No. 21-1104

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAPHEAL SEAY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana (South Bend)
No. 3:20-cr-00006-JD-MGG-1, Judge Jon E. DeGuilio

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT RAPHEAL SEAY

May 5, 2021

Sarah M. Konsky
Counsel of Record
David A. Strauss
Caroline Cordell (Ill. Sup. Ct. R. 711 License Number 2021LS00260)
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190
konsky@uchicago.edu
Counsel for Defendant-Appellant

ORAL ARGUMENT REQUESTED

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1104

Short Caption: United States v. Rapheal Seay

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):
Rapheal Seay

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Newby, Lewis, Kaminski & Jones, LLP
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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
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Attorney's Signature: /s/ Sarah M. Konsky Date: May 5, 2021

Attorney's Printed Name: Sarah M. Konsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☒ **No** ☐

Address: Jenner & Block Supreme Court and Appellate Clinic at The University of Chicago Law School
1111 E. 60th Street, Chicago, IL 60637

Phone Number: 773-834-3190 Fax Number:

E-Mail Address: konsky@uchicago.edu

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N/A

Attorney's Signature: /s/ David A. Strauss Date: May 5, 2021

Attorney's Printed Name: David A. Strauss

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☒

Address: Jenner & Block Supreme Court and Appellate Clinic at The University of Chicago Law School
1111 E. 60th Street, Chicago, IL 60637

Phone Number: 773-702-9601 Fax Number:

E-Mail Address: d-strauss@uchicago.edu

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JURISDICTIONAL STATEMENT

This is a direct appeal from a final judgment of the United States District Court for the Northern District of Indiana, South Bend Division, in a criminal case. A jury in the United States District Court for the Northern District of Indiana found Defendant-Appellant Rapheal Seay ("Seay") guilty of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Dkt. 48; Dkt. 53 at 226–27; *see* Dkt. 67, A1–6.[1] The district court sentenced Seay to 64 months in prison. Dkt. 67 at 1–2, A1–2.

The district court entered its final judgment on January 14, 2021. Dkt. 67, A1–6. Seay timely appealed his conviction to this Court on January 19, 2021. Dkt. 69.

The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this direct appeal, which appeals a final order or judgment that disposes of all of Seay's claims, pursuant to 28 U.S.C. § 1291.

This Court issued an Order on March 4, 2021, granting trial counsel's motion to withdraw and appointing undersigned Counsel of Record to represent Seay in this appeal pursuant to the Criminal Justice Act. 7th Cir. Dkt. 6.

STATEMENT OF THE ISSUE

Whether the district court erred in denying Seay's motions to suppress

[1] Citations to "Dkt. __" are to the district court docket in the case below, *United States v. Seay,* No. 3:20-cr-00006-JD-MMG-1 (N.D. Ind.). Citations to "7th Cir. Dkt. __" are to this Court's docket in this appeal, No. 21-1104. Citations to "A_" are to the required short appendix bound with this brief.

evidence in this case, because the officer conducting the stop of the car did not have personal knowledge giving rise to either reasonable suspicion or probable cause, and the record did not establish a sufficient chain of communication between officers to apply the collective knowledge doctrine.

STATEMENT OF THE CASE

On December 9, 2019, officers from the LaPorte County Sheriff's Department searched Seay and the car he was driving, without a warrant and without his consent. According to officer testimony in the case, Seay was being surveilled by the LaPorte County Drug Task Force ("LCDTF") for suspected drug possession and selling. Dkt. 17-1; 17-2; *see* Dkt. 30 at 1, A7. While surveilling Seay, two officers observed him allegedly fail to stop completely at two stop signs. Dkt. 30 at 2, A8. Those officers did not stop Seay. Instead, a different officer who had not participated in the surveillance and who had not observed the alleged traffic violations pulled Seay over a short time later. *See id.*; Dkt. 17-3 at 1.

The record in this case is unclear about what communications occurred between the time of the alleged traffic violations and the time of the traffic stop. In his contemporaneous police report and subsequent testimony in this case, the officer who conducted the stop offered three different and conflicting accounts of his basis for conducting the traffic stop. The other officers' accounts similarly were different and conflicting. As a result, the record is unclear as to who said what to whom leading up to the traffic stop.

Shortly after the traffic stop, multiple other officers arrived on the scene.

Dkt. 30 at 3, A9. Those officers conducted a dog sniff, Dkt. 30 at 3, A9; Dkt. 17-4, patted down Seay and discovered marijuana, Dkt. 30 at 3, A9; Dkt. 17-2 at 1, and searched the car and found a firearm. Dkt. 17-4 at 1; Dkt. 30 at 3, A9. Based on evidence uncovered in that search, Seay was indicted on one charge of being a felon in possession of a firearm. Dkt. 1. Seay sought to suppress all evidence obtained during and following the stop, arguing that the officer who made the stop illegally seized Seay without having probable cause or reasonable suspicion to do so.[2] Seay now appeals the district court's rulings that the seizure and searches in this case did not violate his rights under the Fourth Amendment.

I. THE WARRANTLESS STOP AND SEARCH

A. The Surveillance of Mr. Seay

On December 9, 2019 around 4:00 p.m., members of the LCDTF began conducting surveillance on Seay because they suspected Seay of illegally possessing firearms and distributing illegal drugs.[3] Dkt. 30 at 1, A7. At that time, Detectives Kyle Shiparski and Jim Fish were watching a residence in Michigan City, Indiana, from their unmarked car. Dkt. 26 at 9–10; Dkt. 30 at 1–2, A7–8. They saw a "dark colored Nissan Altima, with tinted windows" that they believed was Seay's car based on previous surveillance. *Id.*

[2] During the district court proceedings, Seay filed a motion to suppress the evidence. Dkt. 17. The court held an evidentiary hearing on this issue. Dkt. 26. Seay also repeatedly renewed the motion to suppress at trial. As discussed further below, the testimony referenced herein came in through the evidentiary hearing and at trial.
[3] The LaPorte County Drug Task Force consists of members from the LaPorte County Sheriff's Office, the LaPorte City Police Department, the Michigan City Police Department, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. *See* Dkt. 26 at 7–8.

Between 4:00 p.m. and 4:30 p.m., Shiparski and Fish saw the car come and go from the residence. Dkt. 26 at 9–10; Dkt. 17-1. Shiparski and Fish notified another officer, Detective Corporal Henderson, that Seay was driving. Dkt. 26 at 56. Henderson went out to follow Seay in hopes of observing him commit a traffic violation. Dkt. 26 at 56. No officer conducted a stop at this time.

Instead, Seay's car returned to the area that Shiparski and Fish were surveilling around 4:30 p.m. Dkt. 26 at 10. Shiparski and Fish saw Seay and one or two others get out of the car and walk up to a nearby house. *Id.*; Dkt. 17-1 at 1. At 4:45 p.m., they saw Seay conduct what appeared to the officers to be a "hand-to-hand transaction" with the driver of another car. Dkt. 30 at 2, A8; *see* Dkt. 26 at 10. Shiparski suspected this was a drug transaction. Dkt. 26 at 21–22; Dkt. 30 at 2, A8.

Shiparski and Fish did not stop Seay. Shiparski testified at the evidentiary hearing in this case that he did not believe they had probable cause to stop Seay based on the suspected drug transaction. Dkt. 26 at 21–22. Instead, the officers' plan since they began surveilling Seay was to pull him over for a traffic violation. Dkt. 52 at 39. Shiparski testified at trial that "[o]ur plan was to do surveillance in the area, and if we could gain probable cause to stop the vehicle through an infraction, or vehicles for that matter, then that's what our plan was that day." *Id.*

Shiparski and Fish instead watched Seay get into the car and drive away. Dkt. 30 at 2, A8. As Seay drove away, Shiparski and Fish allegedly saw Seay

fail to come to a complete stop at two intersections. *Id.* Between fifteen and thirty minutes elapsed between the suspected hand-to-hand transaction and the alleged traffic violations. Dkt. 26 at 23–24. It is undisputed that Shiparski and Fish were the only officers who observed the alleged traffic violations.

B. The Decision To Stop Mr. Seay

It also is undisputed that another officer who did not conduct the surveillance or observe the alleged traffic violations—Officer Babcock—pulled over Seay's car a few minutes after the alleged traffic violations. Dkt. 17-6; Dkt. 52 at 47–48. But Babcock's basis for making that stop is unclear from the record. As the district court stated in an order in this case, "it is not clear from the different individual police reports what information was conveyed by whom[.]" Dkt. 30 at 7, A13.

Babcock stated under penalty of perjury in his police report that he stopped Seay based on information provided to him by Henderson. Dkt. 17-3 at 1. In his police report, Babcock stated that Henderson told him that Henderson had "witnessed a black Nissan with dark tinted windows driving southbound" and "witnessed the vehicle commit multiple traffic infractions by failing to come to a complete stop at multiple intersections where a stop sign was posted." *Id.*

Similarly, Officer Oberle, a K-9 officer who arrived on the scene of the stop shortly after Babcock, stated in his police report that Henderson contacted him "regarding a subject driving a black Nissan … whom committed multiple traffic violations[.]" Dkt. 17-4 at 1. Neither Babcock's nor Oberle's reports mention that they were in communication with anyone other than Henderson.

See Dkts. 17-3; 17-4. These reports also do not mention either Shiparski or Fish. *Id.* Only Babcock's and Oberle's accounts were written on the day of Seay's arrest; Henderson and Shiparski wrote their accounts later.[4]

The statements in Henderson's and Shiparski's police reports conflicted with the statements in Babcock's and Oberle's police reports, however. Henderson did not report telling Oberle or Babcock anything about the alleged traffic violations or instructing either of them to make a stop. Dkt. 17-2. Nor did Henderson state that he personally observed the alleged traffic violations or even knew about them prior to Babcock's stop. *Id.* The only mention of the alleged traffic violations in Henderson's report is a statement that "[i]t should be noted that several traffic infractions were committed by Seay which were observed by Det. J. Fish and Cpl. Shiparski of the LCDTF prior to Officer Babcock conducting the traffic stop." Dkt. 17-2 at 1. Similarly, Shiparski did not report that he told Henderson about the traffic violations. *See id.*; Dkt. 17-1. Shiparski stated in his police report that Shiparski "contacted Officer Babcock…notifying him of my observed traffic infraction." Dkt. 17-1 at 1.

C. The Traffic Stop

A short time after the surveillance and the alleged traffic violations, Babcock left the police station and pulled over Seay's car. Dkt. 30 at 2, A8; Dkt. 17-3 at 1. The officers agree that the stop was for the alleged traffic

[4] Babcock and Oberle created their reports on the day of the arrest at 6:21 p.m. and 6:23 p.m. respectively. Dkt. 17-3; Dkt. 17-4. Henderson created his report the day after the arrest at 9:31 a.m., and Shiparski created his report four days later at 9:30 a.m. Dkt. 17-2; Dkt. 17-1.

violations rather than for any suspected drug-related activity. *See* Dkt. 52 at 39; *see also* Dkt. 17-1 at 1; Dkt. 17-2 at 1; Dkt. 17-3 at 1; Dkt. 17-4 at 1. Seay was driving the car. Dkt. 30 at 2–3, A8–9; Dkt. 17-3 at 1. After Babcock identified himself to Seay, Babcock explained that he stopped him "for rolling a couple stop signs on Elm." Dkt. 30 at 3, A9.

Henderson and Oberle arrived on the scene shortly after the stop to assist. *Id.* at 1–3, A7–9. While Babcock was completing a background check on Seay, Oberle walked around Seay's vehicle with his K-9 partner. *Id.* at 3, A9. Oberle testified that, "[the K-9] walked around the driver's side of the vehicle where I observed a change of behavior in the form of [the K-9] stopping at the driver's door seam and his breathing becoming louder and faster." *Id.* Oberle testified that this was one of the ways the K-9 makes a "passive alert" for drugs. *Id.*; *see also* Dkt. 26 at 74, 80-81.

