72 F.4th 521
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Damon Todd CAREY, Appellant

No. 21-1837
|
Submitted Under Third Circuit
L.A.R. 34.1(a) June 8, 2023
|
(Filed: July 7, 2023)

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Pennsylvania, Sylvia H. Rambo, Senior District Judge, of drug trafficking and using a firearm in furtherance thereof, and, 2021 WL 4459122, his motions for judgment of acquittal and new trial were denied. Defendant appealed.

Holdings: The Court of Appeals, Ambro, Circuit Judge, held that:

there was an improper variance between indictment and evidence;

sufficient evidence established defendant constructively possessed the gun seized from his residence in furtherance of his drug trafficking;

box of cash seized from trunk of defendant's crashed rental vehicle during warrantless sweep was admissible under the inevitable discovery exception;

police officers had probable cause to obtain search warrant for defendant's residence; and

minor typographical error in search warrant did not undermine police officers' good faith reliance on the warrant.

Affirmed in part, vacated in part, and remanded.

*524 Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Criminal Action No. 1-18-cr-00263-001), U.S. District Judge: Sylvia H. Rambo

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Before: HARDIMAN, AMBRO and FUENTES, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

Damon Carey appeals his convictions for drug trafficking and using a firearm in furtherance thereof. He challenges, among other things, many of the District Court's evidentiary rulings, its calculation of his Guidelines range, and its refusal to grant a directed verdict in his favor. We reject most of his arguments. But we agree that insufficient evidence supports his conviction for possession with intent to distribute 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a). We vacate that count and remand to the District Court for resentencing.

I.

On April 6, 2018, a fugitive task force of U.S. Marshals in Harrisburg, Pennsylvania staked out Carey's residence to arrest him for violating conditions of his supervised release. After Carey placed a large bag in the trunk of his rental car, he soon took the wheel and began to pull away. The task force moved quickly, effecting a vehicle containment maneuver by driving directly toward Carey. Hoping to evade interdiction, Carey "cut the wheel hard to the right and ended up striking a parked car" on the side of the street. App. 86. He was arrested after being pulled from the car. The task force then swept it, "looking *525 for bodies[,] for persons[,] [and] for possible

APPX 1

threats." App. 87. In the trunk, they found Carey's bag—opened. Inside it, they could see a brown shoe box that "had a big opening where you could put your thumb in ...." App. 541. Through that thumb hole, a member of the task force saw U.S. currency. The task force called the Harrisburg Bureau of Police. The Bureau's Vice and Organized Crime Unit arrived, and law enforcement opened the shoe box, which contained $79,320.

From Carey's residence, his pregnant girlfriend, Mikia Slone, heard the commotion. She immediately located two lime-sized bags of cocaine and a baby bottle of PCP, "ran to the bathroom, and flushed what [she] could" down the toilet. App. 756–57. The Government's expert estimated that the bags of cocaine together contained around 112 grams of the drug.

After the crash, U.S. Marshals and Harrisburg Police headed to Carey's residence, where they were met by Slone. Some officers engaged her in small talk "right at the front door, possibly into the living room area," App. 92, while others secured the premises, App. 89, 94. Slone refused to consent to a search of the residence but indicated there was a loaded firearm in the upstairs bedroom (though she could not name the make or caliber). Eventually, she asked if she could leave the house to pick up her son. She was then escorted by police upstairs to obtain her shoes. While Slone and the police walked from the living room to the upstairs area, an investigator took photographs of the interior of the home. At the same time, one officer expressed his belief to Slone that "there were drugs in the house ...." App. 429. She responded by saying that although there was no crack or heroin, there was some marijuana in the duffel bags on the floor of the bedroom. Using Slone's statements and the cash recovered at the accident scene as support for probable cause, police applied for and obtained a search warrant for Carey's residence.[1]

Police soon carried out the search warrant. During the search, they recovered approximately five pounds of marijuana[2] and 310 grams of cocaine, as well as "two blenders[,] [f]ive cellular ***526** phones, a money counter, a loaded 9 millimeter handgun [registered in Slone's name] ..., .45 caliber ammunition[,] a holster, two sifters ..., [f]our digital scales, [a] considerable amount of cutting agent, baking soda, ... confectionary sugar, baggies, a kilo press ..., and measuring spoons." App. 216.

In the days following the search, Carey called Slone from jail on a recorded line to catalogue the recovered evidence and to admonish her for failing to destroy or hide what was found by police during the search. He also instructed her to collect drug debts on his behalf.

Law enforcement suspected Slone's involvement in Carey's criminal enterprise, so they met with her to discuss a cooperation agreement that would resolve potential charges that might be brought against her. Slone initially rejected the overture. But once the Government superseded its indictment of Carey to add Slone as a codefendant, she began cooperating.[3]

Carey filed several motions to suppress the evidence recovered from his vehicle and residence on April 6, 2018. The Court held suppression hearings and heard testimony. Ultimately, it suppressed the photographs taken at Carey's residence by the investigator before the issuance of the search warrant but denied his suppression motions in all other respects.

The grand jury issued its final superseding indictment on March 31, 2021. It alleged that "[o]n or about April 6, 2018, in Dauphin County, within the Middle District of Pennsylvania," Carey (1) possessed with intent to distribute 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 841(a), and (2) possessed with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a). Dist. Ct. Dkt. No. 178. It further charged that on or about April 6, 2018, in Dauphin County "and elsewhere," Carey (3) possessed a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c), and (4) conspired to possess with intent to distribute marijuana and 500 grams or more of cocaine hydrochloride, in violation of 21 U.S.C. § 846. *Id.* Carey pleaded not guilty and proceeded to trial.

At trial, Slone testified against Carey.[4] Among other things, she: detailed Carey's drug-trafficking operation; gave a first-hand account of Carey cooking powder cocaine and cutting cocaine freebase with Benzocaine; admitted to making straw purchases of cutting agents for Carey; outlined the methods Carey used to evade detection; recollected at least six large-scale cocaine deals in Lancaster and Philadelphia during which Carey purchased significant quantities of the drug packaged in 220–250-gram "flat cardboard, rectangular [boxes], with tape wrapped around [them],"[5] App. 730; testified that Carey ***527** was traveling to Lancaster to purchase additional cocaine or settle a prior cocaine debt at the time of his arrest—and that the $79,320 recovered by police from the trunk of the rental car was to be used for that purpose;

App X2

and admitted that Carey, after being arrested, solicited her help in recovering some of his drug debts.

