

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2842-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-657

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ERNESTO ZUNIGA,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Affirmed.*

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals orders suppressing evidence seized pursuant to a search warrant and denying its motion for reconsideration. It argues that marijuana seized from Ernesto Zuniga was admissible because the warrant application establishes probable cause even if parts are excised as

products of earlier unauthorized searches. We reject that argument and affirm the orders.

¶2 A Texas police officer became suspicious about a package shipped through a UPS terminal in San Antonio. In the presence of a UPS loss prevention officer, who was also a police officer, the package was tested with a dog who alerted to the presence of drugs. The UPS employee then opened the package and found marijuana. The Texas authorities transferred the package to Brown County authorities to arrange a controlled delivery. The Brown County authorities again opened the package and confirmed that it contained marijuana. Posing as a UPS delivery agent, an officer delivered the package to Zuniga. The officers then executed a search warrant and arrested Zuniga.

¶3 The trial court initially found that the officers in Texas and Brown County lacked probable cause to open the package without a warrant, rejecting the State's argument that the Texas search was not conducted by State agents. The State has abandoned any challenge to that decision on appeal. It requested reconsideration, however, arguing that the evidence is admissible under the independent source doctrine. The trial court denied reconsideration and the State appeals.

¶4 The State correctly notes that evidence is admissible even if it was discovered by an unlawful search if untainted evidence is sufficient to establish that the officer would have sought and the magistrate would have granted a search warrant. *See Murray v. United States*, 487 U.S. 533, 542 (1988); *State v. Lange*, 158 Wis. 2d 609, 626 463 N.W.2d 390 (Ct. App. 1990). The State contends that “the dog sniff alone constitutes probable cause” citing *State v. Secrist*, 224 Wis.

2d 201, 211 n.8, 589 N.W.2d 387 (1999), and that the warrant application also contains untainted observations of the Brown County officer.

¶5 The State reads *Secrist* too broadly when it argues that the dog alert establishes probable cause. *Secrist* and the authorities cited in that opinion require a showing of the particular dog's reliability. Here, the search warrant application merely recites that "a narcotics trained canine was used and the canine alerted to the package, indicating that controlled substances were contained within the package." The application does not recite the dog's credentials, its experience, training, certification process or its percentage of incorrect identification. As a matter of law, the warrant application's conclusory statement that a narcotics trained canine alerted to the package is not sufficient to establish probable cause to issue a search warrant. *Id.*

¶6 The observations of Brown County authorities added little to the warrant application. The officer identified the names on the mail boxes and registration of the vehicles parked at the residence. None of these observations combined with the canine alert would establish probable cause that the package contained drugs.

By the Court.—Orders affirmed.

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

