05AP0876

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2005AP000876-CR
(Ozaukee County Case No. 04-CM-89)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNA ANNINA,

Defendant-Appellant.

Appeal From The Judgment of Conviction and the Final Order Entered In The Circuit Court For Ozaukee County, The Honorable Joseph D. McCormack, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Cases

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ISSUES PRESENTED FOR REVIEW

Anna Annina was arrested for attempting to prevent Mequon police officers from forcing their way into her home. The search warrant purporting to authorize the home invasion was unsupported by oath or affirmation and thus constitutionally invalid.

Under these circumstances, must Annina's subsequent *Alford* plea, *see North Carolina v. Alford*, 400 U.S. 25 (1970), to resisting an officer under Wis. Stat. §946.41(1) be vacated and that charge dismissed.

The circuit court denied Annina's post-conviction motion seeking relief on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellants' arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Because this is an appeal regarding a misdemeanor, and thus subject to decision by a single judge, publication may not be appropriate under Wis. Stat. (Rule) 809.23.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2005AP000876-CR
(Ozaukee County Case No. 04-CM-89)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNA ANNINA,

Defendant-Appellant.

BRIEF OF
DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed on February 5, 2004, the state charged Anna Annina with one count of disorderly conduct in violation of Wis. Stat. §947.01 and one count of resisting an officer in violation of Wis. Stat. §946.41(1). The charges arose from Annina's response to the police execution of a search warrant at her home on January 24, 2004. (R1).

Following a motion hearing on April 26, 2004, the Court held the search warrant to be invalid as the allegations giving rise to it were not sworn. *See State v. Tye*, 2001 WI 124, 248 Wis.2d 530, 636 N.W.2d 473. The Court accordingly suppressed all physical evidence from the illegal search of Annina's home. However, relying upon its reading of *State v. Hobson*, 218 Wis.2d 350, 577 N.W.2d 825 (1998), the Court declined to order dismissal of the charges. (R74:67-70; App.

11-14; *see* R75:32-34)

On August 3, 2004, Annina entered a plea of no contest to the charge of resisting an officer pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and the charge of disorderly conduct was dismissed and read in for purposes of sentencing (R76:2-7; App. 4-9). As a factual basis for the plea, the court relied upon the criminal complaint (*see* R1) and, at Annina's request, the court's finding that the search warrant was defective (R76:5-7; App. 7-9). The court found a substantial probability of conviction and accepted the plea (R76:7; App. 9). The court then withheld sentence and placed Annina on probation for a period of six months, conditioned on her completion of 75 hours of community service and continued counseling (R76:26).

On January 12, 2005, Annina filed her post-conviction motion pursuant to Wis. Stat. §974.02 and (Rule) 809.30(2)(h). That motion sought an Order vacating her no contest plea and sentence and dismissing the charge of resisting an officer in violation of Wis. Stat. §946.41(1) on the grounds that the conceded facts established that Annina did not in fact commit that offense. Specifically, because the officers forced their way into her home without a valid warrant, they acted without the lawful authority required for conviction under §946.41(1). (R53).

The parties briefed the issue (R56; R57) and, on March 16, 2005, the circuit court, Honorable Joseph D. McCormack, presiding, entered its Order denying that motion.[1] In pertinent part, the court held as follows:

> The central issue before the Court, as it has been in the past, turns on an interpretation of the language in Sec. 946.41(1) that requires an officer to be doing an act in an official capacity and with "lawful authority." The question that this case continues to present is one of

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[1] By Order dated March 16, 2005, this Court extended the 60-day period for decision on the motion otherwise mandated by Wis. Stat. (Rule) 809.30(2)(i) (R62).

> whether or not a police officer who is unlawfully upon premises still retains the "lawful authority" to make an arrest. It has been and continues to be this Court's opinion that a police officer who is upon premises pursuant to a search warrant, later determined to be defective, does not necessarily lose his or her authority to arrest. While it is true that a person whose premises have been entered unlawfully may have the right to sanctions such as suppression of evidence or civil remedies, this does not necessarily mean that a police officer witnessing what he or she believes to be a crime loses lawful authority to make an arrest.
>
> While this Court agrees with defendant that this case is not on all fours with *State v. Hobson*, 218 Wis.2d 350 (1998) it is this Court's view that the principal [sic] is the same even if the police are later found to not be legally upon the premises.