Regarding the gun and ammunition police recovered during the search of Carey's residence, Slone testified that Carey paid for their purchase. She noted that the gun was kept loaded on the nightstand next to where the couple slept—and that it was otherwise "always out." App. 836–37. Her testimony implied that Carey loaded the gun because she did not know how to do it herself. According to Slone, Carey instructed her to bring the gun to drug transactions for protection. Slone admitted to using a holster to carry the gun that was different from the holster police found during their search of Carey's residence.

The jury also heard testimony from Pennsylvania State Trooper Shawn Wolfe, an expert investigator of drug trafficking. He noted that the drugs and the paraphernalia recovered by police—the press, cutting agents, grinders, sifters, strainers, baking soda, and measuring cups—evidenced large-scale drug distribution.

On April 22, 2021, the jury convicted Carey on all counts. Following his conviction, the probation office conducted a presentence investigation and issued a presentence report (PSR). Based on the PSR and the parties' arguments at Carey's sentencing hearing, the District Court concluded that the testimony given by Slone and Wolfe, combined with other direct and circumstantial evidence, provided a sufficient evidentiary basis to estimate Carey's drug weight as a Level 30, per U.S.S.G. § 2D1.1. The District Court based its calculation on the following facts:

- Police seized 310 grams of cocaine from the residence during their search on April 6, 2018.
- Slone flushed an estimated 112 grams of cocaine down the toilet before the search that day.
- The money recovered from the crashed rental car was intended to purchase or settle a debt for at least two kilograms of the drug.
- The $92,700 recorded on an "owe sheet" recovered from Carey's residence reflected the sale of at least two kilograms of cocaine.
- Carey, accompanied by Slone, participated in at least six cocaine deals in Lancaster and Philadelphia, each involving roughly five 220-to 250-gram boxes of cocaine. In total, Carey purchased between 6 and 7.5 kilograms of cocaine during these transactions.[6]

After assessing several other enhancements,[7] the District Court assigned ***528** Carey a Total Offense Level of 34 and a criminal history category of III. It sentenced Carey to 228 months in prison, consisting of 168 months on Counts I and IV and 120 months on Count II to run concurrently with each other, followed by a mandatory 60-month consecutive term of imprisonment for Carey's § 924(c) violation.

Carey filed a timely notice of appeal.[8]

II.

We begin with Carey's challenge to Count I. To convict him for possession with intent to distribute 500 grams or more of cocaine hydrochloride in violation of 21 U.S.C. § 841(a), the Government had to prove that he possessed 500 grams or more of that substance on or about April 6, 2018, in Dauphin County. Carey contends that even if the record is viewed in the light most favorable to the Government, no rational trier of fact could have made that finding. *See United States v. Rowe*, 919 F.3d 752, 758–59, 761 (3d Cir. 2019). We agree.

Only 310 grams of cocaine were seized from Carey's residence on April 6, 2018. The Government attempts to add up the remaining 190 grams in three ways.

First, it points to the two lime-sized bags of cocaine Slone flushed down the toilet before the search on April 6, 2018. Though the Government's narcotics expert estimated that these bags, together, conservatively contained only 112 grams of cocaine, he also suggested that they might have weighed up to 200 grams if "recompressed into a powder form with a press ...." App. 924 (Expert testimony). On appeal, the Government implies that the expert's latter remark can sustain Count I.

The Government's position on appeal differs from its approach at trial, which took as granted the expert's conservative estimate. *See* App. 1028 (Gov't Closing Argument) ("[W]e're just going to add what the expert said as the lowest amount, which would be 112 grams."). The Government's trial approach tracked the evidence: the kilo press police recovered during the search of Carey's residence was only suitable for "pressing 125 to 250 grams of cocaine,"

App. 1019, a weight range exceeding the highest estimate of the flushed bags.

The Government's trial approach gave Carey no reason to elicit testimony from Slone on whether the bags she flushed contained loose powder or "recompressed" cocaine. *See* App. 1049 (Defense Closing Argument) ("We don't know what allegedly was flushed .... But when she held up her fingers and demonstrated, if [each bag] is 56 grams, it's still less than 500."). Principles of forfeiture and fairness thus preclude the Government from now relying on the expert's higher estimate. *See, e.g., United States v. D'Amato*, 722 F. Supp. 221, 225 (E.D. Pa. 1989) (discussing *United States v. Minarik*, 875 F.2d 1186, 1189 (6th Cir. 1989)) ("Notably, the government shifted its position concerning ... allegations central to its case .... As the district court noted when it granted judgment notwithstanding the verdict, the government's changing theories 'presented defendants ***529** with a moving target as they attempted to prepare a defense.' ").

Second, the Government casts aspersions, urging us to condemn Carey just because he is a drug dealer. *See* Gov't Br. 42–43. The District Court appears to have accepted this argument. *See* App. 1347 (Op. at ——) ("The government's expert further testified that an individual operating at the scale of Carey ... would be operating well in excess of 500 grams at one time."). But while Carey's drug dealing "might be a basis for speculation" that he possessed 500 grams of cocaine on or about April 6, 2018, "it is not proof beyond a reasonable doubt." *Rowe*, 919 F.3d at 761. That Carey is generally "blameworthy" does not authorize his conviction for a specific crime absent sufficient proof. *United States v. Salamanca*, 990 F.2d 629, 638 (D.C. Cir. 1993).

Finally, the Government falls back on prior instances of alleged possession to add up to 500 grams. *See, e.g.*, Gov't Br. 41–42 ("Slone also testified she *previously* saw Carey with multiple cardboard boxes of cocaine *on different occasions*—up to 5 at any one time .... Slone further testified that she would accompany Carey to Philadelphia and Lancaster where Carey *regularly* purchased multiple boxes of cocaine from his supplier. *One of those cardboard boxes* was found in Carey's house on April 6, 2018, weighing 222 grams.") (emphases added). This line of reasoning implies that the variance between Count I's indictment charge and the Government's proof of prior possessions at trial is a permissible basis to convict Carey.[9] We disagree.

