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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP2184-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE ROBERT J. SHANNON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Defendant-Appellant Jeffrey L. Moeser entitled to the suppression of blood alcohol concentration evidence found in a blood sample drawn pursuant to an authorized search warrant?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

This case concerns the Fourth Amendment's oath or affirmation requirement. A police sergeant applied for a search warrant to obtain a sample of Moeser's blood after arresting him for his sixth OWI offense. In his supporting affidavit, the sergeant described facts establishing probable cause for Moeser's arrest and advised that the information supplied was true to the best of his knowledge. The sergeant also wrote his name alongside language indicating that he was duly sworn under oath, and he also signed his name next to a notary jurat signifying that he subscribed and swore to the document's contents.

Although it was later determined that the Notary Public failed to administer a traditional, formal oath, the sergeant's actions and the contents of the signed affidavit were sufficient to constitute an affirmation that the information supplied was true and accurate. The purpose of the oath or affirmation requirement is to instill in the affiant's mind the need to tell only the truth, and that purpose was

served under the facts of this case. Thus, the ensuing search warrant was properly authorized, the circuit court properly denied Moeser's motion to suppress the evidence resulting from the search warrant's execution, and this Court should affirm Moeser's conviction.

STATEMENT OF THE CASE

Moeser refused to submit to an evidentiary chemical test of his blood following his arrest for his sixth OWI offense. (R. 5:3; 7:3.) To secure a blood sample from Moeser, Portage County Sheriff's Office Sergeant Steve Brown prepared a search warrant and a supporting affidavit. (R. 7:1–5.) In his affidavit, Sergeant Brown summarized his professional training and experience as a police officer, and he described his observations that led to Moeser's OWI arrest.[1] (R. 7:2–4.)

At the very top of the first page of the affidavit, before describing the facts supporting probable cause, Sergeant Brown wrote his name on a blank line preceding the predicate language, "being first duly sworn on oath, deposes and says." (R. 7:2.) In the affidavit's second paragraph, Sergeant Brown advised, "I have personal knowledge that the contents of this affidavit are true and that any observations or conclusions of fellow officers referenced in this affidavit are truthful and reliable." (R. 7:2.) And, on the final page of the affidavit, Sergeant Brown signed his name alongside a jurat that read, "Subscribed and sworn to before me," followed by the date and name of the Notary Public responsible for notarizing Sergeant Brown's affidavit. (R. 7:5.)

A court commissioner authorized the search warrant, (R. 7:1), and the blood sample drawn from Moeser revealed a blood alcohol concentration of 0.220 g/100 mL, (R. 23:1). The

[1] Moeser did not argue below, nor does he now argue on appeal, that the information detailed in the search warrant affidavit was insufficient to establish probable cause.

State subsequently charged Moeser with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, each as a sixth offense. (R. 5:1–2.)

Moeser moved to suppress evidence, challenging the constitutionality of his traffic stop,[2] (R. 39), and arguing that the search warrant for his blood sample was invalid because Sergeant Brown failed to swear under oath to the contents of his prepared affidavit, (R. 38). Moeser asserted that an audio recording established that Sergeant Brown did not verbally swear under oath to Lieutenant Jacob Wills (the Notary Public who notarized Sergeant Brown's warrant affidavit) that the allegations contained in the warrant affidavit were true. (R. 38:2.) Thus, Moeser argued that the warrant affidavit was "invalid for noncompliance with the constitutional Oath requirement, and thus the search warrant is defective and in violation of the defendant's rights." (R. 38:2.)

The State filed a written response conceding that Sergeant Brown did not audibly swear to the contents of the affidavit. (R. 41:3.) The State also supplied the court with several exhibits, including a single-page police report in which Lieutenant Wills described his participation in notarizing Sergeant Brown's search warrant affidavit. (R. 42:7.) In the report, Lieutenant Wills wrote, "Following the established procedure for obtaining an OWI search warrant, I did not administer an oath, nor did Sgt. Brown swear to me the facts contained in the Affidavit." (R. 42:7.)

