

**No. PD-0388-19**

IN THE COURT OF CRIMINAL  
APPEALS OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
5/23/2019  
DEANA WILLIAMSON, CLERK

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**CHASE ERICK WHEELER,**

*APPELLANT*

**V.**

**THE STATE OF TEXAS,**

*APPELLEE*

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*From the Court of Appeals for the Second District of Texas  
No. 02-18-00197-CR  
Appeal from Cause No. 1473192 in County Criminal Court No. 3 of Tarrant  
County, Texas, the Hon. Bob McCoy Presiding*

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**STATE'S PETITION FOR DISCRETIONARY REVIEW**

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## **IDENTITY OF JUDGE, PARTIES, AND COUNSEL**

Pursuant to Tex. R. App. P. 68.4(a), the following is a complete list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel:

1. The parties to the trial court's judgment are the State of Texas and Chase Erick Wheeler, the defendant.
2. Stephanie Gonzales, attorney of record for the Appellant at trial and on appeal, P.O. Box 121728, Arlington, Texas 76102.
2. J. Daniel Clark, attorney on appeal for the Appellant, 550 Reserve Street, Suite 190, Southlake, Texas 76092.
3. Sharen Wilson, Criminal District Attorney, attorney for the State of Texas, her assistant at trial, Bryce Buchman, and her assistants on appeal, Joseph W. Spence and Shelby J. White, 401 W. Belknap, Fort Worth, Texas, 76196-0201.
4. Hon. Bob McCoy, judge presiding at the trial.

**TABLE OF CONTENTS**

IDENTITY OF PARTIES AND COUNSEL .....2

TABLE OF CONTENTS.....3

INDEX OF AUTHORITIES.....4

STATEMENT REGARDING ORAL ARGUMENT .....6

STATEMENT OF THE CASE.....7

STATEMENT OF PROCEDURAL HISTORY.....8

GROUND FOR REVIEW .....9

ARGUMENT AND AUTHORITIES.....10

    I.    Relevant Facts. ....10

    II.   Relevant Constitutional and Statutory Provisions. ....12

    III.  There Is a Conflict in the Lower Courts Regarding the Effect  
          of Oath-Affirming Language in an Unsworn Affidavit.....13

    IV.  There Is a Conflict in the Lower Courts Regarding a Police  
          Officer’s Objective Good Faith Reliance on a Warrant  
          Approved as to Form by a Magistrate.....19

CONCLUSION AND PRAYER .....23

CERTIFICATE OF COMPLIANCE.....24

CERTIFICATE OF SERVICE .....24

APPENDIX

## INDEX OF AUTHORITIES

### Cases

<i>Ashcraft v. State</i> , No. 03-12-00660-CR, 2013 WL 4516193 (Tex. App.—Austin Aug. 20, 2013, no pet.) (mem. op., not designated for publication) .....	13, 16, 17, 18
<i>Dunn v. State</i> , 951 S.W.2d 478 (Tex. Crim. App. 1997) .....	20
<i>Flores v. State</i> , 367 S.W.3d 697 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) .....	21, 22
<i>Gravitt v. State</i> , No. 05-10-01195-CR, 2011 WL 5178337 (Tex. App.—Dallas Nov. 2, 2011, pet. ref'd) (mem. op., not designated for publication).....	14
<i>Hardy v. State</i> , 187 S.W.2d 678 (Tex. App.—Houston [14th Dist.] 2006) .....	16
<i>Hardy v. State</i> , 213 S.W.3d 916 (Tex. Crim. App. 2007) .....	14, 15, 16, 17
<i>Hunter v. State</i> , 92 S.W.3d 596 (Tex. App.—Waco 2002, pet. ref'd) .....	20
<i>Longoria v. State</i> , No. 03-16-00804-CR, 2018 WL 5289537 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication) .....	20, 21, 22
<i>Marsden v. Troy</i> , 189 S.W. 960 (Tex. Civ. App.—San Antonio 1916, no writ).....	15
<i>Martin v. State</i> , 896 S.W.2d 336 (Tex. App.—Amarillo 1995, no pet.) .....	15
<i>McClintock v. State</i> , 541 S.W.3d 63 (Tex. Crim. App. 2017) .....	19

<i>Order of Aztecs v. Noble</i> , 174 S.W. 623 (Tex. Civ. App.—Austin 1915, no writ).....	15
<i>Smith v. State</i> , 207 S.W.3d 787 (Tex, Crim. App. 2006) .....	14
<i>Swenson v. State</i> . No. 05-09-00607-CR, 2010 WL 924124 (Tex. App.—Dallas Mar. 16, 2010, no pet.) (mem. op., not designated for publication) .....	21, 22
<i>U.S. v. Leon</i> , 468 U.S. 897, 104 S.Ct. 3405 (1984).....	19
<i>Vaugh v. State</i> , 177 S.W.2d 59 (Tex. Crim. App. 1943) .....	14
<i>Woods v. State</i> , 14 S.W.3d 445 (Tex. App.—Fort Worth 2000, no pet.).....	20

**Statutes & Constitutions**

Tex. Code Crim. Proc. art. 1.06 (Westlaw 2017) .....	13
Tex. Code Crim. Proc. art. 15.02(2) .....	19
Tex. Code Crim. Proc. art. 18.01(b) (Westlaw 2017).....	13
Tex. Code Crim. Proc. art. 38.23 (Westlaw 2017) .....	13, 19
Tex. Const. art. I, § 9.....	13
Tex. Penal Code § 37.07 (Westlaw 2017) .....	14, 15, 17, 18

**STATEMENT REGARDING ORAL ARGUMENT**

The State requests oral argument. This case is about the application of Article 38.23(b) to an officer's failure to swear an oath in an application for a search warrant. The State believes oral argument will help the Court decide this issue.

## **STATEMENT OF THE CASE**

Appellant Wheeler was charged with driving while intoxicated. Wheeler refused to submit to field sobriety tests or a blood draw. Thus, the arresting officer filled out and submitted an affidavit for a blood draw warrant. The blood draw revealed that Wheeler had a blood alcohol concentration of 0.14. Wheeler moved to suppress the blood evidence because the officer failed to properly swear an oath in his affidavit for the blood draw warrant. The trial court denied Wheeler's motion, holding that the good faith exception applied, and Wheeler pleaded guilty. The Fort Worth Court of Appeals reversed the trial court's ruling, holding that the officer's affidavit was unsworn and that the officer could not have acted in objective good faith by submitting an unsworn affidavit for a search warrant.

## **STATEMENT OF PROCEDURAL HISTORY**

The court of appeals reversed the trial court's ruling in a published opinion on March 21, 2019. *Wheeler v. State*, --S.W.3d--, No. 02-18-00197-CR, 2019 WL 1285328 (Tex. App.—Fort Worth Mar. 21, 2019). [App. A]. The State did not file a motion for rehearing or reconsideration. This Court granted an extension to file the State's petition until May 22, 2019.



## **QUESTIONS PRESENTED FOR REVIEW**

Pursuant to Tex. R. App. P. 68.4(g), the following are questions presented for review:

1. Is an affidavit considered sworn if the affiant testifies that he did not swear to the affidavit in front of a person authorized to administer oaths, but the affidavit itself contains oath-affirming language?
2. Can an officer act in objective good faith by relying on the magistrate's approval of a warrant that is defective in form?

## ARGUMENT AND AUTHORITIES

### **I. Relevant Facts.**

The factual allegations of this case are not in dispute. Officer Tyler Bonner was the sole police officer on the night shift in Pantego, Texas. [RR 2:7, 10-11, 60-61]. Pantego, Texas, is a small one-square-mile town completely enveloped by Arlington, Texas, and usually only staffs one officer on the night shift. [RR 2:11]. On July 9, 2016, at around 3:00 a.m., Officer Bonner arrested Appellant Chase Erick Wheeler on suspicion of driving while intoxicated. [CR 4, 6]. Wheeler refused to submit to any field sobriety tests and also refused to submit a blood or breath sample. [RR 3:10-13]. Officer Bonner arrested Wheeler and took him to the Pantego police station, where he filled out an affidavit for a search warrant for a blood draw. [RR 2:7-8].

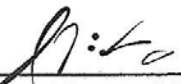
Officer Bonner used a pre-printed affidavit form kept by the Pantego Police Department. [RR 2:8; RR 3:State's Ex. 5, App. B]. The affidavit in the packet contained a jurat with a signature blank for the officer's signature as affiant, and another signature blank below it labeled "Judge/Peace Officer/Notary." [RR 3:State's Ex. 5, App. B].

