STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP1398-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNATHAN L. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE VILAS COUNTY CIRCUIT COURT, THE HONORABLE NEAL A. NIELSEN III, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Constitutions

Statutes

Other Authorities

ISSUES PRESENTED

Police arrested the defendant-appellant Johnathan L. Johnson for operating a motor vehicle while under the influence of an intoxicant (OWI) at a McDonald's restaurant after employees who observed Johnson at the drive-thru window told their manager that Johnson appeared drunk and the manager called 911. Police arrested Johnson and he refused their request for a blood sample. An officer completed a search warrant affidavit, faxed it to a judge, and swore to the truth of the information on the affidavit in a telephone call with the judge, who authorized a search warrant for a blood sample.

1. Is Johnson entitled to suppression of the blood test result because the McDonald's employees delayed giving him his food so that police could arrive, in violation of the fast food contract?

The circuit court answered no and denied Johnson's motion to suppress evidence.

This Court should answer no and affirm.

2. Is Johnson entitled to suppression of the blood test results because the judge did not administer an oath to the officer who submitted an affidavit for a search warrant, or require the officer to say "so help me God" when the officer swore to the truth of the information in the affidavit?

The circuit court answered no and denied Johnson's motion to suppress evidence. The court concluded that even if the judge and officer did not strictly comply with the search warrant statutes the officer relied in good faith on the warrant and exclusion of the blood test results is therefore unnecessary and inappropriate.

This Court should answer no and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issue presented involves the application of well-established principles to the facts presented.

STATEMENT OF THE FACTS AND CASE

A city of Eagle River police officer arrested Johnson for OWI on June 8, 2018. (R. 63:15, 20.) Officers had been dispatched to a McDonald's restaurant after the manager called 911 and told the dispatcher that a driver in the drive-thru lane was "super drunk" and that there was "an open container of booze in the car." (R. 34:7; 63:9.) The manager said that the driver was waiting for his food and that they were holding him until police arrived. (R. 34:7.) Police were dispatched at 1:38 a.m., and Officers Brooke Lewis and Mark Collins officers arrived a few minutes later. (R. 63:8, 16.)

Officer Lewis observed two people in the vehicle. (R. 63:9–10.) She contacted the driver who identified himself as Johnson. (R. 63:10.) Officer Lewis observed that Johnson had "slow, thick, slurred speech," and that there were open intoxicants in the vehicle. (R. 63:9.) The officer had Johnson step out of the vehicle and she observed that Johnson's balance was unsteady. (R. 63:10.) Officer Lewis also observed a glass jar that contained a substance that appeared to be marijuana on the floor of the car. (R. 63:11.)

Officer Collins smelled the odor of intoxicants coming from the vehicle, and he observed an open can of Corona beer on the floorboard on the passenger's side to the vehicle. (R. 63:17–18.) Officer Collins spoke with Johnson and detected an odor of intoxicants on Johnson's breath. (R. 63:19.) He also observed that Johnson had slurred speech

and red glassy eyes. (R. 63:19.) Officer Collins ran Johnson's license and learned that Johnson had four prior OWI convictions. (R. 63:19.) Officer Collins administered field sobriety tests and then arrested Johnson for OWI. (R. 63:19–20.) He read the Informing the Accused form to Johnson and requested a blood sample. (R. 63:20.) Johnson refused. (R.63:20.)

Officer Collins completed an affidavit and a search warrant on the computer in his squad car through the TraCS system and faxed the affidavit and a search warrant to Judge Nielsen. (R. 63:20.) On a three-way call with Officer Collins and the dispatcher, Judge Nielsen asked Officer Collins if he had signed the warrant affidavit and if he swore that everything in the affidavit was true. (R. 63:20, 23.) Officer Collins answered, "Yes, sir." (R. 32:9–10.) The judge signed the warrant and faxed it to the officer. (R. 63:24.) Johnson's blood was drawn at the hospital, and a test revealed an alcohol concentration of 0.187. (R. 9:7–8.)

The State charged Johnson with OWI and operating with a prohibited alcohol concentration, both as fifth offenses. (R. 9:1–2.) Johnson moved to dismiss the charges on the ground that he was searched and seized in violation of the Fourth Amendment. (R. 11.)[1] He asserted that he was impermissibly seized by McDonald's employees in violation of the fast food contract. (R. 12:1, 3.) He also asserted that the blood draw was an unconstitutional search because Officer Collins did not sign the warrant before a notary and did not take an oath which included the words "so help me God" when he swore to the truth of the information in the phone call with Judge Nielsen. (R. 12:1, 3–5; 21:1–2.)

[1] The circuit court parties and the parties treated Johnson's motion for dismissal as a motion to suppress evidence. (R. 33:1; 34:1; 64:23.; Johnson's Br. 8.)

The circuit court denied Johnson's motion after a hearing at which Officer Lewis, Officer Collins, and Johnson testified. (R. 63; 64:23.) The court concluded that the McDonald's employees were not acting as agents of the State and that they did not seize Johnson. (R. 64:12–14.) The court also determined that while it did not use "magic words" in administering an oath or affirmation to Officer Collins, suppression of the blood test results was unnecessary. (R. 64:19–23.) The court concluded that Officer Collins swore that the information in his affidavit was true, so the substance of the oath or affirmation requirement was satisfied. (R. 64:19–20.) The court concluded that even it failed to administer an oath or affirmation, Officer Collins relied in good faith on the warrant the court issued, so the exclusionary rule should not apply and the blood test results need not be suppressed. (R. 64:23.)

