FILED
08-24-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2019AP002184 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant.

PETITION FOR REVIEW

Respectfully Submitted:

John T. Bayer
Attorney for Defendant-Appellant
State Bar No. 1073928

BAYER LAW OFFICES
735 North Water Street, Suite 720
Milwaukee, Wisconsin 53202
Phone: (414) 434-4211
Fax: (414) 210-5272
Email: jtbayer@bayerlawoffices.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED FOR REVIEW iii

STATEMENT OF CRITERIA SUPPORTING REVIEW iii

STATEMENT OF THE CASE v

STATEMENT OF THE FACTS vii

ARGUMENT 1

I. Review of whether a police officer must swear an oath as to the truthfulness of an affidavit to obtain a search warrant to draw the blood of a suspected drunk driver is appropriate to clarify for police statewide how to remain in compliance with the US and WI constitutional requirement that a warrant only be issued upon 'Oath' 1

CONCLUSION 4

CERTIFICATIONS 6, 7

APPENDIX

TABLE OF AUTHORITIES

Cases Page

Kellner v. Christian, 197 Wis.2d 183 (1995).....2, 3

Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552 (2013).....1

State v. Moeser, No. 2019AP2184-CR, (Wis. Ct. App. June 24, 2021).....iii, vi, vii, 2, 3, 4

State v. Tye, 248 Wis.2d 530, 636 N.W.2d 473 (2001)..vi, 3, 4

Statutes and Constitutional Provisions

U.S. Const. Amend. IV ..... iii, 2

Wis. Const. art. I, § 11 ..... iii, 2

Wis. Stat. § 809.62(1r)(a) iii

Wis. Stat. § 809.62(1r)(b) iv

Wis. Stat. § 809.62(1r)(c)2 v

ISSUE PRESENTED FOR REVIEW

1. Whether the 'Oath' requirement under the Fourth Amendment of the US Constitution and Article 1, Section 11 of the Wisconsin Constitution require a police officer to swear an oath to the truthfulness of an affidavit used to obtain a search warrant to conduct an evidentiary blood draw in a criminal OWI matter?

In a two to one appellate judicial decision which is not recommended for publication, the District IV Court of Appeals affirmed the circuit court's order denying Moeser's motion to suppress blood test evidence based upon noncompliance with oath requirement. *State v. Moeser*, No. 2019AP2184-CR, ¶ 1 (Wis. Ct. App. June 24, 2021); (P-Ap. 2). The court of appeals agreed with the circuit court and held that the affidavit satisfied the requirement that search warrants be supported by oath or affirmation. *Id.*

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. The issue presented in this petition raises a real and significant issue of federal and state constitutional law in accordance with Wis. Stat. § 809.62(1r)(a).

Federal law requires under the Fourth Amendment of the US Constitution that any search warrant be issued only upon 'Oath' as does the WI constitution under Article 1, Section 11 require that every search warrant be issued only upon 'Oath.' The issue presented in this petition asks this Court to define what it means for a police officer to be placed under 'Oath' when that police officer is obtaining a search warrant to draw blood in the context of a criminal OWI matter. The context of the search warrant in an OWI arrest is unique, in the sense that the search warrant to draw blood needs to be obtained quickly as the evidence of the alcohol in the suspected drunk driver's blood is being metabolized by his body and the search warrant typically needs to be obtained in the middle of the

night as this is when the vast majority of drunk drivers are arrested at night after they have been drinking at a bar or party. Thus, the common scenario that has emerged is that the arresting police officer will draft an affidavit to support a search warrant to draw the blood of a suspected drunk driver and have the warrant notarized by a fellow police officer and then the affidavit is emailed to a judge or court commissioner and an authorized search warrant is e-mailed back to the officer or the affidavit is presented to the court commissioner or judge in the middle of the night by the notarial officer that notarized the affidavit. The affiant police officer typically never makes telephonic or personal contact with the judge or court commissioner at all and is therefore never directly 'placed under oath' or 'sworn in' by the court commissioner or judge. This type of scenario occurred in the instant case and this same exact scenario occurs with frequency in every county in Wisconsin. The issue which was raised in this case and which implicates a real and significant issue of federal and state constitutional law throughout this state is whether the notary officer needs to have the arresting officer that drafted the affidavit swear an oath as to the truthfulness of the affidavit before the affidavit is emailed or personally presented to the judge or court commissioner in order to satisfy the 'Oath' requirement under the Federal and State constitutions.