(R61:1; App. 1).

Annina timely filed her notice of appeal on April 1, 2005 (R66).

STATEMENT OF FACTS

The relevant facts are those on which Annina's *Alford* plea was based, *i.e.*, those contained in the criminal complaint (R1), supplemented by the fact that the search warrant was unsupported by sworn allegations of fact and thus invalid (*see* R76:5-7; App. 7-9). The allegations in the criminal complaint may be summarized as follows:

On January 24, 2004, a Mequon police officer received a complaint regarding parking on the roadway in front of Annina's address. The officer went to Annina's home and advised her of the complaint through the partially open front door. Annina exclaimed that her neighbors were out to get her and declined the officer's request for additional information. (R1:1-2).

After Mequon police stopped and arrested an underaged person who claimed to have been drinking at the Annina residence, the officer

returned and asked permission to search her home for evidence of underaged drinking. Annina declined to allow the police to enter her home. (R1:2).

The police then obtained a search warrant for Annina's home. When the officer informed Annina of the warrant and began to enter her home, Annina began shutting the door. However, the officer forced the door open and began to handcuff Annina. She became "hysterical[]" and "uncontrollable" and did not cooperate, trying to pull her hands away from the officers and falling to her knees screaming. The officers removed her from her home while they conducted their search. (R1:2).

ARGUMENT

BECAUSE THE CONCEDED FACTS ESTABLISH THAT ANNINA DID NOT COMMIT THE CRIME OF RESISTING AN OFFICER, SHE IS ENTITLED TO WITHDRAWAL OF HER PLEA AND DISMISSAL OF THAT CHARGE

Because the officers did not have a valid warrant to search Annina's home, it was legally impossible for her to commit the offense of resisting or obstructing the execution of that warrant under Wis. Stat. §946.41(1). Because the officers did not have a valid warrant, and had no good faith basis to believe they had such a warrant or other legal basis for invading Annina's home, it was likewise legally impossible for her to commit the offense of resisting arrest for obstructing execution of the warrant. She accordingly is entitled to withdraw her no contest plea and to dismissal of that charge. *See State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232 (1996) (defendant entitled to withdraw *Alford* plea to crime which was legally impossible for him to have committed).

Interpretation of a statute and application of a given legal standard to undisputed facts are questions of law reviewed *de novo*. *State v. Bodoh*, 226 Wis.2d 718, 595 N.W.2d 330, 333 (1999).

A. The Undisputed Facts Establish That Annina Is Not Guilty Of Resisting An Officer

> Pursuant to Wis. Stat. §946.41(1),
> Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.

By its terms, therefore, a defendant is guilty of resisting an officer under this provision *only* if that officer is acting "with lawful authority" at the time of the alleged resistance. *See* Wis. J.I.–Crim. 1765. Annina accordingly can be guilty of resisting the officers *only* if they were acting "with lawful authority" at the time she allegedly resisted either the search of her home or her subsequent arrest for such resistance.

As the circuit court properly held, however, the officers were not acting with lawful authority. The purported search warrant upon which the intrusion into Annina's home was based was in fact constitutionally invalid.[2] The warrant was not supported by a statement under oath or affirmation, and accordingly violated the explicit requirements of both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. *See State v. Tye*, 2001 WI 124, ¶¶2-3, 13-14, 248 Wis.2d 530, 636 N.W.2d 473.

Because the officers thus were not acting with lawful authority when they forced their way into Annina's home, she necessarily cannot be guilty under §946.41(1) of resisting that unlawful search. The

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[2] The court below apparently believed that there is some significance to the fact that the officers' actions were not declared to be unlawful until after Annina's arrest and the search of her home (*See* R61:1; App. 1 ("a police officer who is upon premises pursuant to a search warrant, *later determined to be defective*, does not necessarily lose his or her authority to arrest;" the principle of *Hobson* "is the same even if the police are later found to not be legally upon the premises" (emphasis added)). However, an unlawful police invasion of one's home, like that by a common burglar, is unlawful from the beginning. It does not suddenly become unlawful at the point when a court recognizes it to be unlawful.

circuit court appears to have recognized as much, as its denial of Annina's post-conviction motion focuses, not on the alleged resistance to the unlawful *search* but to Annina's actions in response to her *arrest* (R61:1; App. 1).

