STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2022AP000204-CR
CIRCUIT COURT NO. 2019CT481

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD A. WHITAKER,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE DECISION OF
THE HONORABLE KRISTINE E. DRETTWAN, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH III

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STATEMENT OF THE ISSUES

1) Did the search warrant procedure used to obtain Whitaker's blood comply with statutory and constitutional requirements?

The trial court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that the briefs of the parties will set forth well-established legal authority governing the issues presented. Resolution of the issues in this case requires only application of these established legal principles to the particular facts of this case. The State therefore requests neither oral argument nor publication.

STATEMENT OF FACTS RELEVANT TO THE SUPPRESSION HEARING

On June 25, 2019, Sergeant Goetsch was on duty in full uniform serving as a sworn police sergeant for the Village of Fontana in Walworth County, Wisconsin (R45:4-6). At approximately 7:33 p.m., Sergeant Goetsch was parked at the Village parking lot when he observed a pickup truck traveling on Reid Street towing a boat (R45:5-6). In the boat that was being trailered by the pickup truck was an adult male and juvenile male subject, who were waiving their hands at Sergeant Goetsch (R45:6). Sergeant Goetsch activated the squad emergency lights and conducted a traffic stop on the vehicle (R45:6). Sergeant Goetsch made

contact with the driver of the vehicle, who was identified by his photo driver's license as Donald A. Whitaker (R45:7).

Sergeant Goetsch subsequently placed Whitaker under arrest for operating a motor vehicle while under the influence and read Whitaker the Informing the Accused form at approximately 8:15 p.m. (R45:10; R4:3). Whitaker refused to provide an evidentiary sample of his blood (R4:3). After Whitaker's refusal, Sergeant Goetsch completed the necessary information for the blood search warrant and affidavit (R45:11, 15).

Sergeant Goetsch explained the procedure for obtaining an after-hours search warrant:

> We complete an affidavit, a warrant, with all the information from the current incident and then we have to e-mail it to an on-call Judge e-mail address and after we e-mail that address we call the on-duty judge cell phone and a judge will answer the phone, review the e-mail with the affidavit and warrant. He directs you to raise your right hand. You have to swear to the accuracy of everything on the warrant and then he'll direct you on where to sign the officer's name and he'll direct you to print his name or her name in certain spots and they physically will direct you which line to put the information on.

R45:11. Sergeant Goetsch testified that this procedure was followed with Judge David M. Reddy, who was the Judge on call the evening of this incident (R45:11-18).

Sergeant Goetsch e-mailed the warrant and affidavit to the on-call judge for his review (R45:15-16). Sergeant Goetsch then called Judge David M. Reddy, whom Sergeant Goetsch is familiar with, and advised him that Sergeant Goetsch had completed a search warrant for an OWI blood draw involving a juvenile (R45:12, 16, 31, 33). Sergeant Goetsch testified that "there was nothing discussed [with Judge Reddy concerning the case] besides the fact that I told him it was an impaired driver with a juvenile" (R45:33). After Judge Reddy reviewed the search warrant and affidavit, Judge Reddy had Sergeant Goetsch swear to the fact that everything in the search warrant was true and accurate (R45:16-17). Sergeant Goetsch raised his right hand and swore to the affidavit and search warrant (R45:16). After swearing Sergeant Goetsch, Judge Reddy told Sergeant Goetsch to sign the search warrant and affidavit and serve the warrant on Whitaker (R45:16). Judge Reddy instructed Sergeant Goetsch to hand write Judge Reddy's signature on the form (R45:13, 16-17).

Sergeant Goetsch then transported Whitaker to the hospital where Sergeant Goetsch observed blood samples collected from Whitaker at 9:00 p.m. (R4:3).