2. This petition for review demonstrates a need for the WI Supreme Court to establish a policy within its authority in accordance with Wis. Stat. § 809.62(1r)(b).

The WI Supreme Court through deciding this case can establish a policy for police state-wide on how to comply with the 'Oath' requirement under the Federal and WI Constitutions when obtaining a search warrant to draw the blood of a suspected drunk driver when the affidavit is e-mailed to the court commissioner or judge or presented to the court commissioner or judge by a non-affiant. This case raises the concern that in a vast majority of cases, police are violating the right

that people in this state have that a police officer must swear an oath to the truthfulness of an affidavit before obtaining a search warrant to draw the blood of a suspected drunk driver. The WI Supreme Court by deciding to review this case can establish a statewide policy for police conduct in this context.

3. A decision by the WI Supreme Court will help to develop the law and the question presented is a novel one, the resolution of which will have statewide impact in accordance with Wis. Stat. § 809.62(1r)(c)2.

There is no direct precedent where a Wisconsin court has decided whether a police officer must swear an oath to the truthfulness of an affidavit for the affidavit to be considered legally 'sworn' as to satisfy the constitutional Oath requirement in the context of a police officer obtaining a search warrant to draw the blood of a suspected drunk driver. A decision by the WI Supreme Court will affect police agencies statewide in how they routinely conduct the procedure in obtaining search warrants to draw the blood of suspected drunk drivers.

STATEMENT OF THE CASE

This petition arises from an appeal brought by Moeser which affirmed the circuit court in Portage County which denied Moeser's motion to suppress evidence derived from noncompliance with oath requirement. (P-Ap. 2). Moeser brought a timely appeal to the circuit court decision on the motion which was adverse to Moeser and the court of appeals decided to affirm the circuit court's order denying Moeser's motion. *Id.*

Moeser filed and argued a motion to suppress evidence derived from noncompliance with oath requirement in the Portage County circuit court before Judge Richard Shannon. (R. 38: 1-4; APP037-APP040). The motion alleged that the arresting officer, Sgt. Brown, of the Portage County Sheriff's Office, did not satisfy the 'Oath' requirement of the US and WI Constitutions

when obtaining a search warrant to draw Moeser's blood after Moeser was arrested for sixth offense OWI. *Id.* The parties stipulated for purposes of the motion hearing to the factual scenario laid out in the motion pleadings of the Defense and the State which in essence stated that Sgt. Brown drafted an affidavit to support the search warrant to draw Moeser's blood after a valid OWI Sixth Offense arrest and that Sgt. Brown had the affidavit notarized by Lt. Wills of the Portage County Sheriff's Office. (R.70:2; APP057). Lt. Wills then presented the affidavit to Portage County Court Commissioner Roberts whom authorized a search warrant to draw the blood of the defendant. *Id.* However, Sgt. Brown never swore to the truthfulness of the affidavit to the notary Lt. Wills upon the affidavit being notarized by Lt. Wills. *Id.*

Moeser argued to the circuit court in support of his motion that because Sgt. Brown did not swear to the truthfulness of the affidavit to the notary Lt. Wills upon the affidavit being notarized, that the affidavit is an unsworn affidavit. (R.70:10; APP065). Moeser argued that *State v. Tye*, 248 Wis.2d 530 (2001), supported Moeser's argument as the *Tye* case contained an unsworn affidavit to support a search warrant and the court ruled that the warrant was therefore void, and thus the warrant in Moeser's case should be declared void and the evidence resulting therefrom should be suppressed as the affidavit used to obtain Moeser's blood was not 'sworn' to. (R.70:11; APP066). The circuit court disagreed with Moeser and decided that despite the fact that Sgt. Brown never orally swore to the truthfulness of the affidavit to the notary Lt. Wills upon the affidavit being notarized, that because Sgt. Brown signed his name on the affidavit and wrote his name on the affidavit next to the pre-printed language 'I swear that the following is true' that the functional equivalent of the officer orally swearing to the truthfulness of the affidavit had occurred and thus the affidavit satisfied the constitutional 'Oath' requirement and the court denied Moeser's motion. (R.70:33-34; APP088-APP089).

