction affirmed where evidence showed D could have endangered someone, even though he was driving on a deserted access road in a small town in the middle of night; defendant ran stop sign and was driving left of center).

Temperly v. State, 933 N.E.2d 558 (Ind. Ct. App. 2010) (although D's BAC was .244, he was involved in an accident in which he was not the cause; because no evidence other than D's intoxication was presented to suggest that he operated his vehicle in a manner that endangered himself or another person, there was insufficient evidence to support D's conviction for OWI as a Class A misdemeanor).

Vanderlinden v. State, 918 N.E.2d 642 (Ind. Ct. App. 2009) (D's excessive speed, regardless of driving conditions or her proximity of others, was sufficient to prove endangerment).

OWI causing death/serious bodily injury

To sustain a conviction for causing death when operating a vehicle, "the State must prove the defendant's conduct was a proximate cause of the victim's injury or death;" a substantial cause of the resulting injury or death, not a mere contributing cause. Abney v. State, 766 N.E.2d 1175, 1177-78 (Ind. 2002). But "conduct," in the context of Abney, "is taken to mean the driver's act of operating the vehicle and not any particular way in which the driver operates the vehicle." Spaulding v. State, 815 N.E.2d 1039, 1042 (Ind. Ct. App. 2004).

Bunting v. State, 731 N.E.2d 31 (Ind. Ct. App. 2000) (State failed to present sufficient evidence to sustain D's conviction of OWI causing serious bodily injury, where proof of causation was based entirely on speculation that D's lights were off until just prior to impact. State bears burden of proving causation, but it need not establish causal link between D's alcohol consumption and the fact that serious bodily injury resulted from her driving).

Abney v. State, 858 N.E.2d 226 (Ind. Ct. App. 2006) (State presented sufficient evidence for jury to determine beyond a reasonable doubt that D's operation of a motor vehicle while intoxicated caused death of a bicyclist that he hit with his automobile).

Weida v. State, 693 N.E.2d 598 (Ind. Ct. App. 1998) (trial court properly admitted into evidence D's admission that he was driver of truck, where notwithstanding confession, there was evidence that D and passenger were drinking from late afternoon, two left in D's truck which ended up in ditch, and both were present and intoxicated at accident scene).

Proof of venue

An individual stopped for driving while intoxicated on a public road divided by two counties can be prosecuted in either county. Baugh v. State, 801 N.E.2d 629 (Ind. 2004). If an offense is committed on a public highway … that runs on and along a common boundary shared by two or more counties, the trial may be held in any county sharing the common boundary. Ind. Code § 35-32-2-1(l).

Neff v. State, 915 N.E.2d 1026 (Ind. Ct. App. 2009) (failure to prove venue does not bar retrial).

What is a Vehicle?

A "vehicle" means "a device in, upon, or by which a person or property is, or may be, transported or drawn upon a highway." Ind. Code § 9-13-2-196(a). For purposes of Indiana's operating while intoxicated statutes, the term means a device for transportation by land or air, an excludes electric personal assistive mobility devices. Ind. Code § 9-13-2-196(d). The term also excludes devices moved by human power, that run only on rails or tracks, wheelchairs, and electric foot scooters. Ind. Code § 9-13-2-196(a).

A moped, or "motorized bicycle," is a vehicle for purposes of OWI statutes. State v. Loveless, 705 N.E.2d 223 (Ind. Ct. App. 1999). See also Annis v. State, 917 N.E.2d 722 (Ind. Ct. App. 2009) and State v. Drubert, 686 N.E.2d 918 (Ind. Ct. App. 1997) (a moped is not a vehicle for purposes of driving while suspended statute).

Laker v. State, 937 N.E.2d 1259 (Ind. Ct. App. 2011) (operation of tractor could not support charge for driving while suspended but could support charges for OWI).

A helicopter is also a vehicle for purposes of Indiana's operating while intoxicated statute. Kremer v. State, 643 N.E.2d 357 (Ind. Ct. App. 1994).

Field Sobriety Tests

Foundation requirements

Smith v. State, 751 N.E.2d 280 (Ind. Ct. App. 2001) (investigating officer's training and experience is only evidentiary foundation required for admission of field sobriety test, and State did not have to demonstrate scientific basis for proposition that field sobriety test results are reliable indicators of intoxication).

Cooper v. State, 761 N.E.2d 900 (Ind. Ct. App. 2002) (horizontal gaze nystagmus (HGN) results are admissible in Indiana to show impairment which may be caused by alcohol, if test is performed pursuant to standards and officer is trained in those standards).

O'Banion v. State, 789 N.E.2d 516 (Ind. Ct. App. 2003) (proper foundation for admitting HGN evidence must show officer's education and experience in administering test and showing that procedure was properly administered; proper administration of test does not require that driver is asked to cover one eye and focus the other on an object, and fact that officer did not have D cover one eye was not error).

Brown v. State, 915 N.E.2d 996 (Ind. Ct. App. 2009) (proper procedure for administering the HGN set forth in National Highway Traffic Safety Administration manual).

Advisement of rights need not be given before administering tests

Ackerman v. State, 774 N.E.2d 970 (Ind. Ct. App. 2002) (although field sobriety tests are searches because they are designed to uncover hidden evidence of impairment, police are not required to advise person in custody that she may consult with attorney before administering FSTs; FSTs are qualitatively different than general, unlimited searches because non-invasive, narrow in scope, take little time to administer, and do not require probable cause; due to lack of probable cause requirement, constitutional concerns of Pirtle are not relevant).

State v. Necessary, 800 N.E.2d 667 (Ind. Ct. App. 2003) (for same reasons as in Ackerman, none of Miranda warnings must be given to a defendant before police administer FSTs).

Cohee v. State, 945 N.E.2d 748 (Ind. Ct. App. 2011) (neither Miranda nor Pirtle warnings are required when asking for consent to blood draw).

Breath Tests

State v. Johnson, 503 N.E.2d 431 (Ind. Ct. App. 1987) (Alco-sensor results are admissible to establish probable cause, but they are inadmissible at trial because test is not approved of by department of toxicology).

Sharber v. State, 750 N.E.2d 796 (Ind. Ct. App. 2001) (trial court did not err in preventing D from cross-examining police officer as to results of portable breath test that had been administered following his arrest. Result of test revealed that D had blood alcohol content of .099%. Foundational requirements for admission of breath alcohol test results include showing that test was administered by operator certified by State Department of Toxicology, equipment used in test was inspected and approved by Department, and operator used techniques approved by Department. Breath tests are generally inadmissible for benefit of either party if Department has not approved some aspect of test).

Curley v. State, 777 N.E.2d 58 (Ind. Ct. App. 2002) (no error in excluding results on passengers' PBTs, as they were irrelevant to show whether D was intoxicated and D was not prevented from questioning passengers).

Mullins v. State, 646 N.E.2d 40 (Ind. 1995) (breath test results are generally inadmissible for benefit of either party if Department of Toxicology has not approved some aspect of test).

Herbert v. State, 484 N.E.2d 68 (Ind. Ct. App. 1985) (D has no right to more than one chemical test, and statute does not require officer transport D to place of D's choosing for test).

State v. Rumple, 723 N.E.2d 941 (Ind. Ct. App. 2000) (trial court erred in suppressing results of D's BAC DataMaster test because simulator solution used to calibrate machine does not have to be independently tested and certified by Department of Toxicology).

15-minute requirement/Foreign object in mouth

Prior to a toxicology test, "[t]he person to be tested must have had nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, and must not smoke within 15 minutes prior to the time the breath sample is taken." 260 IAC 2-4-1(a) and 260 IAC 2-4-2(a).

Guy v. State, 823 N.E.2d 274 (Ind. 2005) (tongue stud inserted in a person's mouth more than twenty minutes before breath test did not render results of test inadmissible; intent of the administrative regulation was to apply it to objects placed in the mouth within 20 minutes of testing and not objects already there).

Keys v. State, 811 N.E.2d 961 (Ind. Ct. App. 2004) (exposure to second-hand smoke did not equate to smoking, and at trial D did not argue it was a foreign substance. D could have, but failed, to challenge evidence on reliability grounds by presenting expert testimony that showed that exposure to second-hand smoke renders a chemical breath test unreliable).

Note: Based on following language in Keys, D should request that the Court pay for expert assistance to support the theory at trial that second-hand smoke is a foreign substance.

> ...This conclusion notwithstanding, Keys could have challenged the evidence on reliability grounds by presenting evidence, such as expert testimony, that showed that exposure to second-hand smoke renders chemical breath test results unreliable. He failed to do so. Although much has been written about the implications of exposure to second-hand cigarette smoke, we have no evidence in the record before us of any reason such exposure would interfere with a chemical breath test.... Keys v. State, 811 N.E.2d 961, 963 (Ind. Ct. App. 2004).

State v. Molnar, 803 N.E.2d 261 (Ind. Ct. App. 2004) (as long as subject has removed foreign substance from mouth more than 20 minutes before breath test, test complies with procedure; where D spit out chewing tobacco more than 20 minutes before breath test, that was sufficient time for residue to dissipate). But see Fields v. State, 807 N.E.2d 106 (Ind. Ct. App. 2004), *reh'g granted*, 811 N.E.2d 978 (Court disagreed with Molnar to extent it held that IAC only requires that person not place foreign substance in mouth within 20 minutes; rather, person cannot have any substance in mouth during that period, whether placed there or not; however, D failed to present evidence that if tobacco residue remained in mouth, amount of residue could have effected outcome of chemical breath test).

Note: Although the Court of Appeals in Molnar deferred to the Department of Toxicology's conclusion that 20 minutes is a sufficient waiting period to protect the integrity and accuracy of the test results, it noted:

> This is not to say that a defendant would be precluded from presenting evidence at trial that a test result was actually skewed by residue remaining in his or her mouth. Here, no such evidence was presented...Molnar failed to present sufficient evidence that the tobacco residue, if any, in fact remained by the time the test was administered, affected the outcome of the test in such a way as to call in to question the propriety of the test's administration... State v. Molnar, 803 N.E.2d 261, 267 (Ind. Ct. App. 2004).

State v. Lucas, 934 N.E.2d 202 (Ind. Ct. App. 2011) (portable breath test ("PBT") mouthpiece is not a "foreign substance" that invalidated Datamaster test results where Datamaster test was administered less than 20 minutes after PBT mouthpiece was in D's mouth).

Upchurch v. State, 839 N.E.2d 1218 (Ind. Ct. App. 2005) (Court did not address D's argument that mouthpiece from first breath test was foreign object requiring officer to wait 20 minutes prior to testing D again. But in footnote, Court noted "support" for D's position in 260 IAC 1.1-4-8(7)(B), which directs officer to "return to step 1" if "SUBJECT SAMPLE INVALID" is printed on evidence ticket. Step 1 requires the officer to wait 20 minutes prior to giving breath test).

Corbin v. State, 113 N.E.3d 755 (Ind.Ct.App. 2018) (tears in D's mouth did not constitute foreign substance that could have skewed chemical test results).

