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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CASE NO. 2019AP002184 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

APPEAL FROM THE ORDER DENYING MOTION TO SUPPRESS BLOOD TEST, ENTERED ON NOVEMBER 15, 2019, AND THE JUDGMENT OF CONVICTION FILED ON JULY 10, 2019, THE HONORABLE ROBERT SHANNON, PRESIDING, IN THE PORTAGE COUNTY CIRCUIT COURT. PORTAGE COUNTY CASE NO. 2017CF000515

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STATEMENT OF THE ISSUE

1. Whether the results of an evidentiary blood test should be suppressed due to a failure by police to swear an oath to the truthfulness of the affidavit used to obtain the search warrant to conduct the evidentiary blood draw?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Moeser does not believe that oral argument will assist the Court in considering the issues presented in this appeal; the facts are not complex and can be sufficiently argued in brief format.

Moeser believes that publication is likely to provide needed guidance to litigants and courts throughout Wisconsin on the proper application of standards and procedures for addressing administering an oath to police/affiants in the context of OWI search warrants.

STATEMENT OF THE CASE

This case is about whether the defendant Jeffrey L. Moeser's rights under the Wisconsin and US constitutions which state a warrant must only be issued upon oath were violated when Sgt. Steve Brown of the Portage County Sheriff's Office did not swear an oath that the contents of the affidavit he drafted were true when obtaining a search warrant for a blood draw for an OWI Sixth Offense against Moeser. The circuit court denied Moeser's motion to suppress evidence based upon noncompliance with oath requirement. (R.70:35; APP061). Moeser contends herein that the circuit court's finding was erroneous because the officer's failure to swear an oath to the truthfulness of the affidavit is a violation of the oath requirement under the Wisconsin and US constitutions. Thus, the warrant is constitutionally invalid, and Moeser therefore urges this Court to reverse the circuit court's

contrary conclusion. The following facts are relevant to the Court's understanding of the issue presented herein.

On October 14, 2017, Moeser was arrested for OWI Sixth Offense by Sgt. Brown of the Portage County Sheriff's Office. (R.41:1; APP012). After Sgt. Brown read to the defendant the "informing the accused" form, the defendant refused to voluntarily consent to provide a blood sample. (*Id.*) Sgt. Brown then completed an affidavit for a search warrant to search the blood of the defendant for BAC evidence. (R.41:3; APP014). The affidavit which Sgt. Brown filled out was notarized by Lt. Wills of the Portage County Sheriff's Office and later presented to Court Commissioner Roberts who authorized a warrant to draw the defendant's blood. (*Id.*). There was an audio recording of these proceedings and Sgt. Brown does not audibly swear to the content of the affidavit. (*Id.*). Lt. Wills confirmed in reports that he followed 'established procedure' for obtaining an OWI search warrant: Lt. Wills did not administer an oath, nor did Sgt. Brown swear to the facts contained in the affidavit. (*Id.*). The State concedes that this was the established procedure of the Portage County Sheriff's Offices in obtaining OWI blood draw search warrants. (*Id.*). The State further concedes that this policy is erroneous and has reminded all law enforcement agencies in Portage County that the better practice is to administer an oral oath upon signing the affidavit in support of a search warrant. (*Id.*).

Moeser was subsequently charged with Felony Operating a Motor Vehicle While Intoxicated (6th Offense) in the Portage County Circuit Court. (R.5:1; APP004). He filed a motion to suppress blood test evidence based upon noncompliance with oath requirement. (R.38:1; APP008). The motion was heard by the Portage County Circuit Court, Branch 2, Judge Robert Shannon presiding, on June 28, 2019. (R.62:1; APP025). The circuit court denied Moeser's motion to suppress blood test evidence based upon noncompliance with oath requirement. (*Id.*). The

court based its decision on the rationale that Sgt. Brown intended to be under oath according to circumstances surrounding the signing of the affidavit and its contents and therefore Sgt. Brown was functionally under oath as he did realize that he was swearing to the truth of what he indicated in his affidavit. (R.70:34; APP060).

Moeser pled guilty to OWI Sixth Offense on July 10, 2019 and sentence was withheld as the court placed Moeser on 3 years' probation and as conditions of probation the court ordered 8 months of jail, $1,200 fine plus costs, AODA Assessment, 36 month license revocation and 36 months of Ignition Interlock Device. (R. 52:1; APP001). Moeser appeals from the court's adverse ruling on his motion to suppress evidence based upon noncompliance with oath requirement; *see* Wis. Stat. § 971.31(10). (appeal from suppression ruling viable despite guilty plea). Moeser argues herein that the blood test results should be suppressed because Sgt. Brown did not submit a sworn affidavit with the search warrant application to the court commissioner when requesting the warrant to draw Moeser's blood pursuant to the OWI Sixth Offense arrest on October 14, 2017.

