STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2019AP001398-CR

STATE OF WISCONSIN

Plaintiff-Respondent,

v.

JOHNATHAN L. JOHNSON

Defendant-Appellant.

On Appeal From a Judgment of the Circuit Court
For Vilas County, Case No. 2018-CF-145
Honorable Neal A. Nielsen III, Presiding

Brief of Appellant

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STATEMENT OF ISSUES PRESENTED

I. Did a seizure attributable to the State occur when dispatch acquiesced in McDonalds breaking its drive through fast food contract?

Answered no by the Circuit Court.

II. Was the administration of an oath fundamentally defective when "so help me God" required by Chapter 734 Laws 1951 Section 34 was omitted from the S.968.12(2) proceeding?

Answered no by the Circuit Court.

III. If so, was the search warrant not based upon an oath or affirmation as required by Article 1 Section 11 of the Wisconsin Constitution and therefore either void ab initio or otherwise unenforceable?

Answered no by the Circuit Court.

IV. Could the search warrant be executed in good faith for purposes of Article 1 Section 11 of the Wisconsin Constitution when the officer had actual knowledge he was not sworn in for purposes of S.968.12(2); and sought no mentor review of the search warrant?

Answered yes by the Circuit Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested.

Publication is appropriate to clarify what are the fundamental requirements of an oath or affirmation for purposes of Article 1 Section 11 of the Wisconsin Constitution.

Clarification if good faith is required for a search warrant without an oath or affirmation is necessary to apply State v. Tye, 248 Wis. 2d 530, 543, 636 NW 2d 473, 2001 WI 142 ¶24 in context with State v. Kerr, 383 Wis. 2d 306, 328, 913 NW 2d 787, 2018 WI 87 ¶33 to Article 1 Section 11 jurisprudence.

STATEMENT OF THE CASE

NATURE OF APPEAL

This is an appeal from the final judgment of the Circuit Court of Vilas County, Hon. Neal A. Nielsen III, presiding which entered a judgment of conviction for operating with a prohibited alcohol concentration as a fifth offense. This is a felony conviction obtained through a no contest plea entered with reservation of rights to appeal the suppression decision. S.971.31(10).

Mr. Johnson disputes the denial of his suppression motion. If successful in total, all evidence must be suppressed. If successful in part, the search warrant is void or unenforceable and the blood test suppressed. Under either prong the blood test necessary to support the charge is excluded.

Mr. Johnson ordered food at McDonalds drive through and unknown to him McDonalds called law enforcement. Johnson claims McDonalds broke his fast food contract by not filling the order until law enforcement arrived. If the manager lacked firsthand knowledge of facts constituting reasonable suspicion, and there was acquiescence by law enforcement in the contract being broken; Johnson will argue a seizure occurred without reasonable suspicion.

When Johnson refused a blood sample a telephone search warrant was obtained. Fourth Amendment and Article 1 Section 11 jurisprudence may provide a different result, as to sufficiency of the oath and good faith. Mr. Johnson bases his case on the Wisconsin constitution only.

Officer Mark Collins operated independently of the District Attorney's Office and all other law enforcement personnel when he alone drew up and enforced the affidavit and search warrant. The affidavit was signed at the hospital without a notary. The telephone proceeding asked Officer Collins to **"swear"** to the affidavit, however Collins was never asked to raise his right hand or acknowledge **"so help me God"**.

Johnson must show the oath is fundamentally defective by omitting the legislatively mandated **"so help me God"**. The search warrant is void or unenforceable due to lack of an oath or affirmation when the oath is fundamentally defective. Good faith under Eason is not available as Officer Collins knew he was not sworn in, and failed to consult a required source concerning the affidavit and search warrant.

The Arrest at McDonalds

At 1:35 AM June 8, 2018 Mr. Johnson paid for a drive through food order at McDonalds in Eagle River. (29). There

are no franchise policies addressing reporting of suspected intoxicated drivers. (30). The manager was Karolyn L. Ellis (33-1) who obtained information from Alisha Myshock and Frances Ree. (33-2)(63-44:1-13). Karolyn L. Ellis called dispatch (34-7) at about 1:38 AM (9-3).

Deputy Brook Lewis observed Johnson at 1:41 AM (9-3) and arrested the passenger for controlled substances. (9-4). Officer Mark Collins arrived at 1:43 AM. (9-6). Neither Brook Lewis (63-12:15-16) or Mark Collins (62-19:4-7)(63-24:25-25:2) talked to anyone at McDonalds. Officer Collins administered field sobriety tests and arrested Johnson. (63-19:22-20:9).