Moeser brought a timely appeal to District IV of the court of appeals. The court of appeals affirmed the decision of the Portage County circuit court. *State v. Moeser*, No. 2019AP2184-CR, ¶ 1 (Wis. Ct. App. June 24, 2021); (P-Ap. 2). The court of appeals held that Sgt. Brown's affidavit satisfied the requirement that search warrants be supported by oath or affirmation. *Id.*

STATEMENT OF THE FACTS

The decision of the court of appeals provides a sufficient recitation of the facts relative to the issue to be reviewed here.

ARGUMENT

I. Review of whether a police officer must swear an oath as to the truthfulness of an affidavit to obtain a search warrant to draw the blood of a suspected drunk driver is appropriate to clarify for police statewide how to remain in compliance with the US and WI constitutional requirement that a warrant be issued only upon 'Oath'

In *Missouri v. McNeely*, 133 S.Ct. 1552, 141 (2013) the Supreme Court of the Unite States fundamentally changed the way police handle obtaining blood specimens from suspected drunk drivers that refuse voluntary consent to a blood draw by holding that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. *Id.* This fundamentally changed the way that police officers obtain blood specimens, because prior to *McNeely* a police officer did not need to obtain a search warrant to draw the blood of a suspected drunk driver that refused consent to a blood draw as the police officer simply had the right to draw the blood without a warrant under the exigency exception to the warrant requirement, the exigency being the naturally occurring rapid dissipation of alcohol in the bloodstream. After *McNeely* was decided, police officers in the State of Wisconsin are required to obtain a search warrant to draw the blood of a suspected drunk driver that refuses to voluntarily consent to a blood draw. This created the need for an efficient process to obtain search warrants quickly that occur frequently in the middle of the night, as the vast majority of the OWI arrests occur late at night or early morning hours after bars close and party's end and people are attempting to drive home. Thus, a common scenario that has emerged is that a police officer will draft an affidavit in support of the search warrant and have the affidavit notarized by another police officer and the notarized affidavit is then e-mailed to a court commissioner or judge who then can review the affidavit and e-mail back a search warrant. Another scenario, which is frequent and which occurred in the instant case, is that the arresting officer will fill out an affidavit and have the affidavit notarized and the affidavit is then presented personally for signature by the

notary officer to the court commissioner who can then review the affidavit and issue a search warrant. What is significant about both contexts is that the affiant is never personally 'sworn' in by the court commissioner or judge and never personally makes contact with the court commissioner or judge. Therefore, in both common scenarios, the officer that notarizes the affidavit is responsible for ensuring the affiant police officer swears to the truthfulness of the affidavit. This petition highlights this common scenario and asks the WI Supreme Court to establish a policy that the affiant police officer must swear an oath or affirmation to the truthfulness of the affidavit in the presence of the notary police officer in order to be in compliance with the 'Oath requirement' of the Fourth Amendment of the US Constitution and Article 1, Section 11 of the WI Constitutions.

There is no specific case law that exists in Wisconsin that answers the question of whether or not when a police officer that fills out an affidavit and has the affidavit notarized by another police officer but never directly swears to the truthfulness of the affidavit to the notary that in this context the court must examine certain factors to decide whether the affidavit is constructively under oath or not in order to satisfy the constitutional 'Oath' requirement. The majority in the court of appeals decision in the instant case decided that even though the affiant Sgt. Brown never directly swore to the truthfulness of the affidavit that the court should analyze the affidavit to see if it is constructively 'sworn' and the court based its decision largely on the reasoning from *Kellner v. Christian*, 197 Wis.2d 183 (1995). Moeser believes that the court's reliance on *Kellner* was misplaced. The court of appeals in *State v. Moeser*, No. 2019AP2184-CR (Wis.Ct. App. June 24, 2021) states on ¶21 of its opinion that the four factors articulated in *Kellner* are used to determine whether an oath or affirmation occurred in the context of swearing to the contents of a written document, which is the issue in the instant case. *Id.* at ¶21. But the issue in *Kellner* was not the same issue in the instant case. The instant case involves an interpretation of the Oath requirement in both the Wisconsin and US constitutions and whether it requires an affiant to orally swear to the contents of an affidavit in order to procure a search warrant. The reasoning in *Kellner* should not even be considered persuasive because the factual reality of

Kellner is distinguishable from the instant case, as *Kellner* dealt with the issue of how to efficiently review notices of claims for liability against state employees and the plaintiffs in *Kellner* did in fact orally swear to the truthfulness of the document, they just never had proof of the oath in the written document: "Plaintiffs argue that they orally swore to their notices when their attorney asked them whether the contents were true and accurate to the best of their knowledge. Therefore, plaintiffs assert that, because an oral swearing took place, they satisfactorily complied with the swearing requirement of the statute." *Kellner*, 197 Wis.2d. 183, 193-194 (1995).