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence adduced at the suppression hearing, the trial court found that the procedure used to obtain Whitaker's blood in this case was proper. Specifically, the Court stated:

> In terms of the second motion, which is challenging the sufficiency of the process by which the warrant – his blood was obtained. First of all, as the parties awhile back Mr. Whitaker was represented by Attorney Lettenberger. I had already heard and ruled on a motion with regard to the search warrant, the sufficiency of the affidavit, and a Franks-Mann motion that was made in that regard. And so I certainly incorporate the decision into – I made at that time into this decision as well. In terms of finding of fact of what took place with regard to obtaining the warrant in this case, because this particular challenge isn't necessarily with regard to the sufficiency of the warrant. Because, again, I've already addressed and ruled on that. This one is just a bubble off to the side which is addressing the legitimacy of the process, so legality of the process by which the warrant was obtained.[1]
>
> First of all, I'm going to take judicial notice of how search warrants are obtained. In Walworth County after hours or even, quite frankly, we've started doing it this way during business hours ever since Covid-19 when everything shut down back in March of this year. The Court's policy dictated to by our Supreme Court in terms of limiting in-person contact meant that we need to look at that across the board and we started implementing the after-hour procedures into business hours as well as just to limit the amount of contacts everyone had to have. So my point is that policy that is in place and it has been for years, and I had mentioned that during my decision in the previous search

[1] Whitaker does not appeal Judge Drettwan's ruling that despite any inaccurate information, the search warrant affidavit provides probable cause to search.

warrant challenge as well, and I would incorporate that herein again.

The officer prepares an affidavit and a search warrant. The officer then calls the on-duty judge or commissioner; that Court official directs the officer to send the affidavit and warrant via e-mail. The Court official reviews it. If it is sufficient the Court officer swears the officer – and by Court officer, again, what I mean is a Judge or a commissioner, swears the law enforcement officer in over the phone. Raise your right hand. Do you solemnly swear the information in this affidavit and warrant are true and accurate to the best of your knowledge and belief so help you God. The officer then acknowledges that oath. At that point the court official directs the officer to first sign their name as the affiant on the affiant signature line to the affidavit. Next directs the officer to date the notary portion on the affidavit, to sign or print the Court official's name there. And if there is a section there that's already printed out that says signed at the direction of the above-named Court official then that box gest checked. If there isn't, that section there we direct the officer to write next to the Court official's name as the notary or the one who has sworn him, I should say signed at the direction of the Court. And then next to that writes the officer's name unless it says the automatic check box, which is affiant signed this at the direction of the Court official. The Court official then directs the officer if there is a spot at the top of the warrant to fill in the Court official's name, write it in. At the bottom of the warrant to – on the Court official signature line – to write that official's name, and then, again, either next to it write signed at the direction of the Court with the officer's signature next to that, or check the box below it that says, affiant signed the above Court officer's name at the direction of the Court. We then direct them to on the endorsement to sign their name, to put in the date and we direct them as to the time that the warrant is being authorized. So I am taking judicial notice of that process; that is

one that we have had in effect for years and that I, as well as the other three judges and our two full-time court commissioners are too familiar with. We take turns being on call. So with regard to the findings for this particular case and whether this procedure was complied with, the testimony of the officer is that he prepared the affidavit and warrant. He e-mailed it to the on-call Judge. He then called the Judge's phone, and it was Judge Reddy. He put in his report that he informed him of the incident and that to the best of his recollection that just meant telling him it was an O.W.I. involving a juvenile. He doesn't recall what was said specifically but that it was not much. Just a quick information about what the violation was. He doesn't believe anything else was discussed. He stated that Judge Reddy administered the oath to him over the phone. He then signed it and signed the paperwork as he testified is the process. He admitted during cross-examination that he made mistakes with regard to the affidavit, Section 9, and that he did not put in the admission's section, which is Paragraph 11 of the affidavit, that the defendant says the four beers were over the day or over the course of the day. Like I said, I've already ruled on the problems in the affidavit in terms of Section 9. I'm not readdressing that. So when I then review both our procedure here in Walworth County that has pretty much been in effect since McNeely came down, and I compare it also to the testimony of what the officer did in this case, and my review of Exhibit 1, which clearly I have seen before as part of the Court file. I do find that our procedure and the way it was executed by Sergeant Goetsch and Judge Reddy was in accordance to law under 968.12(2). A search warrant may be based upon sworn complaint or affidavit showing probable cause therefore. There is no requirement there that testimony be recorded under (3) when you have a sworn complaint or affidavit showing probable cause therefore. The complaint or affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under Section 706 to take

acknowledgement; that does not apply here. Or before a Judge, or a Judge may place a person under oath via telephone without the requirement of fact-to-face contact to swear to the complaint or affidavit; that's what happened here. That's what our policy is and that's what happened here. Judge Reddy put Sergeant Goetsch under oath over the telephone and swore him in on that affidavit and it was based on probable cause. I have already made my finding with regard to the probable cause at that previous hearing. Section 2 completes by stating the Judge shall indicated on the search warrant that the person so swore to the complaint or affidavit. Well, that's on – if I can find it here – it's on the first page of the actual warrant itself. It's in the first paragraph. Whereas, the Court has reviewed the affidavit of Derrick Goetsch, who is a Sergeant of the Fontana Police Department, in support of this search warrant, who has this day complained to said Court upon oath that the following person is – and it goes on.