WHEREFORE, based upon this affidavit and Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002), Affiant asks for a search warrant that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed the said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

  
\_\_\_\_\_  
Affiant

Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE §602.002.

  
\_\_\_\_\_  
Judge / Peace Officer / Notary  
ASSOCIATE JUDGE SARA JANE DEL CARMEN  
\_\_\_\_\_  
Official's Printed Name & Title

[ RR 3:State's Ex. 5, App. B]. Officer Bonner signed the signature blank for the affiant's signature, but did not swear to it in front of anyone. [RR 2:18-19, 22-23; RR 3:State's Ex. 5, App. B]. The dispatcher then scanned the packet and uploaded it to a Dropbox account where it was received by the magistrate, Sara Jane Del Carmen. [RR 2:12-13]. Judge Del Carmen reviewed the form, determined that there was probable cause to issue the warrant, and signed the signature blank labeled "Judge/Peace Officer/Notary." [RR 2:38-39, 52-53; RR 3:State's Ex. 5, App. B]. On its face, the jurat stated that Officer Bonner swore to and signed the affidavit in front of Judge Del Carmen, but that is not what occurred.

Officer Bonner testified at the suppression hearing that he did not know that

he needed to swear to a search warrant affidavit in front of anyone, and that he believed he was following standard Pantego Police Department protocol when he signed the form and had it sent to the magistrate via Dropbox. [RR 2:19-20]. Judge Del Carmen testified at the hearing that she did not notice that the form only had one signature blank, and that usually affidavits she received from Pantego police officers were sworn to by another officer or notary before being sent to her. [RR 2:53]. Judge Del Carmen admitted that she was mistaken in signing the jurat as if Officer Bonner had sworn to it in front of her. [RR 2:67-68].

It is undisputed that Officer Bonner did not swear to the affidavit in front of Judge Del Carmen or anyone else. [RR 2:18-19]. The trial court ruled that even though the affidavit was unsworn, the good faith exception applied. [CR 27-30]. On appeal, Wheeler argued that the good faith exception could not excuse an unsworn affidavit because a sworn affidavit was a constitutional requirement.<sup>1</sup> The Fort Worth Court of Appeals held that (1) there is no evidence that the affidavit was supported by any oath or its equivalent, and (2) the officer could not have acted in objective good faith in relying on an affidavit he knew to be unsworn.

## **II. Relevant Constitutional and Statutory Provisions.**

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall

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<sup>1</sup> On appeal, with regard to defects in the search warrant, Wheeler only raised the issue of Officer Bonner's failure to swear an oath under Texas law.

issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, § 9; *see also* Tex. Code Crim. Proc. art. 1.06 (Westlaw 2017).

No warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. ...

Tex. Code Crim. Proc. art. 18.01(b) (Westlaw 2017).

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

...

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

Tex. Code Crim. Proc. art. 38.23 (Westlaw 2017).

### **III. There Is a Conflict in the Lower Courts Regarding the Effect of Oath-Affirming Language in an Unsworn Affidavit.**

The test for whether an oath or affirmation was given is not the language used or any formulaic process, but whether the affiant's statements would be subject to perjury. *See Ashcraft v. State*, No. 03-12-00660-CR, 2013 WL 4516193, at \*6 (Tex. App.—Austin Aug. 20, 2013, no pet.) (mem. op., not designated for publication).

This is because “[t]he purpose of this oath is to call upon the affiant’s sense of moral

duty to tell the truth and to instill in him a sense of seriousness and responsibility.” *Smith v. State*, 207 S.W.3d 787, 790 (Tex. Crim. App. 2006). “A reasonable test to determine if a statement is a proper oath is whether the statement would subject the person to a charge of perjury.” *Gravitt v. State*, No. 05-10-01195-CR, 2011 WL 5178337, at \*2 (Tex. App.—Dallas Nov. 2, 2011, pet. ref’d) (mem. op., not designated for publication) (citing *Vaugh v. State*, 177 S.W.2d 59, 60 (Tex. Crim. App. 1943)).

As a matter of law, so long as a document contains a recital that it was made under oath, the declarant is subject to perjury, regardless of whether the oath was actually made. Tex. Penal Code § 37.07 (Westlaw 2017); *Hardy v. State*, 213 S.W.3d 916, 916 (Tex. Crim. App. 2007) (holding that the defendant was subject to perjury charge because the affidavit said it was sworn under oath, even though it was not). Here, the affidavit for search warrant stated that the Officer Bonner was sworn on oath:

The undersigned Affiant, a peace officer under the laws of the State of Texas, and after first being *duly sworn, on oath* makes the following statements and accusations ...

[RR 3:State’s Ex. 5, App. B (emphasis added)]. However, contrary to *Hardy*, the Fort Worth Court of Appeals held that Officer Bonner’s affidavit could not be considered sworn on oath because he presented testimony contradicting the oath-affirming language and jurat:

This uncontradicted, affirmative evidence that there was no oath or affirmation to the affidavit compels us to conclude that the oath recitations relied on by the State were false and cannot render the affidavit sworn.

[App. A, Op. at 12].

Under prior statutes and case law, the existence of the oath could be disproved if the affidavit was challenged. *See Martin v. State*, 896 S.W.2d 336, 339 (Tex. App.—Amarillo 1995, no pet.) (“An affidavit is simply another way to manifest an oath. It is a pledge in written form, constituting *prima facie* evidence that an oath was taken. That its formalities were not met does not negate the existence of the oath; it merely vitiates the use of the instrument as proof that an oath was taken.”) (citing *Marsden v. Troy*, 189 S.W. 960, 964 (Tex. Civ. App.—San Antonio 1916, no writ); *Order of Aztecs v. Noble*, 174 S.W. 623, 624 (Tex. Civ. App.—Austin 1915, no writ)). However, as this Court held in *Hardy v. State*, with the amendment of § 37.07, a document only need state that it was sworn on oath to be subject to perjury. 213 S.W.3d at 917. Indeed, the purpose of § 37.07 is to ensure that a declarant is subject to perjury for signing a jurat, even if that jurat is false.

In *Hardy*, the appellant, chief deputy of the sheriff’s office, was charged with perjury because he directed another deputy to falsify an affidavit. *Id.* The deputy’s affidavit stated that it was sworn under oath, and the Court found that the jurat was sufficient to subject the deputy, and consequently the chief deputy, to perjury charges. *Id.* There was no need to prove or disprove that the affiant swore an oath in

front of a notary because the oath-affirming language in the affidavit was sufficient standing alone. *Id.* And in fact, there was no evidence that the deputy ever swore to the affidavit in front of a notary.<sup>2</sup> See *Hardy v. State*, 187 S.W.2d 678, 683-84 (Tex. App.—Houston [14th Dist.] 2006), *rev'd*, 213 S.W.3d at 917.

In *Ashcraft v. State*, the Austin Court of Appeals extended the reasoning in *Hardy* to a search warrant affidavit. The court held that an affidavit containing a declaration that it was made under oath was sufficient even though the declarant testified that “the officer administering the oath did not actually verbalize the recitation of an oath.” *Ashcraft*, 2013 WL 4516193, at \*6. In that case, the affiant, Officer McWherter, testified that as far as he knew, the officer administering the oath was just there to witness him signing the affidavit. *Id.* at \*6. Merely having another person watch the signing of an affidavit is not enough to constitute an oath, nor does it suffice to “call upon the affiant’s sense of moral duty to tell the truth and to instill in him a sense of seriousness and responsibility.” *Id.* at \*6. In addition, there was no testimony that Officer McWherter was aware of the oath recital in the affidavit. See *id.* at \*\*6-7. However, the Austin Court of Appeals held that the oath recital in the affidavit, along with the jurat, was sufficient to potentially subject the

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<sup>2</sup> The appellant’s briefing in this Court stated that the deputy never swore an oath at all and never testified that he was aware of the oath recital when he signed the affidavit. See *Brief of Appellant*, Cause No. PD-0536-06, 2006 WL 3421176, at \*22-23, 25 (Nov. 3, 2006). However, this Court did not discuss this evidence in its opinion, and the lower court merely noted that there was no evidence of an oath.