Johnson pled no contest to operating a motor vehicle with a prohibited alcohol concentration as a fifth offense as part of a plea agreement in which the OWI charge was dismissed but read in at sentencing. (R. 65:2–3.) The circuit court entered judgment of conviction. (R. 44.) Johnson now appeals.

STANDARD OF REVIEW

This Court reviews an order denying a motion to suppress under a two-step analysis. *State v. Robinson*, 2009 WI App 97, ¶ 9, 320 Wis. 2d 689, 770 N.W.2d 721. This Court will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. *Id.* Under the clearly erroneous standard, appellate courts will uphold a circuit court's finding of fact unless the finding goes "against the great weight and clear preponderance of the evidence." *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277)). The application of constitutional principles

to the facts found presents a question of law that this Court reviews de novo. *Robinson*, 320 Wis. 2d 689, ¶ 9.

ARGUMENT

I. The circuit court properly denied Johnson's claim that he was seized by McDonald's employees in violation of the fast food contract and is therefore entitled to suppression of the blood test results.

In his brief after the hearing on his motion to dismiss, Johnson asserted that McDonald's broke its fast food contract with him by delaying the delivery of his food so that police officers could come to the McDonald's. (R. 33:2.) He asserted that after he paid $16.79 for two Double Cheeseburgers, one Bacon, Egg and Cheese McGriddle, and three large French Fries, the "[f]ood was delayed and the contract broken." (R. 29; 33:2.) He acknowledged that a Fourth Amendment seizure may only be made by a private citizen if the citizen is acting as an agent of the State. (R. 33:3.) But he argued that when the McDonald's manager said that they were holding him until police arrived, the dispatcher said "okay," the State acquiesced to McDonald's holding Johnson, and the holding became a seizure. (R. 33:4.)

The circuit court rejected Johnson's claim. It said, "I don't know that there is necessarily such a thing as a fast food contract. Other than I agree to pay you money and you agree to provide me with a hamburger." (R. 64:9.) The court concluded that even if McDonald's had some obligation to serve food in a timely manner, and even if had not complied with that obligation, that would not mean that Johnson was seized. (R. 64:9.) The court concluded that a reasonable person in Johnson's position would not have believed that he was not free to leave. (R. 64:9–10.)

The court rejected Johnson's argument that the McDonald's employees conducted a citizen's arrest by not delivering his food to him, concluding that Johnson was not seized and therefore not arrested. (R. 64:10–11.) It also concluded that even if the employees had conducted a citizen's arrest, that arrest would have been justified because there was probable cause that Johnson had driven while under the influence of an intoxicant. (R. 64:11–12.)

The court noted that even if Johnson had been seized by the McDonald's employees, he would not be entitled to suppression because "in the absence of state action, a defendant who is detained by another citizen has no right to suppress the fruits of the citizen's arrest." (R. 64:13.) The court noted that the dispatcher merely said "okay" and dispatched officers, and that "police did not initiate, encourage, or participate in any alleged seizure." (R. 64:13–14.) The court concluded that the employees were not acting as State agents, that there was no state action, and no seizure. (R. 64:13–14.)

On appeal, Johnson argues that "[t]he breach of the fast food contract, acquiesced in by dispatch, constituted an unreasonable seizure." (Johnson's Br. 13 (original formatting altered).) The gist of his argument seems to be that when the McDonald's manager told the dispatcher that they were holding Johnson until police arrived, and the dispatcher said "okay," the dispatcher acquiesced to the McDonald's employees' holding him in violation of the fast food contract, and the employees became agents of the State. (Johnson's Br. 14–15.)

Johnson's argument fails for several reasons. First, he has not established the existence of a fast food contract that requires a restaurant to serve food in a specific period of time. In his "reply memorandum" in the circuit court, Johnson said, "A fast food contract does exist." (R. 35:1.) He relied on *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 327, 103 N.W2d 64

(1960). But that case holds only that when a person orders and pays for food at a restaurant, there is "an implied warranty that the food so sold is reasonably fit for human consumption." *Id.* at 327. *Bethia* does not hold that a restaurant is required to serve food in a certain time period, and that not doing so is a seizure of the person who paid for the food.

Second, "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State v. Williams*, 2002 WI 94, ¶ 4, 255 Wis. 2d 1, 646 N.W.2d 834 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, (1980)). As the circuit court concluded, a reasonable person in Johnson's position would have felt free to leave. (R. 64:9–10.) Johnson does not argue that anyone prevented him from simply leaving the McDonald's parking lot, and there is no evidence that he could not have left.

Third, Johnson acknowledges that the dispatcher's role "was only to acknowledge the 911 call." (Johnson's Br. 14.) But he claims that this was acquiescence by an agent, and that "[a] private party is subject to the Fourth Amendment when acting as a government agent." (Johnson's Br. 14.)

