

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011



Leadership is a behavior, not a position

CASE LAW UPDATES
FIRST QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS



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Commissioner





The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

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Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.



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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at <http://docjt.ky.gov>. Agency publications may be found at <http://docjt.ky.gov/publications.asp>.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE - KRS 508 - CHILD ABUSE

Acosta v. Com., 2011 WL 11251 (Ky. App. 2011)

FACTS: Cecelia Alvarado was born in Florida in 2005, and shortly thereafter, moved with her mother, Monohan, to Tennessee. In July, 2005, Monohan began a relationship with Rankin and moved to Kentucky to live with him. She brought her 2-year-old son, M.A., and Cecelia. Rankin cared for both while Monohan was working. Cecelia's last doctor visit prior to the move, in June, 2005, showed nothing unusual. In August, 2005, Cecelia was seen at a Lexington clinic where the nurse noted a bruise on her forehead and scabbed areas on her legs, but nothing else.

On August 22, 2005, Monohan was late for work due to a car problem. Rankin was watching the children. He later testified the he left Cecelia in her car seat and that when he returned to where she was (a bedroom) at 7 p.m., he found "the car seat knocked over, Cecelia on the floor, and M.A. on top of her, digging his knees into her neck." He took the baby to his parents and called for help. She had vivid bruising on her neck and was not breathing. Cecelia was declared dead after resuscitation efforts.

An autopsy indicated she had a fractured skull and expert testimony indicated that the injuries could not have been caused by M.A. In addition, the autopsy showed "Cecelia also had suffered multiple fractures to her arms, legs and ribs, round, cigarette-type burn marks to her legs, a tear to the frenulum inside the upper front of her mouth, and a dislocated shoulder joint." The injuries were in various stages of healing and had occurred between two and twelve weeks prior to her death.

Both were charged and convicted. Monohan (the subject of this summary) was convicted of Criminal Abuse 1st. She appealed.

ISSUE: May a person be prosecuted for Criminal Abuse who did not commit the actual abuse?

HOLDING: Yes

DISCUSSION: The Court noted that Criminal Abuse may be prosecuted under two different theories - either that the defendant intentionally abused another person, or intentionally permitted another person of whom they have actual custody to be abused. Under either theory, the actual or potential abuse must, of course, be proven. Monohan argued that she did not know Rankin was abusing Cecelia, but evidence was submitted that indicated she had reason to know that there was a problem. She had lied to the clinic by telling them the child had been in a car wreck, which was not the case. Although the evidence was not strong that she'd actually committed any of the abuse, there was at least some evidence that she might have done so. Both theories were submitted and instructed to the jury.

Monohan's conviction was affirmed.

S.B (father) and J.L (custodian) v. Com., ex rel Cabinet for Families and Children, 2011 WL 113367 (Ky. App. 2011)

FACTS: On July 2, 2009, W.B., age 3, was taken to the hospital by his father, S.B., and his father's live-in girlfriend, J.L. He was vomiting and lethargic. J.L. told the hospital that the child had fallen and hit his head on the concrete patio steps earlier that day. A CT scan indicated he had "two separate skull fractures and an associated subdural hematoma." An MRI showed "multiple compression fractures" of his spine. W.B. was referred to an assessment to Pediatric Forensic Medicine, his third since May 1, 2008 and a detailed report was made of his injuries that also noted prior incidents. On July 13, 2009, CHFS filed a child abuse petition alleging by W.B. and Z.B. (his brother) had been abused. At a hearing, the Court agreed that W.B. had been abused and that Z.B. was at risk of abuse. S.B. and J.L. appealed.

ISSUE: Must the family court actually identify the perpetrator of abuse in order to find the parent or custodian allowed the abuse?

HOLDING: No

DISCUSSION: S.B. and J.L. asserted that KRS 600.020 required that the Court identify the abuser "before it can find that abuse of a child had occurred." The Court reviewed the statute and found it "simply unnecessary for the family court to identify the perpetrator of the abuse; rather, a court may merely find that the parent/custodian has either inflicted or allowed to be inflicted physical injury or has created or allowed to be created the risk of physical injury." Either way, the "identity of the perpetrator is simply irrelevant."

The Court's decision was affirmed.

PENAL CODE - KRS 509 – KIDNAPPING

Cox v. Com., 2011 WL 287321 (Ky. 2011)

FACTS: Cox, drunk, broke into his ex-girlfriend's, Jackson's, home in Scott County. He talked to Jackson's teenage daughter and then went upstairs to Jackson's bedroom; Jackson was calling the police to report he had a gun. He threatened Jackson and then tried to rape her, and then took her downstairs. In the meantime, her daughter was outside with the police. Cox dragged Jackson back upstairs and again attempted rape. The police initiated conversation with Cox and he stated he "wanted 30 minutes more with Jackson."

Eventually, Jackson broke free and ran downstairs. Cox fired at her, but "with the aid of police officers, she escaped out the door."

Cox was arrested and charged with Burglary, Attempted Murder, Attempted Rape, Wanton Endangerment and Kidnapping. He was eventually convicted on some of the charges, including Burglary and Kidnapping. Cox appealed.

ISSUE: May a suspect be charged with Kidnapping in addition to Sexual Assault, when they move the victim in more than an incidental way to facilitate the assault?

HOLDING: Yes

DISCUSSION: Cox argued that although his conduct may amount to kidnapping that prosecution was barred by the kidnapping exemption in KRS 509.050. The Court noted that the kidnapping exemption applies when the “criminal purpose is the commission of an offense defined outside this chapter and [the] interference with the victim’s liberty occurs immediately with and incidental to the commission of that offense, unless the inference exceeds that which is ordinarily incident to commission of the offense which is the objective of [the] criminal purpose.”

In Murphy v. Com., the Court devised a three-part test to determine if the exemption applies. First, the underlying criminal offense must be from outside KRS 509. Second, the “interference with the victim’s liberty must occur immediately with and incidental to the commission” of that offense. Third, the interference must be more than what would normally be the case with the crime in question. The purpose of the statute is to prevent duplicative punishment for those offenses where some restraint is part of the underlying offense. In the facts of this particular case, the court agreed that Cox restrained Jackson “even beyond his final attempted rape, until she actually escaped.” “Such restraint was excessive for purposes of the exemption.”

The Court agreed that the kidnapping exemption did not apply.

PENAL CODE - KRS 515 - ROBBERY

Sparks v. Com., 2011 WL 1103239 (Ky. 2011)

FACTS: On the day in question, Sparks allegedly robbed a Greenup County store. At trial, he admitted having been in the store, but stated he was actually getting repaid on a debt by one of the clerks. The prosecution played a recording made by 911, in which an “obviously shaken Shepherd” - the clerk who allegedly owed the debt - told the dispatcher that the robber said he had a gun, but that he did not believe that he did, in fact, have one. Shepherd testified that he initially believed the robber had a gun but came to believe “that probably there was not one.”

Sparks was convicted of Robbery 1st. He appealed.

ISSUE: Does a statement by a robber that they have a gun, even then they do not, elevate the crime to Robbery 1st?

HOLDING: Yes

DISCUSSION: Sparks argued that because he was never shown to actually have a gun, that a threat that he had one was insufficient to convict him of Robbery 1st. The court looked to the recently decided Gamble v. Com., in which the robber specifically indicated he had a gun, although he did not, in fact, ever display one.¹ The Court noted that “Shepherd’s doubts after the robbery” as to whether there was, in fact, a gun does “not compel a finding in Sparks’s favor.” The Court agreed the evidence would permit a juror to believe that “Sparks’s gun reference together with his apparently pointing the gun at Shepherd, his keeping

¹ 319 S.W.3d 375 (Ky. 2010).

his hand in his pocket during the theft, and his warning to the co-worker not to do anything stupid, were meant to convey the threat that Sparks would use a gun if the clerks resisted and succeeded in frightening them - as they both testified - and forestalling their resistance."

The Court affirmed his conviction.

PENAL CODE – KRS - UNLAWFUL TRANSACTION WITH A MINOR

Hale v. Com., 2011 WL 181353 (Ky. App. 2011)

FACTS: Hale confessed to an act of sexual intercourse with a 14 year old female family friend. He was convicted of Unlawful Transaction 1st and appealed.

ISSUE: Must the sexual contact be unlawful for the minor to charge an adult with Unlawful Transaction?

HOLDING: No

DISCUSSION: Hale argued that the Commonwealth was required to prove that the "minor engaged in activity that is illegal for the minor to perform." In this case, he argued, he should have been charged with Rape 3rd, instead. Despite his compelling arguments, the court noted that the Kentucky Supreme Court had already ruled on the issue, and had refused to legislate, noting that its responsibility was to attempt to discern legislative intent, not create new legislation. Since the legislature did not include language that would have required that the minor's sexual behavior would have had to be illegal for the minor, the Court would not find otherwise. The evidence indicated that Hale "assisted her or caused her to engage in the illegal activity" and that the charge was valid.

Hale's conviction was upheld.

DOMESTIC VIOLENCE

Cooreman v. Cooreman, 2011 WL 113294 (Ky. App. 2011)

FACTS: The Cooremans (Katie and Chad) were married in Kentucky in 2009 and then moved to Minnesota. By March 9, 2010, Katie had returned to Henderson County. She requested a DVO based upon conduct that had occurred in Minnesota a month before. Chad appeared through counsel (not in person) and argued that Kentucky lacked jurisdiction over his actions, but the DVO was entered. Chad appealed.

ISSUE: May conduct in another state support a Kentucky-issued DVO?

HOLDING: Yes

DISCUSSION: The Court applied the required test for personal jurisdiction to the facts of the case and concluded that the trial court did, in fact, lack personal jurisdiction over Chad. However, KRS 403.725(1) permits a Kentucky court to "issue a protective order against an individual over whom the court does not

have personal jurisdiction.”² The Court noted that this order was a prohibitory rather than an affirmative order and only applied to actions that Chad might potentially take in Kentucky.

The issuance of the DVO was upheld.

Verax v. Bronson, 2011 WL 475004 (Ky. App. 2011)

FACTS: In early 2010, Verax and Bronson lived together, ending their relationship around the beginning of May. Verax moved out. Bronson was pregnant. On May 5, Verax asked to return to retrieve tools and they met in the parking lot. They “discussed their relationship and an argument ensued.” Verax snatched a cell phone he owned from Bronson and returned to his car to leave. Bronson stepped in front of the car. (She claimed she was walking around the car to get the phone and he claimed she was trying to keep him from leaving.) The vehicle was apparently a manual transmission as he claimed that he let up on the clutch and allowed the car to roll forward. “Bronson testified that she thought Verax was angry and trying to run her over,” so she ran to the driver’s window, “yelled obscenities at Verax, and threw a pop bottle at Verax through the open window.” Verax left.

Bronson requested a DVO and the Kenton Court agreed, issuing the DVO against Verax.

ISSUE: May a threat to commit an injury support a DVO?

HOLDING: Yes

DISCUSSION: The Court agreed that there was no evidence that Bronson was injured. However, she testified that she thought he was trying to run her over and that she was afraid of him. Verax knew she was pregnant and “nonetheless nudged her forward with his car.” The Court agreed that there was no error in “finding that Bronson was more likely than not a victim of domestic violence.” The court upheld the DVO and Verax appealed.

CONTROLLED SUBSTANCES

Com. v. Adkins, 331 S.W.3d 260 (Ky. 2011)

FACTS: On March 16, 2007, Adkins was arrested by an Ohio County deputy sheriff on unrelated charges. He was arrested at his brother’s home, which occupies the same parcel of land as Adkins’ own home. The deputy found almost 17 grams of methamphetamine on Adkins, along with paraphernalia. He was then arrested for trafficking. Adkins testified at trial that he’d found the sock (in which the items were found) in the driveway and that he’d picked it up to keep it from his young son. He also stated he believed a friend of his brother, who was a drug dealer, had dropped it and that he’d seen that friend earlier in the day. He claimed to have tried to contact the sheriff but was unsuccessful, and that he intended to turn in the drugs to the sheriff’s office. He argued for an “innocent possessor” defense to be provided to the jury. The Court denied the request and provided a model instruction to the jury. He was convicted and appealed. The Court of Appeals ruled that he was entitled to “an affirmative instruction encapsulating that defense.” The Commonwealth appealed.

² Spencer v. Spencer, 191 S.W.3d 14 (Ky.App. 2006).

ISSUE: May a person be in lawful possession of illegal controlled substances?

HOLDING: Yes

DISCUSSION: The Court looked to other states and noted that several have addressed the issue. The court noted a number of examples of situations where a “person might take possession of a controlled substance without any unlawful intent.” Further, those individuals may pass on the drugs to someone else, a teacher to a principal, for example, again without unlawful intent. The Court was “confident that the General Assembly did not intend to criminalize the possession or transfer of controlled substances in circumstances such as these.” Under such circumstances, an instruction to that effect should be given. The Court found that KRS 218A.1412, “by implicitly recognizing that in limited circumstances one might innocently and without unlawful intent possess controlled substances that belong to another person, creates such a defense.”

The Court noted that KRS 218A.220 is “meant to encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them.” The Court agreed he was entitled to the instruction, affirmed the decision of the Court of Appeals and remanded the case for further proceedings.

SEARCH & SEIZURE - CONSENT

Martinez v. Com., 2011 WL 941583 (Ky. App. 2011)

FACTS: On January 2, 2009, Martinez was walking to his van. Officers Thomas and Frazier (Lexington PD) spotted him swaying and stumbling. They approached Martinez as he got into his van and appeared ready to drive away. Upon questioning, he stated he was going to the store. Officer Thomas smelled alcohol and believed Martinez to be intoxicated. Officer Thomas had him step out and then saw some shell casings on the ground. Martinez denied having a gun and gave consent to search the van. They found no weapons but did learn that Martinez was a convicted felon.

Officer Thomas asked Martinez for consent to search his home. Martinez agreed, led the police to the nearby apartment and allowed them inside. He explained a friend was there, sleeping, and the officers woke him up before searching. In the only bedroom, they found two rifles.

Both men were arrested and both denied owning the weapons. Martinez stated they belonged to a third party for whom he was keeping them - but could not give the friend's name. Ultimately, the officers also found various ammunition.

Martinez was indicted. He requested suppression, arguing the shell casings could not be directly linked to him. The Court, however, found that his consent was voluntary and that his “alcohol intoxication did not vitiate his consent and that he spoke English well enough to consent to the searches.” The motion was denied and Martinez took a conditional guilty plea. He appealed.

ISSUE: Does an arguably illegal detention invalidate a voluntary consent?

HOLDING: No

DISCUSSION: Martinez argued that his consent was given during an illegal detention, but the court agreed that the “the dispositive inquiry for purposes of the Fourth Amendment was not whether the detention was supported by reasonable suspicion, but rather whether the consent was voluntary.” Under Com. v. Erickson, the Court agreed that “the constitutionality of Martinez’s detention has no bearing on whether the evidence obtained must be suppressed.”³ The only relevant inquiry was whether his consent was voluntary. Nothing indicated that Martinez was “confused or tricked.”

The court upheld the consent and the plea.

SEARCH & SEIZURE - TERRY

Com. v. Sanders, 332 S.W.3d 73 (Ky. App. 2011)

FACTS: On February 2, 2009, Officer Bradbury (Covington PD) saw “Sanders walking on Greenup Street.” A man in front of her turned onto a cross street, as did she. About 2 hours later, Officer Bradbury saw her walking in the opposite direction. He then approached Sanders, “asked her name and why she was in the area.” She explained that she’d been at the home of a family member. She gave what turned out to be a false name, but denied having any ID. When dispatch could not confirm that name, he asked for her Social Security number and ran that - but it came back to a “man who lived in Louisville.” He advised her it was a crime to give a false name, but she continued to insist that information was correct. After he told her it was felony identity theft, however, she admitted to her real name and explained she had a warrant. Officer Bradbury confirmed the warrant and arrested her.

Sanders was indicted on Theft of Identity. She moved for suppression, which was granted. The Commonwealth appealed.

ISSUE: Does walking down the street at night, in a dangerous neighborhood, justify a Terry stop?

HOLDING: No

DISCUSSION: The Court agreed that Sanders was improperly seized, pursuant to Brown v. Texas.⁴ The Court noted that several reasons were put forth to justify the detention, but the Court found that none, individually or collectively, rose to the level needed for reasonable suspicion as she was engaged in the “mere act of walking on a street.” In fact, most of the factors cited occurred *after* her initial detention and noted that the Supreme Court had “clearly mandated that reasonable suspicion must be determined *before* the stop occurs and not be justified in a boot-strap fashion of rationalization by hindsight.”⁵ She was allegedly in a high crime area, which had previously not been held sufficient, and was understandably nervous by being in that area. The only sign of nervousness he articulated was that she picked up her pace, but the court noted it was cold. Sanders stated she was not following someone and the Court agreed that “[p]edestrians walk through the same places and spaces.” It stated: “[m]ere suspicion could

³ 132 S.W.3d 884 (Ky. App. 2004).

⁴ 443 U.S. 47 (1979).

⁵ Emphasis in original.

not be inferred from the act of walking on a street in conjunction with other passerby. To hold otherwise would truly raise the pernicious specter of a police state."

The motion to suppress was upheld.

Com. v. Holman (Lonnie and Keith), 2011 WL 831711 (Ky. App. 2011)

FACTS: On December 11, 2006, Detectives Dixon and Phillips were patrolling in Louisville, in an area know for high narcotics activity. They parked near an apartment complex and walked in, spotting the Holmans sitting in a pick-up truck. They saw the two men "passing a cigarette pack back and forth." They became frantic as the officers approached and the officers asked the two men to get out, "explaining that they were not being arrested but detained for officer safety." Keith Holman tried to run when Det. Phillips frisked him. Det. Dixon saw Lonnie Holman "pitch something away from his body with his hand." A pouch with cocaine and scales was located with the help of a K-9. Crack cocaine was found in the cigarette pack. Both were indicted on trafficking and related charges. Lonnie moved for suppression, which was granted. The Commonwealth appealed.

ISSUE: May a subject observed in suspected drug activity be frisked?

HOLDING: Yes

DISCUSSION: The Court agreed, initially, that police officers are "free to approach anyone in public areas for any reason."⁶ Brief detentions, and frisks, are permitted with sufficient reasonable suspicion, based upon the officer's objective justification for his actions. The Court found that the "officers were justified in a reasonable suspicion that the [Holmans] might be armed" based upon their frantic motions when approached and their presumed drug trafficking.

The Court reversed the suppression.

Jackson v. Com., 2011 WL 831704 (Ky. App. 2011)

FACTS: In 2007, Jackson was stopped in Louisville for excessive window tinting. Officer Bizzell testified that the stop was triggered when she saw Jackson driving in such a way that indicated he was trying to avoid her. She called for backup and decided to frisk Jackson "due to his extreme nervousness." He kept reaching for his waistband while she tried to frisk him, so he was then handcuffed. As she ran her thumb inside his waistband, she "discovered a pouch, which based on her previous experience as an officer, she knew contained drugs." The plastic bag inside "contained suspected crack cocaine and a couple of pills." He was charged with possession and related offenses.

He was convicted and appealed.

ISSUE: May contraband found during a lawful frisk be seized?

HOLDING: Yes

⁶ Com. v. Banks, 68 S.W.3d 347 (Ky.2001).

DISCUSSION: The Court agreed that “[p]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous.”⁷ Further, during a frisk, “an officer may seize any contraband he finds, so long as the illegal nature of the contraband is immediately apparent to the plain feel of his hand.”⁸ The Court noted that “although a search inside the suspect’s waistband typically would not be justified in a Terry stop, it was not unreasonable, given Jackson’s suspect conduct, for Officer Bizzell to run her thumb inside Jackson’s waistband during the pat down to ensure there was no weapon.”

The Court found the seizure to be proper under the circumstances and his conviction was affirmed.

Logan v. Com., 2011 WL 556269 (Ky. App. 2011)

FACTS: On March 27, 2007, Capt. Thompson and Sgt. Salyards (Louisville Metro PD) spotted Logan driving recklessly. Capt. Thompson saw that Logan “was focused on counting a large sum of money spread out in his lap rather than paying attention to where he was driving.” In fact, Logan nearly struck Thompson’s unmarked SUV. Thompson activated his lights and siren to make a stop but Logan drove another block and a half before pulling over. Capt. Thompson saw “Logan make certain furtive gestures during the course of the traffic stop to include reaching inside his right pocket with his right hand” - so Capt. Thompson believed that Logan was either hiding something or removing something. As Thompson approached, Logan brushed a \$50 bill from his lap to the floorboard.

Logan was ordered from the car. Capt. Thompson saw, “two distinct ‘lumps’” in Logan’s pants pocket and also the top of a “tied off plastic baggie” protruding from the pocket. Capt. Thompson “instantly recognized and associated the tied-off plastic baggie with drug trafficking activity.” He was concerned that the additional lump was a weapon and frisked Logan. He confirmed the baggie contained pills (40 OxyContin) and the other lump was \$9,100. Logan was arrested. He moved for suppression and was denied. The opinion does not state the actual resolution of the case, but it was apparently appealed.

ISSUE: Does an observation of an individual trying to hide something in their clothing justify a frisk?

HOLDING: Yes

DISCUSSION: The Court quickly determined that the officers had sufficient cause to make the traffic stop and that his “pre-stop conduct created a reasonable, articulable suspicion that Logan was engaged in criminal activity beyond those traffic violations.” The Court found “substantial evidence” to support the conclusion that he was trying to conceal something and that it might be a weapon, since there was an “indisputable nexus between drugs and guns, which presumptively creates a reasonable suspicion of danger to the officer.”⁹ Spotting the unidentified lumps, it was appropriate to investigate further for a possible weapon. Thompson properly seized the baggie under the “plain feel” doctrine, as its “identity [was] immediately apparent by touch.”¹⁰ Once it was retrieved, Capt. Thompson had probable cause for the arrest.

⁷ Dunn v. Com., 689 S.W.2d 23 (Ky. App. 1984), (quoting Michigan v. Long, 463 U.S. 1032 (1983)).

⁸ Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010).

⁹ Terry v. Ohio, 392 U.S. 1 (1968); U.S. v. Sakyi, 160 F. 3d 164 (4th Cir. 1998).

¹⁰ Com. v. Crowder, 884 S.W.2d (Ky. 1004); Minnesota v. Dickerson, 508 U.S. 366 (1993).

The denial of suppression was upheld.

SEARCH & SEIZURE - OPEN FIELDS

Hawkins v. Com., 2011 WL 556518 (Ky. App. 2011)

FACTS: On July 15, 2007, Deputy Moberly (Mercer County SO) received an anonymous tip about drug activity at a described location. The next day, while seeking the location, he and Trooper Rogers (KSP) found a red pickup truck parked along the road in Anderson County. The driver told them that his "girlfriend was inside of a trailer near the roadway and the driver was concerned for her safety." They went to check on her well-being. Trooper Rogers knocked on the front door, getting no answer, and Deputy Moberly did the same at the back. Deputy Moberly thought he heard voices inside the trailer, though. About that time, Trooper Rogers saw "two large dogs exit a nearby barn and decided to see what was in the barn."

The trooper entered the barn and saw a "jar with clear liquid and lithium stripes and an altered aluminum kettle containing tubing." He realized it was a methamphetamine lab and obtained a search warrant. Upon execution of that warrant, officers found additional evidence of methamphetamine manufacturing.

Hawkins was charged and requested suppression. When that was denied, Hawkins was convicted of lesser offenses and appealed.

ISSUE: May an officer enter a barn under the Open Fields doctrine?

HOLDING: No

DISCUSSION: Hawkins contended that "police failed to establish that they had both probable cause and exigent circumstances to permit their entry into the barn." The Court noted that while the facts justified a search of the actual trailer "under the emergency exigent exception, their search of the barn went beyond the permissible scope of the emergency exigent exception permitting the trailer's search." In order to search a building, the "police must have an objectively reasonable basis for believing that a person within the building is in need of immediate aid."¹¹ The Court found no reason for the officers to believe that she was inside the barn, given what they knew. Seeing the dogs leaving the barn, a perfectly normal thing for dog to do "when strangers are in their yard," was not enough to justify their entry.

Further, the Court did not find it admissible under the Open Fields, as the trooper could not "observe the interior of the barn from the vantage point of the open field" - as he specifically testified that he did not see the evidence "until after he entered the barn." The Court concluded that the evidence in the barn should have been suppressed, as should the warrant, which was based on that evidence.

Hawkins conviction was reversed and the case remanded.

¹¹ Michigan v. Fisher, 130 S.Ct. 546 (2009).

SEARCH & SEIZURE - RUSE

Hack v. Com., 2011 WL 287324 (Ky. 2011)

FACTS: Maeser, a Grayson County CHFS employee, went to Hack's home in Hardin County for a follow-up visit. From prior experience with Hack, she believed he was manufacturing methamphetamine and requested police assistance. On December 10, 2008, Detectives Allaman (Greater Hardin County Drug Task Force), Deputy Dover (Hardin County Sheriff's Office) and Officer Thompson (unknown agency) went with Maeser to Hack's home. Maeser knocked at the front and got no answer, so she went to the back door. Racheal Hack (the suspect's wife) answered and told the "group that clothes and a chair obstructed the back door, and asked them to return to the front door." After a delay, she opened the front door. Deputy Dover explained their purpose and Hack "either invited in or consented to the group's entrance." Detective Allaman noted an odor associated with a "lab situation" and spotted what he believed to be a methamphetamine pipe in plain view. Hack (the suspect) was also present in the house. Deputy Dover gave both Miranda warnings and read a consent to search. Both signed the consent form and a search revealed numerous items related to methamphetamine manufacturing.

Hack was charged and requested suppression. The Court denied the motion, "finding that the purpose of the visit was to close an open CHFS case, there was no evidence of a ruse or that the police used false pretenses to gain entry into [Hack's] house, and the consent to search was validly given."

Hack took a conditional plea to numerous charges, and appealed.

ISSUE: Is accompanying a CPS worker on a home visit a ruse?

HOLDING: No

DISCUSSION: Hack argued that the "police opportunistically used Maeser's request for a police escort to gain entry into his residence under the guise of accompanying her to close out a CHFS case." The Court noted that "the use of ruses is not necessarily unconstitutional," but that "there is no evidence here suggesting that the police employed a ruse to gain admission." Hack's argument that Maeser did not bring documents with her relating to the case, and was operating in a different county, was unavailing. The Court noted that "the consent to search was given after the police were already inside the house and observed a methamphetamine pipe in plain sight."¹² They entered pursuant to Racheal Hack giving permission.

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE - PASSENGER SEARCH

Com. v. Dietz, 2011 WL 112895 (Ky. App. 2011)

FACTS: Dietz was the passenger in a vehicle driven by Jones. Officer Hoyle (Covington PD) noted that the tail lights were not on, as they should have been, and made a traffic stop. As he spoke to Jones,

¹² Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).

Dietz “repeatedly interrupted and appeared nervous.” Officer Hoyle had prior experience with Dietz and knew she had been a drug user, so he called for a drug dog. Officer Richardson arrived with his dog as Hoyle was working on the citation. Officer Richardson had both occupants step out, and both were frisked. Nothing was found. The dog alerted on the right rear passenger door. Officer Hoyle searched Jones and Dietz while Richardson searched the car. Nothing was found in the car, but methadone was located in Dietz’s pocket.

Upon motion, the trial court looked to Morton v. Com.¹³ and Owens v. Com.¹⁴ and concluded “that the original search of Jones and Dietz for weapons upon the exit of the vehicle was appropriate; however, the subsequent search of Dietz lacked the additional nexus which would support an in-depth search of her person.” The Court further noted that “had the officers searched Dietz *after* the completion of the search of the vehicle which produced no drugs, probable cause may well have been established.” The trial court suppressed the evidence. The Commonwealth appealed.

ISSUE: May a passenger be searched when there is evidence they were riding in a vehicle that contained drugs?

HOLDING: No

DISCUSSION: The Court stated that the “crux of the Commonwealth’s argument⁴ is that the trial court erred in its determination that the contemporaneous search of Dietz and the vehicle did not provide the officers with probable cause as to the search of Dietz.” However, the Commonwealth depended upon the inevitable doctrine which the Court ruled inapplicable. The Court differentiated the facts from that of Dunn v. Com., in which there was only one occupant and the smell of burning marijuana¹⁵ which provided “particularized suspicion of criminal activity” both as to the vehicle as well as the occupants. The dog, in this case, alerted on the car, and “Morton permits a search of the person in control of the vehicle as a result of particularized criminal suspicion arising from the canine alert on the vehicle.” Nothing in the facts provided an “independent showing of probable cause as to Dietz, a mere occupant of the vehicle.”

The suppression was upheld.

SEARCH & SEIZURE - CARROLL

Com. v. Ali, 2011 WL 474809 (Ky. App. 2011)

FACTS: On May 5, 2009, Officer Mangus (Covington PD) spotted a car being driving with high beams and the occupants unsecured by seat belts. He suspected, because of prior reports, that the occupants might be involved in drug trafficking in the area. Officer Mangus stopped the car and called for a K-9; the dog and handler arrived while Officer Mangus was writing the citation for the traffic offenses, which apparently included a citation to the driver for driving on a learner’s permit without a licensed driver in the car, since Ali (the passenger) showed a suspended license.

¹³ 232 S.W.3d 566 (Ky.App. 2007).

¹⁴ 291 S.W.3d 704 (Ky. 2009).

¹⁵ 199 S.W.3d 775 (Ky.App. 2006).

Both the driver and Ali were asked to get out while the dog sniffed the car. The dog alerted on several locations and the handler searched the car, finding marijuana residue. He searched Ali and found crack cocaine in his shoe. Ali was arrested. He challenged the search, arguing that “a passenger should not be searched unless there is probable cause, independent of that to search the car, to search him.”¹⁶ The Kenton County Circuit Court granted the suppression and the Commonwealth appealed.

ISSUE: Does Carroll authorize a search of all passengers?

HOLDING: No

DISCUSSION: The Court first noted that the initial traffic stop was proper. It was also appropriate to call for a drug dog, and the Court noted that a “dog’s sniff does not per se constitute a search under the Fourth Amendment and does not require probable cause or reasonable suspicion.”¹⁷ However, an “otherwise lawful canine sweep that is ancillary to a legitimate traffic stop may constitute an unlawful search if the suspect is detained beyond the time necessary to complete the traffic stop.”¹⁸ However, Ali did not challenge the length of time it took for the dog to check the car.

The Court stated, also, that the “dog’s alert to the passenger car door justified the officer’s warrantless search of the car.” However, the Court agreed that “occupants of a car continue to have a heightened expectation of privacy, which protects against personal searches without a warrant.” The Court agreed that “personal searches of vehicle occupants are not authorized under the automobile exception as a result of the occupant’s mere presence within a vehicle, where there is probable cause to search.”¹⁹ However, in this case, “there was no testimony from either officer about why they thought [Ali] had drugs on his person,” and as such, the search of Ali’s person was not justified.

The Court agreed that since the officer’s “did not articulate any reasons for this search other than Ali’s mere presence in the vehicle,” the trial court’s ruling was correct and the evidence was properly suppressed.

SEARCH & SEIZURE - PROBATION/PAROLE

Com. v. Jones, 2011 WL 832112 (Ky. App. 2011)

FACTS: On March 26, 2009, Officer Wilcoxson (Louisville Probation and Parole) was accompanied by four Louisville Metro officers while doing “home visits.” At about 9:30 p.m., they arrived at Jones’s home, where he lived with his mother and girlfriend. Officer Wilcoxson asked to search the residence and he was told to “look wherever he wanted.” They found nothing in Jones’s room, finding nothing, and proceeded to search the entire residence, again finding nothing. Officer Wilcoxson then asked if they could search the vehicle parked outside and was given the keys by Jones. A handgun was found under the front seat and Jones was charged.

¹⁶ U.S. v. Di Re, 332 U.S. 581 (1948).

¹⁷ U.S. v. Place, 462 U.S. 696 (1983); See also Illinois v. Caballes, 543 U.S. 405 (2005).

¹⁸ U.S. v. Jacobsen, 466 U.S. 109 (1984).

¹⁹ However, in Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007), the Court agreed the dog’s alert on the car gave the police probable cause to search Morton, the driver and sole occupant, but that “the probable cause to search would not extend to a passenger without some additional substantive nexus between the passenger and the criminal conduct.”

Jones was charged and requested suppression. At the hearing, Officer Wilcoxson agreed he had no evidence suggesting Jones was involved in anything illegal. He denied, however, that the visit was a pretext to search. With respect to the car, which belonged to Jones's mother, his mother testified that no one asked her consent to search and that the officers took the keys from the top of a television without any permission. The trial court ruled that a home visit was not the "'functional equivalent' of a search" and required no justification or provocation. However, it found no reason to support the search and noted that "Jones's consent to the search could not be considered to have been freely and voluntarily given, as his refusal to admit the officers for a home visit would have been a violation of his probation." The motion to suppress was granted and the Commonwealth appealed.

ISSUE: Is being on probation/parole sufficiently coercive as to invalidate a consent?

HOLDING: No

DISCUSSION: The Court noted that the law "is clear that probation is a privilege rather than a right."²⁰ As such, it was not a matter of being coerced into giving up a right. The Court found that "whether consent to search was voluntarily given is a question of fact to be determined, and noted that the trial court did find that he gave consent to search the vehicle. The Court found that conditions under which he agreed to the search not to be "inherently coercive," even if he argued he did feel compelled to consent. Probationers "do not enjoy the absolute liberty to which every citizen is entitled but instead enjoy only a conditional liberty which is dependent upon observation of special restrictions."²¹

The suppression was reversed and the case remanded.

SEARCH & SEIZURE - VEHICLE SEARCH

Com. v. Jamison, 2011 WL 1085331 (Ky. App. 2011)

FACTS: On April 24, 2008, Det. Davis (Louisville Metro PD) was a housing authority liaison officer. He knew that an elementary school parking lot was used as a place for drug transactions. At about 10 p.m., he spotted a vehicle "parked in the lot near the break in the fence" and Det. Davis knew of no lawful reason for the vehicle to be parked there at that time." After a few minutes, a male got out of the rear of the van and the vehicle moved off. He ran the tags and learned it was a rental. The vehicle was stopped a few blocks away. Det. Davis later summarized his knowledge of the area and concluded by saying that "everything in my career tells me that ... the gentleman [driving the vehicle] had no legitimate reason to be there and that what he was there for was to purchase, either to purchase or sell narcotics."

Davis and his partner approached and Davis "smelled marijuana even before he reached the window." Jamison was in the front passenger seat, closest to Davis. Ultimately, illegal drugs were found and Jamison arrested. He appealed, and the trial court found the stop unlawful, suppressing the evidence found. The Commonwealth appealed.

ISSUE: Does reasonable suspicion justify a traffic stop?

²⁰ Brown v. Com., 564 S.W.2d 21 (Ky. App. 1977).

²¹ Griffin v. Wisconsin, 483 U.S. 868 (1987); Wilfong v. Com., 175 S.W.3d 84 (Ky. App. 2004).

HOLDING: Yes

DISCUSSION: The Court reviewed the stop, and noted that in U.S. v. Cortez, the Supreme Court “explained the two elements in assessing evidence upon which an investigatory stop is made.”²² First, it must be based upon the totality of the circumstances, and noted that a “trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person.” The consideration “must yield a particularized suspicion ... that the particular individual being stopped is engaged in wrongdoing.” The Court emphasized that “in every assessment, there is the ‘imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion.’”

The court looked to the fact that the vehicle was parked for some minutes in a lot that prohibited trespassing and loitering. Even though Jamison argued that there was a possibility that the vehicle was doing something lawful, such as dropping off a resident at the adjacent apartment complex, the Court noted that even “wholly lawful conduct might justify the suspicion that criminal activity was afoot.”²³ The Court also referenced U.S. v. Arvizu, reiterating that the trial court should “take into account all relevant facts, including conduct that might appear to be entirely innocuous, in determining whether the police officer had a reasonable suspicion to believe that criminal activity recently occurred or was about to occur.”²⁴

The Court found that the officer had sufficient reasonable suspicion that criminal activity was afoot thereby justifying the investigatory stop and further found that the officer was fully capable of articulating that suspicion during the suppression hearing.” The Court reversed the suppression and remanded the case.

SEARCH & SEIZURE - VEHICLE SEARCH - GANT

Mucker v. Com., 2011 WL 1103359 (Ky. 2011)

FACTS: On October 14, 2007, Officer Martin (Shively PD) responded to a fight call, On the way, he was also told there was a man with a gun at the location. Upon his arrival, a witness told him a man, in a maroon SUV, was waving a handgun, but officer’s found only a female in the passenger seat. She explained the vehicle belonged to her boyfriend, Mucker. The witness then pointed out Mucker in the parking lot. As Mucker tried to get into the back seat of a different car, Martin seized him and patted him down, finding a loaded firearm. Mucker was arrested. When the license plate check of the SUV indicated that Mucker owned it, the officer asked for consent to search but was denied. The “officers nonetheless commenced a vehicle search, discovering a modified, sawed-off shotgun (with serial numbers filed off and the shoulder stock removed), in addition to a holster, shotgun shells, and a loaded magazine” that fit the weapon found on his person. Mucker was ultimately convicted of various weapons-related state offenses.

Mucker appealed.

ISSUE: Does finding a weapon on a convicted felon justify a search of the vehicle under Gant?

²² 449 U.S. 411 (1981).

²³ Reid v. Georgia, 448 U.S. 438 (1980).

²⁴ 534 U.S. 266 (2002)

HOLDING: Yes

DISCUSSION: Mucker argued that the evidence found during the SUV search should be suppressed as the “fruits of an unconstitutional search.” The Court looked to Arizona v. Gant²⁵ for guidance. The trial court had upheld the search as relevant as it was for evidence of the crime of carrying a concealed deadly weapon, despite the fact a weapon had already been found on Mucker’s person. “The Commonwealth analogizes carrying a concealed deadly weapon to drug offenses and offers McCloud v. Commonwealth,²⁶ in which this Court affirmed the search of a vehicle as a search for evidence of the offense of possession or trafficking in drugs.” The Court agreed, finding that the “unlawful possession of a weapon more closely resembles narcotics-possession offenses than routine traffic violations” and that it was reasonable to believe “evidence relevant to the crime of carrying a concealed weapon might be found in the SUV.” The discovery of ammunition is relevant to show possession, as well. The Court reiterated, however, that the “*cart blanche* rule that a vehicle may be searched incident to arrest of a recent occupant is no more.”

Mucker’s conviction was affirmed.

Robbins v. Com., 336 S.W.3d 60 (Ky. 2011)

FACTS: In September, 2005, Robbins was eating dinner with two friends in Louisville. He had an outstanding bench warrant at the time for a drug trafficking case. Officer learned of his whereabouts from a CI and had followed him to the restaurant. They positively identified him through the window. Robbins left the restaurant and approached his vehicle, unlocking it with a remote key. His female friend opened the rear passenger door. The officer identified themselves and Robbins “ran to the passenger side of the vehicle, reached into his pocket, and threw something to the ground.” Robbins was seized and handcuffed. Robbins was searched and \$1,010 was found. Another officer found a small bindle under the vehicle that they believed contained cocaine. Robbins was then arrested. Other officers searched the vehicle and found more cocaine, totaling over three grams.

Robbins was indicted for trafficking and tampering with physical evidence. He took a conditional guilty plea and appealed both the charge and the forfeiture of the cash. The Court of appeals affirmed the search and the plea. Robbins further appealed.

ISSUE: May a vehicle be searched under Gant when a recent occupant is found to be in possession of drugs?

HOLDING: Yes

DISCUSSION: The Court looked to Arizona v. Gant²⁷ for guidance, and noted that a “vehicle search is permissible following a lawful arrest in two circumstances.” A search may be done when the occupant is arrested and still “unsecured and within reaching distance of the passenger compartment at the time of the search,” and is also appropriate “when it is reasonable to believe the vehicle contains evidence of the offense of arrest.” In this case, the Court found the search valid under the second prong, and in fact, Robbins was arrested based upon drugs he toss away outside the vehicle, and he had a significant amount

²⁵ 129 S.Ct. 1710 (2009)

²⁶ 286 S.W.3d 780 (Ky. 2009).

²⁷ 129 S.Ct. 1710 (2009).

of cash on his person. They also knew him to be a convicted drug trafficker and knew that drugs could be found in multiple places.

The Court looked to Thornton v. U.S. for guidance on his status as a “recent occupant” of the vehicle and noted that while the relationship “may turn on ... temporary or spatial relationship to the car at the time of the arrest and search, ... it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.”²⁸ Robbins was certainly within arm’s reach of the vehicle but had not physically occupied the vehicle once he arrived at the restaurant some time earlier. However, the officers knew that no one had been in the car during the time the car was parked there and that he’d unlocked the car with a remote key.

The Court upheld the denial of the motion to suppress. With respect to the forfeiture, the Court noted that Robbins had been previously convicted of drug trafficking, had no employment at the time of his arrest and also that three bindles of cocaine were found during the searches. The Court upheld the forfeiture as well.

SUSPECT ID

Whaley v. Com., 2011 WL 287322 (Ky. 2011)

FACTS: In April, 2008, Whaley was accused in multiple armed robberies in Louisville. During one of the robberies, he shot the clerk in the leg. Det. Presley (Louisville Metro PD) created a photo-pack, in which he input identifiers in to a computer program, which then provided mug shots from which he could select. He showed the resulting photo-pack to three witnesses, separately and Whaley was identified. He was arrested in May and ultimately convicted. He appealed.

ISSUE: Is a photo pack valid if based on witness descriptions, even if the photos do not actually resemble each other?

HOLDING: Yes

DISCUSSION: Whaley argued that the photo-pack was unduly suggestive because he was the only one with a scar on his lip, he appeared slimmer and the witnesses all knew the photos were mug shots. The Court, however, stated that it was clear that all of the photos were mug shots and the police “expressly informed the victims that the suspect may or may not be in the photo-pack, and that it was okay if they could not make a proper identification.” The court agreed that the men do not closely resemble one another, but “all loosely fit the description the victims gave the detective.” There was nothing that distinguished one from the other, and each victim had the opportunity to see the robber in a good light. The Court agreed the photo-pack identification was properly admitted.²⁹

On a side issue, the Court quickly concluded that the clerk who was shot in the leg suffered a serious physical injury, even though she was hospitalized for only 9 hours. She testified that the injury caused her pain and impaired the functioning of her leg for some time, although it did not “create a substantial risk of death.”

²⁸ 541 U.S. 615 (2004).

²⁹ See Neil v. Biggers, 409 U.S. 188 (1972)

Whaley's conviction was upheld.

INTERROGATION - RIGHT TO COUNSEL

Bradley v. Com., 2011 WL 918746 (Ky. App. 2011)

FACTS: On Nov. 4, 2004, Det. Williamson (Louisville Metro PD) interviewed Bradley concerning a murder. He asked Bradley about his whereabouts and he "falsely informed Bradley that there was a police officer, outside of the interview room, who could identify him as running from the murder scene." Bradley asked if he was going to jail and the detective agreed that "there would be consequences." At a suppression hearing, counsel discussed whether the videotape should be shown, agreeing that the issue "was whether Bradley had invoked his right to counsel and his right to remain silent." After reviewing the tape, the Court found the following to be the "most important portion."

Williamson: Well here's the deal. Well you know what, you're right, but it can be a lot worse. You stand up and you tell the truth . Be a man and take what's coming. . . . You can either be a cold hearted son-of-a-bitch or you can be a man about it with some remorse. Tony [Bradley] only you can make that decision . I cannot do that for you.

Bradley: So I'm going to [be] sitting behind bars now?

Williamson: Well you know what, it's your choice . You're going to do some time. I'm not going to sit here and lie to you. Okay.

Bradley: A lot of time .

Williamson: Well I don't know. I don't know the story. Why don't you run it by me and we'll look at it.

Bradley: Well, you know, I need a lawyer or something .

Williamson: Do what?

Bradley: A lawyer.

Williamson : That's your right. We read you your rights when you come [sic] in here. But I, I'm totally convinced you do what is the right thing and you'll be better off. You see where I'm at? You feel what I'm saying? Do you want to tell us? Just tell us what happened. It's nothing we can't get through, I mean there may be circumstances here that change this whole thing. Only you can tell us. It's a big step.

Bradley: I did do it.

Williamson: You did what. You shot him? Why?

Bradley: Cause he was trying to get me.

Williamson: What was he doing?

Bradley: If I didn't get him he was going to get me

Det. Williamson stated that he did not end the interview when Bradley asked about an attorney because he believed Bradley was "just talking aloud" and that he was "just experiencing normal hesitation to talk." The trial court concluded that he "did not make a clear request for an attorney but simply asked if he needed one" and that his invocation of the right to remain silent was also ambiguous. Eventually Bradley took conditional guilty pleas on multiple charges. In Bradley v. Com., the Court agreed that his right to counsel was violated, and reversed his conviction in the murder case³⁰ but refused to consolidate his

³⁰ 327 S.W.3d 512 (Ky. 2010).

appeal for other offenses, including two counts of arson. Bradley further appealed his conviction for arson in this opinion.

ISSUE: May an inquiry about having an attorney invoke the right to counsel?

HOLDING: Yes

DISCUSSION: The Court agreed that its decision in the murder case, that “Bradley’s constitutional right to counsel was violated by police,” was controlling, and reversed his convictions on the arson charges as well.

Com. v. Quisenberry and Williams, 336 S.W.3d 19 (Ky. 2011)

FACTS: Quisenberry and Williams were charged with the robbery and murder of Harper, which occurred in Louisville on May 18, 2006. Her 2-year old daughter, Erica, was also shot, but survived. They were tried together, and the defense for each was that the other actually fired the shots. Both were convicted, and appealed.³¹

ISSUE: Must a suspect be explicit about requesting an attorney?

HOLDING: Yes

DISCUSSION: Williams argued that his statement was taken in violation of Miranda and that he had invoked his right to silence and/or an attorney. The Court, however, determined that his specific words “did not amount to the unambiguous assertion of his rights.”³²

The Court summarized his statements:

Was he asking for counsel or was he merely asking if counsel was an option? Was his interest in counsel for the sake of counsel's advice or merely in hopes that counsel could screen him from being perceived as a snitch? An officer in these circumstances would reasonably have entertained doubts about Williams's meaning, and thus it was not improper for the detective to continue the interrogation unless and until Williams made his desire for counsel clear, something he never did.

The court also agreed that the pretrial confession of one defendant may not be admitted against the other unless the confessing defendant takes the stand.³³ It “may not even be admitted against the confessor, moreover, if on its face it implicates another defendant being jointly tried with the confessor.”³⁴ The statement may be admitted, however, if the confession is “redacted so as to remove express and obvious inferential references to the defendant.” These redactions were done in this case, and a detective who testified “scrupulously avoided any mention either defendant made of the other, limiting his testimony to what each defendant said about his own actions, about the two victims, and about his having seen a gun and heard gunshots.” The Court found it immaterial that the confession might become incriminatory because of other evidence introduced in the trial. The Court agreed that “the admission of a paraphrased

³¹ Although two separate cases, the Court combined the two in its opinion.

³² Berghuis v. Thompkins, 130 S.Ct. 2250 (2010) .

³³ Richardson v. Marsh, 481 U.S. . 200, 206 (1987) ; see also Crawford v. Washington, 541 U.S. 36 (2004).

³⁴ Bruton v. U.S., 391 U.S. . 123 (1968) ; Gray v. Maryland, 523 U.S. 185 (1998).

version of Quisenberry's redacted statement to police did not violate Williams's right to confrontation." (The opinion detailed the conversation, and noted that while he mentioned the word, he never specifically asked for an attorney.)

Issues relating to Quisenberry are not relevant to this summary. The Court upheld the convictions of both.

INTERROGATION

Jackson v. Com. , 2011 WL 11242 (Ky.. App. 2011)

FACTS: Jackson was arrested and charged with the rape of a friend's 15-year-old daughter. Jackson was taken into custody and interrogated by Det. Ball (Lexington PD). At trial, the Court admitted "portions of the taped interview wherein the detective stated to Jackson that he was lying."

During the interrogation the detective made several statements, including "obviously you're being deceitful with me," "You sitting in that chair trying to bs me is not going to work today[,] "What I don't understand is somebody sitting in that chair telling me they didn't do something when I know they did[,] "So don't lie to me and say that you don't know [J.M.] and don't lie to me and say you were not messing around with [J.M.'s] mom[,] and "See how you were at first, you denied, lied. . ."

Jackson was convicted and appealed.

ISSUE: May an officer accuse a suspect of lying during an interrogation?

HOLDING: Yes

DISCUSSION: The Court looked to the case of Lanham v. Com.³⁵, in which the Court addressed "this very issue." In that decision, the Court said:

We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.

However, the Court agreed that the jury should have been given a "limited admonition that the statements were not to be considered by the jury as evidence of guilt but were only admissible to provide context for Jackson's relevant responses." The Court ruled that the error, however, was harmless, given that he changed his story and essentially admitted to the crime. On a related matter, the Court also agreed that it was improper to admit a statement by the detective that effectively vouched for the truthfulness of the witness³⁶ but since Jackson did not object at the time, the matter need not be considered.

The Court affirmed the conviction.

³⁵ 171 S.W.3d 14 (Ky. 2005).

³⁶ Stringer v. Com., 956 S.W.2d 883 (Ky. 1997).

TRIAL PROCEDURE / EVIDENCE - CHOICE OF EVILS

LaPradd v. Com., 334 S.W.3d 88 (Ky. 2011)

FACTS: On March 20, 2006, LaPradd and others were seen “standing around a stolen car.” Officers stopped and searched him, finding a loaded handgun. As LaPradd was a convicted felon, he was indicted for possession of the handgun, along with related charges. He claimed at trial that he simply picked up the gun from the ground to prevent teens “around the car from obtaining it and using it against him or others at the scene.” Counsel requested a choice of evils defense instruction be given to the jury, because the “Commonwealth had the burden to prove that the defense was not available to him.” The Court did so, as a separate defense, rather than including it as a element in the possession of a handgun by a convicted felony instruction. He was convicted and appealed. The Kentucky Court of Appeals agreed he was entitled to an instruction but found what was provided to be adequate. LaPradd further appealed.

ISSUE: May a choice of evils be raised as a defense in a weapons possession charge?

HOLDING: Yes

DISCUSSION: The Court reviewed the choice of evils defense and concluded that precedent required that the defendant has the initial burden to produce evidence requiring a choice of evils defense, and then the burden shifts to the Commonwealth to disprove it beyond a reasonable doubt. In this case, although the language of the defense was correct, the Court failed to include it in the “instructions as an element of the offense to which it was alleged as a defense - possession of a handgun by a convicted felon.” As such, the court reversed his conviction and remanded the case for a new trial.

TRIAL PROCEDURE / EVIDENCE - DOUBLE JEOPARDY

Maples v. Com., 2011 WL 112051 (Ky. App. 2011)

FACTS: On June 8, 2007, Officer Brigmon (Middlesboro PD) tried to make a traffic stop of a vehicle he'd observed making a traffic offense. Maples and Baker (his passenger) had already gotten out of the car and were walking up a flight of steps to a porch. Officer Brigmon asked them to come back down and as he did so, he saw Maples toss a container onto the porch. Inside, Officer Brigmon later found a green leafy substance and a number of pills. Maples “had glassy, bloodshot eyes and was unsteady on his feet.” He failed several field sobriety tests and admitted he'd smoked marijuana. Brigmon arrested Maples for DUI. He later searched the car and found a number of pills hidden under the hood. (The vehicle was actually in the passenger's name.) All of the pills were identified as being Schedule IV controlled substances, although the opinion did not say specifically what they were.

Maples was charged and convicted with DUI, Possession of a Controlled Substance and Possession of Drug Paraphernalia. He was also a PFO. Maples then appealed.

ISSUE: Are possession and paraphernalia charges double jeopardy?

HOLDING: No

DISCUSSION: Maples argued that it was double jeopardy to be convicted for possession of the pills and the marijuana as well as convicted of possession of the baggie and cellophane wrapper in which they were contained. The Court employed the Blockburger³⁷ test and concluded that he was convicted under two statutes that have no common elements and that as such, double jeopardy did not apply.³⁸ Finally, the Court noted that a single item of evidence may be used to support multiple convictions without running afoul of the double jeopardy prohibition.³⁹

Wolfenbarger v. Com., 2011 WL 832317 (Ky. App. 2011)

FACTS: Wolfenbarger was arrested following a consent search of his home in Fleming County, in which officers found a methamphetamine lab and methamphetamine residue. He was indicted and ultimately convicted. He then appealed.

ISSUE: Are convictions for possession and manufacturing methamphetamine double jeopardy?

HOLDING: No (if based on different proof)

DISCUSSION: Wolfenbarger argued that this convictions for both manufacturing and possession of methamphetamine was a violation of Double Jeopardy - since the same methamphetamine (residue found in plastic funnels in the lab) was used to support both. The Court noted, however, that the manufacturing conviction was based not on the actual substance, but on his "possession of two or more chemicals or items used to manufacture methamphetamine with intent to manufacture" pursuant to KRS 218A.1432(1)(b). The Court continued:

Succinctly stated, the possession of methamphetamine charge against Wolfenbarger was supported by the methamphetamine found on the two blue plastic funnels. On the other hand, the manufacturing methamphetamine charge was supported by the other items used to manufacture methamphetamine seized from Wolfenbarger's residence.

The Court concluded that there had been no violation of Double Jeopardy.

Wolfenbarger also argued that he was entitled to have had a jury instruction for facilitation. The Court agreed that "the circumstantial evidence which was sufficient to support a finding by the jury that the defendant was guilty of being a complicitor to the manufacturing of methamphetamine (which would include a finding that Wolfenbarger intended for the crime to be committed) could also support a finding of facilitation."

Finally, Wolfenbarger argued that it was hearsay to admit testimony by Officer Anderson that Ritchie (who had also been arrested) "admitted to Anderson that he had 'cooked' methamphetamine several times at Wolfenbarger's residence and to testimony of Officer Kinder that Billy Ritchie's mother told Kinder that Billy was manufacturing methamphetamine at Wolfenbarger's residence." The Court looked to Davis v. Washington⁴⁰ and found "no doubt" that Ritchie's statements to Anderson were testimonial. The

³⁷ Blockburger v. U.S., 284 U.S. 299 (1932).

³⁸ See also Com. v. Burge, 947 S.W.2d 805 (Ky. 1996), modified on denial of reh'g, 947 S.W.2d 805 (Ky. 1997).

³⁹ Hampton v. Com., 231 S.W.3d 740 (Ky. 2007).

⁴⁰ 547 U.S. 813 (2006).

statements to Officer Kinder were also made during the course of an investigation. No limiting instruction was given to the jury as to the proper use of the information given and “without the defendant being allowed to cross examine and expose any possible prejudice these individuals may have had against the defendant.”

The Court reversed Wolfenbarger’s conviction based on the Davis violation.

Williams v. Com., 336 S.W.3d 42 (Ky. 2011)

FACTS: Williams was arrested for drug trafficking in Hardin County. 19 grams were found inside the vehicle. On the way to the jail, Williams attempted to swallow a plastic bag with 4.8 grams of cocaine. He was charged with a second count of trafficking, as well as tampering with physical evidence. He was indicted and took a conditional guilty plea, and appealed. The Court of Appeals upheld the conviction, and Williams further appealed.

ISSUE: Is multiple counts of drug trafficking necessarily double jeopardy?

HOLDING: No

DISCUSSION: Williams argued that the dual trafficking convictions were double jeopardy, as both arose from a single course of actions. However, the Court noted he “possessed two discrete quantities of cocaine” - even if originally part of the same stash. In addition, his intervening arrest interrupted the continuing possession of the cocaine. The Court upheld his conviction, finding no double jeopardy.

Pate / Woody v. Com., 2011 WL 557298 (Ky. App. 2011)

FACTS: On December 19, 2007, three people entered a Fulton County grocery, one armed, and stole about \$1300 from the safe. Several months later, five people were charged. Pate, specifically, was charged with subduing one of the clerks and was charged with Robbery 1st and Engaging in Organized Crime. She was also charged with Theft. Several of the other individuals took pleas in exchange for testifying against Pate and another individual, Woody. The pair was tried jointly and Pate was convicted of complicity to commit Robbery 1st and Theft. She moved to dismiss the Theft charge, arguing double jeopardy. That was denied and she appealed.

ISSUE: Is a conviction for Theft and Robbery double jeopardy?

HOLDING: Yes

DISCUSSION: The Court agreed that the two crimes should have merged, as the “taking of the same cash (as charged as theft) represented the theft element in the robbery charge. The conviction for theft was reversed.

TRIAL PROCEDURE / EVIDENCE - 911 CALL

Johnson v. Com., 2011 WL 1103346 (Ky. 2011)

FACTS: On September 18, 2008, Johnson forced his way in Kleinhenz's home in Jefferson County. He encountered an acquaintance, Elder, and tried to shoot her, but the weapon misfired. Johnson ended up stabbing her multiple times. He robbed Kleinhenz, who gave him cash. Johnson grabbed the money and ran. Elder called 911 and described her injuries. She "exclaimed she was dying from the wounds and wanted to talk to her mother and children." A recording of her call was played at trial.

Johnson was convicted of Robbery and Assault. He appealed.

ISSUE: Are statements made by a victim during a 911 call admissible?

HOLDING: Yes

DISCUSSION: Johnson argued that the admission of the 911 call was improper. He agreed that part of the call was relevant and admissible, the part concerning her statement that Johnson had stabbed her, but argued that the other portions were "irrelevant, unduly prejudicial and inadmissible hearsay." The Court, however, found that her statement that she thought she was dying "served to prove" that she had suffered a serious physical injury, an element of Assault 1st degree. Although her perception of the risk of death "is not perfect proof of a substantial risk thereof, it has some relevance to the severity of the injuries she sustained." Her desire to speak to loved ones was "simply circumstantial proof of the same point." The statements were not so prejudicial as to "substantially outweigh their probative value." (The Court noted that she did not die, and "can in fact see her children again" - which mitigated any prejudicial effect.)

With respect to the hearsay objection, the Court noted that they were offered as proof that she was seriously injured, and both conveyed her sense that was the case. They "fit squarely as present sense impressions under KRE 803(1)" which allowed for statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Johnson's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - PROOF

Wallace v. Com., 2011 WL 1103330 (Ky. 2011)

FACTS: On October 29, 2006, Officer Flannery and the coroner responded to a call from Wallace that her mother, Wanda, had died in her home. The officer "observed piles of trash, refuse, clutter, and flies throughout the house." He described the conditions as "horrendous" and "unforgettable." They found Wanda in bed, covered in excrement and bedsores. Wallace insisted she had been feeding her, but it was discovered Wanda's weight had dropped substantially (by 30 pounds) in a short time. Ultimately the medical examiner considered the death to be due to starvation and dehydration due to neglect. It was also discovered that in just a few months, Wallace had transferred all of Wanda's money into her own account, approximately \$75,000, and she had spent much of it. Wallace was convicted of the Wanton Murder of

her mother, Knowing Neglect of an adult by a caretaker, and Knowing Exploitation of an adult over \$300. She appealed.

ISSUE: Must sufficient evidence be presented for each charged offense?

HOLDING: Yes

DISCUSSION: Wallace argued that there was insufficient evidence to support each of the three charges. With respect to the murder and neglect charges, the Court noted that Wallace was, in fact, a nurse, and was well aware of the consequences that might result from not feeding or caring for Wanda. With respect to the financial exploitation charge, she argued that she had permission from her mother to spend the money and that the prosecution, never proved "how far that permission was exceeded." The prosecution introduced the testimony of a forensic accountant, who tracked and detailed Wallace's expenditures during the relevant time.

The Court further agreed that the murder and neglect charges were connected to the financial exploitation charge, as they occurred during the same time frame and the money could be a motive for the neglect - "to insure that Wanda would not find out that [Wallace] was spending all of her money." It also explained why she failed to seek outside help, including from family members who lived out of state.

Wallace's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE - VIDEO

Childers v. Com., 332 S.W.3d 64 (Ky. 2011)

FACTS: Childers was charged with drug trafficking in Lawrence County. The transaction had been videotaped and showed Childers handing something to someone else. She was charged with trafficking. During the trial, one of the detectives was asked to state what was heard on the tape, and did so.

Childers was convicted, and appealed.

ISSUE: May a witness interpret what is on a video?

HOLDING: No

DISCUSSION: The court agreed that with respect to the detective's comments, "the law on this issue is quite clear." A witness may "testify from recollection about events captured on tape, [but] he may not interpret what is on the tape."⁴¹ The detective did not hear firsthand what Childers said and his testimony was not from personal recollection.

However, since the admission was not objected to at trial, the Court declined to overturn the conviction based upon the error. Her conviction was upheld.

⁴¹ Gordon v. Com., 916 S.W.2d 176 (Ky. 1995).

TRIAL PROCEDURE / EVIDENCE - CORROBORATION RULE

Cornelius v. Com., 2011 WL 112717 (Ky. App. 2011)

FACTS: Deputy Riddle (McCracken Co. SO) received a tip from a CI, Hernandez, "who stated that he had made contact with an individual who might be able to sell him some cocaine." A recording device was installed in his car and Deputy Riddle observed the transaction. At the meet, "one of the [three] men in the pickup got out and entered the passenger side of Hernandez's car." Hernandez used money given to him by the deputy to buy a "baggy of a white substance which resembled cocaine" - it was later tested to be cocaine. As the men left the scene, they were stopped. Cornelius, the driver, refused to get out and would not comply with orders. He was removed, handcuffed and searched. They found marijuana on his person. A passenger in the truck was Cornelius's minor son.

Det. Carter interviewed him and received conflicting information about the marijuana. Cornelius claimed he didn't realize the marijuana was there until the last minute and that he was planning to give it up to the officers. He was charged with Possession of Marijuana and Tampering with Physical Evidence (for hiding it in his pocket). He was convicted of Tampering and also PFO, for which he received an enhanced sentence. He appealed.

ISSUE: Is the presence of drugs in a pocket sufficient corroboration to a confession concerning the drugs?

HOLDING: Yes

DISCUSSION: Cornelius noted there was no "eyewitness testimony that he actually put the marijuana in his pocket when the police officers approached the pickup truck." He did, however, confess to Det. Carter that he had put the marijuana in his pocket. Cornelius contended that was not enough to sustain the conviction under RCr 9.60 - the corroboration rule - and that its "mere presence ... in his pocket was insufficient corroboration to support his confession." However, the Deputy testified that "when he ordered the occupants to show him their hands, Cornelius's hands were out of sight, he was moving, and he refused to leave the truck." The court found this sufficient corroboration that he "had placed the marijuana in his pocket during that interval in order to impair its availability in an official proceeding."

Cornelius argued that "no one 'in their right mind' would think that he could successfully conceal drugs by placing them in his pocket when the police are approaching to apprehend him." The Court, however, stated that in its view, "an individual in that highly stressful situation might react in exactly in such a manner." The Court affirmed the conviction (but did reverse the PFO for unrelated reasons).

McClain v. Com., 2011 WL 556197 (Ky. App. 2011)

FACTS: McClain, who was eventually indicted on a variety of Burglary and Theft related offenses in Carlisle, Kentucky, was contacted by Officer Weaver about a burglary of a local liquor store. Chief Denton advised McClain of his Miranda rights when he arrived at the station. He asked McClain about a particular individual and asked to talk about the burglary. McClain claimed he was "initially ... upset and hesitant" but that he then talked about the break-in, describing what they did with a handgun stolen during the crime. In a second recorded session with Deputy Sheriff Buckley, McClain acknowledged that he'd gotten his

Miranda warnings. He moved for suppression of the statements, arguing they were involuntary, but the trial court denied the motion. McClain was convicted and appealed.

ISSUE: Does the Corroboration rule require proof that a particular suspect committed a crime?

HOLDING: No

DISCUSSION: McClain argued that “he was not found in possession of any fruits of the crime, that he was not clearly identifiable from the video surveillance except for his clothing, that he was too large at 320 pounds to fit through the wall’s opening, that police did not have his fingerprints at the crime scene, and that he gave inconsistent confessions.” He noted that RCR 9.60 “precludes a defendant’s conviction on the sole basis of his uncorroborated out-of-court confession.” However, in Slaughter v. Com., the Court had stated that “[t]he corroborative evidence required addresses itself as to whether the *crime* charged was committed and *not as to whether* the particular defendant committed it.”⁴² Further, “[s]uch proof, very simply, must be independent of any out-of-court confession, and must show that the charged crime was, in fact, committed. Once such evidence is present, guilt of the defendant may be proven by the evidence of the confession(s).” In this case, the Court found that the “corroboration of this crime was established by the video recording of the burglary.” Other circumstantial evidence also supported the crime.

With respect to the voluntariness of his statements, the Court noted that “turns on the presence of absence of coercive police or otherwise state activity.”⁴³ A prior Kentucky Supreme Court decision had held that the relevant inquiry to determine voluntariness is as follows: (1) whether the police’s conduct was “objectively coercive;” (2) whether the coercion overbore the defendant’s will; and (3) whether the defendant showed that the coercive police conduct was the “crucial motivating factor” behind his confession.⁴⁴ There was no evidence that any of these factors were present and no evidence that he was not properly read his Miranda warnings.

McClain’s conviction was upheld.

TRIAL PROCEDURE / EVIDENCE - LAB TESTING

Jones v. Com., 331 S.W.3d 249 (Ky. 2011)

FACTS: Jones made two controlled buys from Howard, an informant, in Laurel County. Det. Lewis supervised the buys from a distance. Jones bought marijuana, Xanax and Klonopin. A few of the pills were chemically tested, the rest were confirmed visually by the KSP crime lab. She was charged with multiple counts of trafficking. She appealed and the Kentucky Court of Appeals upheld the convictions. She further appealed.

ISSUE: Must every pill be tested?

HOLDING: No

⁴² 744 S.W.2d 407 (Ky. 1987). See also Dolan v. Com., 468 S.W.2d 277 (Ky. 1971).

⁴³ Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

⁴⁴ Bailey v. Com., 194 S.W.3d 296 (Ky. 2006).

DISCUSSION: Jones argued that “chemical testing is necessary to prove that a substance, such as a pill, is actually a controlled substance.” She further argued that she could not be convicted for the Xanax, none of which was actually tested, because it could have been a simulated substance. The court noted, however, that “prior Kentucky case law has made clear that chemical testing of an alleged controlled substance is not required to sustain a conviction.”⁴⁵ Many states “around the nation have uniformly held that circumstantial evidence is enough to sustain a conviction for an offense involving a controlled substance.” Most states had accepted the Dolan⁴⁶ test, as follows:

[L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in an alleged narcotics transaction. Such circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence .

In this case, the informant was knowledgeable about drugs and knew the “jargon and slang.” He went there to buy what everyone purported to be Xanax and Klonopin. The transactions “were carried out with stealth and undercover operation.” Several pills were confirmed by testing to be Klonopin and experienced technicians visually verified the rest by their unique “trade dress” and pursuant to the lab protocol. The Court found simulation to be extremely difficult and she did, after all, have the opportunity for independent testing had she so desired.

Her conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - EXCULPATORY EVIDENCE

Hawkins v. Com., 2011 WL 43257 (Ky. App. 2011)

FACTS: On August 13, 2008, Villalon, Hawkins and Barnett went to the Tobacco Barn in Elizabethtown. Phillips and “Taz” arrived there as well, in a second vehicle. All but Taz entered, and Villalon bought a money order. The clerk had doubts about the cash she was given and called the police - Officer Fegett responded. The bills were later determined to be counterfeit. Officer Fegett reviewed the surveillance footage and recognized Barnett. He went to a nearby home (where he apparently believed Barnett to be) and found Villalon as well, only Villalon was charged. Hawkins and Phillips were arrested later.

Hawkins was indicted for Complicity to commit Criminal Possession of a Forged Instrument and Theft, as well as PFO 2nd. Only Hawkins went to trial as the others took guilty pleas. At trial, Officer Fegett stated, in response to a question that he did not talk to Hawkins because “she invoked her right to an attorney.” Hawkins requested a mistrial, which was denied, but the judge did admonish the jury to make no inferences from that response as the comment was improper. (The Commonwealth conceded that he had been told

⁴⁵ Miller v. Com., 512 S.W.2d 941 (Ky. 1974).

⁴⁶ U.S. v. Dolan, 544 F.2d 1219 (4th Cir. 1976).

not to mention her invocation, and the Court noted that “Officer Fegett is an experienced law enforcement officer who was advised by the Commonwealth not to mention Hawkins’s invocation of the right to remain silent. In light of this, [it found] his comment which appears to be, at best, non-responsive and potentially self-serving to be particularly difficult to minimize.” Upon further questioning, Officer Fegett testified that Phillips had given him a possible address for Taz in Louisville. When asked why the information was not in his report, he stated the following:

Because I don’t have anything to follow up on. It’s out of the jurisdiction of Hardin County and as a patrolman I can’t go up to Louisville. But that information, in fact, was passed on to Louisville Metro and the Secret Service.

Again Hawkins moved for a mistrial, arguing that the address was exculpatory evidence that should have been provided in discovery. The trial court denied the motion, noting that they had the same information as the prosecution. Hawkins was convicted and appealed.

ISSUE: Is the mere possibility that an item of evidence might be exculpatory sufficient to invoke Brady?

HOLDING: No

DISCUSSION: With respect to the Brady⁴⁷ issue, the Court looked to U.S. v. Agurs, which stated that “[t]he mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” Since she was only speculating that she might discover helpful evidence, the Court rejected her claim.

The Court also considered the statement concerning her invocation of counsel. The Court recognized that “evidence that a defendant exercised his right to remain silent should not be admitted at trial.”⁴⁸ However, not ever reference is improper or reversible. Even if the mention was improper in this case, “admonitions are presumed to cure these types of errors,” except:

(1) when there is an overwhelming probability that the jury will be unable to follow the court’s admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis *and* was inflammatory or highly prejudicial.

The Court noted that the officer had been advised, prior to trial, not to refer to her statement, and found it “difficult to minimize.”⁴⁹ However, the reference was “isolated and brief,” and in fact, was in response to a question asked by Hawkins’ attorney.

Hawkins’ conviction was affirmed.

⁴⁷ Brady v. Maryland, 373 U.S. 83 (1963).

⁴⁸ Vincent v. Com., 281 S.W.3d 785 (Ky. 2009) (citing Doyle v. Ohio, 426 U.S. 610 (1976)).

⁴⁹ The Court expressed strong concern upon how this information came in, but was obliged to follow Kentucky Supreme Court precedent in Vincent.

TRIAL PROCEDURE / EVIDENCE - EXPERT WITNESS

Houser v. Com., 2011 WL 474804 (Ky. App. 2011)

FACTS: At 2:22 a.m., Lexington Fire was dispatched to a pedestrian who had been struck by a car which had left the scene. The victim died. A witness who was with the victim described what had happened. Further investigation led to the discovery of the truck in Anderson County and extensive evidence tied the truck to the victim. In addition, cell phone records placed the owner, Houser, in the area. Officer Lynch, the reconstructionist, later testified that the driver would have had to have known they struck someone. (Houser admitted he knew he'd struck something.)

Houser was convicted of tampering with physical evidence and leaving the scene. He appealed.

ISSUE: May an officer testify as an expert?

HOLDING: Yes

DISCUSSION: Houser objected to Officer Lynch's testimony, in which he put forward a number of opinions based on his expertise. The Court agreed "[h]is testimony satisfied the Daubert⁵⁰ requirements that the testimony be relevant and reliable, of a scientific nature, and assist the trier of fact in understanding the case." His testimony was appropriate and relevant under KRE 702 and not unduly prejudicial under KRE 403. The Court also agreed that Det. Brotherton's testimony as to the credibility of Houser's story was appropriate, given that Houser's attorney "had opened the door" to that line of questioning in the first place.

Houser also challenged the Tampering charge, which was based on changes he made to the vehicle (removing the grille) before he was located. The Court agreed that by driving away and later removing the grille was tampering.

Finally, he challenged a statement by Det. Brotherton regarding a statement made by a third party that contradicted Houser in relevant respect. The Court agreed that it was appropriate to introduce the statement as the issue (Houser's belief he'd done something bad and needed to leave town) was highly relevant to his actions in leaving the scene, as it "indicated that he *knew* he had done something wrong, which goes to the heart of the case"

Houser's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS

Miller v. Com., 2011 WL 95665 (Ky. App. 2011)

FACTS: On October 8, 2008, Officer Lynn spotted a "pickup truck parked between two vacant apartment buildings" in Lexington. He was aware of prior break-ins in that area. He spotted men near the truck as he drove by and noted that "the men saw him and walked out to the sidewalk to determine whether he drove away." Officer Lynn called for backup and returned, approached the men, and "asked if they had

⁵⁰ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

permission to be in the building.” He saw that plywood that had boarded up the door had been removed. Wells told him they had permission to be there from the owner, Mark, but Officer Lynn knew that was not the owner of the building. He separated the men and questioned them, after giving Miranda warnings. He told Wells he knew the owners and Wells then “admitted that he did not know the owner and did not have permission to remove the items.” He also stated “that this load was the second of the day and that they had already taken one load to Baker’s Metals.” Miller stated the same and both later “acknowledged that they had been going to vacant buildings, taking items, and selling them for scrap metal.” Wells testified at trial that he and Miller had been doing this for some time. Evidence from Baker’s Metals substantiated that claim, photos and receipts showed at least 7 trips. Miller testified that he had been told by Wells they had permission to be there and take the items, and denied having told Officer Lynn anything to the contrary.

Millers was convicted of Burglary and PFO and appealed.

ISSUE: Is evidence of prior involvement in burglaries admissible?

HOLDING: Yes

DISCUSSION: Miller argued that admitting evidence that he’d been involved in prior burglaries was improper under KRE 404(b)(1) - the prior bad acts provision. The Court looked to Bell v. Com. for the admissibility of such testimony and noted that three part test requires an examination of its relevance, its probative value and “the prejudice that it may create against the defendant.”⁵¹ To be admitted, “The acts must be relevant for some purpose other than to prove criminal predisposition; sufficiently probable to warrant introduction; and, the probative value must outweigh the potential for undue prejudice to the accused.”⁵² In this case, the evidence was relevant to show that he knew he did not have permission to take the items, and could be used to rebut his testimony that he did not know that. Further, they were probative in that it “demonstrated knowledge, plan, and preparation” and connected him to receipts in his possession concerning other thefts. He indicated at a pretrial hearing that he planned to raise in his defense that he “legally junked items for a living” and as such, that he was going to introduce evidence of prior acts in his defense.

The Court agreed that the admission of the evidence was proper and upheld his conviction.

Finch v. Com., 2011 WL 1104096 (Ky. 2011)

FACTS: Finch was convicted of two counts of murder, and one of assault, when he struck and killed two children and injured an adult while fleeing from police in Louisville. At trial, the prosecution had been allowed to introduce four earlier convictions and a pending charge to “show Finch’s long history of fleeing from police. The Court did not allow three other instances, when he fled on foot rather than in a vehicle, to be introduced, but unfortunately, Sgt. Hensler “made reference during his testimony to an occasion in which he chased Finch on foot for two and a half city blocks.” (He also mentioned a vehicle pursuit that evolved into a foot chase after a wreck.) Upon objection, the Court gave a curative admonition.

ISSUE: Is evidence of other instances of fleeing from police admissible?

⁵¹ 875 S.W.2d 882 (Ky. 1994).

⁵² Clark v. Com., 833 S.W.3d 793 (Ky. 1991)

HOLDING: Yes

DISCUSSION: The Court agreed that the trial court properly allowed the introduction of the “prior bad acts” under KRE 404(b). Using the balancing test developed in Bell v. Com., the Court analyzed “the (1) relevance, (2) probativeness, and (3) prejudicial effect of the evidence at Issue.”⁵³ The Court agreed that the evidence was admissible under the Bell test.

With respect to Sgt. Hensler’s testimony, the Court agreed that his testimony regarding the foot chases was improper. However, “based on the overwhelming amount of evidence against Finch, the slight amount of information Sergeant Hensler provided that exceeded the scope of the trial court’s KRE 404(b) order did not” warrant a mistrial.

Finch’s conviction was affirmed.

EMPLOYMENT

Artrip v. City of Hopkinsville, 2011 WL 336643 (Ky. App. 2011)

FACTS: Artrip started as a Hopkinsville police officer in 2004. A year later, he was charged with DUI and related charges, in Tennessee. He was immediately suspended without pay until the charges were resolved.⁵⁴

Artrip filed suit under federal law against the city, arguing he was wrongfully suspended in violation of KRS 95.450 and KRS 15.520. The Court agreed that it was improper to indefinitely suspend Artrip and noted that:

As of January 4, 2008, however, “Mr. Artrip has not been reinstated to active duty, *no administrative charges have been filed against him*, no hearing has been conducted regarding his suspension, and the criminal charges filed against him in Tennessee are still pending.”

Eventually, in light of the court’s order that he be reinstated and receive back pay, the city entered into a confidential settlement with Artrip, restoring the status quo. On April 15, 2008, just after his reinstatement, the City formally preferred charges against him and suspended his employment.” After a hearing, he was fired. He appealed the decision and the Circuit Court upheld the firing. He further appealed.

ISSUE: Should charges promptly follow a police officer’s suspension?

HOLDING: Yes

DISCUSSION: The Court noted that it was not “bound by a federal court’s interpretation of Kentucky law” and that the statute says the hearing should be provided within 60 days of charges being filed (which was not done until 2008). The Court mentioned an apparent conflict between the two statutes, but stated that since it did not have to resolve the conflict, that it would not do so. The Court agreed that under

⁵³ 875 S.W.2d 882 (Ky. 1994).

⁵⁴ Ultimately, he pled guilty to reckless driving and violation of the implied consent law.

appropriate circumstances, suspension can precede the preferment of charges, but that such charges should be made within a reasonable period of time.

The Court upheld the firing decision, although it set aside one of the counts on procedural reasons.

MISCELLANEOUS

Smith v. Martin (Mayor, Horse Cave), 331 S.W.3d 637 (Ky. App. 2011)

FACTS: On July 31, 2008, during a special city council meeting, Smith (formerly the mayor) complained that Martin (the current mayor) removed trees from a local cemetery without public input. At the meeting, Martin addressed a question to Smith about the purchase of police equipment that was apparently unaccounted for from two years before, but she refused to answer, stating it was not on the agenda.

Smith later filed suit “alleging libel and slander in relation to Martin’s oral statements” made during the meeting, and the publication in a local newsletter of an account of the discussion. Martin refuted that the statements were defamatory and argued they were privileged. The Court dismissed the action and Smith appealed.

The Court reviewed the elements of defamation:

- 1) defamatory language,
- 2) about the plaintiff,
- 3) which is published, and
- 4) which causes injury to reputation.⁵⁵

Further, however, a “claim of defamation may be defeated by establishing the truth of the matter asserted which is an absolute defense,” and may also be defeated by an “assertion of a ‘privilege.’” The Court agreed that “Martin’s statements directed toward Smith during the city council meeting are absolutely privileged and that Martin’s publication of the Horse Cave Newsletter recounting Martin’s statements during the city council meeting may be entitled to a qualified privilege.”

With respect to the first privilege, the Court noted that KRS 83A.060(15) gives city councils the same immunity as allowed to members of the General Assembly, which equates to an “absolute privilege from liability for statements made during such meetings.” However, that same privilege is not available with respect to the newsletter, for that, the Court looked to the qualified privilege in KRS 411.060 - which provided immunity for the publication of a “fair and impartial” report of a city council meeting, unless maliciously made. A report is considered maliciously made if published “solely for the purpose of causing harm to the person defamed.”⁵⁶ Since the trial court did not address that issue, the Court remanded the case back to that court for such a determination.

⁵⁵ Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781 (Ky. 2004).

⁵⁶ Pearce v. Courier-Journal, 683 S.W.2d 633 (Ky. App. 1985).

MISCELLANEOUS - RAILROAD ACCIDENT

Calhoun v. CSX Transportation, Inc., 331 S.W.3d 236 (Ky. 2011)

FACTS: On December 12, 2001, Calhoun was driving her sons to work at the Bullitt County Sanitation Company. To get there, she crossed “an unnamed, partially gravel road (the road), which eventually crossed a single set of CSX's north-south railroad tracks at the crossing in question.” The crossing is marked with crossbucks (the railroad crossing sign shaped like an X) but nothing to indicate to the engineer that they should start sounding the train horn (a “whistle board”). There was “extensive vegetation growth” along the Sanitation Company’s side of the crossing. The morning was dark and foggy. As both the train and Calhoun’s car approached the crossing, the engineer saw her through the tree-line. There was disagreement as to whether the train horn was sounded. “Whatever else did--or did not occur--the train clipped Mary's car's passenger's side rear quarter panel, spinning it around, and ejecting her. She sustained serious injuries and has no memory of the collision.”

Calhoun and her husband filed suit against CSX, arguing, among other things, that CSX was negligent in letting the crossing become dangerous and by failing to warn her of the oncoming train. The trial court gave summary judgment to CSX and the engineer, finding that the crossing was private and that CSX bore no responsibility for it. The Calhouns appealed, and the Kentucky Court of Appeals affirmed the prior decision. The Calhouns further appealed.

ISSUE: Are the duties different with respect to public and private railroad crossings?

HOLDING: Yes

DISCUSSION: Under railroad law, the “ distinction between public and private railroad crossings is critical because ‘the duties required of persons who operate railroad trains, when approaching and passing over public crossings, are very different from those which are required of them at private crossings.’”⁵⁷ The county does not maintain the road in question, the two adjacent property owners do so. As such, CSX’s duties at the crossing were minimal and they had no duty to do any lookout or warning. CSX had “no duty to clear vegetation at private crossings.”⁵⁸ The Court looked to three exceptions to the minimal duty rule and found that one arguably could apply, the question as to whether the vegetation made the crossing more than just hazardous, but “ultra-hazardous.” The Court did agree that the other two did not apply. The case was remanded for a further decision as to whether the crossing was, in fact, ultra-hazardous.

⁵⁷ Stull's Adm'x v. Kentucky Traction & Terminal Co., 189 S.W. 721 (1916).

⁵⁸ Spalding v. Louisville & N.R. Co., 136 S.W.2d 1 (1940).

Sixth Circuit Court of Appeals

ARREST

Kennedy v. City of Villa Hills, 635 F.3d 210 (6th Cir. 2011)

FACTS: In May, 2005, Kennedy was “embroiled in a zoning dispute about the expansion of a strip mall next to his home.” He approached Schutzman, a police officer and building inspector for Villa Hills, about the dispute. Schutzman refused to speak to him, and Kennedy, when leaving, told other city workers in the building that Schutzman “broke all the zoning laws.” Schutzman approached Kennedy and asked him what he has said, and Kennedy made a derogatory personal comment about Schutzman. Schutzman arrested Kennedy for disorderly conduct. Kennedy was acquitted in the criminal case and then sued several parties, including Schutzman, for wrongful and retaliatory arrest. The trial court granted summary judgment to everyone but Schutzman, who had claimed qualified immunity. Schutzman appealed the denial.

ISSUE: If an arrest is clearly unreasonable, is the officer entitled to qualified immunity?

HOLDING: No

DISCUSSION: The Court reviewed the requirements for a qualified immunity defense. The Court noted that an “arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.”⁵⁹ Looking at Kentucky law, the court concluded that Schutzman “could not reasonably believe that he had probable cause to arrest Kennedy” as there was no indication of “public alarm” put forward. Although it was agreed that Kennedy was agitated, the evidence was mixed as to how loud he actually was and it might have actually been a reasonable volume. The court noted that “Kentucky law does not criminalize arguments and noise that disturb only police officers because such conduct does not risk *public* alarm.”⁶⁰ In fact, “because the First Amendment requires that police officers tolerate coarse criticism, the Constitution prohibits states from criminalizing conduct that disturbs solely police officers.”⁶¹ In deed, “the freedom of individuals verbally to oppose or challenge police actions without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”⁶² Finally, “a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.”⁶³ The Court reviewed a number of Kentucky cases concerning disorderly cases as well.

The Court then looked to the claim of retaliatory arrest, and noted that “motive *is* relevant to Kennedy’s claim that Schutzman arrested Kennedy in retaliation for Kennedy’s exercise of his First Amendment rights.”

⁵⁹ Harris v. Bornhorst, 513 F.3d 503 (6th Cir. 2008).

⁶⁰ This language comes from the statutory commentary.

⁶¹ City of Houston v. Hill, 482 U.S. 451 (1987).

⁶² Lewis v. City of New Orleans, 415 U.S. 130 (1974.)

⁶³ Arnett v. Myers, 281 F.3d 552 (6th Cir. 2002).

The Court summarized:

A retaliation claim essentially entails three elements: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.⁶⁴

Although agreeing that proof of motive is difficult, the Court found sufficient evidence by Schutzman's actions that the "content of Kennedy's speech may have been a motivating factor for Schutzman to arrest Kennedy." The right to be free of such arrests was clearly established, however.⁶⁵

The Court affirmed the denial of summary judgment on the grounds of qualified immunity.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Ellison, 632 F.3d 347 (6th Cir. 2011)

FACTS: On September 8, 2007, Det. Melzoni⁶⁶ applied for a search warrant, "relying in part on a tip from a confidential informant." The CI's reliability was not challenged, and he advised the officer that he had observed "within the past seventy-two hours, two males known to the informant as 'Red' and 'Short' meet outside of a residence on Cedar Circle in Nashville, Tennessee, and complete a drug transaction."

The affidavit stated:

The [CI] observed "Short" exit a side door of the residence and meet with "Red". While standing outside, "Short" did give "Red" a large quantity of cocaine in a plastic bag. After the deal was completed "Short" went backing [sic] into the residence and "Red" left the property.

Det. Melzoni explained in the affidavit that his experience indicated that persons at a location where drugs were being sold might have drugs on their person and thus requested authorization to search the home and any persons present. The warrant was issued and executed. Ellison was found outside. A large quantity of drugs, pills, a gun, cash and other items were found. On Ellison's person, they found a "handwritten ledger, which documented money paid and owed for controlled substances that he had distributed and which showed multiple \$50 to \$200 drug sales." While they were executing the warrant, Ellison got a call for a drug delivery. Ellison owned the property authorized by the search warrant and was charged with a variety of drug and firearms charges. He moved for suppression, arguing that the search warrant affidavit did not prove a sufficient nexus between the evidence sought and the place to be searched. The trial court noted that the affidavit was sufficient, even though it did not "name the person selling the drugs or the owner of the property." Ellison took a conditional guilty plea and appealed.

⁶⁴ Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999); See also Hartman v. Moore, 547 U.S. 250 (2006) and Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006).

⁶⁵ Greene v. Barber, 310 F.3d 889 (6th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

⁶⁶ Presumably Nashville PD, but unidentified in the opinion.

ISSUE: Does a suspect's walking into a house provide a sufficient nexus between the house and drug trafficking?

HOLDING: Yes

DISCUSSION: The Court agreed that the search warrant was properly supported by probable cause. "Commission of a drug transaction outside of a house and one participant's walking back into the house, as observed in this case, plainly demonstrated a sufficient nexus with the house." Such "incriminating actions are inextricably connected to the residence for which the search warrant was sought" and certainly gave a "fair probability" that drugs were stored there and that a search would lead to the discovery of contraband. The fact that Ellison was not mentioned by name was irrelevant.⁶⁷ The Court noted that while the probable cause for an arrest required proof that a particular person committed a crime, "a search warrant may be issued on a complaint which does not identify any particular person as the likely offender."

The Court affirmed the conviction.

U.S. v. Patton, 411 Fed.Appx. 806 (6th Cir. 2011)

FACTS: On September 18, 2008, Lexington PD executed a search warrant on Patton's home. They found cocaine residue on a digital scale, a loaded firearm and ammunition. The warrant had detailed that officers "noticed a large volume of traffic coming in and out of" his home. As a result, they had searched the trash from that location and found cocaine, marijuana cigarettes, seeds, stems and a plastic bag with residue. A check of the vehicle that regularly there was registered to Patton, who had a history of drug trafficking. The matter was assigned to a detective, who learned through a CI that Patton was a "primary customer" of a local drug trafficker. A warrant was obtained and Patton was arrested as a result. He challenged the affidavit, but the court upheld it. Patton appealed.

ISSUE: Is a lack of detail fatal to a search warrant affidavit?

HOLDING: No (but see discussion)

DISCUSSION: Patton raised "a litany of purported errors and omissions in the affidavit." The Court agreed that the affidavit "might have been more detailed, but it is constitutionally adequate." Specifically, he did not challenge the legal trash pull, although that "uncovered the most incriminating evidence." That information alone supported the warrant. It was reasonable for the court to believe that "a police officer – particularly one told by a superior to search for drugs – could identify marijuana residue, seeds, stems and cigarettes by smell and sight with a fair degree of accuracy." The Court agreed that more detail, such as the dates and times "the police witnessed traffic moving in and out of his residence" "might have aided the issuing court's analysis," "their absence does not defeat the warrant." It accurately noted that his most recent conviction was in 2003, and it was reasonable to infer that he had not been charged or convicted since that time. His "criminal history was accurately represented in the affidavit and that is all that is required."

The denial of the motion to suppress was upheld.

⁶⁷ U.S. v. Pinson, 321 F.3d 558 (6th Cir. 2003); see also Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

Hammons v. U.S., 411 Fed. Appx. 837 (6th Cir. 2011)

FACTS: On September 11, 2008, Hammons, his wife (Mary Ruth) and his neighbor (Bowling) were arrested in London for Trafficking in Marijuana. Prior to the arrest, a search warrant execution at his home revealed a large quantity of marijuana (58 lbs) and firearms.

The search warrant affidavit was offered by Detective Mitchell (Laurel County SD). It relayed statements by an informant to authorities after being arrested that same morning on unrelated drug charges. He identified Hammons as a dealer and made specific allegations as to amounts and prices that the informant had purchased at Hammons' home. The authorities verified the residence by checking the registration of vehicles parked in the driveway. The informant made a drug buy call which suggested they had an ongoing relationship.

The warrant stated:

On the 11th day of September, 2008, at approximately 8:30 a.m./p.m. affiant received information from/observed: _____ who advised that in the past 3 or 4 months he has purchased 12 to 15 lbs of marijuana from Scott Hammons who resides at the residence referenced in this affidavit. _____ further stated that he purchased the marijuana a (sic) 1 lb. quantities for which _____ paid \$1200 U.S. Currency. _____ also advised that he met Hammons at the residence mentioned in this affidavit on at least one occasion and received marijuana. _____ also advised that Hammons fronted the marijuana to _____ and allowed _____ to pay for the marijuana when he received the next pound. _____ advised that it had been approximately 2 weeks since he last purchased marijuana from Hammons. _____ also advised that he usually contacted Hammons via telephone and that he and Hammons would arrange a meet and time. _____ accompanied law enforcement and showed your affiant the residence referred in this affidavit stating that it was the Hammons residence.