Officer McWherter to a charge of perjury. *Id.* at \*7. Thus, the court reasoned, it constituted a valid oath even though there was no evidence that an oath was taken. *Id.*

The Fort Worth Court's attempt to distinguish *Hardy* and *Ashcraft* from the case at hand is flawed. In distinguishing *Hardy*, the Fort Worth Court noted that § 37.07 requires a declarant to be aware of the oath recital when he signs the document. Officer Bonner testified that he was not aware that the affidavit needed to be sworn, thus the Fort Worth court held that he could not meet that requirement. However, there is no evidence that deputy in *Hardy* testified that he was aware of the recital, and the Court still held that the deputy, and by extension the appellant, was liable under § 37.07. *See Hardy*, 213 S.W.3d at 917. While Officer Bonner testified that he did not know he had to swear to the affidavit in front of anyone else, he did not actually testify that he was unaware that the language of his own affidavit contained an oath recital, as the statute would require. [RR 2:18-20, 25-27]. And, both the Austin Court of Appeals and this Court have found the oath sufficient even when the affiant has not testified regarding his awareness of the oath recital. *See Hardy*, 213 S.W.3d at 917; *Ashcraft*, 2013 WL 4516193, at \*6.

The Fort Worth Court in citing *Ashcraft* noted in its parenthetical cite that “oath recitals combined with other evidence another officer witnessed affiant signing the affidavit rendered affidavit sworn.” [App. A., Op. at 12]. However, as discussed

above, the mere fact that the officer in *Ashcraft* signed his affidavit in the presence of another officer did not make his affidavit sworn, and there was no evidence that any verbal oath was administered, or that the officer took any sort of oath in front of another officer. *Ashcraft*, 2013 WL 4516193, at \*6. Rather, the *only* evidence that the affidavit was sworn was the oath recital language in the affidavit itself and the jurat. *Id.* at \*\*6-7.

There is a split in authorities in the lower courts, notably the Austin and Fort Worth courts, regarding whether an oath recital in an affidavit is sufficient to create a sworn affidavit. This is an important issue because officers can, due to poor training, miscommunication, or other myriad reasons, submit affidavits that contain oath recital language without necessarily reciting a verbal oath at the time of signing. On one hand, the law holds that an oath is sufficient if it subjects the affiant to perjury. And, the law states that an affiant is subject to perjury if the affidavit contains an oath recital, even if no actual oath was made, or even if the oath is false. However, the Fort Worth court held that an affidavit was unsworn, despite containing oath-affirming language. This holding is contrary to the holding of the Austin court on the same issue, and conflicts with this Court's holding in *Hardy*. Thus, the amendment of § 37.07 to define perjury as only requiring oath-affirming language has created a new and important question of state law regarding what constitutes a sworn affidavit.

#### **IV. There Is a Conflict in the Lower Courts Regarding a Police Officer's Objective Good Faith Reliance on a Warrant Approved as to Form by a Magistrate.**

For the good faith exception to apply, there must be (1) objective good faith reliance upon (2) a warrant (3) issued by a neutral magistrate that is (4) based upon probable cause. *McClintock v. State*, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017); Tex. Code Crim. Proc. art. 38.23(b). Here, it is uncontested that the warrant was issued by a neutral magistrate and supported by probable cause. [RR 2:20, 68-69; *see also* App. A, Op. at 16].

The Fort Worth Court of Appeals held that the good faith exception did not apply to the search warrant obtained by Officer Bonner because “[n]o objectively reasonable officer could believe that sworn affidavits are not required in seeking search warrants.” [App. A, Op. at 18]. This holding is misleading because it focuses solely on Officer Bonner’s actions in preparing the affidavit prior to the submission to the magistrate. But the Fort Worth Court of Appeals excludes from its “objectively reasonable officer” analysis the actions of an objectively reasonable officer relying on a warrant that had been approved and signed by a magistrate. Other courts have noted this distinction. For example, in *U.S. v. Leon*, the Supreme Court stated, “In the ordinary case, 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.” 468 U.S. 897, 921, 104 S.Ct. 3405, 3408 (1984). As such, an

objectively reasonable officer would likely consider a warrant that was approved and signed by a magistrate to be valid. Indeed, courts have consistently allowed the good faith exception to apply to warrants that are defective but approved by the magistrate. *Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997) (applying the good faith exception to warrant when magistrate inadvertently failed to sign arrest warrant); *Woods v. State*, 14 S.W.3d 445, 449 (Tex. App.—Fort Worth 2000, no pet.) (applying the good faith exception to warrant that failed to specifically name the offense per Tex. Code Crim. Proc. art. 15.02(2)).

On its face, the search warrant signed by the magistrate indicated that it was issued on probable cause after reviewing an affidavit, in writing, under oath, “which objectively indicates that it was based on a sworn affidavit.” *Longoria v. State*, No. 03-16-00804-CR, 2018 WL 5289537, at \*6 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication); see *Hunter v. State*, 92 S.W.3d 596, 603-04 (Tex. App.—Waco 2002, pet. ref’d), *abrogated on other grounds by Smith*, 207 S.W.3d at 791. Officer Bonner testified that he followed the same procedure he always did, and that he used a pre-printed form prepared by the police department. [RR 2:7, 19-20]. His affidavit, prepared in his normal manner, was signed and approved by the magistrate, as it had been every time before. [RR 2:18-20]. And, once the magistrate signed the warrant, it appeared valid on its face. [RR 3:State’s Ex. 5, App. B]. Thereafter, the magistrate issued the search warrant which was used

to obtain the blood draw. [RR 3:State’s Ex. 5, App. B]. Under these circumstances, even if an officer had knowledge that the supporting affidavit was to be sworn, an objectively reasonable officer could nonetheless rely, in good faith, on a search warrant signed and issued by a magistrate.

The Fort Worth Court diverges from other appellate courts that have held that an officer receiving a search warrant signed by a magistrate and supported by an affidavit claiming to be sworn under oath could reasonably rely on that search warrant. *See Longoria*, 2018 WL 5289537, at \*6; *Flores v. State*, 367 S.W.3d 697, 703 (Tex. App.—Houston [14th Dist.] 2012, pet. ref’d); *Swenson v. State*, No. 05-09-00607-CR, 2010 WL 924124, at \*4 (Tex. App.—Dallas Mar. 16, 2010, no pet.) (mem. op., not designated for publication). While the Fort Worth Court discusses the holding of *Longoria* in the context of whether the affidavit was sworn, it ignores the ultimate holding. At the suppression hearing, the trial court in *Longoria* ruled that the officer had placed himself in jeopardy of a perjury charge if the affidavit were false, and thus the affidavit was sufficiently sworn. 2018 WL 5289537, at \*4. However, on appeal the Austin Court held that assuming the affidavit was defective, the good faith exception nonetheless applied. *Id.* Thus, in *Longoria*, even though the officer knew that his affidavit was unsworn, the officer believed that he had complied with the requirements for a valid warrant, and the warrant “objectively indicates that it was based on a sworn affidavit.” *Id.* at \*\*5-6.

The Dallas Court of Appeals also considered this issue in *Swenson v. State*. At the time *Swenson* was decided, courts were divided regarding the validity of a search warrant sworn to over the phone. 2010 WL 924124, at \*2. The defendant did not challenge the truth of the affidavit or that probable cause existed. *Id.* at \*4. The court assumed that a telephonic oath was invalid, but held that the good faith exception would apply. *Id.* at \*2. The court reasoned that the officer acted in objective good faith because “[h]aving repeatedly obtained warrants under the procedure used by the magistrate, [the officer] could believe in objective good faith the warrant was valid.” *Id.* at \*4; *see Flores*, 367 S.W.3d at 703 (applying good faith exception to defectively sworn warrant when officer testified that he followed standard procedure and warrant contained language indicating it was made under oath).

There is a split among the lower courts regarding the application of the good faith exception to a warrant that is prepared defectively by an officer but subsequently approved by a magistrate. The 3rd, 5th, and 14th Courts of Appeal have applied the good faith exception to warrants that were defectively prepared but approved by a magistrate. In *Longoria*, *Swenson*, and *Flores* – as in this case – the officer preparing the affidavit was also the officer who executed the warrant. However, the Fort Worth Court determined that the good faith exception could not apply to Officer Bonner’s preparation of the warrant because no officer could

reasonably believe that an affidavit need not be sworn. Thus, the court also held that Officer Bonner could not have acted in good faith in executing the warrant, even though it had been signed and approved by the magistrate. Because the Fort Worth Court of Appeals' decision conflicts with that of other courts on the same issue, it is important to the jurisprudence of the State for this Court to define when an objectively reasonable officer can rely on the approval of a warrant by a magistrate.

### **CONCLUSION AND PRAYER**

The State prays that this Court grant its petition for discretionary review, and after full briefing on the merits, reverse the judgment of the court of appeals, affirm the trial court's denial of Wheeler's motion to suppress evidence, and affirm the trial court's judgment.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 3,458 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), as computed by the computer software used to prepare the document.

