

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1522-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIN GALLAGHER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

GARTZKE, P.J. Erin Gallagher appeals from a judgment convicting her of causing injury by operating a motor vehicle with a blood alcohol level over .10% contrary to § 346.63(2)(a)2, STATS.¹ Gallagher seeks review of an order denying her motion to suppress medical records obtained by subpoenas required to be supported by probable cause under § 968.135, STATS. The issue is whether probable cause was shown. We conclude it was and we therefore affirm.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

On June 10, 1994, Gallagher was the driver and seriously injured in a one-car accident. She was transported by ambulance to Memorial Hospital in Darlington, Wisconsin, and soon thereafter by helicopter to University Hospital in Madison. Medical staff at both hospitals administered blood alcohol tests for diagnostic reasons. No law enforcement agent requested that the tests be given.

On October 18, 1994, the Lafayette County district attorney submitted the pertinent affidavit supporting the request for subpoenas. She states the sheriff's department provided her with a police report which showed that on June 10, 1994, Gallagher was operating a motor vehicle involved in the accident, was injured and was transported to Memorial Hospital and then to University Hospital.

The affidavit continues,

Deputy Sides indicates that Erin L. Gallagher at the time of the accident may have been under the influence of alcohol. Deputy Sides reports that Scott A. Garthwaite, who was a passenger in the vehicle Gallagher was operating at the time of the accident, reported to Deputy Sides that he had met Erin L., Gallagher at the Filling Station tavern in Darlington on the night of June 9, 1994, and when it was closing time, he and Erin L. Gallagher went to a party in Illinois.

Deputy Sides further reported that he later found out that Erin L. Gallagher and Scott A. Garthwaite had gone to Nora, Illinois which has an all night tavern and was informed that Erin L. Gallagher and Scott A. Garthwaite had closed the tavern in Nora, Illinois.

Lafayette County Sheriff's Deputy and Sergeant Steven M. McQuaid reports that he interviewed Scott A. Garthwaite on September 8, 1994. Scott A. Garthwaite reported to Sergeant McQuaid that he and Erin L. Gallagher had been to an all night tavern

in Nora, Illinois prior to the car accident and had left the bar when it closed at approximately 6:00 a.m. Scott A. Garthwaite stated to Sergeant McQuaid that although he did not see Erin L. Gallagher drinking, she may have been drinking alcohol while she was playing pool, with the owner of the all night tavern.

Your affiant makes this affidavit in support of a subpoena for production of blood test results acquired by Memorial Hospital of Lafayette County upon the admission of Erin L. Gallagher to said hospital or to the U.W. Hospital and Clinics.

The parties agree that this court should defer to the trial court's determination that probable cause existed, and its determination should stand unless the defendant establishes that the facts are clearly insufficient to support the probable cause finding. *State v. Swift*, 173 Wis.2d 870, 883, 496 N.W.2d 713, 718 (Ct. App. 1993). The *Swift* court said that probable cause exists when the issuing judge is apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime and that the object sought will be found in the place to be searched. The amount of evidence necessary to establish probable cause under § 968.12, STATS., is less than that required to support a bindover for trial. *Id.* at 884-85, 496 N.W.2d at 719. The court continued that the evidence need only be such that a reasonable judge can determine that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* at 884, 496 N.W.2d at 719.

Gallagher asserts that the affidavit fails to state two notable and necessary facts: first, that Gallagher was drinking in the taverns, and second, that blood test results could be found at either hospital. We disagree.

While persons may spend time in a tavern without drinking, the trial court could reasonably infer that a person who stays in one Wisconsin tavern until closing time, goes to a second "all night tavern" in Illinois and leaves that tavern at 6:00 a.m. has been drinking. The inference is strong. The statement of Gallagher's companion that he never saw her drinking but "she may have been drinking alcohol while she was playing pool" reduces but does not eliminate the strength of the inference.

It is reasonable to infer that a person injured in an automobile accident would be subjected to blood tests at the hospital to which she had been admitted. Therefore it is fairly probable that blood test results will be found at each hospital.

Because we conclude that probable cause existed to issue the subpoenas, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.