COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 18, 1996

No. 95-3439-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CRAIG A. SCHEMBERGER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Craig Schemberger appeals his conviction for manufacturing marijuana, after a trial by jury. While executing a search warrant, the police discovered marijuana plants and growing equipment in a root cellar in a home Schemberger was renting. Schemberger argues that the trial court improperly refused to suppress the incriminating evidence. He claims that the affidavit underlying the search warrant was constitutionally

defective under the Fourth Amendment because: (1) the affiant obtained information from a former state trooper, William Bly, who improperly inspected the underground growing operation without a search warrant; (2) the affidavit contained stale evidence that did not state probable cause; and (3) the affidavit contained inadequate facts for the magistrate to conclude that the plants were marijuana. We reject these arguments and affirm Schemberger's conviction.

Bly's search did not invalidate the subsequent search warrant. Bly's search qualified as a private search outside the restrictions of the Fourth Amendment. Bly was not a government official. The Fourth Amendment does apply to private citizens who act as government agents. ***State v. Rogers***, 148 Wis.2d 243, 246, 435 N.W.2d 275, 277 (Ct. App. 1988). A search by a private citizen remains a private search as long as (1) the police did not initiate, encourage, or participate in the private citizen's search, (2) the private citizen engaged in the search to further his own ends or purpose, and (3) the private citizen did not act with the assistance of the government. ***Id***. Here, Bly's search met these standards. He acted independently without the police's knowledge or authorization. He was on the premises by virtue of the invitation of Anthony Miller, a private citizen, who himself had visited the scene earlier at the invitation of another private citizen. This distinguishes Bly's search from the one struck down in ***Knoll Associates, Inc. v. F.T.C.***, 397 F.2d 530 (7th Cir. 1968), cited by Schemberger, in which the private citizen seizing documents acted with the prior knowledge and apparent approval of the Federal Trade Commission.

The search warrant affidavit provided timely, nonstale evidence. Search warrants may not rest on stale evidence. *See*, *e.g.*, ***Sgro v. United States***, 287 U.S. 206, 210 (1932). The affiant dated the affidavit September 21, 1994. The affiant represented that he obtained the information from Miller on September 21, 1994; by implication, the affiant also received his information from Bly on September 21, 1994. These facts created the permissible inference that the information was recent. The magistrate could reasonably infer that someone with Bly's former extensive law enforcement experience would not have allowed such information to become stale before reporting it to police. The same conclusion applied to Miller, who the magistrate could infer possessed a civic desire to promptly rid his locale of drugs. Moreover, the discovery occurred near the time of some flooding, and the trial court independently recalled that such flooding had taken place in the time frame of the date on the affidavit. The magistrate could have made the same connection when issuing

the search warrant. Taken together, these facts permitted the inference that the affidavit supplied timely, nonstale facts.

Finally, the affidavit supplied enough facts for the magistrate to conclude that the plants were marijuana. Probable cause is a flexible, common sense measure of plausibility, not a technical, legalistic concept. ***State v. Petrone***, 161 Wis.2d 530, 547-48, 468 N.W.2d 676, 682 (1991). Viewed in a common sense fashion, the affidavit supported the magistrate's conclusion. First, Bly identified the plants as marijuana. As a former state trooper, Bly had considerable training and experience in the identification of marijuana plants; the affiant stated that Bly was certified to detect them. This information furnished a high level of confidence in Bly's evaluation. Second, a lock hung on the door to the root cellar, and the room contained a bright grow light and a bag of fertilizer. This created the impression that the plants' owner had something valuable to hide and protect; this in turn suggested a clandestine commercial drug operation. Last, the size of the plants were in a range typical of marijuana plants. Taken as whole, these facts provided the magistrate ample evidence to issue the search warrant.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.