Johnson is seemingly arguing that the dispatcher became a government agent by acknowledging the 911 call and acquiescing to a seizure by the McDonald's employees. He relies on *State v. Knight*, 2000 WI App 16, ¶ 8, 232 Wis. 2d 305, 606 N.W.2d 291. But in *Knight*, this Court concluded that the conduct of an attorney appointed by a court—an arm of the government—was governmental. *Id.*

The State does not dispute that the dispatcher's conduct was governmental. But that makes no difference. The issue is not whether the dispatcher was acting as a government agent, but whether the McDonald's employees were acting as

government agents. As the circuit court concluded, there was no seizure by McDonald's employees. (R. 64:9–10.) And even if there had been a seizure, "[t]he police did not initiate, encourage, or participate" in the seizure. (R. 64:13–14.) The McDonald's employees were "no more active as an agent of the State than would any citizen who calls law enforcement and reports what they believe to be evidence of criminal conduct." (R. 64:14.) The officers were not acting as government agents, but as private individuals.

In summary, there was no fast food contract, and no breach of a supposed contract. Johnson was not seized by McDonald's employees and the employees were not acting as government agents. Accordingly, the Fourth Amendment was not implicated by the employees, and the circuit court properly denied Johnson's motion to dismiss or suppress evidence.

II. The circuit court properly denied Johnson's claim that he is entitled to suppression because the search warrant authorizing the blood draw was invalid.

A. The requirement that a search warrant may issue only upon probable cause supported by oath or affirmation is satisfied when a person swears to the truth of the statement supporting probable cause.

Both the United States Constitutions and the Wisconsin Constitution provide that a search warrant may be issued upon probable cause supported by an oath or affidavit. U.S. Const. amend. IV; Wis. Const. art. 1, § 11.

Wisconsin's search warrant statute, Wis. Stat. § 968.12, similarly provides that "A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3) (d), showing probable cause therefor." Wis. Stat. § 968.12(2). A person who requests

a warrant must swear to the truth of the information in the complaint or affidavit to either "a notarial officer authorized under s. 706.07 to take acknowledgments" or a judge. Wis. Stat. § 968.12(2). Alternatively, "a judge may place a person under oath via telephone, radio, or other means of electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit." Wis. Stat. § 968.12(2). "The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit." Wis. Stat. § 968.12(2).

"The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." *State v. Tye*, 2001 WI 124, ¶ 19, 248 Wis. 2d 530, 636 N.W.2d 473 (citing *Kellner v. Christian*, 197 Wis. 2d 183, 192, 539 N.W.2d 685 (1995)). "An oath or affirmation to support a search warrant reminds both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved." *Id.* (citations omitted). It "protects the target of the search from impermissible state action by creating liability for perjury or false swearing for those who abuse the warrant process by giving false or fraudulent information." *Id.* (citing Wis. Stat. §§ 946.31; 946.32). "An oath preserves the integrity of the search warrant process and thus protects the constitutionally guaranteed fundamental right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." *Id.*

Neither the United States Constitution nor the Wisconsin Constitution define "oath" or "affirmation." Courts have defined an "Oath or affirmation" as "a formal assertion of, or attestation to, the truth of what has been, or is to be, said." *United States v. Bueno-Vargas*, 383 F.3d 1104, 1110 (9th Cir. 2004) (citing *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002); *United States v. Turner*, 558 F.2d 46, 50 (2d Cir.1977)).

Black's Law Dictionary defines an "oath" as "A solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise." Black's Law Dictionary 1289 (11th ed. 2019). It defines an "affirmation" as "A solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath." Black's Law Dictionary 73 (11th ed. 2019). Either an oath or an affirmation "may subject the person making it to the penalties for perjury." *Id.*

An oath and an affirmation function in the same manner: "It is established in law that an oath is an affirmation of the truth of a statement, which renders one willfully asserting an untruth punishable for perjury." *Kellner*, 197 Wis. 2d at 191. An oath or affirmation is different than an acknowledgement which is merely "a method of authenticating an instrument by showing that it was the act of the person executing it." *Id.* at 192.

"The key distinction between an 'Oath' as opposed to an 'affirmation' is that the former invokes a reference to deity, whereas the latter does not." *State v. Gutierrez-Perez*, 337 P.3d 205, ¶ 15 (Utah 2014). Wisconsin's statutes recognize this distinction, stating that an oath "shall end with the words, 'so help me God,'" Wis. Stat. § 990.01(24), but also providing that an "affirmation" may be substituted for an "oath." Wis. Stat. § 990.01(24), (41).

Under both the Fourth Amendment and the Wisconsin Constitution, whether an oath or affirmation supports a search warrant depends on whether a person swears to the truth of the statement that provides probable cause for the warrant.

Under the Fourth Amendment's "Oath or affirmation" requirement, an "affirmation" requires a person to:

> (1) knowingly and intentionally make a statement to a neutral and detached magistrate; (2) affirm, swear, or declare that the information in the statement is true and correct; and (3) do so under circumstances that impress upon the affiant 'the solemnity and importance of his or her words and of the promise to be truthful, in moral, religious, or legal terms.

