STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2022AP204-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

DONALD A. WHITAKER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH III, THE HONORABLE KRISTINE E. DRETTWAN PRESIDING, TRIAL COURT CASE NO. 19-CT-481

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S REBUTTAL ARGUMENTS ARE PREMISED UPON A MISAPPREHENSION OF THE ISSUES.

A. Wisconsin Statute § 137.19.

First, the State mischaracterizes Mr. Whitaker's argument by alleging that "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." State's Response Brief at p.15 [hereinafter "SRB"]. The State goes on to claim that Wis. Stat. § 137.19 provides the "legislative mandate" which allows for the swearing of a warrant affidavit in the absence of a recording. SRB at pp. 15-16.

Conveniently overlooked by the State are several relevant items. The first of these is that the plain language of § 137.19, which makes a *general* assertion that electronic signatures are acceptable as the "real thing," has nothing to do with the issue raised by Mr. Whitaker. It is a red-herring argument which diverts the Court's attention from the issue raised by Mr. Whitaker in that § 137.19 speaks *only* to how electronic signatures are as acceptable as those which are "actually inked." Section § 137.19 sets forth no proscriptions, standards, or rules as to what is required when there has been a telephonic communication between a judge and an officer during the warrant application process.

Second, the State ignores the plain provision of § 137.19 which states that electronic signatures are subject to the condition that they be obtained "together with all other information **required to be included by other applicable law**." Wis. Stat. § 137.19 (2021-22)(emphasis added). "Other applicable law" would include § 968.12(3)(d) which provides that "**[w]hen a caller informs the judge that the purpose of the call is to request a warrant**, the judge shall place under oath each person whose testimony forms a basis of the application . . . . The judge or requesting person **shall arrange for all sworn testimony to be recorded** either by a court reporter or by means of a voice recording device." Wis. Stat. § 968.12(3)(d) (2021-22)(emphasis added).

It is undisputed in the instant matter that Sgt. Goetsch informed Judge Reddy

that "the purpose of [his] call [was] to request a warrant" as § 968.12(3)(d) describes. It is also undisputed that, *at a minimum*, Sgt. Goetsch not only informed Judge Reddy that the case involved an "impaired driver" but also involved a "juvenile." SRB at p.7; R45 at 33. These statements of fact go beyond what is the mere swearing of an affidavit, and therefore, constitute "testimony." Apart from these two items, it is important not to lose sight of the fact that there may have been more "statements of fact" relayed to Judge Reddy because Sgt. Goetsch testified that he made contact with the judge to "inform[] him of the incident," but when pressed on cross examination whether he recalled what he told Judge Reddy during their telephonic communication, **Sgt. Goetsch admitted that he could "[n]ot specifically" recall**. R45 at 31:3-18. Counsel asked Sgt. Goetsch whether "it would not be unusual in this situation to give [the judge] a little bit of a back story about [this] incident," to which Sgt. Goetsch replied, "**Most of the time it's just going to be a quick synopsis of this is what it's involved** and the impairment of the juvenile." R45 at 31:19-24.

Precisely because there has been no telephonic recording of what transpired between Judge Reddy and Sgt. Goetsch, the parties and the court have no way of ascertaining what may have been included in the "quick synopsis" Sgt. Goetsch may have provided to Judge Reddy because, conveniently, he could "not specifically" recall what was said. The whole point of recording telephonic communications between officers and judges under § 968.12 is so that there is no question that the process has been fair and that it comports with the Fourth Amendment. In the absence of a recorded conversation, Mr. Whitaker is forced to accept that Sgt. Goetsch's failed recollection did not implicate his Fourth Amendment rights. Apparently, an officer's bald assertion that he cannot remember what was said is sufficient to satisfy both § 968.12 and the Fourth Amendment even when the officer admits that often times the telephonic communication includes a "quick synopsis" of "what is involved."

