COURT OF APPEALS
DECISION
DATED AND RELEASED

November 9, 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. 95-0236-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

GERALD WILLS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Reversed and cause remanded with directions*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. The State appeals from an order dismissing one count of a criminal complaint. The issue is whether there was sufficient evidence to establish probable cause to bind Wills over on the charge of arson. Because the preliminary hearing evidence provided a plausible account of the State's theory that Wills probably committed arson, we reverse the dismissal

order and remand for further proceedings, despite the existence of a plausible, yet contrary account negating Wills's guilt.

The State charged Wills with arson to a building, contrary to § 943.02(1)(a), STATS., and other crimes. Following a preliminary hearing, the trial court dismissed the arson count for insufficient evidence, which it summarized as follows:

> [A] fire was set at a building that was located within a securely fenced compound; that the fire was started at some time between 3:00 p.m. and approximately 8:30 p.m.; that the defendant was seen inside this compound at approximately 8:30 p.m. and apprehended a few minutes later having scaled the fence; that the defendant admitted trying to steal the vehicle and stealing wrenches from the vehicle and that he had a partial book of matches in his pocket; that the defendant further denied having started the fire.

It concluded that "[t]he presence of the defendant at the scene of an arson, admittedly there to steal a vehicle, ... with a partial book of matches in his pocket does not bring this Court to the conclusion that he probably committed arson."

> The focus of the judge at a preliminary hearing is to ascertain whether the facts and the reasonable inferences drawn therefrom support the conclusion that the defendant probably committed a felony .... If the hearing judge determines after hearing the evidence that a reasonable inference supports the probable cause determination, the judge should bind the defendant over for trial. Simply stated, probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant's commission of a felony.

State v. Dunn, 121 Wis.2d 389, 397-98, 359 N.W.2d 151, 155 (1984).

> [A]lthough the judge at a preliminary examination must ascertain the plausibility of a witness's story and whether, if believed, it would support a bindover, the court cannot delve into the credibility of a witness. The issue as to credence or credibility is a matter that is properly left for the trier of fact.

Id. at 397, 359 N.W.2d at 154-55 (citation omitted). We limit our review to whether the State established a plausible account that Wills probably committed arson. *See* ***id***. at 398, 359 N.W.2d at 155.

The State contends that the trial court impermissibly rejected a plausible account of events that established that Wills probably committed the arson. We agree.

The trial court neglected to recite other circumstantial and direct evidence from the preliminary hearing. For example, an employe testified that he was the last person to leave the building. The employe also testified that there were no flammable liquids or chemicals stored in that building. The controller testified that the building had no lights and was without electrical or heat sources. An expert opined that the fire was incendiary in nature; it was not accidental, or the result of a mechanical or electrical problem.

The Fire Chief testified that he saw Wills about thirty to forty feet from the burning building. He yelled and waved his arms at Wills, who looked directly at him, and then ran in the opposite direction. Wills then climbed over the eight-foot chain link, barbed wire fence. After he was apprehended, police found two wrenches, a partially used book of matches and a burnt match in Wills's pockets. Wills admitted that he was trespassing and that he stole the wrenches, but denied responsibility for the fire.[1]

[1] Initially, Wills claimed that his former brother-in-law gave him the wrenches. He

Although Wills emphasizes inconsistent and arguably exculpatory evidence, the court is required to bind a defendant over for trial if there is a plausible account that defendant committed a felony, "even if a contrary but believable or plausible account also exists." ***State v. Sorenson***, 152 Wis.2d 471, 481, 449 N.W.2d 280, 284 (Ct. App. 1989) (quoting ***Dunn***, 121 Wis.2d at 400, 359 N.W.2d at 156). We conclude that Wills's trespass in a secure area, his proximity to the fire, his flight from the fire chief, including scaling an eight-foot barbed wire fence, and the burnt match and partially used book of matches found in his pockets, provide a plausible account that he probably set the building on fire. Although the jury may reject the plausible account that Wills committed arson, the preliminary hearing court may not. *See* ***Dunn***, 121 Wis.2d at 397-98, 359 N.W.2d at 155.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
later admitted that he stole them.