The Search Warrant Process

Officer Collins transported Johnson to Eagle River Memorial Hospital. (9-7). Collins read to Johnson Informing the Accused, but Johnson refused a sample. (63-20:10-13). This started the search warrant process using Tracs. (63-20:23-25). The search warrant affidavit and search warrant were completed by Collins. (62-19:16-18).

The search warrant affidavit was signed at the counter of the emergency room registration. (63-:29:25-30:23)(24, 25, 26). The search warrant documents were generated in Collins's squad car. (63-20:14-18). Those forms came from

Tracs. (63-22-24). Collins then contacted dispatch to set up a telephone hearing with the judge. (63-20:18-22).

The time the search warrant affidavit was signed was about 3:10 AM. (26). The time of the call to dispatch asking to set up a telephone hearing was 3:21:45 AM. (27). Collins faxed the documents to the duty judge. (63-22:23-24). There is an indication the fax was received by the Court at 3:33 AM. (22-5). Another transmission to the duty judge is at 3:37 AM. (22-5).

The affidavit page (22-3) was already signed. The notary page for the affidavit was blank. (22-4). The affidavit was not notarized prior to faxing it to the duty Judge and Collins was not under oath when he signed it at the hospital. (63-30:24-31:1).

The telephone call between Mark Collins and the duty Judge lasts in total 124 seconds. (37-2). There is a transcript of the audio recording. (32-9,10). This recording is from a conference call arranged through the Sheriff's Department. (63-22:23-32:3). There was no other conversation between Collins and the duty Judge other than this transcript. (63-26:18-21).

The recording of the hearing is in two pages. (32-9,10). At page one lines 14 and 15 five pages are faxed, delayed by a temporary paper shortage at line 21. The first

affidavit comes through at page one line 10 and the warrant is at page two lines 8-11. At page two lines 12-21 the court was going to sign and fax back. The time span between page two lines 12 and 25 is 21 seconds (37-2).

The only reference to any type of oath is at page one line 25; **"… you swear all that's true; right?"** The response is **"Yes, sir."** Officer Collins could not recall if he raised his right hand. (63-32:24-33:1). (63-33:15-21).

Collins maintained he swore to the information supporting the warrant (63-23:12)(63-25:24-26:1) and false information could **"impact on you potentially"**. (63-23:16-19).

When asked if he was sworn in during the telephone hearing, Mark Collins said **"The Judge asked me if I swear to the information and I said yes. I was not sworn in per se."** (63-32:16-17). At 3:39 AM the search warrant is signed. (22-5). The exact time the affidavit is notarized is not known.

At 3:45 AM the search warrant is faxed back. (22-5). With the search warrant, Officer Collins obtained the blood sample. (63-24:13-14). There is a return to the search warrant by Mark Collins. (20-9,10). The test result was .187. (6-1).

The body camera had failed during the time the search warrant was applied for. (31). There is no one who was a witness to the proceedings. (63-34:1-16). Brook Lewis took no part in obtaining the search warrant. (63-15:1-7).

Search Warrant Challenge

The State obtained a bind over (62-21:3-8) based upon complaints (1)(9) and charged OWI/PAC 5th as a felony. (10). Johnson ultimately plead no contest to the PAC count (44), which was entirely based upon evidence he sought to suppress. (11). The challenge to the search warrant, if successful, would exonerate the defendant.

The search warrant challenge consisted of two prongs. Attributing the seizure at McDonalds to State sanctioned breach of contract caused by a manager with no firsthand knowledge of intoxication was the first defense. The second defense was no oath or affirmation was administered during the search warrant process. (12-1).

The initial defense memorandum brought before the Court DFI's publication **"Notary Public Information"**. (13-13-30; 14-1-10). All records of how the search warrant was obtained, such as audios and videos were requested. (15).

Those portions from the body camera of Mark Collins provided to the defense left out the crucial segment when the search warrant was being obtained. (19). A subpoena was

served on the Vilas County Sheriff to obtain that information. (20-3). An audio of the telephone search warrant proceeding was provided. (21-1). The search warrant affidavit was not signed at the hospital in front of a notary, and was referred to during the hearing, however Mark Collins was not sworn in. (23).

The suppression hearing of December 13, 2018 (63) addressed the defense subpoena to McDonalds. (17). Documents produced were the franchise policies (30) which were silent on the obligation to call law enforcement. There was no drive-thru video and window workers Alisha Myshock and Frances Ree are no longer employed. (63-44:1-13). The continuing attempt to obtain footage of Mark Collins raising his right hand was recognized (63-49:10-18), however failure to raise the right hand was not deemed to be a controlling fact. (63-49:19-50:2).

