CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHEROSCO BREWER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Timothy F. Sweeney (OH 0040027)*
MEMBER OF THE BAR OF THIS COURT
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
Phone: (216) 241-5003
Email: tim@timsweeneylaw.com
*Counsel of Record

Counsel for Petitioner Cherosco Brewer

INDEX TO APPENDIX

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0278n.06

Case No. 20-5943

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 07, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHEROSCO BREWER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: SUTTON, Chief Judge; McKEAGUE and DONALD, Circuit Judges.

SUTTON, Chief Judge. On consecutive nights, officers pulled over Cherosco Brewer because his car had illegally tinted windows. Each time a drug dog alerted on his car, and each time the officers found drugs and a gun. After the government brought drug-distribution and firearm charges, Brewer moved to suppress the evidence from the traffic stops. The district court denied the motion, and a jury convicted Brewer of the offenses. We affirm.

At roughly 1 a.m. on November 11, 2015, Louisville police officers stopped Brewer's car because the windows contained excessive tint. "All of the windows looked black," the officers observed, and they could not "see the shadow of anyone . . . in the car," even under "light posts." R.43 at 11–12. Detectives Tyler Holland and Holly Hogan approached the car, and the passengers, Brewer and a woman, lowered their windows when asked to roll them down. The officers saw a towel draped over the dashboard, covering the interior lights. Holland asked Brewer to step out

of the car, frisked him for weapons, and retrieved his driver's license. He went to the squad car to check for warrants and write a ticket. Meanwhile, Hogan asked the passenger to step out of the car, frisked her, obtained her information, asked her about any outstanding warrants, and ran the license plate.

Several minutes later, other officers and a drug dog named "Diesel" arrived. While Hogan waited on the license plate check and Holland began writing a citation—nine to ten minutes after the officers initially stopped Brewer—Diesel alerted on the driver's door. The officers found a loaded handgun and individually packaged marijuana under the steering column of the car. They arrested Brewer.

The next night around 11 p.m., a different officer, Detective Stewart, stopped a car with pitch-black windows only to find Brewer, released on bond, in a different car. Stewart recognized Brewer. He asked Brewer to step out of the car, frisked him, then went back to his squad car to run Brewer's information. While he did so, an officer helping with a traffic stop across the street walked Diesel over and Diesel indicated at the driver's door. This time the officers found baggies of cocaine under the dashboard. On this occasion, it took about four minutes after the initial stop to discover the drugs.

A federal grand jury indicted Brewer on firearm and drug-trafficking offenses. Brewer moved to suppress the evidence from the traffic stops. After conducting a hearing, the district court denied the motion. A jury convicted Brewer on all counts. He appeals the denial of his motion to suppress and the jury's verdict.

Motion to suppress. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. In reviewing a district court's ruling on a motion to suppress

after a hearing, we construe any uncertainties in the factual record in favor of the court's decision. *United States v. Martin*, 526 F.3d 926, 936 (6th Cir. 2008).

Brewer has no quarrel with the police officers' authority to stop him each night for excessive window tint, for which the record suggests not just reasonable suspicion but in fact probable cause. *See* K.R.S. § 189.110. He trains his argument instead on whether the officers unduly prolonged each stop.

When police stop a car, the ensuing interaction must suit the circumstances. Police officers, generally speaking, may not prolong a traffic stop "beyond the time reasonably required to complete the mission of issuing a ticket for the violation" and to "attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 350–51, 354 (2015) (quotation omitted). As part of the stop, officers may "check[] the driver's license, determin[e] whether there are outstanding warrants against the driver, and inspect[] the automobile's registration and proof of insurance." *Id.* at 355. They also may order a car's occupants to step out of the vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). In the course of completing these tasks, officers may investigate matters unrelated to the traffic stop when additional suspicion arises from the encounter. *Rodriguez*, 575 U.S. at 355.

Officers may frisk someone for weapons if they have reasonable suspicion that the person is "armed and dangerous" and "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The quantum of suspicion, ever a function of the circumstances facing the officers, requires more than a "hunch" but falls "considerably short" of a preponderance standard. *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012) (quotation omitted).

These stops did not violate the Fourth Amendment. As to the first stop, recall the situation the officers faced. In the course of a late-night stop, they obtained Brewer and his passenger's identification, asked them each to step out of the car, frisked them for weapons, searched for outstanding warrants against Brewer, and explained that process to each passenger. They also began writing a citation and running the car's tags. None of these acts unlawfully prolonged the stop. Most indeed represent normal incidents to a traffic stop. *Rodriguez*, 575 U.S. at 355; *Mimms*, 434 U.S. at 111; *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

What about getting the passenger's information and talking to her about outstanding warrants? Questions "unrelated to the justification for the traffic stop" are not a problem "so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Just so here. Officer Hogan questioned the passenger while Officer Holland dealt with Brewer, and we do not see how Officer Hogan's separate conversation delayed Holland's investigation or the stop as a whole.

As for the frisks, the officers reasonably suspected that Brewer and his passenger had guns. Both officers knew from experience that people driving with excessively tinted windows often have guns with them. Brewer and his passenger only cracked their windows, and both seemed nervous. A towel covered the dashboard lights, making it difficult to see inside the car. In countless traffic stops over their combined 12 years of service, neither officer had seen an effort to conceal a car's interior in this way. Add to the mix that the stop happened around 1 a.m. in a "hot spot[]" for "violent crime," and it is fair to conclude that the officers acted reasonably in frisking the two individuals. R.47 at 6; *see Lyons*, 687 F.3d at 763.

Brewer counters that the stop nonetheless took too long. But he does not point to any cases holding that it is unreasonable as a matter of law to take up to ten minutes to process a stop in these kinds of circumstances. That is hardly outside the norm for run-of-the-mine traffic stops.

He adds that the number of backup officers should have reduced the time needed. Perhaps, and maybe indeed that happened. But it is hardly self-evident that the number of officers made the stop unreasonable. Keep in mind that two officers dealt with each of the car's occupants, and the other officers handled the dog and supplied backup.

In the alternative, Brewer argues that the number of backup officers itself violated the proscription that a *Terry* stop employ "the least intrusive means reasonably available." *Florida v. Royer*, 460 U.S. 491, 500 (1983). But backup officers by themselves do not make a stop unreasonable, particularly when they do not infringe anybody's liberty. No such infringement occurred when it comes to their conduct.

