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

REPLY BRIEF OF DEFENDANT-APPELLANT RAPHEAL SEAY

Sarah M. Konsky
Counsel of Record
David A. Strauss
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

August 6, 2021

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Government Failed To Meet Its Burden Of Establishing A Clear Chain Of Communication To Invoke The Collective Knowledge Doctrine 2

II. The Government Cannot Satisfy Its Burden To Apply The Collective Knowledge Doctrine By Showing That The Officers Were In "Close Communication." 8

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Reher v. Vivo,
656 F.3d 772 (7th Cir. 2011) 3

United States v. Edwards,
885 F.2d 377 (7th Cir. 1989) 9, 10

United States v. Ellis,
499 F.3d 686 (7th Cir. 2007) 3

United States v. Longmire,
761 F.2d 411 (7th Cir. 1985) 3

United States v. Nafzger,
974 F.2d 906 (7th Cir. 1992) 2, 3, 10, 11, 12

United States v. Nicksion,
628 F.3d 368 (7th Cir. 2010) 3

United States v. Parra,
402 F.3d 752 (7th Cir. 2005) 9, 10

United States v. Rodriguez,
831 F.2d 162 (7th Cir. 1987) 3, 12

United States v. Sawyer,
224 F.3d 675 (7th Cir. 2000) 9

United States v. Wheeler,
800 F.2d 100 (7th Cir. 1986) 2, 3

United States v. Wilbourn,
799 F.3d 900 (7th Cir. 2015) 3, 6, 8

United States v. Williams,
627 F.3d 247 (7th Cir. 2010) 11

INTRODUCTION

The government has failed to meet its burden of showing the collective knowledge doctrine applies in this case. This Court's cases, with exceptions that do not apply here, require a clear chain of communication between requesting and stopping officers. A trial court's inferences about what communications took place are not enough. This requirement is necessary to protect Fourth Amendment rights: it prevents abuse of the collective knowledge doctrine by allowing courts to verify that, prior to the stop, sufficient grounds for probable cause or reasonable suspicion existed and were properly communicated to the officer who conducted the stop. And in doing so, it ensures that the justification for the stop was not assembled by officers after the fact.

The government failed to establish a clear chain of communication in this case, because it failed to establish who communicated what to the officer who made the stop, Officer Babcock. Babcock himself offered three different accounts during the course of this case, and the other officers' testimony similarly continued to conflict throughout the course of the case. And contrary to the government's suggestion, the district court below did not find any clear chain of communication in this case.

Instead, the district court applied the collective knowledge doctrine based on its conclusion that five officers were in "close communication" with each other via a combination of police radio and cell phone. That is insufficient under this Circuit's case law. While this Court occasionally has extended the

collective knowledge doctrine to certain communications between officers in close communication at the "same scene," this narrow exception to the clear chain of communication requirement applies when officers are pursuing a suspect together at the same physical location or are "active member[s]" of an established investigation team in the midst of conducting a criminal investigation together across more than one physical location. *See, e.g., United States v. Nafzger*, 974 F.2d 906, 914 (7th Cir. 1992).

Neither is the case here. Rather, in this case, Officer Shiparski and other members of the LaPorte County Drug Task Force were conducting physical surveillance of Seay. Babcock was not a member of this task force. He was not conducting the surveillance with the members of the task force. Nor was he in the same physical location as the members of the task force; Babcock testified that he was sitting in his patrol car in a parking lot that was blocks away. As a result, this Court's "same scene" exception is inapposite, and the collective knowledge doctrine does not apply in this case.

ARGUMENT

I. The Government Failed To Meet Its Burden Of Establishing A Clear Chain Of Communication To Invoke The Collective Knowledge Doctrine.