So the requirement for Number 2 – excuse me – 968.12(2) is clearly met. The Court then looks to (5) which is with regard to signatures. A person requesting a warrant and a Judge issuing a warrant may sign by using an electronic signature, a handwritten signature, or a handwritten signature that is electronically imaged. What happens here is the officer has the original search warrant in front of him. The Court officer, official judge, has the electronic copy on an e-mail in front of him or her which they are reviewing at the same time the officer is sworn in directed by the judge to sign his name, to sign the judge's name, to note the time, to note that this was at the direction of the Court; this I think squarely fits in with a handwritten signature.

I know that the state in their brief talks about the electronic portion of this. They recite to a number of statutes that allow electronic transfer of signatures, et cetera. I'm not sure I even need to go that deep here. There is no requirement under this process nor under the way

this warrant was obtained for this defendant that required it to be voice recorded or transcribed and I think that the defense puts way too much emphasis or concern on the fact that the sergeant said when he called the Judge he informed him of the incident. The officer testified as to what that meant. I think it's is a bit naïve, and he certainly recognized that Mr. Melowski is an experienced defense attorney, but I think it's a bit naïve to think that when an officer comes to a Judge for a search warrant, whether it's in chambers, whether it's in the courtroom fact to face, or whether it's over the telephone that there is not some exchange of pleasantries. Hey, how are you doing. Yeah, I got a search warrant for you. Yeah, I pulled over a guy, it's an O.W.I. and he had a kid in the trailer or something like that; that's just common sense. And the officer certainly did not testify that there was some sort of super secret information imparted that swayed Judge Reddy to the point where he issued this search warrant even though there wasn't probable cause in the affidavit; that's not the case here. So I don't think there was any reason here that this interchange over the telephone that it is required by statute or by the constitutional protections of the Fourth Amendment to be recorded. I also think that the Tate case here, although it had to do with a different type of warrant, it was for a – to track a cell phone. Tate – it's 357 Wis. 2d 172, and it's a Supreme Court case from 19 – from 2014.

What that case discusses amongst other things is the idea that the search warrant that was issued by the Judge in this case complied with the spirit of statute 968.12 because the search warrant expresses legislative choices about procedure to employ for warrants. In fact, Tate stated that to be constitutionally sufficient a warrant must be based on probable cause and be reasonable both in its issuance and in its execution. This is not a situation such as the Tye case relied upon by the defense – T-y-e – which was a situation where the affidavit was not properly sworn and signed off to by an officer;

> that's not the situation. We have to, absolutely, the Court agrees that an affidavit needs to contain probable cause and that it needs to be properly sworn to in front of either a Judge or a notary or some other – a commissioner – absolutely – and that took place here. And it took place within the parameters of 968.12. And just like Tate said, even if it wasn't spot on, it complies with the spirit of the search warrant statute and it absolutely complies with the Fourth Amendment. So for those reasons I am denying the defense's motion in that regard as well.

R45:54-63.

ARGUMENT

Whitaker now argues that the drawing of his blood violated his constitutional rights. As the State will demonstrate, however, the drawing of Whitaker's blood under the facts of this case was constitutionally valid.

I. Drawing Whitaker's Blood Pursuant To His Arrest For Drunk Driving Was Constitutionally Valid And Complied With Wis. Stat. § 968.12(2).