Brewer also claims the district court clearly erred by relying on Holland's testimony that he checked for warrants against Brewer and began filling out a citation before Diesel alerted. *United States v. Lott*, 954 F.3d 919, 922–24 (6th Cir. 2020). Brewer suspects Holland stalled until Diesel arrived and claims the body cam proves it. But the video shows that, after Diesel alerted, Holland ran Brewer's information again and returned to completing the citation. The interaction does not leave a "definite and firm conviction" that Holland unduly stalled when it comes to a stop that still took less than ten minutes. *Kerman v. Comm'r*, 713 F.3d 849, 867 (6th Cir. 2013).

Brewer invokes a slew of cases, most of them unpublished and from outside the circuit, which in his words "found reasonable suspicion" "*lacking* in cases presenting far *greater* 'suspicion'" than the "circumstances relied upon here." Appellant's Br. 45 (quotation omitted). But most of Brewer's cases do not deal with *Terry* frisks, none deals with a novel effort at

concealment that no officer had seen before, and none reveals a stop that the record indicates took less than ten minutes.

Brewer does no better when it comes to challenging the second stop. The officer knew Brewer had been found with a gun the night before in similar circumstances. That by itself justifies the frisk. The rest of the stop consisted of the kinds of routine activities permitted by *Rodriguez* and *Mimms* and took just four minutes.

Sufficiency of the evidence. To convict Brewer for drug distribution, the government had to establish that Brewer knowingly possessed marijuana and cocaine with intent to distribute the drugs. 18 U.S.C. § 841(a). Ample evidence supported the convictions. No one doubted that Brewer possessed marijuana. Up for debate was whether he knowingly possessed the cocaine and whether he possessed the drugs with intent to distribute them. As to possession of the cocaine, the only difference between the marijuana and the cocaine was that the cocaine was found in a car registered to someone else. That does not change the calculus due to the "other incriminating evidence" linking Brewer to the drugs, namely that they were packaged for immediate sale and accessible to Brewer from the driver's seat in hiding places commonly used by drug dealers. *United States v. Arnold*, 486 F.3d 177, 183 (6th Cir. 2007) (en banc) (quotation omitted). As an expert testified, that same evidence—packaging for resale and hiding the drugs in a place often used by drug dealers—closed any gap when it comes to the intent-to-distribute element for both types of drug distribution. That the drug amounts were small in quantity makes no difference; drug dealers often limit the amounts they carry to avoid detection. Like many drug dealers, Brewer drove someone else's car (usually a rental car), had tinted windows, multiple cell phones, large amounts of cash, and a gun. On this record, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

As to the firearm conviction, the government needed to prove that Brewer possessed a gun in furtherance of drug trafficking. 18 U.S.C. § 924(c). We consider (1) whether the gun was strategically accessible, (2) whether the gun was loaded, (3) the type of weapon, (4) the legality of its possession, (5) the type of drug activity, and (6) the time and circumstances under which the firearm was found. *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001). The loaded handgun was easily accessible to Brewer in the driver's seat, illegally possessed, found late at night, and hidden in a car with drugs packaged for sale. That readily suffices to meet the modest *Jackson v. Virginia* sufficiency standard.

We affirm.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v. Criminal Action No. 3:17-cr-37-DJH

CHEROSCO BREWER, Defendant.

* * * * *

MEMORANDUM OPINION AND ORDER

Defendant Cherosco Brewer is charged with being a convicted felon in possession of a firearm; possessing marijuana and cocaine with intent to distribute them; and possessing a firearm in furtherance of a drug-trafficking crime. (Docket No. 1, PageID # 1-3) The charges arise out of two traffic stops by Louisville Metro Police Department officers on November 11 and 12, 2015. (D.N. 17, PageID # 38) Brewer has moved to suppress evidence seized by LMPD during those stops (D.N. 26) and statements made by him during the November 11 stop (D.N. 33). The latter motion is unopposed. (*See* D.N. 43, PageID # 162) The Court held a lengthy evidentiary hearing on the initial motion to suppress (*see* D.N. 42; D.N. 46; D.N. 49), and the parties submitted post-hearing briefs.[1] (D.N. 56; D.N. 57) In addition to his motions to suppress, Brewer has filed a motion to sever the felon-in-possession count or bifurcate the trial (D.N. 38) and a motion to sever Counts 2 and 3 (D.N. 39). For the reasons discussed below, the Court will deny the contested motion to suppress, grant the motion to bifurcate, and deny the motion to sever Counts 2 and 3.

[1] The parties were given ten days following the conclusion of the hearing within which to submit supplemental briefs. (*See* D.N. 49) Prior to the expiration of that deadline, Brewer moved for a seven-day extension (D.N. 55), and he filed his brief four days later (D.N. 57). Because the motion was filed prior to expiration of the original deadline and the requested extension is short, the Court will grant the motion for extension of time and deem Brewer's brief timely filed.

EXHIBIT B
Appx-008

I.

On November 11, 2015, Brewer was pulled over by Detectives Holly Hogan and Tyler Holland of LMPD's Ninth Mobile Division. Hogan and Holland believed that the windows on Brewer's vehicle were excessively tinted; Hogan recalled that although the car passed under several streetlights, "[a]ll of the windows looked black," and no occupants were visible. (D.N. 43, PageID # 172; *see id.*, PageID # 171, 222) When asked to roll down his window, Brewer rolled it down only a small amount. (*Id.*, PageID # 222-23) Once the interior of the car was visible, the officers saw a towel covering the lights on the dashboard, which they construed as an attempt to further conceal the inside of the car. (*Id.*, PageID # 175, 223, 244) Holland perceived Brewer to be "nervous about something" because "a carotid artery in [Brewer's] neck was . . . pulsating pretty fast." (*Id.*, PageID # 223) Hogan thought that Brewer's passenger was also nervous. (*Id.*, PageID # 205) Other officers soon arrived on the scene, including Detective Anthony James and his canine partner, Diesel, a Belgian Malinois trained to detect illegal substances. While Hogan was checking the vehicle's registration, Diesel conducted a sniff around the outside of the vehicle and alerted at the front driver's-side door. (D.N. 43, PageID # 180-81; *see* Joint Ex. 1, Hogan bodycam recording at 7:40-9:16; Gov't Ex. 4, 11/11/15 James bodycam recording at 1:02) A subsequent sniff and search of the car's interior revealed marijuana packaged for sale and a handgun. (D.N. 43, PageID # 181)

