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CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

ROBERTO F. OROZCO-ANGULO,
Defendant-Appellant.

Appeal No. 2014-AP-1744-CR

Waukesha County Circuit Court
Case Nos. 13-CT-1173

ON NOTICE OF APPEAL TO REVIEW JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES PRESENTED

I. Whether a warrant is defective where it is not supported by a legal affidavit, and where probable cause is found only from the testimonial adoption of a warrant application that the witness did not prepare, and later admits he did not read.

Circuit Court's answer: Yes.

II. Whether evidence discovered pursuant to a warrant may be admitted where probable cause is established only when the witness adopts as his own an application he did not create and did not read and that application also misrepresents facts relevant to the finding of probable cause.

Circuit Court's answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant has had sufficient opportunity to review the brief of respondent, it may be that the briefs fully present and meet the issues on appeal, rendering oral argument technically unnecessary under Wis. Stat. (Rule) 809.22(2)(b).

This case may be eligible for publication pursuant to Wis. Stat. (Rule) 809.23(1)(a)1 or 2, in that it may clarify the application of Wis. Stat. § 968.12(3) in circumstances significantly different from that in published opinions.

STATEMENT OF FACTS

On the date in question, dispatch informed area law enforcement that a citizen witness had called to report a Chevy Trailblazer being operated recklessly, R.26:6[1], including striking a median. R.26.10. Deputy Garcia saw a Trailblazer of unknown year, and proceeded to follow the vehicle, ultimately conducting a traffic stop. R.26:6-8. Law enforcement, suspecting the driver, Mr. Orozco-Angulo, of operating the vehicle while intoxicated, conducted field sobriety tests. R.26:22.

Deputy Stenulson determined that a telephonic search warrant would be necessary to conduct an involuntary blood draw. R.26:29. Rather than filling out the application for a search warrant himself, he relayed information to Deputy Thompson, who then produced an application, allegedly relying, at least partially, on the information given to him by Deputy Stenulson. R.26:30. Deputy Stenulson testified that he did not read that document that night. R.26:43

Deputy Stenulson called the on-duty judge to obtain a telephonic search warrant. R.26:30. He swore that the document that was produced was his own statement and was true and accurate. App.11.[2] He also provided limited testimony regarding the events leading up to the traffic stop. *Id.* He never read the warrant application out loud to the Court. App.10-12. No other witness was

[1] R.26:6 is a citation to the record where "R" refers to the record on appeal, "26" refers to the number given to the particular document on the record index, and "6" refers to the page number in that document.
[2] App.11 refers to the Appellee's Appendix, with "11" coinciding with page number "App.11" at the bottom of the appendix document, rather than the original page number on the appendix document.

sworn. *Id.* Based upon the material in the application, in conjunction with the minimal testimony obtained, the court issued a warrant for an involuntary blood draw. *Id.*

STATEMENT OF CASE

Counsel for the defense filed three motions in the trial court to suppress evidence collected, including a challenge to the traffic stop, R.8, a *Franks* motion to suppress evidence, R.9, and a motion to suppress evidence obtained from an improperly granted search warrant. R.10. The State filed a response brief that included copies of the warrant application and a transcript of the testimony before the warrant granting court. R.12. These documents were stipulated to be sufficiently similar to those that the warrant granting court reviewed to be considered for the purpose of the motions. R.26:46. A hearing was conducted on those motions and all three motions were denied. Following the denials, Mr. Orozco-Angulo pleaded guilty and was convicted of Operating a Motor Vehicle While Intoxicated (3rd).

Notice was filed appealing the judgment of conviction for the OWI offense. R.24. The cases were consolidated on appeal. Notice was also filed appealing the circuit court's order denying Mr. Orozco-Angulo's three motions to suppress evidence. *Id.*

Upon further review, counsel for Mr. Orozco-Angulo has determined that it cannot carry its burden of showing that the motion challenging the traffic stop was improperly denied, R.8, and therefore, counsel concedes that that portion of the

appeal should fail. However, counsel maintains that the remaining appeals of the denial of the *Franks* motion to suppress evidence, R.9, the motion to suppress evidence obtained from an improperly granted search warrant, R.10, and the judgment of conviction for OWI, R.23, should continue.

ARGUMENT

When reviewing a circuit court's denial of a motion to suppress evidence, this Court upholds a circuit court's findings of fact unless they are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 352, 766 N.W.2d 729, 733. However, because interpretation of those findings to determine whether evidence obtained from a search must be suppressed is a question of law, this Court reviews those rulings independently. *State v. Phillips*, 2009 WI App 179, ¶ 6, 322 Wis. 2d 576, 585, 778 N.W.2d 157, 161-62.

Arguments related to the application of statutory and constitutional provisions to undisputed facts related to search warrant acquisition present issues of law that appellate courts have determined independently of the circuit court, while benefiting from its analysis. *See Gen. State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473.

I. THE SEARCH WARRANT WAS IMPROPERLY GRANTED BECAUSE THE EVIDENCE SUBMITTED WAS NOT BASED ON OATH OR AFFIRMATION AND THE WARRANT WAS NOT READ BY THE WITNESS REQUESTING THE WARRANT.

The procedure for securing a telephonic search warrant was not followed, resulting in a defective warrant.

A) The evidence relied upon by the warrant granting court was not supported by oath or affirmation, because all parties contributing to it were not sworn.

The evidence that the warrant granting court relied upon was not supported by oath or affirmation. The warrant application was a collaborative effort, R.26:29, but only Deputy Stenulson offered any evidence upon oath or affirmation. App.11-12. Deputy Stenulson did not even read the final product himself before it was transmitted to the Judge who granted the warrant. R.26:43. When he later swore that "the information [he was] providing in support of [the] application for a search warrant in [his] affidavit and verbally here [was his] testimony and [was] true and correct to the best of [his] knowledge," he could only have been swearing to the portions of the application that were his own product, of which he had personal knowledge, and he cannot be deemed to have sworn to the entire collaborative work. App.11. "Further, the record is devoid of any confirmation that the materials reviewed by Judge Carter are identical to those referenced by Deputy Stenulson." R.10:4.

As Mr. Orozco-Angulo's suppression motion argued, the "process…does not comply with the constitutional requirement that a warrant be issued only upon probable cause 'supported by oath or affirmation.'" R.10:4. Because both Deputies that collaborated on the application were not sworn, the evidence in that application was not based upon oath or affirmation, as the Constitutions of the United States and the State of Wisconsin each require. The procedure for

obtaining a telephonic search warrant was not followed, and that resulted in the constitutional violation.

Wisconsin law provides a clear procedure for obtaining a telephonic search warrant under Wis. Stat. § 968.12(3). Under the procedure prescribed in Wis. Stat. § 968.12(3), "[w]hen a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath *each person* whose testimony forms a basis of the application and each person applying for the warrant." Wis. Stat. § 968.12(3)(d) (emphasis added). The warrant granting court in this case only placed one person under oath, even though the application was a collaborative effort.

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 132 S.Ct. 945, 949 (2012). In *Missouri v. McNeely*, the United States Supreme Court reaffirmed that that principle, the right to be secure in one's person, applied to a search identical to the search at issue in the present case, i.e. one "which involved a compelled physical intrusion beneath [the Defendant]'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." *McNeely*, 133 S.Ct. 1553, 1558 (2013). The Court noted, "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id*. (*citing Winston v. Lee*, 470 U. S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602,

616 (1989)). Indeed, the Court had previously made clear that "[i]t could not reasonably be argued…that the administration of the blood test [in OWI cases is] free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Schmerber v. California*, 384 U.S. 757, 767 (1966).

As counsel argued, "Because that [application] was prepared by Deputy Thompson on his squad car's computer and sent to Judge Carter from the address 'mthompson@waukeshacounty.gov', it is not clear when Deputy Stenulson would have even seen a copy of the document, in paper format or otherwise, let alone sworn to it upon oath or affirmation." R.10:4.

> [Wisconsin courts have] long recognized an oath or affirmation as an essential prerequisite to obtaining a valid search warrant under the state constitution. As early as 1924, this court held in *State v. Baltes*, 183 Wis. 545, 198 N.W. 282 (1924), that when no sworn testimony exists to support a search warrant, then the warrant is void. In *Baltes*, the magistrate did not administer an oath to any of the individuals providing information for the issuance of the search warrant. The *Baltes* court stated that "the magistrate should examine under oath the applicant for the search warrant and his witnesses ... at least so much thereof as he relied upon in issuing the warrant...." The *Baltes* court also unequivocally stated that the "essential prerequisite to the issuance of a valid search warrant is the taking of sworn testimony from the applicant and witnesses, if any...." The information provided to support the issuance of a warrant "must be sworn to." The *Baltes* court then suppressed the evidence because no sworn testimony existed to support the warrant. This court has repeatedly cited *Baltes* for the proposition that a valid search warrant requires an oath or affirmation.

State v. Tye, 2001 WI 124, 248 Wis. 2d 530, 538, 636 N.W.2d 473, 477 (footnotes omitted) (citation in original).

The information that the warrant granting court relied on in granting the search warrant was not the product of sworn testimony, and therefore the warrant was defective. The warrant granting court failed to determine whether the application it was reviewing was solely the product of Deputy Stenulson's work, failed to determine if he had personal knowledge as to all the contents, failed to determine if they were referencing identical documents, and instead swore him only to the evidence that Deputy Stenulson was himself providing. Therefore, this process was defective.

While it's possible that some portions of the application were the verbatim product of Deputy Stenulson's personal knowledge, the warrant granting court, and this Court, cannot know what portions, if any, those were. Therefore, none of the information in the application can be validly considered as supported by "oath or affirmation." "The only evidence submitted upon oath or affirmation that Judge Carter had available to him was Deputy Stenulson's statements during their recorded conversation." R.4:5. *See* App.11-12. That evidence does not come close to supporting probable cause because it makes no reference to any sign of intoxication beyond reckless driving. *Id.*

In reviewing whether the minimal evidence sworn to was sufficient for probable cause, this Court must consider whether objectively viewed, the record before the warrant-issuing judge provided "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 they will be found in the place to be searched." *State v. Ward*,

2000 WI 3, 231 Wis. 2d 723, 736, 604 N.W.2d 517, 523. In this case, these facts were insufficient to provide probable cause.

B) This was not a warrant issued pursuant to an affidavit because no legal affidavit was submitted.

An unsworn document is not an affidavit under the meaning given the term "affidavit" in the statute, and it is error for a court to rely on an unsworn document as if it is an affidavit. *State v. Vanmanivong*, 2003 WI 41, 261 Wis. 2d 202, 228, 661 N.W.2d 76, 89. Wis. Stat. § 887.01(1) states the requirements for affidavits "required or authorized by law," such as here. Only "when certified by the officer to have been taken before him or her" may it "be read and used in any court and before any officer." *Id.* The application was not notarized or certified at the time the warrant was granted, and therefore it was not an affidavit. R.26:31.

The lower court reviewing the grant of the warrant accurately found that although the application calls itself an affidavit, "clearly, it is an application being made by law enforcement to a judge for the issuance of a search warrant." R.26:65. The court found that the document "is designated the affidavit but is probably legally better called an application." R.26:67. This is accurate because the application was not a sworn document, attested to by a notary at the time the warrant was granted, and therefore it was not an affidavit pursuant to Wis. Stat. § 968.12(2). Therefore, the warrant was not a warrant issued pursuant to an affidavit.

C) The warrant and application was never read to the warrant granting court and was not prepared by the person seeking it.

The Wisconsin statute places clear requirements for warrant applications based upon oral testimony. "Application. The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant. The judge may direct that the warrant be modified." Wis. Stat. § 968.12(3)(b). These requirements are unambiguous, and "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. The use of the term "shall" indicates that these requirements are not optional. "The general rule is that the word 'shall' is presumed mandatory when it appears in a statute." *Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978) (citing to *Scanlon v. Menasha*, 16 Wis.2d 437, 443, 114 N.W.2d 791 (1962)).

None of the requirements in Wis. Stat. § 968.12(3)(b) were met in this warrant application. The person who was requesting the warrant, and the only person who ever spoke to the judge, was Deputy Stenulson. "Deputy Stenulson did not recite any of the information in the document to Judge Carter." R.10:5.

The requirement that the person who prepares the document be the person to swear to it serves two key functions. First, it ensures that the court and the witness appearing by phone are reviewing the same document, which is

demonstrated by the requirement that the judge issue a warrant "verbatim, what is read." Second, it ensures that that person actually read it. In this case, the warrant granting court took no steps to ensure that the person that court was speaking to prepared the report, so the court did not know if the individual had read it.

In fact, as referenced above, Deputy Stenulson had not read the document, and "the duplicate original warrant" was never read on the phone as required by the statute. Wis. Stat. § 968.12(3)(b). So, not only did the warrant granting court fail to determine if the author of the document was on the phone line, and was the person being sworn, the court never had the warrant read to ensure that it was looking at the same document the "person who [was] requesting the warrant" was looking at. *Id.* If a person prepares a document, he or she has read it, but if, as here, there is no discussion by the court of whether that person prepared the document, the court cannot know if the document was ever read by that person.

Because there was nothing "read" to the warrant granting court, as the warrant statute requires, the court granting the warrant did not, and could not, "enter, verbatim, what [was] read on the original warrant." While the judge may "direct" that the warrant be modified," no such direction was ever given, and the ability to direct a modification should not be interpreted as a license for a warrant granting court to ignore the entire procedure stated before that.

These deficiencies in procedure directly permitted the deficiency in the oath or affirmation addressed above. There was insufficient evidence before the court that the document it was viewing was the sole product, and truthful, verbatim

testimony, of the sole witness sworn. It was not read out loud by the individual seeking the warrant. The document was not created by the witness (or even read by him prior to submission). Thus, the warrant issued was not entered, verbatim, as it was read. Therefore, the warrant itself was not based on oath or affirmation, which is an essential prerequisite to obtaining a valid search warrant under the state constitution. *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 538, 636 N.W.2d 473, 477.

D) There was no good faith here because the Deputy lied to the warrant granting court.

As discussed in depth below, Deputy Stenulson swore falsely. "*Leon* emphasized that even where an officer has obtained a warrant and abided by its terms, exclusion may nonetheless be appropriate. *Id.* at 922, 104 S.Ct. 3405. The standard of objective reasonableness requires, among other things, that police officers have a reasonable knowledge of what the law prohibits. *Id.* at 919 n. 20, 104 S.Ct. 3405. The officer cannot reasonably rely upon a warrant that was based upon a deliberately or recklessly false affidavit, or, a bare bones affidavit that she or he reasonably knows could not support probable cause or reasonable suspicion. *Id.* at 923, 104 S.Ct. 3405." *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 236-37, 629 N.W.2d 625, 638 (citing to *United States v. Leon*, 468 U.S. 897 (1984)).

Deputy Stenulson, at a minimum, knew that he could not honestly swear to the contents of a document he had not read as being the truthful and accurate

accounting of his testimony to the court. Had he been forthright, many of the deficiencies that occurred might have been cured, but he chose to swear falsely.

There is also a significant question about whether Deputy Stenulson actually had "reasonable knowledge about what the law prohibits" in terms of the statutory requirements for obtaining warrants via telephone. He testified that he had never participated in a telephonic search warrant application before, and that this was his first attempt. R.26:32. Neither his conduct in failing to comport with the statutory structure outlined above, nor his testimony, indicate that he clearly had a reasonable knowledge of the law related to telephonic search warrants. "Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis v. United States*, 131 S. Ct. 2419, 2429, 180 L. Ed. 2d 285 (2011) (*quoting Hudson v. Michigan*, 547 U.S. 586, 599 (2006)). The United States Supreme Court has noted that "[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." *Hudson*, 547 U.S. at 599.

Further, the State never argued that the good faith exception applied in this case, which could have been rebutted by factual evidence, and therefore, the argument should be deemed waived. *Gruber v. Vill. of N. Fond du Lac*, 2003 WI App 217, 267 Wis. 2d 368, 384, 671 N.W.2d 692, 699.

II. THE SEARCH WAS UNLAWFUL BECAUSE THE WARRANT WAS ISSUED ON INTENTIONALLY OR RECKLESSLY FALSE STATEMENTS

A) The warrant was granted upon false swearing by the only witness who testified.

As defense counsel brought to the attention of the Circuit Court, the document that Stenulson testified was his testimony "wasn't even necessarily viewed by the deputy" prior to being sworn, and he later testified that he did not read the entire collaborative document. R.26:43. Stenulson was asked, "So, you – you didn't read through everything on the affidavit?" He answered, "As far as the text itself, the paragraphs in the first part of it, not that night, no." *Id.*

The whole process, as described by Deputy Stenulson in his testimony, does not provide any indication that he ever reviewed the document he later swore was his own statement before it was transmitted to the warrant granting judge and then sworn to. Defense counsel examined Deputy Stenulson as follows:

> Q He filled out the form -- a form for you?
> A Correct
> Q And did you have a form in front of you as well, or did he ask some questions? I'm curious about how that went about.
> A I had a blank copy of the affidavit which goes through what he was completing on his computer so as we would -- I would go -- I'd provide him the information, and he would type it on his squad's computer.
> Q Okay. And after it was – the form was completed on the computer, then what did you do?
> A At that point, Deputy Thompson e-mailed it to the on-duty judge, and then a recorded phone conversation was done with a judge.

R.26:30.

Not only did Deputy Stenulson admit he did not read all of the statements

he later asserted, under oath, were his testimony, but when asked what happened after he had provided information to Deputy Thompson to type in to the forms, he did not assert that he ever read those materials before they were emailed to the warrant granting court. *Id.* The unchallenged quotations from the police reports of two deputies, as quoted in one of defense counsel's motions, similarly lack any assertion that the document was ever read by Deputy Stenulson prior to transmission and swearing. R.10:3,5.

Despite the evidence that Deputy Stenulson never read the actual application that he submitted, including his own admission that he did not read it, he did adopt that application as his testimony in its entirety. The transcript shows that the only oath administered was administered as follows. "Do you swear the information you're providing in support of this application for a search warrant *in your affidavit* and verbally here *is your testimony* and is true and correct to the best of your knowledge so help you god?" App.11 (emphasis added). Deputy Stenulson responded, "It is." *Id.*

Deputy Stenulson knew, or should have known, that he could not so swear without actually reviewing the actual documents that were submitted as an "affidavit" before swearing, and so his testimony was a *Franks* violation. "A search warrant may issue only upon probable cause. Probable cause supporting a search warrant is determined by the totality of the circumstances." *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 329, 651 N.W.2d 305, 310 (*citing State v. DeSmidt*, 155 Wis. 2d 119, 131, 454 N.W.2d 780, 785 (1990)). "The task of the

issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him,…there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Ward*, 2000 WI 3, ¶ 23, 231 Wis. 2d 723, 735, 604 N.W.2d 517, 522 (*quoting Illinois v. Gates*, 462 U.S. 213, 238 (1983)). However, "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *State v. Mann*, 123 Wis. 2d 375, 386 n.3, 367 N.W.2d 209, 214 n.3 (1985) (quoting *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978)) (emphasis in original).

It was only upon consideration of the information in the "affidavit," in conjunction with Deputy Stenulson's oral testimony, that the lower court found that there was probable cause to issue a warrant. The lower court stated, "[w]hen you take the transcript plus the information in what is designated the affidavit…that forms the basis for the issuance of the warrant and probable cause." R.26:67. It cannot be reasonably argued that the minimal information contained in the oral testimony was alone sufficient to form probable cause for a warrant. *See Gen.* App.11-12.

In this case, Deputy Stenulson was not truthful about the affidavit being his own testimony. If he had alerted the warrant issuing court to the fact that the document submitted was not his own product, or that he was unaware of the full contents of the document, that court could have remedied the application process by having Deputy Thompson also swear, as was required by Wis. Stat. §

968.12(3)(d). Instead, Deputy Stenulson testified falsely that the document was solely his testimony, and was truthful and accurate, which cannot support the requirement that a warrant issue only upon a "truthful showing." *State v. Mann*, 123 Wis. 2d 375, 386 n.3, 367 N.W.2d 209, 214 n.3 (1985).

B) In addition to his false swearing, Deputy Stenulson also misrepresented facts material to the finding of probable cause.

Deputy Stenulson made misrepresentations to the warrant granting court, and omitted relevant information, all related to the initial stop of Mr. Orozco-Angulo's vehicle. *See* R.9:3-5. Deputy Stenulson had reason to know that those statements were false, but, he either intentionally misrepresented the facts, or recklessly did so. If he did so recklessly, it may well be because he never viewed the actual form that was submitted to the warrant granting court before it was submitted, and therefore couldn't be sure of what he was actually swearing to. R.26:43.

The "Affidavit in Support of OWI Search Warrant" allegedly submitted to Judge Carter indicates that the Mr. Orozco-Angulo "was observed to drive/operate the vehicle by a citizen witness," identified as Maria R. Ward. Deputy Stenulson later provided sworn testimony to Judge Carter via telephone. App.11-12. This testimony was in direct conflict with the testimony of Deputy Garcia, who testified that he chose to pursue Mr. Orozco-Angulo's vehicle based upon it being a Chevy Trailblazer, not because Mr. Orozco-Angulo matched a description of any person given. R.26:6-7; R.26:10-11. There is no indication anywhere in the record that

the person identified as Maria Ward ever described any driver at all.

Deputy Stenulson also testified falsely that “Officer Garcia located a vehicle matching” the “partial vehicle description” that Ms. Ward provided, when Mr. Orozco-Angulo’s vehicle did not match the description given. The Defendant’s vehicle is a Chevy Trailblazer, but it is not a 2007 model as described. R.12:7. The deputies did not observe any of the damage that would be apparent if it had been the vehicle that bounced off the median a couple times, as Ms. Ward described the vehicle that she observed doing. Officer Garcia testified at the motion hearing that “We actually looked for damage, and we didn’t see any damage consistent with striking a cement barrier.” R.26:11.

These are crucial facts that were misrepresented to the warrant granting court. There was no private citizen that reportedly saw Mr. Orozco-Angulo driving, yet Deputy Stenulson informed the court that there was. While the caller had said that she had seen a vehicle “bouncing off the median a couple times,” R.9:11, law enforcement deliberately looking for damage matching such an accident didn’t see any, and yet Deputy Stenulson informed the warrant granting court that the vehicle matched the description given by the caller. App.12.

These misstatements went to the heart of whether or not law enforcement had probable cause or reasonable suspicion necessary to stop the vehicle, to gather further evidence, and whether probable cause existed to search Mr. Orozco-Angulo’s blood for evidence of intoxication. The misstatements were either the product of recklessness or intentional misrepresentation on the part of Deputy

Stenulson.

C) The evidence should have been suppressed and the circuit court should have conducted a *Franks* hearing.

"To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). Counsel for the defense demonstrated that Deputy Stenulson failed to read the documents he submitted as his own testimony to the warrant granting court, which was reckless or intentional, because he knew that that court was likely to rely on those statements, and had reason to know that testimony was not, in fact, his own. He further testified to inaccurate facts concerning the traffic stop of Mr. Orozco-Angulo's vehicle, even though he had an opportunity to consult with other Deputies, to observe the vehicle that was stopped, and to compare it to the dispatch that had "advised all area law enforcement." R.26:20. This was further evidence of intentional misrepresentation or recklessness. An evidentiary basis was established by way of testimony at the motion hearing, and through documents stipulated to be accurate reflections of those that the warrant granting court had before it. *See* R.26.

"[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit

to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing." *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2684-85, 57 L. Ed. 2d 667 (1978). In the instant case, the false swearing to the contents of the application, the false information in the application indicating that the witness, Melissa Ward, had seen the Defendant driving, and the false information regarding Mr. Orozco-Angulo's vehicle "matching" the description provided by the witness, should have removed nearly every morsel of evidence before the warrant granting court. Therefore, not only was a hearing appropriate, and inappropriately denied by the lower court, R.26:58, but suppression should have been ordered. "[T]he Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate." *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978)

CONCLUSION

This Court should reverse the judgment of conviction for Operating While Intoxicated (3rd), reverse the circuit order denying Mr. Orozco-Angulo's *Franks* motion, reverse the order denying his motion to suppress evidence based upon an improperly granted warrant, and remand the case back to the Circuit Court for further proceedings.

Dated this 7th day of November, 2014.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,289 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 7th day of November, 2014.

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CERTIFICATE OF MAILING

Pursuant to Wis. Stat. (Rule) 809.80(4), I hereby certify that on the 7th day of November, 2014, I caused 10 copies of the Defendant-Appellant's Brief and Appendix to be shipped, via FedEx, properly addressed and shipping costs prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688.

Dated this 7th day of November, 2014.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of November, 2014.

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