/s/ SHELBY J. WHITE  
SHELBY J. WHITE

**CERTIFICATE OF SERVICE**

On the 22nd day of May, 2019, a true copy of the State's petition for discretionary review has been e-served on the parties below:

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/s/ SHELBY J. WHITE  
SHELBY J. WHITE

**No. PD-0388-19**

**IN THE COURT OF CRIMINAL  
APPEALS OF TEXAS**

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**CHASE ERICK WHEELER,**

***APPELLANT***

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**THE STATE OF TEXAS,**

***APPELLEE***

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*From the Court of Appeals for the Second District of Texas*

*No. 02-18-00197-CR*

*Appeal from Cause No. 1473192 in County Criminal Court No. 3 of Tarrant  
County, Texas, the Hon. Bob McCoy Presiding*

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**APPENDIX**

App. A: Court of Appeals' Opinion in *Wheeler v. State*, --S.W.3d--, No. 02-18-00197-CR, 2019 WL 1285328 (Tex. App.—Fort Worth Mar. 21, 2019)

App. B: Search Warrant [RR 3:State's Ex. 5]

# App. A



**In the  
Court of Appeals  
Second Appellate District of Texas  
at Fort Worth**

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No. 02-18-00197-CR

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CHASE ERICK WHEELER, Appellant

v.

THE STATE OF TEXAS

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On Appeal from County Criminal Court No. 3  
Tarrant County, Texas  
Trial Court No. 1473192

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Before Gabriel, Pittman, and Bassel, JJ.  
Opinion by Justice Gabriel

## **OPINION**

Appellant Chase Erick Wheeler appeals from the trial court's denial of his pretrial motion to suppress blood-alcohol evidence seized under a warrant that was supported by an unsworn affidavit. In what Wheeler and the State both declare is an issue of first impression, we are asked to decide whether the good-faith exception to the statutory exclusionary rule allows admission of this evidence even though it was obtained in violation of the Texas Constitution's oath requirement. Under the singular facts of this case, we conclude that it does not.

### **I. BACKGROUND**

#### **A. THE ARREST**

The facts surrounding Wheeler's arrest and the issuance of the search warrant are largely undisputed. On July 9, 2016, Officer Tyler Bonner, who at the time had worked for the Pantego Police Department (Pantego) for one year and two months,<sup>1</sup> responded to a report that a driver was asleep behind the wheel of an idling car in the drive-through lane of a fast-food restaurant. Bonner arrived, woke the driver up, and noted that he appeared intoxicated. The driver, identified as Wheeler, refused to perform any field-sobriety tests but told Bonner that he had "consumed 4 beers." Bonner arrested Wheeler and drove him to the police department to get a search warrant for Wheeler's blood after Wheeler refused to supply a sample.

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<sup>1</sup>Apparently, this was Bonner's first employment as a police officer after leaving the training academy.

## B. THE SEARCH WARRANT

Pantego routinely prepares premade packets that include several fill-in-the-blank forms: an affidavit for a search warrant, a search warrant, an order to execute the warrant, and a return. The affidavit form includes a recital that the “undersigned Affiant, a peace officer . . ., and after first being duly sworn, on oath makes the following statements and accusations.” Bonner filled out the affidavit form, supplying the probable-cause facts that he believed supported the issuance of a search warrant for a compelled sample of Wheeler’s blood. These facts included that Wheeler had a moderate odor of alcohol and that his speech was slurred and confused. Bonner signed the affidavit, affirming that it was sworn by his oath, and dated the jurat on the affidavit. Bonner then gave the packet to the dispatcher who called the magistrate and electronically sent the packet to her.

The magistrate, Sara Jane Del Carmen, knew that the arrangement of Pantego’s office space dictated that the requesting officer physically hand the packet documents to the dispatcher who would then electronically forward the packet. When Del Carmen received Bonner’s packet, she reviewed the affidavit, determined that probable cause had been established, and electronically signed the affidavit’s dated jurat and the warrant. The jurat provided: “Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV’T CODE § 602.002.” Del Carmen did not notice that Bonner’s affidavit, unlike other affidavits she had seen from Pantego officers, did not

have another officer's badge number or a notary's stamp on it. Del Carmen admitted that she had signed the jurat in error because she had "missed" that Bonner's affidavit was not sworn. But at the time, Del Carmen believed probable cause for a search warrant had been established and did not see any defects in Bonner's affidavit. She electronically signed the warrant, authorizing officers to take a sample of Wheeler's blood, and electronically returned the packet to the dispatcher. The warrant included a recitation that the affiant—Bonner—"did heretofore this day subscribe and swear to said affidavit before me"—Del Carmen.

The dispatcher informed Bonner that the warrant had been signed. The warrant was executed, and Wheeler's blood draw occurred approximately one hour after his arrest. *See* Tex. Code Crim. Proc. Ann. art. 18.06. On Pantego's blood-room-procedure form, Bonner did not indicate whether the blood draw was pursuant to Wheeler's consent or a search warrant. He later did not remember why he did not circle "Search Warrant" on that form. Bonner signed the return as the affiant, but Del Carmen never signed it.<sup>2</sup> *See id.* art. 18.10. Wheeler's blood-alcohol content was 0.14.

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<sup>2</sup>Bonner did not remember if he signed the return before or after he was informed Del Carmen had signed the warrant. Del Carmen testified that Bonner had already signed the return when she received the packet and that it was not "typical[]" for Pantego officers to sign the return before the warrant was issued. A return cannot be made by the officer until after the warrant is executed. *See* Tex. Code Crim. Proc. Ann. arts. 18.06(a), 18.10. However, these deficiencies in the return do not mandate suppression of the blood-alcohol evidence. *See id.* art. 18.10 ("The failure of an officer

### C. THE MOTION TO SUPPRESS AND APPEAL

Wheeler was charged by information with the class B misdemeanor of driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04(a)–(b). Before trial, he filed a motion to suppress the seized blood-alcohol evidence, arguing that the warrant was invalid because it was based on an unsworn affidavit and therefore violated the United States and Texas Constitutions.<sup>3</sup>

At the trial court’s December 19, 2017 evidentiary hearing, Bonner testified that he did not fabricate the probable-cause facts included in his affidavit. Although he had been trained at the police academy about the oath requirement for warrant affidavits, Pantego did not reinforce that he needed an oath or its equivalent administered before submitting the affidavit. In fact, he stated that he had never before sworn to a probable-cause affidavit in the fourteen months he was a Pantego officer and that he had previously applied for search warrants from Del Carmen. At the suppression hearing, Bonner admitted that he was aware of the constitutional oath requirement for search-warrant affidavits based on his prior academy training.<sup>4</sup> When

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to make a timely return of an executed search warrant . . . does not bar the admission of evidence under Article 38.23 [i.e., the exclusionary rule.]”).

<sup>3</sup>Wheeler also sought suppression because of a lack of reasonable suspicion or probable cause. The trial court denied these portions of the motion, and Wheeler does not attack that denial on appeal.

<sup>4</sup>At the time of the hearing, Bonner was employed by the Farmers Branch Police Department. Before that and after leaving Pantego, Bonner worked for the Dalworthington Gardens Department of Public Safety.



Bonner was asked if an oath had been administered or if someone watched him sign the affidavit for Wheeler's warrant, Bonner stated, "Not that I remember." Bonner admitted that he never communicated directly with Del Carmen that night. But he testified that he followed what he believed to be Pantego's standard procedure in obtaining the search warrant. Bonner was familiar with oaths and understood that the probable-cause facts in his affidavit were never properly sworn. Bonner could not remember if he saw the signed search warrant, but he was not subjectively aware of any defects in his affidavit at the time and he subjectively believed he had a valid search warrant.

Del Carmen testified that she previously had seen many warrant affidavits from Pantego officers and that they ordinarily were sworn either before another officer or before a notary before being sent to her by the dispatcher. She did not notice that Bonner's affidavit was not sworn and she did not administer an oath to Bonner that night. Based on her knowledge of Pantego procedure regarding officers' handing the packet to the dispatcher to forward to her, Del Carmen believed that an attestation to the affidavit could have occurred. But she testified that based on the packet she received regarding Wheeler's warrant, there was no indication of an attestation. Del Carmen agreed that Bonner's affidavit provided no verified facts supplying probable cause for the search warrant.

The dispatcher did not testify at the hearing and was no longer employed by Pantego. The trial court took judicial notice that the dispatcher was terminated for “the creation of fictitious, racial profiling codes.”