The court requested briefs (63-50:6-16) and continued suppression proceedings for April 1, 2019. (64). No body camera footage from Officer Mark Collins of the actual search warrant process was ever produced even through the adjoining time periods were on camera. (31).

Emphasis by the defense was on **"so help me God"** being required to comply with S.990.01(24), as well as to sustain

a perjury charge. (33-13). Under Tye, there was no good faith exception to lack of an oath. (33-1).

The State argued Karolyn Ellis need not personally observe the driver (34-4). Once Collins **"swore"** to the affidavit, an oath was administered within the ambit of S.887.03, since Collins believed he was subject to sanctions. (34-5). The State views defendant's arguments as **"semantics"**. (34-6). The reply brief distinguished S.887.03 for the reason no oath was administered. (35-3).

The Oral Decision

Both defense prongs were rejected and the search warrant was upheld on April 1, 2019. (64). Whether McDonalds delayed food service beyond the normal course of business is unknown. (64-9:17-20). Even if it was Mr. Johnson was not thereby prevented from driving away. (64-10:16-22). If there was a seizure it was constitutional. (64-11:7-9).

A citizen's arrest applies to OWI cases (64-11:9-12:2); and a recent Attorney General's Opinion would not require Karolyn Ellis to personally observe the facts. (64-12:19-13:5). The participation of the dispatcher was no more or less than an acknowledgement. (64-13:21-24). This aspect of the suppression motion was denied. (64-14;10-16).

The second prong was difficult to decide. (64-14:17-15-9). The word **"swear"** was substantially equivalent to **"take an oath"**. One person administers an oath and one person swears to it. (64-17:6-17). This case did not have a total lack of an oath, unlike Tye. (64-20:2-11). The Court thought, in Tye, the District Attorney personally reviewed the search warrant. (64-20:4-5).

The Court then turned to the good faith exception adopted in Eason paragraph 33 and distinguished Tye on the basis a partial oath was present here. (64-21:20-22:14). The form of the oath is the primary question. (64-23:8-12).

The Court concluded Officer Collins acted reasonably, and denied suppression under Eason. (64-23:13-22).

Entry of Judgment

On July 1, 2019 there was a no contest plea to PAC 5th. (39). The sentence was nine months in the county jail, $2,273 and three years loss of license. (44). The motion for a stay pending appeal (36) emphasized the broader protection of the state constitution (37-3); **"so help me God"** is required by legislation, not court rule. (37-4). The legislature had the Third Commandment in mind (37-6); in a manner that does not violate the Establishment Clause. (56). Eason's good faith exception does not apply. (37-5).

The stay motion was granted (65-16:25-17:1) (50), and this appeal was promptly filed as required. (65-17:12-14).

ARGUMENT

I. The Breach Of The Fast Food Contract, Acquiesced In By Dispatch, Constituted An Unreasonable Seizure.

The construction of the contract to purchase $16.79 of fast food is a question of law. Jones v. Jenkins, 88 Wis. 2d 712, 722, 277 NW 2d 815 (1979). The delivery time cannot be determined by the acts of a third party without mutual agreement. Herder Hallmark Cos. v. Regnier Consulting Grp., 275 Wis. 2d 348, 357, 685 NW 2d 564, 2004 WI App. 134 ¶15.

The court was unable to determine if the food delivery was delayed beyond normal delivery time as of the arrival of law enforcement. (64-9:19-20).

The standard of review of suppression rulings is a two-step standard. State v. Martin, 343 Wis. 2d 278, 296, 816 NW 2d 270, 2012 WI 96 ¶28. Factual findings, unless clearly erroneous are upheld. State v. Eskridge, 256 Wis. 2d 314, 320-321, 647 NW 2d 434, 2002 WI App. 158 ¶9. Whether the facts established a search or seizure did occur; and its constitutionality, is reviewed de novo. State v. Richardson, 156 Wis. 2d 128, 137-138, 456 NW 2d 830 (1990). The burden of proof is on the State to show a seizure without a warrant is reasonable. State v. Quartana, 213 Wis. 2d 440, 445, 570 NW 2d 618 (Ct. App. 1997).

The State cannot prove the food delivery time was not extended in this case by breaking the contract. The customer has suffered a disruption of travel plans by not earlier being able to drive off with the food. An investigatory stop occurred even though the driver could have left before getting the food order. United States v. Place, 462 US 696, 708-709, 103 S. Ct. 2637 (1983). The court found no relationship between breaking the contract and a seizure (64-10:18-22).