Gutierrez-Perez, 337 P.3d 205, ¶ 19 (citing *Bueno–Vargas*, 383 F.3d at 1110).

The Wisconsin Supreme Court has explained that the essentials of an oath are: "(1) a solemn declaration; (2) manifestation of intent to be bound by the statement; (3) signature of the declarer; and (4) acknowledgment by an authorized person that the oath was taken." *Kellner*, 197 Wis. 2d at 191–92. This means that "there must be in some form an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath." *Id.* at 192.

The Wisconsin Supreme Court has recognized that whether a search warrant is valid depends on whether it is supported by sworn testimony: "when no sworn testimony exists to support a search warrant, then the warrant is void." *Tye*, 248 Wis. 2d 530, ¶ 13 (citing *State v. Baltes*, 183 Wis. 2d 545, 198 N.W.2d 282 (1924)). The court in *Tye* relied heavily on *Baltes*, in which the court said 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 . . . ." *Tye*, 248 Wis. 2d 530, ¶ 13 (citing *Baltes*, 183 Wis. 2d at 552)

As Professor LaFave has put it, the "Oath or affirmation requirement means the information must be sworn to." 2 Wayne R. LaFave, et al., Crim. Proc. § 3.4(c) (4th ed. 2018) (footnotes omitted). "No particular ceremony is necessary to constitute the act of swearing . . . . [i]t is only necessary that something be done in the presence of the magistrate issuing

the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing." *Id.* (footnotes omitted). "[T]he 'true test' is whether the procedures followed were such 'that perjury could be charged therein is any material allegation contained therein is false.'" *Id.* (footnotes omitted).

Under Wisconsin law, a court is required to administer an oath or affirmation before a witness testifies: a witness "shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so." Wis. Stat. § 906.03(1).

The statute does not require that a court administer an oath or affirmation in any particular manner. It instead provides a model for how a court may administer an oath or affirmation. A court "may" administer an oath "substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God?" Wis. Stat. § 906.03(2). A court "may" administer an affirmation substantially "in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, and this you do under the pains and penalties of perjury." Wis. Stat. § 906.03(3). A person making an oath or affirmation "may" manifest the person's intent "by the uplifted hand." Wis. Stat. § 906.03(4).

B. The search warrant authorizing the drawing of Johnson's blood was valid because Officer Collins affirmed to Judge Nielsen that he signed the affidavit and he swore that that the information in the affidavit was true.

After Officer Collins arrested Johnson for OWI and Johnson refused the officer's request for a blood sample, Officer Collins completed and signed an affidavit setting forth information that provided probable cause for a search warrant and faxed the affidavit and warrant to Judge Nielsen. (R. 22; 63:20, 22-23.) Dispatch then conducted a three-way telephone call with the officer and the judge. (R. 63:23.) Judge Nielsen asked Officer Collins if he was swearing to the truth of the information in the affidavit: "It is your signature, and you swear all that's true; right?" (R. 32:9–10.) Officer Collins answered, "Yes, sir." (R. 32:10.) Judge Nielsen then issued a search warrant for a sample of Johnson's blood. (R. 22:5–6; 32:10.)

In its decision denying Johnson's motion to suppress the blood test results, the circuit court acknowledged that it did not administer an oath or affirmation according to the suggestions in Wis. Stat. § 906.03(2) or (3). (R. 64:17–18.) But it noted that as the Wisconsin Supreme Court recognized in *Tye*, "the oath or affirmation is a matter of substance not form." (R. 64:19–20.) And it recognized that "[t]he whole purpose of the oath or affirmation of course is exactly what subsection 1 of 906.03 says. And that is require a person to declare that they're testifying truthfully and to awaken the person's [conscience[2]] and impress on the witness's mind the duty to do so." (R. 64:17.)

[2] The transcript of the court's remarks says that Wis. Stat. § 906.03(1) operates to awaken the person's "conscientious." It seems clear that the court misspoke or the court reporter did not correctly transcribe what the court said.

The circuit court noted that Officer Collins supplied an affidavit that he signed, indicating that he had personal knowledge of the information contained in the affidavit. (R. 64:19.) The court also noted that Officer Collins "was asked whether or not the affidavit that he presented did contain his signature," and "whether he swore that everything contained in there was true." (R. 64:19.) There is no dispute that Officer Collins answered, "Yes sir." (R. 32:10.) The court recognized that Officer Collins understood the significance of swearing to the truth of his affidavit, noting that "Officer Collins is, of course, a sworn law enforcement officer himself. With many years of experience. He has taken an oath to uphold the Constitution of the United States and the Constitution of the State of Wisconsin." (R. 64:19.)

The court distinguished this case from *Tye*, where an affidavit providing probable cause was not signed, and the affiant did not swear to the truth of the information in the affidavit. The court concluded that unlike in *Tye*, "In this case, it cannot be said that there is therefore a total lack of oath or affirmation." (R. 64:20.)

The court went on to explain that it believed that even if the warrant was not supported by an oath or affirmation, the good faith exception to the exclusionary rule should apply, and the blood test results need not be suppressed. (R. 64:20–23.)

As the State will explain later in this brief, the circuit court was correct in concluding that if the oath or affirmation requirement were not satisfied in this case, the good faith exception should apply. But this Court need not address the good faith exception because the oath or affirmation requirement was satisfied.