The trial court denied Wheeler’s motion on January 9, 2018. In its carefully crafted order, the trial court framed the issue: “Is the good faith exception provision in Article 38.23(b) Code of Criminal Procedure applicable under these facts so that the exclusionary rule contained in Article 38.23(a) is inapplicable?” The trial court, after paying “particular attention” to the plain language of the good-faith exception in article 38.23(b), found that the unsworn affidavit was a procedural mistake, not a substantive error, that fell within the good-faith exception to article 38.23(a)’s exclusionary rule. *See* Tex. Code Crim. Proc. Ann. art. 38.23.

After pleading guilty under a plea-bargain agreement, Wheeler now appeals the trial court’s denial of his pretrial motion to suppress. *See id.* art. 44.02. The trial court certified that Wheeler had the right to appeal from the trial court’s suppression ruling notwithstanding that his guilty plea was the result of a plea bargain. *See* Tex. R. App. P. 25.2(a)(2)(A), (d). Wheeler now argues that because Bonner’s affidavit was not sworn, the evidence seized under the subsequently issued warrant should have been suppressed because it violated the affidavit and warrant requirements found in the Texas Constitution,<sup>5</sup> which could not be cured by the exclusionary-rule exception

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<sup>5</sup>Although Wheeler contends in passing that the search also violated his federal constitutional rights under the Fourth and Fourteenth Amendments, he substantively

found in the code of criminal procedure. *See State v. Villarreal*, 475 S.W.3d 784, 811–12 (Tex. Crim. App. 2014) (5-4 decision) (recognizing legislature cannot create “new exception to the warrant requirement” contrary to constitutional, guaranteed rights); *Ex parte Ainsworth*, 532 S.W.2d 640, 641 (Tex. Crim. App. 1976) (recognizing legislature cannot alter the scope of constitutional protections by statute). *See generally Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010) (recognizing Texas’s exclusionary rule provides broader protections than does federal, judicially created rule); *State v. Huddleston*, 387 S.W.3d 33, 40 n.11 (Tex. App.—Texarkana 2012, pet. ref’d) (noting Texas’s statutory good-faith exception more limited than federal, nonstatutory counterpart).

## II. STANDARD OF REVIEW

In general, when tasked with the review of a trial court’s suppression ruling, we use a bifurcated standard of review—giving almost total deference to historical-fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor and reviewing de novo application-of-law-to-fact questions that do not turn on credibility and demeanor. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App.

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argues only the application of the good-faith exception to the Texas Constitution’s requirements. He affirmatively states in his brief that the “federal exclusionary rule . . . has no applicability to this case” and that he “makes no argument that the blood evidence should be suppressed by operation of the federal exclusionary rule.” Because Wheeler did not substantively brief the United States Constitution or the federal exclusionary rule, we will not address them. *See Merrick v. State*, Nos. 02-17-00035-CR, 02-17-00036-CR, 2018 WL 651375, at \*4 (Tex. App.—Fort Worth Feb. 1, 2018, pet. ref’d).

2007). The facts presented here are undisputed, and we are presented with a question of law: Can the good-faith exception to the exclusionary rule excuse the affidavit-oath requirement found in the Texas Constitution and code of criminal procedure? Because this issue solely implicates the trial court's application of undisputed facts to the law, we review the ruling de novo and will affirm it if it is correct under any applicable legal theory. See *State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Blaylock v. State*, 125 S.W.3d 702, 705 (Tex. App.—Texarkana 2003, pet. ref'd). Further, because Wheeler's arguments implicate the scope of the statutory exclusionary rule and its exception, our question is one of statutory construction, which is also reviewed de novo. See *McClintock v. State*, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017). Finally, because the good-faith exception is just that—an exception—the State had the burden to show its applicability to justify admission of the blood-alcohol results in response to Wheeler's motion to suppress. See 41 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice & Procedure* § 18:28 (3d ed. 2011); cf. Tex. Penal Code Ann. § 2.02(b) (placing burden of proof on the State to negate any labeled exception to commission of an offense).

### **III. AFFIDAVIT AND WARRANT REQUIREMENTS**

#### **A. PURPOSE OF THE OATH REQUIREMENT**

The Texas Constitution provides that lawful issuance of a search warrant is dependent on three requirements: (1) a particular description of the person or thing to be searched, (2) facts establishing probable cause, and (3) supported by oath or

affirmation. Tex. Const. art. I, § 9. The Texas Legislature codified these requirements, including that the affidavit be under oath or by affirmation, i.e., sworn. Tex. Code Crim. Proc. Ann. art. 1.06 (tracking oath-or-affirmation language in Texas Constitution), art. 18.01(b) (“A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.”). Thus, “an oath is both constitutionally and statutorily **indispensable**” in the context of a search-warrant affidavit. *Clay v. State*, 391 S.W.3d 94, 97–98 (Tex. Crim. App. 2013) (emphasis added). To qualify as a sworn affidavit, the declaration of facts contained within the affidavit must be confirmed by oath or its equivalent. *See id.*; *Vaughn v. State*, 177 S.W.2d 59, 61 (Tex. Crim. App. 1943) (op. on reh’g) (quoting *Ex parte Scott*, 123 S.W.2d 306, 311 (Tex. 1939)).

The State concedes that Bonner was not administered an oath before he signed the affidavit. But the State asserts that the oath language in the affidavit’s preamble, in the jurat, and in the warrant’s preamble show that the purpose of the oath was fulfilled, allowing the affidavit to be considered sworn. The purpose of an oath “is to call upon the affiant’s sense of moral duty to tell the truth and to instill in him a sense of seriousness and responsibility.” *Smith v. State*, 207 S.W.3d 787, 790 (Tex. Crim. App. 2006). But if “the record indicates that ‘the affidavit was solemnized by other means,’” the affidavit is sufficient to support the issuance of a search warrant. *Clay*, 391 S.W.3d at 97–98 (quoting *Smith*, 207 S.W.3d at 791).

Here, there is no evidence from which it could be said that Bonner signed his affidavit with “a sense of seriousness and responsibility” or with a “sense of [his] moral duty to tell the truth.” *Smith*, 207 S.W.3d at 790. At the suppression hearing, Bonner testified that he understood the meaning of the oath he took before he began his testimony but he did not state that he had that same understanding at the time he signed his affidavit. Indeed, he was not asked if that was the case. Other than his testimony that he had not falsified the affidavit facts, he did not testify that he signed the affidavit with a knowledge of its seriousness such that he would be subject to perjury. *See id.* (“When an individual swears under oath, society’s expectation of truthfulness increases and the legal consequences for untruthfulness—prosecution for perjury, for example—may be severe.”).

Bonner did not take an oath or otherwise attest to the affidavit facts before having the dispatcher forward the packet to Del Carmen, and Del Carmen specifically testified that she had not administered an oath to Bonner. Both agreed that they never spoke to each other that night, and Bonner testified that he had never before sworn an oath in front of anyone to procure a warrant. And both recognized that the jurat’s oath recital never occurred. We cannot conclude that the oath recitations in the affidavit’s and warrant’s preambles or in the jurat were sufficient to consider the affidavit sworn. The evidence reflects the opposite—no oath or its equivalent occurred. Del Carmen testified that the oath statement in the warrant’s preamble

never happened and opined that the affidavit was not sworn.<sup>6</sup> This uncontradicted, affirmative evidence that there was no oath or affirmation to the affidavit compels us to conclude that the oath recitations relied on by the State were false and cannot render the affidavit sworn. *See generally id.* at 790 n.13 (stating “an oath is a matter of substance, not form”).

These facts distinguish this case from the cases relied on by the State to support its argument that the oath recitations can render an affidavit sworn. In *Longoria v. State*, the court recognized that although the officer testified he had not been formally sworn before signing his affidavit, he stated that he signed the affidavit “swearing that everything in it [was] true,” believing that he had complied with the oath requirement, and no evidence contradicted the oath recitals in the subsequently issued warrant. No. 03-16-00804-CR, 2018 WL 5289537, at \*4–6 (Tex. App.—Austin Oct. 25, 2018, no pet.) (mem. op., not designated for publication); *see also Ashcraft v. State*, No. 03-12-00660-CR, 2013 WL 4516193, at \*6–7 (Tex. App.—Austin Aug. 20, 2013, no pet.) (mem. op., not designated for publication) (holding oath recitals combined with evidence another officer witnessed affiant signing affidavit rendered affidavit sworn). In *Hardy v. State*, the court of criminal appeals held that a perjury

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<sup>6</sup>Del Carmen stated that because she knew an applying Pantego officer would physically hand the warrant packet to the dispatcher, she would “ordinarily, . . . have considered it attested to.” But no evidence shows that Bonner attested to the affidavit to the dispatcher. Bonner testified that he had never sworn or attested to his affidavits before, and Del Carmen testified that there was no indication that Bonner attested to the affidavit in front of the dispatcher.

conviction did not require evidence that the affiant was actually present before the notary public at the time the oath was executed in light of the signed jurat, which stated that the affidavit was sworn to before the notary. 213 S.W.3d 916, 917 (Tex. Crim. App. 2007). But in *Hardy*, the court of criminal appeals relied on a statute applicable to perjury prosecutions that vitiated any defense based on an oath's irregularity if the document contained an oath recital, if the declarant was aware of the recital at the time he signed the document, and if the document contained a signed jurat. *Id.* (citing Tex. Penal Code Ann. § 37.07(b)). Bonner testified that he was not aware his affidavit needed to be sworn at the time he made the affidavit. Further, there is no indication in *Hardy* that there was affirmative evidence that the jurat was false as we have here.

