

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 24, 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. 95-1704-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHERYL BRAUN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed and cause remanded with directions.*

SULLIVAN, J. Cheryl Braun appeals from a judgment of conviction, upon a guilty plea, for operating an automobile while under the influence of an intoxicant. She seeks review whether the trial court erred in denying her motion to suppress evidence because the evidentiary record at the suppression hearing does not support a finding that the police had probable cause to arrest her. The State concedes that the record does not support the trial court's finding of probable cause for Braun's arrest. Accordingly, this court must reverse the judgment of conviction and remand the matter to the trial

court with directions to hold further evidentiary hearings on the issue of the police's probable cause to arrest Braun.¹

The following testimony was provided at the suppression hearing. On August 12, 1994, City of Oak Creek police officers responded to a call that a person was passed out behind the wheel of her automobile while parked in the lot of a fast-food restaurant. The police found Braun with her head back against the headrest of her car, either asleep or passed out, with the car door locked, the engine running, and the car stereo playing. Police pounded on the window and awakened Braun; however, while she fumbled around with her purse to locate her driver's license, the police detected the odor of intoxicants on her breath. One of the officers testified he wanted to "find out whether she was sleeping on the lot or passed out or hurt." At the suppression hearing, the State never introduced any evidence on how or why Braun was arrested.

Nevertheless, the trial court found both that officers had reasonable suspicion to stop Braun, and that they had probable cause to arrest her. The trial court then denied the suppression motion, Braun pleaded guilty to the charge, and the trial court sentenced her. Braun appeals from the judgment of conviction.

Braun argues that the trial court erred in denying the suppression motion because there was no evidence presented by the State to support the officer's probable cause to arrest Braun. The facts are undisputed and, accordingly, whether the police had probable cause to arrest Braun is a question of law that this court reviews *de novo*. *State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

The prosecution has the burden of establishing probable cause for a warrantless arrest under both Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution. *See, e.g., Leroy v. State*, 58 Wis.2d 671, 682, 207 N.W.2d 589, 596 (1973). The State concedes "that the record does not contain enough factual basis for the Trial Court to find that the defendant was arrested based on probable cause that she

¹ This appeal is decided by one judge, as provided by § 752.31(2), STATS.

operated a motor vehicle while intoxicated.” The State acknowledges that: “Whether based on a misunderstanding of the issues requested to be addressed in the motion or an excessive inclination towards judicial economy, the prosecutor's questioning reached only the issue related to the initial contact with Braun and could not be used by the Trial Court to justify the arrest of the defendant.”

Based upon the State's concession to its own error, we reverse the judgment of conviction and remand the matter to the trial court for further evidentiary hearings on Braun's motion to suppress. Based upon these additional hearings, the trial court shall make specific factual findings and conclusions on whether the police had probable cause to arrest Braun.

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

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