For the same reasons, however, Annina cannot be guilty under §946.41(1) of resisting her arrest for resisting or obstructing the unlawful search of her home. An arrest must be based on probable cause, and probable cause requires a reasonable belief that the defendant committed a crime. *E.g.*, *State v. Nordness*, 128 Wis.2d 15, 381 N.W.2d 300, 308 (1986). Since Annina legally could not be guilty of resisting the unlawful search, and the officers could have no good faith basis for believing the search to be lawful, *see Tye*, 2001 WI 124, ¶24 (warrant not based on oath or affirmation is so obviously defective that "good faith" exception to exclusionary rule cannot apply), the officers necessarily were acting without probable cause and thus lawful authority when arresting her for that offense. *See also id.* ¶28 (Crooks, Bablitch & Wilcox, JJ., concurring) ("A warrant that totally lacks an oath or affirmation is so facially deficient that reliance upon the warrant is unreasonable. An officer, who obtains or executes a search warrant unsupported by an oath or affirmation, cannot reasonably rely on that warrant").

Thus, even if the circuit court were correct that "a police officer who is upon premises pursuant to a search warrant, later determined to be defective, does not *necessarily* lose his or her authority to arrest" (R61:1; App. 1), that observation has no relevance here. There may be, for instance, circumstances in which the defendant's assaultive actions break the causal connection between the unlawful entry and the arrest, although the Wisconsin appellate courts have not so held. That appears to be the principle underlying the foreign cases cited by the state below when arguing against suppression of the officer's observations of Annina's conduct following their illegal entry (R23:4-9). *See, e.g.*, *United States v. Waupekenay*, 973 F.2d 1533, 1538 (10th Cir. 1992).

That principle, however, has no application here because the

officers simply had no probable cause to believe Annina was guilty of resisting or obstructing the search of her home.

The circuit court appears to have gone astray by following the state's lead and reading far too much into the Supreme Court's decision in *State v. Hobson*, 218 Wis.2d 350, 577 N.W.2d 825 (1998) (R74:67-70; R75:32-34). The circuit court confused the common law privilege to resist an unlawful arrest (which the Supreme Court could and did abrogate in *Hobson*) with the statutory element of resisting under §946.41(1) that the officers be acting "with lawful authority" (which the Supreme Court did not and could not abrogate).

Contrary to the circuit court's belief that "the principal [sic] is the same" (R61:1; App. 1), *Hobson* has no application in this case. That case merely abrogated the *common law privilege* forcibly to resist a peaceful, albeit unlawful arrest, *Hobson*, 577 N.W.2d at 826, ¶¶1-2; it did not judicially repeal the essential, statutory element of the offense of resisting under Wis. Stat. §946.41(1) that the officers be acting "with lawful authority" at the time of the alleged resistance.

In *Hobson*, the defendant was charged with battery to a peace officer, obstructing, disorderly conduct, and resisting. 577 N.W.2d at 827, ¶8. The charges arose from an incident in which officers sought to question Ms. Hobson's 5-year old son regarding the alleged theft of a bicycle. When she refused, the officers insisted that they would take her son to the station for questioning. The incident deteriorated from there, resulting in Hobson's arrest for obstruction and disorderly conduct based on her vociferous and loud refusal to allow the officers to take her son. *Id.* at 826-27, ¶¶3-6. When the officers sought to arrest her, she fought with them, leading to the charges of resisting and assault. *Id.* at 827, ¶¶7-8.

The circuit court subsequently granted Hobson's motion to dismiss all counts for lack of probable cause. *Id.* at 828, ¶10. The state appealed only the dismissal of the battery charge on the question of whether Wisconsin recognized the common law right forcibly to resist a peaceful but unlawful arrest; it did not challenge dismissal of the

resisting, disorderly conduct, and obstructing counts which was based on the illegality of the police actions. *Id.* at 828, ¶10 & n.7.