Other courts have considered an affidavit to be sworn if there was some indication that an oath was made or if there was no evidence to contradict the oath recitals. *See Flores v. State*, 367 S.W.3d 697, 702–03 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd); *Brent v. State*, 916 S.W.2d 34, 37–38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *cf. Smith*, 207 S.W.3d at 791–92 (holding failure to sign warrant affidavit does not invalidate warrant “if other evidence proves that the affiant personally swore to the truth of the facts in the affidavit before the issuing magistrate”). Here, the evidence was undisputed that no oath or its equivalent was made, and both Bonner and Del Carmen contradicted the oath recitals in the affidavit,



the jurat, and the warrant. Bonner's affidavit was not improperly sworn; it was completely unsworn.

## **B. THE EXCLUSIONARY RULE AND ITS GOOD-FAITH EXCEPTION**

### **1. Application of Exclusionary Rule**

Because there was no oath or its equivalent that would render Bonner's affidavit sworn, his affidavit violated constitutional and statutory requirements. *See* Tex. Const. art. I, § 9; Tex. Code Crim. Proc. Ann. arts. 1.06, 18.01(b). The Texas exclusionary rule forbids the admission of evidence that was obtained "in violation of any provision of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America," which clearly would apply to violations of the "indispensable" oath requirement. Tex. Code Crim. Proc. Ann. art. 38.23(a); *Clay*, 391 S.W.3d at 97–98; *see Longoria*, 2018 WL 5289537, at \*4–6 (applying good-faith exception to facially unsworn search-warrant affidavit and concluding blood-alcohol evidence admissible because officer testified he thought he had complied with the law, believed his affidavit had been sworn, stated that he signed the affidavit "swearing that everything in it is true," and no evidence contradicted the warrant's oath recitals); 40 Dix & Schmolesky, *supra*, at § 7:21 ("The plain language of Article 38.23 makes clear that it applies to evidence obtained in violation of any provision of the Constitution of the State of Texas."); *cf. McClintock*, 541 S.W.3d at 73–74 (applying exclusionary rule's good-faith exception to evidence seized pursuant to warrant affidavit that "failed to establish probable cause" as constitutionally required). But

Wheeler’s blood-alcohol evidence would be excepted from this exclusion if it “was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.” Tex. Code Crim. Proc. Ann. art. 38.23(b); *see McClintock*, 541 S.W.3d at 74 (concluding officers’ conduct was objectively “close enough” to valid in making affidavit that the subsequent search was executed in good-faith reliance on the issued warrant).

## 2. Application of Good-Faith Exception

The State contends that the good-faith exception has been applied to affidavits and warrants with other constitutional infirmities, which justifies its application to the admission of Wheeler’s blood-alcohol evidence. Indeed, many sins have been forgiven by the good-faith exception as pointed out by Wheeler in his brief, leading some to suggest that its reach potentially is limitless absent evidence of a false statement in the affidavit that the affiant made knowingly, intentionally, or recklessly.<sup>7</sup>

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<sup>7</sup>*See, e.g., State v. Crawford*, 463 S.W.3d 923, 932 (Tex. App.—Fort Worth 2015, pet. ref’d) (Dauphinot, J., concurring) (op. on reh’g) (“As I understand the state of the law in Texas, once the warrant issues, the only challenge that will lie is a [lack-of-good-faith-reliance] challenge. Surely lawyers are not being put in the position of being able to challenge the admissibility of evidence obtained pursuant to a defective warrant only by attacking the integrity of the officer who swore to the affidavit.”); *cf. McClintock*, 541 S.W.3d at 75 (Alcala, J., dissenting) (“Given that the plain language in Article 38.23(b) requires the existence of probable cause for the exception in that portion of the statute to apply, and given this Court’s former determination that this search warrant was issued in the absence of any probable cause under a correct application of the law, I would apply the general rule in Article 38.23(a) and hold that the evidence must be suppressed.”); *Simmons v. State*, 7 S.W.2d 78, 79 (Tex. Crim. App. 1928) (holding in case decided before good-faith exception enacted, search-warrant affidavit based only on information and belief of affiant, with no supporting facts or

The court of criminal appeals has clarified that article 38.23's good-faith exception applies if the prior law-enforcement conduct was close enough to "the line of validity" such that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct. *McClintock*, 541 S.W.3d at 72–73 (quoting and relying on *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014)).

Under the clear language of the good-faith exception, Wheeler's blood-alcohol evidence would have been admissible notwithstanding the absence of an "indispensable" oath if (1) Bonner acted in objective good-faith reliance on the warrant, (2) Del Carmen was a neutral magistrate, and (3) the warrant was based on probable cause. *See* Tex. Code Crim. Proc. Ann. art. 38.23(b); *McClintock*, 541 S.W.3d at 67; *Clay*, 391 S.W.3d at 97–98. Wheeler does not dispute that Del Carmen was neutral or that Bonner's unsworn affidavit facts established probable cause for the issuance of a warrant.<sup>8</sup> What Wheeler disputes is whether Bonner acted in objective

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circumstances, subject to exclusionary rule); *State v. Hill*, 484 S.W.3d 587, 592–93 (Tex. App.—Austin 2016, pet. ref'd) (recognizing limited nature of article 38.23(b) and holding good-faith but incorrect reliance on statute or appellate precedents not included in exception, which applies only to good-faith reliance on warrant).

<sup>8</sup>To the extent Wheeler argues that the warrant was in fact not issued because of the lack of an affidavit oath, we disagree. Issuance has been defined as occurring when "a neutral magistrate finds probable cause to issue the warrant and signs the accompanying affidavit." *White v. State*, 989 S.W.2d 108, 110 (Tex. App.—San Antonio 1999, no pet.). Other than a passing reference to Del Carmen's illegible signature, Wheeler does not challenge these elements for issuance. And Del Carmen

good-faith reliance on the issued warrant given that the exclusionary rule's purpose is to deter police misconduct. *See Brick v. State*, 738 S.W.2d 676, 679 n.5 (Tex. Crim. App. 1987); *Self v. State*, 709 S.W.2d 662, 668 (Tex. Crim. App. 1986); *Flores*, 367 S.W.3d at 697; *Brent v. State*, 916 S.W.2d 34, 38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

Here, Bonner testified that he had been trained on the oath requirement for search warrants but that when he began working for Pantego, that concept was not reinforced. Thus, he never swore to any search-warrant affidavits while working for Pantego for fourteen months. He subjectively believed that not swearing to affidavits was Pantego's standard procedure. Del Carmen testified, however, that it was normal procedure for Pantego officers to produce sworn affidavits for her review in determining probable cause. Indeed, Del Carmen "missed" that Bonner's affidavit lacked an oath or its equivalent because such affidavits from Pantego ordinarily contained either another officer's badge number or a notary stamp. Bonner's testimony was that he had been trained on the oath requirement and its constitutional underpinnings but that he subjectively believed that it was not necessary based on his incorrect assumption that Pantego did not require sworn affidavits to procure a search warrant. Thus, Bonner either wrongly assumed that Pantego officers did not submit sworn affidavits and followed suit notwithstanding his training to the contrary or he

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testified at the suppression hearing that she electronically signed the warrant and the jurat.

repeatedly ignored the oath requirement. Bonner’s subjective understanding of Pantego policy is irrelevant. *See Flores*, 367 S.W.3d at 703. No objectively reasonable officer could believe that sworn affidavits are not required in seeking search warrants. Indeed, they are “indispensable.” *Clay*, 391 S.W.3d at 97–98. Bonner’s submission of an unsworn affidavit was not close to the line of validity; therefore, an objectively reasonable officer preparing such an affidavit could not have believed that the subsequent warrant was not tainted by the complete absence of this constitutional and statutory requirement. *See McClintock*, 541 S.W.3d at 73. Because Bonner’s failure to swear to the truth of his affidavit facts is a long-distance call away from the line of validity, he could not have acted in good-faith reliance on the issued warrant. *Cf. id.* at 74 (holding because constitutionality of drug-dog sniffs was close to the line of validity at the time of search, an objectively reasonable officer would have believed that his affidavit was not tainted by unconstitutional conduct, rendering the evidence admissible under the good-faith exception based on the officer’s good-faith reliance on the issued warrant).

#### IV. HARM

Because the trial court erred by denying Wheeler’s motion to suppress the blood-alcohol evidence, we must determine whether that denial harmed Wheeler. *See Marcopoulos v. State*, 548 S.W.3d 697, 707 (Tex. App.—Houston [1st Dist.] 2018, pet. ref’d). Because this was error of a constitutional dimension, we must reverse the trial court’s resulting judgment unless we determine beyond a reasonable doubt that the

denial did not contribute to Wheeler's decision to plead guilty. *See* Tex. R. App. P. 44.2(a); *Bonsignore v. State*, 497 S.W.3d 563, 573 (Tex. App.—Fort Worth 2016, pet. ref'd); *Forsyth v. State*, 438 S.W.3d 216, 225 (Tex. App.—Eastland 2014, pet. ref'd).

We do not have a reporter's record from the plea proceeding, but Wheeler's guilty plea standing alone is not enough to uphold his conviction. *See Marcopoulos*, 548 S.W.3d at 707 (citing Tex. Code Crim. Proc. Ann. art. 1.15). The blood-alcohol evidence, however, was enough to support his guilty plea. This evidence could have given the State leverage in its plea negotiations. Wheeler pleaded guilty only after the trial court denied his motion to suppress, indicating that the trial court's denial was a factor in his decision to plead guilty. As such, harm is established. *See Holmes v. State*, 323 S.W.3d 163, 173–74 (Tex. Crim. App. 2010) (op. on reh'g); *Kraft v. State*, 762 S.W.2d 612, 613–14 (Tex. Crim. App. 1988).

## V. CONCLUSION

We conclude that Bonner's affidavit was unsworn, rendering the evidence collected based on the executed search warrant subject to exclusion under the exclusionary rule. And although the good-faith exception applies even to an infirmity under the Texas Constitution, we cannot apply it under the singular and unusual facts of this case. Bonner was taught and had knowledge of the oath requirement yet repeatedly relied on his subjective but invalid belief that Pantego's procedures allowed for unsworn search-warrant affidavits. Bonner was not acting in objective good faith reliance on the issued warrant. Because the good-faith exception does not apply to

render the seized evidence admissible, the exclusionary rule requires that any evidence seized pursuant to the issued search warrant be suppressed. The trial court's denial of Wheeler's motion to suppress was in error, and we cannot conclude beyond a reasonable doubt that it did not play a role in Wheeler's decision to plead guilty. We sustain Wheeler's issue, reverse the trial court's January 9, 2018 order denying Wheeler's motion to suppress, reverse the trial court's subsequent judgment, and remand to that court for further proceedings consistent with this opinion. *See* Tex. R. App. P. 43.2(d), 43.3(a).

/s/ Lee Gabriel

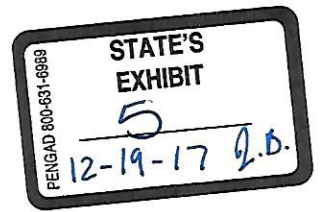
Lee Gabriel  
Justice

Publish

Delivered: March 21, 2019

# App. B





THE STATE OF TEXAS §  
COUNTY OF TARRANT §

**AFFIDAVIT FOR SEARCH WARRANT AND MAGISTRATION**

**I. AFFIANT**

The undersigned Affiant, a peace officer under the laws of the State of Texas, and after first being duly sworn, on oath makes the following statements and accusations:

My name is T. BOWNER. I am a peace officer employed by Fantigo Police Dept. I have successfully completed the State-mandated requirements to become a peace officer. Additionally, I have successfully completed courses and/or training in the field of alcohol detection and intoxication-related offenses. I have seen intoxicated persons in the past and, during the course of my employment, I have observed numerous people who are under the influence of alcohol or other substances and:

- I am certified and/or trained in the detection of impaired or intoxicated drivers through the use of three standardized field sobriety tests [SFSTs], namely: Horizontal Gaze Nystagmus [HGN], One-Leg Stand [OLS], and Walk and Turn [WAT].
- I have formed opinions on intoxication on many occasions and have had my suspicions confirmed by breath, blood, or urine samples that were administered after I performed my law enforcement duties relating to the detection of intoxicated drivers.

**II. SUSPECT & CRIME**

A. The suspected person ["suspect"] is described as follows:

Name: <u>Wheeler, Chase Erick</u>		
TX DL/ID # <u>20589804 TX DL</u>		
Race: <u>White</u>	Sex: <u>male</u>	DOB: <u>01/13/1988</u>
Height: <u>508"</u>	Weight: <u>205</u>	Hair Color: <u>Brown</u>

B. The suspect is presently in custody of a law enforcement agency here in Tarrant County, Texas, namely the Tarrant Police Department, which will present the suspect to execute the warrant requested herein;

C. The suspect has possession of and is concealing human blood, which constitutes evidence that the suspect committed the offense described in paragraph D below;

D. I have good reason to believe that on the 9 day of July, 2016, the suspect did then and there operate a motor vehicle in a public place in Tarrant County, Texas, while intoxicated by not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination thereof, into the suspect's body.

**III. REASON FOR CONTACT / EVIDENCE OF OPERATING**

A. My belief that the suspect committed the offense described in paragraph D above is based on the following facts:

1. On the date specified in paragraph D above, at approximately 0251 o'clock, A.M., the suspect was operating a motor vehicle in a public place in Tarrant County, Texas, namely at the following location 2501 W. Pioneer Pkwy (Track in the box);

2. Additionally, the following information influenced my reasonable-suspicion consideration (any that apply are checked):

TRAFFIC STOP: I stopped the vehicle at the above time and location for the following reason(s): \_\_\_\_\_

\_\_\_\_\_ and, at the time of the

stop, I believed that these facts, among others, possibly indicated that the suspect was committing the following Transportation Code violations: \_\_\_\_\_

\_\_\_\_\_ and/or the offense of driving while intoxicated;

ENCOUNTER: The suspect's vehicle was already stopped and I believed that the suspect had been driving and/or operating the vehicle because: \_\_\_\_\_



\_\_\_\_\_ and, at the time of the contact, I believed that these facts, among others, possibly indicated that the suspect was committing the following traffic and/or criminal violations: \_\_\_\_\_

and/or the offense of driving while intoxicated.

WITNESSES: One or more witnesses, Matil, Manaj, conveyed information to me about observing the suspect's actions and/or motor-vehicle operation. The details of the conveyed information included, but were not limited to: Subject ordered food in the drive-thru and fell asleep before getting to the window. Jack in the box employee Manaj Matil could not wake him up.

B. ORAL ADMISSION RE: OPERATION: The suspect admitted to me that the suspect had been operating a motor vehicle in a public place in Tarrant County, Texas just a short time prior to my arrival: YES / NO

B. INTOXICATION EVIDENCE:

1. GENERAL OBSERVATIONS: During my contact with the suspect, I made the following observations about the suspect:

ODOR OF ALCOHOL: Strong Moderate Faint None

Other: \_\_\_\_\_

SPEECH: Slurred Confused Stuttered Accent Fair Good

Other: \_\_\_\_\_

ATTITUDE: Cooperative Combative Indifferent Hilarious  
Talkative Carefree Excited Insulting  
Cocky Sleepy Profane Polite

Other: \_\_\_\_\_

BALANCE: Falling Staggering Hesitant Swaying Unsure Sure

Other: \_\_\_\_\_

WALKING: Falling Staggering Hesitant Swaying Unsure Sure

Other: \_\_\_\_\_

TURNING: Falling Staggering Hesitant Swaying Unsure Sure

Other: NA \_\_\_\_\_

2. EVIDENCE OF POSSIBLE DRUG/CONTROLLED SUBSTANCE USE:

- Drug paraphernalia found
- Describe drug paraphernalia found \_\_\_\_\_
- Odor of marijuana detected (describe) \_\_\_\_\_
- Statements made by the suspect or others indicating possible drug usage:  
\_\_\_\_\_  
\_\_\_\_\_
- Other: \_\_\_\_\_

3. FIELD SOBRIETY TESTS IN GENERAL:

- During my contact with the suspect, I requested performance of field sobriety tests by the suspect and recorded the results and my observations of the suspect's performance of field sobriety tests and signs of intoxication which include the following:
  - The suspect refused to perform (ALL) SOME) of the requested field sobriety tests, and this refusal indicated to me that the suspect was attempting to hide intoxication evidence: YES / NO

4. SPECIFIC FIELD SOBRIETY TESTS:

NYSTAGMUS: *Refused All SFST*

The suspect was first qualified as a candidate by checking the suspect's eyes for equal tracking, no resting nystagmus, and equal pupil size. The suspect was also qualified as a candidate by questions which revealed that he had not suffered from a head injury, did not have any medical problems, and was not currently on any medications. Additional comments: \_\_\_\_\_

HGN: Total number of observed clues \_\_\_\_\_

Circle observed clues:

- L    R    1. Lack of smooth pursuit
- L    R    2. Distinct and sustained nystagmus at maximum deviation
- L    R    3. Onset of nystagmus prior to 45 degrees

Vertical nystagmus:    YES / NO

Other comments: \_\_\_\_\_

WALK AND TURN:

WAT: Total number of observed clues \_\_\_\_\_

Check appropriate clues:

- \_\_\_\_\_ 1. Cannot keep balance while listening to instructions
- \_\_\_\_\_ 2. Starts before instructions are finished
- \_\_\_\_\_ 3. Stops while walking to steady self
- \_\_\_\_\_ 4. Does not touch heel to toe
- \_\_\_\_\_ 5. Loses balance while walking (i.e., steps off line)
- \_\_\_\_\_ 6. Uses arms for balance (raises arms over six inches)
- \_\_\_\_\_ 7. Loses balance while turning/turns incorrectly
- \_\_\_\_\_ 8. Incorrect number of steps



Other comments: \_\_\_\_\_

ONE LEG STAND:

OLS: Total number of observed clues \_\_\_\_\_

- \_\_\_\_\_ 1. Sways while balancing
- \_\_\_\_\_ 2. Hops
- \_\_\_\_\_ 3. Puts foot down
- \_\_\_\_\_ 4. Uses arms for balance (raises arms over six inches)

Other comments: \_\_\_\_\_

5. ADDITIONAL OBSERVATIONS/FACTORS: Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place include: Blood shot / watery eyes / slurred speech

6. SUSPECT'S ORAL STATEMENTS: The suspect made the following statements:  
That he had consumed 4 beers.

7. OPEN CONTAINER EVIDENCE:

Open container found: YES / NO

List type of open container(s) found: N/A

Describe location of open container(s) found N/A

8. SUMMARY: Based upon my experiences, my training in intoxication-related offenses, and my observations of the suspect during my contact with him/her, I believe that the suspect is intoxicated by reason of the introduction of alcohol, a controlled

substance, a dangerous drug, or a combination thereof, and that the suspect lost the normal use of his/her mental or physical faculties by reason of the introduction of alcohol or one of the other aforementioned substances, or a combination thereof, into his/her body.


9. REFUSAL EVIDENCE: After placing the suspect under arrest for Driving While Intoxicated, I requested a sample of the suspect's breath and/or blood, which the suspect refused to provide a sample in violation of the Texas Implied Consent law. This is an indication to me that suspect is attempting to hide evidence of his/her intoxication. Other relevant statements made by the suspect when refusing include:

\_\_\_\_\_


10. I know from my training and experience that alcohol and other intoxicating substances are absorbed into the bloodstream of an intoxicated person and that the blood of such person can be analyzed for the presence of alcohol and other intoxicating substances.

WHEREFORE, based upon this affidavit and Beeman v. State, 86 S.W.3d 613 (Tex. Crim. App. 2002), Affiant asks for a search warrant that will authorize Affiant or Affiant's agent to search the person of the suspect for the blood evidence described above and seize the same as evidence that the offense described was committed and that the suspect committed the said offense.

Further Affiant asks for issuance of an order to appropriate third parties directing them to assist Affiant in the execution of said warrant.

  
\_\_\_\_\_  
Affiant

Subscribed and sworn to before me on this 9 day of July, 2016, by an official authorized to administer and authorize this oath pursuant to TEX. GOV'T CODE §602.002.

  
\_\_\_\_\_  
Judge / Peace Officer / Notary

ASSOCIATE JUDGE SARA JANE DEL CARMEN

\_\_\_\_\_  
Official's Printed Name & Title

THE STATE OF TEXAS §

COUNTY OF TARRANT §

SEARCH WARRANT

The State Of Texas: To any Sheriff or any Peace Officer of Tarrant County, Texas, or any Peace Officer of the State of Texas:

Whereas, the Affiant, whose name appears on the Affidavit attached hereto is a peace officer under the laws of Texas and did heretofore this day subscribe and swear to said affidavit before me, which said Affidavit is here now made a part hereof for all purposes and incorporated herein as if written verbatim within the confines of this warrant and whereas I find that the verified facts stated by Affiant in said Affidavit show that Affiant has probable cause for the belief Affiant expresses herein and establishes the existence of proper grounds for the issuance of this Warrant:

Now, therefore, you are commanded to take custody of the suspect and transport the suspect to a physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician skilled in the taking of blood from the human body, in Tarrant County, Texas, where the said physician, registered nurse, qualified technician or medical laboratory technician shall, in the presence of a law enforcement officer, take samples of the Blood from the body of the following described individual:

Name: <i>Whicker, Chase Fricar</i>		
TX DL/ID # <i>205895 dx TXDL</i>		
Race: <i>White</i>	Sex: <i>Male</i>	DOB: <i>01/13/1988</i>
Height: <i>5'08"</i>	Weight: <i>205</i>	Hair Color: <i>Brown</i>

Law enforcement officers are authorized to use all reasonable force necessary to assist the physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician to take the samples from the body suspect. After obtaining the samples of Blood, the physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician shall deliver the said samples to the said law enforcement officer.



Herein fail not, but have you then and there this warrant within three days, exclusive of the day of its issuance, with your return thereon, showing how you have executed the same.

Issued on this the 9 day of July, 2016, at 7 o'clock, 3:46 AM.M., to certify which witness my hand this day.

  
\_\_\_\_\_  
Judge, Tarrant County, Texas

THE STATE OF TEXAS §

COUNTY OF TARRANT §

RETURN AND INVENTORY

The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath certifies that the foregoing Warrant came to hand on the day it was issued and that it was executed on the 9 day of July, 2016, by making the search directed therein and seizing during such search the following described property:

Specimens of the suspect's blood.

  
\_\_\_\_\_  
Affiant

SUBSCRIBED AND SWORN to before me, the undersigned authority on this  
9 day of July, 2016.

\_\_\_\_\_  
Judge, Tarrant County, Texas

THE STATE OF TEXAS §

COUNTY OF TARRANT §

**ORDER FOR ASSISTANCE IN EXECUTION OF SEARCH WARRANT**

To any physician, registered nurse, qualified technician, phlebotomist or medical laboratory technician skilled in the taking of blood from the human body, in Tarrant County, Texas:

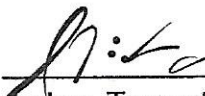
Whereas, the affiant whose name appears on the affidavit attached hereto is a peace officer under the laws of Texas and did heretofore this day subscribe and swear to said affidavit before me which said affidavit is here now made a part hereof for all purposes and incorporated herein as if written verbatim within the confines of this Order, and whereas I find that the verified facts stated by affiant in said Affidavit show that affiant has probable cause for the belief he/she expresses herein and establishes existence of proper grounds for issuance of a search warrant;

And whereas, this court has issued a warrant to search for and seize blood from the suspect named and described in the Affidavit, to-wit:

Name: <u>Wheeler, Chase Eric</u>		
TX DL/ID # <u>205 89804 TX DL</u>		
Race: <u>white</u>	Sex: <u>male</u>	DOB: <u>01/13/1988</u>
Height: <u>5'08"</u>	Weight: <u>205</u>	Hair Color: <u>Brown</u>

THEREFORE, you are hereby ordered and commanded to cooperate with any peace officer requesting your professional assistance in the execution of this warrant. This order is directed to any individual whose aid and assistance is requested by the officer bearing the accompanying search warrant and is authorized by the full authority of this Court to issue warrants and orders to enforce the laws of the State of Texas, and Article 18.08 of the Texas Code of Criminal Procedure. *Any individual who fails to comply with this Order when requested shall be liable for contempt of this Court and subject to all penalties authorized by law.*

Ordered this the 9 day of July, 20 14 at 3:46 AM o'clock,    .M. to certify which witness my hand this day.

  
\_\_\_\_\_  
Judge, Tarrant County, Texas