The following night, Brewer was driving a different vehicle when he was pulled over by another Ninth Mobile Division officer, Detective Chad Stewart, again for excessive window tinting. (D.N. 47, PageID # 302-05) Stewart testified that although it was a "well-lit area," when Brewer passed him, he "couldn't tell how many people were in the car"; he "couldn't see anything." (*Id.*, PageID # 303) Stewart further testified that "[e]ven with [his] headlights shining into the vehicle, [he] couldn't see inside the vehicle, which let [him] know that the

window tint [was] excessively dark." (*Id.*) Detective James and Diesel were nearby and quickly joined Stewart at the scene; while Stewart was running the vehicle's tags and Brewer's warrant status, Diesel alerted on the exterior of the car. (D.N. 47, PageID # 307-08, 327-28; Gov't Ex. 4, 11/12/15 James bodycam recording at 2:31; Stewart bodycam recording at 4:10-4:55) Officers searched inside the car and found cocaine packaged for sale. (Gov't Ex. 4, Stewart bodycam recording at 5:59-8:00)

In connection with the November 11 stop, Brewer was charged with possessing a firearm as a convicted felon (Count 1), possessing marijuana with intent to distribute it (Count 2), and possessing a firearm in furtherance of a drug-trafficking crime (Count 3). (D.N. 1, PageID # 1-2) Count 4 of the Indictment arises out of the November 12 stop and alleges possession with intent to distribute cocaine. (*Id.*, PageID # 3) Brewer seeks to suppress any evidence seized during either stop. (D.N. 26) He also asks the Court to hold three separate trials in this matter: one for the felon-in-possession charge, one for the other two counts arising out of the November 11 stop, and one for the November 12 cocaine charge. (D.N. 38; D.N. 39) Brewer's arguments in support of these motions are largely unpersuasive.

II.

A. Motions to Suppress

The United States has conceded that statements made by Brewer during the November 11 stop should be suppressed. (D.N. 43, PageID # 162; *see* D.N. 33 (motion to suppress statements based on *Miranda* violation)) For purposes of Brewer's remaining motion, the pertinent questions are (1) whether there was reasonable suspicion for the November 11 and 12 stops and (2) whether the canine sniff impermissibly extended the November 11 stop. (*See* D.N. 26, PageID # 109; D.N. 57)

1. Reasonable Suspicion

Brewer contends that the LMPD officers lacked reasonable suspicion to stop him on either November 11 or November 12, 2015. The overall thrust of his argument is that excessive window tinting was not the true reason he was pulled over on those dates. (*See, e.g.*, D.N. 57, PageID # 417) But the reason behind the stops does not matter for Fourth Amendment purposes; it is well established that "[a] police officer may effect a traffic stop of any motorist for any traffic infraction, even if the officer's true motive is to detect more extensive criminal conduct." *United States v. Garrido*, 467 F.3d 971, 977 (6th Cir. 2006) (quoting *United States v. Townsend*, 305 F.3d 537, 541 (6th Cir. 2001)). In other words, "[t]he subjective intent of the officer making the stop is irrelevant in determining whether the stop violated the defendant's Fourth Amendment rights." *United States v. Collazo*, 818 F.3d 247, 253 (6th Cir. 2016) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)). Brewer does not deny that his window tinting exceeded—or at minimum, appeared to exceed—legal limits, and as discussed below, the evidence confirms that the windows were extremely dark. Thus, to the extent he attacks the officers' credibility to establish that the stop was for a reason other than excessive window tinting, his argument is not well taken. (*See* D.N. 57, PageID # 415-17)

A police officer may lawfully stop a motorist based on reasonable suspicion of an ongoing crime. *Collazo*, 818 F.3d at 253 (citing *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2016)). Reasonable suspicion of illegal window tinting may be provided by an officer's experience and observations.[2] *See United States v. Shank*, 543 F.3d 309, 313 (6th Cir. 2008)

[2] Brewer complains that LMPD officers lack objective standards for measuring whether window tinting is excessive. (D.N. 57, PageID # 416, 420-21) In particular, he faults LMPD for failing to provide its officers with tint-measuring wands. (*Id.*, PageID # 416, 420) However, a "tint meter" is used to confirm a violation after a vehicle is stopped, not to establish reasonable suspicion for a stop. *See, e.g.*, *Shank*, 543 F.3d at 312 (while vehicle was stopped, one officer "was using a 'tint meter' to more specifically measure the vehicle's windows in support of the

(noting officers' "substantial prior experience enforcing this traffic regulation" and agreeing with district court that reasonable suspicion for stop existed "[d]ue to the officers' familiarity with window tinting and their estimate that the [defendant's] vehicle was tinted substantially darker than permitted by law"); *see also United States v. Moreno*, 43 F. App'x 760, 765 (6th Cir. 2002) (finding reasonable suspicion in light of "undisputed proof that the defendant's van's side windows were tinted to *some* optically discernible degree, which Officer Valentine had adjudged to appear violative of a controlling legal standard").

Detectives Hogan and Stewart testified that based on their experience, they believed Brewer's windows to be excessively tinted. (*See* D.N. 43, PageID # 173, 176; D.N. 47, PageID # 304-05) Specifically, both detectives testified that they recognize illegal tinting when the silhouettes of persons inside the vehicle are not visible, and that Brewer's windows were tinted to that extent. (*See* D.N. 43, PageID # 171-73, 195-96; D.N. 47, PageID # 302-05) The bodycam recordings confirm that each vehicle's windows were so dark that Brewer (and, on November 11, his passenger) could not be seen inside, even when headlights and streetlights were shining on the car. As the United States observes, "the videos also show the police officers approaching cautiously based on the inability to see who or what is inside the vehicle as they approach."[3] (D.N. 56, PageID # 408) Based on the officers' testimony and the video evidence, the Court finds that on both November 11 and November 12, 2015, the decision to stop Brewer was supported by reasonable suspicion that he was in violation of Kentucky's law prohibiting excessive window tinting. *See* Ky. Rev. Stat. § 189.110(9).