After being notified of the passive alert, Babcock asked Seay to step out of the vehicle. Dkt. 30 at 3, A9; Dkt. 17-3 at 1. Henderson patted down Seay and discovered a jar of marijuana in his pocket. Dkt. 30 at 3, A9; Dkt. 17-2 at 1, 3. Oberle then searched the car and discovered a handgun and magazine. Dkt. 30 at 3, A9; Dkt. 17-4 at 1. Seay was taken to the police station and charged with being a felon in possession of a firearm and with possession of a controlled substance. *See* Dkt. 17-1 at 1; Dkt. 17-5. Seay waived his constitutional rights and confessed to possessing the marijuana and the handgun. Dkt. 30 at 4, A10.

The police incident report states that the "Nature of Incident" was

"Firearms Regulation, Poss Of Marijuana, Traffic Arrest." Dkt. 17-5. It states that the "Officers Involved" were Oberle, Henderson, and Babcock—and does not mention Shiparski or Fish. *Id.* Babcock also issued Seay tickets for the traffic violations later that evening. Dkt. 17-7 (showing the time of the traffic violations as "07:14 PM CST").

II. PROCEDURAL HISTORY

Based on the fruits of these searches, Seay was charged in the U.S. District Court for the Northern District of Indiana with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Dkt. 1.

A. Motion to Suppress

Seay filed a motion to suppress the evidence from the search of the vehicle and his resulting confession on February 13, 2020. Dkt. 17. In his motion, Seay argued that all evidence obtained during and after the search of his person and the motor vehicle was the direct fruit of an illegal, warrantless stop and seizure conducted by police officers, violating the Fourth Amendment. *Id.* Seay asserted that Babcock had neither probable cause nor reasonable suspicion to seize Seay or the vehicle he was driving. *Id.*

As Seay explained in his motion, it was undisputed that Babcock did not personally observe Seay committing the alleged traffic violations. Seay argued in his motion to suppress and his reply in support that the government had failed to meet its burden of establishing that probable cause could be imputed to Babcock under the collective knowledge doctrine governed by *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010). Dkt. 17 at 12–16; Dkt. 20.

Babcock stated in his police report that Henderson told him that he had witnessed the traffic violations, and that Babcock made the stop in reliance on information provided to him by Henderson. Dkt. 17 at 14; *see* Dkt. 17-3 at 1. However, Henderson did not state in his police report that he had either witnessed the alleged traffic violations or been told about them prior to the stop. *Id.*; Dkt. 17-2. Nor did Henderson state in his police report that he had communicated anything about the alleged traffic violations to Babcock. *See* Dkt. 17 at 14–15; Dkt. 17-2. Accordingly, Seay argued that Babcock could not rely on statements from another officer for probable cause that traffic violations had occurred, because the record did not establish that another officer had and conveyed probable cause. Dkt. 17 at 15–16. Seay argued that the seizure was thus unlawful and that all evidence resulting from it should be suppressed as "fruit of the poisonous tree." *Id.* at 16.

Seay further argued that Babcock lacked reasonable suspicion to seize Seay and the vehicle he was operating for the alleged hand-to-hand drug transaction that Shiparski claimed to have witnessed. *Id.* Neither Babcock nor Henderson had personally observed Seay conduct any suspected hand-to-hand drug transaction. *Id.* at 16-17. Only Shiparski claimed to have witnessed the alleged transaction. *See id.*; Dkt. 17-1 at 1. But neither Babcock nor Henderson stated in their police reports that they were apprised of the suspected hand-to-hand transaction prior to the initiation of the traffic stop. *See* Dkt. 17 at 17. Seay therefore argued that Babcock lacked reasonable suspicion under the collective knowledge doctrine to seize Seay, with the

resulting unlawful seizure requiring all evidence to be suppressed as the "fruit of the poisonous tree." *Id.*

B. Evidentiary Hearing

The district court held an evidentiary hearing on July 22, 2020 concerning Seay's motion to suppress. Dkt. 22; Dkt. 26. At the hearing, the district court heard testimony from Shiparski, Henderson, Babcock, and Oberle. Dkt. 26. Seay did not testify at this hearing. *Id.*

The officers changed their accounts at the evidentiary hearing. None of the officers' police reports stated that they were in five-way communication the day of the stop and search. But at the evidentiary hearing, each officer testified that they were communicating simultaneously through radio and telephone following the alleged traffic violations. *See* Dkt. 30 at 2, A8. Specifically, the officers testified that Henderson was communicating over encrypted police radio with Shiparski and Fish. *Id.* at 7–8, 11–12, A13–14, 17–18. The officers testified that Oberle and Babcock could not access this encrypted radio channel, but instead were on a cell phone conference call at the same time that allowed them to hear the same radio communications that Shiparski and Fish could hear. Dkt. 26 at 25–26, 57. Babcock and Henderson further testified that, just prior to the traffic stop, Oberle and Babcock were staged at the Michigan City Police Station waiting to make a traffic stop. Dkt. 26 at 35-36, 56-57.

Babcock also changed his account of his basis for making the stop. At the evidentiary hearing, Babcock testified that "they"—not Henderson, as he

had said in his police report—told him about the suspected drug transaction and alleged traffic violations. *Compare* Dkt. 26 at 36–37 *with* Dkt. 17-3 at 1. He explained that he was "confused" about who "had actually viewed" the traffic violations because "we were all talking on the same line." Dkt. 26 at 38. But Babcock admitted he knows Henderson's voice because they work together often. *Id.* at 46, 51. Babcock did not revise or amend his police report, even though he could have filed a supplemental report. *Id.* at 45.

At the evidentiary hearing, Henderson testified that he did not observe the alleged traffic violations, did not provide information about the alleged traffic violations to Babcock, and did not instruct Babcock to conduct the stop. *Id.* at 56–58. Shiparski testified that he observed the alleged traffic violations and instructed "Babcock and/or Oberle" to conduct the stop. *Id.* at 16.

C. District Court Order

The district court denied the motion to suppress. Dkt. 30, A6–19. In its written order, the district court acknowledged that it was "not clear from the different individual police reports what information was conveyed by whom[.]" *Id.* at 7, A13. Nonetheless, the district court held that it was not necessary that the record reflect a clear chain of communication as to who said what to whom. Rather, the district court found the officers' testimony at the evidentiary hearing to be credible, and held that it was sufficient that the officers had testified that they were in communication with one another at the time of the stop. *Id.* at 8, 11, A14, A17. The district court thus held that the evidence across the team of officers involved in Seay's surveillance and traffic stop was

sufficient in the aggregate to establish probable cause for Seay's stop. *Id.* at 6–7, A12–13.

D. Jury Trial

The case was tried before a jury on October 5 and October 6, 2020. Dkts. 43; 46; 48; 52; 53. At trial, Seay again objected to the admission of the evidence and his confession on Fourth Amendment grounds. Dkt. 52 at 8–9, 33–34, 48, 49–50, 90, 96, 114–16, 140, 144–45, 147, A21–36; Dkt. 53 at 175, 189–97, A38–47. The court overruled each of these objections. *Id.* Relying on its earlier ruling on Seay's motion to suppress, the district court found that the stop and searches were constitutional. *See* Dkt. 53 at 196–97, A46–47.

Babcock's account changed again when he testified at the trial in this case. Unlike in his police report and his evidentiary hearing testimony, Babcock did not testify that he made the stop based on information from Henderson or "they." Rather, at trial, he testified for the first time that "Detective Shiparski notified us that he was observing a vehicle and he witnessed that vehicle commit several traffic infractions and asked me to initiate a traffic stop." Dkt. 52 at 47.

Unlike Babcock, at trial Oberle testified consistent with his police report that he had received information about the alleged traffic violations from Henderson. *Id.* at 101–02. He testified that "[a]ll I know is that Detective Henderson was the one that I recognized that I received the information from." *Id.* at 102. At trial, Henderson testified that he neither observed the alleged traffic violations nor communicated information or instructions following the

alleged traffic violations. Dkt. 52 at 155–56. Shiparski testified at trial that he advised Babcock about the alleged traffic violations and instructed him to perform a traffic stop. *Id.* at 32.

Following the trial, the jury found Seay guilty of violating 18 U.S.C. § 922(g)(1). Dkt. 48; *see* Dkt. 67, A1–6. The district court sentenced Seay to 64 months in prison, with a subsequent two-year term of supervised release upon release from imprisonment. Dkt. 67, A1–6. Seay filed a timely notice of appeal on January 19, 2021. Dkt. 69.

SUMMARY OF ARGUMENT

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "traffic stop 'constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment].'" *Rodriguez v. United States*, 575 U.S. 348, 359 (2015) (alteration in original) (quoting *Whren v. United States*, 517 U.S. 806, 809–10 (1996)). Police may conduct a traffic stop if they have: (1) "reasonable suspicion based on articulable facts that a crime is about to be or has been committed," *United States v. Wimbush*, 337 F.3d 947, 949 (7th Cir. 2003), or (2) "probable cause to believe" that a traffic violation "has been committed." *United States v. McDonald*, 453 F.3d 958, 960–62 (7th Cir. 2006) (requiring probable cause to justify a stop based on a traffic infraction). A traffic stop made without the requisite level of reasonable suspicion or probable cause is illegal. *See, e.g.*, *McDonald*, 453 F.3d at 962. It is undisputed that Babcock, the officer who stopped Seay, did not personally

witness anything giving him reasonable suspicion or probable cause for the stop and resulting seizure.

The government failed to carry its burden of establishing that information known to other officers not present at the scene of the stop could be imputed to Babcock under the Fourth Amendment's collective knowledge doctrine. The collective knowledge doctrine permits police officers to make traffic stops even when the officer making the stop did not have "firsthand knowledge of facts that amount to the necessary level of suspicion," *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010), as long as certain requirements are met. "[The] collective knowledge doctrine requires: (1) that the officer effecting the stop act in objective reliance on the information received; (2) that the law enforcement officer providing the information had a reasonable suspicion to justify the stop; and (3) that the stop conducted was no more intrusive than would have been permissible for the officer requesting it." *United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir. 1992). Further, the doctrine requires that the government demonstrate a clear chain of communication between the requesting and stopping officers. *Williams,* 627 F.3d at 252–53; *see also Nafzger*, 974 F.2d at 911 ("Further, the requesting officer's belief that there is sufficient evidence to detain a suspect must have been communicated to the officer performing the stop.").

The district court erred in holding that the collective knowledge doctrine could apply to the facts in this case. First, as the district court acknowledged, it is unclear here who communicated what information to Babcock in advance

of the traffic stop. The collective knowledge doctrine does not apply when there is no clear chain of communication between an officer who has probable cause based on something he observed at one location, and a different officer who conducts a traffic stop at a different location. Indeed, it is impossible in such circumstances to ensure that probable cause in fact was passed from the officer who observed the alleged violation to the officer who conducted the traffic stop.

Second, the district court misapplied the collective knowledge doctrine when evaluating whether the officer conducting the traffic stop acted in objective reliance on information received. The first prong of the *Nafzger* collective knowledge doctrine test requires the court to affirmatively determine that "the officer taking the action" acted "in objective reliance on the information received." *Williams*, 627 F.3d at 252. There is insufficient evidence of objective reliance here. The officer making the traffic stop could not identify who told him what; rather, the officer making the traffic stop repeatedly changed his story, ultimately offering three different accounts. Moreover, this is not a case where the officers were all closely working together at the same scene to carry out the same task.

The government therefore failed to meet its burden of establishing that the collective knowledge doctrine applies in this case. And as a result, Babcock's stop and seizure of Seay was without probable cause or reasonable suspicion, and instead was an illegal stop. "Evidence seized as a result of an illegal stop is the fruit of the poisonous tree and should not be introduced into

evidence." *United States v. Wilbourn*, 799 F.3d 900, 910 (7th Cir. 2015). The evidence uncovered during the resulting searches and the confession obtained following the searches should both be suppressed.

