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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 REPLY BRIEF

**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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ARGUMENT

I. There was No Constructive Oath Administered to Sgt. Brown for this Court to Conclude that the Affidavit Supporting the Search Warrant to Draw Blood in this Matter was ‘Sworn’ as Required under the Fourth Amendment of both the US and Wisconsin Constitutions

The State argues in its Response Brief that *Kellner v. Christian*, 197 Wis.2d 183 (1995) stands for authority that allows the court to undergo an analysis of what constitutes a constructive oath in Wisconsin law. This is a misreading of *Kellner*. The issue *Kellner* is limited as follows: “The sole issue before this court is to determine what Wis. Stat. §893.82(5) requires when it states that a written notice of claim must be ‘sworn to’ by a claimant before the claimant can bring an action against a state employee.” *Id.* at 189. The court in *Kellner* limited the issue to whether the statute dealing with how a State employee can be held liable for injuries under Wis. Stat. §893.82(5) was sworn to which is distinguishable from the issue before this court, which is whether the affidavit that Sgt. Brown supplied to obtain a warrant to search Moeser’s blood pursuant to an OWI sixth offense arrest was ‘sworn to.’ The statute in this issue is Wis. Stat. §968.12(2) which requires a person requesting a search warrant to swear to the truth of the affidavit to a notarial officer or a judge and that the judge must indicate that the person so swore to the affidavit. *See* Wis. Stat. §968.12(2). The court in *Kellner* rested its reasoning on the purpose of the statute at hand in *Kellner* which was case specific to the issue in *Kellner* and the specific statute which purposes was to ensure the Attorney General can effectively review claims against state employees in a timely and cost effective manner. *Id.* at 194.

If this court does find the reasoning in *Kellner* persuasive, the elements contained therein and argued by the State still have not been met and the court should still agree with Moeser to reverse the circuit court’s

decision and find that the affidavit in Moeser's case was not 'sworn' to. *Kellner* requires that, "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." (citing) *In re Williamson*, 43 B.R. 813, 821 (Utah 1984). *Kellner* at 191. The State asserts in its Response brief that Sgt. Brown could be found guilty by a jury for False Swearing under Wis. Stat. §946.32. This is not true as an element of the offense of False Swearing is that the State must prove that the statement was made under oath. The jury instruction committee in Criminal Jury Instructions 1754 defines in footnote 4 what is required for the State to prove an 'Oath' is that it was administered in the form as required by Wis. Stat. §906.03(2). (See *Criminal JI 1754 and footnote 4*). This is the same statute that Moeser alluded to in his Appellant Brief argument that this court should require for an officer to perform to consider an affidavit be sworn to which did not occur in this case, because the statute requires the affiant to declare: "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). This was not adhered to in this case by Sgt. Brown and therefore this court should find the affidavit was not 'sworn' to as there is no way Sgt. Brown could be found guilty by a jury of False Swearing or Perjury under the facts of this case as no Oath was administered to Sgt. Brown under Wis. Stat. §906.03(2). Additionally, for the same reason, the first *Kellner* requirement has not been met, as there was no solemn declaration made by Sgt. Brown, as there was no statement made or affirmation made with any language which would satisfy Wis. Stat. §906.03(2).

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 September 23, 2020.

A handwritten signature in black ink, appearing to read "John A. Bayer", is written over a horizontal line.

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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 736 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 23rd day of September, 2020.



John Bayer
State Bar No. 1073928

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 Three copies will also be served on the Attorney General's Office, 114 E. State Capitol, PO Box 7857, Madison, WI 53707.

Dated this 23rd day of September, 2020.

A handwritten signature in black ink, appearing to read "John D. Bayer", is written over a horizontal line.

John Bayer

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