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DISTRICT II

September 27, 2023

To:

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Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2022AP2195-CR State of Wisconsin v. Benjamin John Hietpas (L.C. #2021CF241)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Benjamin John Hietpas appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration (4th offense) in violation of WIS. STAT. § 346.63(1)(b) (2021-22).[1] Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Hietpas contends that the circuit court erred in denying his motion to suppress the blood test results obtained pursuant to a search warrant because the judge issuing that warrant failed to date

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[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

the jurat on the arresting officer's affidavit. For the reasons that follow, we reject that contention and affirm.

The following facts are not contested. Appleton Police Officer Austin Lawrence arrested Hietpas for driving with a prohibited alcohol concentration at around 4:30 a.m. on May 2, 2021. Hietpas did not consent to a chemical test of his blood. Lawrence executed an affidavit setting forth probable cause for a search warrant to obtain a sample of Hietpas's blood for testing, which he submitted electronically to the on-call duty judge after speaking with the judge via telephone. The judge signed this affidavit, but he did not fill out the blanks on the jurat indicating the date on which the affidavit was "sworn before [him]" or when his commission expires.[2] The judge electronically sent Lawrence a signed warrant for a blood draw, which stated that "the Court ha[d] reviewed the affidavit … in support of" the warrant; Lawrence endorsed the warrant with his signature, the date (still May 2, 2021), and the time it was received from the judge (5:30 a.m.). Lawrence indicated with another signature that the warrant was executed on the same date at 5:51 a.m. and filed a return of the warrant, also dated May 2, 2021.

Hietpas moved to suppress the results of his blood test, arguing, among other things, that the incomplete jurat on the arresting officer's affidavit meant that the search warrant authorizing Hietpas's blood draw was invalid—and thus that the blood draw violated his Fourth Amendment right to be free from unreasonable search and seizure—under ***State v. Tye***, 2001 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473. The circuit court denied Hietpas's motion, determining that the "lack of dating of the warrant and the affidavit by the judge constitutes an irregularity and does

[2] Notaries who are attorneys licensed to practice in Wisconsin (including, by extension, Wisconsin judges) are entitled to permanent commissions. *See* WIS. STAT. § 140.02(2)(a).

not substantially affect [Hietpas's] substantial rights." Hietpas entered a plea of no contest to the charge of operating a motor vehicle with a prohibited blood alcohol concentration, after which the court entered judgment against him. Hietpas appeals, renewing his argument that the duty judge's failure to date Lawrence's affidavit violated his Fourth Amendment rights.

We review the issue of whether undisputed facts constitute a violation of constitutional rights de novo. ***State v. VanLaarhoven***, 2001 WI App 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411. Both "[t]he United States and Wisconsin constitutions protect and guarantee that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.'" ***State v. Moeser***, 2022 WI 76, ¶17, 405 Wis. 2d 1, 982 N.W.2d 45 (second alteration in original; quoting U.S. CONST. amend. IV), *cert. denied*, 143 S. Ct. 2612 (2023). Our supreme court held in ***Tye*** "that the total absence of any statement under oath to support a search warrant violates the explicit oath or affirmation requirement of both the federal and state constitutions" and that evidence seized pursuant to such a "constitutionally infirm" warrant must be suppressed. 248 Wis. 2d 530, ¶3. In that case, an investigator provided a judge with a draft affidavit that had not been sworn or signed. ***Id.***, ¶¶4-5. The resulting warrant, which referenced a sworn affidavit, was facially defective. ***Id.***, ¶5.

In the more recent case of ***State v. Moeser***, however, our supreme court addressed a situation in which an officer submitted a signed affidavit (notarized by another officer) in support of a search warrant but the officer had not made an oral oath or affirmation either before or after signing. 405 Wis. 2d 1, ¶¶5-8. The court explained that "neither [the federal nor the state] constitution requires that specific language or procedure be used" in administering the "oath or affirmation" required for issuance of a search warrant. ***Id.***, ¶¶17, 23. Instead, "[t]he purpose of

an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth." ***Id.***, ¶36 (quoting ***Tye***, 248 Wis. 2d 530, ¶19) (alteration in original). Because the officer's signed affidavit[3] showed this sense of obligation, with language indicating that the officer was "duly sworn on oath" and had "personal knowledge that the contents of [the] affidavit are true," the affidavit at issue was deemed constitutionally sufficient. ***Moeser***, 405 Wis. 2d 1, ¶¶43, 44, 46.