Manager Karolyn Ellis had not personally seen any evidence of intoxication. The requirement a citizen support a citizen's arrest by **"the use of his senses"** is based upon 69 OAG 217, 218 (1980). The court construed this to include imputed knowledge from co-workers, (64-12:3-13:5); based upon a 2008 Attorney General's Opinion with an incomplete cite.

The role of dispatch was only to acknowledge the 911 call. (64—13:21-24). Defendant alleges this is an acquiescence, or tacit approval, by an agent. Ivers & Pond Piano Co. v. Peckham, 29 Wis. 2d 364, 370-371, 139 NW 2d 57 (1966). A private party is subject to the Fourth Amendment when acting as a government agent. State v. Knight, 231 Wis. 2d 305, 310, 606 NW 2d 291 2000 WI App. 16 ¶8. With no personal knowledge, Karolyn Ellis could have no reasonable

suspicion. State v. Fields, 239 Wis. 2d 38, 48, 619 NW 2d 279, 2000 WI App. 218 ¶23.

All of the evidence from when Brook Lewis first approached the vehicle must be suppressed. Wong Sun v. United States, 371 US 471, 488, 83 S. Ct. 407 (1963).

II. Fourth Amendment And Art. 1 §11 Jurisprudence Both Require a Search Warrant For The Blood Draw.

Should the seizure at McDonalds be upheld, Johnson next argues the .187 blood sample must be suppressed for lack of a valid search warrant. The United States Supreme Court has required a search warrant for an OWI blood draw in a typical case such as this since 2013. Missouri v. McNeely, 569 US 141, 133 S. Ct. 1552 (2013). McNeely is still good law, at least as to conscious motorists, who are not injured. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533 (2019). The Wisconsin Supreme Court has incorporated McNeely, where there are no unusual circumstances. State v. Kennedy, 359 Wis. 2d 454, 475, 856 NW 2d 834, 2014 WI 132 ¶32.

A blood draw is a search of the person. Mitchell, supra, p. 2534. There is no doubt a search warrant is required as a warrantless blood draw in this case is unreasonable. Id. Johnson will show the search warrant was not obtained in compliance with S.968.12(2). Such

noncompliance allows suppression only when there is constitutional error. State v. Raflik, 248 Wis. 2d 593, 608, 636 NW 2d 690, 2001 WI 129 ¶15. That constitutional error is lack of an oath or affirmation. State v. Tye, 248 Wis. 2d 530, 543, 636 NW 2d 473, 2001 WI 142 ¶23.

In the case at bar Officer Mark Collins neither swore to the search warrant affidavit, under oath; or had it peer reviewed prior to the telephone search warrant hearing. The effort to swear in Officer Collins during that hearing failed for the reason **"so help me God"**, as required by S.990.01(24), was overlooked.

Johnson will show omitting **"so help me God"** is a fundamental defect rendering the oath a nullity. Good faith is not available under the Wisconsin Constitution for the reason Officer Collins should have known the oath was defective. Moreover, it is undisputed there was no peer review as required by State v. Eason, 245 Wis. 2d 206, 215, 629 NW 2d 625, 2001 WI 98 ¶3. As a result the blood draw violated Art 1 §11 of the Wisconsin Constitution due to lack of an oath or affirmation, and lack of good faith.

III. Probable Cause was Presented In An Affidavit Not Originally Signed Under Oath, Or Subsequently Sworn To Under A Sufficient Oath.

The search warrant is based upon probable cause found in the affidavit. The affidavit was incorporated by reference during the telephone hearing. This affidavit does not comply with Art 1 §11 due to lack of an oath or affirmation. There are two instances in this case where an oath needed to be administered.

The first instance is signing the affidavit at the hospital. The Circuit Court appeared to construe the affidavit as sworn to for purposes of S.968.12(2) even if no oath was administered at the hospital. (64-16:6-45).

The standard of review if the document at (22-1-4) constitutes an affidavit for purposes of S.968.12(2) is a question of law. The document is only open to one interpretation, and the statute is applied to undisputed facts. An affidavit always requires a jurat. Knappe v. Seyler, 87 Wis. 165, 166, 58 NW 248 (1894). The documents as signed at the hospital cannot constitute an affidavit for the reason no one administered any oath then. Officer Collins recognized he was not at that time under oath. (63-30:24-31:1). **"And when you signed the affidavit, Exhibit No. 1 at the hospital, were you under oath at that time? When I signed the affidavit, no."**

The affidavit is subsequently notarized sometime after the 124 second hearing began. (22-6). It is not clear if

the notary signature is affixed before or after conclusion of the hearing. Since the only conversation between Officer Mark Collins and the notary is reflected within (32-9,10); that detail is immaterial.