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[2] Moeser has abandoned his claim of an unlawful seizure on appeal. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

Despite its concessions, the State maintained that the affidavit was sufficiently sworn or affirmed. (R. 41:4.) In support, the State stressed that Sergeant Brown wrote his name alongside the affidavit language, "being first duly sworn on oath, deposes and says." (R. 41:4; 7:2.) The State also highlighted that Sergeant Brown signed the affidavit in the presence of a Notary Public who affixed a jurat indicating the contents were "[s]ubscribed and sworn to" on that date. (R. 41:4; 7:5.)

The circuit court denied Moeser's suppression motion, first in an oral ruling, (R. 70:31–34), and later in a written order, (R. 62). The court distinguished authority that Moeser presented in his motion, expressed approval of the rationale articulated by the Eighth Circuit in *Brooks*,[3] and held that "Sergeant Brown did realize that he was swearing to the truth of what he indicated in his affidavit." (R. 70:32–34.)

Moeser later entered into an agreement with the State where he pleaded guilty to sixth-offense operating while intoxicated. (R. 49:1; 71:2–4, 8.) The court ultimately withheld sentence and placed Moeser on probation for three years with various conditions, but stayed that sentence pending appeal. (R. 52; 71:17–20.)

Moeser appeals. (R. 57.)

STANDARD OF REVIEW

In reviewing the denial of a motion to suppress, this Court will uphold the circuit court's findings of fact, unless clearly erroneous, but will review de novo the court's application of constitutional principles to those facts. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277.

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[3] *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002).

ARGUMENT

The circuit court properly denied Moeser's claim of an unconstitutional, warrantless blood draw.

Moeser maintains that the affidavit supporting the search warrant to draw his blood was "an unsworn affidavit in violation of the Oath requirement." (Moeser's Br. 2.) He thereafter argues that the issuance of the search warrant in this case violated the United States and Wisconsin Constitution requirements "that a warrant only be issued upon oath or affirmation." (Moeser's Br. 6.)

He is wrong. This Court should hold, based on the contents of the search warrant affidavit, that Sergeant Brown actually or constructively swore to or affirmed the facts presented to the court commissioner in support of the challenged search warrant. This Court should also affirm because the circumstances surrounding the search warrant application impressed upon Sergeant Brown the importance of telling the truth when he supplied facts to the court commissioner, thus satisfying the constitutional protections inherent in the Fourth Amendment's oath or affirmation requirement.

A. The oath or affirmation requirement, generally

Both the United States Constitution and the Wisconsin Constitution provide that a search warrant may be issued upon probable cause supported by an oath or affirmation. 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).

"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.* 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.*

Thus, 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. 545, 198 N.W. 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. at 552).

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) (quoting *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002). 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." *Oath, Black's Law Dictionary* (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." *Affirmation, Black's Law Dictionary* (11th ed. 2019). Either an oath or an affirmation "may subject the person making it to the penalties for perjury." *Id.*

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.[4] The Fourth Amendment's "Oath or affirmation" requirement 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."

State v. Gutierrez-Perez, 337 P.3d 205, ¶ 19 (Utah 2014) (quoting *Bueno-Vargas*, 383 F.3d at 1110).

The Wisconsin Supreme Court has similarly 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

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[4] 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).

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.

According to the Wisconsin search warrant statute, 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 ch. 140 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 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).

This functional approach is consistent with hornbook law. As Professor LaFave puts it, the "Oath or affirmation requirement means the information must be sworn to." 2 Wayne R. LaFave, et al., *Criminal Procedure* § 3.4(c) (4th ed. 2018). "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.* (footnote omitted). "[T]he 'true test' is whether the procedures followed were such 'that perjury could be charged therein if any material allegation contained therein is false.'" *Id.* (footnote omitted).

B. The search warrant authorizing Moeser's blood draw was valid because Sergeant Brown affirmed to the court commissioner that the contents of his affidavit were true.

Because the very contents of Sergeant Brown's affidavit satisfied the four *Kellner* requirements, *see Kellner*, 197 Wis. 2d at 191–92, this Court should hold that Sergeant Brown sufficiently affirmed the facts contained therein so as to support the search warrant for Moeser's blood. The State addresses each requirement in turn.