The indictment charged that Carey possessed 500 grams or more of cocaine "[o]n or about April 6, 2018, in Dauphin County." Dist. Ct. Dkt. No. 178. By contrast, the Government put on evidence at trial showing that Carey possessed 500 grams or more of cocaine in Lancaster and Philadelphia in October and November 2017. This trial evidence "materially differ[ed] from [the facts] alleged in the indictment," *United States v. Daraio*, 445 F.3d 253, 259 (3d Cir. 2006), such that the latter did not "sufficiently inform[ ] [Carey] of the charges against him and allow[ ] him to prepare his defense without being misled or surprised at trial." *United States v. Vosburgh*, 602 F.3d 512, 532 (3d Cir. 2010). "Even when time is not an element of the charged offense, it nonetheless carries part of an indictment's notice load." *United States v. Cochran*, 697 F.2d 600, 604 (5th Cir. 1983). And here, the indictment put Carey on notice only that the Government planned to prove he possessed 500 grams or more of cocaine in Dauphin County reasonably near April 6, 2018. *See Real v. Shannon*, 600 F.3d 302, 308 (3d Cir. 2010). To uphold Carey's conviction based on possessions occurring five to six months prior to that date in a different county would be prejudicial to Carey and would place him at risk of double jeopardy. *Cf. United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014); *United States v. Johnson*, 409 F. App'x 688, 690 n.1 (4th Cir. 2011). We therefore vacate Carey's Count I conviction insofar as the Government argues for a permissible variance. *See United States v. Schoenhut*, 576 F.2d 1010, 1021–22 (3d Cir. 1978) (recognizing a defendant's right ***530** to an indictment that sufficiently informs him of the charges being brought).

III.

Turning to Carey's sufficiency-of-the-evidence challenge to his § 924(c) conviction, he contends that the Government "failed to present evidence linking [him] to [a] firearm" or "to a drug-related offence [sic] on or about the relevant time period." Opening Br. 76. We are unconvinced.

At trial, the Government presented three alternative theories of § 924(c) liability: (1) that Carey constructively possessed the gun in furtherance of his marijuana and cocaine dealing;[10] (2) that he aided and abetted Slone's possession of the gun in furtherance of the same, and; (3) that he was responsible for Slone's possession of the gun because it furthered the object of their drug trafficking conspiracy, *see United States v. Lopez*, 271 F.3d 472, 480 (3d Cir. 2001) (citing *Pinkerton v. United States*, 328 U.S. 640, 647–48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). Each of these theories is legally valid and

constitutional, so we allow a general verdict on Count III to stand if sufficient evidence supports a conviction under any of them.[11] *United States v. Tyler*, 732 F.3d 241, 253 (3d Cir. 2013) (citing *United States v. Syme*, 276 F.3d 131, 144 (3d Cir. 2002)).

We need not look further than the Government's first theory of liability, constructive possession.[12] The record shows that the recovered gun was kept near Carey's bed, close to his drugs and drug-trafficking paraphernalia; that the gun, when seized, was loaded even though Slone testified she did not know how to load it; that Slone did not know the make or model of the gun, even though it was registered in her name; that Carey paid for the gun and bullets; and that police recovered a holster for the gun during their search of Carey's residence that did not belong to Slone. All this substantiates the Government's theory that Slone was Carey's porter. *See, e.g., United States v. Walker*, 657 F.3d 160, 174 (3d Cir. 2011). And it supports the inference "that possession of the firearm advanced or helped ***531** forward [Carey's] drug trafficking." *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004).

Because there is sufficient evidence that Carey constructively possessed the firearm seized from his residence in furtherance of his drug trafficking, we uphold his conviction under Count III.

IV.

Carey also raises a host of challenges to the District Court's suppression rulings. We review them for clear error as to the underlying factual findings and review anew the Court's application of the law to those facts. *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). His challenges do not persuade us.

A.

The Court correctly allowed for the introduction of evidence seized from Carey's vehicle.

As noted, U.S. Marshals—after viewing Carey leave his residence and place a bag in the trunk of his rental car—moved to arrest him as he drove away. Carey, trying to evade arrest, crashed his car. The Marshals then completed the arrest and conducted a warrantless sweep of the vehicle. During that sweep, they encountered a shoebox in the trunk that "had a big opening where you could put your thumb in ...." App. 541. Through that thumb hole, they observed large amounts of U.S. currency. The Marshals called Harrisburg Police, and the shoebox was opened, revealing approximately $80,000 in cash.

Suppression of cash was rightly denied. Detectives of the Harrisburg Police testified that it was standard procedure to perform an inventory search of any vehicle that was to be towed or impounded following an accident or arrest. *See* Harrisburg Bureau of Police General Order # 07-47 (Aug. 10, 2007); *see also* App. 100 (testimony about the policy); App. 235 (same); App. 244 (same). Such a procedure complies with the Fourth Amendment. *See Colorado v. Bertine*, 479 U.S. 367, 371–72, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). And because Carey's crashed vehicle was subject to the policy, the inevitable discovery doctrine applies.[13] *See United States v. Stabile*, 633 F.3d 219, 245 (3d Cir. 2011) (citing *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). In other words, because the District Court correctly determined by a preponderance of the evidence that the Harrisburg Police, using routine procedures, inevitably would have discovered the box of cash in the trunk of Carey's crashed rental car, that evidence is admissible. *See, e.g., United States v. Bullette*, 854 F.3d 261, 266–67 (4th Cir. 2017).

B.

Nor did the District Court err in denying suppression of the items seized from Carey's residence. After Carey crashed his rental car, police went to his residence and spoke with Slone inside the property threshold during a lawful "knock and talk." *See* ***532** *Haberle v. Troxell*, 885 F.3d 170, 176 (3d Cir. 2018). The officers' entry into the home was not a pretext "to search for and seize an object without a warrant." *Contra* Opening Br. 39 (quoting *Payton v. New York*, 445 U.S. 573, 581, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). Rather, it was to speak with Slone, Carey's girlfriend, regarding his suspected criminal activity. When Slone confirmed Carey's drug dealing and acknowledged that marijuana and a firearm were in the home, she gave police probable cause to obtain a search warrant for the residence. At this point, the cash seized from Carey's car was "extra icing on a cake already frosted." *Van Buren v. United States*, —— U.S. ——, 141 S. Ct. 1648, 1661, 210 L.Ed.2d 26 (2021) (quoting *Yates v. United States*,

574 U.S. 528, 557, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting)).

Slone's voluntary statements to police during the "knock and talk" also provided "good reason to fear that, unless restrained, [she] would destroy the drugs before they could return with a warrant." *Illinois v. McArthur*, 531 U.S. 326, 332, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). The police thus acted consistent with the Fourth Amendment when securing the premises and escorting Slone to obtain her shoes when she asked to leave.

Finally, the minor typographical error in the warrant noted above does not undermine the officers' good-faith reliance on it. And the premature photographs taken of the interior of Carey's residence before the warrant's issuance were not used to secure the warrant, so their suppression does not unsettle its legal validity. The District Court thus properly admitted all the evidence seized from Carey's residence during execution of the search warrant.

* * *

We affirm in part, vacate in part, and remand to the District Court for a resentencing consistent with this opinion.

All Citations

72 F.4th 521

Footnotes

1 The police used the wrong street number in their warrant request because of a miscommunication by one of the officers. *See* App. 94 (Testimony of Detective Nicholas Ishman) ("I gave him the wrong house number. I told him 648 South 21st Street, and it was actually 748 South 21st Street."). That error was inadvertent and legally insignificant. *See United States v. Johnson*, 690 F.2d 60, 65 n.3 (3d Cir. 1982). In any event, the detectives on the scene relied on the facial validity of the warrant in good faith. *See* App. 101 (Testimony of Detective Jason Paul) ("Q: Now did you believe the warrant was valid with the correct address at the time that it was signed by the judge? A: Yes.").

2 On cross-examination, the Government's forensic scientist and drug identification expert testified that laboratory tests of the marijuana "did not test for tetrahydrocannabinol [THC] content, and therefore did not distinguish between marijuana and hemp." Gov't Br. 12 (citing App. 714–15, 720–21). However, Slone gave essentially unrebutted testimony of Carey's extensive marijuana trafficking. Moreover, the Government's expert in narcotics and drug trafficking explained that a high-level drug dealer like Carey would not "be involved in hemp use or distribution" because hemp has a negligible psychoactive effect and hence has no role in an illicit drug dealer's portfolio. App. 925. Thus, ample evidence contradicts Carey's claim that the marijuana seized from his residence could have been hemp. *See Griffin v. Spratt*, 969 F.2d 16, 22 n.2 (3d Cir. 1992) (citing *United States v. Schrock*, 855 F.2d 327, 334 (6th Cir. 1988)).

Separately, we reject Carey's contention that the District Court erred by limiting cross-examination on marijuana's legal status in Pennsylvania. As the Government correctly notes, "recent changes in *state* marijuana laws and *state* definitions ... [have] no bearing on the applicable federal standards...." Gov't Br. 48 (emphases in original).

3 The records of these interactions "were provided to Carey [by the Government] and used by [him] at trial to cross-examine Slone and make closing arguments." Gov't Br. 45 (citing App. 772–75, 824–28, 837, 842–43, 846–54). Carey argues that the Government withheld notes and recordings of an earlier meeting with Slone during which it solicited information from her. But "no such notes or recordings exist because no preindictment proffer or interview was conducted." Gov't Br. 45. The District Court noted that Carey's suggestion that the Government violated its constitutional disclosure obligations was "without merit," Dist. Ct. Dkt. No. 264, at 1, and we agree.

4 Carey argues that Slone committed perjury at trial and that the Government withheld exculpatory evidence from its prior interviews with her. Our review of the record reveals no clear error in the District Court's refusal to credit these contentions.

5 The cardboard box recovered in Carey's house on April 6, 2018, weighed 222 grams. Carey understood these boxes to contain, on average, 250 grams of cocaine.

6 Based on this evidence, we reject Carey's contention that the District Court miscalculated the drug quantities involved for sentencing purposes. Even if the Court was wrong to assume that the owe sheet detailed cocaine transactions only, that

Appx - 6

error did not affect Carey's base offense level and is therefore harmless. *See United States v. Diaz*, 951 F.3d 148, 159 (3d Cir. 2020) ("If a district court makes an error in its drug quantity determination that does not affect the base offense level ..., the error is harmless.").

7 Relevant to this appeal, the Court applied a two-level enhancement per U.S.S.G. § 3B1.1(c) based on evidence that Carey led, organized, or supervised drug-trafficking activity. That enhancement was proper, as Carey instructed Slone regarding the collection of drug money and other narcotics-related activities following his arrest.

In addition, the Court enhanced Carey's sentence because he willingly allowed Slone to participate in his drug-trafficking enterprise while she was pregnant, per U.S.S.G. § 2D1.1(b)(16)(B)(iii). Again, the record supports this enhancement. *See* PSR Addendum at ¶ 3 (Carey telling his supervising probation officer that "I have [ ] two boys on the way" several weeks before his arrest—which occurred when Slone was around six months pregnant).

Because we identify no misconduct or reversible error beyond that noted in Section II, we also reject Carey's claim of cumulative error.

8 The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

9 By attacking the sufficiency of the evidence on Count I, Carey preserved a challenge to an improper variance. *See United States v. Miller*, 527 F.3d 54, 69–70 (3d Cir. 2008) (reviewing a sufficiency-of-the-evidence challenge to determine whether there was an impermissible variance); *United States v. Kemp*, 500 F.3d 257, 287 n.18 (3d Cir. 2007) (recognizing that a "pure sufficiency of the evidence challenge" may be interpreted as a claim "alleging a prejudicial variance").

10 There is ample evidence of this drug dealing, which serves as the predicate for Carey's § 924(c) charge. Law enforcement's seizure of five pounds of marijuana from Carey's residence supports his § 841(a) conviction in Count II. And Carey's "owe sheet" and Slone's testimony about his cocaine dealings in Lancaster and Philadelphia demonstrate his participation in an ongoing drug-trafficking conspiracy in violation of § 846, per Count IV. Unlike § 841(a), a § 846 conspiracy is a continuing offense that may be proved by aggregating weights from multiple distributions and discontinuous possessions. *See United States v. Williams*, 974 F.3d 320, 364 (3d Cir. 2020) (citing *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003)).

11 Contrary to Carey's suggestion, none of the Government's alternative theories of possession constructively amended the indictment. *See United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010) ("It is settled that vicarious liability predicated on having aided or abetted the crimes of another need not be charged in an indictment.... These same principles hold true in the case of vicarious coconspirator liability.").