Contrary to the state's argument below, which apparently was adopted by the circuit court, *Hobson's* holding is strictly limited to the policy question of whether the Supreme Court should continue to recognize the *common law right* forcibly to resist an peaceful but unlawful arrest. The illegality of the officers' actions in *Hobson* would not have provided a *statutory* defense to the battery charge. Unlike the resisting/obstructing statute, Wis. Stat. §946.41(1), there is no statutory element to the offense of battery to a peace officer requiring that the officer was acting lawfully at the time of the alleged battery. Wis. Stat. §940.20(2); *see* Wis. J.I.–Crim. 1230.[3] Section 946.41(1) applies only where the "officer is doing any act in an official capacity *and with lawful authority*," (emphasis added), while §940.20(2) merely requires that the officer is "acting in an official capacity." *See* Wis. J.I.–Crim. 915 (defining "official capacity"). *See also State v. Barrett*, 96 Wis.2d 174, 291 N.W.2d 498, 501 (1980):

> As is rightly pointed out by the State, the existence of a peace officer's lawful authority is an element of the crime of resisting or obstructing an officer under sec. 946.41, Stats. It is not an element of the crime of battery to a peace officer. Lawful authority goes to whether the officer's actions are conducted in accordance with the law. This determination is not the same as that which is made in construing whether a peace officer acts in his official capacity.

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[3] Section 940.20(2) provides as follows:

> (2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475(8)(b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class H felony.

Because the state did not appeal dismissal of the resisting and obstructing counts, the Court in *Hobson* was not asked to address the statutory element of those offenses that the officers be acting with lawful authority, and it did not purport to do so. The Court could not remove that statutory element of the offense in any event; only the legislature has the power to do so. *See City of Milwaukee v. Wroten*, 160 Wis.2d 207, 466 N.W.2d 861, 871 (1991) (court cannot construe unambiguous provisions out of laws); *Madison Teachers, Inc. v. Madison Metro. School Dist.*, 197 Wis.2d 731, 541 N.W.2d 786, 795-96 (Ct. App.1995).

B. Because the Undisputed Facts Establish That Annina Is Not Guilty of Resisting an Officer, Her Plea Must Be Vacated and the Charge Dismissed

One type of "manifest injustice" authorizing withdrawal of a plea "is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads." *State v. Smith*, 202 Wis.2d 21, 549 N.W.2d 232, 233-34 (1996) (citations omitted); *see State v. Johnson*, 207 Wis.2d 239, 558 N.W.2d 375 (1997). As the Supreme Court explained in *Smith*, "[i]f there is no evidence as to one of the elements of the crime, the defendant's *Alford* plea cannot be accepted and the factual basis requirement cannot be met." 549 N.W.2d at 234.

As the circuit court properly held, the officers' invasion of Annina's home was unsupported by a valid warrant. Regardless of whether they or Annina may have believed they were acting lawfully, they in fact were acting without lawful authority. Here, as in *Smith*, therefore, the factual basis requirement was not met, and could not have been met as a matter of law.

Annina accordingly is entitled to withdraw her plea to the charge of resisting an officer. *Smith, supra*. Because the undisputed facts further establish that the necessary elements of that offense cannot, as a matter of law, be proven, that charge must be dismissed. *Cf. State v.*

Mann, 123 Wis.2d 375, 367 N.W.2d 209 (1985) (where undisputed facts are omitted from a criminal complaint, and inclusion of those facts would preclude a finding of probable cause, dismissal is required).

CONCLUSION

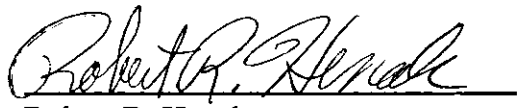
For these reasons, Anna Annina respectfully asks that the Court vacate the judgment of conviction and order dismissal of the charge of resisting an officer.

Dated at Milwaukee, Wisconsin, June 6, 2005.

Respectfully submitted,

ANNA ANNINA,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



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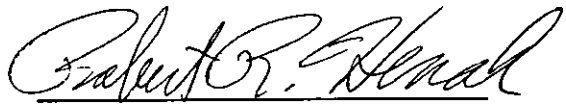
Annina CA Brf.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,917 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2005AP000876-CR
(Ozaukee County Case No. 04-CM-89)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNA ANNINA,

Defendant-Appellant.

APPENDIX OF
DEFENDANT-APPELLANT

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

STATE OF WISCONSIN,

Petitioner,

v.