"When the police initiate a search and seizure, the government bears the burden of establishing by a preponderance of the evidence that the search or seizure did not violate the Fourth Amendment." *See United States v. Wheeler*, 800 F.2d 100, 102 (7th Cir. 1986). Under the Fourth Amendment's collective knowledge doctrine, "the requesting officer's belief that there is sufficient

evidence to detain a suspect must have been communicated to the officer performing the stop." *Nafzger*, 974 F.2d at 911. Accordingly, as explained in Seay's Opening Brief, almost all applications of the collective knowledge doctrine by this Court have involved clear chains of communication from the officer observing the event giving rise to probable cause or reasonable suspicion, to the officer conducting the stop. *See, e.g., United States v. Nicksion*, 628 F.3d 368, 375 (7th Cir. 2010) (requesting officer(s), stopping officer(s), and substance and method of communication all identified); *Wheeler*, 800 F.2d at 104 (same); *United States v. Rodriguez*, 831 F.2d 162, 166 (7th Cir. 1987) (same); *United States v. Longmire*, 761 F.2d 411, 413-14 (7th Cir. 1985) (same); *see also* App. Dkt. 10, Opening Br. at 19-27.

But if the relevant officers are not identified, or the circumstances of communication are hazy, or there are other gaps in the chain of communication, it becomes unclear whether sufficient evidence to detain a suspect actually was communicated to and received by the officer performing the stop. Accordingly, when the chain of communication is incomplete, the government fails to meet its burden of establishing that the collective knowledge doctrine applies. *See United States v. Wilbourn*, 799 F.3d 900, 909 (7th Cir. 2015) (gap in chain of communication between a coordinated drug investigation and arresting officers); *Reher v. Vivo*, 656 F.3d 772, 777 (7th Cir. 2011) ("the extent of the communication between" officers at the same scene "was not clear"); *United States v. Ellis*, 499 F.3d 686, 690, 692 (7th Cir. 2007)

(reversing and remanding because the lower court filled a gap in the chain of communication).

The government first argues that these cases are distinguishable because the district court in fact found a "clear chain of communication" between Shiparski and Babcock. *See* App. Dkt. 16, Gov't Br. at 12, 15-16. That is wrong, however. The district court applied the collective knowledge doctrine based on its finding only of "close communication" between the five officers. *See* Dkt. 30 at 7, A13 ("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."). The district court thus did not find a "clear chain of communication" between Shiparski and Babcock, or a chain for which the court's inferences were unnecessary to fill the gaps. *See* Dkt. 30 at 8, 12, A14, A18[1] (finding that Babcock relied on "information received from Investigator Shiparski and Detective Henderson" and that "information supporting the probable cause … was communicated," without establishing what information Babcock received and from whom). The district court neither made a finding that Babcock received information directly from Shiparski, nor made a finding that Babcock received information from Shiparski via a middleman. Dkt. 30 at 12, A18 ("The Court recognizes that their police reports do not describe *how*

[1] Citations to "A_" are to the required short appendix bound with Seay's Opening Brief.

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.").

Nor could the district court have found a clear chain of communication on this record. As explained in Seay's Opening Brief, the record evidence in this case does not establish a clear chain of communication—and as a result, inferences are needed to fill in gaps. *See* Opening Br. at 19-27. Indeed, even in his evidentiary hearing testimony in this case, Babcock could not identify who communicated what information to him that gave rise to reasonable suspicion or probable cause. *See* Dkt. 26 at 36-37 (Babcock testifying at evidentiary hearing that he was sitting in the police station parking lot when "they" told him about a suspected drug transaction and alleged traffic violation). Babcock offered two different and conflicting accounts in his police report (made under penalty of perjury) and during his trial testimony in this case. *See* Dkt. 17-3 at 1 (Babcock stating in police report that he was driving in his patrol car near an intersection when Henderson told him that Henderson had observed the alleged traffic violations); Dkt. 52 at 47 (Babcock testifying at trial that he was sitting in the police station parking lot when Shiparski told him that Shiparski had observed the alleged traffic violations).[2] The other officers' accounts

[2] Moreover, evidence regarding how the officers were in contact with each other was not in the contemporaneous police reports, *see* Dkts. 17-1; 17-2; 17-3; 17-4, and was first added to the record following Seay's motion to suppress, *see* Dkt. 30 at 7, 11-12, A13, A17-18. The district court itself acknowledged that the officers' accounts conflicted with each other. *Id.*; s*ee also* Opening Br. at 22.

similarly conflicted throughout the case, and the officers never agreed on who said what and to whom. *See* Opening Br. at 8-13, 21-23. This is insufficient to invoke the collective knowledge doctrine. *See, e.g., Wilbourn*, 799 F.3d at 909 (declining to fill gaps and apply the collective knowledge doctrine, despite concluding that "[o]ne might presume that [the officers conducting the stop] received a call on the police radio that the persons inside the Buick were engaged in criminal activity").

In its attempt to establish a clear chain of communication between Shiparski and Babcock, the government cherry-picks language from the district court's decision below. For example, the government asserts that the district court "found that Officer Babcock learned [of the alleged traffic violations] *through* 'communication from Detective Shiparski."' *See* Gov't Br. at 12 (citing Dkt. 30 at 9, A15) (emphasis added). But the district court merely stated that "*following* communication from Detective Shiparski, probable cause existed for Officer Babcock to stop Mr. Seay due to his traffic violations"—without concluding what information Babcock received and from whom. *See* Dkt. 30 at 9, A15 (emphasis added). And while the government asserts that the district court "concluded" that "Det. Shiparski 'directed [Officer Babcock] to make the stop,"' *see* Gov't Br. at 7-8 (citing Dkt. 30 at 12, A18), here too the district court did not make a finding as to what information Babcock received and from whom. *See* Dkt. 30 at 12-13, A18-19 (concluding merely that "the information supporting the probable cause needed to stop Mr. Seay's vehicle was communicated to the officers who made the stop" and that those officers "were

all in close communication with each other").[3] As explained in Seay's Opening Brief, the district court committed clear error by crediting the officers' evidentiary hearing testimony, as their post-*hoc* rationalizations in that testimony were contradicted by both their prior police reports and subsequent trial testimony. *See* Opening Br. at 22. But this Court need not find clear factual error in this case, because the district court relied on its conclusion that the officers were in "close communication" instead of finding a clear chain of communication from Shiparski to Babcock. *See* Dkt. 30 at 8, A14.

Finally, while the government attempts to distinguish cases holding that a court cannot make inferences or fill in gaps to create a complete chain of communication, *see* Gov't Br. at 15-16, those cases in fact preclude application of the collective knowledge doctrine in this case. The government asserts that those cases involved "no evidence of communication, period." *Id.* That is not correct. The defendants in *Wilbourn*, for example, conceded that the officers conducting the drug investigation in fact were communicating by police radio with the officers who made the stop. *See, e.g.*, Brief for Defendants-Appellants at 15, *United States v. Wilbourn*, No. 13-3715 (7th Cir. Aug. 26, 2014), ECF No. 33 (relying on testimony from one of the officers who conducted the stop that

[3] The government also is wrong in asserting that, at the evidentiary hearing, Babcock "clarified that 'information about the traffic violations . . . was coming from Detective Shiparski.'" *See* Gov't Br. at 5 (citing Dkt. 26 at 37-38). Babcock did not say this. Babcock repeatedly testified at the evidentiary hearing that "they" were surveilling the vehicle and observed traffic violations. *See* Dkt. 26 at 37-38. The government lawyer then suggested that Babcock "seem[ed] to be indicating" that information about the traffic violations "was coming from Detective Shiparski." *See* Dkt. 26 at 38. Babcock responded by saying that he had been "confused as to who had actually viewed it." *Id.*

"he was keeping radio contact with the other agents involved and that he was told to stop the maroon Buick" at issue). The Court instead based its holding on the fact that the government failed to establish who said what to the officers making the stop. *See Wilbourn*, 799 F.3d at 909 (holding that while "[t]he government offered extensive evidence to establish that other officers had reason to suspect that the persons in the Buick had committed a crime," it "offered no evidence to suggest that anyone communicated any basis for those suspicions to [the officers who conducted the stop]"). And in any event, these cases make clear that even when there is an "impressive list of surveillance operations" by surveilling officers and "[o]ne might presume" that the stopping officers received information from the surveilling officers via police radio, the court cannot fill in gaps in the chain of communication with that presumption. *See id.*

II. The Government Cannot Satisfy Its Burden To Apply The Collective Knowledge Doctrine By Showing That The Officers Were In "Close Communication."

The government argues in the alternative that the district court's finding of "close communication" alone is sufficient to apply the collective knowledge doctrine. Gov't Br. at 14 (citing *Nafzger*, 974 F.2d at 911; *United States v. Williams*, 627 F.3d 247, 255-56 (7th Cir. 2010)). The government tellingly cites no case holding that "close communication" alone is enough to invoke the collective knowledge doctrine. The government's cases instead involve other narrow exceptions to the clear chain of communication requirement that do not apply in this case.

First, this Circuit has applied the collective knowledge doctrine without a clear and fully developed chain of communication "when officers are in communication with each other while working together at a scene." *United States v. Parra*, 402 F.3d 752, 764 (7th Cir. 2005) (quoting *Nafzger*, 974 F.2d at 911). The government does not appear to argue that the officers in this case were working together at the same scene, and such an argument would fail in any event. This exception applies when officers are working together at the same physical location. *See id.* at 765-66 (imputing the collective knowledge of the "team of officers at the scene" to the arresting officer because they were "conducting surveillance during the … transaction [and] in close communication with each other"); *United States v. Edwards*, 885 F.2d 377, 383 (7th Cir. 1989) ("Detective Rickey's knowledge can then be imputed to Detective Pharo," despite no evidence of communication, "because they made the arrest together" at the same location); *United States v. Sawyer*, 224 F.3d 675, 680 (7th Cir. 2000) ("It does not matter that we do not know what Nelson knew when he initiated Sawyer's arrest, because we do know what Woods knew," and the officers were pursuing the suspect together at the same location.).

That was not the case here, though. It is undisputed that Babcock, who stopped Seay, did not conduct surveillance with Shiparski. *See* Dkt. 17-3; Dkt. 17-6; Dkt. 52 at 47-48. In fact, Babcock testified that at the time of Seay's alleged traffic violations, he was sitting in his patrol car in the parking lot of the police department. Dkt. 52 at 47. Therefore, Babcock was not physically "at [the] scene" like the arresting officers in *Parra*, *Edwards*, and *Sawyer*. *See*

Parra, 402 F.3d at 764; *see also Edwards*, 885 F.2d at 382 ("A supervising officer's knowledge about a defendant cannot be relied upon to provide probable cause for his arrest where there is no evidence that such knowledge was communicated to the agents on the scene who actually made or ordered the defendant's arrest.").

Second, this court has on limited occasions extended this "same scene" exception to cases in which embedded, "active member[s]" of an established investigation team are in close communication while in the midst of conducting a criminal investigation together across more than one physical location. *See, e.g., Nafzger*, 974 F.2d at 914. This Court treats such officers as working together at the "same scene," like the officers in *Parra*, *Edwards*, and *Sawyer*, despite the fact that they are operating together in separate physical locations. *Id.* at 915. ("[T]he 'same scene' qualification need not be taken literally" when active members of an established investigation team are in close communication while carrying out the investigation.).

The cases applying this "same scene" exception are distinguishable from the present case, however, because the missing "link" in the clear chain of communication in these cases was between active members of an established team in the midst of conducting a criminal investigation using established channels of communication. *Nafzger*, for example, involved a "combined FBI-state investigation of an interstate car theft ring." 974 F.2d at 908. The arresting officer was "assigned to provide security" to the investigation and sat in on a briefing during which officials shared information supporting probable

cause. *Id.* While there was a clear chain of communication from the briefing officials to the arresting officer, the record did not reflect how the briefing officials received the information supporting probable cause from the "command post" of the investigation. *Id.* at 911. This Court found that it was "proper to impute [ ] knowledge to these [briefing] officers" from the investigation team because they were in close communication with the command post of the investigation team through "reliable channels[.]" *Id.* at 915.

Similarly, in *United States v. Williams*, "Chicago police officers pulled over [the defendant] at the request of another Chicago police officer, who was a member of a Drug Enforcement Administration ("DEA") task force." 627 F.3d 247, 249 (7th Cir. 2010). Once again, there was a clear chain of communication from the requesting officer to the arresting officers, who were not members of the DEA task force. *See id.* at 250 ("Gutierrez called Simon, [and] gave him a description of the vehicle and the license plate"). The record did not establish, though, how the requesting officer, "a member of the [DEA] task force [who] was responsible for coordinating the DEA's efforts with the CPD," received the information supporting probable cause from the members of the task force who originally possessed it. *Id.* at 249, 255. The Court held that "knowledge … can be imputed to [him] *based on his role in the task force's investigation*." *Id.* at 255 (emphasis added).

Unlike the briefing officials in *Nafzger* and the DEA agents in *Williams*, Babcock was not an active member of a team in the midst of conducting a

criminal investigation. Babcock was a patrolman and was not a member of the LaPorte County Drug Task Force. Dkt. 26 at 63. He and Officer Oberle, the K-9 handler, testified that their involvement in the case stemmed from a "conference call" shortly before the arrest. *Id.* at 35-36, 75. Similar to the arresting officers in *Nafzger* and in *Williams*, Babcock's only role was to make a traffic stop—to act as a peripheral "extension" of the drug task force, *Rodriguez*, 831 F.2d at 166, summoned only for minor "assistance" without participating in the broader investigation. *See* Dkt. 26 at 64. Babcock's level of involvement is therefore insufficient to impute probable cause on "close communication" alone.

The communication methods of the five officers in this case, far from the "reliable channels" in *Nafzger*, further indicate that Babcock was not an active member of the drug investigation. *See* 974 F.2d at 915. Shiparski testified that he and Detectives Fish and Henderson were in communication over an encrypted radio channel, and that he called Babcock and Oberle on their cell phones. Dkt. 26 at 25-26. This was necessary because Babcock, a patrolman and not a task force member, lacked the credentials to access the encrypted channel. *Id.* at 25. And the task force was forced to patch Babcock in on his personal cell phone because "patrolmen are not issued department cell phones," further indicating Babcock's separation from the drug investigation. Dkt. 26 at 27. This *ad hoc* communication proved to be unreliable. Babcock testified that he knew Detective Henderson's voice. Dkt. 26 at 46. But Babcock nevertheless changed his account from his initial police report, testifying that

"they"—not Henderson, as Babcock stated in his police report—had informed him about the alleged traffic violation. *Compare* Dkt. 26 at 36-37 *with* Dkt. 17-3 at 1.

The fact pattern in this case thus is a far cry from those in which this Circuit has applied the "same scene" exception to the collective knowledge rule. And to extend this exception to the collective knowledge rule to the fact pattern in this case would make the exception swallow the rule. This Court's collective knowledge cases require that the government establish a clear chain of communication, to ensure that probable cause or reasonable suspicion in fact was transferred from the officer observing the events to the officer making the stop. *See* Section I, *supra*; *see also* Opening Br. at 19-27. If the government could satisfy its burden merely by showing that an officer making a traffic stop received unspecified information about an alleged traffic violation from an unspecified officer with whom he was in radio or some other type of communication, these Fourth Amendment protections virtually would be eviscerated.

CONCLUSION

For the foregoing reasons and the reasons set forth in his Opening Brief, Rapheal Seay respectfully requests that the Court vacate his conviction and reverse the denial of his motion to suppress.

Respectfully submitted,

Dated: August 6, 2021

s/ Sarah M. Konsky
Sarah M. Konsky
Counsel of Record
David A. Strauss
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 3,469 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: August 6, 2021

s/Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on August 6, 2021, I caused the foregoing **Reply Brief 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 **Reply Brief 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: August 6, 2021

s/ Sarah M. Konsky
Sarah M. Konsky