12 Carey was in constructive possession of the gun if he "knowingly ha[d] both the power and the intention at a given time to exercise dominion or control over it, either directly or through another person or persons." *United States v. Cunningham*, 517 F.3d 175, 178 (3d Cir. 2008) (quoting *United States v. Iafelice*, 978 F.2d 92, 96 (3d Cir. 1992)). Proof of constructive possession may be "by either direct or circumstantial evidence, and it need not be exclusive to a single person." *United States v. Walker*, 657 F.3d 160, 172 (3d Cir. 2011) (citing *United States v. Iglesias*, 535 F.3d 150, 156 (3d Cir. 2008)); *see also United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004) ("[I]mmediate accessibility [of the gun] at the time of search or arrest is not a legal requirement for a § 924(c) conviction.").

13 Carey's car "constitute[d] a hazard or obstruction to the flow of traffic." General Order 07-47 III.D.2. It was disabled from an accident, Carey was arrested, and no one was immediately available to take custody of it. *See* General Order 07-47 II.A.7, 12; *id.* at III.G–H. City policy thus authorized Harrisburg Police to impound and inventory Carey's vehicle and to search the closed containers in it. *See United States v. Salmon*, 944 F.2d 1106, 1120–21 (3d Cir. 1991), *abrogated on other grounds by United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013). We can readily distinguish this case from *United States v. Vasey*, where impoundment was an option of "last resort" to which the defendant objected contemporaneously. 834 F.2d 782, 790 n.4 (9th Cir. 1987).

Appx - 7

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Appx-8

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**No. 1:18-CR-0263**
	:	
v.	:	
	:	
DAMON TODD CAREY	:	**Judge Sylvia H. Rambo**

MEMORANDUM

Presently before the court are Defendant Damon Todd Carey's ("Defendant") motions to suppress evidence found during a search of his vehicle and during a search of his residence (Docs. 27, 29) and to dismiss the indictment for a violation the Double Jeopardy Clause of the Fifth Amendment or a violation of the Compulsory Process Clause of the 6th Amendment and Defendant's 14th Amendment Due Process rights (Docs. 31, 73). For the reasons that follow, Defendant's motions will be denied.

I. Background

A. Procedural History

On December 10, 2008, Defendant was charged in a two-count indictment with Conspiracy to Distribute 50 Grams and More of Cocaine Base, in violation of 21 U.S.C. § 846 and Possession With Intent to Distribute 50 Grams and More of Cocaine, in violation of 21 U.S.C. § 841(a)(1). On September 3, 2009, Defendant was sentenced to 120 months imprisonment followed by five years of supervised

release. Defendant began his five-year term of supervised release on May 12, 2017. On June 21, 2018, the court sentenced Defendant to 46 months imprisonment for violating the conditions of his supervised release.

On August 8, 2018, the Defendant was charged in a three-count indictment with Possession With Intent to Distribute Cocaine Hydrochloride, in violation of 21 U.S.C. § 841(a)(1) (Count 1), Possession With Intent to Distribute Marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 2), Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. 924(c)(1)(a) (Count 3). (Doc. 1.) A grand jury returned a superseding indictment on January 9, 2019, that added an additional defendant and allegations of a drug weight of 500 grams and more of cocaine hydrochloride. (Doc. 51.) On September 12, 2018, Defendant entered a plea of not guilty and was detained. (Docs. 15, 16.)

On November 5, 2018, Defendant filed (1) a motion to suppress physical evidence recovered from his vehicle (Doc. 27); (2) a motion to suppress physical evidence recovered during a search of his residence (Doc. 29); and (3) a motion to dismiss the indictment for a violation of the Double Jeopardy Clause related to the revocation of his supervised release and the resulting term of imprisonment (Doc. 31). A suppression hearing was held on December 6, 2018. (Doc. 48.) On January 15, 2019, Defendant filed an additional motion to dismiss the indictment or, in the alternative, suppress evidence based upon a violation of the Compulsory Process

Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, arguing that unknown police officers destroyed a box and bag that allegedly contained a large sum of money and was found in the trunk of Defendant's vehicle. (Doc. 76.) The Government has responded to Defendant's initial three motions to suppress but has not responded to the motion to dismiss or suppress based on violations of the Sixth Amendment. Because the time to respond thereto has lapsed, Defendant's motions are fully briefed and are ripe for disposition.[1]

B. Relevant Factual Background

The court's recitation of the factual background is limited to those facts necessary to dispose of Defendant's motions. As noted above, Defendant began a term of supervised release on May 12, 2017, stemming from prior convictions. During his term of supervised release, Defendant violated the terms of his release on numerous occasions, including unauthorized travel, unprescribed opioid use, and police contact for domestic situations. Probation eventually reported these violations, and a warrant was issued for Defendant's arrest on March 27, 2018. (*See*

[1] Pursuant to Local Rule 7.6, the court will deem such a motion unopposed. Although deemed unopposed, the court is still mandated to consider whether the granting of the motion is appropriate. *Trickel v. Disc. Gold Brokers, Inc.*, No. 14-cv-1916, 2015 WL 12290017, *2 (M.D. Pa. July 21, 2015), *report and recommendation adopted sub nom. Trickel v. Disc. Gold Brokers, Inc.*, No. 14-cv-1916, 2015 WL 12517429 (M.D. Pa. Aug. 11, 2015); *see also Winkelman v. United States*, No. 01-cr-304, 2010 WL 11432872, *1 (M.D. Pa. Nov. 5, 2010) ("No opposing brief has been filed. Thus, according to the Middle District Local Rules, [the defendant's] motion is deemed unopposed. Now, therefore, for the following reasons, we will deny the motion without prejudice.").

Doc. 29-6.) On April 6, 2018, the United States Marshalls Service Fugitive Task Force ("Task Force") executed the warrant and arrested Defendant. At the time of the arrest, Defendant was operating a rented vehicle[2] in the vicinity of his residence. Prior to his arrest, Gary Duncan, a Deputy United States Marshall ("Marshall Duncan"), observed Defendant exit his residence and place a large bag into the trunk of the car. (Doc. 73-3, p. 13.) Marshall Duncan followed Defendant and eventually turned on his lights and sirens in an attempt to detain Defendant. (*Id.*) Marshall Duncan testified that it initially appeared that Defendant was not going to obey the signal to pull over, but at the last minute, Defendant swerved to the side of the street and struck a parked car. (*Id.* at 14-15.) After taking Defendant into custody, Duncan and other members of the Task Force performed a routine search and inventory of the vehicle. In the course of searching the vehicle, Marshall Duncan cleared the trunk to ensure that no other occupants were hiding therein. He stated that, in his experience, the trunk would sometimes be occupied to conceal additional persons in the vehicle. (*Id.* at 17.) In the trunk, Duncan found a large paper bag that contained a shoe box. The bag had tipped over and the shoebox had partially fallen out of the bag. (*Id.* at 21, 34.) The shoe box was not open, but there was a hole in the side of the shoebox, which apparently was the size of a person's finger and used to open the

[2] Despite the fact that the vehicle operated by Defendant was a rental, the court refers to it herein as "Defendant's vehicle" for the sake of clarity.

Appx-19

shoe box. (*See* Doc. 73-4.) Through this hole, Marshall Duncan saw what he believed to be currency. Believing the currency to be related to drug trafficking, Marshall Duncan opened the box and discovered cash in an amount later determined to be $79,320. (Doc. 73-3, pp. 19, 63-64.)[3] After clearing the trunk of the vehicle, Marshall Duncan called the Harrisburg Police Department's Vice Division ("Vice"), which is predominantly tasked with investigating crimes related to drug trafficking and prostitution in Harrisburg. (*Id.* at 25-26, 42.) While waiting for Vice to arrive, Marshall Duncan secured the residence, meaning that he entered the residence to ensure that no one entered or exited until Vice arrived with a valid search warrant. (*Id.* at 26.)

Detectives Jason Paul ("Detective Paul") and Nicholas Ishman ("Detective Ishman") of Vice arrived on the scene and secured the shoe box and money found in the vehicle. (*Id.* at 42-43, 68-70.) Per standard procedure, Detective Ishman secured the box by taping it with evidence tape and signing it along with Marshall Duncan. (*Id.* at 44.) He then delivered the sealed box to his partner, Detective Paul, for processing and entered the residence. (*Id.* at 45.) Detective Paul testified that it was standard procedure to perform an inventory of any vehicle that was to be towed to ensure that there were no valuable items in the vehicle. (*Id.* at 69.) He stated that this policy was to prevent owners of the vehicle from later claiming that items of

[3] An additional $1,550 was found inside the residence. (Doc. 29-3.)

value were missing from the vehicle when it was recovered from impound. (*Id.* 70.) Because Defendant's vehicle had struck a parked car, it was standard procedure to have that vehicle towed from the scene.

After securing the shoebox and money, Detective Paul indicated to Detective Ishman that he would be applying for a search warrant for the residence. (*Id.* at 46.) Detective Paul initially asked Defendant's girlfriend, Mikia Slone ("Slone"), for permission to search the residence, which she declined. (*Id.* at 75.) Detective Ishman told Detective Paul, incorrectly, that the relevant address was 648 South 21st Street, but the correct address was 748 South 21st Street. (*Id.* at 46, 74.) This error was overlooked at the time, and the search warrant was obtained for the incorrect address. In reliance on the validity of the search warrant, Detectives Ishman and Paul began searching the residence. (*Id.* at 47.) Detective Ishman later noted this error in his report of the incident. (*Id.* at 49-50; Doc. 29-3, p. 14.) After Detective Paul obtained the search warrant, an Investigator with Vice, Karen Lyda ("Investigator Lyda"), photographed the interior and exterior of the residence and the vehicle. (Doc. 73-3, pp. 47-50, 77, 98.)[4]

[4] Defendant, against the advice of counsel, took the stand to testify on his own behalf at the suppression hearing. At the hearing, he disputed Investigator Lyda's testimony that she did not photograph the residence until after the search warrant was obtained. He stated that he witnessed a female officer opening the trunk multiple times and photographing prior to Detective Paul obtaining the warrant. (Doc. 73-3, p. 105.) It does appear that Investigator Lyda did photograph the shoebox and money prior to Detective Paul obtaining the search warrant. (Doc. 29-3, p. 12 (report of reporting officer stating that Detective Paul delivered the shoebox to him prior to applying for the search warrant).) Defendant also stated that he was not attempting to flee when

Appx-21

The Detectives of Vice performed a search of the residence. (Doc. 73-3, p. 65.) During the search, members of the Task Force located the following items:

1. Taurus 9mm handgun, serial number TKR74986 and magazine laying on the bed in the master bedroom

2. .45 caliber ammunition in the kitchen

3. Five large vacuum sealed bags of marijuana in the bedroom

4. Bags of cooking and packaging materials, including two blenders, 2 glass measuring cups, two sifters, three digital scales, 4 bottles of benzocaine hydrochloride, Arm and Hammer baking soda, a bag of confectioner's sugar, a bag of small Ziplock style baggies, a box of sandwich bags, a kilogram press, measuring spoons, Rubbermaid containers and spoons

5. Bag of white powder

6. Money counter

7. Mail for Defendant

8. Defendant's wallet

9. Black holster in the master bedroom

10. Five cellular telephones

11. $1,550 in U.S. currency

12. An owe sheet

(Doc. 29-3, pp. 3-8.) Members of the Task Force packaged the evidence and processed it according to standard procedure. (Doc. 29-3, p. 14.)

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he hit the parked car, but instead was forced to the side of the road by Marshall Duncan. (*Id.* at 108.)

App 8/22

II. Legal Standard

The United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "On a motion to suppress, the government bears the burden of showing that each individual act constituting a search or seizure under the Fourth Amendment was reasonable." *United States v. Ritter*, 416 F.3d 256, 261 (3d Cir. 2005). "The applicable burden of proof is by a preponderance of the evidence." *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

III. Discussion

A. Suppression Motions

i. Evidence Found in Defendant's Vehicle

Defendant argues that the shoebox and cash found in the trunk of his vehicle should be suppressed because Marshall Duncan effected the search without a warrant and without probable cause. Specifically, Defendant argues that the search to clear the car of potential dangers or other occupants was a pretext either to search the vehicle for evidence of a crime generally or because Marshall Duncan had witnessed Defendant place a paper bag in the trunk prior to the initiation of the arrest.

Under the Fourth Amendment, warrantless searches and seizures are presumed to be unreasonable unless an exception to the warrant requirement applies. *California v. Acevedo*, 500 U.S. 565, 580 (1991). The government bears the burden

of proving by a preponderance of the evidence that each individual act constituting a search under the Fourth Amendment was reasonable. *Ritter*, 416 F.3d at 261; *Matlock*, 415 U.S. at 177 n.14. Exceptions to this general rule exist if the search incident to arrest is based upon the need to (1) preserve evidence of the crime of arrest or (2) maintain officer safety. *Chimel v. California*, 395 U.S. 752, 762-65 (1969); *Arizona v. Gant*, 556 U.S. 332 (2009). Moreover, an exception exists where police take an inventory of the vehicle pursuant to standard procedure for non-investigative purposes. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

Defendant argues that neither of the first two exceptions apply because he was not near the vehicle at the time of the arrest and could not have accessed any items in the trunk of the vehicle, so officer safety was not a concern, and there was no legitimate connection between the crime for which he was being arrested and any items in the trunk because he was arrested for violations of the terms of his supervised release committed prior to the date of arrest. The court need not consider, however, whether Marshall Duncan's initial search of the trunk was lawful because the evidence contained within the trunk would have inevitably been discovered by Detectives of the Harrisburg Police Department.

When Marshall Duncan attempted to pull Defendant over to the side of the road, Defendant swerved and struck a parked vehicle. Regardless of whether he was intending to flee or was forced to the side of the road, his vehicle was involved in a

traffic accident. Detective Paul testified that it is standard practice for Harrisb Police to inventory vehicles to be taken to impound following an accident or arrest. Even if Marshall Duncan had not opened the trunk at all, Harrisburg Police would have conducted an inventory search of the car immediately prior to towing it away from the scene of the accident.

> Under the inevitable discovery doctrine, "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." The Government can meet its burden by establishing "that the police, following routine procedures, would inevitably have uncovered the evidence." The inevitable discovery analysis focuses on "historical facts capable of ready verification, not speculation."

United States v. Stabile, 633 F.3d 219, 245 (3d Cir. 2011) (citing *Nix v. Williams*, 467 U.S. 431 (1984); *United States v. Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998) (internal citations and quotations omitted)). "Impoundment constitutes a reasonable course of action when the owner of a vehicle abandons it, or law enforcement cannot identify the owner." *United States v. Bullette*, 854 F.3d 261, 265 (4th Cir. 2017) (holding that a search of a defendant's car on property under investigation was valid under the inevitable-discovery doctrine because standard DEA practice would have required an impoundment and inventory of the vehicle) (citing *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976)). The facts of this case fit squarely in the bounds of the inevitable-discovery doctrine and investigative

searches pursuant to impoundments. Detective Ishman testified that it was standard procedure to inventory vehicles prior to impoundment to catalog valuable items. (Doc. 73-3, p. 70.) Thus, assuming, *arguendo*, that Marshall Duncan's search was invalid, members of the Harrisburg Police Department would inevitably have been called to remove the vehicle and would have searched the vehicle to inventory it according to standard practice and procedure. Accordingly, the shoebox and money contained therein need not be suppressed.

ii. Evidence Obtained from Defendant's Residence

Defendant next argues that the evidence recovered from a search of his residence was invalid. Specifically, Defendant argues that the search warrant is invalid based solely on an error in the numerical address of the residence. Detective Ishman incorrectly relayed the address to Detective Paul as 648 South 21st Street, Harrisburg Pennsylvania rather than 748 South 21st Street, Harrisburg Pennsylvania, and, thus, the address listed on the search warrant was incorrect. Although "minor irregularities" and typographical errors should not be allowed to defeat what would otherwise support a finding of probable cause, *United States v. Sirmans*, 278 F. App'x 171, 173 (3d Cir. 2008), the search warrant standing alone may not be sufficiently particularized because it contains no other identifying information aside from the street address of the residence. Even if it did not meet this requirement,

however, the search would not be invalid because of the "good faith exception" to the warrant requirement.

The good faith exception allows the inclusion of evidence obtained pursuant to a search warrant later held to be invalid unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). The good faith exception applies unless: (1) the affidavit supporting the warrant was deliberately or recklessly false; (2) the magistrate did not act in a neutral or detached fashion; 3) the affidavit supporting the warrant was also lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant was facially deficient and did not particularize the place to be searched or the thing to be seized. *United States v. Zimmerman*, 277 F.3d 426, 436-437 (3d Cir. 2002). Because the officers were physically present at the relevant residence and were aware of the general area to be searched, there is little concern that the officers would be confused by the typographical error, and they would have little basis to conclude that the warrant was invalid. Further, none of the factors set forth in *Zimmerman* are present in this case. The affidavit was not recklessly or intentionally false. Detective Paul testified that he relied on Detective Ishman's misrecollection of the address. There is no evidence that the Judge did not act in a neutral or detached fashion. The affidavit of probable cause was quite descriptive, referring to the site of the initial

arrest, the residence Defendant was observed leaving, and the residence of Defendant and his girlfriend, Slone. The affidavit also makes note of the money found during the initial search as well as voluntary statements by Slone that Defendant dealt marijuana from the residence. These details are far from lacking in indicia of probable cause. Finally, aside from the single misplaced digit, there is no facial deficiency in the warrant. Accordingly, the court concludes that the officers relied upon the validity of the warrant in good faith while conducting the search, and, thus, the evidence obtained from that search need not be suppressed.

B. Motions to Dismiss Indictment

i. Double Jeopardy

Defendant first moves to dismiss the indictment under the Double Jeopardy Clause of the Fifth Amendment which provides, in pertinent part: "nor shall any person be subject for the same offence twice put in jeopardy of life or limb." U.S. Const. amend. V. Despite acknowledging case law to the contrary, Defendant argues that the court's revocation of supervised release precludes prosecution of the charges in the instant indictment. It is well-settled that revocation of a defendant's term of supervised release based upon the same conduct of new charges does not violate the Double Jeopardy Clause because the term of imprisonment following the revocation is considered part of the original sentence. *Johnson v. United States*, 529 U.S. 694, 700 (2000); *United States v. Dees*, 467 F.3d 847, 853 (3d Cir. 2006).

In *Johnson v. United States*, the Supreme Court addressed whether Double Jeopardy attaches when a defendant's actions in violation of terms of supervised release are criminal in their own right. *Johnson*, 529 U.S. at 700. The Court concluded that prosecution of the acts giving rise to the revocation of supervised release does not implicate double jeopardy because the revocation is based upon the "breach of trust" shown by the defendant in violating the terms of his release rather than the criminal nature of the acts themselves, and the subsequent term of imprisonment relates back to the original offense rather than a future offense that may arise from those same criminal acts. *Id.* Put more plainly, when a court sentences a defendant to a term of supervised release, the court places trust in the defendant that he will abide by the conditions imposed by the court. If the defendant fails to abide by these terms, the court may impose an additional term of imprisonment that is tied to the original offense because the defendant failed to uphold the conditions placed upon him by the court at the time of sentencing, not necessarily because of the criminal nature of the acts resulting in revocation.