---

ticket [the other officer] was writing." Likewise, Detective Stewart's inability to determine a window's tinting percentage by sight is not significant. (*See* D.N. 47, PageID # 304; D.N. 57, PageID # 420-21 (challenging Stewart's credibility on ground that he could only tell tint percentages from looking at boxes when he worked in a tint shop))

[3] Holland testified that "the tint was so dark that [he] . . . stood at [his] door frame for a second" for safety reasons until Brewer rolled down his window. (D.N. 43, PageID # 222; *see id.*, PageID # 223-24)

2. Canine Sniff

Even if the stops were initially supported by reasonable suspicion, the officers must have reasonably suspected "more extensive criminal conduct" in order to lawfully detain Brewer beyond the time necessary to issue a citation for excessive window tinting. *Samuels*, 443 F. App'x at 159 (quoting *United States v. Townsend*, 305 F.3d 537, 541 (6th Cir. 2002)). Thus, although "the use of a well-trained narcotics-detection dog . . . during a lawful traffic stop[] generally does not implicate legitimate privacy interests," *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), a stop may not be extended for a canine sniff "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015).

Brewer maintains that the November 11 stop was impermissibly extended by Diesel's sniff because investigation of the window-tinting violation was complete once Detective Hogan made contact with Brewer's passenger. (D.N. 57, PageID # 418) Brewer misrepresents Hogan's testimony on this point, however. He quotes Hogan as stating, "It was of the window tint" in response to the question of whether her investigation of the window-tinting violation was complete at the time she began speaking to Brewer's passenger. (*Id.*, PageID # 418 (purportedly quoting D.N. 43, PageID # 196-97)) In fact, the exchange was as follows:

Q. And at that point was your investigation of the window tint concluded?

A. It was—of the window tinting?

Q. Yes.

A. *It was still ongoing.*

(D.N. 43, PageID # 197 (emphasis added))

Hogan ultimately agreed that she had "addressed" (i.e., confirmed) the window-tint issue "on contact." (*Id.*; *see id.*, PageID # 216-17) But a traffic stop typically—and properly—entails

tasks such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez*, 135 S. Ct. at 1615 (citing *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979)). Several officers testified that such inquiries are a normal part of any LMPD traffic stop. (*See* D.N. 43, PageID # 226-27; D.N. 47, PageID # 277, 308-09) Hogan had not yet completed these tasks when she approached Brewer's passenger, and thus "the purpose of the initial stop had not ended," even if she had already confirmed the window-tint violation. *Samuels*, 443 F. App'x at 160. While Hogan was waiting to hear the results of the registration check and Holland was filling out a citation for excessive window tinting, Diesel indicated that there were drugs in the vehicle. (D.N. 43, PageID # 180-81, 227; *see* Joint Ex. 1, Hogan bodycam recording at 7:40-9:16; Gov't Ex. 4, 11/11/15 James bodycam recording at 1:02) The canine sniff thus did not extend the stop.[4] And because "[a]n alert to the presence of drugs by a properly trained narcotics detection dog is sufficient to establish probable cause to search a vehicle," *United States v. Sharp*, 689 F.3d 616, 618 (6th Cir. 2012), the subsequent search was likewise lawful.[5]

Finally, the Court rejects Brewer's argument that the Ninth Mobile Division operates as an unlawful "roaming roadblock"—a concept that, as far as the Court can tell, does not exist in Fourth Amendment jurisprudence—because a drug-sniffing dog is present for most traffic stops. (*See* D.N. 57, PageID # 421-22) Brewer cites a single case, *City of Indianapolis v. Edmond*, 531

[4] The Court notes that the officers would have had reasonable suspicion to extend the stop for a canine sniff in any event. Hogan and Holland viewed the towel over the vehicle's interior lights as an extreme attempt to conceal Brewer's identity; Brewer's failure to roll the window all the way down also led the officers to believe that he was hiding something illegal. (D.N. 43, PageID # 175-76, 203, 205, 223-24, 228) In addition, while not dispositive, the fact that Brewer seemed exceptionally nervous during the stop (*id.*, PageID # 205, 223-24) also supports a finding of reasonable suspicion. *See United States v. Pacheco*, 841 F.3d 384, 393 (6th Cir. 2016) (citing *Illinois v. Wardlaw*, 528 U.S. 119, 124 (2000); *United States v. Wilson*, 506 F.3d 488, 495-96 (6th Cir. 1995)). In short, there was reasonable suspicion for the canine sniff regardless of whether the window-tinting violation had already been resolved.

[5] Brewer does not challenge Diesel's training or reliability.

U.S. 32 (2000), in support of this argument. In *Edmond*, the Supreme Court held that police checkpoints whose "primary purpose . . . [was] ultimately indistinguishable from the general interest in crime control" violated the Fourth Amendment. *Id.* at 48. But the *Edmond* Court was concerned with stops conducted "in the absence of individualized suspicion of wrongdoing." *Id.* at 37. As explained above, the LMPD officers had reasonable suspicion to stop Brewer on November 11 and 12, 2015. *See supra* Part II.A.1. Moreover, Brewer's own argument recognizes that the Ninth Mobile Division's stops are not "suspicionless," *id.* at 47: he asserts that "[a]nyone traveling within the perimeter of the Ninth Mobile is subject to likely stops and searches *for any minor infraction*." (D.N. 57, PageID # 422 (emphasis added) (arguing that "failure to have a seatbelt with a visible shoulder strap, having insufficient illumination on [a] license plate, failing to signal a lane change or turn from an alley, and any other number of trivial violations of the numerous traffic regulations" could result in a stop)) Again, the officers' actual motivations for stopping Brewer are irrelevant, and the reasonable-suspicion standard applies to any "ongoing [traffic] violation, no matter how minor." *Gregory v. Burnett*, 577 F. App'x 512, 516 (6th Cir. 2014) (citing *United States v. Simpson*, 520 F.3d 531, 540-41 (6th Cir. 2008)); *see Whren*, 517 U.S. at 813; *Garrido*, 467 F.3d at 977, 979. Thus, the fact that the Ninth Mobile's overarching purpose is to reduce violent crime does not render its traffic stops unconstitutional.

