COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP905-CR
2015AP906-CR

Cir. Ct. Nos. 2012CF246
2013CM234

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS SEDLAK,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Travis Sedlak was tried before a jury and convicted of several drug charges related to the cultivation of marijuana in his residence, as well as possession of psilocybin and LSD. Sedlak appeals, arguing that the circuit court erroneously denied his motion to suppress evidence because the court

erroneously rejected Sedlak's argument that police illegally acquired information, necessary to obtain a subpoena for power company records, by effectively employing the services of a power company employee who made observations for the police. As a result, Sedlak contends, both the subpoena and subsequent search warrants were not supported by probable cause. We reject Sedlak's narrow argument because he fails to show clear error in circuit court findings to the effect that a warrant was not necessary for the "private party search" that Sedlak challenges. Accordingly, we affirm.

BACKGROUND

¶2 We briefly summarize the events that are the subject of this appeal. We will refer to additional facts pertinent to Sedlak's arguments concerning those events in the discussion that follows.

¶3 Police were contacted by employees of the Scenic River Power Company about a residence served by the power company, later determined to be Sedlak's, with "high power usage." Based in part on this and other information offered to the police by the power company employees, police served an investigatory subpoena under WIS. STAT. § 968.135 (2013-14)[1] on the power company for records related to electrical consumption at Sedlak's residence. Based in part on the information obtained from those records, police executed a search warrant to obtain a thermal imaging pattern of Sedlak's residence. Based in

[1] WISCONSIN STAT. § 968.135 provides, "Upon the request of the attorney general or a district attorney and upon a showing of probable cause ... a court shall issue a subpoena requiring the production of documents ...."

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

part on the information obtained through the execution of the thermal imaging warrant, police executed a search warrant to physically search Sedlak's residence for evidence of indoor marijuana cultivation.

¶4 While executing this last search warrant, police discovered an indoor marijuana cultivation operation along with marijuana plants and processed marijuana, and two safes. Pursuant to a later search warrant, police subsequently discovered more marijuana, psilocybin, LSD, and money in one of the safes.

¶5 The State charged Sedlak with drug crimes, alleging a marijuana cultivation operation and possession of psilocybin and LSD. Sedlak moved to suppress the evidence obtained as a result of the subpoena and subsequent search warrants. The circuit court held two hearings and denied Sedlak's motion.

DISCUSSION

¶6 Sedlak's argument is narrow, focusing on a single step of the investigative process in this case. According to Sedlak, the circuit court erroneously denied his motion to suppress evidence because the investigatory subpoena for utility records was based on observations by power company employees whose visit to his rural residential property, Sedlak argues, had to have been driven by police conduct, and therefore a warrant was required for the employees to visit the property. Absent a warrant, the argument proceeds, the evidence obtained during the visit was unlawfully obtained, and the chain of investigation that began with service of the subpoena was tainted so that all evidence was obtained without a necessary showing of probable cause along the way. As we now explain, we reject this argument based on the application of the "private party search" doctrine to the findings of the circuit court not shown to be clearly erroneous.

¶7 In reviewing a denial of a motion to suppress, we accept the circuit court's findings of fact and the inferences drawn from those facts unless they are clearly erroneous, and we independently review the application of the law to those facts. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448.

A. Introduction to Sedlak's Argument

¶8 As stated, police served an investigatory subpoena on the power company for records related to electrical consumption at Sedlak's residence. The subpoena was supported in part by observations made by a power company employee, Ron Jentz, when Jentz went to Sedlak's rural residence to examine the meter. The circuit court found that Jentz went to Sedlak's residence as part of his normal responsibilities related to the operation of the power company, for the ends of the power company, and not because he was encouraged to do so by the police or to help the police.

¶9 Sedlak argues, to the contrary, that the subpoena was tainted by police "misconduct." Specifically, Sedlak argues that the police used Jentz to help the police explore Sedlak's residence without a warrant in violation of the Fourth Amendment.

¶10 We set forth the pertinent parts of the affidavit supporting the subpoena and the related hearing testimony, review the legal analyses that the parties argue may apply, and explain why Sedlak's argument fails for lack of any evidentiary support under the legal standard that does apply.