The Department of Financial Institutions publication, Notary Public Information, is authoritative. Estate of Hopgood v. Boyd, 345 Wis. 2d 65, 68, 825 NW 2d 273, 2013 WI 1 ¶4 n.4. Administering an oath is a ministerial act, State v. Johnston, 133 Wis. 2d 261, 267, 394 NW 2d 915 (Ct. App. 1986); which a Circuit Court Judge can perform in the capacity of a notary. S.757.02(3).

The notarization process for the signature sheet at (22-6) is not satisfied by just affixing a notary signature only: **"NOTARIAL ACTS Preforming a notarial act requires more than just affixing a notary seal and signature. In fact, simply signing and sealing a document is meaningless."** Notary Public Information, p.10 (13-22). Whether or not a notary seal was affixed to the original was never determined. (22-3)(12-4,5). There is a common law presumption once a condition is proven to exist, that condition is presumed to continue to exist. Bruss v. Milwaukee Sporting Goods, 34 Wis. 2d 688, 695, 150 NW 2d 337 (1967). The sheets coming out of the fax machine had no

seal at 3:37 AM, (32-9:10). Presumably those sheets continued to have no seal at 3:45 AM.

The mere fact the sheet at (22-6) is signed without a seal only authenticates the signature at (22-3). Notary Public Information p.11 (13-23). There must be an accepted form of administering an oath, S.887.03; to upgrade authentication to an affidavit. Whatever form of oath is used must comply with S.990.01(24). Kellner v. Christian, 188 Wis. 2d 525, 530 n.3, 525 NW 2d 286 (Ct. App. 1994). The four corners of the sheet at (22-6) do not satisfy the requirements for administering an oath. The words **"So help me God"** must be used. 60 OAG 429, 430 (1971).

When an affidavit is already signed prior to presentation to the notary, it must be signed a second time. **"MUST A PERSON ALWAYS SIGN THE DOCUMENT IN MY PRESENCE? If the document is an affidavit or other document requiring an oath the person MUST sign it in your presence… If the document is already signed have the person sign again in your presence, above or below the other signature"**. Notary Public Information p.11 (13-23). Without a repeat signature, there can be no signature in the presence of the notary.

There are additional steps, including raising the right hand and including **"so help me God"** Id p.16 (13-28).

The four corners of (22-6) do not address these criteria. The four corners of the affidavit (22-1-4,6) do not sustain the search warrant (22-5) for purposes of S.968.12(2).

The second instance an oath is required was the telephone search warrant hearing. Legislation at 2017 Wisconsin Act 261 §11 m effective April 11, 2018 expands S.968.12(2). In relevant part, this addition reads: **"968.12(2) WARRANT UPON AFFIDAVIT… or a judge may place a person under oath via telephone… without the requirement of face to face contact, to swear to the… affidavit. The judge shall indicate on the search warrant that the person so swore to the… affidavit."** Pursuant to S.990.01, in order to comply with S.968.12(2) placing a person under oath means compliance with S.990.01(24). There is no indication in this case officer Mark Collins chose to affirm pursuant to S.990.01(41).

The 124 seconds, two page record of the hearing (32-9,10) shows the request to swear to the affidavit was not combined with **"so help me God."** Fourth Amendment jurisprudence considers this a technical error only. (37-18). Suppression is not sought under the Fourth Amendment.

Unlike federal prosecutions where the oath is a court rule; the oath in Wisconsin is defined by legislation to include God. The legislature effective August 21, 1951

expanded the definition of oath at Chapter 734 Laws 1951 Section 34. This legislation, other than being renumbered as S.990.01(24); is unchanged since 1951. In 1951 the legislature added the following. **"If an oath is administered it shall end with the words "so help me God."** The word **"shall"** is mandatory, not directory. Karow v. Milwaukee County Civil Serv. Comm., 82 Wis. 2d 565, 570, 263 NW 2d 214 (1978).

