

FILED
09-27-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2019AP2184-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. MOESER,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN W. KELLIS
Assistant Attorney General
State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
(608) 294-2907 (Fax)
kellisjw@doj.state.wi.us

INTRODUCTION

Petitioner Jeffrey L. Moeser seeks review of a decision of the court of appeals that affirmed a judgment convicting him of operating a motor vehicle while intoxicated as a sixth offense. *State of Wisconsin v. Jeffrey L. Moeser*, Case No. 2019AP2184-CR, 2021 WL 2589158 (Wis. Ct. App. June 24, 2021) (unpublished). (Pet-App. 1–32.) For the reasons stated in this response, the State opposes the petition for review. Review by this Court is unnecessary because the issue Moeser frames—whether a police officer must swear to or affirm that information offered in support of a search warrant is true—is already clear; Moeser simply takes issue with the fact that the officer who applied for a search warrant in his case did not express his affirmation through a formulaic ceremony. This Court should deny Moeser’s petition, accordingly.

BACKGROUND

In October 2017, Sergeant Steve Brown arrested Moeser for operating a motor vehicle while intoxicated as a sixth offense. (Pet-App. 2.) After Moeser refused to consent to a blood draw, Sergeant Brown prepared a search warrant and supporting affidavit. (Pet-App. 2.)

In that affidavit, Sergeant Brown wrote his name on a blank space alongside the phrase, “being first duly sworn on oath, deposes and says.” (Pet-App. 2.) In the affidavit’s second paragraph, Sergeant Brown claimed, “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.” (Pet-App. 2.) Near the affidavit’s end, Sergeant Brown signed the affidavit alongside a notary jurat that read, “Subscribed and sworn to before me.” (Pet-App. 2–3.) A Notary Public signed the jurat and affixed his notary seal. (Pet-App. 3.)

Sergeant Brown presented the search warrant and supporting affidavit to a court commissioner, but he made no additional oral statement attesting to the truth of the affidavit's contents to the Notary Public or the commissioner. (Pet-App. 3.) Moeser's blood was drawn pursuant to that search warrant, and he later moved to suppress his blood alcohol concentration results, arguing that the search warrant for his blood did not satisfy constitutional requirements because Sergeant Brown did not formally and orally swear to the truth of the affidavit's contents. (Pet-App. 3.)

The circuit court denied Moeser's motion. (Pet-App. 5.) Citing *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002), the court reasoned that the affidavit's contents revealed that Sergeant Brown swore to the truth of the information offered therein. (Pet-App. 5.) Moeser subsequently appealed his conviction entered pursuant to a guilty plea, renewing the same argument that the oath or affirmation requirements of the United States and Wisconsin Constitutions were not satisfied because Sergeant Brown was never placed under oath, nor did he orally swear to facts alleged in his affidavit. (Pet-App. 5–6.)

The court of appeals affirmed, concluding that “the search warrant was supported by [Sergeant] Brown's oath or affirmation that the statements in his affidavit were true.” (Pet-App. 11.) Applying the factors outlined in *Kellner v. Christian*, 197 Wis. 2d 183, 539 N.W.2d 685 (1995), the court concluded that Sergeant Brown's affidavit “contained the requisite oath or affirmance in support of the warrant issued in this case.” (Pet-App. 12–13.)

The court also distinguished two cases relied upon by Moeser: *State v. Tye*, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, and *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568. (Pet-App. 13–14.) The court observed that there was a “total absence of any statement under oath” in

Tye, whereas the affidavit in Moeser’s case contained “numerous indicia of [Sergeant] Brown’s intent to swear or affirm to the truth of the affidavit’s contents.” (Pet-App. 13.) Even more factually dissimilar to Moeser’s case, the court observed that the arrest warrant in *Hess* “was not supported by any affidavit whatsoever, whether sworn or unsworn.” (Pet-App. 14.)

Finally, the court of appeals examined persuasive authority from numerous other jurisdictions, each of which upheld search warrants where no formal oath or affirmation ceremony was conducted. (Pet-App. 15–18.)

Writing in dissent, Judge JoAnne Kloppenburg would have reversed the circuit court’s decision and held that the search warrant for Moeser’s blood was void. (Pet-App. 20–32.)

DISCUSSION

Review is not warranted in this case.