STANDARDS OF REVIEW

When reviewing challenges to the denial of a motion to suppress, the Court reviews factual determinations for clear error and reviews conclusions of law *de novo*. *United States v. Nichols*, 847 F.3d 851, 856–57 (7th Cir. 2017).

ARGUMENT

I. THE VEHICLE STOP VIOLATED THE FOURTH AMENDMENT, BECAUSE IT WAS WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION.

The collective knowledge doctrine is a limited exception to the Fourth Amendment's requirement that an officer can only conduct a vehicle stop when he has sufficient probable cause or reasonable suspicion for that vehicle stop. *See, e.g.*, *Williams*, 627 F.3d at 252; *United States v. Harris*, 585 F.3d 394, 400–01 (7th Cir. 2009). The doctrine provides that when one officer has reasonable suspicion or probable cause, and he sufficiently communicates that reasonable suspicion or probable cause to a second officer, that second officer can make a stop based on the first officer's reasonable suspicion or probable cause. *See, e.g.*, *Harris*, 585 at 400–01. When the doctrine applies, the information known to the first officer is "imputed" to the second officer. *Williams*, 627 F.3d at 252.

The collective knowledge doctrine, however, does not give officers carte blanche to make stops based on nothing more than "curiosity, inchoate

suspicion, or a hunch," *United States v. Cole*, No. 20-2105, -- F.3d--, 2021 WL 1437201, at *3 (7th Cir. Apr. 16, 2021), so long as they can later show that some other officer had reasonable suspicion or probable cause. That would effectively gut the reasonable suspicion and probable cause requirements. Such an indiscriminate application of the collective knowledge doctrine would be especially dangerous in the traffic context, given that a local police force bent on "strictly enforc[ing] the traffic laws" could arguably "arrest half the driving population on any given morning." *Id.* (quoting Robert H. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)). And as this Court recently recognized, "[w]e should not be surprised that there is a significant risk of 'mission creep' where the stop is justified constitutionally by one limited purpose but is actually motivated by a different purpose." *Id.* at *11.

This Circuit therefore has only applied the collective knowledge doctrine in limited circumstances. This is a "vertical collective knowledge" case, because the government seeks to impute probable cause from one officer who observed facts giving rise to probable cause, to a different officer at a different location who hadn't himself observed the facts giving rise to probable cause. The government first bears the burden of showing that the requesting officer communicated his "belief that there is sufficient evidence to detain [the] suspect" to the officer performing the stop. *Nafzger*, 974 F.2d at 911. That showing must include a clear accounting of the chain of communication

between the officers.[5] *Wilbourn*, 799 F.3d at 909–10. Additionally, the government must show that the officer who took the action "act[ed] in objective reliance on the information received," that the officer who provided the information had "facts supporting the level of suspicion required," and that the stop was "no more intrusive than would have been permissible for the officer requesting it." *Williams*, 627 F.3d at 252–53.

The district court erred in applying the collective knowledge doctrine to the facts of this case. It acknowledged that "Officers Babcock and Oberle were confused as to who communicated the information to them," Dkt. 30 at 12, A18, and that "it is not clear from the different individual police reports what information was conveyed by whom," *id.* at 7, A13. It also acknowledged that the officers' accounts conflicted with each other and "do not describe *how* the information was communicated[.]" *Id.* at 7, 12, A13, A18. Still, the district court held that the officers' testimony at the evidentiary hearing that they were in communication together—which was not mentioned in the officers' contemporaneous police reports and was first added to the record following Seay's motion to suppress—was sufficient to establish that probable cause sufficiently had been communicated and conveyed to Babcock. *Id.* at 12, A18. This approach misconstrues the collective knowledge doctrine and opens the

[5] Vertical collective knowledge cases can be distinguished from "horizontal collective knowledge" cases, where multiple officers working on a scene together each have partial knowledge that in some circumstances can collectively rise to the necessary level of suspicion. *See United States v. Parra*, 402 F.3d 752, 764 (7th Cir. 2005) (distinguishing cases where an officer "act[s] at the direction of another officer or police agency," from those where "officers are in communication with each other while working together at a scene") (quoting *Nafzger*, 974 F.2d at 911).

door to abuses by law enforcement officers, who could be tempted to provide an after-the-fact "collective knowledge" justification for an improper seizure.

A. The district court erred in applying the collective knowledge doctrine here because the government did not clearly account for the chain of communication between the officers.

In the vertical collective knowledge cases on which the district court relied, the government clearly accounted for the chain of communication between the officers—and the court did not have to fill in the gaps as to what communication occurred. *See United States v. Nicksion*, 628 F.3d 368, 375 (7th Cir. 2010) (stating that a detective told the acting officers the facts underlying his suspicions and then requested that they stop the defendant's car); *Williams*, 627 F.3d at 253 (noting that one officer "specifically identified [a] Suburban and its occupants" to the officer who made the stop); *Tangwall v. Stuckey*, 135 F.3d 510, 513, 520 (7th Cir. 1998) (stating that an officer notified the arresting officer of a positive identification of the suspect); *Nafzger*, 974 F.2d at 912–13 (noting that an FBI agent relayed information underlying his suspicions to supervising officers at a command post, who told other officers at the command post, who then directed the acting officer to make the stop). By contrast, when the chain of communication is missing a link, this Circuit does not apply the collective knowledge doctrine. *See, e.g.*, *Reher v. Vivo*, 656 F.3d 772, 777 (7th Cir. 2011) (declining to apply the collective knowledge doctrine given district court finding that "the extent of the communication between the officers was not clear"); *United States v. Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) (declining to apply the collective knowledge doctrine because the officer

effecting the search "couldn't hear exactly what was being said back and forth" between the other officers).

United States v. Wilbourn illustrates this requirement. 799 F.3d 900 (7th Cir. 2015). There, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") agents and Chicago Police Department ("CPD") officers had been surveilling the defendant. *Id.* at 906. The defendant left a gas station where he was under surveillance, and a CPD officer promptly stopped the defendant's car. *Id.* The ATF agent's incident report did not provide a justification for the stop, although the government later claimed the stop was for a traffic violation. *Id.* at 909. In denying the defendant's suppression motion, the district court presumed that the federal agents, who themselves had probable cause, had sufficiently communicated with the CPD officers. Brief of Defendants-Appellants at App. 85 (order denying defendant's motion to suppress (N.D. Ill. Nov. 26, 2008)), *United States v. Wilbourn*, No. 13-3715 (7th Cir. Aug. 26, 2014), ECF No. 33. This Court reversed, holding that the government had not met its burden of clearly showing that the agents had "communicated [the] basis for the[ir] suspicions to" the CPD officers. *Wilbourn*, 799 F.3d at 909–10. Thus, a reasonable inference that information was transferred from a requesting officer to a stopping officer is insufficient. The court cannot fill in the gaps. Rather, the government bears the burden of establishing either that the stopping officer himself had firsthand knowledge of the facts giving rise to reasonable suspicion or probable cause, or of establishing how that information was conveyed to the stopping officer.

Because the record in this case similarly does not establish a clear chain of communication, the government did not meet its burden of establishing that probable cause was sufficiently communicated to the arresting officer. *United States v. Wheeler*, 800 F.2d 100, 103 (7th Cir. 1986); *see also Nafzger*, 974 F.2d at 911. This case suffers from the same problems that this Court has found to foreclose application of the vertical collective knowledge doctrine in other cases. It is undisputed that Babcock did not himself observe anything giving rise to probable cause or reasonable suspicion, and that he was not participating in surveillance alongside the other officers. As the district court noted, the record evidence is incomplete and inconsistent. Dkt. 30 at 7, A13. The officers' contemporaneous police reports were contradictory, irreconcilable, and insufficient to establish probable cause or reasonable suspicion. Indeed, Babcock and Oberle stated in their reports that they received information supplying them with probable cause from Henderson, but Henderson's report indicates he did not communicate any information to them. Like in *Wilbourn*, the original record includes gaps that could only be reconciled long after the stop by filling in missing information. *See Wilbourn*, 799 F.3d at 909–10.

And even after the officers offered new accounts at the evidentiary hearing and at trial, their accounts continued to conflict with one another and conflict with their original reports. Babcock himself offered three different accounts of how he supposedly came to have probable cause for the traffic stop. *See* Dkt. 17-3 at 1; Dkt. 26 at 36–37; Dkt. 52 at 47. Like in *Reher*, the district court noted that the record wasn't "clear" as to who conveyed what to

whom. 656 F.3d at 777 (holding that the government's accounting of the "extent of the communication between the officers" was far from "clear"); *see* Dkt. 30 at 7, A13.

Moreover, while the district court found that "the [evidentiary] hearing testimony of the police officers was credible, consistent and reasonably explained the inconsistency in the officer's police reports," *see* Dkt. 30 at 11, A17, that finding is both wrong and irrelevant. The officers' post-hoc rationalizations were wholly inconsistent with their police reports made under penalty of perjury, and the district court committed clear error by crediting those post-hoc rationalizations without sufficient explanation. *See, e.g., Ray v. Clements*, 700 F.3d 993, 1013 (7th Cir. 2012). But those credibility findings are immaterial, in any event, because the district court committed an error of law regardless of the credibility findings.

The district court applied the collective knowledge doctrine based on its finding that the officers were in "close communication" with each other. Dkt. 30 at 7, 12–13, A13, A18–19. This holding runs afoul of Seventh Circuit precedent. *See* Section I.B, *infra*. Moreover, the district court also acknowledged in its opinion that the chain of communication in this case was unclear. *See, e.g.,* Dkt. 30 at 12, A18 (concluding that "the information supporting the probable cause needed to stop Mr. Seay's vehicle *was communicated* to the officers who made the stop" (emphasis added)); *id.* at 12, A18 (concluding that "Officer Babcock who completed the traffic stop acted in objective reliance on the information received from Investigator

Shiparski *and* Detective Henderson" (emphasis added)); *id.* at 8, A14.

Each of these deficiencies, on its own, forecloses reliance on the vertical collective knowledge doctrine in this case. When taken together, moreover, these deficiencies demonstrate that this is far from the clear chain of communication required to invoke the vertical collective knowledge doctrine. *See Wilbourn*, 799 F.3d at 909–10; *Reher*, 656 F.3d at 777; *see also Ellis*, 499 F.3d at 690. Because there was no clear chain of communication between the officer observing events giving rise to probable cause or reasonable suspicion, and the officer subsequently making the stop, the district court erred in applying the collective knowledge doctrine.

B. The district court further erred in evaluating whether Officer Babcock acted in objective reliance on information he received.

The first prong of the *Nafzger* test requires the court to affirmatively determine that "the officer taking the action" acted "in objective reliance on the information received." 974 F.2d at 911. The inquiry involves an "objective" analysis of "the information received"—it is not an opportunity for the court to guess at an officer's personal knowledge and subjective motivation. *Williams*, 627 F.3d at 254–55 ("subjective reasons for making the stop and initiating the search are irrelevant"); *Whren v. United States*, 517 U.S. 806, 813 (1996). For a court to properly "review[] a stop or arrest to see if reasonable suspicion or probable cause was present, it should examine the information known to both the officer giving the direction and the officer carrying out the *Terry* stop or arrest to determine whether, between the two, there was an adequate factual

basis for the action." *Nafzger*, 974 F.2d at 912.

Despite noting the three-part *Nafzger* test, the district court condensed the inquiry into a general question of whether the officers were in "close communication." Dkt. 30 at 6, A12. This was in error, however. When officers act on knowledge or information that they do not personally possess, the source of that information is critical. An examination of "the information known to . . . the officer giving the direction," *see Nafzger*, 974 F.2d at 912, necessarily requires knowing that officer's identity.

Accordingly, this Court requires a sufficiently clear and developed record of communication in order to objectively determine whether probable cause existed and was conveyed. *Wilbourn*, 799 F.3d at 909–10 (holding that knowledge cannot be imputed based on the "presum[ption] that" interceding officers "received a call" from officers detailing "extensive evidence" justifying reasonable suspicion). Alternatively, this Court has held that objective evidence of communication can exist when the officer conducting the stop or arrest is an active and embedded member of a team of officers in the midst of executing the same operation at a scene. *United States v. Parra*, 402 F.3d 752, 766 (7th Cir. 2005) (distinguishing cases where "officers … worked together closely in monitoring the drug transaction as it unfolded") (*citing Nafzger*, 974 F.2d at 911).

Neither of those requirements is satisfied in this case. First, the record in this case does not provide a clear account of who provided information to Babcock and, as such, does not enable an objective analysis of the

communication. *See* Section I.A *supra*; *see also Wilbourn*, 799 F.3d at 909. Where an officer's story changes because he was "confused," and where it is unclear "what information was conveyed by whom," Dkt. 30 at 12, 7, A18, A13, a court cannot properly find that "the officer effecting the stop act[ed] in objective reliance on the information received," *Nafzger*, 974 F.2d at 911.

Second, this case is not exempt from the requirement of a clear and developed record of communication. In finding that the government had met its burden to invoke the collective knowledge doctrine, the district court emphasized that the officers were part of a "coordinated investigation" and in "close communication" with each other. Dkt. 30 at 8, A14. That misapprehends this Circuit's precedent, however. This exception typically involves officers working closely together in close physical proximity—for example, officers conducting an operation together at a scene. *See, e.g., Nafzger*, 974 F.2d at 911 (explaining that "when officers are in communication with each other while working together at a scene, their knowledge may be mutually imputed . . . ."). And while the district court relied on *Nafzger* for the proposition that the "same scene" requirement need not always be taken literally, *see* Dkt. 30 at 6, A12, *Nafzger* involved a materially different fact pattern. In that case, the officers were all substantively "briefed" ahead of time, were working together to conduct the same investigation "cover[ing] a large area," and were using "an established communication system." *Nafzger*, 974 F.2d at 914–15; *see also Wilbourn*, 799 F.3d at 909 (declining to "presume" contents of police radio communication).

This case does not involve any of those factors. It is undisputed that

Shiparski and Fish were conducting surveillance—but that Babcock was not. Thus, it is irrelevant whether Shiparski's knowledge of facts giving rise to probable cause can be imputed to officers with whom he was conducting the surveillance operation—that list didn't include Babcock in any event. Further, the knowledge the government seeks to impute in this case is different from the object of the surveillance operation. Dkt. 26 at 21-22 (Shiparski's testimony that he did not believe his surveillance had given him probable cause for a stop). Babcock further was not at the location of the surveillance. This therefore is not a "horizontal" collective knowledge doctrine case where facts relevant to an ongoing investigation can be aggregated among officers actively working closely together on the scene of that investigation.

As a result, the cases relied upon by the district court below are inapposite. Those cases involved either a situation where the chain of communication was clear among the officers at issue, or involved a situation where the officers at issue were conducting surveillance together. Dkt. 30 at 8, A14; *see Parra*, 402 F.3d at 765–66 (highlighting the fact that the arresting officer was a DEA agent participating in a multi-day, multi-suspect drug investigation and had "shared a surveillance van" with a fellow agent); *Harris*, 585 F.3d at 401 (involving a clear, developed, and consistent chain of communication from one officer to another member of "the same police unit"); *Nicksion*, 628 F.3d at 375 (noting the arresting officers were briefed by a single detective on specifics of "the investigation into" the suspect's drug trafficking). Neither is the case here.

If "objective reliance" did not require a traceable chain of probable cause, courts could not meaningfully review the very stops the collective knowledge doctrine is meant to govern. The collective knowledge doctrine would be nearly boundless if the mere existence of a traffic stop could be sufficient to show "objective reliance" on another officer. Similarly, the collective knowledge doctrine would be nearly boundless if testimony that officers were in radio contact with each other could be sufficient to show "objective reliance" on another officer. The district court thus erred in its evaluation of objective reliance on the facts of this case, and in its resulting holding that the requirements of the collective knowledge doctrine had been satisfied. *See* Dkt. 30 at 7–9, 12–13, A13–15, A18–19.

Accordingly, the government failed to establish a sufficiently clear chain of communication from Shiparski and Fish who conducted the surveillance and observed the alleged traffic violations, to Babcock who later conducted the traffic stop at a different location. As a result, the collective knowledge doctrine does not apply in this case. Officer Babcock therefore had neither probable cause nor reasonable suspicion for the stop and seizure, and the stop and seizure were in violation of the Fourth Amendment.

II. THE EVIDENCE UNCOVERED DURING AND FOLLOWING THE SEARCHES OF SEAY'S VEHICLE AND PERSON MUST BE SUPPRESSED AS FRUITS OF THE POISONOUS TREE.

"Evidence seized as a result of an illegal stop is the fruit of the poisonous tree and should not be introduced into evidence." *Wilbourn*, 799 F.3d at 910. In this case, the evidence uncovered following the stop and search of Seay

included a firearm and two magazines, in addition to Seay's subsequent confession to possessing these items following his arrest. Dkt. at 30 at 1, 4, A7, A10. Because the stop of the vehicle was not supported by either probable cause or reasonable suspicion, all physical evidence recovered during the searches of Seay's person and the vehicle must be suppressed as the direct fruits of the unconstitutional stop and seizure. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963) ("[E]vidence seized during an unlawful search [can] not constitute proof against the victim of the search. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.") (citations omitted). Seay's subsequent confession to possessing the items uncovered during the searches similarly is the direct fruit of the unconstitutional stop and seizure, and similarly must be suppressed. *Id.*; *see also United States v. Jones*, 214 F.3d 836, 838 (7th Cir. 2000) ("A confession that occurs during unlawful custody, or was influenced by unlawfully seized evidence, must be suppressed unless intervening events demonstrate that the illegality did not cause the confession.") (collecting cases); *United States v. Reed*, 349 F.3d 457, 463 (7th Cir. 2003) (same) (citing *Brown v. Illinois*, 422 U.S. 590, 602 (1975)).

CONCLUSION

For the foregoing reasons, Rapheal Seay respectfully requests that the Court vacate Seay's conviction and reverse the denial of his motion to suppress.

Respectfully submitted,

s/ Sarah M. Konsky

Dated: May 5, 2021

Sarah M. Konsky
Counsel of Record
David A. Strauss
Caroline Cordell (Ill. Sup. Ct. R. 711 License Number 2021LS00260)
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC
AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
773-834-3190
konsky@uchicago.edu
Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with page limitation of Rule 32(a)(7)(A) of the Federal Rules of Appellate Procedure because the Brief contains 7,655 words excluding the parts the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements in Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: May 5, 2021

s/ Sarah M. Konsky
Sarah M. Konsky

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I, Sarah M. Konsky, an attorney, certify that all materials required by Circuit Rule 30(a) and (b) are included in Defendant-Appellant's required short appendix.

Dated: May 5, 2021

s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on May 5, 2021, I caused the foregoing **Brief and Required Short Appendix of Defendant-Appellant Rapheal Seay** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief and Required Short Appendix of Defendant-Appellant Rapheal Seay** to be transmitted to the Court via UPS overnight delivery, delivery service prepaid within 7 days of that notice date.

Dated: May 5, 2021

s/ Sarah M. Konsky
Sarah M. Konsky

INDEX OF REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT RAPHEAL SEAY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA **Plaintiff,** **vs.** **RAPHEAL SEAY** **Defendant.**	**CASE NUMBER: 3:20CR006-001** **USM Number: 16930-027** **DAVID P JONES** **DEFENDANT'S ATTORNEY**

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on count 1 of the Indictment by a jury after a plea of not guilty on October 6, 2020.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title, Section & Nature of Offense	Date Offense Ended	Count Number
18:922(g)(1) FELON IN POSSESSION OF A FIREARM WITH FORFEITURE ALLEGATION	December 9, 2019	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Final order of forfeiture forthcoming.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, mailing address or other material change in the defendant's economic circumstances until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

January 14, 2021
Date of Imposition of Judgment

s/ Jon E. DeGuilio
Signature of Judge

Jon E. DeGuilio, Chief Judge, U.S. District Court
Name and Title of Judge

January 14, 2021
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **64 months.**

The Court makes the following recommendations to the Bureau of Prisons: That the Bureau of Prisons designate as the place of the defendant's confinement, if such placement is consistent with the defendant's security classification as determined by the Bureau of Prisons, a facility as close as possible to his family in Michigan City, Indiana to facilitate regular family visitation.

The Court leaves it to the BOP to calculate any credit for time served.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years.**

CONDITIONS OF SUPERVISION

While on supervision, the defendant shall comply with the following conditions:

1. You must not commit another federal, state, or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must not unlawfully use any controlled substance, including marijuana, and must submit to one drug test within 15 days of the beginning of supervision and at least 2 periodic tests after that for use of a controlled substance.

4. You must cooperate with the probation officer with respect to the collection of DNA.

5. You must be lawfully employed full-time (at least 30 hours per week). If you are not employed full-time, you must try to find full-time employment under the supervision of the probation officer. If you become unemployed, or change your employer, position, or location of employment, you must tell the probation officer within 72 hours of the change. If after 90 days you do not find employment, you must complete at least 10 hours of community service per week until employed or participate in a job skills training program approved and directed by your probation officer.

6. You must report in person to the probation office, in the district which you are released, within 72 hours of release from the custody of the Bureau of Prisons. You must report to the probation officer in the manner and as frequently as the court or the probation officer directs; and you must notify the probation officer within 48 hours of any change in residence, and within 72 hours of being arrested or questioned by a police officer.

7. You must not travel knowingly outside the federal judicial district without the permission of the court. Alternatively, the probation officer will grant such permission when doing so will reasonably assure the probation officer's knowledge of your whereabouts and that travel will not hinder your rehabilitation or present a public safety risk.

8. You must truthfully answer any inquiry by the probation officer and must follow the instruction of the probation officer pertaining to your supervision and conditions of supervision. This condition does not prevent you from invoking the Fifth Amendment privilege against self-incrimination.

9. You must permit a probation officer to meet at your home or any other reasonable location and must permit confiscation of any contraband the probation officer observes in plain view. The probation officer will not conduct such a visit between the hours of 11:00 p.m. and 7:00 a.m. without specific reason to believe a visit during those hours would reveal information or contraband that wouldn't be revealed through a visit during regular hours.

10. You must not meet, communicate, or otherwise interact with persons whom you know to be engaged or planning to be engaged in criminal activity.

11. You must not possess a firearm, ammunition, destructive device, or any other dangerous weapon (meaning an instrument designed to be used as a weapon and capable of causing death or serious bodily harm).

12. You must not enter into any agreement to act as an informant or special agent of a law enforcement agency without the court's permission.

13. Unless an assessment at the time of release from imprisonment or commencement of probation indicates to the court that participation is unnecessary, you must participate in a substance abuse treatment program or aftercare program. The court will receive notification of such assessment. You must abide by all treatment program requirements and restrictions, consistent with the conditions of the treatment provider. You will be required to participate in drug and /or alcohol testing, not to exceed 85 drug and/or alcohol tests per year. At the request of a treatment provider, probation officer, or you, the court may revise these conditions. While under supervision, you must not consume alcoholic beverages. You must pay all or a part of the costs for participation in the program, not to exceed the sliding fee scale as established by the Department of Health and Human Services and adopted by this court. Failure to pay these costs will not be grounds for revocation unless the failure is willful.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$100	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 102 Robert A. Grant Courthouse, 204 South Main Street, South Bend, IN 46601. The special assessment payment shall be due immediately.

FINE

No fine imposed.

RESTITUTION

No restitution imposed.

FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

1) Taurus G2C Pistol CAL:9 SN: TMR72881; and

2) 28 rounds Winchester-Western Ammunition CAL 9

Name: RAPHEAL SEAY
Docket No.: 3:20CR006-001

ACKNOWLEDGMENT OF SUPERVISION CONDITIONS

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 3:20-CR-006 JD
	)	
RAPHEAL SEAY	)	

AMENDED OPINION AND ORDER[1]

Defendant Raphael Seay is charged with one count of possessing a firearm as a felon. Mr. Seay was stopped by an officer after committing two traffic violations and he did not have a driver's license but provided his identification card and the vehicle's registration. [DE 17]. While the first officer was running a background check on Mr. Seay's documents in his squad car, a second officer's K-9 partner gave a positive alert to the existence of drugs at the driver's side door of Mr. Seay's car. A search of his person revealed marijuana and other drug paraphernalia. A search of the car revealed a firearm with a high capacity extended magazine under the front passenger seat and another magazine in the center console. [DE 19]. Mr. Seay has now moved to suppress all evidence obtained during the search of his person and his vehicle, arguing that the searches were unlawful. For the following reasons, the Court denies the motion to suppress.

I. FACTUAL BACKGROUND

On December 9, 2019, members of the La Porte County Drug Task Force were conducting surveillance of Mr. Seay, who the officers knew from an ongoing investigation into the sale and distribution of narcotics. [DE 26 at 8-9]. The surveillance was conducted by Investigator Shiparski and Detective Fish a few blocks from the Michigan City Police Department ("MCPD"). At approximately 4:30 p.m., Investigator Shiparski and Detective Fish

[1] The Court has amended this order to reflect the citations to the transcript of the evidentiary hearing that was docketed at DE 26.

observed a "dark colored Nissan Altima, with tinted windows" park near the area of Elm and Main Street. [DE 17-1 at 1]. Investigator Shiparski, "familiar with [Mr. Seay's] appearance and characteristics through previous law enforcement investigations," recognized Mr. Seay as he exited the vehicle and walked up to the porch of a nearby home. *Id*. Around 4:45 p.m., Investigator Shiparski observed another sedan pull up to where Mr. Seay was standing, Mr. Seay approached the vehicle, and conducted "what appeared to [be] . . . a hand-to-hand transaction." *Id*. Investigator Shiparski watched Mr. Seay approach the vehicle, interact briefly with the driver who remained in the vehicle before walking away and then the vehicle pulled away. *Id*.

At around 5:00 p.m., Investigator Shiparski and Detective Fish watched Mr. Seay get into his car, pull away from the house, and drive south on Elm Street. At this point in time, Investigator Shiparski observed that the car that Mr. Seay was driving "failed to come to a complete stop" at the intersections of Elm and Pearl Street and then at Elm and Dupage street. *Id*. While Shiparski and Fish were conducting surveillance of Mr. Seay, they were communicating with Detective Henderson, who was located at MCPD, and Officers Babcock and Oberle, who were parked in the MCPD parking lot a couple blocks away. [DE 26 at 11-12, 36-37]. At the evidentiary hearing, Detective Shiparski testified that "[f]rom the moment we began surveillance, I was in constant communication with Corporal Henderson via the radio." [DE 26 at 15]. Detective Shiparski explained that they were simultaneously in contact with Detective Henderson by way of the police radio and with Officers Babcock and Oberle via a cellphone through the Bluetooth in-car phone system. [DE 26 11-12]. While listening to the information relayed from the surveillance team, Officer Babcock drove to where the vehicle was traveling and then activated his red and blue lights and initiated a traffic stop. [DE 26 37-38].

After identifying himself to Mr. Seay, Officer Babcock explained that he stopped Mr. Seay "for rolling a couple stop signs on Elm." *Id*. at 40. Mr. Seay stated that he did not have a driver's license but provided his Indiana ID card and the registration for the vehicle. While these events were occurring, both Detective Henderson and Officer Oberle arrived at the traffic stop to assist with the investigation. As Officer Babcock completed a background check on Mr. Seay's information, Officer Oberle walked around Mr. Seay's vehicle with his K9 partner, Axel. *Id*. at 41. When Officer Oberle commanded Axel to sniff, "he walked around the driver's side of the vehicle where I observed a change of behavior in the form of him stopping at the driver's door seam and his breathing becoming louder and faster." [DE 17-4 at 1]. Officer Oberle explained in the evidentiary hearing that Axel made a "passive alert" for drugs by sitting next to the driver's side door. [DE 26 at 74].

Once Officer Oberle alerted the team to the passive alert, Officer Babcock returned to Mr. Seay's vehicle and asked him to step out. [DE 26 at 41-42]. As Detective Henderson was patting down Mr. Seay, he "immediately felt a large mason jar in [his] front right coat pocket and [said] the following, 'You probably have a jar of weed in your pocket,' and Mr. Seay stated yes." [DE 17-2 at 1]. Following this, Mr. Seay was detained and Detective Henderson completed a search of his person where he found: a digital scale, small clear plastic zip lock bags, a clear plastic bag containing a green leafy substance, a dropper bottle containing Crazy Glue, an iPhone and $33 of U.S. currency. *Id*. at 1-2. Officer Oberle started searching the passenger compartment of the vehicle and Detective Henderson informed Mr. Seay that the positive K9 alert provided probable cause to search the vehicle. *Id*. at 2. Officer Oberle alerted all officers on the scene that he found a handgun underneath the front passenger seat. *Id*. Officer Babcock then transported Mr. Seay to the MCPD to begin the booking process. Officer Oberle located an additional loaded

magazine in the center console of the Nissan. *Id*. Detective Henderson noted in his report that he "took possession of all articles of evidence found inside the Nissan at approximately 1730 hours." *Id*.

Once all the evidence from Mr. Seay's person and vehicle were processed and stored, Investigator Shiparski and Detective Henderson spoke with Mr. Seay in the holding area at MCPD. Mr. Seay was escorted to an interview room where he waived his Constitutional rights and confessed to possessing approximately 14 grams of marijuana and a 9mm pistol with a 30-round clip. [DE 17-1 at 2]. Mr. Seay stated that he "purchased the firearm off the streets in South Bend for $450" about a month prior, that he was the only person to possess it, and that he had never shot it. *Id*. Mr. Seay "stated that he knew he was a felon and that he couldn't possess a firearm, but that he felt he needed one to protect himself." *Id*. Mr. Seay also explained that he used his cell phone to arrange the sale of marijuana and that he does not sell any other kind of drug. *Id*. Finally, Mr. Seay was issued three traffic tickets with a time stamp of 07:14 pm—one for driving while suspended and two for failing to make a complete stop at two intersections. [DE 17 at 7].

II. DISCUSSION

Mr. Seay now moves to suppress all of the evidence obtained during the search of his person and his vehicle as the evidence is the direct fruit of an illegal, warrantless seizure conducted by police officers and upon which the Grand Jury solely relied in its indictment of him for being a felon in possession of a firearm. Mr. Seay also stated at the evidentiary hearing that he did not question the events subsequent to the stop made by Officer Babcock but stated that his argument came down to whether Officer Babcock had probable cause to make the stop in the first place. [DE 26 at 4-5].

A. Probable Cause for the Stop

Mr. Seay argues that the search of his person and the car was unlawful, and as the result of that search, the evidence found should be suppressed. The government indicates that only the 9mm pistol, its ammunition, the second magazine and its ammunition, Mr. Seay's cell phone along with some of its extracted contents, and portions of his recorded interview with investigators would be admissible at trial. [DE 19 at 6]. The parties dispute a number of issues relative to the stop and subsequent search, but primarily disagree as to whether there was probable cause for the stop.

Mr. Seay argues that Officer Babcock lacked probable cause to seize him and the vehicle he was operating. Both parties agree that Officer Babcock did not personally witness or observe Mr. Seay commit the two alleged traffic infractions which led to the traffic stop and issued citations. To complicate matters, Officer Babcock's report indicates that "Detective Henderson relayed more information stating that he witnessed the vehicle commit multiple traffic infractions" which led Babcock to make the traffic stop. [DE 17-3 at 1]. Officer Oberle's report indicates that he was contacted by Detective Henderson as well. [DE 17-4 at 1]. Detective Henderson's report does not state that he communicated this information to either officer. [DE 17-2 at 1]. And notably, Investigator Shiparski's report indicates that he was the one to contact Officer Babcock regarding Mr. Seay's traffic violations. [DE 17-1 at 1]. Thus, Mr. Seay argues that Officer Babcock lacked probable cause to seize him and the vehicle he was operating because 1) he did not personally witness the traffic offense and 2) his knowledge cannot be imputed through the "collective knowledge doctrine." [DE 17 at 13].

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810 (1996). In this instance, Investigator Shiparski and Detective Fish observed Mr.

Seay's car fail to come to a complete stop at two intersections, but they were not the officers who completed the traffic stop. The collective knowledge doctrine applies to situations such as this where "[t]he police who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of another officer or police agency" and instead "the arrest is proper so long as the knowledge of the officer directing the arrest, or the collective knowledge of the agency he works for, is sufficient to constitute probable cause." *Tangwall v. Stuckey,* 135 F.3d 510, 517 (7th Cir. 1998) (emphasis removed). Thus, under the doctrine, Officer Babcock could stop, search, or arrest Mr. Seay at the direction of another officer even if he did not have firsthand knowledge of the facts that provided the necessary level of suspicion for the stop. *See United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010). There are three requirements for the doctrine to apply:

> "(1) the officer taking the action must act in objective reliance on the information received, (2) the officer providing the information—or the agency for which he works—must have facts supporting the level of suspicion required, and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it."

United States v. Nafzger, 974 F.2d 906, 911 (7th Cir. 1992). Generally, if the officers conducting surveillance and the officers making the traffic stop are in close communication with each other, then the collective knowledge doctrine will apply. *See United States v. Parra*, 402 F.3d 752, 766 (7th Cir. 2005); *Williams*, 627 F.3d at 256. "Thus, it is the ability of the officers to communicate with each other that matters most, not whether the officers were physically at the same scene." *Nafzger,* 974 F.2d at 911.

To apply the collective knowledge doctrine here, the Court must determine what knowledge may be imputed to Officer Babcock at the time of the traffic stop and whether that knowledge was sufficient to support probable cause for the stop. When Mr. Seay was stopped on

Thurman Street, the team of officers involved in his surveillance and the traffic stop had the following information: (1) Mr. Seay was in an area known for its drug activity, (2) Mr. Seay had a history of dealing drugs, (3) Mr. Seay came and went from a house under surveillance over the course of 45 minutes to an hour, (4) Mr. Seay likely completed a hand-to-hand drug transaction outside of the house, and (4) after leaving the house, Mr. Seay failed to make a complete stop at two stop signs as required by law. [DE 26 at 9-11; 15-16]. This is sufficient evidence in aggregate to establish probable cause for Mr. Seay's stop. Now, the Court must determine whether this information may be imputed to Officer Babcock who stopped him.

Although it is not clear from the different individual police reports what information was conveyed by whom, the record from the evidentiary hearing demonstrates that the officers conducting surveillance of Mr. Seay were in close communication with Detective Henderson and the two patrol officers including Officer Babcock. Investigator Shiparski testified that while conducting surveillance of Mr. Seay, he was communicating by radio with Detective Henderson and "[a]t the same time, I had Officers Oberle and Babcock on the phone, again, on that speaker Bluetooth system within our vehicle. So as that's happening and as I'm communicating with [Detective] Henderson via radio, Babcock and Oberle can also hear what I'm saying to [Detective] Henderson." [DE 26 at 16]. Investigator Shiparski stated that he informed everyone that Mr. Seay had disregarded two stop signs and that he requested "the vehicle have a traffic stop done . . . by Officer Babcock and/or Oberle." *Id*. Similarly, Officer Babcock testified that the officers involved in the surveillance of Mr. Seay stated they observed multiple hand-to-hand transactions, that they suspected drug dealing was occurring at the house, and that multiple traffic violations had occurred. [DE 26 at 37]. Officer Babcock also testified that through his phone he could hear Officer Oberle, Detective Shiparski, and Detective Fish and that he could

hear the detectives communicating with Detective Henderson through their encrypted police radio. *Id*.