So the facts of *Kellner* are completely opposed to the instant case, and the *Kellner* court decided that an oral 'oath' was not sufficient in the context of the case because of public policy reasons regarding efficient disposal of claims against state employees, as the Attorney General's office must review these claims and therefore monetary efficiency was a major policy decision which the *Kellner* court factored in to its decision: "We disagree for several reasons. First adopting such an interpretation would hinder the express purposes of the statute…These purposes are reinforced by requiring evidence on the face of the notice that the claimant has sworn to its contents." *Id.* at 194. Therefore, the court of appeals' reliance on *Kellner* is misplaced and this court should revisit this opinion as the Federal and Wisconsin constitutions do require the affiant to swear an oral oath that the contents of the affidavit are true in the context of a search warrant.

Moeser asserts that in the search warrant OWI context an affiant must swear to the truthfulness of the affidavit to the notary as without this action under Wisconsin law the affiant cannot be charged and convicted of perjury or false swearing for lying on the affidavit. The court of appeals in *State v. Moeser*, No. 2019AP2184-CR (Wis.Ct. App. June 24, 2021) states on ¶16 of the opinion that *State v. Tye*, 248 Wis.2d 530 (2001), interprets the constitutional oath requirement as essential to the warrant process because it protects the accused 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.* (¶ 19 of *Tye).* The court of appeals never addresses in its opinion

whether the officer in the instant case could actually be charged with the crimes of perjury or false swearing had he in fact lied in the affidavit. The foreign case law cited by the court of appeals in its decisions that allows constructive oaths for affidavits supporting search warrants for the most part allows the constructive oath because the affiant can be charged with perjury or false swearing if the affidavit turned out to be premised on a lie. *State v. Moeser*, No. 2019AP2184-CR (Wis.Ct. App. June 24, 2021) at ¶ 30. Moeser argues here that an affiant police officer in this context in WI that did not swear to the truthfulness of the affidavit cannot be charged with perjury or false swearing because these crimes require the State to prove that an oath was administered under Wis. Stat. §906.03(2). (*See Criminal JI 1754 and footnote 4).* There is simply no way for a prosecutor in Wisconsin to prevail on a charge of perjury or false swearing for lying on an affidavit to obtain a search warrant under Wisconsin law by arguing to a judge or jury that there was a constructive oath administered because that officer signed his name on a pre-printed affidavit template and had the affidavit template notarized, which is the facts in the instant case. The WI Jury Instruction 1754 footnote 4 suggests that the State must prove the affiant was administered an oath under Wis. Stat. §906.03(2) in order to proceed on a charge of perjury or false swearing. Therefore, because there is not an outlet under Wisconsin law for holding an officer accountable for lying on an affidavit when that officer simply signs his name on an affidavit and has it notarized, this WI Supreme Court should take this case and clarify that a constructive oath is not appropriate in this context to satisfy the constitutional 'Oath' requirement and articulate for officers across the State of Wisconsin what is required to satisfy the 'Oath' requirement of the WI and US Constitutions in the context of obtaining a search warrant to draw the blood of a suspected drunk driver.

CONCLUSION

For the aforementioned reasons, this Court should grant review of the issue presented.

Dated at Milwaukee, Wisconsin on August 19, 2021.

John Bayer
State Bar No. 1072928
Bayer Law Offices
735 N. Water Street, Suite 720
Milwaukee, Wisconsin 53202
Tel: (414) 434-4211
Fax: (414) 210-5272
Email: jtbayerlaw@gmail.com

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 petition produced with a proportional serif font. The length of this brief is **3,022** 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 19th day of August, 2021.

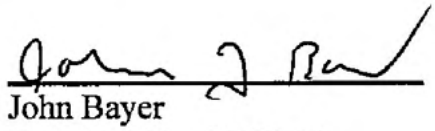
John Bayer
State Bar No. 1073928

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) the findings or opinions of the circuit court; and (3) 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the finding of fact and conclusions of law, if any, and final decision of the administrative agency.

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 19th day of August, 2021



John Bayer
State Bar No. 1073928