B. Motion to Sever Felon-in-Possession Count

Brewer argues that it would be "unduly prejudicial" for the jury to be made aware of his status as a convicted felon during trial of the other charges. (D.N. 38, PageID # 145) He therefore seeks a separate trial on Count 1 of the Indictment. In the alternative, he asks that the trial be bifurcated. (*Id.*) The United States opposes severance or bifurcation, arguing that either measure would be inefficient and unnecessary. (D.N. 41)

Federal Rule of Criminal Procedure 14(a) provides that "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts . . . or provide any other relief that justice requires." Here, as in previous cases before this Court, separating the trial of the felon-in-possession count from that of the drug-trafficking charges "would be only a minor burden on the public. It would not take much time to present the evidence of the felon in possession count to the same jury after they reach a verdict on the other counts." *United States v. Robinson*, No. 3:15-CR-96-TBR, 2016 U.S. Dist. LEXIS 88637, at *4-*5 (W.D. Ky. July 8, 2016). Meanwhile, there is "real possible prejudice in the jury knowing that [Brewer] is a convicted felon." *Id.* at *5. The Court thus concludes that bifurcation is appropriate, and Brewer's motion will be granted insofar as it seeks a bifurcated trial. (*See* D.N. 38, PageID # 145)

C. Motion to Sever Counts 2 and 3

Brewer also seeks to sever the drug and firearm charges arising out of the November 11 stop from the drug charge arising out of the November 12 stop. (D.N. 39) He argues that there are no facts alleged in the indictment connecting the November 11 offenses to the November 12 offense and that trying the counts together would result in a prejudicial "spillover effect." (*Id.*, PageID # 149; *see id.*, PageID # 148-50) The United States maintains that joinder was appropriate and that separate trials are unwarranted. (D.N. 41)

Pursuant to Federal Rule of Criminal Procedure 8(a),

> [t]he indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Fed. R. Crim. P. 8(a). Thus, the test for joinder is not whether offenses are related or have overlapping facts, as Brewer suggests. (*See* D.N. 39, PageID # 148-49) Rather, "joinder of

offenses that are 'of the same or similar character' but unrelated . . . is explicitly permitted under Rule 8(a)." *United States v. Chavis*, 296 F.2d 450, 460-61 (6th Cir. 2002) (quoting Fed. R. Crim. P. 8(a)). Brewer's alleged offenses are unquestionably "of the same or similar character" and arguably "constitute parts of a common scheme or plan," namely a scheme or plan to sell drugs. *Cf. United States v. McClellan*, No. 93-4084, 1994 U.S. App. LEXIS 30790, at *8-*11 (6th Cir. 1994) (finding no misjoinder under Rule 8(a) where indictment charged drug-trafficking and firearm offenses arising out of three separate incidents over a period of one year in which police found drugs and firearms in defendant's car). Moreover, consolidation of the offenses for trial serves the interest of judicial efficiency, as even in a separate trial, the United States could offer evidence of similar incidents for any purpose permissible under Federal Rule of Evidence 404(b)(2) (e.g., to show Brewer's knowledge or intent). *Cf. United States v. Jacobs*, 244 F.3d 503, 507 (6th Cir. 2001). Any potential prejudice from trying the offenses together can be minimized by a limiting instruction. *See id.* In sum, severance under Rule 8 is not warranted.

Nor has Brewer shown that he is entitled to relief under Rule 14. (*See* D.N. 39, PageID # 149 ("If the Court decides that the Cou[n]ts are properly joined, then Mr. Brewer asks for a Rule 14 severance of the Counts.")) As discussed above, Rule 14 authorizes severance or "any other relief that justice requires" where "the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government." Fed. R. Crim. P. 14(a). Brewer cites *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015), for the factors used to determine whether joinder is prejudicial, such as "whether spillover evidence would incite or arouse the jury to convict on the remaining counts, whether the evidence was intertwined, the similarities and differences between the evidence, the strength of the government's case, and the ability of the jury to separate the evidence." *Id.* at 656-57 (quoting *United States v. Dale*, 429 F. App'x 576, 579 (6th Cir. 2011)). The *Soto* panel also noted, however, that a defendant must

"offer more than conclusory statements to show that the joinder prejudiced his defense." *Id.* at 657 (citing *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 478 (6th Cir. 2006)). Here, Brewer merely asserts that he "will be prejudiced by a spillover effect" because "[t]he jury will believe that each of the drug counts makes the other count more likely to have occurred." (D.N. 39, PageID # 149) But "absent a showing of substantial prejudice, spillover of evidence from one [count] to another does not require severance." *Hang Le-Thy Tran*, 433 F.3d at 478 (alteration in original) (quoting *United States v. Johnson*, 763 F.2d 773, 777 (6th Cir. 1985)). Brewer's conclusory assertions do not establish that he would be substantially prejudiced by a consolidated trial.

III.

For the reasons set forth above, it is hereby

ORDERED as follows:

(1) Brewer's motion to suppress evidence seized during the November 11, 2015 and November 12, 2015 traffic stops (D.N. 26) is **DENIED**.

(2) Brewer's unopposed motion to suppress statements made during the November 11 stop (D.N. 33) is **GRANTED**.

(3) Brewer's motion to sever the felon-in-possession count or for bifurcated trial (D.N. 38) is **GRANTED** to the extent it seeks a bifurcated trial. Count 1 of the Indictment, which charges possession of a firearm by a convicted felon, shall be tried before the same jury immediately following the return of a verdict on Counts 2-4.

(4) Brewer's motion to sever Counts 2 and 3 (D.N. 39) is **DENIED**.

(5) Brewer's motion for extension of time to file his post-hearing brief (D.N. 55) is **GRANTED**.

A pretrial conference will be set by subsequent order.

January 29, 2018

David J. Hale, Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v. Criminal Action No. 3:17-cr-37-DJH

CHEROSCO BREWER, Defendant.

* * * * *

ORDER

Defendant Cherosco Brewer has filed a motion to reconsider the Court's prior suppression ruling and a motion to dismiss the indictment. (Docket Nos. 93, 94)[1] Brewer, who is charged with various firearm and drug-trafficking offenses, argues that the indictment in this matter is the result of selective and vindictive prosecution and that marijuana and a handgun seized during a November 11, 2015 traffic stop should be excluded from evidence. For the reasons discussed below, both motions will be denied.