The testimony clearly demonstrates that the officers were part of a coordinated investigation and were in close communication with each other. The Seventh Circuit has found officers to be in "close communication" in other similar factual situations. Where numerous cellphone calls between officers were made throughout the transaction reporting the activities and locations of the parties in interest and while other officers communicated with the surveillance team by radio, *see Parra*, 402 F.3d at 765; where a confidential informant shared information about narcotics potentially being stored in a vehicle with one officer who then called other officers who were the ones that ultimately completed the traffic stop, *see United States v. Harris*, 585 F.3d 394, 401-402 (7th Cir. 2009); and where a detective advised officers of an investigation into drug trafficking and requested they stop the suspect's car approximately 20 minutes after observing a drug transaction, see *United States v. Nicksion*, 628 F.3d 368, 376 (7th Cir. 2010). The instances where the Seventh Circuit did not find close communication involved situations where there was *no communication* between the officers with knowledge supporting reasonable suspicion and the officers at the scene. *See United States v. Ellis,* 499 F.3d 686, 690 (7th Cir. 2007); *United States v. Wilbourn*, 799 F.3d 900, 909 (7th Cir. 2015) (emphasis added). Notably here, the officers' communication with each other easily qualifies as "close communication" as there were multiple forms of communication occurring almost simultaneously between Officer Babcock and the surveillance team who observed the traffic violations; therefore, the collective knowledge doctrine applies to Mr. Seay's stop.

Moreover, Officer Babcock who completed the traffic stop acted in objective reliance on the information received from Investigator Shiparski and Detective Henderson. Investigator

Shiparski provided the necessary facts to support probable cause to stop Mr. Seay's vehicle for committing traffic violations by failing to come to a complete stop at two stop signs.[2] Even though Officer Babcock did not personally witness Mr. Seay run through the two stop signs, the collective knowledge doctrine enables him to rely on that information from Detective Shiparski. Detective Shiparski testified that Mr. Seay's "vehicle would slow down, however, it [did] not come to a complete stop where the stop sign was erected and proceeded through the intersection." [DE 22 at 29]. "Probable cause exists when 'the circumstances confronting a police officer support the reasonable belief that a driver has committed even a minor traffic offense.'" *United States v. Simon*, 937 F.3d 820, 828–29 (7th Cir. 2019) (quoting *United States v. Cashman*, 216 F.3d 582, 586 (7th Cir. 2000)). If an officer reasonably thinks he sees a driver commit a traffic infraction, that is a sufficient basis to pull him over without violating the Constitution. *United States v. Muriel*, 418 F.3d 720, 724 (7th Cir. 2005).

Here, Mr. Seay was witnessed committing two traffic violations following surveillance of his activities likely involving drug transactions, which formed the basis for Detective Shiparski's direction to stop his vehicle. Under the totality of the circumstances and following communication from Detective Shiparski, probable caused existed for Officer Babcock to stop Mr. Seay due to his traffic violations. *United States v. Sawyer*, 224 F.3d 675, 679 (7th Cir. 2000).

B. Search of his Person and Vehicle

As for the intrusiveness of the stop, the Court finds that it was no more intrusive than necessary. After initiating the traffic stop, Officer Babcock testified that Mr. Seay told him he

[2] A person who drives a vehicle shall stop at an intersection where a stop sign is erected at one (1) or more entrances to a through highway that are not a part of the through highway and proceed cautiously, yielding to vehicles that are not required to stop. Ind. Code Ann. § 9-21-8-32.

did not have a driver's license, but instead provided his Indiana ID card along with the vehicle's registration. [DE 26 at 40]. As Officer Babcock is checking the BMV records for Mr. Seay's license plate and driving history, Officer Oberle takes his K-9 partner, Axel, around Mr. Seay's vehicle. *Id*. at 41. Officer Oberle testified that there was a positive alert for narcotics from Axel at the driver's side door of Mr. Seay's vehicle. *Id*. at 79. "It is well-established a dog sniff of a vehicle's exterior only for illegal drugs *during* a lawful stop for a traffic violation does not infringe Fourth Amendment rights, even absent reasonable suspicion of drugs." *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). As in *Caballes*, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. *Id*. at 209. Following the alert from the drug dog, Officer Babcock returned to Mr. Seay's vehicle and asked him to step out of the car before Detective Henderson completed a pat down of his person. And once the drug dog alerted to the presence of drugs, the officer had probable cause to search the car. *United States v. Martin*, 422 F.3d 597, 602 (7th Cir. 2005).

Mr. Seay was not asked to step out of his vehicle until after a positive alert from a trained drug dog that occurred shortly after the stop was made. And here, the dog sniff did not prolong the stop in any way but was completed simultaneously to a background check being run on Mr. Seay's documentation. See *United States v. Lewis*, 920 F.3d 483, 491 (7th Cir. 2019). After exiting the vehicle at Officer Babcock's direction, Detective Henderson conducted a pat-down and discovered a mason jar in Mr. Seay's jacket pocket, which he confirmed was marijuana. [DE 19 at 4]. Following this discovery, Mr. Seay was detained in handcuffs and Detective Henderson recovered additional drug paraphernalia from his person. *Id*. And based on the K-9 alert, Officer Oberle conducted a search of Mr. Seay's vehicle while he was being detained. Thus, "[a]t each stage of the investigation, the additional information obtained justified additional investigation."

Martin, 422 F.3d at 602. Moreover, the video evidence from the officers' body cameras corroborate this testimony demonstrating that the entire stop lasted approximately eight minutes long before Mr. Seay was transported to MCPD. [Ex. 4]. The dog sniff lasted no more than two minutes after Officer Babcock took Mr. Seay's identification and registration back to his squad car. [Ex. 6]. Thus, the stop was no more intrusive than necessary, and Mr. Seay was not detained longer than required to secure the scene and search the car.[3]

Mr. Seay chiefly contested the fact that the officers were all on a conference call together and that Officers Babcock and Oberle were advised of the alleged hand-to-hand drug transaction and the alleged traffic offenses in real time. [DE 20 at 2]. Mr. Seay further asserted that the information supplied by the government in response to the motion to suppress "completely contradict[ed] the background and sequence of events that Officer Babcock and K9 Officer Oberle laid out in their separate reports about the traffic stop" and questioned why the alleged conference call and police radio contact were not referenced in the report. *Id*. The Court finds that the hearing testimony of the police officers was credible, consistent and reasonably explained the inconsistency in the officer's police reports, i.e., discrepancy about which officer had actually witnessed the traffic offense and communicated that information to Officer Babcock.

At the evidentiary hearing, Investigator Shiparski testified that first he and Detective Fish contacted Detective Henderson via radio communication on their encrypted frequency before calling MCPD Officers Babcock and Oberle via cellphone since the officers did not have access to the police radio. [DE 26 at 11-12]. He went on to explain that he had Officers Oberle and

[3] The Court also notes that Mr. Seay did not have a driver's license, meaning it would have been unlawful for him to drive away by himself even after the initial traffic stop. *See United States v. Fadiga*, 858 F.3d 1061, 1063 (7th Cir. 2017) (holding that a traffic stop was not unreasonably prolonged where the occupants could not lawfully drive away in the car).

Babcock on the phone through the car's Bluetooth speaker system while simultaneously communicating with Detective Henderson via police radio. *Id*. at 16. Shiparski further testified that he "informed everybody that the vehicle and driver had disregarded those two stop signs . . . [and] request[ed] that the vehicle have a traffic stop done on that vehicle by Officer Babcock and/or Oberle." *Id*. Officer Babcock corroborated this testimony and explained the discrepancy in his police report, which stated that Detective Henderson directed him to make the stop instead of Investigator Shiparski. At the hearing, Babcock testified that at the time, he believed it was Detective Henderson who directed him to make the stop as they "were all speaking on this conference call and it was a radio communication, so I was just confused as to who had actually viewed it because they're all talking on the same line." [DE 26 at 38]. Moreover, Officer Oberle testified that he was first contacted by Henderson to be in the area of the police department due to the drug surveillance occurring and then stated that he was later contacted by Shiparski and Fish via a conference call where he "could hear everybody in the background." *Id*. at 75.

Due to the number of officers involved and the different methods of communication utilized, it is understandable that Officers Babcock and Oberle were confused as to who communicated the information to them. The Court recognizes that their police reports do not describe *how* the information was communicated to them, but it does not believe that is a critical point, rather the focus should be on *what* was communicated to them. Here, the information supporting the probable cause needed to stop Mr. Seay's vehicle was communicated to the officers who made the stop. Furthermore, the testimony provided at the evidentiary hearing was credible and clearly demonstrated how the series of events unfolded and how the officers, including those with knowledge to support probable cause for the stop, were all in close

communication with each other. Therefore, the Court denies Mr. Seay's motion to suppress as to the search of his person and the car.

III. CONCLUSION

For these reasons, the Court DENIES the motion to suppress. [DE 17].

SO ORDERED.

ENTERED: September 2, 2020

/s/ JON E. DEGUILIO
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	Cause No.:
	)	3:20-cr-0006-JD-1
vs.	)	
	)	
RAPHEAL SEAY,	)	South Bend, Indiana
	)	October 5, 2020
Defendant.	)	
	)	
_____	)	

VOLUME 1-PM
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JON E. DEGUILIO

APPEARANCES:

For the Government:
MS. MOLLY E. DONNELLY
MR. JEROME W. McKEEVER
United States Attorney's Office
M01 Federal Building
204 South Main Street
South Bend, IN 46601

For the Defendant:
MR. DAVID P. JONES
Newby Lewis Kaminski Jones LLP
916 Lincolnway
LaPorte, IN 46350

of leave the courtroom on occasion. So when you do, we'll just wait for you.

MS. DONNELLY: Understood, Your Honor. I appreciate it.

THE COURT: No problem.

MR. JONES: Judge, I'm also going to object at the appropriate time as a means to preserve the record, so I don't know what the Court wants me to say.

THE COURT: Relative to the search?

MR. JONES: Yeah, relative to the search and preserving the issue -- I don't want to waive any issues that are subject to the motion to suppress. In other words, I don't want the Court of Appeals to say later that "I know you argued that at a motion to suppress but you didn't contemporaneously object during the trial."

THE COURT: Right.

MR. JONES: I'm aware of those type of issues.

So I would just plan on saying, "Defense objects, subject to our objections outlined in docket entry 17," which was our motion to suppress, unless the Court needs a more specific objection.

THE COURT: No, and I could just say something generic like, "Consistent with the previous ruling, the objection is overruled."

MR. JONES: Yes.

THE COURT: Okay.

MR. JONES: I don't plan to use the words "motion" or "suppress" or anything like that. I was going to refer to it -- I believe it's docket entry 17.

THE COURT: For the record, you've made clear what that objection is going to be about so --

MR. JONES: Okay.

THE COURT: -- hopefully that establishes a sufficient record.

Anything else, Mr. Jones?

MR. JONES: No, Your Honor.

THE COURT: Ms. Donnelly?

MS. DONNELLY: No, Your Honor.

THE COURT: We can bring in the jury.

Thank you, John.

(Jury in at 12:47 p.m.)

THE COURT: Please be seated.

Ladies and gentlemen of the jury, welcome back. I hope you had a nice lunch. I just want to quickly confirm everybody is in their spot.

You're number 19, sir, Mr. Dobbs?

JUROR: Yes.

THE COURT: And 17 and 11.

(Respective jurors nod in the affirmative.)

THE COURT: Very good.

Q. Tell us what Corporal Oberle does.

A. Corporal Oberle is at the time a K-9 handler with the Michigan City Police Department.

Q. What about Detective Henderson?

A. Detective Henderson works with me in the Detective Bureau.

Q. Now, when we started this, we said that with all of this surveillance you were in your car about 4:00 p.m.; is that correct?