State v. Albright, 632 N.E.2d 725 (Ind. 1994) (where 20-minute observation period required by IAC was followed, trial court erred in suppressing results of Intoxilyzer test; DeBruler and Dickson, JJ., dissenting, found facts did not support majority's decision).

See also Nasser v. State, 646 N.E.2d 673 (Ind. Ct. App. 1995) (State met burden of establishing 20-minute observation period before officer administered test).

Haddin v. State, 812 N.E.2d 1057 (Ind. Ct. App. 2004) (in OWI prosecution, trial court properly denied D's motion to suppress, as proper procedure for admitting breath test does not require 20 minutes of continuous observation by administering officer; record indicated that officer properly followed rules adopted by Department of Toxicology in instructing D to remove chewing gum 20 minutes prior to testing and results revealed no indication of a foreign substance in D's mouth at time of test); see also Daum v. State, 625 N.E.2d 1296, 1927 (Ind. Ct. App. 1993) (procedure for breath test does not require 20 minutes of constant observation).

Corbin v. State, 113 N.E.3d 755 (Ind. Ct. App. 2018) (defendant failed to demonstrate that tears would have been a "foreign substance" that could have skewed the chemical test results).

Implied consent/Refusals

Burnell v. State, 56 N.E.3d 1146 (Ind. 2016) (equivocal response to implied consent advisement constitutes refusal).

Griswold v. State, 725 N.E.2d 416 (Ind. Ct. App. 2000) (implied consent laws do not violate Fourth Amendment or Indiana Constitution Art. 1, § 11; because implied consent law does not require search or seizure, but still gives the defendant the right to refuse (with penalties), the law does not violate right to be free from unreasonable searches and seizures).

Cochran v. State, 771 N.E.2d 104 (Ind. Ct. App. 2002) (rejecting D's argument that warrantless chemical search is per se unreasonable absent exigent circumstances and that informed consent statute must be restrained by statute that provides mechanism to compel reluctant physician to draw blood sample).

Brown v. State, 774 N.E.2d 1001 (Ind. Ct. App. 2002) (Indiana's implied consent law, Ind. Code § 9-30-6, does not preclude a law enforcement officer from obtaining a search warrant to obtain a sample of a person's blood once a chemical test has been refused).

Abney v. State, 766 N.E.2d 1175 (Ind. Ct. App. 2002) (a person may be required to submit to blood draw if police have probable cause; nothing in implied consent law explicitly prohibits police from gathering evidence of a person's intoxication in a lawful manner other than by consent once person refuses to consent to chemical test). See also Brown v. State, 774 N.E.2d 1001, 1007 (Ind. Ct. App. 2002).

Gibson v. State, 777 N.E.2d 87 (Ind. Ct. App. 2002) (trial court did not abuse discretion in denying D's motion to suppress refusal to submit to breathalyzer test, where during all three attempts to take test D blew into machine twice, providing total of six breath samples, all of which were inadequate; police determined D was not cooperating and recorded refusal to consent despite D's pleas to take test fourth time; appropriate method of giving test sanctions various courses of action, including recording refusal due to lack of cooperation.).

Parker v. State, 530 N.E.2d 128 (Ind. Ct. App. 1988) (neither due process nor implied consent statutes require that D be given chemical sobriety test following refusals to take such a test).

Monjar v. State, 876 N.E.2d 792 (Ind. Ct. App. 2007) (when officer offers to take D to hospital for blood draw, but D refuses, such an offer is valid and not an illusory request; fact that officer never took D to a hospital or other facility where a person authorized to take blood draw was present did not invalidate the request or consent).

Schulze v. State, 16 N.E.3d 441 (Ind. Ct. App. 2014) (even though officer who offered implied consent for chemical test wasn't qualified to give the test, trial court erred in reinstating D's driving privileges; offer of test was not "illusory" as officer could have found another officer to administer test had D not refused to take test).

Reynolds v. State, 698 N.E.2d 390 (Ind. Ct. App. 1998) (Ind. Code § 9-30-6-10(f), requiring D to show by preponderance of evidence that court's suspension of license was erroneous, does not violate due process rights; right to jury trial also triggered by license suspension due to refusal to submit to chemical test).

Hurley v. State, 75 N.E.3d 1074 (Ind. 2017) (unless D clearly manifests an unwillingness to take the test, a police officer is required to offer a second test following an "insufficient" sample message; D's mandatory suspension for refusing breath test vacated).

Adequacy of arresting officer's advisement

Schmidt v. State, 816 N.E.2d 925 (Ind. Ct. App. 2004) (arresting officer was not required to advise D of his right to counsel before asking him to submit to a chemical breath test; Pirtle does not apply as purpose of Pirtle doctrine is to ensure that no person in custody consents to an unlimited search unless she is fully informed of constitutional rights he is waiving, and purpose of Pirtle doctrine would not be served by extending that doctrine to chemical breath testing, even though D was already in custody).

Vetor v. State, 688 N.E.2d 1327 (Ind. Ct. App. 1997) (officer is required to advise person that refusal of test will result in suspension of driving privileges; failure to inform driver of this means D was not properly offered breath test and D could not be found to have refused to submit to test).

State v. Huber, 540 N.E.2d 140 (Ind. Ct. App. 1989) (officer's advisement to D that license may be suspended if he refused to take breathalyzer test was not adequate; statute requires that refusal follow advisement of consequences, although there is no mens rea requirement). See also Todd v. State, 566 N.E.2d 67 (Ind. Ct. App. 1991).

Jacks v. State, 853 N.E.2d 520 (Ind. Ct. App. 2006) (suspected driver is not entitled to receive an advisement warning him that evidence of his refusal can be admitted in a criminal prosecution against him).

Improper test-taking procedure

Failure to follow techniques approved by the Department of Toxicology and set forth in 260 IAC 1.1-4-4 renders breath test results inadmissible.

> State v. Johanson, 695 N.E.2d 965 (Ind. Ct. App. 1998) (no abuse of discretion in refusing to admit breathalyzer test results into evidence where breathalyzer machine malfunctioned, did not print results, and test operator wrote down time and results of test on print card; although D's BAC registered on Intoxilyzer screen, it did not print properly onto print record, and court found that strict compliance with procedure require officer to check print record and failure to do this cannot be circumvented by introduction of inherently less reliable evidence).
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> Connor v. State, 114 N.E.3d 901 (Ind. Ct. App. 2018) (trial court abused its discretion in admitting into evidence results of breath test where department of toxicology's failed to provide instructions on procedure following "maximum flow exceeded" error message).
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> Cioch v. State, 908 N.E.2d 1154 (Ind. 2009) (officer in this case followed each of required steps of procedure and did not do anything that calls into question the reliability of the instrument or the evidence ticket when he noticed the erroneous timestamp and wrote the actual time of day on it).

Steward v. State, 638 N.E.2d 1292 (Ind. Ct. App. 1994) (where D was taken to police station and no proper personnel were present to take urine test from him, he did not refuse to take chemical test for intoxication, because it could not be properly offered. D was not given any field sobriety tests or breathalyzer but was arrested for possession of marijuana and taken to jail, then asked to give urine sample but did not provide one and was charged with OWI; urine test must be obtained by physician, nurse, EMT, or paramedic, and samples must be obtained in medically accepted manner).

Upchurch v. State, 839 N.E.2d 1218 (Ind. Ct. App. 2005) (an evidence ticket stating "SUBJECT SAMPLE INVALID" on it does not permit an officer to enter the test as a refusal, only when "SUBJECT SAMPLE, INCOMPLETE" is printed may the officer do so; thus, trial court erred in denying D's verified petition for judicial finding of no refusal in operating while intoxicated case; officer should have offered D an alternative chemical test).

Bowman v. State, 564 N.E.2d 309 (Ind. Ct. App. 1990) (trial court erred in admitting D's breathalyzer test results where test operator did not record test ampoule control number on test result form, as required by administrative code; approved breathalyzer test method consists of 12 steps, last of which is that operator must record test ampoule control number and instrument serial number on test result form. Requirement has purpose of facilitating verification of accuracy of test, and because this step was not followed, speculation was required that recordation requirement seeks to avoid, so D's conviction for driving with BAC > .10% causing death must be reversed, although OWI causing death was affirmed (see below)). See also Bowman v. State, 577 N.E.2d 569 (Ind. 1991) (affirming court of appeals on substantial decision but finding in addition that because there was substantial likelihood that erroneously admitted breathalyzer evidence contributed to conviction for OWI causing death, D was entitled to new trial on that charge as well).

Blood Tests

Consent or probable cause required

Blood tests are significantly more intrusive, and their reasonableness must be measured in light of the availability of the less invasive breath test. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). In Birchfield, the Court held that the Fourth Amendment requires a warrant to take a blood draw from an OWI arrestee but not for a breath test. But a warrantless blood draw may be permissible in some exigent circumstances. Thus, police may draw person's blood without consent only if: (1) there is probable cause to believe the person operated a vehicle while intoxicated; (2) police obtain a search warrant, or dissipation of alcohol creates exigent circumstances; (3) the test chosen to measure person's blood alcohol concentration is a reasonable one; and (4) the test is performed in a reasonable manner. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); see also Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Birchfield also held that states may not charge and convict a person for refusing to take a blood test, though they may impose administrative sanctions such as license suspensions.

When police encounter an unconscious driver suspected of driving under the influence of alcohol or drugs, the exigent circumstances doctrine will "almost always" permit a blood test without a warrant. Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019). To determine whether an exigency exists where a suspected drunk driver is unconscious, the Court considers whether the BAC evidence is dissipating, and when some "other factors create pressing health, safety, or law enforcement needs which would take priority over an application for a warrant." Thus, when a driver is unconscious, the Court imposed the general rule that a warrant is not needed. The Court declined to answer whether Wisconsin's implied consent law alone justifies a warrantless blood draw on unconscious individuals.

Indiana's implied consent statute has been interpreted to require officers to first offer a chemical test to a defendant before requesting medical personnel perform a blood draw. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App. 2003). In addition, the State must show that the defendant gave actual, knowing, and voluntary consent to drawing and testing blood. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App. 2003) (Marion County Sheriff's Department had standard policy assuming that in any accident resulting in serious injury or death, implied consent of Ind. Code § 9-30-7 automatically authorized obtaining blood of driver of each vehicle, by force if necessary. No special needs exception to probable cause prerequisite for government search because this exception does not apply to law enforcement-related searches).

See also, on rehearing for Hannoy, the court would not consider new argument that inevitable discovery doctrine should apply to admit first blood tests; court also reiterated that there is a clear and substantial difference between allowing police to force person to submit to having blood drawn to look for evidence and police receiving blood test results after the fact pursuant to Ind. Code § 9-30-6-6(a). Hannoy v. State, 793 N.E.2d 1109 (Ind. Ct. App. 2003).

Consent to a blood test is governed by the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution. Gutenstein v. State, 59 N.E.3d 984 (Ind. Ct. App. 2016) (trial court properly denied motion to suppress where, although defendant was handcuffed and placed in a police car, he was given both Miranda advisements and implied consent warnings, defendant acknowledged that he understood his rights, and consented to the blood draw).