I.

The Court previously summarized the facts of this case as follows:

> On November 11, 2015, Brewer was pulled over by Detectives Holly Hogan and Tyler Holland of [Louisville Metro Police Department]'s Ninth Mobile Division. Hogan and Holland believed that the windows on Brewer's vehicle were excessively tinted; Hogan recalled that although the car passed under several streetlights, "[a]ll of the windows looked black," and no occupants were visible. (D.N. 43, PageID # 172; *see id.*, PageID # 171, 222) When asked to roll down his window, Brewer rolled it down only a small amount. (*Id.*, PageID # 222-23) Once the interior of the car was visible, the officers saw a towel covering the lights on the dashboard, which they construed as an attempt to further conceal the inside of the car. (*Id.*, PageID # 175, 223, 244) Holland perceived Brewer to be "nervous about something" because "a carotid artery in [Brewer's] neck was . . . pulsating pretty fast." (*Id.*, PageID # 223) Hogan thought that Brewer's passenger was also nervous. (*Id.*, PageID # 205) Other officers soon arrived on

[1] Brewer filed an amended motion to reconsider after his initial motion was deemed deficient by the Clerk of Court. (*See* D.N. 91; D.N. 92; D.N. 93) The initial motion will be denied as moot.

EXHIBIT C
Appx-020

> the scene, including Detective Anthony James and his canine partner, Diesel, a Belgian Malinois trained to detect illegal substances. While Hogan was checking the vehicle's registration, Diesel conducted a sniff around the outside of the vehicle and alerted at the front driver's-side door. (D.N. 43, PageID # 180-81; *see* Joint Ex. 1, Hogan bodycam recording at 7:40-9:16; Gov't Ex. 4, 11/11/15 James bodycam recording at 1:02) A subsequent sniff and search of the car's interior revealed marijuana packaged for sale and a handgun. (D.N. 43, PageID # 181)
>
> The following night, Brewer was driving a different vehicle when he was pulled over by another Ninth Mobile Division officer, Detective Chad Stewart, again for excessive window tinting. (D.N. 47, PageID # 302-05) Stewart testified that although it was a "well-lit area," when Brewer passed him, he "couldn't tell how many people were in the car"; he "couldn't see anything." (*Id.*, PageID # 303) Stewart further testified that "[e]ven with [his] headlights shining into the vehicle, [he] couldn't see inside the vehicle, which let [him] know that the window tint [was] excessively dark." (*Id.*) Detective James and Diesel were nearby and quickly joined Stewart at the scene; while Stewart was running the vehicle's tags and Brewer's warrant status, Diesel alerted on the exterior of the car. (D.N. 47, PageID # 307-08, 327-28; Gov't Ex. 4, 11/12/15 James bodycam recording at 2:31; Stewart bodycam recording at 4:10-4:55) Officers searched inside the car and found cocaine packaged for sale. (Gov't Ex. 4, Stewart bodycam recording at 5:59-8:00)
>
> In connection with the November 11 stop, Brewer was charged with possessing a firearm as a convicted felon (Count 1), possessing marijuana with intent to distribute it (Count 2), and possessing a firearm in furtherance of a drug-trafficking crime (Count 3). (D.N. 1, PageID # 1-2) Count 4 of the Indictment arises out of the November 12 stop and alleges possession with intent to distribute cocaine. (*Id.*, PageID # 3)

(D.N. 66, PageID # 509-10) In its January 29, 2018 Memorandum Opinion and Order, the Court denied Brewer's motion to suppress evidence seized during the November 11 and 12 traffic stops, rejecting Brewer's arguments that the officers lacked reasonable suspicion to stop him and that the November 11 stop was impermissibly extended by the canine sniff. (*Id.*, PageID # 511-14) Brewer now seeks reconsideration of that decision. (D.N. 93) He further maintains that the entire indictment is the result of selective and vindictive prosecution and should therefore be dismissed. (D.N. 94) The United States opposes both motions. (D.N. 101; D.N. 102)

II.

Because Brewer's motion to dismiss would be dispositive if granted, the Court will address it first.

A. Motion to Dismiss Indictment

1. Vindictive Prosecution

"A showing of vindictive prosecution requires (1) an exercise of a protected right; (2) a prosecutorial stake in the exercise of that right; (3) unreasonableness of the prosecutor's conduct; and (4) the intent to punish the defendant for exercise of the protected right." *United States v. Young*, 847 F.3d 328, 361 (6th Cir. 2017) (quoting *United States v. Meda*, 812 F.3d 502, 510 (6th Cir. 2015)). No hearing is required on a claim of vindictive prosecution unless the defendant demonstrates "a realistic likelihood of vindictiveness" through the elements listed above. *United States v. Simpson*, 226 F. App'x 556, 560 (6th Cir. 2007).

Brewer exercised a protected constitutional right by pleading not guilty to the state charges. *See, e.g.*, *United States v. Goodwin*, 457 U.S. 368, 377-84 (1982). But he fails to explain how federal prosecutors would have a stake in avoiding trial at the state level. *See United States v. Wells*, 211 F.3d 988, 1002 (6th Cir. 2000) ("To establish vindictive prosecution, a defendant must show that the prosecutor has some personal 'stake' in deterring the exercise of his constitutional rights . . . ." (citing *United States v. Branham*, 97 F.3d 835, 849-50 (6th Cir. 1996))). In any event, it is well established that the general prosecutorial stake in securing a guilty plea does not support a claim of vindictive prosecution; the Supreme Court has "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *see also Young*, 847 F.3d at 362 (citing *United States v. Suarez*, 263

F.3d 468, 480 (6th Cir. 2001)). Brewer's not-guilty plea to the state charges is thus irrelevant here.