A. Standard Of Review.

When a suppression motion is reviewed, the circuit court's finding of fact will be sustained unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825, 828 (Ct. App. 1995). However, whether a government search passes constitutional muster is a question of law subject to de novo review. *Id*. "Suppression is only required when evidence has been obtained in violation of a defendant's constitutional rights or if a

statute specifically provides for the suppression remedy." *State v. Raflik,* 2001 WI 129, ¶ 15, 248 Wis. 2d 593, 636 N.W.2d 690 (citation omitted). There is no statutory provision for suppression as a remedy for failure to comply with Wis. Stat. § 968.12, which governs the issuance of search warrants. Therefore, the court must only consider whether the alleged failure to comply with the statutory procedure violated a constitutional right. *Raflik,* 248 Wis. 2d 593, ¶ 15, 636 N.W.2d 690.

B. The Procedure Used To Obtain The Search Warrant For Whitaker's Blood Was Proper.

Both the United States Constitution and the Wisconsin Constitution provide that no warrant shall issue, but upon probable cause, supported by oath or affirmation. This is codified in the Wisconsin statues under Wis. Stat. §968.12(1) & (2), which provides:

> Search warrant. (1) Description and issuance. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.
>
> (2) Warrant upon affidavit. 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 therefore.** The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint

> or affidavit before a notarial officer authorized under ch. 140 to take acknowledgments or before a judge, **or 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.** The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit.

[Emphasis Added].

In this case, after Judge Reddy reviewed the search warrant and affidavit, which had been emailed to him, he had Sergeant Goetsch swear to the fact that everything in the search warrant was true and accurate over the telephone. Whitaker now appears to argue that there is no legislative mandate in the state of Wisconsin that allows a person to swear to a search warrant affidavit telephonically without being recorded. Whitaker, however, is mistaken.

Wis. Stats. §§ 968.12 (2), 137.19, 990.01(24) and 990.01(38) give the court authority to electronically swear out a search warrant affidavit. Wis. Stat. § 137.19 provides:

> **Notarization and acknowledgement.** If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to administer the oath or to make the notarization, acknowledgment, or verification, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Wis. Stat. § 137.12 states that this subchapter, except as otherwise provided, applies to electronic records and electronic signatures relating to a transaction. Wis. Stat. § 137.11(15) defines a transaction as "an action or set of actions occurring between 2 or more persons relating to the conduct of business, commercial, or governmental affairs." The statute further lists exceptions to the applicability to Wis. Stat. § 137.12, none of which apply to a criminal search warrant. Wis. Stat. § 137.21 also states that "a record or signature may not be excluded as evidence solely because it is in electronic form."

Wis. Stat. § 990.01(24) further provides in relevant part that "in actions and proceedings in the courts, a person may take an oath or affirmation in communication with the administering officer by telephone or audiovisual means." Wis. Stat. § 990.01(38) also states:

> If the signature of any person is required by law it shall always be the handwriting of such person or, if the person is unable to write, the person's mark or the person's name written by some other person at the person's request and in the person's presence, or, subject to any applicable requirements under subch. II of ch. 137, the electronic signature of the person.

Therefore, Wis. Stat. § 968.12 (2), 137.19, 990.01(24) and 990.01(38) give the court authority to swear out a search warrant affidavit by the means used in this case.

In addition, contrary to Whitaker's assertion, simply because a telephone was used during the warrant procedure does not automatically mean that any conversation with the Judge must be recorded. Subsection (2) of Wis. Stat. § 968.12 has no such requirement regardless of whether the search warrant was sworn to and signed in the physical presence of a Judge, or as in this case, over the telephone. Instead, memorializing probable cause for a search warrant can be accomplished through a sworn complaint or affidavit – as was done in this case, testimony recorded by a phonographic reporter, or by recording the telephone sworn testimony supporting the warrant. *See* Wis. Stat. § 968.12(2) and (3)(d). These three means of recording probable cause all serve to preserve the policies of judicial integrity and the right to judicial review. *State v. Raflik*, 2001 WI 129, ¶ 21, 248 Wis. 2d 593, 636 N.W.2d 690.

In this case, the search warrant affidavit is the actual document that was reviewed by the Judge to find probable cause for the search of Whitaker's blood, complying with the procedures in Wis. Stat. § 968.12(2). Therefore, because the procedure used to obtain the search warrant for Whitaker's blood complied with both the

constitutional and statutory requirements for obtaining a warrant, Whitaker's appeal must be denied.

C. Even If The Procedure Used In This Case Did Not Comply Wis. Stat. § 968.12, Any Perceived Error Was Procedural.

Even if this Court should find that the procedure utilized in obtaining the search warrant for Whitaker's blood failed to comply with Wis. Stat. § 968.12; under the circumstances on this case, any perceived error in swearing out the search warrant affidavit was ministerial.

A violation of a Wisconsin statute relating to search warrants does not necessarily lead to the conclusion that a search that was conducted is unreasonable. *See, e.g.*, *State v. Meier*, 60 Wis. 2d 452, 459–60, 210 N.W.2d 685 (1973) (concluding that any error as to the return of the search warrant violating Wis. Stat. § 968.17 did not prejudice the rights of the defendant and therefore did not affect the validity of the search). Case law and Wis. Stat. § 968.22 provide that "evidence must not be suppressed for a mere statutory violation or a technical irregularity of search warrant procedure *unless* the violation or irregularity is material or the violation or irregularity has prejudiced the defendant or affected the defendant's substantial rights." *State v. Popenhagen*, 2008 WI 55, ¶ 126, 309 Wis. 2d 601, 749 N.W.2d 611 (Prosser, J., concurring).

"Conversely, if a statutory violation or statutory irregularity of search warrant procedure is material or if the violation or irregularity has prejudiced the defendant or affected the defendant's substantial rights, the court has implicit, if not explicit, statutory authority to suppress the tainted evidence." *Id.* (citing § 968.22). As stated, the search warrant affidavit providing probable cause for the issuance of the warrant was made under oath before a judge. Under these circumstances, whether or not the procedure used in reviewing the search warrant and administering that oath was in accordance with the statutes does not affect Whitaker's substantial rights. Accordingly, the evidence seized from the search warrant is not subject to suppression.

The State is unaware of any Wisconsin case law addressing the specific issue raised in this case, however, case law in other jurisdictions support the state's position. Case law from those jurisdictions, although not precedent, is helpful in construing and applying § 968.12, and may be persuasive. *See State ex rel. E.R. v. Flynn*, 88 Wis. 2d 37, 44-46, 276 N.W.2d 313 (Ct. App. 1979).

In *State v. Andries*, 297 N.W.2d 124 (Minn. 1980) the Minnesota Supreme Court upheld the validity of a search warrant "authorized over the telephone by a judge who fully

complied with the requirements of the relevant statutes except that he did not personally sign the warrant but instead delegated that ministerial act to the applicant." *Andries*, 297 N.W.2d at 125. In that case, a county attorney with probable cause to believe that marijuana would be found at a certain residence, sought telephone authorization for a search warrant from a judge located eighty-five miles away. *Id*. The judge convened a three-way conference call with the county attorney and the deputy sheriff involved in the case, during which the deputy sheriff signed and read an affidavit prepared by the county attorney, and read a proposed warrant. *Id*. The judge determined there was probable cause upon which to base a search warrant, and "delegated to the deputy the task of signing the judge's name to the warrant." *Id*. In upholding the warrant's validity despite the absence of a statute explicitly authorizing telephonic search warrants, the court in *Andries* cautioned that it did "not mean to sanction the indiscriminate use of such a procedure," but noted that under the circumstances of that case "there was a demonstrated need for such a warrant, the procedures specified in the statute were substantially followed, and a record was made which was thereafter available for use by

defendant in challenging the issuance of the warrant." *Andries*, 297 N.W.2d at 125–26.

In *People v. Snyder*, 449 N.W.2d 703 (Mich. App. 1990), the officer contacted the judge by telephone at home and faxed a copy of the unsigned warrant documents to the judge's home. *Id*. at 704. At the judge's instruction over the telephone, the officer raised his right hand and swore to the affidavit. *Id*. The officer then signed the affidavit and faxed a copy of the signed affidavit to the judge, who then signed the warrant and faxed a copy to the officer. *Id*. Pursuant to the judge's instruction, the officer then stamped the judge's signature onto the original warrant form and added his own initials. *Id*. The court ruled that it did not violate the Fourth Amendment for a police officer to fax a search warrant affidavit to a judge and then swear to it over the telephone. The court held that "[t]he telephone link by which the judge and the officer communicated creates enough of a presence to satisfy" the statutory and Fourth Amendment purposes. *Id*. at 706.