A. Correct.

Q. What time did you actually see the traffic infractions?

A. That was approximately 5:00 p.m.

Q. After you contacted Officers Babcock, Oberle, and Henderson, what happened next?

A. Moments after advising them of the traffic infractions that I observed, Officer Babcock was able to conduct that traffic stop right near the intersection of Thurman and Poplar Street.

MR. JONES: Judge, I'm going to interpose an objection to the last question and that answer based on the outside-the-jury's-presence discussion that we had before the trial began.

THE COURT: Can we go on our headsets to talk about that?

(Sidebar discussion held by headset as follows:)

Mr. Jones, explain that to me.

MR. JONES: Judge, it's evidence of the traffic stop

and the reason for the traffic stop, and I'm just trying to preserve -- I'm not trying to interrupt Mr. McKeever. I'm just trying to preserve the objection here.

THE COURT: Oh, this is the objection that we talked about before we brought the jury in?

MR. JONES: It is, Judge.

THE COURT: Okay. I just wanted to clarify. So we'll go back -- we're on the record, obviously, but in the presence of the jury, I'll indicate that the objection is overruled consistent with my previous ruling.

MR. JONES: Judge, if I make an objection that does not revolve around docket entry 17, I'll be very clear that it's a different type of an objection.

THE COURT: Okay. Thank you, Mr. Jones.

MR. JONES: Thank you.

(Sidebar discussion held by headset concluded.)

THE COURT: Consistent with the Court's previous ruling, the objection is overruled.

Please proceed, Mr. McKeever.

BY MR. McKEEVER:

Q. Officer Shiparski, do you want me to repeat the question for you?

A. Sure.

Q. After you contacted Officers Oberle, Babcock, and Henderson, what happened next?

A. Yes. It was a black Nissan with dark-tinted windows and he also gave the plate description.
Q. Where did you go at that time?
A. So at that time I drove down Tremont to Elm and then south on Elm where we found the vehicle and I initiated the stop.
Q. And where did you ultimately pull that dark Nissan over?
A. Near Thurman and Poplar.
Q. And can you, again, I guess with an "X" this time since we used a circle the last time, draw the approximate location where you pulled the car over.
A. Right --
MR. JONES: Judge, I'm going to interpose the same objection I made the last time.
THE COURT: Okay. Again, the objection is overruled consistent with the Court's previous ruling.
A. (Indicating.)
BY MS. DONNELLY:
Q. And did the car actually pull over when you pulled it over?
A. Just prior to me activating my lights, the car had already pulled to the side of the road.
Q. And the location where this happened in Michigan City, was this within the Northern District of Indiana?
A. Yes.
Q. On December 9th of 2019, were you wearing a video recording device on your uniform, sometimes what's called a body camera?

A. Yes.
Q. And did you have it on when you started this traffic stop?
A. Yes.
Q. I'm going to hold up a disk, Government's Exhibit 2, and ask that this screen go blank. Also show you the first screen that is just viewable to you right now of a recording.

Have you previously watched this approximately three-and-a-half-minute long recording?
A. Yes.
Q. And is that a clip from your body camera recording device on December 9th of 2019?
A. Yes.
Q. Does it truly and accurately depict what happened and what you saw during this traffic stop?
A. Yes.
Q. Is it fair to say that what's been marked as Government's Exhibit 2 is a portion of what you recorded that night, not the entire long recording; is that right?
A. Correct.

MS. DONNELLY: Your Honor, I would seek to admit Government's Exhibit Number 2.

THE COURT: Any objection, Mr. Jones?

MR. JONES: Same objection as before, Your Honor.

THE COURT: None other than that?

MR. JONES: None other than that.

THE COURT: Okay. Government's Exhibit 2 is admitted over the objection, consistent with the Court's previous ruling.

MS. DONNELLY: Your Honor, I would seek leave to publish and pause a few times during this recording to ask the officer questions.

THE COURT: Granted.

(Video published.)

BY MS. DONNELLY:

Q. Now, we're looking at just the beginning of this clip, and it shows a time in the upper right-hand corner of 23:03:59. Now, was that time accurate to when you pulled this car over?

A. No.

Q. And you said you pulled it over a little after 5:00 p.m.?

A. Yes.

Q. Can you explain why the discrepancy between the actual time and the recording device?

A. I'm not sure exactly why it displays that time, but that's an issue with Axon, the body camera company.

Q. Is that why where there's other locations where you write times down to make sure that that's accurate?

A. Yes.

Q. Now, I'm going to play again here.

(Video published.)

Q. I'm pausing here, again, just a few seconds later,

MR. McKEEVER: Your Honor, we offer Government's Exhibit 3 into evidence.

THE COURT: Mr. Jones, any objection?

MR. JONES: Same objection as before, Your Honor.

THE COURT: Okay. The objection is overruled consistent with the Court's previous ruling. Government's Exhibit 3 is admitted.

MR. McKEEVER: Permission to publish?

THE COURT: You may.

MR. McKEEVER: Your Honor, can we publish the video now?

THE COURT: You may.

(Video published.)

BY MR. McKEEVER:

Q. Corporal Oberle, we're looking right now at just the first second of that clip. You see up on the top right-hand corner there --

A. Yes, sir.

Q. -- it says 2019-12-09. Is that the date of this recording?

A. Yes.

Q. And next to that it has a timestamp of 23:04:12. Do you see that?

A. I do.

Q. What time does that mean?

A. That would be 11:04.

Q. Corporal, I'm going to approach you with the lid of a bankers box. I'm handing that to you. Inside the lid of that bankers box, we have what's been identified as Exhibits 4A and 4B. Do you see those?

A. I do.

Q. Do you recognize what Exhibits 4A and 4B are?

A. 4A and 4B is the firearm and the magazine that was recovered from the front passenger seat.

Q. How can you identify it?

A. By the serial number and other markings on the firearm.

Q. Are Exhibits 4A and 4B in the same or substantially the same condition as when you found them under the passenger seat in Mr. Seay's car on December 9th, 2019?

A. Yes, it looks to be.

MR. McKEEVER: Your Honor, we offer Exhibits 4A and 4B into evidence.

THE COURT: Any objection, Mr. Jones?

MR. JONES: Yes, Your Honor, as stated before.

THE COURT: No other basis?

MR. JONES: No other basis.

THE COURT: Again, consistent with the Court's previous ruling, the Court overrules the objection, and Government's Exhibit 4A and 4B --

MR. McKEEVER: Yes.

THE COURT: -- are admitted.

Q. That's the angle the camera actually sees when you play a recording?

A. Yes, directly in front of me.

Q. In addition to this Exhibit 3, which is this five-minute or so clip that we played for the jury, did you review your entire body cam video from December 9th, 2019?

A. Yes.

Q. Did that entire body cam video fairly and accurately depict what you saw and heard on December 9th, 2019, during that traffic stop?

A. Yes.

MR. McKEEVER: Your Honor, we offer Exhibit 3A into evidence, which would be the entirety of the body cam recording.

THE COURT: Any objection, Mr. Jones?

MR. JONES: Judge, I'm going to interpose the same objection that I did before for the reasons I stated before, but I don't have an objection to the completeness doctrine that the government is trying to -- the record should be complete with the entire body cam, but I also object to the entire body cam, if that makes any legal sense.

THE COURT: So you've reviewed the entirety of the body cam?

MR. JONES: We've been provided that, yes, Your Honor.

THE COURT: And you have no objection other than the

one you've posed regularly throughout trial?

MR. JONES: Correct.

THE COURT: Can we don our headsets?

(Sidebar discussion held by headset as follows:)

THE COURT: Mr. McKeever, what do you anticipate the body camera is going to show us? You can't hear me? Can you hear me now?

(Counsel confer off the record.)

MS. DONNELLY: Can you hear me, Your Honor?

THE COURT: Yes.

MS. DONNELLY: I believe our intention at this point is to admit the exhibit but not publish it.

THE COURT: Do you intend to publish it at some point?

MS. DONNELLY: Your Honor, our thought behind admitting it was due to counsel's questions. Obviously the jury is going to have all of the exhibits in the jury room for deliberation purposes. If they wish to view it at that point, to see, since the question has been raised, what they could see on it.

THE COURT: Do you anticipate that this recording would, in fact, show the firearm or ammunition in the vehicle?

MS. DONNELLY: Your Honor, it would not show the firearm or ammunition in the vehicle where he found it. Detective Henderson on the video asks Officer Oberle whether he captured the location of the gun on his body camera. Officer

Oberle answers yes. So Detective Henderson essentially says -- you know, they talk about how they're going to gather the evidence, but Detective Henderson in essence confirmed that the original location of the firearm was captured on some type of device.

THE COURT: Okay. So you're just making this evidence available for the jury if at some point they want to review it?

MS. DONNELLY: Correct, Your Honor.

THE COURT: Okay.

MS. DONNELLY: In terms of whether it would be published in terms of closing argument, I don't anticipate that at this point. That will be something Mr. McKeever and I will discuss this evening.

THE COURT: Okay. Again, Mr. Jones, your only objection is the same that you've been posing throughout the course of the trial?

MR. JONES: Correct.

THE COURT: Okay. Thank you.

(Sidebar discussion held by headset concluded.)

THE COURT: Defendant's objection is overruled consistent with the Court's prior ruling. Government's Exhibit 3A is admitted.

MR. McKEEVER: Your Honor, that's all the questions we have.

THE COURT: Okay. Any further cross, Mr. Jones?

Q. What are they?
A. They are photographs of the firearm that was recovered from underneath the front passenger seat along with the magazine that was recovered from the center console.
Q. Are those all photographs that you took once you had returned to the police station?
A. They are.
Q. Do all of those pictures truly and accurately depict the evidence as you had collected it and while you were processing it on December 9th, 2019?
A. They do.
MS. DONNELLY: Your Honor, I would seek to admit Government's Exhibits 6 through 10 into evidence.
THE COURT: Mr. Jones?
MR. JONES: Subject to the same objection, Your Honor.
THE COURT: No others?
MR. JONES: No others.
THE COURT: Okay. Government's Exhibits 6 through 10 are admitted. The defendant's objection is overruled consistent with the Court's prior ruling.
MS. DONNELLY: Your Honor, I would also seek leave to approach the witnesses.
THE COURT: You may.
BY MS. DONNELLY:
Q. Detective Henderson, I'm also going to be handing to you

A. I did.
Q. When did you make it?
A. This morning.
Q. And did you make it this morning in preparation for your testimony here today?
A. Yes, ma'am, I did.
Q. Prior to that cut being in that evidence bag, was it in a sealed condition?
A. Yes, ma'am, it was.
Q. Was it in the same condition it had been in after you took all of these photos and processed the evidence on December 9th, 2019?
A. It was.
Q. How on the sealing on the outside of that bag are you able to tell?
A. Due to the integrity of the seal that's placed on both sides, along with taped edges, you'll see that my initials are placed on the top and bottom on both sides and on both edges of the front.

MS. DONNELLY: Your Honor, the government would seek to admit Exhibit 5.

THE COURT: Any objection, Mr. Jones?

MR. JONES: Same as before, Your Honor. No other objection though.

THE COURT: Government's Exhibit 5 is admitted, and

the defendant's objection is overruled consistent with the Court's previous ruling.

BY MS. DONNELLY:

Q. Other than photographing these items, is there something else that you did with both the gun, the extended magazine, and the standard regular magazine?

A. I did. They were processed for DNA.

Q. Can you explain to the jurors how and what you did to do that.

A. Specifically, with firearms, cotton-tipped applicators very similar to a Q-tip are utilized in combination with a saline solution. Swabs are then obtained from the grip, the slide, and the trigger of the firearm. They're typically retained for future comparison purposes, and they're sealed in their own evidence bags as the magazine was with integrity for themselves as well.

Q. So all of those items were swabbed for DNA and were they then put into secured evidence?

A. They were.

Q. After you processed the evidence, did you meet with Rapheal Seay?

A. I did.

Q. Who else was with you when you met with him?

A. Corporal Shiparski.

Q. And where did you meet with him?

A. They do.

MS. DONNELLY: Your Honor, at this point, I would seek leave to admit Government's Exhibits 11A through D.