It is important to emphasize as well that § 968.12 employs the mandatory language that "*all*" testimony "*shall*" be recorded. "The general rule has been that the word 'shall' is presumed to be mandatory when it appears in a statute." *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 643, 511 N.W.2d 874 (1994); *Karow v. Milwaukee Cty. Civil Serv. Com.*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978). On its face, § 968.12(3)(d) does not afford either the court or the officer a choice to disregard the recording requirement.

Finally, another canon of statutory construction comes into play when assessing the State's § 137.19 argument, and that is the canon that "the specific controls the general." *In re Estate of Sykes*, 27 Wis. 2d 211, 216, 133 N.W.2d 805 (1965). This canon has been characterized as a "fundamental principle" of statutory construction. *James v. Heinrich*, 2021 WI 58, ¶ 22, 397 Wis. 2d 516, 960 N.W.2d 350. Applying it to the State's argument, it is evident that § 137.19 is a *general* statute which describes under what circumstances an electronic signature is acceptable whereas § 968.12 sets forth the procedures to be followed in the *specific* circumstances of a warrant application. Thus, the procedures described in the latter section control over the former.

B. State v. Raflik.

In its ostensible rebuttal of Mr. Whitaker's position, the State relies upon *State v. Raflik*, 2001 WI 129, 248 Wis. 2d 593, 636 N.W.2d 690. SRB at pp. 22-23. Contrary to the State's assertion, *Raflik* is not instructive because it is wholly distinguishable from the circumstances in the instant matter.

First, in *Raflik*, the parties appearing telephonically during the warrant application process incorrectly acted under the belief that they *were being recorded*. *Id*. at ¶ 4. In the instant case, there is *no* dispute that Sgt. Goetsch and Judge Reddy *knew* they were *not* being recorded.

Second, as soon as the judge in *Raflik* learned that there had been a problem with the recording of the warrant application, the parties to the telephone call reconvened—a *mere* eighteen hours later—and reconstructed their communication while the matter was fresh in their memory. *Id*. ¶¶ 7-8. In the instant case, there has *never* been an attempt to reconstruct what was said between Sgt. Goetsch and Judge Reddy to clarify what the sergeant could "not specifically" recall about the "quick synopsis" he may or may not have provided the judge. Regrettably, Mr. Whitaker "is stuck" with the sergeant's vagaries because a total of **thirty-seven months** have now elapsed between the time the sergeant spoke with Judge Reddy and the date of the filing of this brief. The likelihood that either of them could recall what was said during the application for the warrant is *zero*.

Third, the *Raflik* case had one thing the instant matter lacks, namely the

presence of a third party to ensure that matters relevant to the application for the warrant were adduced and comported with the Fourth Amendment. More specifically, the district attorney was present on the unrecorded line at the time the warrant was sought, and further, was present at the *ex parte* hearing to reconstruct the testimony proffered at the original hearing. *Id*. ¶¶ 3-4, 8. In Mr. Whitaker's case, there was no additional party present to ensure that Sgt. Goetsch's testimony comported with the Fourth Amendment.

Fourth, Raflik *was* ultimately provided with an actual record which could be reviewed to determine whether any issues under the Fourth Amendment could be raised. *Id.* ¶¶ 11-12. No such record exists for Mr. Whitaker to review.

Finally, it is important to take note of what the *Raflik* court warned against because it *supports* Mr. Whitaker's position to the consternation of the State's misplaced reliance on *Raflik*. The court observed:

> We recognize the importance of these policies, but we find that they are not necessarily compromised **by allowing a warrant application to be reconstructed**. **Judicial integrity, the right to judicial review, and the observance of Fourth Amendment guarantees can be adequately protected when a careful reconstruction of a warrant application is made**. We also recognize the defendant's concerns about police misconduct and the possibility of police acting in bad faith. In cases where the failure to record a warrant application is the result of misconduct by police, reconstruction may not be an adequate option, and suppression may be appropriate.