ARGUMENT

I. MOESER'S BLOOD TEST RESULTS SHOULD HAVE BEEN SUPPRESSED BECAUSE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS NOT SWORN TO BY THE AFFIANT SGT. BROWN

A. Standard of Review

The Fourth and Fourteenth Amendments to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee Wisconsin citizens freedom from 'unreasonable searches and seizures.' *State v. Griffith*, 2000 WI 72, ¶ 25, 236 Wis.2d 48, 613 N.W.2d 72 (2000). The question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. *Id.* at ¶ 23. On review this, court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently. *Id.*

B. The WI and US Constitutions Require the Affidavit by Sgt. Brown be Sworn to Under Oath for a Valid Search Warrant to be Issued

A warrant authorizing a search under the Fourth Amendment must be supported by a statement under oath or affirmation. *State v. Tye*, 248 Wis.2d 530, 533, 636 N.W.2d 473 (2001). The Fourth Amendment to the US Constitution provides, in relevant part, 'that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' *Id.* The total absence of any statement under oath to support a search warrant violates the explicit oath or affirmation requirement of both the federal and state constitutions. *Id.*

The Supreme Court of Wisconsin held the Oath requirement as essential to a valid search warrant in the *Tye* decision. *Id.* at 538. The *Tye* court discusses

the history of the Oath provision to the search warrant process and cites to *State v. Baltes*, 183 Wis.2d 545, 198 N.W.282 (1924) as the authority for the longstanding proposition that a valid search warrant requires an oath or affirmation. *Id.* The failure to swear to the information upon which a warrant is obtained cannot be dismissed as a mere failure to comply with a technicality. *Id.* at 539. The oath or affirmation requirement 'is so basic to the Fourth Amendment that the court simply can't look at it as a technical irregularity not affecting the substantial rights of the defendant. *Id.*

In the instant case, Sgt. Brown of the Portage County Sheriff's Office prepared an affidavit for a search warrant to search the blood of the defendant for blood alcohol content following an OWI Sixth Offense arrest. (R.41:3; APP014). Sgt. Brown presented the affidavit to Lt. Jacob Wills of the Portage County Sheriff's Office who provided a notary signature and stamp to the affidavit. (*Id.*) At no time during this procedure was the affiant Sgt. Brown placed under oath nor did he orally swear that the contents in the affidavit were true to the best of his knowledge. (*Id.*) Thus, the affidavit used in the instant case to obtain the search warrant to draw Moeser's blood is an unsworn affidavit in violation of the Oath requirement.

In *Tye*, the facts were such that a 30-year police officer veteran drafted an affidavit for a search warrant of a residence suspected of harboring drugs. *Id.* at 534. The police officer presented the affidavit to an assistant district attorney for review and approval, the affidavit was approved. *Id.* The police officer next presented the affidavit to a Racine County Circuit Court Judge, however, the police officer failed to sign and swear to the truth of the affidavit written in support of the search warrant and failed to give sworn testimony attesting to the accuracy of the statements contained in the affidavit. *Id.* Neither the assistant district attorney involved in the initial review of the affidavit nor the circuit court judge who issued the warrant nor the police officer himself realized that the

police officer failed to make the allegations contained in the affidavit under oath. *Id.* The *Tye* court held under these facts that the affidavit was unsworn and fails to comply with the Oath requirement. *Id.* at 539. The *Tye* court next discusses the State's argument that failure to comply with the Oath requirement is a mere technicality, and denies the State's position by articulating the notion that an oath is a matter of substance, not form, and it is an essential component of the Fourth Amendment and legal proceedings. *Id. 540.* The *Tye* court held that

> The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth. 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. An oath or affirmation 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. 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. at 540-541. Here the *Tye* court describes the procedure of the Oath as a substantive procedure with its purposes serving the integrity of the process. Wis. Stat. §906.03 contains Wisconsin Rule of Evidence on administering Oaths or Affirmations to witnesses, and it states

> 1. Before testifying, every 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.
> 2. The oath may be administered 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.
> 3. Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn

> declaration or affirmation, which may be 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 thus you do under the pains and penalties of perjury.
>
> 4. The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

Wis. Stat. §906.03(1)-(4). Wisconsin rules of evidence describe how a witness is to be formally sworn, and it is this same procedure which this court should adopt as a requirement when a police officer has an affidavit notarized so that the affidavit can legally be considered a 'sworn affidavit.'