The first *Kellner* requirement compelled Sergeant Brown to make "a solemn declaration." *See id*. at 191. He did that: at the very top of the first page of his signed affidavit, Sergeant Brown wrote his name alongside the predicate language, "being first duly sworn on oath, deposes and says." (R. 7:2.) By signing this document bearing this formal, official language, Sergeant Brown signaled to the court commissioner that he was not offering a flippant factual summary to a friend or colleague; he intended to make a solemn declaration, "on oath."

The second *Kellner* requirement compelled Sergeant Brown to "manifest[ ] [his] intent to be bound by [his] statement." *See Kellner*, 197 Wis. 2d at 191. He satisfied this mandate in several ways. As just explained, Sergeant Brown wrote his name alongside language demonstrating that he intended to offer facts while "duly sworn on oath." (R. 7:2.) Not

only that, he also advised that he had personal knowledge that the facts alleged were true and personally vouched for the credibility of any fellow officers or civilians who supplied additional facts. (R. 7:2.) To further stress that he intended to be held accountable for the facts presented, Sergeant Brown signed the affidavit alongside a notary jurat indicating that the document's contents were "[s]ubscribed and sworn to" on that date. (R. 7:2, 5.) Sergeant Brown intended to stand by his words and be bound by them, and the contents of his affidavit clearly demonstrate this.

The third *Kellner* requirement compelled Sergeant Brown to affix his signature to the affidavit. *See Kellner*, 197 Wis. 2d at 192. There is no question that Sergeant Brown signed his affidavit before submitting it for the court commissioner's consideration. (R. 7:5.)

Finally, the fourth *Kellner* requirement mandated an "acknowledgment by an authorized person that the oath was taken." *Kellner*, 197 Wis. 2d at 192. Lieutenant Wills made that acknowledgment. (R. 7:5.) Admittedly, when reflecting on his involvement in the search warrant application, Lieutenant Wills later stated his own personal belief that he did not administer a formal oath and that Sergeant Brown did not swear to the contents of the affidavit. (R. 42:7.)

But he was wrong in that assessment. As the State has explained above, the very contents of Sergeant Brown's affidavit that he signed, believing that he was doing so under oath, revealed that he was swearing to or affirming those facts he would later present to the court commissioner. This holds true even if he did not utter any specific words or raise his right hand contemporaneously. By affixing his name and signature to his affidavit, attesting to the fact that his observations detailed therein were true to the best of his knowledge, and submitting that document to a judicial official, Sergeant Brown took "an unequivocal and present act

by which [he] consciously [took] upon himself the obligation of an oath." *See Kellner*, 197 Wis. 2d at 192.

In that regard, the supreme court has previously held, in no ambiguous terms, "*An oath is a matter of substance, not form*, and it is an essential component of the Fourth Amendment and legal proceedings." *Tye*, 248 Wis. 2d 530, ¶ 19 (emphasis added). The essential nature of an oath or affirmation derives not from the ability to hear an affiant utter any magic words or perform any ceremonious ritual. Rather, *Tye* teaches that the Fourth Amendment significance of an oath or affirmation is "to impress upon the swearing individual an appropriate sense of obligation to tell the truth," and to "remind[ ] both the investigator seeking the search warrant and the magistrate issuing it of the importance and solemnity of the process involved." *Id*.

In *United States v. Brooks*, the Eighth Circuit echoed those same principles, recognizing that "[a]n oath or affirmation 'is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words.'" 285 F.3d at 1105 (quoting *United States v. Turner*, 558 F.2d 46, 50 (2d Cir. 1977)). It was that recognition that led the Eighth Circuit to hold that the affiant's state of mind when signing an affidavit and warrant application "ensured that the purpose of the fourth amendment's 'Oath or affirmation' requirement was fulfilled." *Id*.

Although the court opined that a better practice would be "for an affiant orally to affirm or swear before a person authorized to administer oaths," it nevertheless held that the affiant was under oath when he applied for the challenged search 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*. at 1106. Moreover, the court also concluded:

> Even if [the affiant] was not under oath, however, 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. Thus the fourth amendment was not violated by the issuance of the warrant.

Id.

Brooks is not an outlier in this regard; indeed, the *Brooks* court identified several other jurisdictions around the country that arrived at the same conclusion:

In *Atwood v. State*, the Supreme Court of Mississippi recognized, "The form of the oath is immaterial so long as it appeals to the conscience of the party making it, and binds him to speak the truth." 111 So. 865, 866 (Miss. 1927). In *Atwood*, the officer-affiant signed a search warrant affidavit in the presence of that justice of the peace, but no formal oral oath was administered, nor was the affiant required to hold up his hand to be sworn. *Id*. at 865. Both the affiant and justice of the peace knew and realized an oath was required, they considered their actions to be sufficient to comprise an oath, and the justice of the peace affixed his jurat to the affidavit. *Id*.

The Supreme Court of Mississippi held that, "by construction, what occurred amounted to the taking of the necessary oath by the affiant," and that, "Whenever the attention of the affiant is called to the fact that his statement is not mere assertion, but must be sworn to, and he is then called upon to do some corporal act, and does it, this is sufficient to constitute an oath." *Id*. at 866.

Similarly, in *State v. Douglas*, 428 P.2d 535 (Wash. 1967), the Supreme Court of Washington upheld a search warrant notwithstanding a court commissioner's failure to administer a traditional oath. In *Douglas*, a detective approached a court commissioner with an affidavit for a

search warrant that began, "[Affiant's name] being first duly sworn on oath deposes and says," and ended with a jurat, "Subscribed and sworn to before me this 19th day of January, 1966," along with the court commissioner's signature. *Douglas*, 428 P.2d at 538–39. The court commissioner later testified to a failure to administer a formal oath. *Id*. at 539.

Albeit plainly critical of the court commissioner's practice, the Supreme Court of Washington determined that "what occurred . . . amounted to the taking of the necessary oath by [the affiant]." *Id*. In arriving at its decision, the court recognized that the affiant "could be held responsible if the statements in the affidavit he signed had been false and the search warrant wrongfully issued," and went on to discuss the Supreme Court of Mississippi's analysis in *Atwood*. *Id*.

Both *Brooks* and *Douglas* also referenced *Farrow v. State*, 112 P.2d 186 (Okla. Crim. App. 1941), where the Oklahoma Court of Appeals similarly held that, where a deputy sheriff read an affidavit for a search warrant, signed it, and handed it to the justice of the peace who placed his jurat on the affidavit and issued the search warrant, the search warrant was valid as "it was understood by both parties that said acts of the deputy fulfilled the requirements as to taking an oath." *Farrow*, 112 P.2d at 190.

Undoubtedly, Sergeant Brown's affidavit contained similar assertions that he intended to swear to the contents of his prepared affidavit, and the very language of the document revealed Sergeant Brown's belief that the facts submitted for the court commissioner's consideration were true to the best of his knowledge. If any of those facts were later determined to be false, Sergeant Brown's assertions and the manner he signed and presented the affidavit to the court commissioner would lead a jury to conclude that he made a false swearing punishable under Wis. Stat. § 946.32. *See* LaFave et al., *supra*, § 3.4(c).

Consistent with the above authority, this Court should hold that Sergeant Brown, at a minimum, constructively affirmed the contents of his affidavit, and that the ensuing search warrant was therefore valid. In doing so, for the reasons articulated below, this Court should reject Moeser's unpersuasive arguments to the contrary.

Relying almost exclusively on *Tye*, Moeser insists that Sergeant Brown failed to comply with the oath or affirmation requirement when he applied for the challenged search warrant. (Moeser's Br. 1–5.) There are some glaring problems with Moeser's argument. For starters, Moeser highlights an important distinction between his case and *Tye*: the officer-affiant in *Tye* failed to sign and swear to the truth of the search warrant affidavit. (Moeser's Br. 2, 5.)