Officer Collins' affidavit was not strictly under "oath," because when he swore to the truth of the information in his affidavit Officer Collins did not say "so help me God," as

required by Wis. Stat. § 990.01(41). But the affidavit was under affirmation, because Officer Collins swore to the truth of the information in the affidavit. Officer Collins knowingly and intentionally made a statement in an affidavit and signed the affidavit. He submitted the affidavit to a judge and swore that the information in the affidavit was true. And he understood that if he provided incorrect information, he faced a potential impact. (R. 63:23.) This was a solemn declaration, manifesting Officer Collins' intent to be bound by the statement, that he signed, and that the judge acknowledged. It was therefore a valid oath or affirmation under Wisconsin law, *Kellner*, 197 Wis. 2d at 191–92, and under the Fourth Amendment, *Gutierrez-Perez*, 337 P.3d 205, ¶ 19 (citing *Bueno–Vargas*, 383 F.3d at 1110).

By swearing to the truth of the information in his affidavit, Officer Collins satisfied the oath or affirmation requirement in the Fourth Amendment to the United States Constitution, Article I, section 11 of the Wisconsin Constitution, and Wis. Stat. § 968.12.

C. Johnson's arguments that Officer Collins did not comply with the oath or affirmation requirement are unavailing.

Johnson asserts that the warrant was improper, and the blood drawn pursuant to the warrant must be suppressed. (Johnson's Br. 16–27.) He does not dispute that there was probable cause to issue the warrant, or that Officer Collins swore to the truth of the information in his affidavit. He argues that the warrant was nonetheless improper because Officer Collins signed the affidavit at the hospital without being placed under oath. (Johnson's Br. 16–20.) Johnson also argues that he was not under oath when he swore to the truth of the information in the affidavit in his phone call with Judge Nielsen because he did not say "so help me God." (Johnson's Br. 20–27.) Johnson's arguments are unavailing.

1. Not signing the affidavit while under oath.

Johnson first argues that the affidavit Officer Collins signed at the hospital was not really an affidavit because "no one administered any oath then." (Johnson's Br. 17.) He notes that the affidavit was not notarized when Johnson signed it (Johnson's Br. 17–20), and he argues that "[t]he four corners of the affidavit do not sustain the search warrant for purposes of s. 968.12(2)." (Johnson's Br. 20) (citation omitted).

However, it makes no difference that the affidavit was not notarized when Officer Collins signed it. Under Wis. Stat. § 968.12, a person seeking a search warrant based upon an affidavit must swear to the affidavit. There is no requirement that the affidavit be notarized. "[A] sworn statement and a notarization are not synonymous; each is separate and distinct." *Kellner*, 197 Wis. 2d at 192 (citing *Koller v. Pierce County Dep't of Human Services*, 187 Wis. 2d 1, 5, 522 N.W.2d 240 (Ct. App. 1994)). "A statement may be sworn without being notarized (*e.g.* sworn testimony under § 887.01(1), STATS.), just as a statement may be notarized without being sworn (*e.g.* persons affirm their signatures on durable powers of attorney before a notary under § 243.10(1), STATS.)." *Kellner*, 197 Wis. 2d at 193 (citing *Koller*, 187 Wis. 2d at 6–7).

"[A] search warrant may be based either 'upon sworn complaint or affidavit, or [of oral] testimony recorded by a phonographic reporter.'" *Tye*, 248 Wis. 2d 530, ¶ 11 n.12 (citing Wis. Stat. § 968.12(2)). A person requesting a warrant based upon an affidavit must swear to the affidavit. Wis. Stat. § 968.12(2). There are various methods of doing so, including going before a notarial officer or a judge. A person may swear to an affidavit via telephone if a judge places the person under oath to swear to the affidavit. Wis. Stat. § 968.12(2). And an oath includes an affirmation, Wis. Stat. § 990.01(24), so a person can swear to an affidavit under affirmation. A person who takes an oath or affirmation in any of the usual forms is

"deemed to have been lawfully sworn" or affirmed for "[a]ny oath or affidavit required or authorized by law." Wis. Stat. § 887.03.

Had Officer Collins not sworn to the judge that he signed the affidavit and that the information in the affidavit was true, the warrant may not have been valid. *Tye*, 248 Wis. 2d 530, ¶ 19. But here, Office Collins affirmed to Judge Nielsen that he signed the affidavit and he swore that everything in the affidavit was true. The affidavit did not somehow violate the Wisconsin Constitution because Officer Collins signed it before his affirmation and without having it notarized.

2. Not saying "so help me God."

Johnson next argues that the search warrant was invalid because Officer Collins was placed under oath during his telephone call with Judge Nielsen. (Johnson's Br. 20–27.) Johnson does not dispute that Office Nielsen told the judge that he signed the affidavit and that he swore to the truth of the information in the affidavit. Johnson argues that because Officer Collins did not say "so help me God," he was not properly under oath. (Johnson's Br. 20–27.)