Although Defendant concedes that this general rule would not implicate the Double Jeopardy Clause, he points to a recent decision by the Tenth Circuit that announced an exception to this rule and is currently under consideration by the Supreme Court. *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017), writ of certiorari granted, ___ U.S. ___, 2018 WL 3008875 (October 26, 2018). Although

a review of this decision is an illuminating academic exercise, the facts of Defendant's case do not fit the exception set forth by the Tenth Circuit. In *Haymond*, following a conviction for possession of child pornography, the defendant was sentenced to a term of imprisonment of 38 months and a term of supervised release of ten years. After his release from prison, the defendant's term of supervised release was revoked after the district court found by a preponderance of the evidence that he had possessed child pornography. As the Tenth Circuit explained, Section 3583(k) of the Sentencing Code mandates that, if the district court finds, by a preponderance of the evidence, that the defendant committed certain offenses in violation of his terms of supervised release, the court *must* impose a minimum term of imprisonment of five years to life. *Haymond*, 869 F.3d at 1162 ("A violation that is the commission of 'any criminal offense under chapter 109A ["Sexual Abuse"], 110 ["Sexual Exploitation and Other Abuse of Children"], or 117 ["Transportation for Illegal Sexual Activity and Related Crimes"] , or section 1201 ["Kidnapping"] or 1591 ["Sex trafficking of children or by force, fraud, or coercion"], for which imprisonment for a term longer than 1 year can be imposed,' however, is governed instead by [18 U.S.C.] § 3583(k), which, when read with [18 U.S.C.] § 3583(e)(3), requires a mandatory term of reimprisonment of at least five years and up to life."). The Tenth Circuit held Section 3583(k) unconstitutional because "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily

prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished." *Id.* at 1162.

In contrast, Defendant's supervised release was revoked pursuant to Section 3583(e)(3), which does not impose a mandatory minimum sentence or deprive the district court of discretion to impose a reasonable term of reimprisonment. Moreover, Defendant cites to no case which has held Section 3583(e)(3) unconstitutional, and this court has found no such case. *See Dees*, 467 F.3d at 855. Accordingly, the exception to *Johnson* announced by the Tenth Circuit in *Haymond* is inapplicable in this case, even if *Haymond* were controlling precedent to this court or the Supreme Court were to affirm the Tenth Circuit's decision. Accordingly, Defendant's motion to dismiss the indictment will be denied.

ii. Destruction of Evidence

Defendant lastly argues that the government destroyed the shoe box and paper bag in violation of its constitutional duty to turn over exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). This duty extends to the preservation of evidence in police custody. *United States v. Deaner*, 1 F.3d 192, 199 (3d Cir. 1993). In order to justify dismissal of a case for a violation of the duty set forth in *Brady*, a defendant must show: (1) that the evidence destroyed had exculpatory value that was

apparent prior to it being destroyed; and (2) police destroyed the evidence in bad faith rather than by mere negligence. *Arizona v. Youngblood*, 288 U.S. 51, 58 (1988). To demonstrate bad faith, the defendant must show that police knew of the exculpatory evidence at the time it was destroyed. *United States v. Jackman*, 72 F. App'x 862, 866 (3d. Cir. 2003). In the absence of bad faith, the court may consider suppression of the evidence that was withheld or destroyed. Specifically, in his brief in support of his motion to dismiss the indictment, Defendant argues that:

> If there is a tight fit between the box and bag, that tightness of fit would prevent the box from easily sliding out of the bag as alleged. If the box is not sufficiently outside of the bag, the U-shaped cutout on the box top (and the currency therein) obviously would not be in plain view. In like manner, the box and bag appear to be rectangular in shape. If so, the relative orientation of the box and bag (again, the manner in which the box fits inside the bag, lengthwise versus widthwise) also allows the finder of fact to properly assess the credibility of the officers' claim that the U-shaped cutout was in plain view.

(Doc. 74, p. 7.) *See Lambert v. Blackwell*, 387 F.3d 210, 252 (3d Cir. 2004) ("impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule") (citation omitted).

Initially, the court has little evidence that the physical shoe box and paper bag are sufficiently material or exculpatory to trigger *Brady*. There are several photographs that show the relative size and shape of the box and bag that a reasonable jury could evaluate Defendant's argument. (Doc. 73-4.) The court, however, need not reach this issue for the reasons stated above relating to the

inevitable-discovery doctrine. Defendant's argument hinges on the idea that the cash in the box would not have been discovered because the box could not have slid out of the paper bag, thus exposing the hole in the box to Marshall Duncan's plain view of the trunk's interior. As explained above, even if the court determines that Marshall Duncan's search was unlawful, Harrisburg Police would have discovered the box and cash during their inventory of the vehicle subject to impoundment. Accordingly, the alleged impeachment value of the physical box and bag is nullified and suppression of the evidence or dismissal of the indictment is not required in this case.

IV. Conclusion

For the reasons set forth above, the court finds that Defendant's vehicle and residence were subject to lawful searches and, thus, suppression of the evidence resulting therefrom is not warranted. Additionally, the court finds that the physical evidence allegedly destroyed by police holds no exculpatory value and, thus, the alleged destruction does not mandate dismissal of the indictment or suppression of the evidence under *Brady*. Further, the court finds that the revocation of Defendant's supervised release does not implicate the Double Jeopardy Clause of the Fifth Amendment. Accordingly, Defendant's motions to suppress will be denied in their entirety, Defendant's motion to dismiss the indictment pursuant to the Double Jeopardy Clause will be dismissed, and Defendant's motion to dismiss the

indictment or, in the alternative, suppress evidence will be denied. An appropriate order follows.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: May 2, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1837

UNITED STATES OF AMERICA,

v.

DAMON TODD CAREY,

Appellant

(District Court No.: 1-18-cr-00263-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges and AMBRO* and FUENTES*, Senior Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

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*Judge Ambro and Judge Fuentes' votes are limited to panel rehearing only.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: October 12, 2023
Sb/cc: Damon Todd Carey
All Counsel of Record

Additional material from this filing is available in the Clerk's Office.