The 124 second hearing asks if the witness swears to the truth of what is in the affidavit. The concluding phrase required by Ch. 734 Laws of 1951 §34, **"so help me God"**, was not used. The Circuit Court viewed this oversight as substantial compliance with an accepted form of administering an oath (64-19:23-20:1). **"Admittedly, that is not quite the same magic words that are contained in 906.03(2) or (3). But, the oath or affirmation is a matter of substance not form as the Court notes in Tye."** The substance of an oath includes the concluding phrase **"so help me God"**, since **"oaths and affirmations generally consist of a "solemn declaration, accompanied by a swearing to God or a revered person or thing…"** Hopgood, supra, ¶29.

The case next turns to the question if omitting **"so help me God"** is a technical or fundamental violation of S.990.01(24) and S.968.12(2). This is a question of first

impression in Wisconsin. Case law from other jurisdictions cannot be relevant unless that jurisdiction has legislation that mandates **"so help me God"** in the oath.

IV. The Requirement In Art. 1 §11 Of An Oath Or Affirmation Prior To Issuance Of A Search Warrant Was Violated When The Oath Was Administered Without The "So Help Me God" Required By S. 990.01(24).

A search warrant issued without a supporting affidavit or testimony under oath or affirmation does not satisfy Article 1 Section 11 of the Wisconsin Constitution. State v. Tye, 248 Wis. 530, 543, 636 NW 2d 473, 2001 WI 142 ¶23.

The question before the court is if omitting **"so help me God"** from the oath is a technical or fundamental violation of S.990.01(24). The existence of a fundamental defect is a question of law. Am. Family Mut. Ins. v. Royal Ins. Co., 167 Wis. 2d 524, 533, 481 NW 2d 629 (1992). Deciding whether a defect is fundamental or technical is a question of statutory interpretation reviewed de novo. Id. The burden of proof is on the state to show the defect is technical only. Id.

Whether the defect is technical or fundamental is resolved by analyzing the purposes of the statute and the type of action involved. Novak v. Phillips, 246 Wis. 2d 673, 682-683, 631 NW 2d 635, 2001 WI App. 153 ¶17. Defects

which are **"central"** to the statutory scheme are fundamental. DWD v. LIRC, 367 Wis. 2d 609, 620, 877 NW 2d 620, 2016 WI App. 21 ¶12.

In election matters, which support political debate, the omission of God is not fundamental. In Matter of Recall of Redner, 153 Wis. 2d 383, 394, 450 NW 2d 808 (Ct. App. 1989), In court proceedings, which seek the truth, the omission of God from S.906.03(2) is fundamental.

The defect is fundamental due to the inability to sustain a perjury charge without strict compliance with S.990.01(24). WJI-Criminal 1750 n. 3 (33-13). More importantly, omitting the oath process depreciates the solemnity of the proceeding. State ex rel Individual Subpoenaed v. Davis, 281 Wis. 2d 431, 446, 697 NW 2d 803, 2005 WI 70 ¶.30.

The Supreme Court of Arizona explains the historical purpose of the oath; (in that case the oath also contained so help me God), **"strengthens the social tie by uniting it with that of religion"**. The 16th edition of Blackstone's Commentaries published in London in 1811 was relied on to support this historical fact. Elfbrandt v. Russell, 94 Ariz. 1, 6, 381 P. 2d 554 (1963). Compliance with the third of the Ten Commandments is a religious duty. Stone v. Graham, 449 US 39, 42, 101 S. Ct. 192 (1980).

In 1951, our Legislature had the same intent based upon knowledge of existing jurisprudence. Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 775-776, 461 NW 2d 150 (Ct. App. 1990).

The purpose of the administration of the oath is to, with dignity and solemnity; impress the witness with the obligation imposed by it. State ex rel Shields v. Portman, 242 Wis. 5, 14-15, 6 NW 2d 713 (1942). The court rule under consideration in Portman was enacted at 241 Wis. v, vi and was a predecessor to S.906.03(2). That rule was effective July 1, 1943 and included **"so help you God"**.

This is consistent with the common law, where the affiant is accountable to God or the Supreme Being. 60 OAG 429 (1971). The State Constitution appears to conflate God and the Supreme Being collectively as Almighty God, in the Preamble, and Art. 1 §18.

There are Ten Commandments, the third of which directly relates to taking an oath in the name of God. Van Orden v. Perry, 545 US 677, 707, 125 S. Ct. 2854 (2005). When someone swears in the name of God something is true, the name of the Lord is taken in vain when the person lies. Lying under an oath in the name of God invokes a violation of the third of the Ten Commandments. Perjury does not.

Without **"so help me God"** the witness is only accountable to the statutes passed by the legislature. With **"so help me God"**, there is additional accountability through the Third Commandment. These are two different types of accountability. Mr. Johnson relies upon the Third Commandment to establish there is additional accountability through an oath based upon God.

In 1890, the Wisconsin Supreme Court extensively considered the significance of the King James Version of the Holy Bible in State ex rel Weiss v. District Board, 76 Wis. 177, 44 NW 967 (1890). In Weiss, judicial notice was taken of the Bible, Id p.191; obeying a Supreme Being is common to all sects, Id p.193, 194; the Ten Commandments represent a moral code, Id p.195; and are among the Bible's priceless truths, Id p.202.

The Ten Commandments are found in Exodus Chapter 20. An extract of Exodus 20 from Bibles published before 1890 is in the record (57-1, 6, 7). The 1951 legislature is deemed to be aware of the Third Commandment which reads, as of 1890, as follows; **"Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain."** (57-1).

Johnson's position the 1890 recognition of the Third Commandment supports 1951 legislative intent that omission

of **"so help me God"** is a fundamental defect does not violate the Establishment Clause for two reasons. The first reason is use in courts of **"so help me God"** in a witness oath does not violate the First Amendment. Zorach v. Clauson, 343 US 306, 313, 72 S. Ct. 679 (1952).

The second reason is based upon historical facts. Weiss was decided 61 years before the legislation; and Chapter 734 Laws of 1951 was in effect 66 years before the arrest. These time spans exceed the 44 years the Ten Commandments display in Van Orden was located at the Texas Capitol. Passage of substantial periods of time create a presumption a religious display has primarily acquired an historical significance. American Legion v. American Humorist Assn, 139 S. Ct. 2067, 2074 (2019).

Simply put, God in the oath process is **"central"** to the purpose of accuracy in courts. Removing God removes an element of solemnity the legislature cannot duplicate. The state cannot enforce its laws concerning false testimony to the degree the Third Commandment will be ultimately enforced. This point is explained during the PBS interview by Sir David Frost with the Reverend Billy Graham aired January 29, 1993. (A.-Ap. 139-146).

Specifically, Reverend Graham concludes (A-Ap. 145). **"He'll take over. And he won't make any mistakes. There's**

not going to be anybody in hell that wasn't supposed to be there and there's not going to be anybody in heaven that wasn't supposed to be there." For this reason **"so help me God"** is central to the purpose of S.990.01(24); S.968.12(2) and S.906.03(2).

There is no difference between total lack of an oath or an oath that is fundamentally defective. The result is the same-no oath. Without an oath, the search warrant is void. Tye, supra, ¶11 n. 11, ¶14, ¶19, ¶23.

The position of the Circuit Court an attempt at the oath resulted in a technical defect is harmless error if there is a good faith exception to the exclusionary rule.

V. Lack Of Review Of The Affidavit Prevents A Claim Of Good Faith For Purposes Of Article 1 Section 11.

The Circuit Court found Officer Mark Collins acted in good faith, based upon Eason (64-20:15-16). In Eason, the Wisconsin Supreme Court adopted a good faith exception derivative of United States v. Leon, 468 US 897, 104 S. Ct. 3405 (1984). Eason adopted Leon's good faith jurisprudence, and added two additional obligations the State had to meet.

The State, for purposes of Art 1 §11, must show a significant investigation and review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable

government attorney. State v. Eason, 234 Wis. 2d 396, 399, 610 NW 2d 208, 2001 WI 98 ¶3, ¶63.

Eason's requirement of review of the proposed search warrant remains in effect. State v. Scull, 361 Wis. 2d 288, 306, 862 NW 2d 562, 2015 WI 22 ¶35. In this case, while the court assigned to itself the responsibility for omitting **"so help me God"**; law enforcement shares the blame by knowingly enforcing a defective warrant. Only Mark Collins processed the warrant. No one else reviewed it, or enforced it. Tye, supra, ¶29.

Collins knew the warrant was not signed under oath at the hospital (63-30:24-31:1) and knew that he was not later sworn in **"per se"** (63-32:16-17). There is a common law presumption he did not raise his right hand. Bruss v. Milwaukee Sporting Goods, supra. Had the body camera not malfunctioned at that time that presumption may, or may not, be rebutted.

There is enough responsibility attributable to law enforcement the fourth Leon exception applies. Tye, supra, ¶28. There is a common good faith factor in Leon and Eason: a reckless disregard for legal requirements. When only one officer participates in the entire search warrant process, there is actual knowledge of all legal errors. Illinois v. Krull, 480 US 340, 348-349, 107 S. Ct. 1160 (1987).