B. The Subpoena Affidavit and Hearing Testimony

¶11 In order to obtain the challenged subpoena, Investigator Brian Monahan submitted an "Affidavit in Support of Request for Subpoena for Documents," seeking account information, including monthly energy and gas usage details and payment methods, from the power company for Sedlak's residence, as well as normal monthly energy usage details for three two-story farmhouse residences comparable to Sedlak's. As stated, Sedlak argues that certain information in the affidavit was obtained by police conduct requiring a search warrant. The following facts relevant to Sedlak's argument are taken from the affidavit and hearing testimony.

¶12 The power company provided electricity to Sedlak's residence. A power company employee observed that energy usage was high and that utility bills were paid in cash for that residence. The employee asked colleague Ron Jentz to check whether the residence's electrical service needed to be upgraded to prevent an overload to the system. Jentz saw from the records that before Sedlak occupied the residence, monthly energy usage at the residence had been typical of most homes — 800 to 2,000 kilowatt hours — and that after Sedlak moved in, monthly usage increased to 4,000 to 6,000 kilowatt hours. Because the transformer for the residence was rated for between 800 and 2,000 kilowatt hours per month, Jentz wanted to examine the meter to make sure that it was adequate and would not blow a fuse from overload and cause the residence to lose power.

¶13 Before Jentz went to examine the meter at Sedlak's residence, a power company employee other than Jentz contacted police about the high energy use at the residence. Deputy Monahan met with Jentz, who told Monahan about

the high energy usage at the residence and the cash payments. Jentz told Monahan that he was going to examine the meter at the residence.

¶14 Monahan was aware in advance as to when Jentz was going to visit Sedlak's residence and arranged for officers to be in the woods near the residence when Jentz was there. Police officers did not accompany Jentz when he went to Sedlak's residence. Jentz did not know prior to his arrival at Sedlak's residence that police officers would be in nearby woods, and Jentz did not know that police officers were in nearby woods when he was at Sedlak's residence.

¶15 While Jentz and a co-worker examined the meter at the residence, Sedlak came out and spoke with Jentz. While they talked, Jentz observed two dryer vents extending from a plywood board that had been installed in place of a basement window.

¶16 In his affidavit in support of the subpoena, Monahan included the information he obtained from Jentz about the vents that Jentz saw when he was at the residence.

C. The Law Governing Sedlak's Police "Misconduct" Argument

¶17 Sedlak's only argument on appeal is that Jentz acted as a "stalking horse" for the police when he went to examine the meter at Sedlak's residence. *See* ***State v. Hajicek***, 2001 WI 3, ¶22, 240 Wis. 2d 349, 620 N.W.2d 781 ("A 'stalking horse' is '[s]omething used to cover one's true purpose; a decoy.'" (quoting *The American Heritage Dictionary* 1751 (3d ed. 1992))). In ***Hajicek***, our supreme court stated that a probation officer acts as a "stalking horse" for the police when the probation officer uses his or her authority to help the police evade the Fourth Amendment's warrant requirement. ***Hajicek***, 240 Wis. 2d 349, ¶22.

Other cases that refer to this concept of a "stalking horse" include: ***State v. Wheat***, 2002 WI App 153, ¶21, 256 Wis. 2d 270, 647 N.W.2d 441 ("a probation officer cannot be a 'stalking horse' of law enforcement if the probation officer instigated the search"); ***State v. Griffin***, 126 Wis. 2d 183, 194, 376 N.W.2d 62 (Ct. App. 1985) (search by parole officer accompanied by police is permissible where the parole officer is not a stalking horse for the police); ***State v. Flakes***, 140 Wis. 2d 411, 426-27, 410 N.W.2d 614 (Ct. App. 1987) (no credible evidence that parole agent was a stalking horse for the police when he searched Flakes' apartment); ***State v. Jackowski***, 2001 WI App 187, ¶15, 247 Wis. 2d 430, 633 N.W.2d 649 (no evidence that police used city building inspector who was conducting a building code enforcement inspection as a stalking horse to gain entry to building without a warrant). Based on this case law, Sedlak argues that the police unlawfully used Jentz to access and "explore" Sedlak's residence without a warrant in advance of the application for the subpoena.