We conclude that the facts in Hietpas's case align much more closely with ***Moeser*** than they do with ***Tye***. This is not a case where there is a "total absence of any statement under oath to support a search warrant." ***Tye***, 248 Wis. 2d 530, ¶3. Like the officer in ***Moeser***, Lawrence signed an affidavit that showed his appreciation that he was under a legal obligation to be truthful, including statements that he was "duly sworn on oath" and had "personal knowledge that the contents of this Affidavit are true." *See* 405 Wis. 2d 1, ¶43. He then submitted that affidavit to a judge who, like the fellow officer in ***Moeser***, endorsed the affirmation by signing it. Hietpas's only complaint is that the judge signing Lawrence's affidavit failed to complete the jurat with the date on which he signed and the date on which his commission expired, the practical effect being, Hietpas says, that there is no "proof that the officer was sworn *prior to* the judge reviewing the affidavit." We note that the search warrant from the judge states that it was issued after the court had "reviewed the affidavit … in support [there]of." The warrant was received by Lawrence approximately an hour after Hietpas's arrest, and executed twenty minutes after that. Regardless, Hietpas misses the point made by the ***Moeser*** court that the test for

[3] The court noted that "it was recognized during the Founding that an 'oath' could be written rather than spoken" and that "to make affidavit of a thing, is to testify upon oath." ***State v. Moeser***, 2022 WI 76, ¶19, 405 Wis. 2d 1, 982 N.W.2d 45 (citation omitted), *cert. denied*, 143 S. Ct. 2612 (2023).

constitutionality of a search warrant is whether the "oath or affirmation" supporting it showed that the requester—in this case, Lawrence—appreciated his legal obligation to tell the truth in his affidavit when he submitted it to the judge. Hietpas does not explain how the judge's addition of the date would change that analysis (or how the addition of the date would prove that the officer swore to the affidavit's contents before the warrant was executed).[4] Given our supreme court's admonition not to "elevate form over substance," we conclude the affidavit at issue was constitutionally sufficient to support issuance of the search warrant. *See* ***Moeser***, 405 Wis. 2d 1, ¶29; ***Tye***, 248 Wis. 2d 530, ¶19.

The ***Moeser*** court also explained that the "Wisconsin Statutes … do not require any specific language or procedure for oath or affirmation administration" in the context of search warrants. 405 Wis. 2d 1, ¶37. Thus, Hietpas's argument that the search warrant is invalid based on the duty judge's failure to sign *and date* the jurat as required by WIS. STAT. § 140.15(1)(b) is unavailing.[5] Moreover, WIS. STAT. § 140.26 provides that "the failure of a notarial officer to perform a duty or meet a requirement specified in this chapter does not invalidate a notarial act performed by the notarial officer."

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[4] Hietpas did not address ***Moeser*** at all except to quote (in his reply brief) the State's acknowledgement that ***Moeser*** "reaffirmed the critical importance of oaths or affirmations in the context of search warrant applications."

[5] We recognize that "the better practice for all parties involved in the search warrant application process is to utilize the directory methods of administering an oath or affirmation that our legislature has provided in WIS. STAT. § 906.03(2) and (3)," and to conduct the administration of an oath on a recorded line so that it can be transcribed and made part of the Record. *See* ***Moeser***, 405 Wis. 2d 1, ¶26 (quoting ***State v. Johnson***, No. 2019AP1398-CR, unpublished slip op., ¶33 (WI App Sept. 9, 2020)). Likewise, it would be preferable for anyone endorsing an affidavit to sign and date the jurat pursuant to WIS. STAT. § 140.15(1)(b).

Because we conclude that the search warrant for a sample of Hietpas's blood was constitutional, we need not reach the issue of whether the good faith exception applies. For all of the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals