IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW PULLUM,

Defendant.

OPINION & ORDER

16-cr-2-jdp

This case arises out of an FBI sting targeting defendant Andrew Pullum, a City of Madison police officer. An undercover FBI agent posing as the girlfriend of a drug dealer told Pullum about a car ostensibly belonging to the drug dealer, from which Pullum allegedly stole $3950 in cash. The day after Pullum is supposed to have taken the money, agents executed a search warrant at Pullum's residence where they found and seized cocaine, marijuana, and 16 firearms. On January 6, 2016, the grand jury returned a two-count indictment against Pullum. Count 1 charges Pullum with stealing $3950 that belonged to the FBI. Count 2 charges Pullum with unlawfully possessing the 16 firearms as a prohibited person, specifically, an unlawful user of marijuana and cocaine. *See* Dkt. 11.

Pullum, by counsel, has filed nine pretrial motions, which the court addresses below in docket order. The bottom line is that the court will deny all of Pullum's pretrial motions.

ANALYSIS

A. Dkt. 18: Motion to sever

The government agrees that the court should sever the counts for trial. Dkt. 33, at 6. The parties have agreed to try Count 1 to the court on May 9, 2016. Dkt. 38; Dkt. 44;

Dkt. 45. The parties will try Count 2 to a jury on June 6, 2016. Dkt. 43. In light of the parties' agreement, the court will deny the motion as moot.

B. Dkt. 19: Motion to quash search warrant and suppress evidence

On December 18, 2015, this court issued a search warrant for 260 Meadowside Drive, Verona, Wisconsin, a two-story residential unit in a fourplex, and authorized a search for money taken from an FBI undercover vehicle and any indicia of occupancy. Pullum has moved to quash the search warrant and suppress all evidence seized as a result thereof for three reasons: (1) the affidavit in support of the warrant does not articulate any facts connecting Pullum to the Meadowside Drive residence; (2) the affidavit does not say why the FBI believed that they would find evidence of a crime at the residence; and (3) the warrant did not authorize law enforcement to search Pullum's vehicle, which was not at 260 Meadowside Drive during execution but at a police station six miles away. The court will address the third contention in connection with Pullum's third motion, at Dkt. 20.

Pullum has attached a copy of the warrant and the supporting affidavit to his motion, Dkt. 19-1, and the documents speak for themselves. To summarize, the affiant, FBI Special Agent Beth Boxwell, states that in August 2015, the Internal Affairs Division (IAD) of the Madison Police Department (MPD) requested assistance from the FBI and ATF after receiving a tip that an MPD officer was planning to help others commit a robbery. On December 17, 2015, the FBI, with assistance from MPD, targeted MPD Officer Andrew Pullum for a sting investigation. MPD Lieutenant Kelly Donohue intentionally passed along to Officer Pullum a tip from a concerned citizen, who was actually an undercover FBI agent. Officer Pullum telephoned the woman, who stated that she was angry with her drug-dealing boyfriend and that she wanted the police to search his car, which he was using to transact a

cocaine sale. The woman told Pullum where the car was and stated that there was cocaine in the trunk and that the key was hidden in a wheel well; the guys buying the drugs would fish out the key, open the trunk, take the cocaine, and leave the cash payment.[1]

As part of the sting, the FBI had parked a bait car in a parking lot at Elver Park. The FBI had placed a duffle bag holding "approximately $4,000 in prerecorded FBI owned money" in the trunk. Dkt. 19-1, ¶ 6. The bag also contained a hidden GPS tracking device. A police surveillance airplane watched Pullum drive to the bait car, park his squad, circle the car on foot, and retrieve the key from the wheel well. Pullum opened the trunk, grabbed the duffle with the cash and the GPS tracking device, placed the duffle in his squad car, and drove off.

Pullum then returned to the bait car and radioed for a drug-detecting canine. Several MPD officers arrived, including a K-9 unit, and the dog alerted to the car. Officers searched the car but seized nothing. They all left the scene in their own squad cars. At the end of his shift (around 10:00 p.m.), Pullum returned to the MPD West District Station and entered the building briefly before leaving in his personal car. The GPS tracking device indicated that the bait bag was in Pullum's personal car as he drove west on McKee Road and turned into a parking lot at a rural park (the Ice Age National Scenic Trail Park). Surveillance, presumably the airplane, watched Pullum exit his car, throw something resembling a bag into a trash can, and drive off, now heading back east on McKee Road. The GPS tracking device indicated that the bag had been left in the park. Agents on the ground recovered the bait bag from the trashcan; it was empty. Airplane surveillance watched Pullum stop at a residence near McKee

[1] Pullum has submitted a transcript of the undercover agent's statements at Dkt. 26-1, but the transcript was not part of the search warrant application.

Road, where he spent about 30 minutes inside before returning to his car and driving west on McKee Road, toward Verona. According to Agent Boxwell, at about 10:35 p.m., "airplane surveillance then observed Officer Pullum pull into his garage at 260 Meadowside Drive in Verona." *Id.* ¶ 7.

That same evening, an IAD officer checked with the West District's property supervisor and checked computer records to confirm that Pullum had not turned in any money and had not logged into evidence any money before concluding his shift and leaving the station.

Agent Boxwell closed her affidavit with the statement that "[a]s set forth above, there is probable cause to believe that the money taken from the undercover vehicle will be found at 260 Meadowside Drive, Verona, WI or in any of his vehicles." *Id.* ¶ 10. This court, by Magistrate Judge Stephen Crocker, issued the warrant on December 18, 2015, at 1:40 p.m.

Pullum's first challenge to the warrant is that the affidavit does not contain any facts that connect Pullum to 260 Meadowside Drive. Pullum points out that the only sentence in the affidavit that specifically links him to 260 Meadowside Drive is the statement that the agents in the plane saw him pull into "his" garage at 260 Meadowside Drive in Verona. Pullum contends that this is the sort of unsupported, conclusory allegation that *Illinois v. Gates*, 462 U.S. 213, 239 (1983), and the circuit courts condemn. Pullum separately argues that the affidavit fails to connect the alleged theft of the money from the bait car to the residence to be searched. The court will address both points together, at least initially.

Pullum has a minor point: the affiant should have included a sentence explaining how the FBI knew that the residence to be searched was Pullum's residence. They were correct, it turns out, but they did not specifically articulate how they knew that Pullum lived at 260

Meadowside Drive. It would have been simple to include this information in the affidavit, but nobody caught the oversight—not the FBI, not the U.S. Attorney's Office, not the court when it issued the warrant. But this oversight provides no reason to quash the warrant because the warrant included sufficient information to establish probable cause to search 260 Meadowside Drive, regardless of who lived there.

For probable cause purposes, it was enough for the agents in the plane to see Pullum drive to and stay at the residence at 260 Meadowside Drive. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *United States v. Mancari*, 463 F.3d 590, 594 (7th Cir. 2006) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)). In *Zurcher*, the Court observed that it is untenable to conclude that law enforcement may search property only if they reasonably suspect that the *occupant* committed a crime and is subject to arrest; the Fourth Amendment does not prevent entry into a third party's property to recover evidence of a crime not committed by them but by others. 436 U.S. at 559. In other words, if the affidavit in this case establishes probable cause to believe that evidence of the alleged theft of government money would be found at 260 Meadowside Drive, then it is irrelevant whether the affidavit also establishes that it was Pullum's residence.[2]

[2] The Seventh Circuit case that Pullum cites in support of this aspect of his motion makes the same point. In *United States v. Brown*, the court noted that not only did the search warrant affidavit fail to show how the police knew that the Westminster apartment was truly one of the defendant's addresses, but "[a]lso there was a paucity of information suggesting that a search of the Westminster address would uncover evidence of wrongdoing." 832 F.2d 991, 994 (7th Cir. 1987).

So the court turns to Pullum's second contention—namely, that the affidavit does not establish probable cause to believe that law enforcement would recover evidence of a crime at 260 Meadowside Drive. Pullum essentially argues that just because he stopped there does not mean that law enforcement had good reason to believe that they would find the stolen money there. The affidavit provides that FBI agents in an airplane saw Pullum remove the bag of money from the bait car and then watched him continuously for the rest of the evening and monitored the GPS tracking device hidden in the duffle bag. After searching the bait car for the benefit of his fellow officers, Pullum finished his shift; the GPS device indicated that he still had the bag of money with him. Pullum checked out at the West District Station before departing in his personal car; the GPS device indicated that he still had the bag with him, in his personal car. That same evening an IAD lieutenant confirmed that Pullum had not turned in any cash before leaving the station. The affidavit allows for the reasonable inference that Pullum still had the money with him at the end of the night because he took the bag to a desolate park and dumped the empty bag into a trashcan. The likely scenario, then, was that Pullum had the money with him when he left that park without the bag. Agents saw him stop for a while at a residence near McKee Road before returning to his car to drive into "his" garage at 260 Meadowside Drive in Verona.

By the end of the night, the evidence indicated that Pullum had left the money at one of three places: at the residence near McKee Road, in his personal car, or at the residence on Meadowside Drive. Because Pullum had parked his car for the night at the Meadowside Drive residence, it became a 50/50 shot where the FBI would find its money, regardless of where Pullum actually lived.

The affidavit established probable cause to search the Meadowside Drive residence. The judge reviewing a warrant application must make a practical, common sense decision whether, given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. This is a low evidentiary threshold, requiring only a "probability or a substantial chance of criminal activity not an actual showing of such activity." *United States v. Roth*, 201 F.3d 888, 893 (7th Cir. 2000) (quoting *Gates*, 462 U.S. at 243-44 n.13). *See also Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013) (probable cause is a "practical, commonsense standard that requires only the type of fair probability on which reasonable people act").

Put another way, regardless of who lived at 260 Meadowside Drive, this court had a substantial basis to conclude that a search of the residence "was reasonably likely to uncover evidence of wrongdoing." *United States v. Reichling*, 781 F.3d 883, 886 (7th Cir. 2015) (quoting *United States v. Aljabari*, 626 F.3d 940, 944 (7th Cir. 2010)). "Probable cause is established when, based on the totality of the circumstances, the affidavit . . . sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *Id.* at 886. As the court put it in *United States v. Aleshire*, 787 F.3d 1178, 1178 (7th Cir. 2015), "a warrant-authorized search must be sustained unless it is pellucid that the judge who issued the warrant exceeded constitutional bounds."

Pullum calls this "bootstrapping" in his reply brief, Dkt. 40, at 4-5, but he gets stuck on the misguided notion that probable cause must stem from facts establishing that 260 Meadowside Drive is "his" home. But as discussed, the probable cause analysis travels to the locations that Pullum visited if law enforcement has reason to believe that they may find evidence of a crime at those locations, regardless of where Pullum lives. Based on the airplane

surveillance, the FBI probably could have sought and obtained search warrants for both residences that Pullum visited after leaving the empty duffle bag in the park. But the agents chose to obtain a warrant only for where Pullum concluded his night, a choice that was the FBI's investigative prerogative. As the court put it in *Aleshire*, "judges do not view facts in isolation. As *Gates* holds, the question is whether the available facts, taken together, justify the proposed intrusion into the suspect's private life." 787 F.3d at 1179. The search warrant issued for 260 Meadowside Drive is valid.

As a fallback, the government offers a token "good faith" argument pursuant to *United States v. Leon*, 468 U.S. 897, 919-23 (1984). In his reply brief, Pullum devotes a significant amount of ink to showing why *Leon* does not apply here, but his arguments rely on his substantive attacks on the affidavit's probable cause, which the court has already rejected. If the probable cause question were a closer call, the court would conclude that the affidavit does not contain any material falsehoods and does not omit any material facts, that the magistrate judge who issued the warrant did not abandon his duty to review the application in a neutral and detached fashion, and that the affidavit was not bare bones. *See, e.g.*, *Reichling*, 781 F.3d at 889 (citations omitted).

C. Dkt. 20: Motion to suppress vehicle search

Pullum has also moved to suppress evidence seized during the search of his vehicle that occurred while it was parked at a police station six miles from 260 Meadowside Drive. The government responds that law enforcement did not seize any evidence from Pullum's vehicle. Dkt. 33, at 6. Accordingly, the court will deny this motion as moot.

D. Dkt. 21: Motion to suppress firearms

In applying for the search warrant issued in this case, the FBI represented that they were looking for evidence related to their sting investigation, specifically, money Pullum allegedly took from the FBI's undercover vehicle (plus evidence of residency). While executing the warrant, law enforcement found cocaine, marijuana, drug paraphernalia, 15 firearms, and about 3900 rounds of ammunition, all of which they seized. (Inventories of items seized are located at Dkt. 33-2.) Pullum has moved to suppress the firearms, arguing that law enforcement did not have authority to seize them pursuant to the warrant, nor could law enforcement seize them under the plain view doctrine because their contraband nature was not immediately apparent. Although Pullum has not formally withdrawn this motion, his attorney has informally indicated in conversations with Magistrate Judge Crocker that, upon further review of all of the reports about the search, he is not actively pursuing this motion. As a result, the government did not respond to it, and Pullum did not address it in his reply brief.

But for completeness's sake, the court notes that Pullum has accurately set forth the three-part plain view doctrine test, *see, e.g.*, *United States v. Raney*, 342 F.3d 551, 558-59 (7th Cir. 2003), and has conceded the first two factors. Pullum challenges only the searching officers' determination on the scene that Pullum's firearms were obvious contraband. The fact that the firearms themselves were not inherently contraband does not preclude application of the plain view doctrine. *Id*. at 559. But law enforcement had the authority to seize the firearms only if the officers knew at the time that they were searching that Pullum was a "prohibited person" under 18 U.S.C. § 922(g)(3)—namely, that Pullum was an "unlawful user of or addicted to any controlled substance."

The report of Pullum's December 18, 2015, FBI interview shows that Pullum started answering questions at about 2:52 p.m. and talked until 4:41 p.m. *See* Dkt. 33-1. During the interview, Pullum admitted that he smoked marijuana "a lot" with his friend Eugene Crisler, and he also admitted that he had been using coke for "a while," preceding his move to Madison two years earlier. *Id.* at 1-2. ATF agents executing the search warrant at 260 Meadowside Drive reported that they seized Pullum's firearms and ammunition after learning that Pullum had admitted to regularly using both marijuana and cocaine. Dkt. 33-2, at 1. A report by a Verona police officer indicates that the ATF agents were still on the scene when that officer arrived at 5:15 p.m. on December 18, 2015. *Id.* at 4. This establishes that agents executing the search warrant were aware that Pullum was an ongoing unlawful user of controlled substances, which rendered his possession of firearms unlawful under 18 U.S.C. § 922(g)(3). Therefore, the contraband nature of Pullum's firearms was apparent to the agents before the agents seized them. The court will deny the motion to suppress.

E. Dkt. 22: Motion to dismiss Count 2, 18 U.S.C. § 922(g)(3) as facially vague

Pullum has filed five motions to dismiss counts in the indictment. Four of the motions challenge the constitutionality of 18 U.S.C. § 922(g)(3), which bars certain categories of persons (including "unlawful user[s] . . . of any controlled substance") from possessing firearms. Pullum contends that the statute violates due process (as void for vagueness) and the Second Amendment, and he has mounted both a facial challenge and an as-applied challenge under each theory. The court will address the four motions in turn, beginning with Pullum's facial challenge to the statute as unconstitutionally vague, in violation of due process.

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (The government violates due process when it punishes someone under a "criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983))). Pullum contends that § 922(g)(3) is unconstitutional on its face because the statute does not explain what it means to be an "unlawful user." He argues that the term "unlawful user" does not tell the public how current or how frequent one's controlled substance use must be to qualify for the prohibition, leaving the public unsure about what conduct the statute prohibits and leaving law enforcement free to enforce the statute arbitrarily.

As of now, no court has seized the opportunity to consider a facial challenge to § 922(g)(3), which is not surprising. As a general rule, courts do not entertain facial vagueness challenges to criminal statutes; vagueness challenges must be brought on an as-applied basis. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010). The principle behind the general rule is that a defendant whose conduct is clearly proscribed cannot complain about the vagueness of the law as applied to others. *Id*. There tends to be some leeway for laws that proscribe activity protected by the First Amendment, *see, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 573 (1974), on the theory that any statutory vagueness carries a high risk of interference with constitutionally protected activities at the whim of enforcing

officers and judges. But § 922(g)(3) does not reach into First Amendment territory, so the court could dismiss Pullum's facial challenge as dead on arrival.

Against the general rule, Pullum cites the Supreme Court's recent decision in *Johnson*, which Pullum contends authorizes direct facial vagueness challenges to criminal statutes. In *Johnson*, the Court did indeed go straight to the facial vagueness of the Armed Career Criminal Act's residual clause and held that it was unconstitutional for that reason. One would think that if the Court intended to significantly change the void-for-vagueness doctrine it would announce it more clearly. (And, in dissent, Justice Alito makes this point. 135 S. Ct. at 2580-81 (Alito, J., dissenting).) But for purposes of Pullum's motion, the court will acknowledge that *Johnson* does appear to authorize facial vagueness challenges outside of the context of the First Amendment and will consider the facial vagueness question here. But *Johnson* does not do the job for Pullum.

Johnson reiterates that a criminal statute is not unconstitutionally vague merely because it calls for the application of some qualitative standard:

> As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.

Id. at 2561 (citation and internal quotations marks omitted). In other words, a law is not unconstitutionally vague merely because one can adduce some borderline cases in which the application of the law will call for judgment. That is essentially all that Pullum has done here. He proposes several categories of people who might be considered "unlawful users" under § 922(g)(3). Dkt. 22, at 6. Some of Pullum's categories are arguably on the margins of "unlawful user," such as someone who used to be a heavy user, but now uses controlled

substances only every few years. But at least one of Pullum's categories represents the core of those who would unequivocally count as unlawful users of controlled substances: those who frequently use drugs for a long time both before and after possessing a firearm. (Think Cheech and Chong, suggests Pullum.)

The vagueness problem identified by the *Johnson* Court was more fundamental than the borderline-case problem that Pullum has identified. The Court concluded that the problem with the residual clause was not merely disagreements about borderline cases, *Johnson*, 135 S. Ct. at 2560, because even constitutionally clear laws can have indistinct margins. Rather, the problem was that the Court's previous decisions, and those of other courts, had produced only pervasive disagreement about the nature of the inquiry and the factors to consider in applying the residual clause. "[T]his Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* at 2258. It is worth pointing out here that the residual clause, by its nature, deals with hard cases, because the specifically enumerated crimes and the physical force element take care of the run-of-the-mill violent felonies.

As the government points out, the residual clause required courts to analyze many different crimes in the abstract to determine whether they fit within the residual clause. But § 922(g)(3) only requires courts to answer a "real-world" question—namely, whether a particular individual was a habitual controlled substance user at the time he or she possessed a firearm or ammunition. Although no court has entertained a facial vagueness challenge to § 922(g)(3), the meaning and scope of the section has come up in a variety of contexts. Courts of appeal that have considered the scope of § 922(g)(3) have consistently held that to

be an unlawful user subject to § 922(g)(3), one must use drugs on a regular or habitual basis, and the drug use must be contemporaneous with the firearm possession.[3]

The Seventh Circuit has also interpreted § 922(g)(3) as requiring regular use contemporaneous with firearm possession. *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (declaring in the context of a Second Amendment challenge to § 922(g)(3) that an "unlawful user" is someone who regularly ingests controlled substances in a manner except as prescribed by a physician and that the § 922(g)(3) prohibition "bars only those persons who are *current* drug users from possessing a firearm"); *see also United States v. Grap*, 403 F.3d 439, 446 (7th Cir. 2005) (defendant's drug use had to be "contemporaneous with his firearm possession" to qualify him as prohibited person under § 922(g)(3) for purposes of sentencing enhancement); *United States v. Thomas*, 426 F. App'x 459, 461 (7th Cir. 2011) (rejecting defendant's vagueness challenge to § 922(g)(3) because a person's status as unlawful user determined at the time he committed a gun offense and handgun was found in defendant's bedroom along with cocaine).

[3] *See United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004) ("[O]ne must be an unlawful user at or about the time he or she possessed the firearm and that to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm."); *United States v. Turnbull*, 349 F.3d 558, 562 (8th Cir. 2003) (recognizing need for "temporal nexus between regular drug use and . . . possession of firearms" to support conviction under § 922(g)(3)), *cert. granted, judgment vacated*, 543 U.S. 1099 (2005), *opinion reinstated*, 414 F.3d 942 (8th Cir. 2005); *United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002) (district court did not err in finding that to support conviction under § 922(g)(3), government must establish "a pattern of use and recency of use"); *United States v. Purdy*, 264 F.3d 809, 812-13 (9th Cir. 2001) ("[T]o sustain a conviction under § 922(g)(3), the government must prove . . . that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm.").

In light of this consistent construction among federal courts of appeal, Pullum cannot show that § 922(g)(3) is a "standardless" statute that grants "unfettered discretion" to law enforcement and triers of fact. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute[.]"). Pullum has, at most, shown that the application of § 922(g)(3) to some types of people would be uncertain. An imprecise but comprehensible statute is not unconstitutionally vague. *Goguen*, 415 U.S. at 578. Put another way, the mere fact that Pullum is able to hypothesize some cases at the margins where § 922(g)(3)'s application would be uncertain does not warrant striking down the statute as unconstitutional on its face. The court will deny Pullum's first motion to dismiss.

F. Dkt. 23: Motion to dismiss Count 2, 18 U.S.C. § 922(g)(3) as vague as applied

Pullum's as-applied challenge is pitched in terms almost identical to his facial challenge: he contends that the term "unlawful user" so vague that he did not know when his prohibited status began, or how he could end it. In other words, Pullum insists that he is entitled to know precisely where the border is. But that is just a recapitulation of his facial challenge in which he contended that § 922(g)(3) is facially vague because there are borderline cases.

The fundamental problem with Pullum's as-applied challenge is that he falls squarely within the well-defined core of unlawful users. The government's proffer, including Pullum's statements to investigating officers and the evidence seized at his home, indicates that Pullum was regularly using marijuana and cocaine at the time that he possessed numerous firearms. During his post-arrest interview, Pullum admitted that he smoked marijuana frequently and that he had a problem with cocaine. Those statements were corroborated by

the evidence agents found among his personal belongings, including at least 10 grams of cocaine, marijuana, a marijuana blunt, smoking pipes containing suspected marijuana residue, rolling papers, a scale, and a marijuana grinder. And after he made his initial appearance in this case, Pullum submitted a urine sample that tested positive for marijuana. An ordinary person—and certainly Pullum himself—would understand that Pullum's actions established him as an unlawful user under § 922(g)(3).

Pullum argues that the fact that he was employed as a police officer and was required to carry a firearm somehow bolsters his vagueness challenge. The court recognizes that a drug-using police officer is in a tough spot, because asking for help means admitting to a crime and jeopardizing his job. But Pullum is not under indictment because he asked for help with his drug problem. And the weapons charged in Count 2 are not his service weapons, but the additional guns that agents seized in Pullum's home. And if anything, the fact that Pullum was a police officer should have made him more aware than an ordinary person that his possession of firearms while using controlled substances on a regular basis was against the law. The court will deny Pullum's as-applied challenge under due process.

G. Dkt. 24: Motion to dismiss Count 2, 18 U.S.C. § 922(g)(3) facial Second Amendment challenge

Pullum has also moved to dismiss Count 2 because § 922(g)(3), on its face, violates the Second Amendment. Pullum concedes that Seventh Circuit case law currently dooms this motion, *see Yancey*, 621 F.3d 681, but he preserves the issue for appeal and suggests that reconsideration is in order. Duly noted. The court will deny the motion.

H. Dkt. 25: Motion to dismiss Count 2, 18 U.S.C. § 922(g)(3) as-applied Second Amendment challenge

The final installment of Pullum's Count 2 challenge is his contention that § 922(g)(3) violates the Second Amendment as applied to him. The Second Amendment provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms that is not conditioned on service in a militia. At the core of the amendment is the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. *See also McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) ("[T]he right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty.").

But the right to bear arms is not unlimited. *Heller*, 554 U.S. at 626. Although the Court in *Heller* declined to undertake an exhaustive historical analysis of the full scope of the Second Amendment, it identified "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" as examples of regulatory measures that were "presumptively lawful." *Id.* at 626-27 n.26.

But "presumptively lawful" implies that a specific firearm prohibition might be unconstitutional. Although the Supreme Court has not expressly commented on the constitutionality of § 922(g)(3), the Seventh Circuit has held that the statute does not violate the Second Amendment as interpreted in *Heller*, as referenced in the previous section. *Yancey*,

621 F.3d at 685-87. The Seventh Circuit applied the same intermediate scrutiny framework it had applied in earlier cases addressing challenges to the statute that disqualifies individuals convicted of misdemeanor crimes of domestic violence, § 922(g)(9), *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *vacated and remanded*, 614 F.3d 638 (7th Cir. 2010) (en banc), and the statute that disqualifies convicted felons, § 922(g)(1), *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010). The Seventh Circuit determined that the government had made a strong showing that disqualifying unlawful drug users from possessing firearms was substantially related to the important governmental objective of reducing armed violence by keeping guns out of the hands of presumptively risky people. *Yancey*, 621 F.3d at 683-86. The court reasoned that laws disarming drug users were analogous to laws disarming felons, which, although potentially "'wildly overinclusive' for encompassing nonviolent offenders," *id.* at 685, nonetheless had a long pedigree in the states and had been deemed permissible under the rationale that someone with a felony conviction is more likely than a non-felon to engage in illegal and violent gun use. *Id.* at 684-85. The court reasoned further that habitual drug users, like the mentally ill, are more likely to have difficulty exercising self-control, making it more dangerous for them to possess weapons. *Id.* at 685. Thus, the court concluded that prohibiting illegal drug users from possessing firearms is substantially related to an important governmental interest in preventing violent crime. *Id*. at 687.

The next step in the as-applied analysis under Seventh Circuit precedent is to determine whether prosecuting Pullum specifically under § 922(g)(3) advances the government's interest in preventing violent crime. *Williams*, 616 F.3d at 693. Following the reasoning in *Yancey*, the answer is plainly "yes" because Pullum's habitual use of illegal drugs coincided with his possession of firearms. "[T]he Second Amendment . . . does not require

Congress to allow him to simultaneously choose both gun possession and drug abuse." *Yancey*, 621 F.3d at 687. It is worth noting here, as the *Yancey* court observed, that the burden imposed on illegal drug users is less than the burden on convicted felons, because drug users can regain their firearm rights by ceasing their drug use.

Despite clear direction from the Seventh Circuit, Pullum invites the court to follow *United States v. Barton*, 633 F.3d 168 (3rd Cir. 2011), which, like *Williams*, involved a Second Amendment challenge to the convicted felon bar. The Third Circuit held that "[t]o raise a successful as-applied challenge, [the defendant] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *Barton*, 633 F.3d at 174. But the court is constrained to follow the Seventh Circuit precedent provided by *Williams* and *Yancey*, which focuses on the government's interest in preventing violent crime, rather than focusing on the historical view of the Second Amendment.

But even under the historical approach taken in *Barton*, Pullum would not fare well. The *Barton* court explained that "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen[,]" or a felon whose crime of conviction is decades old might show that he poses no continuing threat to society. *Id.* In other words, under *Barton*, a defendant might be able to show that, notwithstanding his felony conviction, he is a member of the "virtuous citizenry" deserving of the right to possess a firearm. Ultimately, the question still comes down to whether Pullum can show that he is not at risk to commit a violent crime. This is a showing Pullum cannot make.

Pullum admitted that he used drugs habitually and that his drug use had become a problem. In the court's view, that is probably enough to satisfy the government's burden and

end the analysis. But even if there is room for Pullum to attempt to overcome the presumption that unlawful drug users should not possess dangerous weapons, he cannot succeed. The government's proffer indicates that Pullum's drug use had impaired his judgment: he turned a blind eye towards his friend's unlawful activity and his status as a known drug dealer, and he stole almost $4,000, which he promptly used to purchase marijuana. Further, he engaged in this conduct while serving as a police officer, sworn to uphold the law. Pullum is not among the virtuous citizenry deserving of the right to possess a firearm.

The court will deny Pullum's Second Amendment as-applied challenge to Count 2.

I. Dkt. 28: Motion to dismiss Count 1

Finally, Pullum moves to dismiss Count 1, which charges that he "knowingly embezzled, stole, and converted to his own use" government money, in violation of 18 U.S.C. § 641. Pullum concedes that the $3950 was government money, and he also concedes that whether he knew it was government money is not an element of the crime. But it *is* an element of the crime to *knowingly* embezzle and steal the money. Pullum contends that this, in turn, requires the government to prove that he took the money knowing that the money lawfully belonged to someone else. And he could not have known this because he thought it belonged to a drug dealer: a drug dealer has no legal interest in the proceeds of his drug deals, because those proceeds are subject to forfeiture to the government. And yet the government does not take title until it executes the forfeiture. So, argues Pullum, drug money is necessarily in a kind of ownership limbo. Pullum's theory is that drug money simply cannot be stolen because it belongs to no one.