Johnson acknowledges that Officer Collins' not saying "so help me God" does not invalidate the warrant for purposes of the Fourth Amendment. He says that "Fourth Amendment jurisprudence considers this a technical error only." (Johnson's Br. 20). Johnson argues, however, that because Officer Collins did not say "so help me God," he was not under oath for purposes of the Wisconsin Constitution. (Johnson's Br. 16).

However, Article I Section 11 of the Wisconsin Constitution is materially identical to the Fourth Amendment. And the Wisconsin Supreme Court has historically "interpreted Article I, Section 11 of the Wisconsin

Constitution in accord with the Supreme Court's interpretation of the Fourth Amendment." *State v. Arias*, 2008 WI 84, ¶ 20, 311 Wis. 2d 358, 752 N.W.2d 748. And just like the United States Constitution, Wisconsin's constitution does not define "oath or affirmation" or require any reference to God for a valid oath or affirmation.

Johnson's argument is really that the search warrant in this case was invalid because it violated Wisconsin statutes. He claims that because Office Collins did not say "so help me God," he did not give an oath under Wis. Stat. § 990.01(24). (Johnson's Br. 20.) And he claims that this is a fundamental error rather than a technical one. (Johnson's Br. 21–27.)

This Court need not determine whether not saying "so help me God," is a fundamental or technical violation of Wis. Stat. § 990.01(24). It makes no difference because by swearing to the truth of his affidavit Officer Collins gave a valid affirmation. And under the United States Constitution, the Wisconsin Constitution, and the Wisconsin statutes, an affirmation providing probable cause is sufficient to support a search warrant, as explained above.

Johnson addresses affirmations in his brief only to say that "[t]here is no indication in this case officer Mark Collins chose to affirm pursuant to s. 990.01(41)." (Johnson's Br. 20.)

But Officer Collins did not have to choose an affirmation rather than an oath. The Fourth Amendment and Article I, Section 11 require an "oath or affirmation." And Wis. Stat. § 990.01(24) and (41) make clear that an oath includes an affirmation. "It is established in law that an oath is an affirmation of the truth of a statement, which renders one willfully asserting an untruth punishable for perjury." *Kellner*, 197 Wis. 2d at 191.

An oath "invokes a reference to deity." *Gutierrez-Perez*, 337 P.3d 205, ¶ 15. An affirmation does not. *Id.* Wis. Stat. § 990.01(24) recognizes that difference, requiring that an oath

"shall end with the words, 'so help me God.'" But the statute makes clear that such reference is not required because an "affirmation" may be substituted for an "oath." Wis. Stat. § 990.01(24), (41).

In *United States v. Brooks*, the court recognized that an oath requires "'a swearing to God or a revered person or thing, that one's statement is true' . . . while an 'affirmation' is a 'pledge equivalent to an oath without reference to a supreme being or to "swearing."'" 285 F.3d 1102, 1105 (8th Cir. 2002) (citing Black's Law Dictionary, 1099, 59 (7th ed. 1999)). The court addressed the requirement of an oath or affirmation requirement in a case in which a warrant was issued based on an officer's sworn affidavit made while not under oath. *Id.* at 1105. The court concluded that even of the officer was not under oath, "it is plain that his affidavit contained at the very least an affirmation of the truth of the statements in it, because it included a number of formal assertions that he was telling the truth." *Id.* at 1106.

The same is true in this case. Even if Officer Collins was not under oath, he affirmed to the judge that he had signed the warrant affidavit and he swore that everything in it was true. (R. 32:9–10.) By affirming orally to a judge that he signed the affidavit and that everything in it was true, Officer Collins was subject to perjury charges if he made those statements without believing them to be true. Wis. Stat. § 946.31(1)(c). And by signing and swearing to an affidavit that was required by law as a prerequisite for the judge to issue a search warrant, Officer Collins was subject to false swearing charges if he had made or subscribed a false statement that he did not believe was true. Wis. Stat. § 946.32(1)(a).

The affirmation by Officer Collins that he signed the affidavit and that he swore that everything in it was true, satisfied the "true test" for swearing to the truth of information, because if Officer Collins had not told the truth,

he would have been subject to charges of perjury and false swearing.

Johnson argues that omission of a swearing to God from an oath under Wis. Stat. § 906.03(2) is a fundamental defect even though this Court rejected the argument that an oath or affirmation without the words "so help me God" is invalid, in *Redner v. Berning*, 153 Wis. 2d 383, 393, 450 N.W.2d 808 (Ct. App. 1989). (Johnson's Br. 23.)

The issue in *Redner* concerned a petition for recall of a mayor. The petition required that circulators of the recall petition be placed under oath. *Id.* at 394. However, none of the oaths ended with the words "so help me God." *Id.* at 394. Redner argued that the oaths were therefore invalid under Wis. Stat. § 990.01(24). *Id.* This Court rejected that argument because "[t]he circulators were asked whether they had read the petition and affidavit of the circulator, whether they understood it, and whether they swore to it." *Id.* This Court concluded that the circulators substantially complied with the law even though they did not say "so help me God." *Id.*

Johnson argues that the situation in this case is different than the one in *Redner* because *Redner* concerned political debate, while here the issue concerns a court proceeding, which seeks the truth. (Johnson's Br. 23.) He argues that although the failure to say "so help me God" was not a fundamental error in *Redner*, it is a fundamental error in the court context. (Johnson's Br. 23.)