Unlike in *Tye*, where the affiant failed to sign or swear to the contents of his affidavit, Sergeant Brown *did* sign his affidavit, and he signed his name next to a jurat indicating that he was swearing to the contents of the document. (R. 7:5.) He also wrote his name alongside text indicating that he was offering the information "being first duly sworn on oath." (R. 7:2.) The facts of this case do not reveal the same "total absence of any statement under oath to support a search warrant" that drove the supreme court's decision in *Tye*. *See Tye*, 248 Wis. 2d 530, ¶ 3.

Additionally, Moeser appears to misinterpret both the issue presented in *Tye* and the supreme court's holding. He rightly admits that "[t]he Tye court never analyze[d] the affidavit to determine whether the police officer was constructively under oath." (Moeser's Br. 5.) That's true; whether the officer-affiant sufficiently swore to his affidavit was not disputed in *Tye*. The parties agreed that the affiant failed to do so in that case, so the court had no need to decide whether certain words or actions could constitute an oath or affirmation. *See id.* ¶¶ 3, 14–25. Put another way, each of the State's four justifications against evidence suppression

assumed the search warrant was void from the beginning. *See id*. ¶ 15.

Thus, the supreme court had no reason to decide whether the affiant's words or actions were sufficient to constitute an oath or affirmation. But even if the facts in *Tye* were more like those presently before this Court, it is unsurprising that the supreme court—confronted with a narrow issue concerning the appropriate remedy for a Fourth Amendment violation—declined to concoct an alternative argument not raised by the State that the affiant's words or actions constituted an oath or affirmation. Indeed, the court had no duty to abandon its neutrality to identify and develop possible alternative arguments that the State could have pursued. *See State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992).

The *Tye* court did not prescribe a specific method by which a person seeking a search warrant must swear or affirm to the contents of his affidavit. Nor did the supreme court hold that an affidavit is not sufficiently sworn or affirmed when a police officer approaches a Notary Public, presents an affidavit indicating that he offered facts having been "duly sworn under oath," and affixes his signature alongside a jurat stating that the document's contents were "subscribed and sworn to" on that date. Despite Moeser's invitation to do so, one cannot read the *Tye* decision as a rejection of arguments never addressed by the court nor raised by either party.

Moeser is equally misguided in his reliance on *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568. (Moeser's Br. 5.) Similar to *Tye*, the issue in *Hess* concerned the remedy for an assumed Fourth Amendment violation: did the good-faith exception to the exclusionary rule apply to contraband seized pursuant to an improperly granted search warrant? *Hess*, 327 Wis. 2d 524, ¶ 1.

But the parties in *Hess* agreed that the challenged search warrant was facially defective. *Id*. The supreme court explained that the challenged warrant was unsupported by oath or affirmation—an unsurprising declaration given that the circuit court issued the warrant, without sworn testimony or an affidavit, based solely on a letter from a probation agent asking that Hess be detained to accommodate a pre-sentence investigation. *See id*. ¶¶ 7–8, 22, 33–37.

Like *Tye*, *Hess* prescribed no specific manner by which an individual must swear or affirm the contents of his or her affidavit. Nor did *Hess* reject the principle embodied in *Brooks*, *Douglas*, *Atwood*, and *Farrow* that a police officer can be deemed to have sworn or affirmed the contents of an affidavit based on the circumstances surrounding the warrant application and the very words contained in the affidavit.

In sum, the circumstances surrounding the warrant application undeniably impressed upon Sergeant Brown the requirement to state the truth in his affidavit. Thus, the purpose of the oath or affirmation requirement was duly served, and Moeser's Fourth Amendment rights were therefore protected. Moeser is not entitled to the suppression of the chemical test results of his blood, the circuit court correctly denied his motion, and this Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 8th day of September 2020.

Respectfully submitted,

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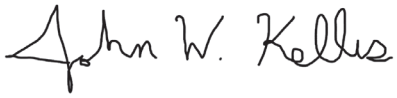

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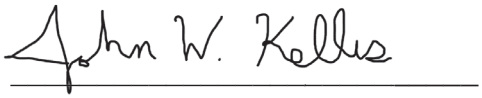
CERTIFICATION

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 4675 words.

Dated this 8th day of September 2020.



JOHN W. KELLIS
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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 8th day of September 2020.

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