POLICE / PROSECUTOR UPDATE

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A couple of months ago we looked at two cases which held that to obtain a conviction for Class A misdemeanor **OWI** the State may not rely on evidence of intoxication alone to prove the element of **"endangerment."** There is another case which reinforces this rule.

In the early morning hours a deputy sheriff observed a car parked in the middle of a CVS parking lot. The car's engine was running, and its headlights were on. Inside, the defendant sat in the driver's seat slumped over the steering wheel. The deputy approached the car, shined his flashlight on the defendant through the driver's side window, banged on the window, and orally hailed the defendant for about thirty seconds before the defendant acknowledged him. The deputy noticed that the defendant was speaking slowly, was reacting to questions slowly, had red eyes, and had a strong odor of alcohol about him. The defendant told the deputy that he had been at a party at a nearby friend's house and that he was on his way home. The defendant also told the deputy that, on his way home, he had driven to a nearby McDonald's for some food. The deputy asked the defendant to take two field sobriety tests. He failed one of them and was arrested. His blood alcohol content tested at 0.12%. At no point did the deputy observe the defendant traveling in the car in which he was found. The defendant was convicted of OWI as a Class A misdemeanor.

The Court of Appeals held that the State presented sufficient circumstantial evidence that the defendant operated the car. The defendant's statement that he had driven from a party to McDonald's to purchase food and then had parked his car in the CVS parking lot was sufficient to show that the defendant operated his car while intoxicated. However, to convict of the Class A misdemeanor charge, the State had to show that the defendant's operation of the car "endangered a person." Following the earlier cases, the court held that the State was required to submit proof of endangerment that went beyond mere intoxication. Here, the defendant was found intoxicated inside his parked car, and no evidence other than his intoxication suggested that he was operating his car in a manner that endangered himself or any other person. This was insufficient, and his Class A misdemeanor conviction was reversed. Dorsett v. State, 921 N.E.2d 529 (Ind. App. 2010).

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A recent case illustrates an invalid **warrantless search of a vehicle** based on concerns of officer safety. A police officer observed a car traveling on the road with one of its headlights not working and initiated a traffic stop. He approached the car to speak with the driver (the defendant). As a matter of his own practice, the officer asked the defendant if he had any weapons or guns in the car. The defendant said he had a handgun underneath the driver's seat and that he had a valid license to carry the handgun. The officer had the defendant step out of the car and handcuffed him so the officer could safely secure the handgun. The officer shined his flashlight under the seat to locate the gun and in doing so observed a baggie containing what he recognized to be marijuana. The officer confirmed that the defendant had a valid handgun permit and released him. He was later charged with possession of marijuana.

The law permits a reasonable search for weapons for officer protection if the officer has reason to believe that he is dealing with an armed and dangerous individual. In the present case, prior to the search for the handgun, the officer did not express any concerns for officer safety. The traffic stop was based on a headlight that was not working. As a matter of practice, the officer asked about guns or weapons.

The defendant admitted he had a handgun and also had a valid permit for it. He was at all times cooperative with the officer. He made no furtive movements, answered the officer's questions, and showed no disrespect. The officer did not testify to any *specific concern* for officer safety. The court held that in the absence of an *articulable basis* that either there was a legitimate concern for officer safety or a belief that a crime had been or was being committed, the search of the car for the handgun was not justified and was illegal. Washington v. State, 922 N.E.2d 109 (Ind. App. 2010).