However, the failure of a person who is placed under oath before testifying or requesting a search warrant cannot be a fundamental error because a person is not required to take an oath in order to testify, or to provide probable cause for a search warrant. Wis. Stat. §§ 906.03; 968.12. Instead, a person can take an affirmation, which does not require saying "so help me God."

Johnson argues that saying "so help me God" is fundamental to the oath requirement because without that language, "the witness is only accountable to the statutes passed by the legislature," but with that language, "there is additional accountability through the Third Commandment." (Johnson's Br. 25.)

Even if Johnson is correct about additional accountability, not saying "so help me God" cannot be a fundamental error because, again, an affirmation rather than an oath is sufficient for a person to testify or request a warrant. Accountability to the statutes passed by the legislature is plainly sufficient to ensure that a person tell the truth.

Johnson argues that saying "so help me God" is fundamental to an oath because a person who takes an oath without that language is not subject to a perjury charge. (Johnson's Br. 23 (citing Wis. JI–Criminal 1750).)

However, Johnson points to nothing in the jury instructions for perjury or false swearing providing that a person has a defense to a charge for either perjury or false swearing if he or she did not say "so help me God" when taking an oath. Because a person is subject to perjury or false swearing charges for making a false statement after affirmation, which does not require saying "so help me God," not saying that language cannot reasonably be a defense when the person was under oath rather than affirmation.

Finally, Johnson argues that "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." (Johnson's Br. 26.)

But the United States Constitution, Wisconsin Constitution, and Wisconsin statutes all recognize that a search warrant may be issued upon probable cause supported

by "oath or affirmation." Even if an oath requires reference to a deity, that reference is not required for the issuance of a valid search warrant. What is required is "the taking of sworn testimony from the applicant and witnesses, if any . . . ." *Tye*, 248 Wis. 2d 530, ¶ 13 (citing *Baltes*, 183 Wis. 2d at 552). Officer Collins swore to Judge Nielsen that the information in his affidavit was true. And the search warrant was validly issued based upon probable cause supported by his affirmation.

III. Even if Judge Nielsen failed to administer a proper oath or affirmation to Officer Collins, suppression of the blood test results is unnecessary and inappropriate because the officer relied in good faith on the search warrant.

A. Applicable legal principles.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citations omitted). "The exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009)); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)). The exclusionary rule does not apply to all constitutional violations. *Id.* (citation omitted). Instead, "exclusion is the last resort." *Id.* (citation omitted).

The good faith exception provides that the exclusionary rule should not apply when officers act in good faith. *Id.* ¶ 36 (citing *Herring*, 555 U.S. at 142; *United States v. Leon*, 468 U.S. 897 (1984)). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such

deterrence is worth the price paid by the justice system." *Id.* (quoting *Herring*, 555 U.S. at 144). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (quoting *Herring*, 555 U.S. at 144).

The Wisconsin Supreme Court adopted the good faith exception in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The court concluded that the good faith exception applies in cases in which the officers act in "objectively reasonable reliance on settled law subsequently overruled." *Dearborn*, 327 Wis. 2d 252, ¶¶ 37, 43 (citing *Ward*, 231 Wis. 2d 723, ¶ 73). The supreme court affirmed that the good faith exception applies in Wisconsin when officers reasonably rely on clear and settled precedent, because "[a]pplication of the exclusionary rule would have absolutely no deterrent effect on officer misconduct, while at the same time coming with the cost of allowing evidence of wrongdoing to be excluded." *Id.* ¶ 44.

In *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, the supreme court applied the good faith exception to a police officer's reliance on a search warrant that was facially valid, but later found to be based on insufficient evidence. The court concluded that when an officer relies in objective good faith on a warrant issued by a judge, the good faith exception applies if the State satisfies the additional requirement of "a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 3.

B. The circuit court correctly concluded that the good faith exception applies in this case and that suppression is not required.

The circuit court concluded that even if the court failed to properly administer the oath to Officer Collins, it was the

fault of the court, not the officer. (R. 64:22.) The court concluded that suppression of the blood test results would not serve the interests of deterring law enforcement officers' misconduct, so the exclusionary rule should not apply. (R. 64:21.)

As explained above, the search warrant was valid because it was based on probable cause supported by Office Collins' affirmation. But even if that were not true, the circuit court correctly determined that evidence need not be suppressed because the officer relied in good faith on the warrant.

The police did nothing in this case that even arguably constituted misconduct. Officers Lewis and Collins investigated Johnson's OWI offense, and as the circuit court concluded, "There is no question here that [Johnson] was arrested with absolute probable cause." (R. 64:22.) Officer Collins completed and signed an affidavit, faxed it to Judge Nielsen, and affirmed to Judge Nielsen that he signed the affidavit and that information in it was true. (R. 22:1–4; 63:22–23.) And the officer then executed a facially valid warrant. (R. 22:5–6.)