¶18 The State counters the case law demonstrates that the "stalking horse" analysis applies only to searches by government officials, such as probation officers, authorized to search on less than probable cause. Without a meaningful discussion of why there might be differences between police prompting or using government employees to conduct searches, rather than private parties, the State argues that this case, involving a private company employee, is more appropriately analyzed as a "private party search" not subject to Fourth Amendment protection. Sedlak fails in his reply brief to provide any developed argument that his challenge is not properly analyzed in terms of whether Jentz's visit to Sedlak's residence was a private party search. Accordingly, we take him to concede that the private party search analysis applies. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An

argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

¶19 "Private searches are not subject to the Fourth Amendment's protections because the Fourth Amendment applies only to government action." ***State v. Payano-Roman***, 2006 WI 47, ¶17, 290 Wis. 2d 380, 714 N.W.2d 548. The mere presence of a government official does not transform a private search into government action. ***Id.***, ¶20. Three requirements must be met for a search to be a private search:

> (1) the police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purpose; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts.

Id., ¶18 (quoted source omitted). Whether a search is a private search or a search by government agents is determined based on the totality of the circumstances. ***Id.***, ¶21.

¶20 Here, as we next explain: (1) the circuit court found that when Jentz went to Sedlak's residence to examine the meter, Jentz was fulfilling his normal job responsibilities as an employee of the power company; (2) Sedlak fails to show that that finding is clearly erroneous; and (3) based on that finding we can conclude only that Jentz was engaged in a private party search, and therefore a warrant was not necessary.

D. Sedlak's Police Conduct Argument Fails

¶21 Sedlak ignores the applicable test. While there was evidence of communication between power company employees and the police, Sedlak fails to point to any evidence that the police "initiate[d], encourage[d], or participate[d]"

in any power company search; that the power company was not "further[ing] its own ends or purpose" in visiting Sedlak's residence; or that the visit was not "for the purpose of assisting" the police. *See* ***Payano-Roman***, 290 Wis. 2d 380, ¶18. Alternatively, as Sedlak frames his argument, Sedlak points to no evidence that the police somehow prompted Jentz to visit Sedlak's residence, or that Jentz acted to help the police rather than because he would normally do so in the course of his employment.

¶22 Sedlak does not specifically address the circuit court's factual finding that when Jentz went to Sedlak's residence to examine the meter, Jentz was fulfilling his normal job responsibilities as an employee of the power company. Rather, Sedlak tries to impugn Jentz's motives by making assertions that have no basis in the record.

¶23 Sedlak asserts that the police must have "instructed" Jentz on what to look for, because a utility employee would not "know what is common to look for for marijuana growing." However, Sedlak acknowledges that there is no testimony of such instruction. Sedlak argues that it should raise suspicions that Jentz "was checking out the property" while a co-worker examined the meter. However, Sedlak fails to explain why Jentz could not reasonably make observations that might relate to power usage as part of his ordinary job functions during the visit, and in addition Jentz testified that he stayed by the side of the utility vehicle while Sedlak was talking to him.

¶24 Sedlak also asserts that there was "no other way for the police to obtain [the information about the existence of vents] except by coordinating with" Jentz, and that the police "admit they ... were coordinating directly with the utility

employees." However, Sedlak does not cite to any evidence in the record to support these assertions of coordination.

¶25 Finally, Sedlak suggests that his argument is supported by the fact that one of the officers in the woods was married to the prosecutor in this case. Sedlak asserts that this fact "supports that the police were using multiple persons as stalking horses" to get information to support the subpoena. This appears to be rank speculation, and we reject the argument because Sedlak fails to cite any factual support for it in the record.

¶26 In sum, Sedlak fails to show that the circuit court's finding — that Jentz went to Sedlak's residence in the normal exercise of his responsibilities as an employee of the power company — was clearly erroneous. Based on that finding, we conclude that Jentz was engaged in a private party search that neither required a warrant nor violated Sedlak's Fourth Amendment rights. Accordingly, Sedlak's challenge to the investigatory subpoena fails.

¶27 This resolves the only substantive argument that Sedlak makes on appeal. As stated above, Sedlak argues that without the evidence that he asserts is tainted by police conduct, the subpoena and subsequent search warrants lack probable cause. However, we have rejected his argument that the subpoena was based on activity driven by police conduct, and Sedlak fails to provide any other basis for a probable cause challenge to the subpoena and search warrants. Accordingly, his probable cause challenge also fails.

CONCLUSION

¶28 For the reasons stated, we affirm.

By the Court.—Judgments affirmed.

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