

Criminal Procedure
Search Warrants – Oath or Affirmation in Support of Warrants

State v. Moeser, 2022 WI 76 (filed Nov. 23, 2022)

HOLDING: The affidavit in support of the search warrant in this case fulfilled the “oath or affirmation” requirement of the U.S. and Wisconsin Constitutions.

SUMMARY: This case concerns the requirement that warrant applications be supported by oath or affirmation. Moeser was arrested and charged with sixth-offense operating while intoxicated (OWI). He refused to consent to a blood draw at the hospital to which he was transported. Accordingly, the arresting officer, Brown, decided to seek a search warrant.

Brown prepared a form document titled “Affidavit.” He inserted his own name before the language “being first duly sworn on oath, deposes and says.” The second paragraph of the affidavit stated that Brown had personal knowledge of the affidavit’s contents. Thereafter, Brown filled in the probable cause section, which contained facts specific to Moeser’s arrest. Brown then signed and

dated the affidavit. His signature line was immediately above the jurat, which read “Subscribed and sworn to before me.”

A lieutenant on site notarized the affidavit in Brown’s presence by signing it and affixing a seal. A judicial officer came to the hospital and approved the warrant application. At no time did Brown say an oath or affirmation out loud.

The defendant moved to suppress the evidence obtained from the blood draw. He argued that the warrant was constitutionally defective because Brown was not placed under oath or affirmation when he signed the affidavit in support of the warrant. The circuit court denied the motion, and ultimately the defendant pleaded guilty to the OWI charge. In an unpublished decision, the court of appeals affirmed.

In a majority opinion authored by Chief Justice Ziegler, the supreme court affirmed the court of appeals. It concluded that requirements under the U.S. Constitution and the Wisconsin Constitution, relevant case law, and the Wisconsin Statutes all indicate that the oath or affirmation requirement is an issue of substance, not form (see ¶ 3). Although an oath or affirmation is an essential prerequisite to the issuance of a valid search warrant, neither the U.S. nor the Wisconsin Constitution requires that specific language or procedure be used (see ¶ 17). The same can be said about Wisconsin case law and statutes. The purpose of an oath or affirmation is to impress upon the swearing individual an appropriate sense of obligation to tell the truth (see ¶ 44). According to the supreme court, the language in Brown’s affidavit, his signature, and the lieutenant’s notarization satisfy this requirement (see *id.*).

The defendant made much of the fact that Brown did not himself swear before or present the affidavit to a judge. The supreme court said that “no constitutional language requires that procedure” (*id.* n.14).

Justice Hagedorn, together with Justice Karofsky, joined in the majority opinion but wrote a concurring opinion in which they said that the oath procedure in this case was sufficient to pass constitutional muster – “but not by much” (¶ 50). Justice A.W. Bradley filed a dissent that was joined in by Justice Dallet.

Searches – Backyard Entry – Hot Pursuit

State v. Wilson, 2022 WI 77 (filed Nov. 23, 2022)

HOLDING: Police officers’ entry into the defendant’s fenced-in backyard was un-

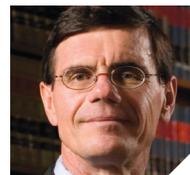
lawful; they had no warrant nor did “hot pursuit” justify the entry.

SUMMARY: An individual called 911 to report seeing a grey BMW being driven erratically for several miles. The caller allegedly observed the BMW come to a stop at a particular address and the driver get out of the car, climb over a fence, open a gate, and enter the backyard.

When police officers arrived at the location, they saw the BMW, which was running, parked on a back parking slab. The officers contacted the 911 caller for more information before moving a “large garbage can” so that they could enter the backyard through the gate. The officers knocked on the side door of the garage. The person who came to the door, Wilson, seemed to match the description given of the driver and allegedly displayed conduct similar to that of a person who is intoxicated. The officers searched Wilson (the defendant) and the vehicle and then arrested him.

The defendant was charged with several offenses. After the circuit court judge denied the defendant’s motion to suppress evidence, the defendant pleaded guilty to counts of operating while intoxicated and endangering safety. In an unpublished decision, the court of appeals affirmed.

The supreme court reversed the lower courts in a unanimous opinion authored by Justice A.W. Bradley. The supreme court held that police officers had entered the defendant’s backyard without a warrant or other justification and that the entry therefore was unlawful. War-



BLINKA



HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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rantless searches of homes are presumptively unreasonable (see ¶ 22). The police officers did not have a warrant, and the state conceded that the backyard was “protected curtilage” (¶ 24). On these facts, the police officers lacked an “implicit license” to enter the backyard for purposes of a “knock and talk” (¶ 29).

Nor did the “hot pursuit” exception apply on these facts. Distinguishing prior cases, the court held that the officers were not in “hot pursuit” (for example, there was no “chase”) based on the 911 caller’s information (¶ 42). “Simply put, police did not “pursue” Wilson to his home” (¶ 47).