The Court assumes for present purposes that Brewer has "adequately asserted a protected right in filing a civil rights suit." *Simpson*, 226 F. App'x at 560; *see id.* at 560-61 (concluding that defendant's "right to bring a civil action under 42 U.S.C. § 1983 is a protected right, the exercise of which may be the basis of a claim of prosecutorial vindictiveness"). He has not, however, alleged any facts establishing "a prosecutorial stake in the exercise of that right." *Young*, 847 F.3d at 361. According to Brewer, he faces federal charges because certain LMPD officers sought revenge against him for suing them. (*See* D.N. 94) Yet he cites no facts suggesting that state prosecutors had a stake in his exercise of the right to file a § 1983 action, much less anyone in the United States Attorney's Office. *Cf. Simpson*, 226 F. App'x at 561 (finding prosecutorial-stake element not met where even if action by Assistant United States Attorney whose father Simpson had sued "was undertaken for improper motives, the Government's decision to prosecute Simpson [was] not tainted by that motive because all decisions actually relating to Simpson's prosecution were made by individuals other than" the potentially conflicted AUSA). Brewer likewise points to no evidence of unreasonableness on the part of the prosecutors in this matter or an intent by those prosecutors to punish him.[2] *See Young*, 847 F.3d at 361. Thus, dismissal of the indictment on the basis of vindictive prosecution is not warranted, and no hearing is necessary. *See id.*; *Simpson*, 226 F. App'x at 560.

[2] As the United States observes, the federal investigation of Brewer was underway before he filed his civil-rights lawsuit; Brewer was ultimately referred for federal prosecution by the Bureau of Alcohol, Tobacco, Firearms and Explosives. (*See* D.N. 101, PageID # 685-86; D.N. 101-1; D.N. 110-2; D.N. 101-3; D.N. 101-5; *Brewer v. Holland*, No. 3:16-cv-00014-CRS, ECF No. 1 (W.D. Ky. Jan. 7, 2016))

2. Selective Prosecution

Brewer offers even less to support his claim of selective prosecution.

> A prosecutor selectively prosecutes someone when three things occur. First, he must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991) (internal citations omitted). Here, Brewer asserts that he "was singled-out" for traffic stops in November 2015 and beyond "due to his race as an African-American." (D.N. 94, PageID # 658-59) He does not argue that his race was a factor in the initiation of this federal prosecution, however, or that "similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

Brewer does assert in passing that "because [he] exercised his constitutional rights, and sued the police officers, he has been singled out for federal prosecution while others similarly situated and committing the same acts have not." (D.N. 94, PageID # 664) Yet he does not claim to be part of "an identifiable group" of persons who filed civil-rights lawsuits against police officers, nor does he claim that his prosecution was intended to, and did, result in a discriminatory effect on that group. *Anderson*, 923 F.2d at 453-54 (explaining distinction between selective and vindictive prosecution). His claim of selective prosecution therefore fails.

B. Motion to Reconsider Suppression Ruling

In deciding whether to reconsider its ruling on a motion to suppress, the Court weighs several factors: whether the party seeking reconsideration has "provide[d] a reasonable explanation for failing to present the evidence initially," "the timeliness of the motion, the

character of the testimony, the effect of granting the motion, and whether the opposing party will be prejudiced by reopening the hearing." *United States v. White*, 455 F. App'x 647, 651 (6th Cir. 2012) (citing *United States v. Carter*, 374 F.3d 399, 405 (6th Cir. 2004), *vacated on other grounds*, *Carter v. United States*, 543 U.S. 1111 (2005); *United States v. Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985)). Although the United States does not contend that it would be prejudiced if the motion were granted (*see* D.N. 102), the remaining factors weigh against reconsideration. First, Brewer seeks to present new argument, not new evidence; his motion was prompted by a change in counsel following the Court's prior ruling. (*See* D.N. 93, PageID # 646 (claiming that new counsel discovered "misinterpretation of facts and misapplication of law" in the Court's decision)) This is not a compelling reason. *See Carter*, 374 F.3d at 406 (finding mere change in defense counsel to be insufficient justification for failure to present evidence at initial suppression hearing); *see also White*, 455 F. App'x at 651 (affirming denial of motion to reconsider suppression ruling where evidence sought to be introduced by defendant "had not been previously unavailable").

Furthermore, the motion was not timely. Following a status conference involving Brewer's new counsel on May 31, 2018, the Court reset certain pretrial deadlines, allowing the parties twenty-one days from entry of the Memorandum of Conference and Order within which to seek extension—"for good cause"—of other deadlines that had already passed, including the deadline for motions to suppress. (D.N. 89, PageID # 623; *see* D.N. 16) Fifty-three days later, Brewer filed his initial motion to reconsider, with no explanation for the delay and no attempt to show the required good cause. (D.N. 91) The timeliness factor thus does not support reconsideration. *See White*, 455 F. App'x at 651. Indeed, denial of the motion would be warranted on this basis alone: "Good cause is a flexible standard heavily dependent on the facts

of the particular case as found and weighed by the district court in its equitable discretion. At a minimum, it requires the party seeking a waiver to articulate some legitimate explanation for the failure to timely file." *United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010) (finding no abuse of discretion in district court's denial of request to file untimely motion to suppress) (citations omitted)); *see* Fed. R. Crim. P. 12(c) (providing that court may set deadline for pretrial motions and that untimely motion may be considered upon showing of good cause).

Nor would reconsideration result in a different outcome. The Court previously found that the November 11 traffic stop was not unreasonably delayed as a result of the canine sniff. (D.N. 66, PageID # 513-15 & n.4) Brewer argues that this conclusion was erroneous because the proof shows that "the officers engaged in inordinate delay[and] foot-dragging and virtually halted any normal effort toward issuing a ticket, or any other appropriate task-based step associated with the purpose for the initial stop." (D.N. 93, PageID # 648 n.1) As an example of unnecessary delay, he points to a gap of "over 2 ½ minutes" between the time Detective Hogan instructed his passenger to stand at the rear of the car and the time she called in the vehicle information. (*Id.*, PageID # 650) Brewer acknowledges that Hogan was questioning the passenger about outstanding warrants during this time but asserts that the Sixth Circuit has found a two-minute delay for extraneous questions to be impermissible. (*Id.* n.2 (citing *United States v. Stepp*, 680 F.3d 651, 663 (6th Cir. 2012))) Neither the recording of the stop nor the case he cites supports his argument.