In *State v. Turner*, 558 F.2d 46 (2nd Cir. 1977), the 2nd Circuit eloquently explained why swearing an oath over the telephone comports with the Fourth Amendment:

> In a ritualistic sense, it may be that an oath taken over the telephone appears less formal or less solemn than one taken in the physical

> presence of the oath taker. The constitutionality of oaths does not depend, however, on such purely ritualistic considerations. In every meaningful sense, [the officers on the telephone] were under oath. We hold that search warrant application procedures can constitutionally be brought into line with twentieth century technology.

Id. at 558 F.2d 46, 50. *See also Commonwealth v. Long*, 786 A.2d 237 (Penn. 2001) (In securing a search warrant, oath was properly administered by telephone to officer.).

The Supreme Court of Idaho also approved the officer signing the judge's signature on a search warrant, noting that as a ministerial function a judge could direct a third person to sign the warrant on the judge's behalf. *State v. Zueger*, 152 P.3d 8, 11 (Idaho, 2007).

The controlling Wisconsin law and persuasive case law from other jurisdictions demonstrates that the procedures utilized in this case did not affect Whitaker's substantial rights, therefore, the evidence seized from the search warrant is not subject to suppression.

In addition, *Raflik*, 248 Wis. 2d 593, is instructive and supports the State's view of this case.

In *Raflik,* an officer and an assistant district attorney called in a telephonic search warrant application and the judge took testimony over the phone, but the call was mistakenly not recorded. *Id.,* ¶¶ 5–6. The officer, assistant district attorney and the judge got together the

next day and reconstructed the officer's testimony. *Id.,* ¶¶ 7–10. The Wisconsin Supreme Court held that the warrant process fulfilled all the requirements of the Fourth Amendment. The reconstruction of the warrant application adequately protected Raflik's right to judicial review. *Id.,* ¶ 21. "The essential thing is that proof be reduced to permanent form and made a part of the record, which may be transmitted to the reviewing court." *Glodowski v. State,* 196 Wis. 265, 272, 220 N.W. 227 (1928), *quoted in Raflik,* 248 Wis. 2d 593, ¶ 28, 636 N.W.2d 690.

Here, as in *Raflik,* the procedure used preserves the policies of judicial integrity and the right to judicial review. *Raflik,* 248 Wis. 2d 593, ¶ 21, 636 N.W.2d 690. The record of the proceeding in this case is the actual documents that were reviewed by the Judge. There is no prejudicial or constitutional violation requiring suppression.[2]

[2] Whitaker also appears to argue that the search warrant in this case was not issued by a neutral, detached magistrate. Whitaker, however, fails to cite any actual facts or authority to support his position. Instead, the only evidence introduced at the hearing was that Judge Reddy simply reviewed the search warrant affidavit, and never asked Sergeant Goetsch any questions pertaining to the search warrant affidavit before finding it contained probable cause (R45:33). Whitaker fails to state how the facts in this case equate to a finding that Judge Reddy was not a neutral, detached magistrate; nor is the State aware of any. Arguments unsupported by references to either legal authority or facts should not be considered by this court. *State v. Verhagen*, 2013 WI App 16, ¶ 38, 346 Wis. 2d 196, 827 N.W.2d 891. Because Whitaker has not provided either a factual or legal basis for his claim, this claim should be denied.

II. If This Court Finds That The Procedure Employed In This Case To Swear Out The Affidavit Was Improper And Not Procedural, The Good Faith Exception To The Exclusionary Rule Denies Whitaker Relief.

In *United States v. Leon*, 468 U.S. 897 (1984) the United States Supreme Court recognized an objective good faith exception to the exclusionary rule that normally applies to evidence obtained as a result of a violation of the Fourth Amendment. *State v. Marquardt*, 2005 WI 157, ¶ 24, 286 Wis. 2d 204, 705 N.W.2d 878.

In *State v. Eason*, 2001 WI 98, ¶¶ 3, 74, 245 Wis. 2d 206, 629 N.W.2d 625, the Wisconsin Supreme Court adopted an objective good faith exception to the exclusionary rule that normally applies to evidence obtained as a result of a violation of Wis. Const. art. I, § 11.