The burden of proof to show good faith under Leon is on the State. United States v. Diehl, 276 F. 3d 32, 41-42 (1st Cir. 2002). Good faith is reviewed de novo. United States v. Raymonda, 780 F. 3d 105, 113 (2nd Cir. 2015).

The Court of Appeals of Indiana ruled good faith in overlooking the oath is essentially plenary on review. State v. Brown, 840 NW 2d 411, 422 (Ct. App. Ind. 2006). Officer Collins is chargeable with knowledge of the oath process, since he is a sworn officer (64-19:15-19). This situation is not wholly the fault of the judiciary, or wholly subsumed within judicial integrity. The State cannot meet its burden of good faith under Leon.

If good faith is upheld as to Leon, it cannot be upheld under Eason. There was absolutely no review by the District Attorney or any other law enforcement officer. Eason, ¶3. There can be no good faith available for Art. 1 §11 purposes. The State cannot meet its burden of good faith under Eason, ¶3. Good faith is still required when a search warrant is void through judicial error.

This case presents a potential conflict between Eason and State v. Kerr, 383 Wis. 2d 306, 913 NW 2d 787, 2018 WI 87. In Kerr, an arrest warrant was invalid due to judicial error. Suppression, viewed as a deterrent to police misconduct, could not be applied. In the case at bar if no

law enforcement misconduct is found under Leon, good faith is still required by Eason due to the differences between search warrants and arrest warrants.

In Kerr, the arrest warrant was not a document which the enforcing officer had to investigate prior to issuance, or could have mentor review prior to issuance. Kerr's position at ¶23 that Eason's good faith ambit need not be considered does not transfer to the search warrant at bar. Unlike in Kerr, the enforcing officer, Mark Collins; was required by Eason to obtain review prior to the telephone hearing as well as investigate for probable cause. A reviewing officer would have required a notary at the hospital.

There is a distinction between search warrants and arrest warrants as to the need for preliminary investigation and review by a mentor. State v. Hess, 327, Wis. 2d 524, 552, 785 NW 2d 568, 2010 WI 82 ¶57. Whether void ab initio or unenforceable, the search warrant was ineffective for purposes of Art. 1 §11 unless there was good faith.

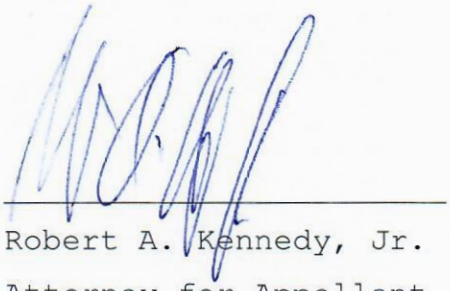
Whether through Leon, or the extra protection of Eason ¶3, ¶63; or both, the State is deprived of the privilege of good faith. The search warrant remains in violation of the

oath or affirmation clause of Art 1 §11. Hess at ¶37. Suppression is required by Hess at ¶62.

CONCLUSION

This case should be remanded with directions to grant the suppression motion.

Respectfully submitted this 23rd day of September, 2019.



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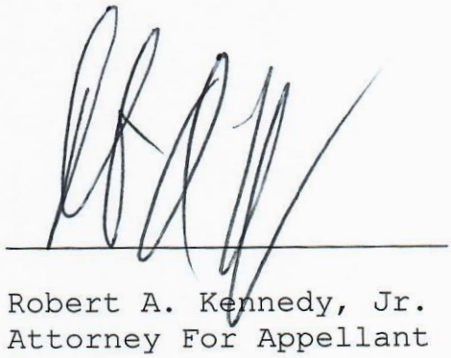

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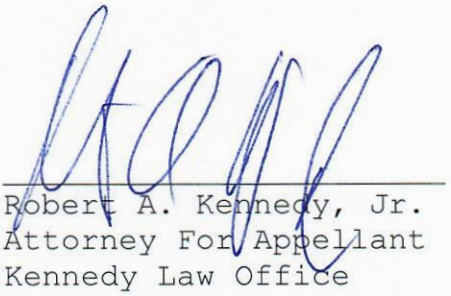

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I certify that this brief together with a separate appendix was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this 23rd day of September, 2019. I further certify that the brief was correctly addressed and postage was prepaid.

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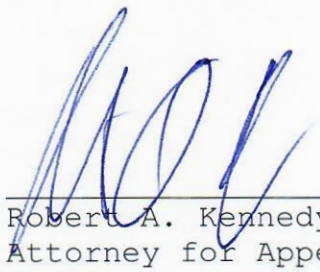

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