In *Stepp*, the defendant argued that the traffic stop at issue "was unreasonably prolonged by [the police officer's] extraneous questioning." 680 F.3d at 662. The Sixth Circuit explained that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries

do not measurably extend the duration of the stop." *Id.* (alteration in original) (quoting *United States v. Everett*, 601 F.3d 484, 490 (6th Cir. 2010)). "A traffic stop is not 'measurably' extended by extraneous questioning even when such questioning undeniably prolongs the stop to a minimal degree." *Id.* (citing *Everett* at 492). Ultimately, the court concluded in *Stepp* that "six minutes of questioning measurably prolonged the traffic stop beyond its original purposes because the topics covered more than just context-framing questions and the extraneous questions lasted a not insubstantial amount of time." *Id.* at 663. It reached this conclusion "by considering the totality of the circumstances, which requires considering both the duration of the extraneous questioning and its subject matter." *Id.* at 662.

Here, the extraneous questions took less than half the time found unreasonable in *Stepp*. *See id.* at 663. And although the questions were unrelated to the initial purpose of the stop, they were not "related to the investigation of a secondary crime," *id.* at 662, but instead asked as an apparent courtesy: Hogan explained that if Brewer's passenger had an outstanding warrant and the information were radioed in, she would have to be taken to jail, whereas the officers would have some discretion if Hogan checked the computer instead. (*See* Hogan video at 4:21) Nothing about this interaction suggests that Hogan abandoned or veered impermissibly from the initial purpose of the traffic stop; rather, her "overall course of action during [the] traffic stop, viewed objectively and in its totality, [was] reasonably directed toward the proper ends of the stop." *Everett*, 601 F.3d at 495 (noting that "the reasonable diligence standard does not 'require [an officer] to move at top speed'" (quoting *United States v. Turvin*, 517 F.3d 1097, 1102 (9th Cir. 2008))). Moreover, the questioning did not last as long as Brewer contends: at 5:36 on the bodycam recording, Hogan is seen adjusting her radio to call in the vehicle information, and the call begins at 6:06. (*See* D.N. 93, PageID # 651 (asserting that "[t]he call on the vehicle was

made at 6:43")) Thus, neither the duration nor the subject matter of the extraneous questioning indicates that it unreasonably prolonged the traffic stop. *See Stepp*, 680 F.3d at 662. Finally, as Brewer acknowledges (D.N. 93, PageID # 650), the canine officer alerted—giving rise to probable cause—while Hogan was awaiting the results of the registration check. *See United States v. Sharp*, 689 F.3d 616, 618 (6th Cir. 2012) ("An alert to the presence of drugs by a properly trained narcotics detection dog is sufficient to establish probable cause to search a vehicle." (citing *United States v. Diaz*, 25 F.3d 392, 393-94 (6th Cir. 1994))) Because the traffic stop was ongoing and the extension by Hogan was de minimis, no Fourth Amendment violation occurred. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015); *Stepp*, 680 F.3d at 662. In sum, Brewer has not demonstrated that reconsideration of the Court's suppression ruling is necessary or appropriate. *See White*, 455 F. App'x at 651.

III.

For the reasons set forth above, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Brewer's motion to dismiss the indictment (D.N. 94) is **DENIED**.

(2) Brewer's amended motion to reconsider (D.N. 93) is **DENIED**.

(3) Brewer's initial motion to reconsider (D.N. 91) is **DENIED** as moot.

October 25, 2018

David J. Hale, Judge
United States District Court

United States District Court

Western District of Kentucky

LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.
Cherosco Brewer

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:17-CR-37-1-DJH
US Marshal No: 18898-033
Counsel for Defendant: **Larry D. Simon, Appointed**
Counsel for the United States: **Corinne Keel, Asst. U.S. Atty**
Court Reporter: **Dena Legg**

THE DEFENDANT:

☐ Pursuant to plea agreement

☐ Pleaded guilty to count(s)

☐ Pleaded nolo contendere to count(s) which was accepted by the court.

☒ **Was found guilty on count(s) 1-4 of the Indictment following trial by jury which concluded on January 10, 2019.**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) (Is) (are) dismissed on the motion of the United States.

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

7/30/2020
Date of Imposition of Judgment

David J. Hale, Judge
United States District Court

August 3, 2020

EXHIBIT D

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

COUNTS OF CONVICTION

Title / Section and Nature of Offense	Date Offense Concluded	Count
18:922(g)(1), 924(a)(2), 924(e)(1) FELON IN POSSESSION OF FIREARM AND AMMUNITION	11/11/2015	1
21:841(a)(1) and (b)(1)(D) POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA	11/11/2015	2
18:924(c)(1)(A) POSSESSION OF FIREARM IN FURTHERANCE OF DRUG TRAFFICKING CRIME	11/11/2015	3
21:841(a)(1) and (b)(1)(C) POSSESSION WITH INTENT TO DISTRIBUTE COCAINE	11/12/2015	4

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **60 months as to Count 2 and 180 months as to Counts 1 and 4 to run concurrently with each other, and 60 months as to Count 3 to be served consecutively to the term imposed on Counts 1, 2, and 4 for a total term of 240 months imprisonment.**

☒ **The Court recommends to the Bureau of Prisons that the defendant's health condition be evaluated for appropriate placement.**

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at A.M. / P.M. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ Before 2:00 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to Count 4 and 5 years as to each of Counts 1-3 to run concurrently for a total of 5 years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ **You must cooperate in the collection of DNA as directed by the probation officer.**
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.
7. ☐ You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

SPECIAL CONDITIONS OF SUPERVISION

14. The defendant shall submit to testing to determine if he/she has used a prohibited substance. The defendant shall contribute to the Probation Office's cost of services rendered based upon his/her ability to pay as it relates to the court approved sliding fee scale. The defendant must not attempt to obstruct or tamper with testing methods.
15. The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers [as defined in 18 USC 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

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.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

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

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 400.00**		

☒ **The fine and the costs of investigation, prosecution, incarceration and supervision are waived due to the defendant's inability to pay.**

☐ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ **Restitution is not an issue in this case.**

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

Criminal debt may be paid by cash, check or money order or may be paid online at www.kywd.uscourts.gov (See Online Payments for Criminal Debt). If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ Fine and/or ☐ Restitution

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **Brewer, Cherosco**
CASE NUMBER: **3:17-CR-37-1-DJH**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ Due immediately, balance due
☐ not later than , or
☐ in accordance with C, D, or E below); or

B ☐ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after The date of this judgment, or

D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States: Forfeiture shall be addressed by further order of the Court.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.