Taxation

Claim for Recovery of Unlawful Taxes – Requirement That Taxpayer Pay the Challenged Tax Prior to Filing Claim

Saint John’s Communities Inc. v. City of Milwaukee, 2022 WI 69 (filed Nov. 22, 2022)

HOLDING: A taxpayer must pay a tax before submitting a claim for recovery of the tax.

SUMMARY: Saint John’s Communities owns an age-restricted continuing-care

retirement community in Milwaukee. For the tax years 2010-2018, the city recognized the property as fully exempt from property taxation under Wis. Stat. section 70.11. In 2018, Saint John’s began building new facilities in an area of its property previously used for parking. In 2019, the city assessor determined that this was a new use of the property and notified Saint John’s that the city no longer considered the property to be tax-exempt.

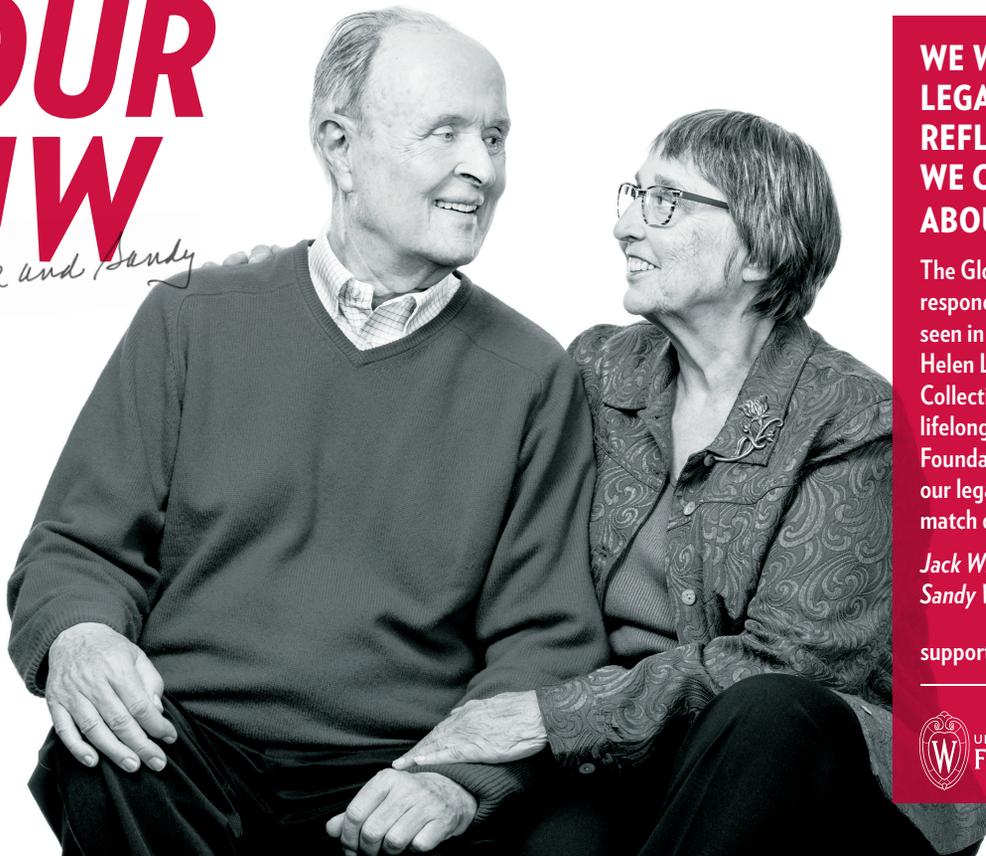
Saint John’s then filed a claim to recover unlawful taxes pursuant to Wis. Stat. section 74.35; however, it did not pay the challenged taxes before filing the claim. Because the taxes were not paid before Saint John’s filed the claim, the city disallowed the claim. Saint John’s then commenced this lawsuit against the city. The city moved to dismiss, but the circuit court denied the motion.

In a published decision, the court of appeals reversed, holding that the city’s motion to dismiss should have been granted because Saint John’s filed its claim without first paying the challenged tax. See 2021 WI App 77.

In a unanimous opinion authored by Chief Justice Ziegler, the supreme court affirmed the court of appeals. It

concluded that “Saint John’s claim for recovery of unlawful taxes was procedurally deficient. According to Wis. Stat. § 74.35(2)(a), ‘[a] person aggrieved by the levy and collection of an unlawful tax assessed against his or her property may file a claim to recover the unlawful tax against the taxation district which collected the tax.’ The plain language of this statute requires Saint John’s to first pay the challenged tax or any authorized installment payment prior to filing a claim. If Saint John’s has not yet paid the tax, then Saint John’s is not ‘aggrieved by the levy and collection of an unlawful tax,’ and there is no paid tax to ‘recover.’ Saint John’s did not make any payment of the challenged tax before it filed its § 74.35 claim. Therefore, Saint John’s § 74.35 claim was procedurally deficient, and the circuit court erred in denying the City’s motion to dismiss” (¶ 30). **WL**

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