

State of Wisconsin,

Plaintiff,

v.

Case No. 2007CF001421

Joshua DeWitz,

Defendant.

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**Notice of Motion and Motion to Suppress Statement**

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Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves to suppress the statement made to Pawel Kurkowski of Wisconsin Correctional Service admitting that he (DeWitz) had smoked marijuana.

As grounds, the undersigned shows to the court as follows:

1. The defendant was released on bail in Waukesha County Circuit Court no. 2007CF001071 (operating under the influence of alcohol 5th offense). One condition of bond imposed on DeWitz was that he report to and cooperate with the W.C.S. Intoxicated Driver Program.

2. On November 14, 2007 DeWitz reported to W.C.S. as ordered by the court. During that visit Pawel Kurkowski questioned DeWitz about whether he had used marijuana and DeWitz admitted to Kurkowski that he (DeWitz) had smoked marijuana.

3. At the preliminary hearing in this matter DeWitz' admission to Kurkowski was offered by the State and was a substantial part of the court's probable cause finding.

4. Kurkowski was functioning as an agent of the court (i.e. of the government) and DeWitz was under compulsion to answer Kurkowski's questions and, therefore, the statement was not

voluntary.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this 27th day of June, 2008.

Law Offices of Jeffrey W. Jensen  
Attorneys for the defendant

By: \_\_\_\_\_

Jeffrey W. Jensen  
State Bar No. 01012529

633 W. Wisconsin Ave., Suite 1515  
Milwaukee, WI 53203

414.224.9484

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**Memorandum of Law in Support of Motion to Suppress Statement**

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**Introduction**

The defendant, Joshua DeWitz (hereinafter "DeWitz") was released on bail in a case where he is facing charges for operating under the influence of alcohol (5th). One important condition of his bond was that he report to, *and cooperate with*, the W.C.S. Intoxicated Driver Program. Therefore, on November 14, 2007, DeWitz reported to W.C.S. where he was questioned by Pawel Kurkowski regarding any marijuana use. DeWitz admitted to Kurkowski that he had, in fact, recently smoked a small amount of marijuana.

As will be set forth in more detail below, DeWitz was under court compulsion to report to and to cooperate with W.C.S. As such, the statements made by DeWitz were involuntary and, therefore, they must be suppressed.

## Argument

**I. DeWitz was under compulsion to answer Kurkowski's questions about marijuana use and, therefore, the statement was not voluntary and must be suppressed.**

As will be set forth in more detail below, it is well-settled that statements made by a probationer in response to his supervising agent's questions are not voluntary. This is because when the person is put in that position he is forced to choose between losing his conditional freedom and giving up his right to remain silent. As such, any statements made under those conditions are not voluntary. Here, although DeWitz was a pretrial detainee, his freedom was conditional. That is, his freedom was subject to the conditions of bond imposed by the court. As such, when Kurkowski began questioning DeWitz he was forced to choose between losing his conditional freedom (release on bail) and his right to remain silent. Therefore, DeWitz' statements were not voluntary and must be suppressed.

Whether a defendant's statement was voluntary is a question of law not of fact. See *State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759, 765 (1987). To determine if a confession is voluntary, the court must look at the totality of the circumstances surrounding the confession and balance the defendant's personal characteristics against the pressures police imposed to induce the defendant to respond to questioning. *Clappes*, 136 Wis. 2d at 235-36, 401 N.W.2d at 765.

The Fifth Amendment provides, in pertinent part, that "no person ... shall be compelled in any criminal case to be a witness against himself." *U.S. Const. amend V*. Under the Fifth Amendment, a defendant may refuse to answer questions if the answers might incriminate him in future criminal proceedings. *Minnesota v. Murphy*, 465 U.S. 420, 426, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984). However, a probationer must answer a probation officer's questions if accusations of criminal conduct prompt such questions, *State v. Thompson*, 142 Wis. 2d 821, 830, 419 N.W.2d 564, 567 (Ct. App. 1987), because a probationer's absolute obligation to keep his probation officer informed of his activities is the "very essence" of the probation system. *State v. Evans*, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664, 668-69 (1977), It is hoped that this free exchange will help the probation officer adequately supervise the probationer's activity and rehabilitate the probationer. *Id.* Under *Evans*, to simultaneously guarantee a probationer's Fifth Amendment rights and also preserve the probation system's integrity, a probationer's compelled answers to a probation or parole agent's questions are

inadmissible against the probationer in subsequent criminal proceedings on related charges. *Evans*, 77 Wis. 2d at 235-36, 252 N.W.2d at 668-69.

If a probationer must choose between giving answers that will incriminate him in a pending or subsequent prosecution and "losing his conditional liberty as a price for exercising his fifth amendment right to remain silent, the state may not use his answers for any evidentiary purpose in the criminal prosecution." *Thompson*, 142 Wis. 2d at 832, 419 N.W.2d at 568 (emphasis added).

Here, although DeWitz was a pretrial detainee, his freedom was conditional. That is, DeWitz was under a court-ordered obligation to report to W.C.S. and to cooperate with his agent there. The situation is nearly identical to being on probation. As such, DeWitz was forced to choose between losing his conditional freedom (i.e. release on bail) and incriminating himself. Certainly, if DeWitz had refused to answer Kurkowski's questions regarding drug use it would have been reported to the court and DeWitz' bail would have been revoked.

Therefore, DeWitz's statements were compelled and cannot be used against him in this bail jumping case.

Dated at Milwaukee, Wisconsin, this 27th day of June, 2008.

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By: \_\_\_\_\_

Jeffrey W. Jensen  
State Bar No. 01012529

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Milwaukee, WI 53203

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