ANNA ANNINA,

Respondent.

DECISION and ORDER

Case No. 04-CM-89

FILED
OZAUKEE COUNTY, WISCONSIN
MAR 16 2005
JEFFREY S. SCHMIDT
CLERK OF COURTS

The above-entitled matter is before the Court on defendant's motion to vacate her August 3, 2004 conviction for resisting arrest in violation of Wis. Stats. 946.41(1).

The central issue before the Court, as it has been in the past, turns on an interpretation of the language in Sec. 946.41(1) that requires an officer to be doing an act in an official capacity and with "lawful authority." The question that this case continues to present is one of whether or not a police officer who is unlawfully upon premises still retains the "lawful authority" to make an arrest. It has been and continues to be this Court's opinion that a police officer who is upon premises pursuant to a search warrant, later determined to be defective, does not necessarily lose his or her authority to arrest. While it is true that a person whose premises have been entered unlawfully may have the right to sanctions such as suppression of evidence or civil remedies, this does not necessarily mean that a police officer witnessing what he or she believes to be a crime loses lawful authority to make an arrest.

While this Court agrees with defendant that this case is not on all fours with State v. Hobson, 218 Wis. 2d 350 (1998) it is this Court's view that the principal is the same even if the police are later found to not be legally upon the premises.

IT IS THEREFORE THE ORDER OF THE COURT that defendant's motion for post conviction relief be and is hereby denied.

Dated at Port Washington, WI, this 16th day of March 2005.

Copy: Sandy Williams, District Attorney
Robert R Henak, Defense Counsel

BY THE COURT:

/s/ Joseph D. McCormack

Honorable Joseph D McCormack
Circuit Court Judge, Branch 3

[redacted]

App. 2

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

BRANCH III

STATE OF WISCONSIN, Plaintiff, vs. ANNA ANNINA, Defendant.	Case No. 04-CM-000089 PLEA/SENTENCING HEARING

Ozaukee County Courthouse
Port Washington, Wisconsin
August 3, 2004

BEFORE: HONORABLE JOSEPH D. McCORMACK
Circuit Judge Presiding

APPEARANCES:

MS. SANDY A. WILLIAMS, District Attorney, appeared on behalf of the State of Wisconsin.

LAW OFFICE OF FRANK JOSEPH SCHIRO, LTD., by MR. FRANK S. SCHIRO, Attorney at Law, appeared on behalf of and with the Defendant.

Reported by: JANE E. SCHNEIDER, RMR, CRR
Circuit Court Reporter

PROCEEDINGS

THE COURT: Please be seated.

This is in the matter of State versus Anna Annina. What are the appearances?

MS. WILLIAMS: State by Sandy Williams.

MR. SCHIRO: Good afternoon, your Honor. Attorney Frank Schiro appearing on behalf of Anna Annina, and she appears in person.

MS. WILLIAMS: Judge, we're here today for a final status. Through discussions with defense counsel, it's believed that the case is now resolved.

It's my understanding that the defendant will be entering a change of plea, other than not guilty to count -- I believe it's count 2, resisting an officer. If the Court accepts that change of plea, the state would be moving to dismiss count 1, the disorderly conduct, but reading that into the record for the Court to consider at the time of sentencing.

I've informed defense counsel that the state's recommendation is that the sentence be withheld; that she be placed on a period of probation; as a condition of her probation, that she perform 75 hours of community service; and that she continue in counseling as determined appropriate by

the department.

THE COURT: And what period of probation are you recommending, any particular length?

MS. WILLIAMS: No, Judge.

THE COURT: Is that your understanding of the state's recommendation, Mr. Schiro?

MR. SCHIRO: Your Honor, it is, with the qualification that the plea that was being proffered before the Court pending the Court's acceptance would be based upon an Alford type plea and with the other qualification that the defense is free to argue, of course, to the Court. I think that was understood.

THE COURT: Correct.

MS. WILLIAMS: Yes.

THE COURT: Mrs. Annina, how do you plea to the charge that on or about 24th of January of this year in the City of Mequon, you did knowingly resist a police officer while that officer was doing an act in his or her official capacity and with lawful authority?

THE DEFENDANT: No contest.

THE COURT: You're further entering, as your attorney said, an Alford type no contest plea; is that correct?

THE DEFENDANT: That's correct.

THE COURT: And do you understand or have you had sufficient discussions with Mr. Schiro as to what an Alford plea is?

THE DEFENDANT: Yes.

THE COURT: And if I was to tell you that an Alford type plea is a plea where you are asserting your innocence, but also conceding that there's a substantial probability that you will be convicted before a jury on the evidence presented, is that essentially your understanding what an Alford plea is?

THE DEFENDANT: Yes, it is, sir.

THE COURT: And you and Mr. Schiro have had a chance to go over this and discuss this?

THE DEFENDANT: Yes.

THE COURT: And do you understand by entering that plea, though, you're waiving, that is, you're giving up your right to require the state to prove, by evidence beyond a reasonable doubt to a jury of 12, all 12 agreeing on your guilt by that standard, that -- this is what they'd have to prove, you understand that, to the jury, by that standard of proof, that you knowingly resisted a police officer, that you knew that person to be a police officer, and you knew that person to be a police officer acting in

their official capacity and with lawful authority, or you should have known that. Do you understand that's what they would have to prove?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: Each and every one beyond a reasonable doubt, do you understand that?

THE DEFENDANT: I do, yes.

THE COURT: You and Mr. Schiro have been over this plea questionnaire form?

THE DEFENDANT: Yes.

THE COURT: Is there anything on there you don't understand, anything you want me to explain to you?

THE DEFENDANT: No, Judge.

THE COURT: Other than the recommendation you heard from the D.A. and her dismissal of count 1, did anybody offer you anything or threaten you in any way in order to get to you sign this form or enter the plea you've just entered?

THE DEFENDANT: No one, your Honor.

THE COURT: Mr. Schiro, do you believe your client is making a free, voluntary, and informed plea?

MR. SCHIRO: Your Honor, I do, and I think it merits my comment to the Court and on the record

that I have spent considerable time with my client, and most recently this past Saturday with her and with her husband, that being one of many occasions, discussing the prospects of entering this type of plea, explaining to her that the Alford type plea, which is one that she might be able to enter for the Court for these reasons to resolve this case, that she would protest her innocence, but recognize that the evidence as presented, a jury could well conclude that they would find her guilty of the offense, and that she's doing this knowingly and voluntarily, with the assistance of her husband, with the many conferences, I believe she's doing this freely, voluntarily, and intelligently.

THE COURT: And do you and Mrs. Annina stipulate to the Court considering the probable cause section of the complaint as a basis for this charge?

MR. SCHIRO: Your Honor, we would be prepared to stipulate that that's what the state would produce as evidence. With the Alford plea -- If she would have gone to trial, we'll be prepared to say that's what will be the state's evidence. We understand it.

We'd only ask that the factual basis include one other factor, which is that consistent

with the Court, this case history, that there was a search warrant the Court found was executed without a sworn oath, and the Court so found that.

THE COURT: The Court ruled the warrant effective.

MR. SCHIRO: Right, on the basis that there was no sworn oath.

THE COURT: Correct. Okay. I'll accept the defendant's plea to count number 2 in case number 04-CM-89. Upon a reading of the probable cause section of the complaint, which has also in great detail been before the Court previously on motions, the Court finds that there is a -- if the evidence presented by the state -- or alleged by the state in the complaint was presented to a jury, a substantial probability exists that the defendant would have been convicted of the offense alleged therein, and I therefore find her guilty of count 2, and order -- in the aforesaid case, and order count 1 dismissed on motion of the state. Any other comments? Well, first of all, are we ready to proceed with sentencing or --

MS. WILLIAMS: We are.

THE COURT: There's no notification problems or anything?

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

BRANCH III

STATE OF WISCONSIN, Plaintiff, vs. ANNA ANNINA, Defendant.	Case No. 04-CM-89 MOTION HEARING

Ozaukee County Courthouse
Port Washington, Wisconsin
April 26, 2004

BEFORE: HON. JOSEPH D. MC CORMACK
Circuit Judge Presiding

APPEARANCES:

JEFF SISLEY, Assistant District Attorney in and for the County of Ozaukee, appeared on behalf of the State of Wisconsin.

FRANK J. SCHIRO, Attorney at Law, appeared on behalf of and with the Defendant, Anna Annina.