This Court grants petitions for review “only when special and important reasons are presented.” Wis. Stat. § (Rule) 809.62(1r). Moeser contends that review is warranted to address a real and significant issue of federal and state constitutional law under Wis. Stat. § (Rule) 809.62(1r)(a), to establish policy under Wis. Stat. § (Rule) 809.62(1r)(b), and to develop the law concerning a question of statewide impact under Wis. Stat. § (Rule) 809.62(1r)(c). (Pet. 4–6.) As the State explains below, he is wrong in all three respects.

Beginning with his first and second justification, there is no need for this Court to grant review “to define what it means for a police officer to be placed under ‘Oath’” or to establish some sort of state-wide policy dictating a specific procedure by which a constitutional oath or affirmation is administered. (Pet. 4–6.) By previously rejecting the notion that an oath is a matter of form over substance, this Court has already clarified that the requirement’s importance

derives not from specific language by which the oath or affirmation is administered but by its underlying purpose: impressing upon the affiant and magistrate the importance and solemnity of the warrant application process. *Tye*, 248 Wis. 2d 530, ¶¶ 18–19.

Here, the court of appeals properly recognized that Sergeant Brown’s affidavit served that interest. (Pet-App. 12–13.) In that regard, the court of appeals astutely observed that Sergeant Brown made a “solemn declaration” by signing his name alongside language indicating that he was duly sworn on oath, and he manifested his intent to be bound by his statement in several ways, including his explicit assurance that he had personal knowledge that the affidavit’s contents were true. (Pet-App. 12.) Simply put, Sergeant Brown made clear that his affidavit’s contents were true and that he stood by them, and there is no need for this Court to grant review to establish a policy prescribing a formulaic script by which an officer in Sergeant Brown’s position must attest to the validity of his affidavit’s contents.

Turning to Moeser’s third justification, there is no need for this Court to grant review to develop the law. (Pet. 6.) In effect, Moeser’s pitch for law development is merely a rehashing of his preceding arguments; he simply wants this Court to impose a statewide procedure by which officers must swear to or affirm the contents of a search warrant affidavit. (See Pet. 6.) As explained above, however, Moeser’s case does not present a need for this Court to micromanage police agencies and court officials by prescribing a specific procedure to ensure that search warrant applicants understand that they must tell the truth.

Finally, even though Moeser presents no persuasive reason for further review, this Court should also deny Moeser’s petition because the court of appeals’ decision was soundly supported by the authority cited therein. While Moeser criticizes the court’s application of *Kellner*, he offers

no persuasive reason why the *Kellner* considerations are not instructive when deciding whether an individual has properly sworn to or affirmed document's contents under Wisconsin law; he just points out differences in the context by which the courts assessed whether an individual made the requisite oath or affirmation. (*See* Pet. 10–12.)

However, the court of appeals made no attempt to hide the differences in context underlying *Kellner* and Moeser's case. (*See* Pet-App. 12.) It merely recognized that the four factors laid out in *Kellner* were used to determine whether an oath or affirmation occurred in the context of swearing to the contents of a written document. (Pet-App. 12.) And given that both *Kellner* and Moeser's case required a court to assess whether an oath or affirmation occurred, it should come as no surprise to Moeser that the court employed a test that this Court had already developed.

In sum, the court of appeals correctly determined that the oath or affirmation requirement was satisfied when police secured a search warrant for Moeser's blood. Moeser's call for this Court to impose arbitrary rules governing how an oath or affirmation is administered does not undermine that simple conclusion.

CONCLUSION

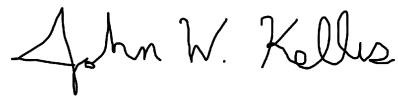
The court of appeals correctly affirmed Moeser's judgment of conviction, and further review by this Court is unnecessary and unwarranted.

Dated this 27th day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL

Attorney General of Wisconsin

A handwritten signature in black ink that reads "John W. Kellis". The signature is written in a cursive style with a large initial 'J' and 'K'.

JOHN W. KELLIS

Assistant Attorney General

State Bar #1083400

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 266-7081

(608) 294-2907 (Fax)

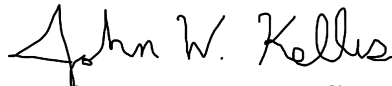
kellisjw@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 1,409 words.

Dated this 27th day of September 2021.

Respectfully submitted,



JOHN W. KELLIS

Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULE) 809.19(12)
and 809.62(4)(b) (2019–20)**

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

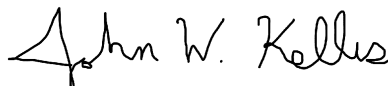
I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 27th day of September 2021.

Respectfully submitted,



JOHN W. KELLIS

Assistant Attorney General