Suppressing the blood test results would have no possible deterrent effect, because Officer Collins did not do anything even arguably wrong. And even if there had been officer misconduct in this case, or some conceivable deterrent effect in preventing an officer from relying on a facially valid search warrant issued by a judge, that was properly based upon probable cause, suppression would be inappropriate because of the societal impact of suppression. "[T]he benefits of deterrence must outweigh the costs." *Herring*, 555 U.S. at 141 (quoting *Leon*, 468 U.S. at 910). "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Id.* (quoting *Krull*, 480 U.S. at 352–53).

Suppressing the blood test results would likely have the effect of allowing a person who drove with an alcohol concentration that a blood test revealed to be .187, more than nine times the limit above which he could not legally drive, to escape the consequences of his actions. All because the officer was not formally placed under oath and did not say "so help me God." And even though none of Johnson's rights were violated.

C. Johnson's arguments for not applying the good faith exception are unavailing.

On appeal, Johnson argues that the good faith exception should not apply, because the State cannot satisfy the obligations that it conducted a sufficient investigation and have a search warrant application reviewed by an officer trained in probable cause and reasonable suspicion or a government attorney. (Johnson's Br. 27 (citing *Eason*, 245 Wis. 2d 206, ¶¶ 3, 63).)[3]

But here, Officer Collins conducted a sufficient investigation and had "absolute probable cause" to arrest Johnson and seek a search warrant. (R. 64:22.) And there is no dispute that the information Officer Collins put in his affidavit, and that he swore to, was easily sufficient for probable cause. Johnson has not explained what additional investigation Officer Collins could have done before applying for a search warrant. The officers spoke to Johnson, observed signs of impairment, ran his license, discovered that he had four prior OWI convictions, and administered standard field sobriety tests. Eason's significant-investigation requirement looks at the nature of focus of an investigation, not just the numbers of officers and hours involved. *State v. Marquardt*, 2005 WI 157, ¶ 54, 286 Wis. 2d 204, 705 N.W.2d 878. Here,

[3] To preserve the issue for possible supreme court review, the State contends that the *Eason* court erred by creating additional requirements for the good-faith exception.

the investigation was significant given the nature and focus of the investigation.

In any event, *Eason*'s two additional requirements—a significant investigation and review by a government attorney or police officer knowledgeable in probable cause—does not apply here. The good-faith exception to the exclusionary rule does not apply in four situations. *Marquardt*, 286 Wis. 2d 204, ¶ 25. As relevant here, two of those situations are when an affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" and when a warrant is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.* (citation omitted). *Eason*'s requirements of significant investigation and review by an officer trained in probable cause apply in cases where a defendant challenges a search warrant as lacking probable cause. *See, e.g.*, *id.* ¶ 27 (noting the issue on appeal was whether the warrant lacked probable cause, not any of the other three situations where the good-faith exception is inapplicable); *Eason*, 245 Wis. 2d 206, ¶¶ 66–67 (noting that the defendant challenged the warrant as lacking probable cause, not as being facially deficient). The good-faith exception simply does not apply "to a warrant issued on the basis of a statement that totally lacks an oath or affirmation." *Tye*, 248 Wis. 2d 530, ¶ 24. The reason why is that "[a] warrant that totally lacks an oath or affirmation is so facially deficient that reliance upon the warrant is unreasonable." *Id.* ¶ 26 (Crooks, J., concurring).

So, the issue here is whether the warrant is so facially deficient that the officers could not reasonably rely on it. In other words, the issue is whether the warrant affidavit totally lacks an oath or affirmation such that the good-faith exception would not inapplicable under *Tye*. Because Johnson does *not* argue that the officers could not reasonably rely on the warrant because it was so lacking in probable cause, it

would not make sense to look at whether Officer Collins did a significant investigation and had his warrant reviewed by an officer trained in probable cause. Those requirements would apply only if Johnson were challenging the warrant as lacking probable cause.

Officer Collins had no reason to question the validity of the search warrant. After all, the search warrant statute provides that if there is probable cause a judge "shall issue a search warrant." Wis. Stat. § 968.12(1). The statute defines a search warrant as "an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property." *Id.* And it says that "[a] judge shall issue a search warrant if probable cause is shown." *Id.* Here, Officer Collins provided information sufficient for probable cause in his affidavit, and he swore to the truth of the information to the judge. And then the judge issued the warrant. Officer Collins had no reason to question the validity of the warrant.

Johnson argues that officer Collins was at fault because he "knowingly enforce[d] a defective warrant." (Johnsons' Br. 28.) He asserts that Officer Collins knew that he did not sign the warrant under oath at the hospital and that he was not later sworn in. (Johnson's Br. 28.)

But it makes no difference that Officer Collins did not sign the affidavit under oath. Judge Nielsen asked Officer Collins if he signed the affidavit and if he swore to the truth of the information in the affidavit. Officer Collins had no reason to know whether his answer—"yes, sir"—was sufficient to constitute an oath or affirmation. A reasonable officer who had probable cause, who completed an affidavit providing that probable cause, who submitted the affidavit to a judge, and then swore to the judge that he signed the affidavit and that the information in it was true, would have no reason to doubt the validity of the resulting warrant. He

certainly would not be "knowingly enforcing a defective warrant." Because there was no police misconduct, and suppression would have no deterrent effect, the good faith exception should apply, and the blood test results should not be suppressed.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 6th day of December 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8110 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby 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).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of December 2019.

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