REPORTED BY: Kathryn A. Jagow
Circuit Court Reporter

suppressable or not.

MR. SCHIRO: Isn't it a policy argument when the Justice Abrahamson says with regard to the Fourth Amendment, we have a bright line rule here that if that oath's not there, if that protection for the Fourth Amendment, the Article One Section 11 of the Wisconsin Constitution is so sacrosanct that that fundamentally affects what that documentss and that must be and the evidence should be suppressed. I mean, that's policy, too, isn't it?

THE COURT: I frankly read it to stronger than that.

MR. SCHIRO: Well, it's at least policy, I think it is stronger than that. But it's constitutional.

THE COURT: It's not policy, it's constitutional, exactly.

MR. SCHIRO: That's all I have.

THE COURT: Okay. Anything else?

MR. SISLEY: No, not on those issues, Judge.

THE COURT: Well, let me talk about how much longer -- well, let me talk about this and then once -- what we've had up till now and anybody -- we can get on here. First of all, regarding the sufficiency of the complaint and how it relates to the two charges of resisting and disorderly conduct, I'm basically agreeing with the State that while an argument can be made that once you get outside the four

corners of the complaint that some of these or at least especially in the disorderly conduct charge may have some proof problems to it, the burden that the State has as it mentioned is they have to stay within the four corners of the complaint. They have to meet the Evanow vs. Seraphim standards that existed in this state now for 33 years.

And matters outside the four corners of the complaint shouldn't be considered by the Court in either bootstrapping the complaint or in attacking it. And when read in light of that, I find that probable cause does exist to support both allegations, and I'll deny the motion to dismiss.

Regarding the search warrant, I think it's important to make some findings in regard to the probable cause aspect of the complaint as it relates to both the reliability of the informant and the sufficiency of the affidavit before I have more to say about it. Regarding the reliability of the informant, one of the things that the police have to consider, not only past track record of any defendant, they also have to consider all the circumstances under which they obtain this information.

And frankly, the information under the circumstances obtained cried out that this witness was reliable. He was making a statement against interest, he had just -- was in the vicinity of the suspected location, he had

been consuming intoxicants, he was of an age of the person suspected to be on the premises, and for a full variety of reasons I think it was certainly a reliable witness on its face.

Regarding the type of offense charged, while I think it was not the best practice to allege simply Section 125, I think that was sufficient also. However, I think in meeting state -- in reading State vs. Tye as Mr. Sisley already said, it doesn't look so good for the State. That case made it about as clear, as I said before, this is about as close to being on point as a case can get when argued in front of the Court. The four criteria, the four arguments that the State made relying on Nicholson, relying on a good faith exception, relying on 968.22, and all the arguments fell on deaf ears. And indeed the Court in its decision was a seven zero -- seven to zero decision where a concurring opinion really was written to indicate even more reasons why they thought the evidence had to be suppressed and why they believed the warrant was valid.

This is a clear message, relatively recent message from the Wisconsin Supreme Court, but it's been the law now for just -- been just about two years at the time that this event took place, clearly said if a nation not taken under -- information not taken under oath cannot form the basis of a search warrant, and I think basically said

that this is more than just paperwork. These are basic constitutional protections.

And I'm convinced that there's not -- there isn't any ambiguity here, and that the Court has to determine that the officers did not have a valid warrant and I so determine. Regarding the remedy, it's my opinion that the State's argument, however, regarding the charges before the defendant is one that the Court finds persuasive that notwithstanding the invalid warrant, the offenses alleged here are not furnishing and not possession of controlled substances, did not contributing to the delinquency of a minor, did not a variety of charges which the evidence would have to be suppressed because of the invalidity of the warrant, they're simply the outgrowth of the confrontation that allegedly occurred between the defendant and the officers at the door.

And while I will leave for perhaps other forums a determination as to what those remedies are outside the suppression of evidence in this case that Ms. Annina might have because of the invalidity of the warrant, clearly I don't think she's entitled to a dismissal of these charges. She is entitled to suppression of all evidence that was seized pursuant to the investigation that the police undertook, and that is ordered at this time. Now, on the issue of change of venue, did you want to be heard on that

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 6th day of June, 2005, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Anna Annina to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

Robert R. Henak

Cert. of Mailing.wpd