Explaining the good faith exceptions to the respective exclusionary rules, the court said in *Marquardt*, 286 Wis. 2d 204, ¶¶ 24-26:

> Under *Leon*, evidence seized by officers "reasonably relying on a warrant issued by a detached and neutral magistrate" will not necessarily be suppressed. *Leon*, 468 U.S. at 913. "In the ordinary case," the Court in *Leon* explained, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id*. at 921.
>
> At the same time, the Court in *Leon* described four sets of circumstances under which the good faith exception does not apply:

> [1] the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. . . . [2] the issuing magistrate wholly abandoned his judicial role. . . [3] Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." [4] Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923 (citations omitted).

> In *Eason*, this court added two requirements that must be met before the good faith exception may apply. Specifically, the State must show that the process used in obtaining the search warrant included (1) a "significant investigation," and (2) a "review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 63.

In Whitaker's case, the search warrant affidavit makes plain that there was both an investigation and a review by a knowledgeable police officer. And, none of the *Leon* deficiencies are present.

Although the Wisconsin Supreme Court in *State v. Tye* held that the good faith exception does not extend to a search warrant issued on the basis of a statement ***totally*** lacking oath or affirmation; as previously demonstrated the facts of this case are distinguishable from *Tye*. *State v.*

Tye, 2011 WI 124, ¶24. In *Tye*, the affidavit supporting the search warrant was never signed and sworn to before a judge. Upon returning from executing the search warrant, the investigator realized that the affidavit supporting the warrant had not been given under oath. *Id*. at ¶6-7. Unlike *Tye*, the officer here specifically contacted a Judge and swore to the contents of the affidavit. Therefore, the affidavit was indeed sworn to under oath, even though this Court may find that the procedure used to swear to the affidavit was improper.

In applying the good faith exception to this case, the court must decide whether the officer "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *State v. Dearborn,* 2010 WI 84, ¶33, 327 Wis. 2d 252, 786 N.W.2d 97 (citation omitted). It is clear that the officer did so. It was objectively reasonable for the officer to believe in the legality of the swearing out procedure when the officer was advised of such procedure by the Judge actually swearing out the affidavit. *Cf. State v. Johnson*, 2013 WI App 140, 352 Wis. 2d 98, 841 N.W.2d 302. In *Johnson* the court concluded that the good faith exception to the exclusionary rule applies when United States officials reasonably rely on foreign interpretations of the legality of a search of a foreign

residence. *Id*. at ¶10-13. In *Johnson* evidence was seized from the defendant's Mexican residence after consent was given by the landlord to search the premises. According to Mexican law, landlord consent did not permit the warrantless search. *Id*. at ¶9. The *Johnson* Court held that it was objectively reasonable for American law enforcement to believe in the legality of a joint Mexican-American search under the control of Mexican law enforcement that was carried out based on contact between the FBI liaison to Mexico and his counterpart in Mexico who contacted the head law enforcement officer in California who advised as to how the warrantless search could occur. *Id*. at ¶12. Similarly, in this case the officer contacted the Judge who advised the officer on the appropriate procedure for swearing out the affidavit and search warrant. Thus, like the officers in *Johnson*, the officer here was objectively reasonable in relying on the assurances of the Judge that the procedure used to employ the oath was legal.

This case is also distinguishable from *State v. Hess*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568. In *Hess*, the Wisconsin Supreme Court stated that the good-faith exception to the exclusionary rule did not apply to situations in which evidence was seized as result of a civil bench warrant for defendant's arrest that was void ab

initio, in that it did not comply with any statute authorizing the court to issue a warrant, it was not supported by an oath or affirmation, and the court issued the warrant without the benefit of verification of the facts or scrutiny of the procedure to ensure that the judge acted as a detached and neutral magistrate. Here, unlike *Hess*, the Judge had the authority to swear out the affidavit. Thus, even if this Court should find that the method of swearing out the affidavit was faulty, the Judge did not exceed his authority in administering an oath to the officer.

In this case the record reflects that the officer proceeded reasonably and in good faith. The officer followed all of the procedures required by the issuing Judge in obtaining the warrant, and relied on the Judge's determination of the law. Therefore, the good faith exception to the exclusionary rule denies Whitaker relief.

CONCLUSION

For all the above stated reasons, the State respectfully requests that this Court uphold the trial court's order denying Whitaker’s motion to suppress.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c).

- Monospaced font: 10 characters per inch; double spaces; double spaced; 1.25 inch margin on the right and left side and 1 inch margins on the other 2 sides.

The length of the brief is 29 pages.

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