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

Reply Brief of Appellant

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ARGUMENT

I. Freedom To Leave Is Unreasonably Based Upon Forfeiture Of The Fast Food Contract.

The State disputes a fast food contract existed at page 6 of its brief (R.B.-6), and in any event argues Johnson could have left prior to receiving the order. This is a basic contract. Gustafson v. Physicians Ins. Co., 223 Wis. 2d 164, 173, 588 NW 2d 363 (Ct. App. 1998). Expecting Johnson to forfeit the contract to preserve Fourth Amendment rights is unreasonable. Maxey v. Redevelopment Authority of Racine, 94 Wis. 2d 375, 403, 288 NW 2d 794 (1980).

II. A S.906.03(3) Affirmation Requires The Witness Declare Conscientious Scruples Against Saying "So Help Me God".

The State construes S.990.01(41) as equating the taking of an oath with an affirmation as long as the statement is sworn to. At (R.B.-15-20) this position is based on the phrase **"you swear all that's true; right?"** The response did not declare the presence of conscientious scruples **"against taking the oath, or swearing in the usual form"** per S.906.03(3); but instead was **"Yes Sir."** The State's position omission of **"so help me God"** is moot for the reason there was an affirmation is incorrect. Use of

"so help me God" is a condition precedent to the option of an affirmation.

A witness must first decline to give an oath prior to being allowed to affirm the truth of forthcoming testimony. Officer Collins could not have affirmed anything since he did not object to taking an oath.

The difference between an oath and affirmation is described in Notary Public Information at p. 10 (13-22). **"The difference is that an oath requires swearing, (and may be understood to call upon a Supreme Being as witness), while an affirmation does not."** The repeated reference to **"swore to"** (R.B.-15-20) as the basis for an affirmation is illusory for the reason swearing and affirming are mutually exclusive. United States v. Brooks, 285 F. 3d 1102, 1105 (8th Cir. 2002).

The procedure in Wisconsin to take an affirmation instead of an oath is clear. **"If the deponent or declarer asserts 'conscientious scruples against taking the oath' then, and only then, the notary public may 'swear' the deponent or declarer in affirmation form as provided in sec. 887.04 Stats."** 60 OAG 429, 430 (1971). This procedure remains valid today as S.906.03(3) is the successor to S.887.04 Stats. In 1973 the Supreme Court replaced

S.887.04, at 59 Wis. 2d R4, with today's nearly identical S.906.03(3) at R161.

The record cannot be construed to satisfy the requirement of an affirmation for purposes of S.906.03(3), S.990.01(24) or S.990.01(41). The word **"affirmed"** was never mentioned by the court or Collins. The **"many years of experience"** never included one instance of Mark Collins having **"conscientious scruples against taking the oath or swearing in the usual form."**

At p.16 of Notary Public Information (13-28) an example of how to notarize a sworn statement asks the declarant to swear the statement is true. The witness is not initially given an option to take an affirmation. Only if the witness "… **is unwilling to 'swear' or take an oath, the party may instead 'affirm' to the truth of his or her statements…"**

The affirmation needed to support the search warrant for purposes of Article 1 §11 is fundamentally defective because it never existed. Federal cases overlooking **"so help me God"** are irrelevant since they are not based upon Chapter 734 Laws of 1951 §34, and Art 1 §11.

The State's position (R.B-21) Collins could be charged with perjury without strict compliance with S.990.01(24) is incorrect. Note 3 to WJI-Criminal 1750 says **"the form of**

the testimonial oath is described in §906.03(2) and 990.01(24)." That note goes on to refer to those who have conscientious scruples against taking the oath and S.906.03(3) sets out that form. Strict compliance with the form of the oath is required. Kellner v. Christian, 188 Wis. 2d 525, 532 n5, 525 NW 2d 286 (Ct. App. 1994).

At (R.B.-13) the State seriously understates the mandatory fundamental requirements of Chapter 734 Laws of 1951 §34 as being a **"suggestion"**. Another error is equating perjury with a court proceeding in which the witness was never sworn in (R.B.-19-20). Intent to commit perjury does not constitute perjury. United States v. Laikin, 583 F. 2d 986, 971 (7th Cir. 1978). WJI-Criminal 1750 is clear the statement must be made while under an oath or affirmation. Unless a witness is sworn in, there can be no perjury regardless of intent.

The Supreme Court in Brown v. State, 91 Wis. 245, 64 NW 749 (1895) supports the jury instruction. In that case an information alleging perjury was held to fail to state a claim.

The same shortcoming exists here for the same reason. Collins was never sworn in. **"To charge the crime of perjury, the information must at least charge that the accused was sworn and testified. These facts must be**

alleged directly and positively and not by way of inference or recital… This information does not allege that the accused was sworn at all, or that he testified at all… Surely to say being required to depose the truth, on his oath legally administered, is not equivalent to saying that he 'was sworn and took his corporal oath', as the old forms have it… It is neither a direct nor positive allegation that he was sworn." (Emphasis in original) Id p.248.

Since Officer Mark Collins was not sworn in there could be no oath or affirmation required by Art 1 §11 for a valid search warrant.

III. The Second Additional Eason Good Faith Requirement Was Not Met.

There are four Leon factors, any one of which will void a search warrant as not being obtained through good faith. The State disputes Johnson's application of the fourth Leon exception. This dispute is cumulative if Johnson succeeds on the second of the two additional Eason requirements. For the state to show good faith the first additional Eason requirement is the need for an investigation (R.B.-25). Johnson is not disputing this first factor. Johnson does rely upon the second requirement that Officer Collins obtained prior peer review of the search warrant.

At (R.B.-26) the State claims this second Eason additional requirement is not applicable. The State appears to merge the two additional Eason requirements of investigation and prior peer review into the four Leon factors. The 2005 Marquardt decision relied upon by the State did not address the second additional Eason factor. State v. Marquardt, 286 Wis. 2d 204, 219, 705 NW 2d 878, 2005 WI 157 ¶27.

There is no basis for the State to say peer review no longer applies, since Scull reaffirmed that requirement in 2015. State v. Scull, 361 Wis. 2d 288, 306,862 NW 2d 562, 2015 WI 22 ¶35.

If the search warrant was void under Art 1 §11 due to lack of oath or affirmation, it remains void due to lack of prior peer review required by Eason.

CONCLUSION

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

Respectfully submitted this 18 day of December, 2019.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is seven (7) pages.

Dated: December 18, 2019

Robert A. Kennedy, Jr.
Attorney For Appellant

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I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of §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: December 18, 2019

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CERTIFICATE OF MAILING

I certify that this reply brief together 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 18 day of December, 2019. I further certify that the brief was correctly addressed and postage was prepaid.

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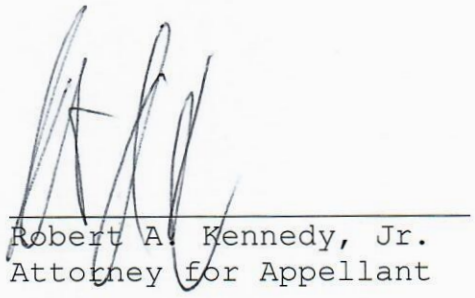

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