The court will give Pullum some credit for creativity, but his theory utterly lacks commonsense appeal. If Pullum's view is correct, then it is not a crime to rip-off genuine drug dealers. According to Pullum, it might be against department policy or an abuse of office for police officers to rob drug dealers. But it would not be stealing for a police officer to take and keep money from anyone so long as they believed that the money represented proceeds for or from a drug deal. Taking Pullum's argument to its logical conclusion, Frank Serpico and Robert Leuci had it all wrong: it is not official corruption for a police officer to take and keep drug money: "he can't be guilty of stealing something that another has no right to." Dkt. 28, at 9.

In addition to its commonsense implausibility, Pullum's argument is legally flawed. Forty-three years ago the Seventh Circuit addressed a similar, though not quite identical, issue in *United States v. Smith*, 489 F.2d 1330 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974). There, the defendant, with a few others, planned to scam a drug buyer by selling him fake heroin. When the buyer showed up with $12,000 to buy 16 ounces of heroin, the defendant took the buy money and ran, literally. It turned out that the buyer was an undercover FBI agent with surveillance agents covering his back. The agents chased down the defendant, who subsequently was charged with and convicted of theft of government money under 18 U.S.C. § 641. Citing to *Morissette v. United States*, 342 U.S. 246 (1952), the defendant contended that the government had failed to prove his intent to steal government money. The Seventh Circuit rejected this argument. While the court acknowledged that *Morissette* stood for the proposition that a defendant cannot be convicted of converting property that he did not know *could* be converted (prototypically, abandoned property), "in the present case, there is no question in regard to that kind of scienter—defendant here knew

that the $12,000 had not been abandoned and was to be the consideration for 16 ounces of heroin." 489 F.2d at 1332. The Supreme Court denied certiorari, apparently finding no basis to quarrel with this gloss of *Morissette*. Pullum is in nearly the same position as Smith: Pullum knew the money had not been abandoned; it was to be consideration for a cocaine purchase. It was not his to take, and he knew it.

Pullum's citations to the federal asset forfeiture statutes, *see* Dkt. 28, at 5, change nothing. Even if the money really were drug money, the federal forfeiture statutes establish elaborate procedures for making an initial seizure and then determining whether the money actually is forfeit. *See* 21 U.S.C. § 881(b) (incorporating the seizure procedures of 18 U.S.C. § 981(b)). The statutory scheme does not put drug money in such limbo that it should be deemed "abandoned" like the rusting bomb shells that Mr. Morissette salvaged. Property taken or detained under the federal drug forfeiture statutes "shall be deemed to be in the Custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof[.]" 21 U.S.C. § 881(c). The Attorney General decides how to dispose of property that has been civilly or criminally forfeited. *Id.* § 881(e). Nothing in the federal statutory scheme states or implies that street cops who answer a call from a snitch get to keep the money they find.

As a final point, a cursory check of the case law establishes that police officers who are caught robbing purported drug dealers in what are actually FBI stings are routinely charged with and convicted of stealing government money pursuant to 18 U.S.C. § 641. *See, e.g.*, *United States v. Wells*, 739 F.3d 511, 514-15 n.1, n.2. (10th Cir. 2015) (in an FBI sting, Tulsa police officers were convicted of § 641 charges for stealing government-owned money they believed belonged to a drug dealer); *United States v. Rehak*, 589 F.3d 965, 968-69 (8th Cir.

2009) (in an FBI sting, two Ramsey County Sheriff's Office employees were convicted of a § 641 charge for stealing government-owned money that they thought belonged to a drug dealer); *United States v. Patterson*, 348 F.3d 218, 223 (7th Cir. 2003) (in an FBI sting, a Chicago police officer was convicted of stealing government-owned money after taking $20,000 and (sham) cocaine that he thought belonged to cocaine dealers in their stash house).

In short, Pullum's motion to dismiss Count 1 is untethered to the law, the facts, or to common sense. It is denied.

ORDER

IT IS ORDERED that defendant Andrew Pullum's first through ninth (superseded) pretrial motions, Dkts. 18-25 and 28, are DENIED.

Entered April 28, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge