COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1995

No. 95-0838

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHERYL BRAUN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed.*

SCHUDSON, J.[1] Cheryl Braun appeals from the trial court order affirming the decision of the hearing examiner for the Wisconsin Department of Transportation, suspending her operating privileges for six months pursuant to § 343.305(8), STATS. She argues that the record before the trial court was insufficient to support the affirmance of the suspension. The State concedes that the record does not contain a sufficient factual basis for the trial court to affirm

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

the decision of the hearing examiner. Thus, the State joins Braun in asking this court to reverse the trial court decision.

Braun was arrested for operating an automobile while under the influence of intoxicants on August 12, 1994. A hearing to determine whether her driving privileges should be suspended pursuant to § 343.305(8), STATS., was held on September 6, 1994. A hearing examiner for the Wisconsin Department of Transportation ordered suspension of Braun's driving privileges for six months. Braun sought review and the trial court held a hearing on February 27, 1995.

This court concludes that the record provides insufficient evidence to establish probable cause to arrest under § 343.305(8)(b)2.e, STATS. Section 343.305(8)(b)2.e., provides that the administrative hearing is limited to issues including "[w]hether probable cause existed for the arrest."[2]

The arresting officer testified that he was dispatched to a restaurant parking lot where he observed Brown behind the wheel of her parked vehicle. She "appeared to be asleep or passed out," with the motor running, the stereo on loud, and the doors locked. He was able to wake her only by "pounding and pounding and pounding" on the window. "She seemed disoriented and confused," fumbled in her purse to obtain her driver's license, and had an odor of intoxicants on her breath.

We have explained:

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[2] In this case, the record reflects considerable confusion about what actually was being litigated. Initially the trial court referred to the case being before the court "on several motions by the defendant." After disposing of two issues, the trial court and defense counsel agreed "[t]hen that leaves us with the motion for ... stop and arrest." It is unclear whether the trial court and defense counsel were viewing the stop and arrest issues within the context of § 343.305(8)(b)2., STATS., (where, this court notes, the police stop is not an enumerated issue), or as a more general motion challenging reasonable suspicion to stop and/or probable cause to arrest. In any event, following brief testimony from a police officer at the hearing, the prosecutor stated his understanding that "this was a stop motion." The prosecutor was incorrect and, apparently because of that misunderstanding, he confined his questions to establishing the police officer's reasonable suspicion for the stop.

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." It is also a commonsense test. The probabilities with which it deals are not technical: "[T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act." Finally, courts will look to the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether he or she reasonably believed that the defendant had committed an offense.

County of Dane v. Sharpee, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990) (citations omitted; brackets in ***Sharpee***). Although the circumstances of this case would seem to satisfy that commonsense test, the parties also direct this court's attention to ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), in which the supreme court stated:

> Probable cause requires more than bare suspicion. Unexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to arrest someone for driving while under the influence of intoxicants.... Without such a test, the police officers could not evaluate whether the suspect's physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest.

Id. at 453 n.6, 475 N.W.2d at 155 n.6 (citation omitted).

Regardless of whether the facts of this case fall short of the ***Swanson*** standard, the prosecutor failed to elicit testimony to clarify the point at which the officer arrested Brown and the officer's belief at that point. Thus, the evidence does not allow a court to "look to the totality of the facts and circumstances faced by the officer at the time of the arrest to determine whether he ... reasonably believed that the defendant had committed an offense." ***Sharpee***, 154 Wis.2d at 518, 453 N.W.2d at 510. Accordingly, this court agrees with the parties that the trial court order affirming Brown's license suspension must be reversed.

By the Court. – Order reversed.

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