Blood alcohol test results from sample obtained and tested by hospital for own diagnostic purposes and later released to law enforcement may be admitted at trial. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App. 2003).

State v. Eichhorst, 879 N.E.2d 1144 (Ind. Ct. App. 2008) (trial court erred in suppressing medical records, including blood alcohol test results, where doctor ordered tests for purpose of treatment).

Schlesinger v. State, 811 N.E.2d 964 (Ind. Ct. App. 2004) (D's conviction for operating vehicle with .15% > BAC > .08% was reversed where police did not have probable cause to order hospital personnel to draw blood from D and blood draw was not done for normal medical reasons. After accident, D admitted that he had consumed a few drinks, but passed field sobriety test prior to being interrupted by emergency medical personnel; while being treated for minor injuries, blood was drawn for hospital and for state. To do blood draw, police must have: (1) a warrant; (2) probable cause; or (3) consent. Here, no probable cause existed where D passed field sobriety tests and deputy did not indicate on hospital form that probable cause existed; general consent to treatment form at hospital did not equal consent to have blood drawn for State and there was no evidence that BAC test was performed for medical reasons).

Wiggins v. State, 817 N.E.2d 652 (Ind. Ct. App. 2004) (D's difficulties in answering officer's questions is not significant enough, absent some objectively observed clear indication of intoxication, such as dilated pupils, telltale odor, or failed field sobriety tests, to provide probable cause required for blood or urine tests. Urine test results improperly admitted where officer did not obtain D's consent to portable breath test or chemical test, did not seek D's consent before ordering urine test, on hospital form detailing reason for test checked only post-accident, not reasonable suspicion/cause box, and testified that it was standard policy to require blood or urine sample in all serious accidents).

Duncan v. State, 799 N.E.2d 538, 543 (Ind. Ct. App. 2003) (where D refused to submit to blood test and blood was drawn, revealing BAC of .106%, officer's testimony that D's speech and mannerisms and alcoholic beverage container in car led him to believe D was intoxicated was insufficient to establish probable cause for the blood draw; interests of human dignity and privacy protected by Fourth Amendment forbid police from making such bodily intrusions on mere chance that desired evidence will be obtained).

Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App. 2005) (in operating a vehicle with a BAC greater than .08% prosecution, Court rejected D's claim that evidence from blood draw should have been excluded because it was not the least intrusive means of chemical testing available; the question under the Fourth Amendment is not whether the choice of the chemical test was the least intrusive but whether it was reasonable).

Frensemeier v. State, 849 N.E.2d 157 (Ind. Ct. App. 2006) (although occurrence of traffic accident coupled only with an odor of alcohol will not necessarily rise to level of probable cause in all instances that would justify warrantless blood testing of a D, additional factors suggesting D's intoxication in this case were sufficient to demonstrate that officer had probable cause to order blood draw. Here, evidence showed that when officer ordered blood draw, he knew that D had been involved in automobile accident, that his breath smelled of alcohol, and that his eyes were bloodshot. In addition, D admitted that he had been drinking and might have fallen asleep at wheel, and officer noticed his manual dexterity was slow. Sullivan, J., dissenting, noted that officer testified that D's speech was clear, that

there were no facts or circumstances that suggested D was drunk, and that he did not come away with thought that D was intoxicated).

Justice v. State, 552 N.E.2d 844 (Ind. Ct. App. 1990) (nonconsensual seizure of D's blood unlawful because police violated guidelines contained in implied consent laws when obtaining D's blood sample and exigent circumstances did not apply because D was not involved in auto accident).

Abney v. State, 821 N.E.2d 375 (Ind. 2005) (Ind. Code § 9-30-6-6(g) permits warrantless non-consensual taking of blood samples in cases involving serious bodily injury or death, regardless of whether a physician is reluctant to take the sample. Statute is designed as tool to acquire evidence of blood alcohol content rather than as a device to exclude evidence. Contrary language in Guy v. State, 678 N.E.2d 1130 (Ind. Ct. App.1997); Spriggs v. State, 671 N.E.2d 470 (Ind. Ct. App.1996); and State v. Robbins, 549 N.E.2d 1107 (Ind. Ct. App.1990) disapproved.

Note: In 2018, the legislature substantially amended IC 9-30-6-6 and removed former subsection (g), presumably in response to Birchfield, which had allowed law enforcement officers to request blood samples be obtained from physicians or persons trained in obtaining blood samples as long as they certified in writing that they had probable cause to believe Def. was in violation of IC 9-30-5 , that the Def. had been involved in a motor vehicle accident resulting in death or SBI of another, and that the accident occurred not more than 3 hours before time sample was requested.

State v. Hunter, 581 N.E.2d 992 (Ind. Ct. App. 1991) (trial court properly granted D's motion to suppress BAC test results because at time officer received blood sample, he did not have probable cause for seizure. D was involved in one car crash, but D denied driving and other person was killed in crash; officer was suspicious that D was driving but was not sure until after obtaining blood sample and talking to other officer; because no probable cause at time of seizure, BAC test results could not be used).

Brown v. State, 744 N.E.2d 989 (Ind. Ct. App. 2001) (former Ind. Code § 9-30-7-3, providing that law enforcement officer may offer chemical test to any person who officer has reason to believe operated vehicle involved in accident-causing death or serious injury, was constitutionally applied to D, so blood draw search was reasonable. Although D did not cause accident resulting in fatality, mere fact of driving vehicle involved in fatal accident established consent to chemical test; no requirement of probable cause of intoxication before driver may be asked to submit to test under statute, and blood draw screening for all proscribed substances was not overly broad).

Herron v. State, 44 N.E.3d 833 (Ind. Ct. App. 2015) (trial court should have suppressed blood alcohol results because the affidavit filed by the arresting officer failed to establish probable cause because it did not actually allege that Defendant was driving).

Pedigo v. State, 146 N.E.3d 1002 (Ind. Ct. App. 2020) (addressing a matter of first impression, Court held that I.C. 9-30-7-3 permits a law enforcement officer to offer a subsequent chemical test to a person who the officer has reason to believe operated a vehicle that was involved in a fatal accident or an accident involving serious bodily injury when the officer has first administered a portable breath test that produces negative results, even if the officer does not have probable cause to believe the person is under the influence of a controlled substance or another drug; nothing in the statute prohibits an officer from offering more than one test following an accident resulting in death or serious bodily injury).

Metzger v. State, 6 N.E.3d 485 (Ind. Ct. App. 2014) (willfully resisting, hindering, or delaying execution of warrant for blood draw can result in contempt charges); but see Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) (states may not charge and convict a person for refusing to take a blood test, though they may impose administrative sanctions such as license suspensions).

Foundation for admission of blood test results

Blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a "physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." Ind. Code § 9-30-6-6(a).

State v. Bisard, 973 N.E.2d 1229 (Ind. Ct. App. 2012) (violation of blood draw statute, specifically fact that drawer was not on list in Ind. Code § 9-30-6-6(j), did not require suppression; D made no credible suggestion that any deviation compromised the reliability of the samples).

Combs v. State, 895 N.E.2d 1252 (Ind. Ct. App. 2008) (trial court abused its discretion in admitting blood test results where State failed to lay a proper foundation that the medical technologist who drew the blood was acting under the direction of or under a protocol prepared by a physician).

Brown v. State, 911 N.E.2d 668 (Ind. Ct. App. 2009) (although D consented to blood draw, State failed to lay proper foundation for admission of results; certified lab technician did not follow protocol developed by physician but rather method she learned in school, and a certified lab technician is not a medical professional listed in Ind. Code § 9-30-6-6(j) who can draw blood at the request of a law enforcement officer).

State v. Hunter, 898 N.E.2d 455 (Ind. Ct. App. 2008) (inadequacy of foundation is even more pronounced because State failed to present any evidence that nurse was "a person trained in obtaining bodily samples"; existence of search warrant directing hospital personnel to obtain a bodily substance sample should not trump and/or negate statutory requirements for obtaining blood samples).

Boston v. State, 947 N.E.2d 436 (Ind. Ct. App. 2011) (trial court properly retroactively applied amendment to Ind. Code § 9-30-6-6 setting forth the evidentiary foundation for results of a blood draw; the amendment eliminated the certified phlebotomist language and added subsection (j) which exempts bodily substance sample taken at a licensed hospital from the requirements).

Kolish v. State, 949 N.E.2d 856 (Ind. Ct. App. 2011) (where there was no dispute that D's blood sample was taken at a licensed hospital, trial court did not abuse its discretion when it admitted the results of blood test into evidence at trial).

Martin v. State, 154 N.E.3d 850 (Ind. Ct. App. 2020) (State laid proper foundation for blood draw evidence to be admitted at trial for operating while intoxicated; nurse testified that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol).

Evidentiary Issues

Right to Confrontation/hearsay

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2536, n.5 (2009) (because affidavits of State lab analysts are testimonial, the Sixth Amendment requires that a lab chemist be called to testify in order to admit the lab analysis into evidence in a trial, absent a showing that the analysts were unavailable to testify and the defendant had a prior opportunity to cross-examine them; however, not everyone who laid hands on the evidence must be called. Like autopsies, breathalyzer results are grouped among those forensic tests that may not be capable of repetition, but that nevertheless require confrontation).

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005) (State's failure to present live testimony at trial from officer who conducted breath tests violated Confrontation Clause in light of Crawford v. Washington, 124 S.Ct. 1354 (2004). However, admission of breath test instrument certification documents did not violate Crawford).

Rembusch v. State, 836 N.E.2d 979 (Ind. Ct. App. 2005) (certificates of inspection and compliance of breath instruments are not testimonial in nature, and thus, do not violate D's confrontation rights under Crawford; certificates serve an administrative function and are prepared in a routine manner rather than for the purpose of an individual case. Fact that D was unable to cross examine a police officer on certification process of the machine because officer had no knowledge of the certification process did not deny D his right to cross-examination). See also Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App. 2006); Johnson v. State, 879 N.E.2d 649 (Ind. Ct. App. 2008).

Ramirez v. State, 928 N.E.2d 214 (Ind. Ct. App. 2010) (after Melendez-Diaz, Court reaffirmed position that certificates verifying routine inspection of breath test instruments are non-testimonial). See also Jones v. State, 982 N.E.2d 417 (Ind. Ct. App. 2013) (trial court did not violate D's confrontation rights by admitting certificate of inspection about accuracy of chemical breath test device, even though the person who certified the device did not testify at trial because the certificate was non-testimonial).

State v. Belvin, 986 So.2d 516 (Fla. 2008) (breath test affidavit prepared by non-testifying breath test technician constituted testimonial hearsay for purposes of confrontation clause).

Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) (D's Sixth Amendment right to confrontation was not violated by admission of evidence ticket from B.A.C. Datamaster without testimony from equipment technician. Mechanically generated data does not constitute hearsay because a machine is not a witness against a person and cannot be cross-examined. Mechanical hearsay is not true hearsay because the issues it raises are issues of relevance, such as whether the machine was operating properly when it spoke, not a problem of perception, recollection, narration, or sincerity on the part of the machine. Because mechanically generated data cannot be hearsay in the first instance, it cannot constitute testimonial evidence for purpose of the Confrontation Clause and Crawford).

Koenig v. State, 916 N.E.2d 200 (Ind. Ct. App. 2009) (trial court committed harmless error by allowing a lab report showing the victim had methadone in his system to be admitted through the coroner and not the lab analyst who prepared the report).

Beldon v. State, 906 N.E.2d 895 (Ind. Ct. App. 2009) (doctor's busy work schedule was not sufficient to circumvent the constitutional right to confrontation; admission of deposition in lieu of testimony was harmless error).

Wright v. State, 916 N.E.2d 269 (Ind. Ct. App. 2009) (rule in Crawford neither explicitly nor implicitly signaled that dying declaration exception to hearsay ran afoul of an accused's right of confrontation under Sixth Amendment).

Wilson v. State, 973 N.E.2d 1211 (Ind. Ct. App. 2012) (trial court properly limited D's cross-examination regarding the Department of Toxicology lab audit and the discontinuation of it. The discontinuation of the audit on blood-alcohol samples and the period of time covered by the audits generally may bear upon the credibility of testing results from 2007 to 2009. But it is not clear that these questions bear upon the credibility of the Department's analysis here, where different procedures were executed by different analysts serving under a different Director more than 1.5 years beyond the chronological scope of the audits. Nor was the D denied his right to confrontation being he cross-examined both the lab director and the lab analyst who performed the test).

Priest v. State, 181 N.E.3d 1046 (Ind. Ct. App. 2022) (denial of motion to suppress evidence of BAC reversed because State only entered the traffic citation itself which was inadmissible hearsay).

Foundation for admission of breathalyzer test

Boother v. State, 439 N.E.2d 708 (Ind. Ct. App. 1982) (foundation for admission of breathalyzer test results: (1) test was administered by operator certified by department of toxicology; (2) equipment used was inspected and approved by department of toxicology; and (3) operator used techniques approved by department of toxicology; here, State laid insufficient foundation where it did not offer as evidence a certified copy of document outlining required procedure, but admission of test results and videotape were harmless because substantial evidence of probative value supports verdict).

Thurman v. State, 661 N.E.2d 900 (Ind. Ct. App. 1996) (evidence established sufficient foundation from which court could conclude that proper procedures had been followed, based on officer's testimony that he observed D and did not observe anything in mouth or see D place anything in mouth;test operator does not have affirmative duty to open and visually inspect D's mouth).

State v. Johanson, 695 N.E.2d 965 (Ind. Ct. App. 1998) (no abuse of discretion in refusing to admit breathalyzer test results into evidence where breathalyzer machine malfunctioned, did not print results, and test operator wrote down time and results of test on print card; failure to follow techniques approved by toxicology department and set forth in 260 IAC 1.1-4-4 renders breath test results inadmissible; although D's BAC registered on Intoxilyzer screen, it did not print properly onto print record, and court found that strict compliance with procedure require officer to check print record and failure to do this cannot be circumvented by introduction of inherently less reliable evidence).

Wolpert v. State, 47 N.E.3d 1246 (Ind. Ct. App. 2015) (D's breath test results were adequately certified; State failed to certify the dry gas used to calibrate the breath test machine, however, State used an equally valid method to certify the dry gas by providing a certificate showing that the breath test machine itself was properly certified).

Admission of breath tests/Certification of officer

Nasser v. State, 646 N.E.2d 673 (Ind. Ct. App. 1995) (State laid sufficient foundation for admission of Intoxilyzer 5000 test results, where letter listing officers certified as breath test officers qualified as certificate of officer's qualifications, and there was no confusion regarding authenticity of exhibit because all pages were clearly part of same document and attestation letter incorporated officer lists).

Christian v. State, 710 N.E.2d 582 (Ind. Ct. App. 1999) (trial court abused discretion in excluding evidence of repairs made to breathalyzer machine used on D; D should be permitted to rebut presumption, based on certification of machine, that machine was in proper working order, and history of repairs was relevant evidence that jury was entitled to consider).

Wray v. State, 751 N.E.2d 679 (Ind. Ct. App. 2001) (abuse of discretion to admit into evidence letter from department of toxicology indicating D's arresting officer was certified by department of toxicology to operate breath test; Ind. Code § 9-30-6-5 provides that department of toxicology shall adopt standards for certification of breath test operators, but officer testified that he had not received training in four of five required areas, and operator who was not trained in accordance with department of toxicology's regulations regarding training is not certified. Due to officer's testimony, certification did not fall into public records hearsay exception because it lacked trustworthiness) But see State v. Lloyd, 800 N.E.2d 196 (Ind. Ct. App. 2003) (Trial court abused discretion in refusing to admit breath tests and testifying officer's breath test operator certification into evidence; administrative rule cited in Wray on which trial court relied was amended to require only 12 hours of training, rather than training in specific areas, and officer testified that he had received a sufficient number of hours of training in all necessary subjects).

Carter v. State, 734 N.E.2d 600 (Ind. Ct. App. 2000) (trial court did not err in admitting evidence of D's breath test that expressed that D had .17 grams of alcohol in 210 liters of his breath. Breath test printouts are hearsay, but evidence of blood alcohol content is admissible under statutory exception to hearsay, Ind. Code § 9-30-6-15; legislature clearly wants to validate use of breath tests, so results are admissible despite bad drafting of statute and blood alcohol tests or conversion to blood alcohol concentration is not necessary).

Nivens v. State, 832 N.E.2d 1134 (Ind. Ct. App. 2005) (250 IAC 1.1-2-1(e)(3) provides that, "For the purpose of inspecting the breath test equipment, the analytical result shall be expressed to the third decimal place." Four tests were conducted on the BAC Datamaster at issue with two taking results to the fourth decimal and two to the second decimal. Court found that ISDT's interpretation of administrative regulation was reasonable; regulation does not specify number of tests needed to determine the accuracy of machine prior to certification).

Blood test as business record

Burp v. State, 612 N.E.2d 169 (Ind. Ct. App. 1993) (results of D's blood tests were admissible under business records exception to hearsay rule in D's trial for OWI > .10% BAC).

Judicial notice/presumption

In jury trials, trial court must expressly take judicial notice of effect of the Administrative Code's standards and regulations for selection and certification of breath test equipment and

chemicals; and instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Ind. Rules Evidence § 201(g).

Baran v. State, 639 N.E.2d 642 (Ind. 1994) (printout of Intoxilyzer 5000, showing reading of .11%, was sufficient to support conviction for Operating with BAC > .10%. Court rejected argument that because Ind. Code § 9-11-2-1(a) requires evidence of BAC, additional evidence of breath alcohol to blood alcohol conversion process of Intoxilyzer was required; on the contrary, conversion not necessary because Intoxilyzer expressed results by required BAC and machines are tested for accuracy and trial court was entitled to take judicial notice of fact printout expressed result as percentage by weight in blood).

Mullins v. State, 646 N.E.2d 40 (Ind. 1995) (State need not present evidence concerning approved procedures for administering breath tests, as administrative code prescribes procedures, and they should be judicially noticed. State just must lay sufficient foundation that arresting officer followed approved procedures. Here, where BAC Datamaster recorded Breath Analysis of .20%, trial court was entitled to take judicial notice that printout expressed test result as percentage of alcohol by weight in blood, and that the test result constituted sufficient evidence to support finding that amount of alcohol in D's blood was greater than .10% by weight). See also Sturgis v. State, 654 N.E.2d 1150 (Ind. Ct. App. 1995) (failure to instruct jury about effect of trial court taking judicial notice of administrative regulations regarding breath testing was harmless error); Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994) (conviction for operating vehicle with BAC > .10% reversed where trial court failed to take judicial notice of effect of breath test regulations and instruct jury accordingly); and Berry v. State, 720 N.E.2d 1206 (Ind. Ct. App. 1999).

Thompson v. State, 646 N.E.2d 687 (Ind. Ct. App. 1995) (presumption created by evidence that D was driving with .10% BAC at time of arrest does not disappear from case upon introduction of contradictory evidence; where arresting officer testified as to results of BAC test, rebuttable presumption of BAC arose, and fact that officer admitted on cross-examination that he did not know what D's BAC was at time of arrest and admitted it could have been under .10% did not rebut presumption; jury was free to accept or reject presumption). See also Disbro v. State, 791 N.E.2d 774 (Ind. Ct. App. 2003) (Trial court did not err in giving jury presumptive instruction relating D's BAC level at time chemical test was performed to his BAC level at time of driving, as instruction properly informed jury that presumption was rebuttable) and Finney v. State, 686 N.E.2d 133 (Ind. Ct. App. 1997) (Evidence sufficient to support conviction for operating vehicle with at least .10% BAC, where BAC test was administered within three hours of time D was operating vehicle, and D's expert witness failed to rebut presumption that BAC was at least .10% at time she operated her vehicle).

BAC best evidence rule

Glassock v. State, 576 N.E.2d 600 (Ind.Ct.App. 1991) (trial court erred in admitting BAC lab report in lieu of machine printout from analyzer because it was not best evidence of results, but error was harmless because D did not identify any actual dispute over the accuracy of this secondary evidence; D's objection did not specifically identify dispute with report).

Basis of expert witnesses' opinion

Schmidt v. State, 816 N.E.2d 925 (Ind. Ct. App. 2004) (in OWI prosecution, trial court properly precluded D's toxicology expert from testifying regarding D's level of intoxication based on information D had told him before trial, where D had not testified and did not place those facts into evidence. Ind. Rule Evidence § 703 allows experts to testify to opinions based on inadmissible evidence, provided it is of the type reasonably relied upon by experts in the field, but courts have shown considerable reluctance to find reasonable reliance on information not prepared by persons with specialized training, such as statements by a party or lay witnesses or data prepared in anticipation of litigation. Further, trial court did not abuse its discretion when it ruled that D's toxicologist and field sobriety test expert could not give opinions regarding D's medical diagnoses based on D's one-page medical record; Sullivan, J., dissented on this issue and would remand for new trial).

Hastings v. State, 58 N.E.3d 919 (Ind. Ct. App. 2016) (trial court improperly excluded expert witness testimony regarding the specific chemical breath tests, the effects of alcohol on the human body, and how alcohol is absorbed and metabolized by the body; subject matter is beyond the knowledge of the average person, expert had sufficient knowledge and experience in this area that would have been helpful to the jury pursuant to Indiana Evidence Rule 702(a), and should have been allowed).

Proof of blood alcohol content and serum alcohol content rather than BAC

Melton v. State, 597 N.E.2d 359 (Ind. Ct. App. 1992) (when alcohol testing of D's blood plasma revealed .167% milligrams of alcohol per deciliter, but no evidence to translate this finding into percentage of alcohol by weight in whole blood, evidence was insufficient to support conviction for Operating while BAC > .10%; while BAC may be established by testing breath, blood, urine or other bodily substances, standard set for intoxication by legislature is based on weight of alcohol in whole blood, and any results from other testing must be converted into this measure).

Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App. 2005) (alcohol content of whole blood is not the same as alcohol content of either plasma or serum portion of blood; thus, results obtained from testing of other bodily substances must be converted into the weight of alcohol in the whole blood).

Blinn v. State, 677 N.E.2d 51 (Ind. Ct. App. 1997) (in OWI prosecution, which requires no specific BAC for conviction, trial court did not err in admitting evidence of D's serum alcohol content rather than his whole blood alcohol content as proof of intoxication; conversion of serum alcohol content to BAC is not required for evidence of serum count to be relevant to issue of intoxication, despite medical evidence showing that levels of alcohol in serum may show alcohol content 18% to 20% higher than content that would be reflected by BAC test).

Newcomb v. State, 758 N.E.2d 69 (Ind. Ct. App. 2001) (because State presented no expert testimony converting blood serum figures to whole BAC, and failed to establish medical technologist as expert qualified to testify regarding D's BAC based on results of serum blood test, there was failure of proof on this element and evidence was insufficient to sustain D's conviction).

Pickens v. State, 751 N.E.2d 331 (Ind. Ct. App. 2001) (admission of blood serum results without explanation of conversion factor and without testimony regarding what whole blood alcohol content would be after conversion was harmless error).

Relevancy

Sturgis v. State, 654 N.E.2d 1150 (Ind. Ct. App. 1995) (affidavit signed by trooper indicating that he had personal knowledge of D's arrest when trooper had nothing to do with arrest was not relevant in prosecution for operating vehicle while intoxicated, where trooper who arrested and investigated D testified that they were the only officers on scene and that all facts contained in affidavit were true and had been either observed or performed by them).

Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (admission of inadmissible or unfairly prejudicial "other act" evidence violated D's due process right to a fair trial, in which D and his girlfriend testified the girlfriend had been driving the vehicle; prosecution not only flooded courtroom with unnecessary and prejudicial details of prior criminal conduct, but also its case in chief seemed to be a focused inquiry into D's prior driving convictions, alcohol problems, and history of domestic violence and questions concerning legitimacy of D's and girlfriend's child and circumstances surrounding girlfriend's divorce).

Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *aff'd on rehearing*, 723 N.E.2d 460 (reversible error to admit D's driving record showing prior convictions and license suspensions unrelated and irrelevant to crime with which he was charged).

Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009) (trial court erred when it allowed the State to use as a demonstrative aid in closing argument, a YouTube video that had nothing to do with the facts of D's case).

Stoltmann v. State, 793 N.E.2d 275 (Ind. Ct. App. 2003) (unsworn, prior inconsistent statement in which other occupant of vehicle identified D as the driver was admissible for limited purpose of impeaching other occupant's testimony).

Right to Jury Trial to determine prior OWI

Bunting v. State, 854 N.E.2d 921 (Ind. Ct. App. 2006) (in OWI with prior conviction prosecution, D was not denied his rights under U.S. and Indiana Constitutions to have a jury determine recidivist factor of whether he had a prior conviction for OWI).

Defenses

Albaugh v. State, 721 N.E.2d 1233 (Ind. 1999) (State failed to prove beyond reasonable doubt that police officer did not cause D to drive his truck while intoxicated. D's truck broke down by road, and he walked home and began drinking; when officer demanded that he move truck because it was a hazard, D attempted to move truck but drove it into a cornfield).

Green v. State, 698 N.E.2d 832 (Ind. Ct. App. 1998) (State was not required to rebut D's expert rebuttal witness, who questioned accuracy of chemical test result and testified that he believed D's blood alcohol count to be in range of .06% to .08%. Witness also opined that Intoxilyzer 5000 produces estimate that is based on many variables and that these variables prevent test result from being conclusive. Trial court determined either that D's rebuttal witness was not credible or that his testimony was insufficient to overcome State's evidence, or both).

Bowman v. State, 564 N.E.2d 309 (Ind. Ct. App. 1990) , *rev'd on other grounds*, 577 N.E.2d 569 (trial court did not err in refusing to give D's instruction that jury should find D not guilty of DUI resulting in death if it found that his passenger's failure to wear seatbelt was direct cause of her death; victim's failure to wear seatbelt was not superseding cause; it is clearly foreseeable that automobile passenger might fail to wear seatbelt, and evidence showed that D was aware that victim was not wearing seatbelt and asked her to do so, which she refused).

Diehlman v. State, 539 N.E.2d 507 (Ind. Ct. App. 1989) (trial court did not err in refusing to give D's tendered instruction that jury must accept as law of case that D did not willfully refuse to take breath test; civil determination is not admissible as evidence in criminal case and D's tendered instruction would invade province of jury by mandating evidentiary conclusion).

Christian v. State, 710 N.E.2d 582 (Ind. Ct. App. 1999) (trial court abused discretion in excluding evidence of repairs made to breathalyzer machine used on D; D should be permitted to rebut presumption, based on certification of machine, that machine was in proper working order, and history of repairs was relevant evidence that jury was entitled to consider).

Alfrey v. State, 960 N.E.2d 229 (Ind. Ct. App. 2012) (taking medicine as prescribed is not a defense to crimes resulting from intoxication, because legislature did not list it as a circumstance in which intoxication is a defense).

Hayes v. State, 514 N.E.2d 332 (Ind. 1987) (D may call an expert in regard to use of intoxilyzer and its validity and same may be important in casting reasonable doubt upon test results shown by State).

Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994) (D who was passenger in automobile and assumed control of car after driver dove into back seat while automobile was still running was entitled to instruction on defense of necessity).

Barber v. State, 911 N.E.2d 641 (Ind. Ct. App. 2009) (in OWI prosecution, trial court abused its discretion in denying D's motion to continue filed on Monday morning of her bench trial. Defense counsel filed her motion because she had located two witnesses that weekend who supported her defense of involuntary intoxication).

State v. Boadi, 905 N.E.2d 1069 (Ind. Ct. App. 2009) (failing to stop at a red light at an intersection due to inadvertence or an error in judgment cannot, without more, constitute criminally reckless conduct).

State v. McCaa, 963 N.E.2d 24 (Ind. Ct. App. 2012) (officer's order of possibly impaired driver whose truck was blocking traffic during rainstorm to drive two miles down the road to a gas station was not outrageously dangerous).

Matlock v. State, 944 N.E.2d 936 (Ind. Ct. App. 2011) (where the possibility exists that a defendant accused of OWI may at some point regain competency and be released back into society, which release also may include the defendant driving, the State may pursue an OWI conviction even if D's incompetency caused he or she to be detained for a period in excess of the maximum possible sentence for OWI).

Jury instructions

Ham v. State, 826 N.E.2d 640 (Ind. 2005) (Instruction which informs jury that it may consider evidence that D refused to submit to a chemical breath test as evidence of intoxication is improper. Ind. Code § 9-30-6-3 only says that a refusal is admissible into evidence, not that it is evidence of intoxication. Whether a D's refusal to submit a chemical test is evidence of intoxication or merely that the D refused to take the test is for lawyers to argue and the jury to decide. An instruction from the bench one way or the other misleads the jury by unnecessarily emphasizing one evidentiary fact).

Marks v. State, 864 N.E.2d 408 (Ind. Ct. App. 2007) (instruction listing seven evidentiary facts that can establish impairment in OWI case was erroneously given, as it emphasized certain evidence).

Sturgeon v. State, 575 N.E.2d 679 (Ind. Ct. App. 1991) (instruction which fails to inform jury that it has choice or might infer desired conclusion, and which nowhere informs jury that presumption of BAC at time of operation is rebuttable, is erroneous because it is both mandatory and conclusive). See also Regan v. State, 590 N.E.2d 640 (Ind. Ct. App. 1992) (instructions similar to those in Sturgeon not erroneous because other instructions clearly

required burden of proof to remain with State, and stated that presumption was disputable, etc.) and Carter v. State, 734 N.E.2d 600 (Ind. Ct. App. 2000) (instruction stating that jury could find D guilty even if evidence did not establish that he was operating in manner other than ordinary prudent and cautious person was not unconstitutional mandatory instruction—but should have been worded more clearly).

Rouse v. State, 525 N.E.2d 1278 (Ind. Ct. App. 1988) (D's convictions for BAC death were fundamental error, because this offense was not factually included in charged offense of OWI death; allegations in OWI death charge did not state that D's BAC was at least .10% at time of offenses, which was fatal to argument that BAC death was factually included offense of OWI death as D received no notice that he could be convicted of this offense and this denial of due process constituted fundamental error).

Slate v. State, 798 N.E.2d 510 (Ind. Ct. App. 2003) (in OWI prosecution, no error for trial court to give following instruction: Endangerment means that [D's] condition or manner of operating the vehicle could have endangered any person, including the public, the police, or [D]. Thus, proof that [D's] condition rendered operation of the vehicle unsafe is sufficient to establish endangerment. D argued that because endangerment was removed from definition of intoxication under Ind. Code § 9-13-2-86, D's condition could no longer be used to prove endangerment; but instruction was appropriate because D was charged under Class A misdemeanor portion of OWI statute, which includes endangerment).

NOTE: The instruction given in Slate should be challenged as an impermissible mandatory presumption, because it advises the jury that the State has met its burden of proof on the endangerment element. See Sandstrom v. Montana, 442 U.S. 510 (1979) (instruction identifying a conclusive presumption that shifts burden of proof from state to D is unconstitutional).

Hall v. State, 560 N.E.2d 561 (Ind. Ct. App. 1990) (Instruction that jury shall presume that D had .10% BAC at time of operating vehicle when he tested at least .10% within three hours after arrest created mandatory presumption and impermissibly shifted burden of proof to D). See also Disbro v. State, 791 N.E.2d 774 (Ind. Ct. App. 2003) (trial court did not err in giving jury presumptive instruction relating D's BAC level at time test was performed to BAC level at time of driving; instruction properly informed jury that presumption was rebuttable) and Thompson v. State, 646 N.E.2d 687 (Ind. Ct. App. 1995) (trial court properly instructed jury that BAC presumption was rebuttable and jury was free to accept or reject presumption, even if no rebuttal evidence was introduced).

Pattison v. State, 47 N.E.3d 621 (Ind. 2016) (trial court did not err in giving jury a mandatory rebuttable presumption to presume D's ACE at the time of the offense based on a chemical test conducted within three hours of being stopped by police; because the presumption is rebuttable, D may still present evidence of his defense).

Short v. State, 962 N.E.2d 146 (Ind. Ct. App. 2012) (trial court properly rejected D's request for a jury instruction regarding the foundation for admissibility of a breath test result; the mere fact that certain language is used by appellate courts to reach a final conclusion does not make it proper language for a jury instruction).

Bowman v. State, 564 N.E.2d 309 (Ind. Ct. App. 1990), *rev'd on other grounds*, 577 N.E.2d 569 (trial court did not err in refusing to give D's instruction that jury should find D not guilty of DUI resulting in death if it found that his passenger's failure to wear seatbelt was direct cause of her death; victim's failure to wear seatbelt was not superseding cause).

Diehlman v. State, 539 N.E.2d 507 (Ind. Ct. App. 1989) (trial court did not err in refusing to give D's tendered instruction that jury must accept as law of case that D did not willfully refuse to take breath test; civil determination is not admissible as evidence in criminal case and D's tendered instruction would invade province of jury by mandating evidentiary conclusion).

Henderson v. State, 108 N.E.3d 407 (Ind. Ct. App. 2018) (instruction on "operate" adequate even though it did not include words "expended some effort").

Poortenga v. State, 99 N.E.3d 691 (Ind. Ct. App. 2018) (In OWI prosecution, trial court abused its discretion in admonishing the jury during defense counsel's closing argument to ignore evidence that D's alcohol concentrate equivalent was under the legal limit at the time of his arrest; evidence of a person's ACE is relevant and should be considered when determining whether a person was intoxicated, regardless of whether the individual's ACE was more or less than 0.08).

Operating with Controlled Substance in Body

Brown v. State, 744 N.E.2d 989 (Ind. Ct. App. 2001) (Court rejected D's equal protection and vagueness challenges to Ind. Code § 9-30-5-1(b) (operating vehicle while having controlled substance in body). Statute adequately and unambiguously informs person of ordinary intelligence of proscribed conduct, and statute is not concerned with how marijuana metabolite entered body, but merely that it was present in body, so D's argument that marijuana can be ingested by second-hand smoke was rejected). See also Bennett v. State, 801 N.E.2d 170 (Ind. Ct. App. 2003) (rejecting D's claim that term body as used in statute is unconstitutionally vague; legislature clearly intended to broaden scope of statute by sanctioning use of urine screens to show metabolites in body).

It is a defense to Ind. Code § 9-30-5-1(c) that the accused consumed the controlled substance under a valid prescription or order of a practitioner, or the substance was marijuana, the person was not intoxicated, did not cause a traffic accident and the substance was identified by means of a chemical test taken pursuant to IC 9-30-7. Ind. Code § 9-30-5-1(d). See also Bass v. State, 75 N.E.3d 1100 (Ind. Ct. App. 2017) (May, J., dissenting, arguing that the majority should have

vacated D's Class C misdemeanor conviction on sufficiency of evidence grounds; trial court found that the statutory defense meant D needed to take the drugs in the manner prescribed; language of the defense is clearly ambiguous and should be interpreted in D's favor meaning to show that D needed to merely show that he had a valid prescription).

Shepler v. State, 758 N.E.2d 966 (Ind. Ct. App. 2001) (Ind. Code § 9-30-5-1 is not an unconstitutional offense, even though it does not quantify level of controlled substance necessary to cause impairment; because there is not accepted agreement as to quantity of controlled substance needed to cause impairment, statute does not violate E.P. clause; legislature did not act arbitrarily in determining that person who operates vehicle with controlled substance in body is endangering others, so no due process violation; disparate treatment between two groups (those who use alcohol and those who use controlled substances) is reasonably related to inherent characteristics that distinguish unequally treated classes, so no P&I violation; and D's drug use did not, by itself, provide basis for prosecution, so no Eighth Amendment violation).

Rowe v. State, 867 N.E.2d 262 (Ind. Ct. App. 2007) (Court rejected D's claim that increased punishment for persons operating a vehicle with a schedule I or II controlled substance in their blood causing death, who are at least 21 years-old, is not reasonably related to any inherent characteristics which distinguish them from a person under 21).

Dalton v. State, 773 N.E.2d 332 (Ind. Ct. App. 2002) (notwithstanding breathalyzer test that revealed alcohol concentration equivalent of only .06% BAC, D's driver's license was properly suspended for D's refusal to take second chemical test; totality of circumstances provided sufficient evidence that D may have operated his vehicle while under influence of some type of controlled substance; thus, officer had probable cause to offer second test).

State v. Isaacs, 794 N.E.2d 1120 (Ind. Ct. App. 2003) (existence of valid prescription for a controlled substance is a defense to operating a vehicle with a controlled substance in one's body).

Estes v. State, 656 N.E.2d 528 (Ind. Ct. App. 1995) (A positive urine test was insufficient to prove that D had marijuana in his blood at the time he was arrested for operating a vehicle with a Schedule I or II controlled substance in his blood; note: Legislature amended statutes in 1997 and 2000 to sanction use of urine screen to show metabolites in the "body").

Consistency of Verdicts

Beattie v. State, 924 N.E.2d 643 (Ind. 2010) (jury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable; to remedy concerns re: compromise verdicts, D is afforded protection against jury irrationality or error by the independent review of sufficiency of the evidence).

Slate v. State, 798 N.E.2d 510 (Ind. Ct. App. 2003) (D's acquittal of public intoxication was not inconsistent with conviction for OWI as a Class A misdemeanor. Although both offenses require a showing of intoxication, court upheld jury verdicts because different definitions of intoxicated were given in jury instructions for each charged; public intoxication instruction noted that a significant loss of normal physical and mental faculties was necessary for conviction, rather than simply a loss as indicated in the OWI instruction).

Radick v. State, 863 N.E.2d 356 (Ind. Ct. App. 2007) (although convictions for Class C felony OWI causing death and C misdemeanor driving with controlled substance were inconsistent with jury's acquittal of Class C felony operating with controlled substance causing death, reversal was unnecessary because both guilty verdicts were supported by sufficient evidence).

Guilty Pleas and Diversions

Garcia v. State, 916 N.E.2d 219 (Ind. Ct. App. 2009) (trial court erred by trying the enhancement phase of D's Class D felony OWI trial and the habitual substance offender phase without obtaining from D a personal waiver of his right to a jury trial).

Wingham v. State, 780 N.E.2d 1164 (Ind. Ct. App. 2002) (D's guilty plea to OWI was erroneously accepted because D maintained innocence; at guilty plea hearing, D stated that he was not intoxicated, to which court responded, "do you understand that one of elements of this crime is that you were intoxicated at time you were driving vehicle and if you plead guilty today, you admit that you were intoxicated?" D responded, "yes." This was not sufficient to retract or overcome D's denial that he was in fact intoxicated).

Brown v. State, 613 N.E.2d 69 (Ind. Ct. App. 1993) (where D pled guilty to OWI as D felony, but received alternative A misdemeanor sentence, subsequent vacation of prior OWI conviction did not require vacation of plea, only reduction of conviction to misdemeanor).

Beldon v. State, 657 N.E.2d 1241(Ind. Ct. App. 1995) (juvenile D's guilty plea to operating vehicle with .10% BAC or greater was not made knowingly, voluntarily, or intelligently, where juvenile unilaterally waived his own rights in contravention of Ind. Code § 31-6-7-3 (now Ind. Code § 31-32-5-1). Statute permits waiver of juvenile's rights by either juvenile's counsel or his parent or guardian, but it does not authorize minor to waive his own rights).

State v. Cooper, 918 N.E.2d 355 (Ind. Ct. App. 2009) (D was prejudiced by trial court's failure to establish sufficient factual basis for D's guilty plea to operating while HTV; had D known he was not an HTV on date of offense, he would not have pled guilty to the charge).

Fletcher v. State, 649 N.E.2d 1022 (Ind. 1995) (D's express acknowledgment that he was operating while intoxicated constitutes sufficient factual basis for acceptance of plea).

Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. 2007) (D received ineffective assistance of counsel as a result of his attorney's failure to advise him of the immigration consequences of his felony conviction).

Alvey v. State, 911 N.E.2d 1248 (Ind. 2009) (trial court lacks the authority to allow defendants the right to appeal the denial of a motion to suppress evidence when a defendant enters a guilty plea, even where a plea agreement maintains that such an appeal is permitted).

Gonzalez v. State, 908 N.E.2d 313 (Ind. Ct. App. 2009) (trial court abused its discretion by admitting a letter written by D because it was written as part of the plea negotiation process. See Ind. Evidence Rule § 410 and Ind. Code § 35-35-3-4. D's letter expressed his condolences to all who were involved in accident he caused, apologized for his irresponsible actions and poor decision to drink, and asked the State to show compassion by allowing the court to be somewhat lenient in sentencing. Trial court rejected plea agreement but erroneously admitted letter at trial).

OWI diversion is not available for CDL holders. State v. Hargrave, 52 N.E.3d 255 (Ind. Ct. App. 2016).

Discovery

State v. Schmitt, 915 N.E.2d 520 (Ind. Ct. App. 2009) (trial court did not abuse its discretion in dismissing OWI charges because the State's refusal to respond to D's Request for Production, as trial court ordered, constituted bad faith. Dismissal of charges is an appropriate sanction for a discovery violation where a prosecutor's failure to provide discovery was intentional or in bad faith and resulted in prejudice. Here, D filed Interrogatories and a Request for Production of Documents on 11/25/08. The Request for Production sought information and documentation regarding the arresting officer's training for the administration of traffic stops and field sobriety tests. The RFP also sought the NHTSA manual the arresting officer used and was trained under. The State filed a protective order, and D filed a motion to compel. On 01/16/09, trial court granted the State's protective order as to the Interrogatories but ordered the State to respond to D's Request for Production of Documents no later than 01/23/09. Trial court warned the State that it would consider a failure to respond as bad faith. A few days later, because of bad weather, the trial was rescheduled from 01/30/09, to 02/27/09. On 02/03/09, D asked trial court to strike the arresting officer's testimony or to dismiss the charges because the State had yet to produce the documents as ordered by trial court on 01/16/09. Court of Appeals agreed with the trial court that the State "was less than diligent in complying with the Court's January 16, 2009 order" and that the State failed to comply despite the trial court's warning that the failure to respond would constitute bad faith. Court also observed that the misdemeanor charges had been pending against D for nearly one year).

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (fact that State prevented D from testing breathalyzer numerous times in defiance of court orders and destroyed any possible exculpatory

evidence by re-certifying breathalyzer before D could inspect it required suppression of test results).

Chissell v. State, 705 N.E.2d 501 (Ind. Ct. App. 1999) (lost or destroyed videotapes of D performing field sobriety tests at scene of traffic stop and in police station did not rise to level of materially exculpatory evidence, where there was no indication that videotapes would have depicted D passing those tests).

Sentencing Issues

Simmons v. State, 773 N.E.2d 823 (Ind. Ct. App. 2002) (driver convicted of OWI who had two previous OWI convictions within five years was properly sentenced to six months imprisonment pursuant to Ind. Code § 35-50-2-2(b)(4)(q). 1999 statutory enactment providing for minimum of 10 days imprisonment is a gap-filler and operates to require minimum term of imprisonment in situations where general suspension statute is inapplicable, i.e., where D has two priors but none within five years).

Schenk v. State, 895 N.E.2d 1271 (Ind. Ct. App. 2008) (trial court did not err in finding D's 1988 OWI conviction qualified as one of the two OWI convictions under Ind. Code § 35-50-2-2(b)(4)(R), which mandates a non-suspendible six-month sentence on D's Class D felony).

Mitigators and aggravators

Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003) (in operating while intoxicated causing death prosecution, trial court could consider D's high BAC level and clear abuse of alcohol and time of day of D's conduct together as separate and proper aggravating circumstances).

Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) (the use of a prior conviction to support a HSO finding or to elevate a criminal charge does not preclude trial court from considering the same conviction as an aggravating factor; however, trial court cannot elevate a criminal charge based upon a prior conviction and then enhance the sentence for that same charge by way of a habitual offender finding based upon the same prior conviction. Mills v. State, 868 N.E.2d 466 (Ind. 2007)).

Fees and restitution

Slinkard v. State, 807 N.E.2d 127 (Ind. Ct. App. 2004) (trial court did not err in ordering D to participate in and pay fee for substance abuse program in addition to serving maximum jail term for operating vehicle with .10% BAC or greater conviction; judge has authority pursuant to Ind. Code § 9-30-5-15 to impose additional penalties on a class C misdemeanant involved in a driving offense).

Haltom v. State, 832 N.E.2d 969 (Ind. 2005) (in ordering restitution in criminal case, trial court is not bound by civil settlement agreement between D's insurance carrier and victim. While criminal courts are permitted to take note of such agreements in deciding whether to order restitution and in what amount, these agreements in no way preclude a criminal court from ordering restitution when appropriate under Ind. Code § 35-50-5-3. Here, before D's conviction for operating while intoxicated causing serious bodily injury, accident victim signed a release of all claims and received a $100,000 settlement from D's insurance carrier in her civil action. Notwithstanding settlement agreement, trial court in criminal case had authority to award $27,956.68 in restitution for victim's medical expenses and lost wages).

Jaramillo v. State, 803 N.E.2d 243 (Ind. Ct. App. 2004), *vacated on other grounds*, 823 N.E.2d 1187 (order specifying merely that restitution of $34, 707.40 to three victims is due within six months or as ordered by the court is improper where no further details of form payment is to take and no showing that D would be able to pay that full amount in six months; case remanded within instructions to set manner of performance regarding payment of restitution orders after considering D's ability to pay).

Szpunar v. State, 914 N.E.2d 773 (Ind. Ct. App. 2009) (State failed to present sufficient evidence that D willfully failed to pay restitution although he had only paid $464 towards his $1,387,550 restitution order).

Morris v. State, 985 N.E.2d 364 (Ind. Ct. App. 2013) (trial court abused its discretion in ordering that D pay restitution for victim's funeral expenses where plea agreement was silent on whether D could be ordered to pay restitution).

Baker v. State, 70 N.E.3d 388 (Ind. Ct. App. 2017) (restitution for a totaled car is determined by the value of the car; not the difference between the cost of a new car and the insurance proceeds paid to the victim).

Inappropriate sentence

Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006) (trial court erred in enhancing Class C felony OWI conviction based on D's prior conviction for OWI; a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence. Court reduced sentence to presumptive and ordered D to serve sentence in community corrections).

Gibson v. State, 856 N.E.2d 142 (Ind. Ct. App. 2006) (maximum eight-year sentence for OWI causing death was inappropriate under Rule 7(B), where D pled guilty without benefit of a plea bargain, which is a substantial mitigating circumstance; held, remanded with instructions to reduce D's sentence to six years).

Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003) (after accepting D's guilty plea to OWI causing death, trial court's sentence of eight years was inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B); Court reduced sentence from eight years to three and one-half years).

Cf. Wolf v. State, 793 N.E.2d 328 (Ind. Ct. App. 2003) (maximum sentence for operating vehicle after lifetime suspension was not inappropriate).

Ashba v. State, 816 N.E.2d 862 (Ind. Ct. App. 2004) (enhanced three-year sentence for OWI was appropriately based on trial court's findings that D had history of criminal activity, including three prior OWI convictions, and that he had committed offenses while on probation).

Morris v. State, 985 N.E.2d 364 (Ind. Ct. App. 2013) (trial court properly considered victim's death as evidence of egregiousness of offense even though State agreed to dismiss OWI causing death charged in exchange for D's guilty plea).

HO/HSO status

Burp v. State, 672 N.E.2d 439 (Ind. Ct. App. 1996) (elevated sentence for OWI as a class D felony under cannot also be enhanced under Indiana's general habitual offender statute); see also Puckett v. State, 843 N.E.2d 959 (Ind. Ct. App. 2006).

Roberts v. State, 725 N.E.2d 441 (Ind. Ct. App. 2000) (1996 amendment to Indiana's habitual substance offender (HSO) statute illustrated legislature's intent that D felony OWI could be used as predicate offense to HSO).

Beldon v. State, 906 N.E.2d 895 (Ind. Ct. App. 2009) (Trial court abused its discretion in using D's prior OWI to support his conviction as a Class D felony and to enhance sentence based on HSO finding; no error in using the prior OWI as part of D's criminal history as an aggravating factor)

Double Jeopardy

See IPDC Sentencing Manual, Ch.9, for update on double jeopardy-- In Wadle v. State, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court expressly overruled the Constitutional tests formulated in Richardson v. State as they apply to claims of substantive double jeopardy, instead articulating a new analytical framework to resolve multiple punishment claims going forward. The new test first looks at language of statutes to determine if they clearly permit multiple punishments, and if not clear, courts then apply Indiana's included offense statutes to determine whether the charged offenses are the same. (See Ind. Code §§ 35-38-1-6 and 35-31.5-2-168). If neither offense is included in the other (either inherently or as charged), there is no double jeopardy violation. But if one offense is included in the other, then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms

of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy, even if one offense is, by statutory definition, "included" in the other..

Wadle v. State, 151 N.E.3d 227, 255 (Ind. 2020) (convictions for Level 5 felony OWI-SBI and Level 3 felony leaving the scene of an accident violated double jeopardy where OWI offense was included in leaving the scene offense and there was no temporal distinction between the two in either the charging instrument or the jury instructions).

Stutz v. State, 970 N.E.2d 263 (Ind. Ct. App. 2012) (Class A misdemeanor operating a vehicle with BAC of .15% or greater is not a lesser included offense of Class C misdemeanor OWI).

Watson v. State, 972 N.E.2d 378 (Ind. Ct. App. 2012) (OWI with at least a .08 BAC is a lesser included offense of OWI with at least a .15 BAC).

Wharton v. State, 42 N.E.3d 539 (Ind. Ct. App. 2015) (convictions for both OWI with a prior conviction as a Level 6 felony and OWI with at least a .08 BAC with a prior conviction as a Level 6 felony violates double jeopardy).

Kellogg v. State, 636 N.E.2d 1262 (Ind. Ct. App. 1994) (where both charges predicated on D's driving drunk, convictions for OWI and neglect of dependent were precluded by double jeopardy because OWI was factually included offense of neglect).

Kovats v. State, 982 N.E.2d 409 (Ind. Ct. App. 2013) (trial court properly found that D's convictions for class B felony neglect of dependent, class D felony criminal recklessness, and class D felony OWI violated double jeopardy prohibition because all were based on, or elevated by, the same serious bodily injury, severe injuries to D's passenger from crash occurring at end of high-speed police chase).

Marshall v. State, 563 N.E.2d 1341 (Ind. Ct. App. 1990) (double jeopardy bars conviction for both reckless homicide and driving with .10 BAC resulting in death based upon death of single victim).

McElroy v. State, 864 N.E.2d 392 (Ind. Ct. App. 2007) (no double jeopardy violation for convictions and sentences for OWI causing death and failure to stop at accident resulting in death based on one death; D was not punished twice for same act, but rather was punished for two separate acts: (1) causing the victim's death; and (2) failing to stop after the accident which resulted in death. Death was only a circumstance of failure to stop and causation was not an element).

Smith v. State, 725 N.E.2d 160 (Ind. Ct. App. 2000) (convictions for OWI and public intoxication violated Indiana double jeopardy where both were based on D's driving on public road while intoxicated).

NOTE: Indiana common law double jeopardy principles may prohibit convictions on both OWI and Driving While Suspended and/or Driving While a Habitual Traffic Violator. By analogy, see Hatchett v. State, 740 N.E.2d 920 (Ind. Ct. App. 2000) (possession of firearm by serious violent felon and carrying handgun without license violated Indiana DJ principles).

Moala v. State, 969 N.E.2d 1061 (Ind. Ct. App. 2012) (in deciding which conviction to vacate upon a double jeopardy violation, the trial court is to vacate the conviction with the least severe penal consequences. License suspension is not punitive and courts do not consider a license suspension or potential future consequences (i.e. conviction could serve as a predicate for Level 6 felony OWI charge) when deciding which conviction to vacate; thus, trial court had to vacate Class C misdemeanor OWI instead of Class B misdemeanor public intoxication since Class B public intoxication carried the greatest penal consequences, notwithstanding the potential future consequences and license suspension carried with the Class C misdemeanor OWI).

Orta v. State, 940 N.E.2d 370 (Ind. Ct. App. 2011) (trial court alleviated any potential double jeopardy problem by reducing D's conviction for class B felony operating with a controlled substance in the blood causing death to class A misdemeanor, instead of vacating D's murder conviction).

Schrefler v. State, 660 N.E.2d 585 (Ind. Ct. App. 1996) (administrative suspension of driving privileges does not bar subsequent criminal prosecution for operating vehicle while intoxicated).

Prior Conviction Used to Enhance

State v. Traver, 957 N.E.2d 672 (Ind. Ct. App. 2011) (five-year period in Ind. Code § 9-50-5-3, enhancing an OWI to a class C felony, begins to run on date of previous OWI conviction, not from its occurrence). See also State v. Eichorst, 958 N.E.2d 1 (Ind. Ct. App. 2011) (it is the previous conviction that is subject to the five-year limit, not the act that gave rise to the conviction).

Stringer v. State, 899 N.E.2d 748 (Ind. Ct. App. 2009) (defense counsel's stipulation to D's prior conviction was the functional equivalent to a guilty plea to enhancement based on prior conviction; any challenge to the voluntariness of the plea must be addressed on PCR).

Garcia v. State, 916 N.E.2d 219 (Ind. Ct. App. 2009) (right to jury trial of enhancement phase of D's Class D felony OWI trial and habitual substance offender phase cannot be waived by trial counsel; D must personally waive right to jury trial).

State v. Rans, 739 N.E.2d 164 (Ind. Ct. App. 2000) (D's previous misdemeanor conviction in Michigan of driving vehicle while visibly impaired did not constitute a previous conviction of operating while intoxicated as required by Ind. Code § 9-30-5-3 to support OWI as Class D felony).

Jaramillo v. State, 803 N.E.2d 243 (Ind. Ct. App. 2004), *vacated on other grounds*, 823 N.E.2d 1187) (insufficient evidence for enhancement of OWI conviction from class C felony to class B felony due to insufficient evidence of priors. State argued that police officer's testimony, probable cause affidavit, charging information, and order from guilty plea hearing were sufficient circumstantial evidence for jury to find that D was convicted of OWI offense in 1998, but court found that proof that guilty plea was entered and taken under advisement is insufficient proof that convicted resulted therefrom. Thus, D's signed guilty plea agreement form, without more, was inadequate to prove prior conviction).

Only previous convictions in jurisdictions where the elements of the crime are substantially similar to the elements of Indiana's OWI statute can be used to enhance a conviction. Ind. Code § 9-13-2-130.

Mann v. State, 754 N.E.2d 544 (Ind. Ct. App. 2001) (trial court should have taken notice of Ohio's OWI statute and determined that it was substantially similar to Indiana's OWI statute).

State v. Akins, 824 N.E.2d 676 (Ind. 2005) (prior Michigan conviction for DUI committed within five years of Indiana offense could be used to enhance Indiana DUI offense).

State v. Bazan, 45 N.E.3d 856 (Ind. Ct. App. 2015) (New York OWI offense not similar to Indiana offense).

Livingston v. State, 537 N.E.2d 75 (Ind. Ct. App. 1989) (Evidence was insufficient to support enhancement of D's conviction for driving with .10 BAC, due to prior OWI conviction. In enhancement proceedings concerning prior offenses, mere documentary evidence relating to conviction of one with same name as D is not sufficient to demonstrate that it was indeed D who was convicted of prior offense). See also Jones v. State, 716 N.E.2d 556 (Ind. Ct. App. 1999) (taken together, documents and officer's testimony sufficiently established that D was person who was convicted of prior OWI).

Walker v. State, 813 N.E.2d 339 (Ind. Ct. App. 2004) (sufficient evidence existed to establish D's identity where D's matching date of birth and driver's license number were on charging information for his current charges and his prior conviction, abstract of court record indicated that the D of the prior conviction had the same birth date as D, and D's matching date of birth was on his prior breath test ticket).

Oller v. State, 469 N.E.2d 1227 (Ind. Ct. App. 1984) (D's conviction for Class D felony OWI improper because of insufficient evidence of priors where State introduced certified photocopies of preprinted fee book entry stating only that D was charged with OWI and was guilty, without judge's signature or other information, and also introduced printout of D's driving records obtained from BMV. Although certified copy of driving record was admissible as public record, it was not adequate to prove prior conviction because entries are ambiguous/confusing (show only arrests, not convictions. On rehearing court noted Aas a matter of law, such printouts, admitted into evidence in this cause, cannot be evidence of a conviction notwithstanding Ind. Code § 9-11-4-14(b)(1)).

Simmons v. State, 962 N.E.2d 86 (Ind. Ct. App. 2011) (enhancement of OWI conviction to a class C felony because of prior conviction for OWI causing death did not violate the prohibition on ex post facto laws because no additional punishment was added to prior offense; statutory enhancement affected only future crimes).

Probation

Ferrill v. State, 904 N.E.2d 323 (Ind. Ct. App. 2009) (trial court is without authority to sua sponte modify the terms of D's probation unless D first violates the conditions of his probation, even though the additional conditions arguably are reasonably related to D's rehabilitation). But see Collins v. State, 911 N.E.2d 700 (Ind. Ct. App. 2009) (declining to follow Ferrill and holding that trial courts have statutory authority to add probation conditions after probation begins even though the probationer has not committed a violation; such authority does not violate due process or ex post facto protections).

Slinkard v. State, 807 N.E.2d 127 (Ind. Ct. App. 2004) (in operating vehicle with .10% BAC or greater prosecution, trial court did not err in requiring D to participate in substance abuse program for which he had to pay program service fee of $225, in addition to serving sixty days in jail. Judge has authority pursuant to Ind. Code § 9-30-5-15 to impose additional penalties on a class C misdemeanant involved in a driving offense).

Davis v. State, 916 N.E.2d 736 (Ind. Ct. App. 2009) (defense counsel's admission that D had a new arrest and that he agrees to serve twelve years for the probation violation contingent on beating the new arrest was insufficient to support probation revocation).

Mogg v. State, 918 N.E.2d 750 (Ind. Ct. App. 2009) (State proved that technology behind SCRAM bracelet that monitors for alcohol consumption was sufficiently reliable for the resulting data to be admissible in a probation revocation proceeding; Court cautioned that SCRAM data is not admissible in any type of proceeding or for purposes other than to prove the subject consumed alcohol. Moreover, State must present sufficient evidence that the monitoring system was functioning reliably, and probationer should be given the opportunity to cross-examine the expert who analyzed the data and opined alcohol consumption).

Holmes v. State, 923 N.E.2d 479 (Ind. Ct. App. 2010) (urinalysis report was substantially trustworthy and admissible in-home detention revocation hearing);

Smith v. State, 971 N.E.2d 86 (Ind. Ct. App. 2012) (accompanying affidavit from the lab supervisor made the reports showing D had used marijuana and cocaine substantially trustworthy).

Constitutionality of Sobriety Roadblocks

State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002) (sobriety roadblocks do not violate Art. 1, Sec. 11 of Indiana Constitution per se; however, trial court properly suppressed evidence obtained from roadblock in this case because procedures followed did not satisfy requirements of Section 11; a minimally intrusive roadblock designed and implemented on neutral criteria that safely and effectively targets a serious danger specific to vehicular operation is constitutionally reasonable, unlike the random and purely discretionary stops Court has disapproved of. Where State offered montage of objectives, including generic law enforcement goal of making sure everyone is doing what they're supposed to, court concluded that roadblock was more like a generalized dragnet than a minimally intrusive, neutral effort to remove impaired drivers from roadways before they hurt someone. To be constitutionally reasonable, location and timing of sobriety checkpoints should take into account police officer safety, public safety, and public convenience, and roadblock should also effectively target public danger of impaired driving. Because State did not offer evidence of objective considerations such as unusually high rate of OWI-related accidents or arrests in chosen area, State did not show sufficient relation to legitimate law enforcement purpose of combating drunk driving. State also failed to show that it provided sufficiently clear guidance to ensure against arbitrary or inconsistent actions by screening officers, which is a crucial factor in weighing reasonableness of roadblock. Reasonableness of four-minute detention period was questionable, and lack of demonstrated avoidability and effectiveness of roadblock also weighed slightly against State).

King v. State, 877 N.E.2d 518 (Ind. Ct. App. 2007) (two sobriety checkpoints set up by police officers on private property were unreasonable and violated Art. 1, Sec. 11 of Indiana Constitution).

Sublett v. State, 815 N.E.2d 1031 (Ind. Ct. App. 2004) (factors listed by Court in State v. Gerschoffer are not required elements that must be satisfied in order for a roadblock to be reasonable under Article 1, Section 11; here, trial court did not err in admitting evidence resulting from sobriety checkpoint, which D claimed was in violation of Fourth Amendment and Article 1, Section 1; asking a motorist to produce his driver's license and vehicle registration was not unreasonably intrusive even though police could have used less intrusive means of observing drivers for signs of intoxication).

Cleer v. State, 929 N.E.2d 218 (Ind. Ct. App. 2010) (operation of a sobriety checkpoint did not violate state constitution's provision on separation of powers).

Reasonable Suspicion to Stop and Detain

State v. Whitney, 889 N.E.2d 823 (Ind. Ct. App. 2008) (police officer needs reasonable suspicion to offer a portable breath test (PBT) to determine whether a driver is intoxicated).

Banks v. State, 681 N.E.2d 235 (Ind. Ct. App. 1997) (officer's suspicion that person is drinking underage is insufficient to justify Terry frisk; officer's testimony that he was uncomfortable because nobody knew to whom car belonged and because he thought he might be dealing with intoxicated persons was insufficient).

State v. Renzulli, 958 N.E.2d 1143 (Ind. 2011) (based on totality of circumstances, concerned citizen supplied sufficient information re: possibly intoxicated driver to establish reasonable suspicion to support investigatory stop). See also Russell v. State, 993 N.E.2d 1176 (Ind. Ct. App. 2013) (concerned citizen's tip of possible intoxicated driver demonstrated sufficient reliability to give rise to reasonable suspicion to support an investigatory stop under both the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution).

Bowers v. State, 980 N.E.2d 911 (Ind. Ct. App. 2012) (stopping D's vehicle was reasonable where police witnessed D and his wife pull up in a van, wife exited the van, and the two were shouting at each other; when police questioned the wife after the van pulled away, she said that the two had been drinking and she was obviously intoxicated; when van pulled up again, police stopped D and was reasonable because of arguments between wife and D and also the intoxicated state of the wife).

Potter v. State, 912 N.E.2d 905 (Ind. Ct. App. 2009) (officer's observation of D's vehicle continuously weaving from side to side in its lane and nearly strike a concrete median when making a turn warranted a brief traffic stop to confirm or dispel officer's reasonable suspicion of driver impairment).

Turner v. State, 862 N.E.2d 695 (Ind. Ct. App. 2007) (where admittedly pretextual stop was facilitated by traffic violation of questionable validity, stop was unreasonable under Indiana Constitution; officer stopped D for speeding based on his visual estimation of D's speed and without knowing what speed limit in area was).

Atkinson v. State, 992 N.E.2d 899 (Ind. Ct. App. 2013) (even if D did not commit a driving infraction, officer had reasonable suspicion to stop him because he swerved back and forth many times between the center line and over the fog line, thus driving in a way consistent with a person driving while intoxicated). See also Barrett v. State, 837 N.E.2d 1022 (Ind. Ct. App. 2005) (Although driver did not commit any traffic infractions, brief touching of fog line indicated to officer an "objective sign of impairment".).

But see Goens v. State, 943 N.E.2d 829 (Ind. Ct. App. 2011) (D did not commit an infraction by having one inoperable brake light; officer's stop of his car was invalid, and the resulting evidence of his intoxication should have been suppressed); State v. Sitts, 926 N.E.2d 1118 (Ind. Ct. App. 2010) (D's act of crossing the center line once between the adjacent southbound lane was not a violation of Ind. Code § 9-21-8-2(a) because he did not cross into the opposite lane of travel; thus, officer did not have an objectively justifiable reason for stopping D's vehicle); and U.S. v. Peters, 2012 U.S. Dist. LEXIS 46977.

State v. Rhodes, 950 N.E.2d 1261 (Ind. Ct. App. 2011) (State did not show that it was possible under circumstances for D to comply with turn signal statute; moreover, call from concerned citizen which failed to describe D or his vehicle did not give officer reasonable suspicion that D was operating his vehicle while intoxicated).

Expungement

State v. J.S., 48 N.E.3d 356 (Ind. Ct. App. 2015) (BMV must report commercial driver's expunged OWI conviction; Trial court erred in prohibiting the VMC from reporting the OWI conviction of a driver who had his criminal record expunged. Indiana and federal laws require disclosure. See 49 C.F.R. § 384.225 and Ind. Code § 9-24-6-2(d). 2015 amendment to expungement statute under Ind. Code § 35-38-9-2 expressly allows the BMV to comply with reporting requirements).