In *US v. Brooks*, 285 F.3d 1102, 1105 (2002), the Eighth Circuit US Court of Appeals held that despite the fact that the police officer (affiant) did not recall an oral oath being administered to him prior to signing the affidavit before a notary nor did he remember the notary make him raise his right hand and solemnly swear to tell the truth and nothing but the truth, the court held that the affidavit itself saying 'duly sworn' and the affiant's conduct were consistent with the intention of being under oath. *Id.* The police officer (affiant) signed the affidavit before an individual authorized to administer oaths and signed them before that individual, and he presented to a judge for signature a warrant that acknowledged that the warrant application was 'duly verified by oath or affirmation.' *Id.* The *Brooks* court held that the oath requirement was satisfied because the facts support a conclusion that the police officer (affiant) was under oath when he made the application for the warrant because he intended to undertake and did undertake that obligation by the statements that he made in his affidavit and by his attendant conduct. *Id.* The *Brooks* court held that the Federal Oath requirement can be satisfied even if the affiant is not under oath as long as the affidavit contains at the very least an affirmation of the truth of the statements in it. *Id.*

Distinguishable from *Brooks*, The *Tye* court never analyzes the affidavit to determine whether the police officer was constructively under oath. The *Tye* court dealt with an affidavit that was not signed nor sworn to by the affiant, but the court does not analyze the affidavit itself along with the actions of the police officer to determine whether there was a sufficient intent to be sworn by the affiant. The *Tye* court instead discusses at length in the opinion the importance of the oath requirement. The *Tye* court never mentions the lack of signature on the affidavit in the rationale of the opinion as the basis for the constitutional oath violation, as the focus of the constitutional violation was a total absence of any statement under oath to support a search warrant. *Tye*, 248 Wis.2d 530, 533, 636 N.W.2d 473. In *State v. Hess*, the Supreme Court of Wisconsin analyzes a case similar to *Tye*, and the *Hess* court discusses the *Tye* decision by stating

> When a warrant fails to comply with the constitutional oath or affirmation requirement, we have considered it to be 'invalid when issued.' Id., ¶ 23. In *Tye* the warrant was 'facially defective because no *sworn* affidavit was attached,'

Hess, 327 Wis.2d 524, 541, (2010). The *Hess* case involved a warrant procedure where the affiant provided no affidavit at all, and the court held that without an affidavit accompanied by oath or affirmation, the warrant failed to meet a basic constitutional requirement and was void ab initio. *Id.* at 542.

Similar to *Hess* and *Tye*, this court should find that in the instant case the failure of Sgt. Brown to swear to the truthfulness of the affidavit violates the Wisconsin and Federal constitutional requirement that a warrant should only issued upon oath.

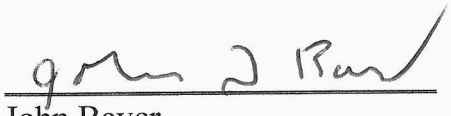
C. The Court Should Suppress the Blood Test Results

As described above, the affidavit in the instant case was unsworn and the search warrant was issued in violation of Moeser's rights in both the federal and state constitutions that a warrant only be issued upon oath or affirmation. The *Tye* court held in such a circumstance the proper remedy is suppression of evidence. *State v. Tye*, 248 Wis.2d 530, 534 (2001). The *Tye* court analyzed and rejected the State's arguments against suppression: that the failure to administer an oath is a mere technical defect; an investigator's second affidavit that is sworn but issued after the search remedies the absence of a sworn affidavit before the search; failure to administer an oath is an unintended mistake and does not vitiate the warrant and cause suppression; the good faith exception to the exclusionary rule should apply. *Id.* at 539-544. This court should follow precedent in the instant case and suppress the results of the blood test.

CONCLUSION

For the aforementioned reasons, Moeser asks this court to hold that the circuit court should have suppressed the results of the blood draw as resulting from a violation of the constitutional requirement that a warrant be issued only upon oath. He further requests that the court remand his case for proceedings consistent with this holding.

Dated at Milwaukee, Wisconsin on July 2, 2020.



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **2,057** words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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.

Respectfully submitted this 2nd day of July, 2020.

John Bayer
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

Respectfully submitted this 2nd day of July, 2020

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.40(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on July 2, 2020. I further certify that the brief will be correctly addressed and postage prepaid. Three copies will be served by the same method on ADA Robert Jambois, Portage County District Attorney's Office, 1516 Church Street, Stevens Point, WI 54481. Three copies will also be served on the Attorney General's Office, 114 E. State Capitol, PO Box 7857, Madison, WI 53707.

Dated this 2nd day of July, 2020.

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DISTRICT IV

CASE NO. 2019AP002184 - CR

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DEFENDANT-APPELLANT'S SHORT APPENDIX

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