On the morning of 09-11-2008 the Laurel County Sheriff's Office executed a search warrant at the _____ residence. During that search approximately 1/2 pound of marijuana was recovered. _____ advised that this was the remainder of the most recent purchase made from Hammons. Acting on the information received, affiant conducted the following independent investigation: Your affiant secured the cooperation of _____ to place a controlled call to Hammons in the presence of law enforcement. _____ called Hammons at XXX-XXX-XXXX, the number _____ advised belonged to Hammons. _____ inquired with Hammons if _____ could meet Hammons later this date and Hammons advised that he could. Hammons also told _____ that Hammons had something that was a lot better. On a second call, also on in the presence of law enforcement, Hammons told _____ that "we" are loaded heavy and that it was "good stuff." Law Enforcement established surveillance on the residence mentioned in this affidavit and ran computer checks on registration checks on vehicles in the driveway and other computer databases. The vehicles are registered to Timmy Scott Hammons at XXXX XXXXX, London.

During the search, Mary Ruth described her husband's actions, and after being advised of Miranda, Hammons confessed. He was ultimately indicted on federal marijuana trafficking charges and related offenses. He moved for suppression and requested the identify of the informant. When that motion was denied, Hammons took a conditional guilty plea and appealed.

ISSUE: Must an unproven CI's information be corroborated?

HOLDING: Yes

DISCUSSION: Hammons argued that the affidavit did not provide a nexus between the crime and his residence. The Court agreed that “[t]here must ... in other words, be a nexus between the place to be searched and the evidence sought.”⁶⁸ The Court agreed that warrants can be based on hearsay, but that “the source of information is highly relevant to the probable cause determination.”⁶⁹ When it is based upon an informant “without indicia of reliability,” “courts insist that the affidavit contain substantial independent police corroboration.”⁷⁰ The identity of the informant had been given to the magistrate, but the only indication that he was reliable was that Hammons was allegedly source of the marijuana the informant had in his possession. The court had held that such “penal statements do not establish reliability.”⁷¹ However, under Woosley, the Court could also look to the totality of the circumstances, if the affidavit includes sufficient corroboration.⁷² The Court, however, agreed that the phone calls, made in the presence of the law enforcement officers, where Hammons “spoke both to the quantity and quality of marijuana in his possession,” was sufficient corroboration.

With respect to the nexus, the Court agreed that since the supposed sales had occurred over several months, there might be an issue of staleness. However, it “clearly linked [Hammons’] drug trafficking activities to his home and established a fair probability that evidence would be found there.”⁷³ A nexus might be inferred “between a suspect and his residence, depending upon the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.”⁷⁴

Finally, the court agreed that “[a]lthough the government is privileged to withhold the identity of police informants, “[w]here the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.”⁷⁵ “Mere conjecture or supposition about the possible relevancy of the informant’s testimony is insufficient to warrant disclosure.”⁷⁶ Instead, a defendant bears the burden of showing how disclosure of an informant’s identity will materially aid his defense.⁷⁷

Hammons argued that since the informant did not request to remain anonymous, he should be provided the information, but the court noted that the privilege in question “is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law.”⁷⁸ The Court agreed Hammons had failed to make a showing as to why he needed the information to support his

⁶⁸ U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006).

⁶⁹ U.S. v. Gunter, 551 F.3d 472 (6th Cir. 2009).

⁷⁰ U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

⁷¹ U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003) See U.S. v. Higgins, 557 F.3d 381 (6th Cir. 2009) (citing Armour v. Salisbury, 492 F.2d 1032 (6th Cir. 1974)).

⁷² U.S. v. Woosley, 361 F.3d 924 (6th Cir. 2004).

⁷³ U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006) (citing Zurcher v. Stanford Daily, 436 U.S. 547 (1978)); see also U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004) (en banc).

⁷⁴ U.S. v. Williams, 544 F.3d 683, 687 (6th Cir. 2008) see also Gunter, 551 F.3d at 478; U.S. v. Gunter, 266 F. App’x 415 (6th Cir. 2008); U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002); U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).

⁷⁵ Roviaro v. U.S., 353 U.S. 53 (1957).

⁷⁶ U.S. v. Sharp, 778 F.2d 1182 (6th Cir. 1985).

⁷⁷ See U.S. v. Moore, 954 F.2d 379 (6th Cir. 1992).

⁷⁸ Roviaro, *supra*.

defense and that despite his assertion he needed the information to determine if the affidavit “exaggerated or omitted information,” he had not made a sufficient case.

Hammons’ conviction was affirmed

SEARCH & SEIZURE - CONSENT

U.S. v. Ammons, 2011 WL 1130447 (6th Cir. 2011)

FACTS: Deputy Walker was investigating a residential theft one morning in Newbern, Tennessee. Robert and Billy Shanklin told the deputy that their mother, Judy, owned the house, but that she actually lived with her former boyfriend, Ammons, in a camper in the driveway. (The house was being remodeled.) They had found some of their mother’s belongings in the house and believed Ammons had stolen them and hidden them there. Judy Shanklin arrived and asked the deputy to search the house - he did so, finding other items. Ammons was arrested for Theft. Billy Shanklin found pawn shop receipts, indicating that Ammons, who was a convicted felon, had also pawned three guns.

Ammons, out on bond a week later, was arrested towing a stolen tractor. Two more guns were seized from his vehicle during that arrest. He was ultimately indicted on five counts of possession of firearms as a convicted felon. He moved for suppression, which was denied. He then appealed.

ISSUE: May officers rely on apparent authority in a consent?

HOLDING: Yes

DISCUSSION: Ammons argued that each of the searches was improper. With respect to the house, the Court found that the officers had, “at the very least ... good faith reliance on Judy Shanklin’s apparent authority to consent.”⁷⁹ In fact, there was some question about the relationship between the two parties, and the house, and that in some situations, the actual property owner might lack the authority to give consent to search a home occupied by another. However, faced with her assertion that she owned the house, supported by her sons’ statements that no one actually lived in it, it was appropriate for the deputy to believe Shanklin could give consent.

With respect to the truck, the Court noted that a CI’s tip gave the officers reasonable suspicion to stop Ammons. That informant was known to the officers and had provided reliable information in the past.⁸⁰ The informant provided “detailed, not general, information, as he spoke specifically about Ammons, the truck, and when and where Ammons would be the next day.” The officer personally verified everything prior to the stop, except for the fact that the tractor was, in fact stolen. The Court upheld the stop, and the subsequent arrest and search.

Ammons’ conviction was affirmed.

⁷⁹ Illinois v. Rodriguez, 497 U.S. 177 (1990).

⁸⁰ Florida v. J.L., 529 U.S. 266 (2000); U.S. v. Allen, 211 F.3d 970 (6th Cir. 2000).

SEARCH & SEIZURE – PAROLE

U.S. v. Davis, 2011 WL 944376 (6th Cir. 2011)

FACTS: Davis was on parole in Ohio in January, 2007, at an approved residence in Akron. On January 8, Sgt. Dittmore (Canton PD) learned Davis was living in Canton and possibly involved in trafficking. The source gave specific information, which Sgt. Dittmore verified. He contacted Officer Beebe, of the Parole Authority, who joined the investigation along with an ATF agent. As they were surveilling the property, Davis arrived in a vehicle they'd previously linked to him. They stopped him, searched the vehicle and searched the residence, finding a firearm. Davis was arrested, given Miranda and confessed in writing to possession of the gun. At a suppression hearing, the Court found that conditions for a warrantless search were met and denied the motion. At trial Davis claimed he was coerced and did not know about the gun, and that he heard the officers talking about charging his girlfriend (who lived there with her children) with child endangerment and that motivated him to cooperate.

Davis was convicted and appealed.

ISSUE: Is a parole search privilege limited only to the parolee's assigned officer?

HOLDING: No

DISCUSSION: Davis argued that the warrantless search violated his Fourth Amendment rights. The Court examined the Ohio statute relevant to parole searches, which had already "passed constitutional muster." It also looked at the "facts of the search itself" and found adequate reasonable suspicion to believe Davis was violating his conditions.⁸¹ Even though a different parole officer conducted the investigation, other than his assigned officer, the Court found it to be adequate.

Davis's conviction was affirmed.

SEARCH & SEIZURE - ABANDONED PROPERTY

U.S. v. Jones, 406 Fed.Appx. 953 (6th Cir. 2011)

FACTS: Ohio officers made a traffic stop of a vehicle identified as transporting drugs. The driver "ran from the vehicle and the officers gave chase." He tossed a gun and cocaine and ran into a bar – the First Note Café. The first officer entered and ordered everyone to the floor, other officers arrived and began patting down the patrons. Jones was near the front door and was noted, during the pat-down, to be wearing a bullet-resistant vest. The officers located a jacket, matching the one worn by the fleeing subject, near the rear of the bar. Inside they found a Kenton County inmate bracelet that included information about Jones, as well as an "inmate personal property inventory list" that described the jacket and a bullet-resistant vest.

Jones was indicted and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

⁸¹ U.S. v. Loney, 331 F.3d 516 (6th Cir. 2003).

ISSUE: May abandoned property be seized and used as evidence against a suspect?

HOLDING: Yes

DISCUSSION: Jones conceded that the jacket had been abandoned before found and that “search and seizure of abandoned property does not violate the Fourth Amendment.”⁸² As such, all evidence introduced relating to the jacket was proper. His drug trafficking conviction was affirmed.

SEARCH & SEIZURE - TERRY

U.S. v. Dingess, 411 Fed.Appx. 853 (6th Cir. 2011)

FACTS: Columbus (OH) officers spotted two men in a vehicle in “the common driveway of a duplex.” They received reports that a person was selling drugs from a vehicle matching that description, so they checked the license plate. They learned Dingess owned the vehicle and upon pulling up his photo of record, learned he had a lengthy criminal history. (He was later discovered to be staying with his girlfriend who lived in the duplex.)

The officer spent some time on an unrelated traffic stop and returned to investigate further. They parked on the street. Officer Phalen approached the driver’s side and Officer Narewski the passenger side. Both car windows were down and they smelled burning marijuana. Officer Phalen saw that Dingess was “holding a marijuana blunt.” Spotting them, Dingess “said that he was not doing anything wrong and demanded that the officers move away.” He allegedly tossed the blunt into his brother, Drew’s, lap and Drew raised his hands in surrender. Officer Phalen opened the car door and told Dingess he was under arrest. During an ensuing struggle, Dingess was tasered twice. As he fell, Officer Narewski saw a gun and alerted Phalen.

Dingess was charged with possession of the firearm as he was a convicted felon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a consensual encounter require reasonable suspicion?

HOLDING: No

DISCUSSION: Dingess argued that “the officers engaged in a Terry stop without a reasonable, articulable suspicion.” The Court, however, agreed that the “officer initiated a consensual encounter rather than a Terry stop, and the officers had probable cause before the encounter ripened into a Terry stop or an arrest.” The Court noted such factors as – the “officers parked their car without blocking Dingess’s egress and then approached Dingess and Drew to initiate conversation.” Dingess noted a number of factors, including the number of officers, but the Court found them to be irrelevant to the situation. Once they smelled the marijuana, they had probable cause to make the arrest. Dingess did not brief the issue of the officers entrance “uninvited onto private property,” but the Court agreed that it would have lacked merit “in light of the open access to the common driveway and the officers’ unobstructed view of Dingess’s activities.”⁸³

⁸² Abel v. U.S., 362 U.S.217 (1960).

⁸³ U.S. v. Smith, 783 F.2d 648 (6th Cir. 1986).

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE - JAIL SEARCH

U.S. v. Warfield, 404 Fed.Appx. 994 (6th Cir. 2011)

FACTS: On February 14 and 28, 2006 Detective Harper (KSP) worked with a CI to make two 3-oz. cocaine buys from Warfield. On March 16, the same CI made arrangements to buy 8 oz. of crack. He informed his KSP handler that Warfield would be driving a specific vehicle. Det. Harper knew that Warfield had a suspended OL. He was following the Warfield vehicle prior to the buy and spotted him swerving. Troopers in a marked vehicle stopped Warfield and eventually arrested him for operating on the suspended OL. A drug dog alerted on the vehicle but no drugs were found during the subsequent search.

Warfield was taken to the Warren County Regional Jail. Detective Harper told the jailers that the dog had alerted. "Based on this information, a nine-year-old drug conviction, and Warfield's refusal to submit to a search without his lawyer present, the police at the jail suspected Warfield of possessing drugs on his person and took him into a room for an unclothed pat-down search." Before he was searched, however, he "dropped a small baggie that he had concealed in his crotch area." The baggie contained eight oz. of cocaine.

Warfield was indicted on trafficking and distribution of cocaine. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a strip search at the jail require reasonable suspicion?

HOLDING: Yes

DISCUSSION: Warfield objected to the "threatened strip-search at the jail, the anticipation of which led him to drop the baggie containing the crack cocaine." The Court agreed that the KSP "could properly arrest him for driving on a suspended license." A full "strip-search" under such circumstances is appropriate if the "circumstances demonstrate that it was 'reasonable.'"⁸⁴ The decision requires a balancing between the invasion of the personal privacy rights and the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Kentucky's jail policies allow such searches "only a reasonable suspicion that is based upon the existence of objective information that may predict the likelihood of the presence of" drugs.⁸⁵ Warfield's criminal history, his refusal to submit and the drug dog alert together justified the search, providing an "adequate reason under Bell⁸⁶ for the jail officers' strip-search of Warfield."

Finding so, the Court found it unnecessary to address the issue as presented by the Commonwealth, which was that Warfield abandoned the crack cocaine. Warfield's conviction was affirmed.

⁸⁴ Bell v. Wolfish, 441 U.S. 520 (1979).

⁸⁵ Reynolds v. City of Anchorage, 379 F. 3d 358 (6th Cir. 2004); 501 KAR 3:120, Sec. 3(1)(b).

⁸⁶ Bell, *supra*.

SEARCH & SEIZURE - PRETEXT

U.S. v. Riley, 410 Fed.Appx. 96 (6th Cir. 2011)

FACTS: In October, 2005, Riley was arrested as a result of a search at a friend's home, in which cocaine was found. On March 9, 2007, Riley was the passenger in a vehicle stopped by Columbus (OH) officers. Becoming suspicious, the officers called for a drug dog and Andor arrived promptly. Andor alerted on the two front doors. The driver was arrested and a firearm was found on his person during the search incident to the arrest. The driver claimed the gun was Riley's (and in fact, later evidence suggested that was the case.) Riley was directed out of the car, handcuffed and frisked, and a "cookie of crack" was found in his pocket. He was arrested. On April 10, Riley's mother's home was searched, pursuant to a warrant, as a result of a controlled drug buy at the home the day before. Crack cocaine and related drug paraphernalia were found, the drug-buy money, and "two loaded AK-47 rifles placed in tactical positions within the home."

Riley was charged in federal court for multiple drug and firearms crimes. He was convicted and appealed.

ISSUE: May a vehicle be stopped on a pretext?

HOLDING: Yes

DISCUSSION: Riley argued that the circumstances of the March traffic stop were questionable, as it was based, in part on the officer's statement that the license plate light was out, when they later stated they ran a license plate check - which he claimed would have not been possible if the light was, in fact, out. The Court found that even if the stop was a pretext to search for drugs, that was "not relevant in a Fourth Amendment analysis, so long as the police had probable cause to believe that a traffic violation occurred before they stopped the vehicle."⁸⁷

Riley also argued that they had insufficient probable cause for an arrest and search. The Court looked to the specific facts known to the officers - the nervousness of the driver, the drug dog's alert on both sides of the car, and the cocaine and gun found on the driver, which he claimed belonged to Riley. The Court agreed the search and arrest were proper and affirmed his conviction.

SEARCH & SEIZURE - VEHICLE STOP - GANT

U.S. v. Buford, 632 F.3d 264 (6th Cir. 2011)

FACTS: On May 18, 2008, Nashville officers stopped a car driven by Buford and learned that Buford had an outstanding warrant for a probation violation. He was arrested and the vehicle searched. Officer Chisolm found a loaded handgun under the seat. On the way to jail, Buford volunteered that he had the gun because he feared being robbed for the truck. He was charged with the unlawful possession of the weapon.

⁸⁷ U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999); U.S. v. Blair, 524 F.3d 740 (6th Cir. 2008); Whren v. U.S., 517 U.S. 806 (1996).

Buford argued that since he was secured at the time, the search of the vehicle was improper and the evidence should be suppressed. Although Gant was not decided until the next year, the Court agreed that under the retroactivity principle, Gant must be applied. The trial court suppressed the evidence and the prosecution appealed.

ISSUE: Is Gant retroactive to pending cases?

HOLDING: No

DISCUSSION: The Court agreed that "It is firmly established that a decision of the Supreme Court declaring a new constitutional rule applies "to all similar cases pending on direct review." And, it was clear that the search violated Gant. However, that was not the end of the analysis. The Court decided it must look to "whether the exclusionary-rule remedy requires that we suppress the fruits of the unconstitutional search of Buford's vehicle notwithstanding the police's reliance on 'a different kind of authority, namely' this circuit's well-settled case law."

The Court reviewed the opinions of other circuits that had addressed the issue, noting that the "Supreme Court had not yet directly addressed the question." The Court noted that in Leon, the Court declined to require suppression when an officer reasonably relied on an invalid warrant to conduct the search because "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."⁸⁸

The Court ruled that "exclusion is not the appropriate remedy when an officer reasonably relies on a United States Court of Appeals' well-settled precedent prior to a change of that law." The Court reversed the suppression and remanded the case for further proceedings.

41 U.S.C. §1983 - ARREST

Wheeler v. Newell, 407 Fed.Appx. 889 (6th Cir. 2011)

FACTS: On August 10, 2007, Elizee, mother of K.G., arrived at the Sandusky PD to get help in retrieving K.G. from the home of her paternal grandparents (Wheeler and husband). She'd had permission to visit them, but Elizee learned that K.G.'s father, Griffith, had travelled from Massachusetts and was also at the home. Elizee feared for K.G. and drove from Florida to pick him up.