Id. ¶ 21 (emphasis added). *Raflik* is unlike Mr. Whitaker's case in that there has been *no* reconstruction of the warrant application even in the face of Sgt. Goetsch's admission that he could "not specifically" recall what he said to Judge Reddy even though he often offers a "quick synopsis."

C. Suppression As a Remedy.

The State protests at length that suppression is not an available remedy for a violation of § 968.12. Respondent's Brief at pp. 18-22. There are several problems with this assertion.

First, in *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, the Wisconsin Supreme Court held:

> **[The common law when] properly read, do[es] not require the legislature expressly to require or allow suppression of unlawfully obtained evidence in order for a circuit court to grant a motion to suppress**. In other words, the legislature need not express its intent to provide a remedy of exclusion or suppression of evidence with greater clarity than ordinarily required of any legislative enactment. The cases demonstrate that the circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute.
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> The proposition of law that wrongfully or illegally obtained evidence may not be suppressed except when the evidence was obtained in violation of an individual's constitutional rights or in violation of a statute that expressly requires suppression of evidence as a sanction has been carried expressly or impliedly from case to case without any support or reasoning. **This proposition is an unsupported mistaken statement of the law.** Mistaken statements of the law should not constitute precedent that binds this court. **We do more damage to the rule of law by refusing to admit error than by correcting an erroneous proposition of law.**

Popenhagen, 2008 WI 55, ¶¶ 68-70 (citations omitted; emphasis added). Clearly, the Wisconsin Supreme Court did *not* adopt the approach which the State suggests. Suppression *is* an appropriate remedy when law enforcement officers have acted in derogation of a constitutional right—in this case, Mr. Whitaker's Fourth Amendment right to be free from unreasonable searches and seizures when the applying officer admits that more than a simple oath may have been administered during the application process.

Second, the procedures set forth in § 968.12 cannot merely be construed as "ministerial" as the State suggests. If this Court elects to treat the violation of § 968.12 as a "mere technicality," it will be eviscerating the statute. Without some remedy to impose for a violation of § 968.12, the legislatively-enacted condition attendant to telephonic applications for search warrants might as well not exist because it will be a "law without teeth." This Court is not authorized to act as a "super legislature" and read requirements imposed by duly-elected representatives of the citizens of the State of Wisconsin "off the books." Such an outcome violates not only Mr. Whitaker's rights, but violates the Separation of Powers Doctrine as well.

Since § 968.12 is designed to protect and preserve the sanctity of the Fourth Amendment and Article I, § 11 of the Wisconsin Constitution by prescribing

specific procedures which must be followed to secure a search warrant, it follows that a violation of those procedures must result in the long-standing sanctions typically imposed for a violation of a person's right to be free from illegal searches and seizures. **If there exists no sanction for a violation of § 968.12, then the requirements set forth in that statute are literally unenforceable. It becomes a "law without teeth," and this certainly is not an outcome the legislature could have intended**. The absence of any remedy under law would render the entirety of § 968.12 superfluous, and the construction of a statute which renders any part or all of it superfluous is to be avoided. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 681 N.W.2d 110.

D. The Warrant Process in Walworth County.

In a dismissive footnote in its Response Brief, the State erroneously claims that the concerns Mr. Whitaker raised in his Initial Brief are unfounded because he has provided no "references to . . . [the] facts" which support his claim. SRB at p.23 n.2. This is a remarkable, if not unbelievable, assertion by the State given that *in its own brief* it cites Judge Drettwan's findings wherein she clearly and unequivocally states: "I'm going to take **judicial notice** of how search warrants are obtained [i]n Walworth County after hours . . . ." SRB at p.8.