THE COURT: Any objection, Mr. Jones?

MR. JONES: The single objection I have is the one that I've already stated, Your Honor.

THE COURT: Okay. You've reviewed these clips?

MR. JONES: I have been provided, yes, and reviewed them.

THE COURT: Okay. Defendant's objection is overruled consistent with the Court's previous ruling, and Government's Exhibits 11A through D are admitted.

MS. DONNELLY: Your Honor, I would seek leave to publish the clips during the testimony.

THE COURT: You may.

BY MS. DONNELLY:

Q. First, turning to Government's Exhibit 11A. At the beginning of your conversation with Mr. Seay, was he advised of anything?

A. He was, his constitutional rights.

Q. And this first clip that we're going to look at, is that about a minute and a half long, maybe a little longer?

A. It is.

Q. All right. Publishing 11A.

(Video published.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	Cause No.:
	)	3:20-cr-0006-JD-1
vs.	)	
	)	
RAPHEAL SEAY,	)	South Bend, Indiana
	)	October 6, 2020
Defendant.	)	
	)	
_____	)	

VOLUME II
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JON E. DEGUILIO

APPEARANCES:

For the Government:
MS. MOLLY E. DONNELLY
MR. JEROME W. McKEEVER
United States Attorney's Office
M01 Federal Building
204 South Main Street
South Bend, IN 46601

For the Defendant:
MR. DAVID P. JONES
Newby Lewis Kaminski Jones LLP
916 Lincolnway
LaPorte, IN 46350

directed not to consider the legality of the search and stop. As well as *U.S. v. Cunningham*, reported at 462 F.3d 708, a decision written by Judge Kanne out of the Seventh Circuit.

So, again, just a smattering of cases that kind of talk about this issue and, for what it's worth, confirm what I think we all came to conclude yesterday, or believe, that it's not appropriate for a jury to be deciding the legality of stops and searches. That's a question of law and that's for the Court.

I think, lastly, as I understand it, the government's going to present Special Agent Johnson as the interstate nexus witness and then rest?

MS. DONNELLY: That is correct, Your Honor.

THE COURT: Okay. Then, at that point, do you anticipate any motions, Mr. Jones?

MR. JONES: Judge, I anticipate a motion that's identical to docket entry 17, just to preserve the error.

THE COURT: Okay. And that's it?

MR. JONES: That's it.

THE COURT: And then, obviously, given the prior ruling, I'll deny the objection consistent with the previous ruling.

Do you anticipate presenting any evidence?

MR. JONES: No, Your Honor.

THE COURT: Mr. Seay will not testify?

THE WITNESS: Thank you, Your Honor.

THE COURT: Ms. Donnelly, does the government have any additional evidence?

MS. DONNELLY: We do not, Your Honor. The United States rests.

THE COURT: Thank you, Ms. Donnelly.

Mr. Jones, do you have any motions?

MR. JONES: Yes, Your Honor.

THE COURT: Okay. Do you want to make it --

MR. JONES: Headset?

THE COURT: Yes. Thank you.

(Sidebar discussion held by headset as follows:)

MR. JONES: Can you hear me, Your Honor?

THE COURT: Yes, I can, Mr. Jones.

MR. JONES: Your Honor, we would move for a directed verdict, this time based on the testimony of the officers and in line and incorporate by reference our motion to suppress, which was docket entry 17, and ask that you direct that Mr. Seay be found not guilty.

THE COURT: Okay. So you are, in fact, making a motion under Rule 29?

MR. JONES: Yes, Your Honor.

THE COURT: Oh, okay. With that then, I think I'm going to excuse the jury. It's just easier to hear argument and make my ruling outside their presence. So let me do that.

MR. JONES: Judge, I can tell you that I don't have any additional argument. I don't think there's any new ground to be tread here based on all of the evidence you heard at the suppression, which is part of the record, and the evidence that you heard today. I don't have any additional legal theories to present to the Court.

THE COURT: Okay. Ms. Donnelly, do you want to be heard on the issue?

MS. DONNELLY: Your Honor, I would just say briefly as to the four elements of the crime, first as to possession, Mr. Seay was alone in a vehicle with the firearm and he later confessed to bringing it into the car and to the details of where he bought it, when he bought it, as well as describing the firearm itself.

As to his status as a felon and knowledge of such status, he has multiple prior felony convictions which were admitted into evidence. He served terms of six years, eight years, two and a half years, and 30 months of imprisonment. The PSR letter reviewed with Mr. DiMichele said specifically, "As a convicted felon, I understand that I cannot possess a firearm."

There are multiple ways in which we have shown he was a felon and he knew he was.

As to the fourth, the interstate nexus, Special Agent Johnson has just testified that the gun came from Brazil to

Florida to Illinois to Indiana in 2019, thus meeting that element as well.

THE COURT: Okay. Thank you, Ms. Donnelly.

As is typically my practice, I have a ruling that I'm going to enter. It's probably much more formal than I need to make, but that's how I do it.

So what I'm going to do is I'm going to excuse the jury so I can indicate what my ruling is specific to each element and the evidence that I believe is sufficient to support it for purposes of Rule 29. And then I think I'll afford counsel a bit of time then to prepare for closing, bring the jury back, ask the defendant if he has any evidence to present, which I assume you will say no. Do you rest? Yes. And then go straight to closing.

Does that work for you, Mr. Jones?

MR. JONES: It does, Your Honor.

THE COURT: Ms. Donnelly?

MS. DONNELLY: Yes, Your Honor.

THE COURT: Okay. Very good.

(Sidebar discussion held by headset concluded.)

THE COURT: Ladies and gentlemen of the jury, I know we haven't been at this very long, but we're going to take a brief recess at this time. So you can return to the deliberation room and would, again, admonish you that you are cautioned still not to discuss this case amongst yourselves or

with anyone else, not to read or listen to any reports in the press or media, and not to form or express any opinion on the case until it is finally submitted to you.

So let's take a brief recess and we'll be back at it shortly.

Thank you.

(Jury out at 10:10 a.m.)

THE COURT: Please be seated.

Let me first address the issue of the interstate nexus expert.

My typical practice is to rule specifically on it even when there isn't an objection. I know that's probably extremely -- that's probably unnecessary, but the Seventh Circuit had some case law several years ago that suggests that even when there isn't an objection, a court should properly rule on that subject. So let me just do that for the record, even though it's not contested and I think there's absolutely no issue about Special Agent Johnson's qualifications to opine and the relevance of his opinion.

So, briefly, the admissibility of expert testimony is governed by Rule 702 and *Daubert*. Here, Special Agent Johnson is with ATF. His testimony, obviously, as to interstate nexus of the firearm is helpful because that is an element of the charge, and the Seventh Circuit has concluded it's an appropriate subject for expert testimony, consistent with

Brownlee. Special Agent Johnson recited his substantial training and experience in firearms, including his years of service, his experience in handling firearms, attending the nexus expert school, maintaining contact with others, other experts in the field and periodicals to maintain an understanding of nexus, and his knowledge of import-expert, and also indicates that he's examined approximately a thousand firearms.

So I do find that his opinions are sufficiently reliable as he's explained the process by which he's arrived at his opinions.

He's also explained the methodology he used in determining the origin of the firearm coming from Brazil based upon its markings and based upon the history, the sales history. Very, very thorough testimony in that respect. I'm not sure I've ever seen testimony so thorough in terms of tracing step by step how the gun came to this country and how it went from Brazil to Miami to Illinois to Indiana and then to a private owner.

He's also expressed an opinion that it's a firearm as defined under the law because it is capable of expelling a projectile.

So based upon all of that, I believe that he's sufficiently qualified, that his opinion is relevant to the matters before this jury, and that his opinion is relevant

based upon the methodology that he's employed here.

That takes us to the Rule 29.

So here's my ruling relative to the Rule 29 motion.

Federal Rule of Criminal Procedure 29(a) governs motions for judgment of acquittal. When a defendant moves for judgment of acquittal pursuant to Rule 29, a court must ask whether evidence exists from which any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Consistent with *United States v. Hach*, H-a-c-h. The movement faces a nearly insurmountable hurdle because courts consider the evidence in the light most favorable to the government, and will grant the motion only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. Consistent with *Blassingame*. Thus, a Rule 29 motion is granted only if the record is devoid of evidence from which a jury could find guilt. Consistent with *Pulido*, P-u-l-i-d-o.

Mr. Seay has been charged with one count of felon in possession of a firearm in violation of 922(g)(1). We're already familiar with the elements of that offense. He argues that the government has failed to prove these elements beyond a reasonable doubt. Respectfully, however, the Court finds that the government has offered sufficient evidence from which a reasonable juror could find beyond a reasonable doubt that

Mr. Seay unlawfully possessed a firearm as a felon and is guilty of the offense.

The first question is whether Mr. Seay knowingly possessed a firearm on about December 9th of last year. There's ample evidence from which it could do so. As to the circumstances surrounding his arrest, Officer Oberle testified that, upon searching his car, he located a 9 millimeter pistol with a 30-round magazine as well as another magazine in the vehicle. Further, Mr. Seay stated the firearm was his during an interview with law enforcement and gave details of when and where he bought the firearm. Consistent with Government's Exhibit 11. Those pieces of evidence could allow the jury to infer that Mr. Seay possessed the firearm.

Second, the government presented evidence of Mr. Seay's prior felony convictions, namely, Government's Exhibit 13 through 15, which are certified copies of his convictions for crimes punishable by imprisonment for more than one year. Mr. Seay served several sentences that exceeded more than one year. Additionally, the government presented testimony and evidence that he was still on supervised release from his most recent felony conviction at the time of this arrest for the underlying offense in this case. This evidence allows a jury to conclude that Mr. Seay was a felon at the time he possessed the firearm.

Third, to establish that Mr. Seay knew he was a felon

at the time he possessed the firearm, the government has discussed earlier admitted evidence of his prior convictions from which a jury could confer he knew he had previously been convicted of a felony.

Further, the government admitted evidence that Mr. Seay signed the conditions of his supervised release of his most recent conviction, in which it states he is prohibited from possessing a firearm. Mr. Seay also signed the Project Safe Neighborhoods letter, further reiterating that as a convicted felon he could not possess a firearm. Government's Exhibit 17.

Fourth, Special Agent Ryan Johnson with ATF testified that the weapon meets the federal definition of a firearm and it was not manufactured in Indiana. He explained very thoroughly where it was manufactured, why he had that opinion, and how it traveled both through international and interstate commerce.

In support of his motion, the defendant argues that based upon the testimony of the officers and the motion to suppress filed at docket entry 17 that the government has not met its burden.

The Court regards these -- the Court does not disagree with these -- the Court disagrees with these arguments in light of the evidence discussed herein, and so based on all of this evidence, believes a reasonable jury could find that the

essential elements of this offense have been proven beyond a reasonable doubt. So the Court denies the Rule 29 motion for judgment of acquittal and, likewise, denies the objection seeking to suppress the search and seizure, consistent with its previous ruling.

Okay. So unless I'm missing something, what I would propose to do is to bring the jury back at some point. Give you a few minutes to prepare for closing. Bring the jury back. Ask you, Mr. Jones, if you have any evidence to present. I assume the answer is still no?

MR. JONES: It is.

THE COURT: Then you will rest. Then we'll go straight into closing arguments. I'll begin with the reading of preliminary instructions. I think I read 1 through 20, then break for closing, and then read the last four instructions before the jury will deliberate. So that's my plan.

Ms. Donnelly, are you on board with that?

MS. DONNELLY: We are, Your Honor.

THE COURT: Anything before we break?

MS. DONNELLY: No, Your Honor.

THE COURT: Mr. Jones?

MR. JONES: No, Your Honor.

THE COURT: Okay. Let's take a few minutes, again, just so you can get ready for closing argument. Let Mr. Schrader know when you're ready to go and then we'll