Officer Newell went with Elizee, they arrived at about 1 a.m. Wheeler, her husband and Griffith were watching a movie, K.G. was asleep. Officer Newell rang the doorbell and discussed the matter with Wheeler, who showed him an email indicating that K.G. could visit until August 16. Officer Newell explained that under Ohio law, Elizee was entitled to full custody unless there was a court order to the contrary and requested the boy be returned. "Griffith began yelling at Elizee [who was outside] and made his first of three attempts to run past Officer Newell and confront Elizee outside the house." Other officers arrived and eventually, Griffith was arrested for disorderly conduct and resisting arrest. Wheeler headed out to confront Elizee and her husband grabbed at her hand. She shouted at Elizee across the street, and "was very upset throughout these events and refused to obey the officers' commands to calm down."

⁸⁸ U.S. v. Leon, 468 U.S. 897 (1984).

Eventually, she too was arrested. The opinion does not indicate the disposition of that arrest, but she filed suit against Sandusky and the officers for false arrest - the case was removed to federal court under federal question jurisdiction. The District Court awarded summary judgment to the officer and Wheeler appealed.

ISSUE: May a false arrest claim be made when officers had probable cause to make the arrest?

HOLDING: No

DISCUSSION: First, the Court looked to whether she had “made out the violation of a constitutional right.”⁸⁹ The Court reviewed the elements of a disorderly conduct charge in Ohio and agreed that “based on the undisputed facts,” the arrest was appropriate. Because unlawful actions took place in the presence of the officers, they had probable cause and did not violate her rights. The dismissal was upheld.

Everson v. Calhoun County, 407 Fed.Appx. 885 (6th Cir. 2011)

FACTS: In September, 2005, Everson informed the Calhoun County (Michigan) Sheriff’s Office that on December 16, 2004, her then-boyfriend, Officer Graham (Battle Creek PD) had “forcibly sodomized her during an otherwise-consensual sexual encounter.” She had broken up with him but had been unsure what to do next, and had confided in various people before deciding to make the report. Detective Picketts investigated and confirmed she had, in fact, discussed the matter with several individuals. Graham denied the action, however, and claimed she filed the report in spite when she learned he was getting married. Everson, the complaining victim and eventually plaintiff, later claimed, however, that the detective did not interview several critical witnesses.

Eventually, a report was submitted and the prosecution declined the case. Upset by the decision, Everson “criticized Picketts loudly and repeatedly, accusing him of not doing his job and being “just part of the good ole boy system.”” She made a formal complaint to the Sheriff and to the Calhoun County prosecutor.

Picketts then began an investigation of Everson, and eventually filed an arrest complaint against her for filing a false police report - having witnesses that she admitted having lied about the claim. She was charged, and ultimately, she was bound over for trial. The trial court, however, quashed the case for lack of evidence. She was rearrested and the case submitted in another county, but again, the case was dismissed.

Everson filed suit against Picketts and Calhoun County, under 42 U.S.C. §1983, alleging retaliation for her exercise of her First Amendment rights. Most of the case was dismissed, but Picketts remained in the action and appealed the denial of his motion for summary judgment.

ISSUE: Is a retaliatory arrest actionable?

HOLDING: Yes

DISCUSSION: The Court noted that this type of case employed a “two-step test, considering (1) whether, viewing the allegations in the light most favorable to the injured party, a constitutional right had been

⁸⁹ Thacker v. Lawrence Cnty., 182 F.App’x 464 (6th Cir. 2006),

violated: and (2) whether that right was clearly established.”⁹⁰ The Court agreed that it had already been clearly established that “the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”⁹¹ To make a retaliation claim, she would be required to show “(1) protected speech; (2) injury as a result of defendant’s actions; and (3) causation.”⁹² Picketts argued that he had probable cause for the arrest. The Court, however, found there remained “genuine disputes of material facts” about the second investigation and thus, it was necessary to allow the case to go forward.

The Court affirmed the denial of qualified immunity.

41 U.S.C. §1983 - FORCE

Coble v. City of White House (Tennessee), 634 F.3d 865 (6th Cir. 2011)

FACTS: On April 6, 2007, at about 2240, Officer Carney (White House, TN, PD) was patrolling. He saw a vehicle pull out of a parking lot. It crossed the fog line and Officer Carney turned on his in-car video and his emergency lights. Coble (the driver) continued on until he turned into his own driveway. Officer Carney followed the car into the driveway. Coble refused to obey any commands or answer questions, and instead, argued with the officer, “told him to get off his property, and began walking toward his house.” Carney sprayed Coble with OC and took him to the ground, during which time Coble’s ankle was badly broken. With the help of Officer Bilbrey, he was subdued. What happened next was not caught on the camera but audio was captured by the microphone worn by Officer Carney. Coble claimed that the officer pulled him up by the cuffs and forced him to walk 7 or 8 steps on his obviously broken ankle, and eventually he was dropped face-first to the ground. Officer Carney testified that they did get him up, but after Coble said his leg was broken and he saw that it was, he “immediately sat him down on the driveway.” Coble was taken by helicopter to the hospital and found to have a BA of .16. He was charged, and pled guilty, to DUI and resisting. He then filed suit for excessive force, false arrest and related claims under 42 U.S.C. §1983. The District Court ruled that force before he was cuffed was barred by Heck v. Humphrey.⁹³ Further, it found that the claims of excessive force were also be dismissed “in light of the audio recording,” pursuant to Scott v. Harris.⁹⁴ The Court noted that the videotape indicated that Coble said nothing until he cried out that his leg was broken and that he was immediately directed to sit down at that point. The testimony of the officers was “square with the audiotape” and Coble’s was not. Coble appealed.

ISSUE: May there still be a genuine issue of fact even when an event is recorded?

HOLDING: Yes

DISCUSSION: The Court agreed that usually, “construing the facts on summary judgment in the light most favorable to the non-moving party usually means adopting the plaintiff’s version of the facts.” However, Scott indicates that is only the case if there is a genuine dispute as to those facts. Appellate courts are not required to “accept ‘visible fiction’ that is ‘so utterly discredited by the record that no reasonable jury could

⁹⁰ Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008); Pearson v. Callahan, 129 S.Ct. 808 (2009).

⁹¹ Hartman v. Moore, 547 U.S. 250 (2006).

⁹² Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

⁹³ 512 U.S. 477 (1994).

⁹⁴ 550 U.S. 373 (2007).

have believed it.”⁹⁵ The Court found no reason to hold that Scott could not be extended to an audio recording. However, the Court agreed that Coble’s claims were not “blatantly contradicted” by the audio recording and that a lack of sound did not necessarily mean that the sound did not occur. Further, even if part of his testimony was discredited, “that does not permit the district court to discredit the entire version of the events.”

For that reason, the Court found there remained a genuine issue of material fact and reversed the summary judgment on behalf of the officer. The case was remanded for further proceedings.

Schmalfeldt v. Roe, 412 Fed.Appx. 826 (6th Cir. 2011)

FACTS: Officer Roe (Coloma Township, Michigan, PD) responded along with other officers to Schmalfeldt’s home, in response to a call that he and his girlfriend (Gross) had been arguing. Schmalfeldt had apparently made the call, asking that Gross be removed from the house for violent behavior. Both were physically injured and Schmalfeldt was “highly intoxicated.” He was seated at a table when Officer Roe decided to arrest him. Schmalfeldt stated that Officer Roe, “without any warning, deployed the Taser against him.” He fell to the floor and was ordered to roll over, which he was unable to do, and was shocked again. He was “forcibly pulled up from the floor, handcuffed, and removed from the house” and sustained a detached muscle in his arm as a result.

Schmalfeldt was charged with resisting and obstructing an officer and domestic violence. He pled guilty to lesser charges and filed suit, claiming that he was “unarmed, offered no resistance, and was cornered by four police officers so that he obviously had no means of escape” and that the use of the Taser was “objectively reasonable and constituted excessive force.”

Roe however, contended that Schmalfeldt physically resisted when an officer grabbed his arm and then became physically aggressive and threatening towards the officers, thus requiring the use of the Taser.” The District Court, because of this dispute in the stories, determined that qualified immunity was not appropriate. Roe appealed.

ISSUE: Is using a Taser against a non-resisting suspect excessive force?

HOLDING: Yes

DISCUSSION: The Court agreed that the “existence of disputed fact in this case works to deprive [the court] of authority to hear [the] appeal, based on the Supreme Court’s ruling on Johnson v. Jones.⁹⁶” In that case, it was held that “a defendant entitled to raise qualified immunity as a defense may not appeal a district court’s summary judgment order denying qualified immunity if the pretrial record is “sufficient to show a genuine issue of fact for trial.” Jurisdiction to review the denial of qualified immunity is available only “to the extent it turns on an issue of law.”⁹⁷

The Court noted that it had “precedents stretching back at least to 1994, indicating that spraying a suspect with mace - then the equivalent of later-developed pepper sprays and electroshock devices - can amount to

⁹⁵ U.S. v. Hughes, 606 F.3d 311 (6th Cir. 2010).

⁹⁶ 515 U.S. 305 (1995).

⁹⁷ Mitchell v. Forsyth, 472 U.S. 511 (1985).

excessive force if used unreasonably against a non-resisting suspect.”⁹⁸ Since this case turns on a credibility determination as to whether the force was necessary, the question “is one for a jury and not for the district court.”

The Court upheld the decision.

Meirthew v. Amore, 2011 WL 1195944 (6th Cir. 2011)

FACTS: On May 19, 2007, Officer Amore (Wayne, Michigan, PD) was patrolling Meirthew’s neighborhood. He saw, through her windows, that several minors were consuming alcohol. He obtained a search warrant and returned. The officers found that several minors had been drinking and that “Meirthew herself was highly intoxicated, having consumed six to ten beers.” She was told to sit down but instead walked away. The officers took her to the floor and handcuffed her. At some point, she “allegedly kicked a reserve officer in the groin.” She was arrested for a variety of charges, including furnishing the alcohol to the minors, felony assault, resisting arrest and disorderly conduct. Two of the juveniles, including her daughter, were also arrested. They were all taken to the booking room, where, according to video, Meirthew appeared “intoxicated and belligerent.” They concluded they should forgo booking and prior to putting her in a cell, she was to be searched by a female officer. The officer, Amore, led her “to a wall and instructed her to spread her feet.” He was “holding her by her handcuffs or wrists” The video showed “some level of resistance” but it was not clear. Officers testified that she was kicking, swinging her elbows and would not cooperate. One of the juveniles stated that she “refused to spread her feet, continually moving them together after Amore would kick them apart” but that she was not otherwise violent and did not attempt to actually kick the officers.

Officer Amore used a “pain-compliance technique” - lifting her arms “such that her elbows were above her head.” When she still did not cooperate, he used an “arm-bar takedown” to “thrust Meirthew to the floor face first.” She fell, “unbraced and uncontrolled, to the floor, hitting her face with the full force of her body.” As she was bleeding profusely, she was taken for treatment, and found to have “six facial fractures, head lacerations, and a nosebleed.” As a result, she claimed to have numbness in part of her face and arm and wrist pain. Eventually, the assault charges were dismissed and she pled guilty to the alcohol and disorderly conduct charges. She then filed suit under 42 U.S.C. §1983 for excessive force.

ISSUE: May a use of force against a non-compliant subject still be found to be excessive?

HOLDING: Yes

DISCUSSION: The Court reviewed the facts and agreed that she “set forth sufficient admissible evidence to establish a genuine issue of material fact regarding the reasonableness of Amore’s use of force.” When Amore used the takedown, Meirthew was “unarmed, handcuffed, surrounded by police officers, physically restrained, and located in the secure confines of a police station.” Although she was non-compliant, the Court agreed a jury “could find that Merthew posed no danger and the use of the arm-bar takedown was unreasonable under the circumstances.”

The Court looked to Graham v. Connor,⁹⁹ noting that all the “factors favor a finding of excessive force.”

⁹⁸ See Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).

⁹⁹ 490 U.S. 386 (1989).

First, the underlying crimes allegedly committed by Meirthew were not severe. While Meirthew was charged with kicking an officer in the groin, the charge was dismissed pursuant to a plea bargain in which she pleaded no contest to three counts of furnishing alcohol to a minor and disturbing the peace. Second, Meirthew did not pose an immediate threat at the police station. Indeed, she was unarmed, handcuffed, and surrounded by police officers.). Moreover, Meirthew made no verbal or physical threats, is five feet, four inches in height, and 123 pounds in weight. Amore, on the other hand, is five feet, ten inches in height, and 230 pounds in weight.¹⁰⁰ Moreover, the situation confronting Amore in the booking room was not a “tense, uncertain, and rapidly evolving” situation requiring him to make “split-second judgments.” Finally, Meirthew was not attempting to resist or evade arrest by flight. Indeed, she was already arrested, handcuffed, and present in the City of Wayne police station. While Meirthew refused to spread her feet to be searched, such resistance was minimal.¹⁰¹ Moreover, while Meirthew’s non-compliance may have justified *some* physical response by Amore, the *amount* of force utilized may have been unreasonable.¹⁰²

The Court noted that the maneuver, which “forcefully thrust her to the booking room floor” was performed, “despite the fact that [Meirthew] was handcuffed, leaving her with no means with which to protect her face.” The Court agreed, as well, that the right had been clearly established, as prior decisions had clearly stated “that it is unreasonable to use significant force on a restrained subject, even if some level of passive resistance is presented.”¹⁰³

The Court agreed qualified immunity was not warranted and allowed the case to go forward.

Rodriguez v. Passinault, 637 F.3d 675 (6th Cir. 2011)

FACTS: On Sept. 5, 2003, Murray and Rodriguez attended a party and were then dropped off at Murray’s truck. Murray was intending to drive Rodriguez home. As they left the parking area, Murray spotted a police car. Because he was on parole and prohibited from drinking alcohol, Murray “attempted to elude the cruiser by maneuvering his vehicle through alleys and driveways before pulling into an alley and shutting off his engine and lights.” He ducked down and told Rodriguez to do the same.

Deputy Sheriffs Passinault and Jenkins (Shiawassee County SO), suspicious, began to search the area on foot. Murray started the engine and tried to drive away. Passinault, “allegedly fearing for his and his partner’s safety, fired several shots at the vehicle. Murray was fatally struck, and his truck subsequently crashed into a ditch.” Rodriguez was injured by flying glass caused by the gunshots. Further details were stated in a previous decision on the same case.¹⁰⁴

Rodriguez filed suit against Passinault and others under 42 U.S.C. §1983. This case was suspended while the previous case (involving Murray’s estate) was litigated. When the court in that case finally affirmed the dismissal of Jenkins but reversed the dismissal of Passinault. Rodriguez then re-filed her complaint naming only Passinault. The court granted Passinault summary judgment, “concluding that Rodriguez was

¹⁰⁰ See Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009); Harris v. City of Circleville, 583 F.3d 356 (6th Cir. 2009); Solomon v. Auburn Hills Police Dep’t, 389 F.3d 167 (6th Cir. 2004).

¹⁰¹ Rohrbough v. Hall, 586 F.3d 582 (8th Cir. 2009); Shreve v. Jessamine Cnty. Fiscal Court, 453 F.3d 681 (6th Cir. 2006).

¹⁰² Santos v. Gates, 287 F.3d 846 (9th Cir. 2002).

¹⁰³ Griffith v. Coburn, 473 F.3d 650 (6th Cir. 2007).

¹⁰⁴ Murray-Ruhl v. Passinault, 246 Fed. Appx. 338 (6th Cir. 2007) - summary included in the 2007 compiled Case Law Update.

not seized within the meaning of the Fourth Amendment because Passinault did not know that she was a passenger in Murray's truck, because she was not actually shot, and, in any event, because Passinault was entitled to qualified immunity." Rodriguez appealed.

ISSUE: Is a passenger in a vehicle seized when the vehicle is seized?

HOLDING: Yes

DISCUSSION: To make a claim of "excessive force under the Fourth Amendment requires that a plaintiff demonstrate that a seizure occurred, and that the force used in effecting the seizure was objectively unreasonable."¹⁰⁵ The Court reviewed the cases of Fisher v. City of Memphis¹⁰⁶ and Troupe v. Sarasota Cnty., Fla.¹⁰⁷ both of which relied on Brower v. Cnty. of Inyo.¹⁰⁸ The court also looked to Scott v. Clay Cnty., Tenn.¹⁰⁹ The court noted that "an officer's intentionally applied exertion of force directed at a vehicle to stop it effectuates a seizure of all occupants therein." Murray's injuries resulted in the car stopping, eventually, as he lost control.

Because, like Murray-Ruhl in the previous case, Passinault's entitlement to qualified immunity depends on which party's version of the facts a jury accepts, the Court reversed the summary judgment and allowed the case to go forward.

Howard v. Wayne County Sheriff's Office, 2011 WL 1130395 (6th Cir. 2011)

FACTS: Howard was arrested by Deputy Wood (Wayne County SO) because he "elbowed Wood in the stomach as he proceeded through the employee entrance security checkpoint" at the Young Municipal Center. Wood ordered him to stop, but Howard responded in a profane way that "Wood needed to get out of his way." He proceeded to walk toward the elevators over Wood's telling him he was under arrest. Wood and Deputy Hardie went after him and took him into custody. Howard's version was different, asserting that he may have accidentally bumped Wood and was never profane.

Wood sprayed Howard with OC, took him to the ground and handcuffed him. Howard claimed he momentarily blacked out. He was ultimately acquitted of any charges. Howard filed a pro se complaint against the deputies. The trial court granted the deputies summary judgment, even though it agreed there were genuine issues of material fact ... regarding the necessity of using the degree of force employed by Wood and, derivatively, by Hardie: because "[t]he precise contours of the right to be free from the use of excessive force remain unclear where an individual offers some form of resistance to an arresting officer."

Howard appealed.

ISSUE: If OC is used unreasonably, is it excessive force?

HOLDING: Yes

¹⁰⁵ Graham, supra.

¹⁰⁶ 234 F.3d 312 (6th Cir. 2000).

¹⁰⁷ 419 F.3d 1160 (11th Cir. 2005),

¹⁰⁸ 489 U.S. 593 (1989).

¹⁰⁹ 205 F.3d 867 (6th Cir. 2000).

DISCUSSION: Howard first argued that he was improperly arrested without probable cause. The Court looked to the Michigan law and found that Michigan had equated resistance to obstruction, even though the statute explicitly differentiated the two. The Court agreed that “Howard was required to comply with Wood’s request to place his hands behind his back regardless of whether the defendant deputy sheriff had probable cause to voice such an order.” The Court upheld the summary judgment on that issue.

With respect to the force claim, and looking to Graham, the Court agreed that it must pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹¹⁰ Examining the issue from Howard’s viewpoint, the court assessed whether qualified immunity was appropriate. Under Harlow v. Fitzgerald, “[q]ualified immunity from liability is available to government officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹¹ The trial court had looked to three other OC cases “in an attempt to elucidate the purported lack of uniformity in such decisions occasioned by an arrestee’s varying levels of resistance to authority.”¹¹² Unlike those cases, however, Howard “denied engaging in any actions that would justify arresting officers using pepper spray to subdue him.” The Court agreed that using a chemical weapon is not per se unreasonable, but agreed that using such weapons unreasonably, “may constitute excessive force.”¹¹³ As such, at the time of the arrest, the law was “was already clearly established that use of pepper spray on an arrestee who was not accused of a serious crime, was not posing an immediate threat to the safety of the officer or others, and was not actively resisting arrest or seeking to flee is constitutionally unreasonable.”

The Court reversed the summary judgment regarding the excessive force claim and remanded the case for further proceedings.

SUSPECT ID

U.S. v. Peterson, 411 Fed.Appx. 857 (6th Cir. 2011)

FACTS: Peterson was involved in a Springboro, Ohio, bank robbery. Bowman, a bank manager, identified Peterson from a photo array of 6 images. He was convicted and appealed.

ISSUE: Must all of the photo pak subjects be wearing the same clothing and be of the same age?

HOLDING: No

DISCUSSION: In addition to various procedural claims, Peterson argued that the photo identification procedures was unduly suggestive because “his photo was the only one in dark clothing, which was part of the description of the robber, there was an apparent difference in age between his photo and that of the other individuals; and the officers asked Bowman whether she could identify the robber from the photo

¹¹⁰ Graham v. Connor, 490 U.S. 386 (1989).

¹¹¹ 457 U.S. 800 (1982).

¹¹² Greene v. Barber, 310 F.3d 889, 898 (6th Cir. 2002); Abdul-Khaliq v. City of Newark, 275 F. App’x 517 (6th Cir. 2008); Vaughn v. City of Lebanon, 18 F. App’x 252 (6th Cir. 2001).

¹¹³ Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).

array, thereby suggesting that the robber was found in one of the six photos.” The Court however, found the inquiry to be appropriate, and also discounted “Bowman’s two possible viewings of photographs of the robber before the identification.” (The news media had apparently shown still images from the surveillance video.)

Further, even if suggestive, the Court found that “an analysis of the totality of the circumstances under the *Biggers* test still assures us that there was no substantial likelihood of misidentification in this case. In assessing the reliability of the identification, we consider five factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the witness’s degree of attention at the time of observation;
- (3) the accuracy of the witness’s prior description of the criminal;
- (4) the level of certainty demonstrated by the witness when confronting the defendant;
- and (5) the length of time between the crime and the confrontation.

The manager had ample opportunity to view the robber and had accurately described his appearance. She expressed adequate certainty of her identification and although the delay between the crime and the confrontation (over a year and a half) was substantial, that did not outweigh the other factors. The Court upheld the identification, and Peterson’s conviction.

TRIAL PROCEDURE / EVIDENCE - CORROBORATION RULE

U.S. v. Ramirez, 635 F.3d 249 (6th Cir. 2011)

FACTS: During an unrelated investigation, Ramirez admitted to two separate investigators that she was aware that the company for which she worked hired illegal aliens. At a grand jury proceeding, Ramirez denied knowing that a person had submitted false documents and stated that “she had no reason to believe that any of Durrett Cheese’s employees were illegal aliens.” She was indicted, however. One of the investigator’s testified as to the statements she had made and a number of documents were introduced that suggested Ramirez had helped prepare employment documents for alleged illegal aliens.

Ramirez was convicted and appealed.

ISSUE: Must a confession be corroborated by other evidence?

HOLDING: Yes

DISCUSSION: Ramirez argued that “the government did not substantially corroborate her extra-judicial statements, resulting in her conviction being based on ... statements alone.” The Court agreed that a “defendant cannot be convicted based solely on her uncorroborated statements or confessions.”¹¹⁴ “The purpose of this rule is to avoid errors in convictions based upon untrue confessions and to promote sound law enforcement by requiring police investigations to extend their efforts beyond the words of the accused.”¹¹⁵ It “ensures that an appropriate investigation is done prior to prosecution.” The Court continued, stating that “[a]n out-of-court admission is adequately corroborated if the corroborating evidence

¹¹⁴ Smith v. U.S., 348 U.S. 147 (1954).

¹¹⁵ Wong Sun v. U.S., 371 U.S. 471 (1963);

'supports the essential facts admitted sufficiently to justify a jury inference of their truth.'¹¹⁶ However, "corroborative evidence need not establish each element of the evidence." Instead, "corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty." The Court found that a "confession is adequately corroborated where '[e]xtrinsic proof ... fortifies the truth of the confession, without independently establishing the crime charged.'"¹¹⁷ Instead, "[s]o long as portions of the defendant's statement are corroborated by "substantial independent evidence" that "tend[s] to establish the trustworthiness of the statement," then the elements of the crime may be established by the defendant's statements." The Government argued that "it is not required to corroborate every fact contained in Ramirez's statements to the investigators, but is only required to corroborate some of the important facts."¹¹⁸ It contended that the documentary evidence indicated that she was aware of the illegal status of the applicants and that she conspired to hire them.

The Court agreed the evidence was sufficient to corroborate her statement to the investigators. Her conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - CHAIN OF CUSTODY

U.S. v. Rodriguez, 409 Fed.Appx. 866 (6th Cir. 2011)

FACTS: Rodriguez was allegedly involved in two robberies in Tennessee, the first on February 14, 2006 and the second on March 23, 2006. Rodriguez was arrested less than two month later and was questioned in English by the investigating officer, Wilder. Rodriguez responded in Spanish. The resulting confession was transcribed and signed. Reed, the clerk at the second robbery, identified Rodriguez in a preliminary court appearance. Rodriguez had planned to question Wilder about a prior misdemeanor theft arrest (from over 10 years before) but the court agreed it could not be admitted under the federal court rules as it was not, under case law, a crime of dishonesty.¹¹⁹ A number of witnesses linked Rodriguez to the robberies, and in the first one, one detective testified that he took fingerprints from a CD that had been touched by one of the robbers (as seen on the surveillance video). The fingerprints were linked to Rodriguez. Rodriguez was convicted and appealed.

ISSUE: Must the item on which a fingerprint is taken be preserved for actual evidence in the trial?

HOLDING: No

DISCUSSION: Rodriguez argued that since the "government failed to produce the original source of the fingerprints, a CD" that the admission of the print card ID was improper. However, "direct testimony reasonably established that one of the robbers touched a CD and that the fingerprints lifted from a CD matched Rodriguez's fingerprints." The Court found an adequate chain of custody supported the admission of the evidence.

¹¹⁶ U.S.v. Pennell, 737 F.2d 521 (6th Cir. 1984) (quoting Opper v. U.S., 348 U.S. 84 (1954)).

¹¹⁷ U.S. v. Ybarra, 70 F.3d 362 (5th Cir. 1995).

¹¹⁸ Dalhouse

¹¹⁹ Fed. R. Evid. 609; U.S. v. Rattigan, 1993 WL 190910 (6th Cir. 1993).

The Court further agreed that the trial court was correct in not admitting the testimony concerning the misdemeanor offense.

Rodriguez's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - EXPERT WITNESS

U.S. v. Ham, 628 F.3d 801 (6th Cir. 2011)

FACTS: Ham was arrested as a result of a drug search warrant in Knoxville, TN. At trial, various agents testified as to the characteristics of crack cocaine as well as distribution methods. The same agent testified as to the amounts of crack cocaine consistent with personal use and to the use by dealers of throw-away cell phones (he had three). Another agent, who was present at the scene, testified as to what certain items are used for - plastic bags, etc. Ham was convicted and appealed.

ISSUE: When a witness testifies in a dual role (lay and expert), must the jury be instructed on that issue?

HOLDING: Yes

DISCUSSION: The Court agreed that when a witness testifies both as to fact and expert opinion, the court must give a jury instruction regarding the "dual witness roles" and there must be a "clear demarcation" between the two. However, even though the court failed to do so in this case, the Court did not find that it "seriously affected" the court proceedings

Ham's conviction was affirmed.

ADA

Everson v. Leis, 412 Fed.Appx. 771 (6th Cir. 2011)

FACTS: On April 19, 2003, Everson had a seizure while at a Cincinnati-area mall. Deputy Wittich (Hamilton County SO) arrived in response to the call; EMS was already on scene. Later testimony indicated that Everson was trying to swing and kick at mall security and EMS, he also kicked the deputy. He was taken to the ground while EMS tried to get a blood sugar reading. Wittich, "putting an end to this ruckus," restrained Everson and he was placed on the cot. Wittich arrested Everson and eventually charged Everson with Assault and Disorderly Conduct. The charges were dismissed when Everson provided documentation of his medical condition.

Everson subsequently sued various parties, include Wittich and Sheriff Leis, under 42 U.S.C. §1983. Everson eventually agreed to dismiss some of the claim, proceeding only with his Title II claims under the ADA. The District Court gave summary judgment to the defendants, finding that "Everson's actions were involuntary and caused by his epilepsy, but nonetheless concluded that any discrimination was unintentional and thus not actionable under the ADA." Everson appealed.

ISSUE: Is the arrest of a person with a medical disability a violation of the ADA?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that Wittich had testified that he asked an EMS crew member if Everson's actions were due to his medical condition, and that the EMT had stated that it was not. The Court noted that "Wittich received no training on accommodating people with epilepsy." However, the Court found no evidence that indicates that "Wittich intentionally discriminated against him based on his disability by approaching and restraining him." Everson was presenting a threat to those around him and "Wittich was justified in using reasonable force to secure the scene." The arrest was not motivated by any discrimination and in fact, there was evidence supporting Wittich's belief that his conduct was purposeful, as he "was not randomly thrashing about, but was engaging in what appeared to be targeted physical and verbal attacks."

The summary judgment was affirmed.

Lee v. City of Columbus, 636 F.3d 245 (6th Cir. 2011)

FACTS: Members of the Columbus Division of Police filed suit that "as employees, they were subject to certain impermissible city Division Directives that mandate the procedures governing their return to regular duty following sick leave, injury leave, or restricted duty." They claimed that the "the mandatory disclosure and funneling of confidential medical information through immediate supervisors" violated the Rehabilitation Act ¹²⁰ as well as privacy considerations. The District Court awarded summary judgment and an injunction against Columbus, and the government appealed.

ISSUE: Is requiring a sick leave note (to an immediate supervisor) a violation of the ADA?

HOLDING: No

DISCUSSION: The Court looked to the Americans with Disabilities Act¹²¹, as well as the Rehabilitation Act, and noted that while both prohibit discrimination against the disabled, only the Rehab act "expressly prohibits discrimination *solely* on the basis of disability." To recover under the Rehab Act, "an employee must establish that: "1) he is an individual with a disability; 2) he is otherwise qualified to perform the job requirements, with or without reasonable accommodation; and 3) he [suffered an adverse employment action] solely by reason of his handicap."¹²² The trial court had found that the policy "was overly intrusive and improperly provided supervisors with confidential medical information even when they had no reason to possess such knowledge, particularly in light of the fact that the City had a human resources department which presumably could be used to create a "confidentiality barrier between these personnel, whose jobs consist of handling medical information, and supervisors."

The Court agreed that the "ADA's limitations on the disclosure of medical information set forth in 42 U.S.C. § 12112(d) are incorporated by reference into the Rehabilitation Act." The Court, however, found that "the requirement that an employee provide a general diagnosis – or in this case, an even less specific statement regarding the "nature" of an employee's illness" is not "tantamount to an inquiry "as to whether such employee is an individual with a disability or as to the nature or severity of the disability" under §

¹²⁰ 29 U.S.C. § 791 *et seq.*

¹²¹ 42 U.S.C. § 12111 *et seq.*; 29 U.S.C. § 794(d); *see also* Doe v. Salvation Army in the U.S., 531 F.3d 355 (6th Cir. 2008).

¹²² Jones v. Potter, 488 F.3d 397 (6th Cir. 2007).

12112(d)(4)(A).” The Court found “the analysis in the present circumstances should focus on whether a medical inquiry is intended to reveal or necessitates revealing a disability, rather than whether the inquiry may merely *tend to* reveal a disability.”

The Court determined that the policy did not trigger the protections of the Rehab Act or the ADA. The decision was overturned and the injunction vacated.

EMPLOYMENT - FIRST AMENDMENT

Asbury v. Teodosio, 412 Fed.Appx. 786 (6th Cir. 2011)

FACTS: Asbury, a detention supervisor in Summitt County, was terminated because of prohibited contacts with juveniles whom she had supervised, following their release. The trial court granted summary judgment to the employer. She appealed, arguing that a prohibition on further contact with the juveniles violated her First Amendment rights to free speech and free association.

ISSUE: Does a government employee have a lesser right under the First Amendment than other citizens?

HOLDING: Yes

DISCUSSION: Although the Court noted that a “government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment,”¹²³ that the government employee does have a greater ability to regulate employee speech that it does with respect to the speech of citizens in general.¹²⁴ The government may put limits on an employee’s speech “that would be unconstitutional if applied to the public generally.”

The Court continued:

To successfully make out a prima facie case for retaliation, “the employee must demonstrate that: (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two”¹²⁵ This same framework also applies to First Amendment freedom of association claims.¹²⁶ Demonstrating constitutionally protected speech requires the plaintiff to make two threshold showings: first, that the speech involves a matter of public concern and second, that the speech occurred outside the duties of his or her employment.¹²⁷ Matters of public concern relate to political, social, or other concerns of the community.¹²⁸ As a result they are distinguishable from internal office politics

¹²³ City of San Diego v. Roe, 543 U.S. 77 (2004).

¹²⁴ Connick v. Myers, 461 U.S. 138 (1983) (quoting Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

¹²⁵ Scarborough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006) (citing Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc)).

¹²⁶ This same framework also applies to First Amendment freedom of association claims.

¹²⁷ Hughes v. Region VII Area Agency on Aging, 542 F.3d 169 (6th Cir. 2008); Miller v. City of Canton, 319 F. App’x 411 (6th Cir. 2009).

¹²⁸ Connick, *supra*.

where an individual speaks as an employee about matters of only personal interest.¹²⁹ We determine whether speech involves a matter of public concern by looking “to the content, form, and context of the statements in light of the record as a whole.”

If the Court determines the plaintiff meets the threshold showings, it then applied the “Pickering balancing test.” If the speech is private, however, and “does not touch on matters of public opinion,” it “need only satisfy rational basis review.”¹³⁰

Asbury asserted that her “association and speech with released juveniles are a matter of societal concern because she encouraged and supported the juveniles in an effort to help them become and remain law-abiding and productive members of society,” but following precedent, the Court found that it was a private matter and did not “rise to the level of a matter of public concern” - taking it out of constitutional protection. The policy had a rational basis to prevent an appearance of conflict of interest and appearance of propriety. The Court refused to “constitutionalize Asbury’s self-serving criticisms” and affirmed the summary judgment in the employer’s favor.

Further, none of her statements (her “protests”) were “directed at informing the public about improper conduct at the Detention Center” but instead were always in response to disciplinary actions caused by her own misconduct.

COMPUTER CRIME

Doe v. Boland, 630 F.3d 491 (6th Cir. 2011)

FACTS: Boland is an Ohio attorney. As part of a project to use in testifying in two child pornography cases, Boland “downloaded innocent-looking images” of two female children. He then “digitally manipulated the pictures to make it look like the children were engaging in sexually explicit acts.” During his testimony, Boland “displayed a series of ‘before-and-after’ images that he had digitally altered” to illustrate how it would not be possible for a person who did not actually participate in creating the images to know that the child depicted is an actual minor engaged in unlawful acts.

The prosecutor raised the idea that Boland himself “may have violated federal law by creating and possessing some of these images.” The judge noted they were done at the express order of the court, but told Boland to purge the images. He did not, instead using them in two more criminal cases. In 2004, the FBI searched his home and seized files. He entered into an agreement, admitting that he violated §2252A(a)(5)(B) - possessing images that had “been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.”¹³¹ Following this admission, the children (through their guardians) filed suit under federal law - which permitted civil remedies to anyone aggrieved by a violation of the above statute.

The District Court dismissed the case, given that Boland had been acting as an expert witness under court order to develop the evidence. The plaintiffs appealed.

¹²⁹ Akers, 352 F.3d at 1037 (quoting Jackson v. Leighton, 168 F.3d 903 (6th Cir. 1999)).

¹³⁰ Waters v. Churchill, 511 U.S. 661 (1994); U.S.v. Nat’l Treasury Emps. Union, 513 U.S. 454 (1995)

¹³¹ See also 18 U.S.C. §2256(8)(C).

ISSUE: May an expert witness create pornographic images involving children has an example in court?

HOLDING: No

DISCUSSION: The Court agreed that the federal statutes in question do not provide an exemption for expert testimony. Further, the Court noted that the Adam Walsh Child Protection and Safety Act of 2006¹³² requires that child pornography “shall remain in the care, custody, and control of either the Government or the court” - although the defendant shall have ample opportunity to examine it. Boland argued that without an exemption for “this kind of expert testimony,” a “defendant’s right to put on an effective defense under the Sixth Amendment would be hindered, requiring a narrowing of the civil-remedy provisions under the constitutional avoidance doctrine.” The Court noted, however, that federal law “does not allow for the creation and possession of new contraband.”

The Court noted that establishing the knowledge of the defendant “that he possessed child pornography because digital-imaging technology makes it difficult to know if an image represents an actual, as opposed to a virtual, child” did not authorize or require the creation of child pornography. “Once Boland modified the images of the minors, he crossed the line between possessing lawful images and violating the statute.” The court order did not expressly authorize the creation of child pornography, but only permitted the creation of images to illustrate “the ease of creating digital images that are indistinguishable from actual images ... without creating images that depict minors in sexually explicit situations.”

The Court overturned the dismissal and remanded the case for further proceedings.

¹³² Pub. L. No. 109-248, § 504 (codified at 18 U.S.C. § 3509(m)).