Perhaps the State is unaware of what "judicial notice" means. Mr. Whitaker will explain. According to *Black's Law Dictionary*, "judicial notice" is defined as "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; . . . ." *Black's Law Dictionary*, at pp.863-64 (8th Ed. 2004). Beyond the well-settled definition of judicial notice, § 902.01 also permits a court to accept as true those facts of which it takes notice. Wis. Stat. § 902.01 (2021-22). As Professor Blinka noted in his seminal treatise on the Wisconsin Rules of Evidence, Judge Drettwan was permitted to take judicial notice of the procedures for obtaining a warrant in Walworth County because "the fact [was] one that is generally known within the territorial jurisdiction of the court. In practice, **the judge will function as a barometer of the fact's notoriety in the jurisdiction**." D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence*, § 201.3, at p.71 (4d Ed. 2017)(emphasis added). One must ask: Who is a better barometer of the warrant application procedures in Walworth County than a judge of that county?

Clearly, Mr. Whitaker has established a factual basis for his argument because Judge Drettwan took judicial notice of the warrant application process in Walworth County and described them *in detail*. Based upon the foregoing, the argument Mr. Whitaker set forth in his Initial Brief at Section II.D., pp. 18-21, *has a factual basis* which the State has failed to address. The State's failure to address Mr. Whitaker's argument, either factually or legally, should be dispositive of the issue in Mr. Whitaker's favor as the State claims in its brief. *See* SRB at p.23 n.2.

E. The Good Faith Exception Does Not Apply.

The State closes its brief by proffering that the seizure of a sample of Mr. Whitaker's blood should be excused under the "good-faith" doctrine.

Typically, the provisions of Article I, § 11 of the Wisconsin Constitution are interpreted co-extensively with the U.S. Supreme Court's Fourth Amendment holdings. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598. This is *not* the case when it comes to the application of the good faith exception to the Exclusionary rule. Wisconsin has adopted a more rigorous test for applying the good faith exception. *State v. Eason*, 2001 WI 98, ¶ 3, 245 Wis. 2d 206, 629 N.W.2d 625. Moreover, "[c]ourts have applied the good faith exception and deviated from the exclusionary rule in only a few types of cases and in limited circumstances." *State v. Blackman*, 2017 WI 77, ¶ 70, 377 Wis. 2d 339, 898 N.W.2d 774.

Blackman provides an example of why this Court should not apply the good-faith exception. The *Blackman* court examined whether the Informing the Accused form was misleading when it misrepresented that for persons who refuse to take a test requested under Wis. Stat. § 343.305(3)(ar)2., the penalty was not a revocation of the person's operating privilege, but rather, the person was subject to "arrest" for refusing. *Blackman*, 2017 WI 77, ¶¶ 32-33, 38. The court took issue with the fact that the form did not warn those persons who are asked to take a test under § 343.305(3)(ar)2. that probable cause was not a necessary prerequisite for the officer to request a test, unlike those tests requested under § 343.305(3)(a) which required probable cause. *Blackman*, 2017 WI 77, ¶ 34.

In attempting to avoid sanction, the State argued that the arresting officer in *Blackman* was acting in "good faith." *Id.* ¶ 72. The *Blackman* court rejected the State's "good faith" argument noting that if it accepted the good faith argument,

"[i]t evinces the potential of a 'recurring or systemic' error, a widespread error, affecting the rights of an accused." *Id.* ¶ 73. The *Blackman* court felt that the potential for a "recurring or systemic" error was so great that "[u]nless the evidence in the instant case is suppressed, law enforcement officers across the state will continue to read the Informing the Accused form to accuseds in the same situation as Blackman without providing correct information . . . ." *Id.*

The risk identified in *Blackman* is no less significant in Mr. Whitaker's case. If the blood test result is not suppressed in this matter, then law enforcement officers throughout Wisconsin will continue to provide unrecorded "quick synopses" to judges and judges in Walworth County will continue to inject themselves into the warrant process. Thus, the *Blackman* court's concerns about preventing systemic error can only be avoided in this case if the good-faith exception is *not* applied.

Dated this 12th day of June, 2022.

Respectfully submitted:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,983 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 13, 2022. I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Dated this 12th day of June, 2022.

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